Exhibit A

No. 23-20035

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JENNIFER HARRIS
Plaintiff-Appellee

v.
FEDEX CORPORATE SERVICES, INC.
Defendant – Appellant

Appeal from the United States District Court
For the Southern District of Texas, Houston Division
No. 4:21-cv-1651

BRIEF FOR AMICUS CURIAE LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I supplement the certificate of interested persons provided in the briefs of appellants and appellees by naming the following persons who have an interest in the outcome of this litigation:

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INTEREST OF AMICUS CURIAE[1]

Lawyers for Civil Justice (LCJ)[2] is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has advocated for procedural reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Working through the Rules Enabling Act process, LCJ often urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ has specific expertise on the meaning, history, and application of Federal Rule of Evidence 702, drawing on both its own efforts undertaken during the rulemaking process and the collective experience of its members who are involved in litigation in the federal courts. LCJ

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[1] Counsel certifies that (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than amicus curiae—contributed money intended to fund the preparation or submission of this brief. *See* FIFTH CIR. R. 29(a)(4)(E).

[2] LCJ's members are listed on its website, at the "About Us" tab. https://www.lfcj.com/about-us.html.

has submitted several extensive comments, including original research, to the Judicial Conference Advisory Committee on Evidence Rules (referred to in this brief as the Advisory Committee).[3] LCJ's analysis has identified widespread misunderstanding of Rule 702's requirements and purposeful shifting of the expert admissibility standard away from in the Rule's text. LCJ has also recently submitted amicus briefs in both the United States Supreme Court and in federal courts of appeals urging courts to give meaning to Rule 702 and its requirements. *See, e.g.*, *Monsanto Company v. Edwin Hardeman*, 21-241 (United States Supreme Court); *Fischer v. BMW of North America*, No. 20-01399 (United States Court of Appeals for the Tenth Circuit); *Daniels-Feasel et al. v. Forest*

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[3] *See, e.g.*, Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to Advisory Committee on Evidence Rules (Sept. 1, 2021); https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007 (henceforth "Clarity and Emphasis"); *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee on Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020); https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_rule_702_0.pdf; Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, submitted to Advisory Committee on Evidence Rules (September 30, 2021), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008.

Pharmaceuticals, et al., No. 22-146 (United States Court of Appeals for the Second Circuit).

LCJ and its members have an interest in ensuring that the Federal Rules of Evidence be consistently interpreted across the nation, particularly with respect to the burden of production and the reliability criteria set forth in Rule 702. That standard, and not local variations that modify or remove elements or alter the explicit admissibility requirements, reflects the result of the Rules Enabling Act's rulemaking process and is the governing law.

SUMMARY OF ARGUMENT

Rule 702 of the Federal Rules of Evidence strikes a wise balance. On one hand, litigants may introduce expert testimony that is "reliable" and "helpful" to the trier of fact.[4] On the other, the trial court has an obligation to ensure that the expert testimony is "the product of reliable principles and methods," is based on "sufficient facts or data," and "reliably appli[es] the principles and methods to the facts of the case."[5] Moreover, the district court cannot leave the job of gatekeeping the expert's purported testimony to the jury. Just as when it considers any other kind of testimony, Rule 702 expert testimony may only be admitted where the trial court "decide[s]" that those crucial indicia of reliability are met.[6]

Some courts, however, have refused to adhere to Rule 702's letter and intent. Relying on cases dating back years before Rule 702 was substantively amended in 2000, many courts have punted to the jury this judicial gatekeeping function. LCJ's extensive research, as presented to

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[4] FED. R. EVID. 702; *see also United States v. Barnes*, 979 F.3d 283, 307 (5th Cir. 2020) (describing requirements for introduction of expert witnesses).

