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24-1121(CON), 24-2360 (CON), 24-2594

**United States Court of Appeals
for the Second Circuit**

TIFFANY RUTLEDGE, INDIVIDUALLY AND AS MOTHER, GENERAL GUARDIAN
OF, ET AL., KRISTOPHER WHITE, BRIDGET MCCONNELL, ALEXANDER
HOLLAND, CHRISTINE HOLLAND,

Plaintiffs-Appellants,

—against—

WALGREEN CO., COSTCO WHOLESALE CORPORATION, CVS HEALTH
CORPORATION, CVS PHARMACY, INC., SAFEWAY, INC., ,

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND AMERICAN
TORT REFORM ASSOCIATION IN SUPPORT OF REHEARING**

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(Caption continued)

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FAMILY DOLLAR, INC., TARGET CORPORATION, SAM'S WEST, INC., DOLLAR
TREE, INC., 7-ELEVEN, INC., FAMILY DOLLAR STORES, INC., THE KROGER
CO., DOLLAR TREE STORES, INC., JOHNSON & JOHNSON CONSUMER INC.,
BIG LOTS, GIANT FOOD, LLC, ALBERTSON'S, HARRIS TEETER LLC,
DOLGENCORP, LLC,

Defendants-Appellees

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and L. A., minors, ALISHA DAY, individually and as mother, General
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General Guardian of K.G., a minor, JUAN EMANUEL BORDOY,
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JANTAIL BARBEE, individually and as Mother of DEANDRE
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ANDREW BASSETT, SONNITA ROBY, individually and as General
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MCKENZIE, HEATHER GILLIAM, COLBY GILLIAM, TAYLOR
BROWN, TARYNE BURKE, individually and as Mother with Court
Appointed Guardian of ASHTON BURKE, SAMARI SIMS, individually,
DENISA CULLOM, individually and as Mother of SAMARI SIMS,
COLLIN STOVER, individually, DANA STEWART, individually and as
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SHILO RICH, individually and as Mother of RIAN CZAR JOHNSON,
SHEENA SCHNEPP, individually and as Mother and Natural
Guardian of H.S., a minor, ZAYNE COSTELLO, individually,
CRYSTAL ALEXANDER, COURTNEY TILLOTSON, MICHELLE
BROWN,

Plaintiffs-Appellants,

—against—

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

American Tort Reform Association (ATRA) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. ATRA has no parent corporation, and no publicly held company has 10% or greater ownership in ATRA.

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INTEREST OF *AMICI CURIAE*¹

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with a goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

filed *amicus* briefs in cases involving important liability issues and supported efforts to adhere to traditional tort law principles.

Amici's members have a strong interest in this case because Federal Rule of Evidence 702 is an essential tool for defending against expert-driven litigation.

INTRODUCTION AND SUMMARY

En banc review is needed to restore coherence and rigor to this Circuit's law on the admissibility of expert testimony.

The District Court applied Rule 702 as it is meant to be applied, and as its text requires. The court undertook a thorough review of plaintiffs' expert opinions on causation, identified serious flaws in how those opinions analyzed scientific evidence, and explained why the opinions did not reflect a reliable application of reliable methods. With those opinions excluded, plaintiffs lacked evidence sufficient to sustain their core claim. The District Court therefore correctly entered summary judgment for defendants in hundreds of cases.

The panel's decision reversing that careful gatekeeping determination conflicts with Rule 702, and it threatens to let unreliable scientific testimony sustain unmeritorious litigation, drive unfair

settlements, and distort business decisions. Rule 702 requires the proponent of an expert opinion to demonstrate by a preponderance of evidence that the opinion “reflects a reliable application” of reliable methods. Fed. R. Evid. 702(c), (d). The panel repeatedly treated that inquiry as satisfied so long as the expert’s reasoning appeared “scientifically plausible” or another scientist had purportedly said the same thing. Op. 44.

