Nos. 24-5493 and 24-5691

IN THE

United States Court of Appeals for the
Ninth Circuit

IN RE NFL SUNDAY TICKET ANTITRUST LITIGATION
(C.D. CAL. NO. 2:15-ML-02668-PSG-SK)

On Appeal from the United States District Court
for the Central District of California
Hon. Philip S. Gutierrez

BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS-APPELLEES/ CONDITIONAL CROSS-APPELLANTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* International Association of Defense Counsel states that it is not a publicly held corporation, does not issue stock, and does not have a parent corporation.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The International Association of Defense Counsel (IADC) has been serving a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. Its activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients, as well as the civil justice system and the legal profession. Moreover, the IADC takes a leadership role in many areas of legal reform and professional development.

The IADC and its members have a strong interest in the sound development of Federal Rule of Evidence 702. Through the work of its Rule 702 Sustainability Committee, the IADC has provided essential guidance on how the amended Rule 702 has not only charted a new path forward but has resulted in a large body of case law that has now been emphatically rejected and overruled. *See* Eric Lasker & Joshua Leader, *New Federal Rule of Evidence 702: A Circuit-by-Circuit Guide to Overruled "Wayward Case Law,"* 91(2) Defense Counsel Journal 1 (June 28, 2024).

All parties to this case have consented to the filing of this brief.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Amicus Curiae IADC submits this brief in support of the proper application of the recently amended Federal Rule of Evidence 702. On December 1, 2023, Federal Rule of Evidence 702 was amended to address what the Standing Committee's Advisory Committee on Evidence Rules ("Advisory Committee") determined was a failure by many courts "to apply correctly the reliability requirements of that rule."[2] In a law review article explaining the Advisory Committee's thinking, the Chair of the Advisory Committee's Rule 702 Subcommittee, District Judge Thomas Schroeder, specifically called attention to pre-amendment caselaw in the Ninth Circuit, which he explained was "facially wrong" in its failure to hold proponents of expert testimony to their Rule 702 burden.[3]

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[2] Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends., *available at* https://tinyurl.com/2azkurv5.

[3] *See* T.D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039 (2020). Judge Schroeder noted further that "[t]he Ninth Circuit appears to set its own standard for assessing admissibility of expert opinion apart from Rule 702" and improperly "interpret[s] Daubert as liberalizing the admission of expert testimony." *Id.* at 2050-51.

The present case provides an ideal vehicle to confirm the correct standard under Federal Rule of Evidence 702. The overarching issue in this appeal is whether the district court properly exercised its gatekeeping role under Federal Rule of Evidence 702 by excluding the testimony of Appellants' experts, Prof. Daniel Rascher and Dr. John Zona, in the *National Football League's "Sunday Ticket" Antitrust Litigation* multidistrict litigation. In seeking reversal of the district court's opinion, Appellants rely heavily on the same flawed understanding of Rule 702 that led to the recent amendment.

Amicus curiae IADC defers to Defendant-Appellees to address the specific flaws in the economic analyses of Prof. Rascher and Dr. Zona under Rule 702. This amicus brief seeks to aid the Court in its review of the district court's gatekeeping analysis by providing background on the genesis, purpose, and adoption of the Rule 702 amendments. Amended Rule 702 provides an essential bulwark against the dangers posed by the admission of unreliable expert opinions, as highlighted by the jury's damages verdict in this case.

ARGUMENT

This Court should affirm the district court's proper exercise of its discretion in concluding that Plaintiffs-Appellants had failed to meet their burden under Rule 702 for admission of the expert testimony of Prof. Rascher and Dr. Zona.

A. The recent amendments to Rule 702 reinforce district courts' expert testimony gatekeeping role.

As the Supreme Court recognized in *Daubert*, the admissibility of expert testimony is governed by Federal Rule of Evidence 702, not by case law. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 587 (1993). Accordingly, the recent amendment to Rule 702 requires this Court to take a fresh look at the expert admissibility requirements, particularly given that the rule change was precipitated by analyses demonstrating that many courts had been applying the rule incorrectly.[4]

In 2016, the Reporter to the Advisory Committee, Professor Daniel

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[4] *See* D. Bernstein & E. Lasker, *Defending Daubert*: *It's Time to Amend Federal Rule of Evidence* 702, 57 Wm. & Mary L. Rev. 1 (2015), *available at* https://tinyurl.com/3znahmfn.