[5] *Id.*

[6] FED. R. EVID. 104(a)

the Advisory Committee considering changes to Rule 702, tells the tale. Between January 1, 2015, and August 1, 2021, 179 federal cases stated a variation of the incorrect statement that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."[7] Three hundred federal cases erroneously reiterated a form of this statement: "[Q]uestions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility."[8] And 90 federal cases incorrectly insisted that the soundness of the "factual underpinnings" of the expert's analysis are "factual matters" for the jury.[9] Such statements cannot be reconciled with Rule 702. District courts in this circuit are among those who have strayed from the text of the rule.

The district court here, in deciding whether to exclude the plaintiff's human resources expert, Coneisha Sherrod, made exactly the errors LCJ's research shows are so common. Rather than analyze whether the proposed testimony embodied a sufficient factual foundation and reliable principles and methods, the district court simply said the crucial

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[7] *See Clarity and Emphasis*, *supra* note 2, at 2.

[8] *Id.*

[9] *Id.*

gatekeeping function was a "jury call, not to be pre-judged by the Court." (Op. at 3). It provided no analysis of the crucial aspects of reliability required by Rule 702, nor did it ensure that the evidence would help the jury. In short, the district court applied an unfounded presumption that expert testimony is admissible. This was error under Rule 702.

The consequences of that decision here were serious. Sherrod was allowed to testify without even remotely satisfying the requirements of Rule 702. Instead, based on only her review of the plaintiff Jennifer Harris's complaint, Sherrod testified that she had identified a "system failure" at FedEx supporting a finding of liability, despite not reading the key documents in the case. That cannot be proper. The district court's grave evidentiary error lies at the heart of the extraordinary verdict in this case. Had the district court engaged in the analysis required by Rule 702, Sherrod's highly prejudicial testimony would have been excluded. Because the district court's mistake in this case, and the mistakes made by many other courts, was based in part on loose and long-supplanted language contained in decisions of this Court, the Court should now clarify to district courts around the circuit that Rule 702 must be applied by following its text, and that older cases straying from the text are

disapproved. Doing so would both properly resolve this case and helpfully clarify the expert admissibility standard courts and parties should apply going forward.

ARGUMENT

I. This Court should enforce the standard in Federal Rule of Evidence 702 for admission of expert opinions—not the misguided direction originating in abrogated cases.

A. Rule 702 establishes the standard for admissibility.

The Rules Enabling Act gives the power to make procedural rules to the Supreme Court and the Judicial Conference committees. 28 U.S.C. § 2072(a) and (b). Those rules must include an "explanatory note" on the rule. 28 U.S.C. § 2073(d). The expert witness standard set forth in Federal Rule of Evidence 702 was adopted by the Supreme Court and submitted to Congress in 2000 following rulemaking actions conducted under the Rules Enabling Act. *See* Order Amending the Federal Rules of Evidence, 529 U.S. 1189, 1195 (2000). As a rule of evidence adopted by the Supreme Court, Rule 702 supersedes any other law, including cases decided by the courts of appeal: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). Thus, the "elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility." *See* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

Rule 702(b) mandates that opinion testimony must be "based on sufficient facts or data" and thus the court must decide the adequacy of an expert's factual foundation as a matter of admissibility. *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018), at 43, in ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018). Thus, courts applying Rule 702 must decide whether the necessary elements for admission of opinion testimony—helpfulness to the jury, sufficient factual basis, use of reliable principles and methods, and reliable application of the methodology to the facts of the case — have been shown by a preponderance of the evidence. *See* Advisory Committee Note to Fed. R. Evid. 702, 2000 Amendments ("the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence"); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (identifying Rule 702 as establishing the criteria under which "an expert may testify"). Because Rule 702 emerged from the Rules Enabling Act Process, "that Rule must be given effect." *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009) (discussing Federal Rules of Civil Procedure).