That did not even happen here—the scientific community rejected plaintiffs’ causation position. And that approach creates confusion in this Circuit’s law that the *en banc* Court should correct. The panel narrowed Rule 702’s reliability inquiry to whether an expert’s reasoning seemed plausible or was purportedly repeated elsewhere in the scientific community—an approach that recalls the errors the Advisory Committee sought to correct by amending Rule 702 in 2023. *En banc* review is needed to clarify that district courts must rigorously assess reliability, including reliability of methodology.

En banc review is also warranted because the issues are exceptionally important. Scientific and technical evidence is now everywhere, and aggregate proceedings like multi-district litigation

magnify the consequences of each admissibility ruling. In this litigation environment, the standard courts apply in making Rule 702 determinations can be case-determinative and shape settlement leverage—or even affect real-world business decisions about products and investments. An overly lax standard that admits unreliable testimony cannot be fixed by juries. To the contrary, the specialization that makes expert testimony useful also makes unreliable expert testimony unusually difficult for lay jurors to detect and discount.

ARGUMENT

I. REHEARING *EN BANC* IS NEEDED TO RESTORE UNIFORMITY IN THIS CIRCUIT’S APPLICATION OF RULE 702.

Rule 702 assigns the trial judge the task of evaluating whether the proponent of an expert opinion has “demonstrate[d] to the court” that the opinion, “more likely than not,” satisfies several requirements. Fed. R. Evid. 702. Those requirements include both whether the expert used “reliable principles and methods” and whether the expert’s particular “opinion reflects a reliable application” of those methods. *Id.* 702(c)–(d). The 2023 amendments to that Rule underscore that a rigorous evaluation of both of these reliability requirements remain the trial judge’s

responsibility—not the jury’s. *See* Fed. R. Evid. 702 advisory committee’s note to 2023 amendment.

The panel opinion recited these standards but then neglected to apply them. In doing so, it created confusion in this Circuit’s law on how far a district court must go in determining whether an expert reliably applied a reliable methodology.

The panel narrowed the District Court’s gatekeeping role to determining whether the expert’s reasoning seemed plausible, or whether other scientists purportedly said something similar. Scientists did not even do that. And that is not the law anyhow: Rule 702 requires scrutiny of the expert’s *methodology*, not merely his endpoint. Although the panel instructed district courts to take a “hard look” at each expert’s opinion, the endpoint of the panel’s “hard look” was whether the opinion “actually reflects how experts operate in the field” or instead represents a “one-off opinion that the field has roundly rejected or would be likely to.” Op. 49. The panel applied that acceptability standard throughout: for example, it deemed Baccarelli’s dose-response analysis reliable because it “analyz[ed] acetaminophen dose response in exactly the manner used by scientists in his field,” Op. 35; and his biological-plausibility testimony

reliable because it “finds support in the practices of other epidemiologists outside the courtroom,” *id.* at 36.

The panel also explicitly left for the jury the kinds of determinations that the 2023 amendments made clear should be about admissibility, not weight. The panel dismissed the District Court’s critical conclusion that Baccarelli’s methodology reflects unreliable “cherry-picking” of evidence, characterizing his selective analysis as merely “argument[] and counter-argument[] of the sort that scientists can and do make when engaging in professional academic debates about contested scientific questions.” Op. 40–44.

That approach conflicts with Rule 702. Before that Rule, federal courts followed *Frye v. United States*, under which “general acceptance” in the relevant scientific community was the test for admitting scientific evidence. 293 F. 1013, 1014 (D.C. Cir. 1923). But *Daubert v. Merrell Dow Pharmaceuticals, Inc.* rejected *Frye* as inconsistent with Rule 702, explaining that general acceptance is *one*—but not the *sole*—indicator of reliability. 509 U.S. 579, 588–95 (1993). And district courts must do more: an expert’s opinion does not satisfy Rule 702’s admissibility threshold

solely because other scientists are following the same unreliable methodology. *Id.*; *contra* Op. 44, 49.