J. Capra, identified a pervasive problem of "wayward case law" in which federal courts had been "far more lenient about admitting expert testimony than any reasonable reading of the Rule would allow."[5] Professor Capra concluded that "courts have *defied* the Rule's requirements" and he lamented that the Evidence Rules were being "disregarded by courts."[6] The Advisory Committee conducted its own review and reached a similar conclusion, bemoaning that in a "number of federal cases . . . judges did not apply the preponderance standard of admissibility to [Rule 702's] requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury."[7]

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[5] Daniel J. Capra, Reporter, *Mem. To: Advisory Comm. on Evidence Rules Re: Pub. comment suggesting an amendment to Rule 702* (Oct. 1, 2016), in Advisory Comm. on Rules of Evidence Agenda Book 259, 262 (Oct. 21, 2016), *available at* https://tinyurl.com/9x9jk6ff.

[6] *Id.* at 268, 271.

[7] Advisory Comm. on Evidence Rules, *Minutes of the Meeting of Nov. 13, 2020* in Advisory Comm. on Evidence Rules, Agenda Book 15, 17 (Apr. 30, 2021), *available at* https://tinyurl.com/ycxvurnv.

In response to these concerns, Rule 702 was amended to provide clarification on a party's burden in establishing the admissibility of expert testimony. As amended, the Rule now reads as follows (with changes in italics and strikeouts):

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise *if the proponent demonstrates to the court that it is more likely than not that*:
>
> a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> b) the testimony is based on sufficient facts or data;
>
> c) the testimony is the product of reliable principles and methods; and
>
> d) ~~the expert has reliably applied~~ *the expert's opinion reflects a reliable application of* the principles and methods to the facts of the case.

Fed. R. Evid. 702, as amended Dec. 1, 2023.[8]

The amendments confirm three key elements of the Rule 702 admissibility standard that the Advisory Committee determined had been most frequently ignored in prior decisions. First, Rule 702 now makes clear that the court should not defer to the jury in factual determinations of whether the expert satisfies the admissibility criteria of the Rule. Second, the Rule explains that the court must find that the proponent of the expert testimony satisfies each of the four elements of Rule 702 by a preponderance of the evidence. Third, the Rule requires courts to go beyond the checkbox approach of simply confirming the existence of factual bases and an expert methodology to evaluate whether the expert's opinion reflects a reliable application of the methodology to the facts. By expressly focusing the court's inquiry on the expert's opinion, this amendment further establishes that the court's gatekeeping responsibility is an ongoing one that continues through trial to guard

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[8] A*vailable at* https://tinyurl.com/2azkurv5.

against experts overstating the conclusions that can be reliably reached from their analyses.

Although not yet addressed by this Court, a number of other circuit courts have recognized the importance of this new Rule 702 language. For example, the Sixth Circuit observed that the Rule 702 amendments "were drafted to correct some court decisions incorrectly holding 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. 2024). Likewise, the Federal Circuit cited to prior incorrect applications of Rule 702 in explaining the import of the new language, noting that "[j]udicial gatekeeping is essential to ensure an expert's conclusions do not go beyond what the expert's basis and methodology may reliably support." *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1339 (Fed. Cir. 2025) (internal quotations omitted); *see also Harris v. FedEx Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024) (citing amended Rule 702 in concluding

that the district court "abdicated its role as gatekeeper" by allowing expert "to testify without a proper foundation"); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283-84 (4th Cir. 2021) (invoking draft amended Rule in rejecting "incorrect" decisions finding expert's factual basis and methodological application to be matters of weight and not admissibility). District courts in this Circuit also have begun to take note. *See, e.g., Klein v. Meta Platforms, Inc.*, 766 F. Supp. 3d 956, 961 (N.D. Cal. Feb. 13, 2025) (court described the 2023 amendments as "intended to amplify" the requirements of Rule 702).

B. The drafting history of amended Rule 702 provides essential guidance for the proper application of the new Rule.

While judicial authority interpreting the new Rule is still nascent, the Court can find useful guidance in an extensive drafting history. The amendments to Rule 702 were the product of eight years of extensive analysis by the Advisory Committee. Their purpose is reflected both in the Advisory Committee Note accompanying the newly amended rule and in the Advisory Committee's working papers and publications.