B. Many courts, including courts in this Circuit, have ignored the text and intent of Rule 702.

Despite this clear guidance provided by Rule 702, courts have gone astray. As the Advisory Committee has determined, "many courts have held that the critical questions of the sufficiency of an expert's basis" are questions of "weight and not admissibility," which is an "incorrect application of Rules 702 and 104(a)." Advisory Committee on Evidence Rules, Committee Note Proposal, https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf. The Advisory Committee's comment stems from the fact that federal caselaw brims with misapprehensions of the controlling law.[10] While litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago," pre-*Daubert* authority is still cited by Federal courts. *Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016).

[10] Reinforcing the LCJ study cited in note 3 above, other observers have also shown that federal courts have not followed the gatekeeping standard set forth in Rule 702. *See* Bayer Corp., *Amending Federal Rule of Evidence* 702 at 1 & n. 1, 20-EV-O Suggestion from Bayer -Rule 702 (Sept. 30, 2020), (discussing more than 200 rulings issued since January 2015 including erroneous law quoting erroneous language from *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988); *see also* Ford Motor Co., *Amending Federal Rule of Evidence 702*, at 3 & n. 11, 20-EV-L Suggestion from Ford – Rule 702 (Sept. 26, 2020) (discussing problematic rulings rooted in pre-*Daubert* caselaw within the Fourth Circuit), 20-ev-l_suggestion_from_ford_motor_company_-_rule_702_0.pdf (uscourts.gov)

These misunderstandings of the gatekeeping standard have occurred throughout the federal court system. For instance, the Eighth Circuit has incorrectly applied a highly permissive admissibility test taken from precedent that long-predates Rule 702, concluding that opinion testimony can be excluded only if it is "so fundamentally unsupported" by its factual basis that "it can offer no assistance to the jury. *In re Bair Hugger Forced Air Warming Devices Prods. Liability Lit.*, 9 F. 4th 768 (8th Cir. 2021). The Third Circuit has similarly declared—directly contrary to the Rule's text—that Rule 702 somehow "embod[ies] a strong preference for admitting any evidence that may assist the trier of fact" and requiring a "liberal policy of admissibility." *In re Sem Crude LP*, 648 Fed. App'x 205, 213 (3d Cir. 2016). Courts continue to invoke the Tenth Circuit's statement in *Werth v. Makita Elec. Works Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991) that "doubts concerning" testimony's "factual sufficiency" go simply to the weight of the evidence. And the Ninth Circuit starkly reads *Daubert* as "favoring admission" and often affirms challenged experts' admission based on that diluted standard. *See Hardeman v. Monsanto*, 997 F.3d 941 (9th Cir. 2021), *citing Messick v.*

Novartis Pharms. Corp., 747 F.3d 1193, 1196 (9th Cir. 2014); *accord Wendell v. GlaxoSmith Kline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017).

Courts in this circuit are not immune. District courts here have declared that "as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility…." *Kent v. International Paper Company*, No. 3:17-cv-350, 2018 WL 11216577, at *1 (S.D. Miss. 2018); *see also In re Katrina Canal Breaches Consol. Litig.,* No. CA 10-866, 2012 WL 4328354, at *1 (E.D. La. Sept. 20, 2012) (same). Other courts have warned that courts should not be "lured by arguments disguised as Daubert challenges that actually attack the weight of the expert testimony, not its admissibility." *Gen. Elec. Capital Bus. Asset Funding Corp. v. S.A.S.E. Military Ltd.,* No. CIV. SA-03-CA-189-RF, 2004 WL 5495590, at *5 (W.D. Tex. Oct. 21, 2004). *See also Hale v. Denton Cty.*, No. 4:19-cv-0037, 2020 WL 4431860, at *4 (E.D. Tex. July 31, 2020); *Trevelyn Enterprises, L.L.C. v. Seabrook Marine, L.L.C.*, No. 18-11375, 2020 WL 6822555, at *2 (E.D. La. Nov. 20, 2020); *Fogleman v. O'Daniels*, No. 1:16-cv-210, 2017 WL 11319287, at *2 (S.D. Miss. Dec. 5, 2017). Some courts have even declared that "expert testimony is presumed admissible." *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009).