The panel treated the District Court’s identification of serious methodological flaws in Baccarelli’s report as manifest error, sending a dangerous signal to district courts in this Circuit. Just as Rule 702 requires, the District Court found repeated signs of result-driven analysis. Baccarelli ignored or discounted studies reporting no association, negative associations, or conflicting results, for example. He also minimized sibling-control and other evidence that genetic or familial confounding could explain the observed associations. *In re Acetaminophen–ASD-ADHD Prods. Liab. Litig.*, 707 F. Supp. 3d 309, 340–46, 352–54 (S.D.N.Y. 2023). Rule 702 requires district courts to identify exactly that kind of uneven application of an accepted methodology.

The panel’s approach also conflicts with this Court’s prior decisions endorsing a “rigorous review” of expert reliability and rejecting arguments that defects in an expert’s analysis are merely questions of weight. *See* Pet. 11, 16–17 (citing cases). The panel brushed aside these concerns in a footnote. It recognized that the 2023 amendment was

adopted to correct a “hands-off” approach under which courts treated “the sufficiency of an expert’s basis” and “the application of the expert’s methodology” as questions of weight rather than admissibility. Op. 44 n.25. Yet the panel told district courts to “strike a middle-ground” between taking a “hard look at the expert’s opinions to ensure that they are reliable” and assessing the expert’s persuasiveness. *Id.* That formulation replaces the Rule’s clear command—to decide whether the proponent has shown by a preponderance that the opinion is reliable—with a vague instruction to look hard, but not too hard, at expert opinions.

En banc review is needed to restore a coherent Rule 702 framework in this Circuit—one that requires district courts to rigorously determine reliability.

II. RULE 702 ISSUES ARE OF EXCEPTIONAL IMPORTANCE.

En banc review is also warranted because the panel’s opinion concerns an issue of exceptional importance. *See* Fed. R. App. P. 40(b)(2)(D).

“We live in an era of science and technology, with legal controversies reflecting that fact.” Elena Kagan, Foreword, in *Reference Manual on Scientific Evidence* xiii (4th ed. 2025). Indeed, “science in all

its forms ... has in recent years invaded the courtroom to an unparalleled extent.” Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 Seton Hall L. Rev. 1379, 1379 (2008). In mass-tort and product-liability cases in particular, the rules for how rigorously judges must scrutinize scientific and technical evidence on topics like epidemiology affects an enormous—and growing—share of litigation.

In such cases, the proper approach to Rule 702 can be outcome determinative. “[T]he admissibility of expert opinion testimony is a key driver of the outcome in a multitude of . . . civil proceedings.” Daniel J. Capra & Liesa L. Richter, *The Difference a Year Makes: The Admissibility of Expert Opinion Testimony Under the 2023 Amendment*, 111 Cornell L. Rev. 127, 128 (2026). “Without an admissible expert opinion, a plaintiff in a toxic tort or products liability action will be unable to survive a defense motion for summary judgment.” *Id.* As a result, a single ruling on the admissibility of a general causation expert can effectively “resolve” an entire mass-tort litigation like this one “in one fell swoop.” D. Theodore Rave, *Bankruptcy v. Multidistrict Litigation for Mass Torts*, 114 Cal. L. Rev. 839, 861 (2026). Conversely, admitting expert testimony that does

not satisfy Rule 702 can keep alive thousands of claims that should fail for lack of reliable proof.

Expert admissibility rulings also affect settlement behavior. If a plaintiff's expert testimony is admitted, "a defendant often feels irresistible pressure to settle the action rather than risk a battle of [the] experts at trial that, if the defendant loses, can cost exponentially more than the settlement cost of the action." Christopher R.J. Pace, *Admitting and Excluding General Expert Testimony: The Eleventh Circuit Construct*, 37 Am. J. Trial Advoc. 47, 48 (2013). A study of 2,127 *Daubert* motions in over 1,000 cases found that plaintiffs' victories on those motions were associated with increased settlement rates, while defendants' victories were associated with fewer settlements. James C. Cooper, *Information and Settlement: Empirical Evidence on Daubert Rulings and Settlement Rates*, 51 Int'l Rev. L. & Econ. 1, 1–11 (2017). These sorts of effects are amplified in the mass-tort context, where the admission of unreliable expert testimony can allow thousands of claims to proceed or create strong incentives for global settlement. See Cary Silverman, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* 4 (U.S. Chamber Inst. for Legal Reform Feb. 2021). By lowering the

threshold for admitting expert testimony, the panel’s decision risks skewing settlement leverage and the value of tort cases throughout this Circuit.