Advisory Committee Notes provide the most succinct and readily accessible guide to the proper application of federal court rules. Published alongside the rules themselves, the Notes are subject to the same rule-making process, public notice and comment, and Supreme Court and congressional review and approval. *See Class v. United States*, 583 U.S. 174, 187-88 n.2 (2018) ("Advisory Committee's Notes are adopted by the committee that drafts the rule; they are considered by the judicial conference when it recommends promulgation of the rule; they are before this Court when we prescribe the rule under the Rules Enabling Act."). As such, "the interpretations in the Advisory Committee Notes 'are nearly universally accorded great weight in interpreting federal rules.'" *Horenkamp v. Van Winkle & Corp.*, 402 F.3d 1129, 1132 (11th Cir. 2005). The Supreme Court has likewise relied upon advisory committee notes to interpret the federal rules. *See, e.g.*, *Tome v. United States*, 513 U.S. 150, 160 (1995) ("Our conclusion that Rule 801(d)(1)(B) embodies the common-law premotive requirement is confirmed by an examination of the Advisory Committee's Notes to the Federal Rules of Evidence. We have

relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules.") (citations omitted).

As with Advisory Committee Notes, Advisory Committee deliberations provide important guidance in the interpretation of federal rules. In *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946), for example, the Supreme Court looked to statements from the Advisory Committee's spokesperson when construing the meaning of Fed. R. Civ. P. 4(f). Later, in *Amchem Products v. Windsor*, 521 U.S. 591, 613-19 (1997), the Supreme Court relied upon public statements by the Advisory Committee reporter to assist in determining the meaning of Fed. R. Civ. P. Rule 23(b)(3). *See also United States v. Petri*, 731 F.3d 833, 839-40 (9th Cir. 2013); *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir. 1982) (en banc).

C. Plaintiffs-Appellants advocate for a position that contradicts or ignores Rule 702's requirements.

In seeking reversal of the district court's opinion, Plaintiffs-Appellants repeatedly call upon the Court to ignore their burden to

satisfy the standards for expert admissibility required under Rule 702. This Court should decline this invitation.

The Advisory Committee Note makes clear that "expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends. Indeed, "the [Advisory] Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule."[9]

Ignoring this guidance, Plaintiffs-Appellants seek support in pre-amendment Ninth Circuit opinions that have held that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Plaintiffs-

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[9] Jud. Conf., Comm. on Rules of Practice and Procedure, Comm. Note to Rule 702 at 228 (Oct. 19, 2022) (citing Fed. R. Evid. 104(a)), *available at* https://tinyurl.com/2x38778a.

Appellants' Br. at 46 (citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2005)). But these are the very authorities that the Advisory Committee Rule 702 Subcommittee Chair, Judge Schroeder, criticized in explaining the need for the Rule 702 amendments.[10] "[S]ome courts have defaulted to invoking the Supreme Court's caution that Rule 702 is not meant to prohibit 'shaky but admissible' evidence and have relegated the issue to the jury's consideration on the grounds it can be subject to cross-examination and contrary proof."[11] In so doing, "these courts have inadvertently applied Rule 104(b)'s standard for admissibility, in contravention of *Daubert*."[12]

Plaintiffs-Appellants likewise rely on pre-amendment case law to urge that Rule 702 is intended to "screen only for 'unreliable nonsense.'" Plaintiffs-Appellants' Br. at 49. And they contend that a district court's role is *not* "to evaluate whether [the expert's testimony] is corroborated

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[10] Schroeder, Admission of Expert Testimony, at 2050.

[11] *Id.* at 2042.

[12] *Id.* at 2042-43.

by other evidence on the record . . . . That is for the litigants to argue, and for the jury to decide." *Id.* at 45. But, again, these arguments fly in the face of the newly amended rule. The amendment to Rule 702(d) makes unmistakably clear that the district court must determine whether "the expert's opinion reflects a reliable application of those principles and methods to the facts of the case." Fed. R. Evid. 702, as amended Dec. 1, 2023.[13] By focusing the subpart (d) inquiry on "the expert's opinion," the amendment removes any doubt "that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends.[14]

Plaintiffs-Appellants also bemoan what they portray as improper factfinding by the district court in crediting defendants' fact witnesses over plaintiffs' experts. Plaintiffs-Appellants' Br. at 46. But as the Advisory Committee has explained, "when it comes to making

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[13] A*vailable at* https://tinyurl.com/2azkurv5.

[14] *Available at* https://tinyurl.com/2azkurv5.

preliminary determinations about admissibility, the judge is and always has been a factfinder."[15] Again, in amending the Rule, the Advisory Committee expressly rejected the holdings of "many courts [that] have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends.[16]

D. The jury verdict highlights the importance of keeping junk science out of the courtroom which ensures due process and a fair trial.