In all these cases, the gatekeeping function contemplated by Rule 702 has not been employed. Instead, these courts have simply opened the gate and walked away without worry about who or what might come through.

These errors are caused by mistaken reliance on now-superseded statements of this Court, and therefore can be fixed by this Court. District courts that ignore Rule 702 often cite either *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991) or *Viterbo v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir. 1987) as their source for holding that a court "must allow" the jury to make credibility decisions and to decide what weight to afford a report's findings.[11] *See, e.g.*, *Mullenix v. Univ. of Tex. at Austin,* No. 1-19-CV-1203-LY-SH, 2021 WL 4304815, at *8 (W.D. Tex. Sept. 21, 2021) (citing *Moss* for notion that if reports are "incomplete and inaccurate" that is an issue for the jury); *BNJ Leasing, Inc. v. Portabull Fuel Serv., LLC*, 591 F. Supp. 3d 125, 138 (S.D. Miss. 2022) (citing *Moss* to admit expert testimony that potentially "overlook[s] certain data"); *Gulf Restoration Network v. Oscar Renda Contracting,*

[11] One of LCJ's contributions to the ongoing efforts to revise Rule 702 contains dense detail of how this Court's decision in *Viterbo* has infected not only the decisions of district courts in this circuit, but courts around the country. *See* Clarity and Emphasis, *supra* note 3, at 8 (citing dozens of cases in which *Viterbo* has been mistakenly relied on in nearly every federal circuit).

Inc., No. 1:17CV130-LG-RHW, 2018 WL 6579171, at *2 (S.D. Miss. Dec. 13, 2018) (same).

But neither *Moss* nor *Viterbo* interpret the current version of Rule 702,—which was not even written at the time of those decisions. And *Moss* does not even address expert reports, but rather the admission of investigative reports by government agencies under what was then Federal Rule of Evidence 803(8)(C), covering "evaluative reports." *Moss*, 933 F.3d at 1305. *Viterbo* likewise predates both *Daubert* and the current version of Rule 702. It is no surprise that the case announces deference to the jury's role as "the arbiter of disputes between conflicting opinions." *Id.* at 422. But the 2000 version of Rule 702 ended whatever force those cases might previously have had.

Given that district courts have been led astray by statements by this Court in cases that have been supplanted by Rule 702, this Court should declare that neither *Moss* nor *Viterbo* have any binding precedential value for their holdings on expert testimony. That ruling would assist district courts around the circuit and set a clean slate for rulings going forward.

C. The Supreme Court has approved clarifications to Rule 702 to address courts' failures to perform their gatekeeping function.

Rule 702's requirements should have been clear with the 2000 Amendments. But because of the incorrect gatekeeping approaches that courts have taken, as discussed above, any confusion has been laid to rest by the extensive work the Judicial Conference and the Advisory Committee on the Rules of Evidence have done since 2016 to emphasize the importance of judicial gatekeeping in the admission of expert testimony. The Judicial Conference has authorized and the U.S. Supreme Court has adopted important clarifications to Rule 702, driven by the fact that "many courts 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." Proposed Committee Note, Rule 702. As the Advisory Committee observed, these "rulings are an incorrect application of Rules 702 and 104(a)." On April 24, these amendments were adopted by the Supreme Court and sent to Congress, pursuant to the procedure established by the Rules Enabling Act. In the absence of congressional action, they will go into effect on December 1, 2023. But, crucially, these amendments do not impose "any new, specific,

procedures," but merely "clarify" that Rule 702 is governed by Federal Rule of Evidence 104(a)'s requirement that the *court* must decide "any preliminary question" of a witness's admissibility. *See* Fed. R. Evid. 702 Advisory Committee's Note to 2023 proposed amendment. Because the amendment does not change the expert admissibility standard, but only clarifies the Rule 702 requirements that courts have applied incorrectly, the understanding reflected in the amendment and the Advisory Committee's analysis should inform courts' gatekeeping assessments now. *See Sardis v. Overhead Door Corp.*, 10 F.4th 268, 284 (4th Cir. 2021) (discussing Advisory Committee's analysis and concluding "[i]t clearly echoes the existing law on the issue.").