This multidistrict litigation illustrates the potential costs. The parties agreed to litigate general causation first because that threshold issue would determine whether the cases proceeded to further discovery. Op. 19–20. The issue turned out to be case-determinative: after excluding plaintiffs’ general-causation experts, the District Court entered summary judgment in approximately 550 cases. *Id.* at 23. The panel’s decision vacated those judgments and revived them all.

These costs are exactly what the 2023 amendments to Rule 702 were designed to protect against. Judges have a responsibility to “fulfill their *Daubert* gatekeeping function” in ways that “help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points towards the right” targets “and does not destroy the wrong ones.” *Gen.l Elec. Co. v. Joiner*, 522 U.S. 136, 148–49 (1997) (Breyer, J., concurring). The panel did not fulfill that responsibility, and *en banc* review is needed to “assure”

that “the powerful engine of tort liability” does not remain aimed at the “wrong” targets. *Id.*

These stakes also underscore why reliability cannot be left to the jury to sort out. “[L]ay jurors may be improperly swayed by so-called ‘expert’ witnesses who overwhelm them with sterling credentials and scientific jargon, but who may have cut corners or made unsupported assumptions on the way to their conclusions.” Capra & Richter, *supra*, at 131. They lack the “specialized knowledge” needed to assess scientific and technical evidence, including whether an expert’s conclusions “go beyond what the expert’s basis and methodology may reliably support.” Fed. R. Evid. 702 advisory committee’s note to 2023 amendment. And that is the whole problem: precisely because “jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion,” judicial gatekeeping is “essential.” *Id.*

Lay jurors may be particularly ill-equipped to identify made-for-litigation, result-driven reports on case-altering subjects like epidemiology. Most plaintiffs and their lawyers can pay to generate scientific opinions that use accepted terminology, cite peer-reviewed

studies, invoke recognized methodologies, and reach a conclusion supported within the broad boundaries of current scientific discourse. *See* Michael Weisberg & Anastasia Thanukos, *How Science Works, in Reference Manual on Scientific Evidence* 47, 60–66. But Rule 702 demands more: the expert conclusions must reflect a reliable application of a reliable method. An opinion thus may “employ[] the trappings of science” but still rest on an unreliable application of accepted methods. *Id.* at 67. Plaintiffs did not satisfy even those threshold requirements. And even if they had, the District Court demonstrated how plaintiffs’ experts’ opinions “obfuscate the weakness of the evidence on which they purport to rely.” *In re Acetaminophen*, 707 F. Supp. 3d at 334.

The panel’s look-hard-but-not-too-hard standard risks sending patently unreliable expert opinions to lay jurors. By limiting the court’s gatekeeping role through its heavy emphasis on whether anyone echoed plaintiffs’ unreliable theories, the panel makes the false appearance of scientific respectability a substitute for reliability. But an expert opinion can sound like legitimate science—and sound like it falls within the range of “reasonable” debate—while still falling far short of Rule 702’s threshold. The District Court’s careful analysis of the unreliable

methodology of plaintiffs' experts was precisely what the Rule demands. Absent *en banc* review, the panel's ruling risks distorting Rule 702's critical gatekeeping function throughout this Circuit—with far-reaching consequences for future cases and the real-world business decisions those cases shape.

CONCLUSION

The Petition should be granted.

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,450 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17th, 2026, an electronic copy of the foregoing Brief for *Amicus Curiae* The Chamber of Commerce of the United States of America and American Tort Reform Association in Support of Rehearing was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

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