Due process requires a fair trial. "While the Constitution certainly protects other values as well, the [due process] rights protected by the Fifth and Sixth Amendments . . . can be understood as largely focused on establishing mechanisms for . . . guarding against unreliable evidence." Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process*

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[15] Patrick J. Schiltz, Rpt. of the Advisory Comm. on Evidence Rules To Standing Comm. on Rules of Practice and Procedure, at 7 (May 15, 2022), *available at* https://tinyurl.com/3pjycam2.

[16] *Available at* https://tinyurl.com/2azkurv5.

and Evidentiary Rules in the Age of Innocence, 47 Ga. L. Rev. 723, 725 (2013). When trial judges fail to fulfill their critical gatekeeping duty, and admit unreliable scientific testimony, litigants are deprived of a fair trial and due process.

The jury verdict below amply demonstrates the dangers inherent in unreliable expert testimony. Confronted with expert testimony that failed to hold up to real world evidence, the jury spun off in its own speculative direction, rendering a verdict that was untethered to either the opinion of Prof. Rascher or Dr. Zona. *See, e.g.*, Slip Op. at 15 ("Instead, the jury came up with its own specific damages based on a methodology, detached from Dr. Rascher's opinion or calculations, that the Court can definitively trace."). Justice is ill-served when jurors are left so adrift in a sea of what the district court ultimately recognized as "gobbledygook." *See, e.g.*, 11-ER-2022 (Trial Tr. 1621:15-24).

Junk science is "the science of things that aren't so." Peter Huber, *Junk Science and the Jury*, 1990 U. Chi. Legal F. 273, 276 (1990) (quoting Irving Langmuir, *Pathological Science* (1953)). It can be defined as

"scientific testimony based on idiosyncratic, invalid, or unreliable science, in which the methodologies used are not generally accepted by the relevant scientific community." Thomas G. Gutheil, M.D. & Harold J. Bursztajn, M.D., *Attorney Abuses of Daubert Hearings: Junk Science, Junk Law, or Just Plain Obstruction?*, 33 J. Am. Acad. Psychiatry L. 150, 150 (2005). "Referred to as science without evidence, junk science typically employs questionable methodology to reach unsupported conclusions" based on "grossly fallacious interpretations of scientific data or opinions." Debra L. Worthington, et al., *Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation: Making the Case for Court-Appointed Experts in Complex Medical and Scientific Litigation,* 8 Psych., Pub. Pol'y, & L. 154, 158 (2002) (internal quotation marks and citations omitted).

The amendments to Rule 702 were designed to ferret out junk science, acknowledging that "just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also

lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support." Fed. R. Evid. 702 Advisory Comm.'s Notes to 2023 Amends. The amendment to subpart (d) of Rule 702 was designed to address the problem of experts' overstating what can be reliably concluded from his or her methodology. The Advisory Committee expressly noted that the amendment to subpart (d) is "consistent with *Gen. Elec. Co., v. Joiner*, 522 U.S. 136 (1997), in which the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion." 2022 Rpt. to the Standing Comm. at 6.[17]

In short, allowing unreliable expert testimony into the courtroom can lead to unfounded decisions and runaway verdicts, the very antithesis of due process. Professor Capra noted that the amended subsection (d) to Rule 702 expressly addresses a court's ongoing gatekeeping role with respect to "opinion ultimately expressed by a

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[17] *Available at*, https://tinyurl.com/4vmtdkhx.

testifying expert" due to the inability of jurors being able to "assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support."[18] As amended and if properly applied, Rule 702 provides an essential tool for judges to protect jurors from the "both powerful and quite misleading" allure of expert speculation, *Daubert*, 509 U.S. at 595, and promote the vital role of sound science and reliable expert analyses in the fair resolution of legal disputes. Further, a court's duty to ensure that expert testimony is both relevant and reliable does not abate once that testimony is presented to the jury. Indeed, the amended Rule 702 makes clear that a district court may (and indeed, must) satisfy its gatekeeper role at all times—including on a post-trial motion.

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[18] Daniel J. Capra and Liese L. Richter, Reporters, Advisory Comm. on Evidence Rules, *Mem. To Advisory Comm. on Evidence Rules, Possible Amend. to Rule 702* (Oct. 1, 2024), at 3, in Advisory Comm. on Evidence Rules November 2021 Agenda Book 135 (2021), *available at* https://tinyurl.com/59yud4p4.

CONCLUSION

The December 2023 amendments to Rule 702 provide important clarification on the proper standard for admissibility of expert testimony. The Court should reject the Plaintiffs-Appellants' reliance on incorrectly decided pre-amendment case law and hold Plaintiffs-Appellants to their more likely than not burden under each subpart of the amended Rule.

June 17, 2025

Respectfully submitted,

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