The proposed amendment will clarify Rule 702 in three key ways. First, the amendment clarifies that the *court* must rule on admissibility before allowing the evidence to be shown to the trier of fact—this change emphasizes that such questions are not for the jury to decide. Second, the amendment places the preponderance of the evidence standard within the text of Rule 702, requiring the proponent of expert evidence to "demonstrate[] to the court that it is *more likely than not*" that all the requirements of Rule 702 are satisfied. *See* Fed. R. Evid. 702, 2023

Amendment. This change clarifies that the "preponderance standard applies to the three reliability-based requirements added in 2000," contrary to the holdings of many courts. Advisory Committee's Note, at 3. This amendment shows that an even-handed preponderance of proof test, and not some presumption of admissibility of opinion testimony, is how judges must determine experts' admissibility.

Third, Rule 702(d) is amended to emphasize that each expert opinion must "reflect a reliable application" of her principles and methods to the fact of the case. While this standard "does not require perfection," the Advisory Committee emphasized that an expert may not make claims that are "unsupported" by the expert's basis and methodology. Again, judicial gatekeeping is necessary to protect jurors who cannot "evaluate meaningfully" the expert's testimony. *Id.* Given the forthcoming amendments and their commentary, district courts must exercise careful discretion before admitting expert testimony. This Court should recognize these new developments in its opinion in this case.

II. Under the correct standard, the district court's admission of Sherrod's testimony was reversible and prejudicial error.

The district court's decision here is a prime example of the errors the Advisory Committee has identified. In its brief opinion, the district

court did not cite Rule 702's standard for reliability at all—instead relying on a bare citation to *Daubert*. The district court further announced that Sherrod's reliability "is a jury call, not to be pre-judged by the Court." (Op. at 3). It did not apply a preponderance of the evidence standard. That is, the court explicitly refused to undertake its "essential" judicial "gatekeeping" function, at the same time as providing this Court with no reasoned basis to review its decision.

The inadequacy of Sherrod's testimony to satisfy Rule 702 was evident at trial. She admitted that the only document she reviewed was plaintiff's then-operative complaint and jury demand. She simply *assumed* the facts alleged in the complaint were true. Sherrod did not read FedEx's policies against discrimination or its policies against retaliation. ROA.4304-05. She did not read the written complaints that were submitted by Harris to FedEx's human resources departments, or any of the emails produced in discovery sent to FedEx, any of the notes of the meetings Harris's supervisor had with her, or the responses issued by FedEx's HR department. Sherrod did not even read the investigations carried out by FedEx's human resources department into Harris's complaints. ROA.4333-39. Based on nothing but the Complaint and

"common sense," ROA.4305, Sherrod concluded that the root cause of Harris's injuries was FedEx's alleged failure to supervise its own employees.

Sherrod's report amounts to a conclusory ipse dixit that parrots Harris's conclusions. It cannot satisfy the reliability standards of Rule 702. And the forthcoming revisions to the rule underscore that both the testimony and the district court's analysis of it were inadequate. Had the district court viewed this report and testimony through the correct lens required by Rule 702, it would all have been excluded.

CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 3, 2023, a true and correct copy of the foregoing document was filed with the clerk of the court for the United States Court of Appeals for the Fifth Circuit, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,628 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in Times New Roman (Scalable) 14 pt. for text and Times New Roman (Scalable) 12pt for footnotes.

/s/ Raffi Melkonian
Raffi Melkonian

ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) the electronic submission is an exact copy of any paper document submitted pursuant to 5th Cir. R. 25.2.1; (iii) the document has been scanned for viruses and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

/s/ Raffi Melkonian
Raffi Melkonian