No. 13-1252

IN THE

# Supreme Court of the United States

ESTATE OF HENRY BARABIN;
GERALDINE BARABIN, personal representative,
*Petitioners*,

v.

ASTENJOHNSON, INC. AND
SCAPA DRYER FABRICS, INC.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondent AstenJohnson, Inc. hereby certifies that its stock is not publicly traded and that no publicly traded corporation owns more than 10% of its stock. Respondent's parent company is AstenJohnson Holdings, Ltd.

TABLE OF CONTENTS

| | Page |
|---|---|
| CORPORATE DISCLOSURE STATEMENT | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| REASONS FOR DENYING THE WRIT | 4 |
| THE NINTH CIRCUIT'S REMAND RULING RAISES NO ISSUES WARRANTING CERTIORARI | 4 |
| CONCLUSION | 12 |

# TABLE OF AUTHORITIES


CASES Page(s)

*Cutter v. Wilkinson*,
544 U.S. 709 (2005) ...................................... 4

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
509 U.S. 579 (1993) ....................................*passim*

*Deputy v. Lehman Brothers, Inc.*,
345 F.3d 494 (7th Cir. 2003) ........................ 11

*Sprint/United Management Co. v. Mendelsohn*,
552 U.S. 379 (2008) ...................................... 11, 12

*Weisgram v. Marley Co.*,
528 U.S. 440 (2000) ................................ 6, 7, 8, 10

STATUTES

28 U.S.C. § 2106 ............................................... 9

28 U.S.C. § 2111 ............................................... 2, 4

RULES

Fed. R. Evid. 702 .............................................. 1, 3

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## BRIEF IN OPPOSITION

Respondent AstenJohnson, Inc. respectfully submits this Brief in Opposition to the Petition for Certiorari filed on April 15, 2014 by Petitioners the Estate of Henry Barabin and Geraldine Barabin.

## INTRODUCTION

All members of the Ninth Circuit *en banc* panel agreed that it was necessary to vacate the district court's judgment because the district judge had failed to analyze Petitioners' expert testimony as required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.

Pet. App. 20a. As the Ninth Circuit *en banc* panel majority characterized it, the district court had declined to perform its gatekeeper role of ensuring the reliability of expert testimony by erroneously "delegating that role to the jury." *Id*. at 13a. Petitioners do not challenge the *en banc* panel's determinations that a *Daubert* challenge was raised, a *Daubert* analysis was required, and a *Daubert* analysis was not conducted.

The *en banc* panel also unanimously agreed that the existing record was "too sparse" to allow a court to determine whether the expert testimony in question would survive a *Daubert* challenge, if one had been conducted. *Id.* at 19a, 21a. Petitioners do not challenge that determination either. Because the *Daubert* issues could not be resolved on the existing record, the *en banc* majority followed longstanding Circuit precedent and remanded for a new trial. *Id.* at 20a.

Instead of a new trial, Petitioners would have the *en banc* panel direct the district court to try to salvage the verdict and avoid a new trial by determining, post-appeal, whether some or all of the expert testimony could have met *Daubert* standards. Pet. 11; *see also* Pet. App. 19a. The hearing that Petitioners contemplate would presumably produce one of two results: the district court might confirm that the expert testimony was inadmissible, resulting in judgment for the defendants. Or, as Petitioners hope, the district court could vindicate its own prior ruling, and the jury verdict, by ruling *nunc pro tunc* that their expert evidence could have met *Daubert* standards, with the verdict then reinstated. Petitioners argue that such a post-remand *Daubert* procedure, in lieu of a new trial, is somehow mandated by the federal harmless error statute, 28 U.S.C. § 2111. Pet. 10-11.

Petitioners' argument raises no issue appropriate for certiorari.

First, the remand issue decided by the Ninth Circuit rarely arises, and is unlikely to recur. Judging from the lack of case law cited by Petitioners, cases like this one, in which a district court wholly abdicates its *Daubert* duties, are unusual. It is, of course, rarer still for the district court both to fail to conduct any *Daubert* analysis *and* for the record generated by the parties to be "too sparse" to perform a *Daubert* analysis post-hoc. As a result, the issue presented is unlikely to arise and has little practical significance.

Second, Petitioners ultimately offer no precedential support for the type of post-hoc, post-appeal procedure they advocate.

Third, this is the type of issue on which the Circuit Courts of Appeals are well-positioned to develop precedents suitable to their Circuits.

Finally, Petitioners' argument that their statutory rights have been impaired is without merit: The jury verdict plainly rested on expert scientific exposure and causation testimony not shown to have been reliable under Federal Rule of Evidence 702. Thus, the error affected the "substantial rights" of the parties, requiring that the verdict be vacated. Petitioners' argument here addresses only remand procedures, with the Ninth Circuit adopting a perfectly rational approach of ordering a new trial, rather than putting the trial court in a position of reopening the post-trial record and attempting to judge these expert issues post-hoc, long after the fact, based on post-appeal, post-verdict evidence and argument.

## REASONS FOR DENYING THE WRIT

### THE NINTH CIRCUIT'S REMAND RULING RAISES NO ISSUES WARRANTING CERTIORARI

1. Petitioners base their question presented (Pet. i), their Statement of the Case (Pet. 3-4), and much of their substantive argument (Pet. 10, 14-15, 16-17) on a federal statute, 28 U.S.C. § 2111, which they say "cannot be squared" with the decision below (Pet. 10). That statute was mentioned in passing in Petitioners' *en banc* petition but it was not briefed or argued by Petitioners to the original panel. It was not mentioned in the original panel decision; it was not mentioned by the majority *en banc*, nor by the dissenters. This Court generally does not review issues not addressed by the court of appeals. *See generally*, *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach defenses not addressed by the court of appeals).

2. Petitioners argue that the Ninth Circuit created an "automatic-reversal rule," Pet. 5, that ignores the harmless error standard of 28 U.S.C. § 2111, requiring courts to disregard errors that do not "affect the substantial rights of the parties." Petitioners' characterization is misguided. There was no "reversal"; the Court of Appeals merely vacated and remanded for a new trial; the Court of Appeals found the record too sparse to reverse. And the remand order was not "automatic." To the contrary, the Ninth Circuit conducted a harmless error review and then a review of the record to determine whether the evidence in the

record was sufficient to resolve the *Daubert* issue. Pet. App. 14a-17a.[1]

The Ninth Circuit was explicit that *if* the admission of the expert testimony in question had been harmless error, the verdict would have been sustained. *Id.* at 19a. Here, however, the admission of Petitioners' expert testimony was *not* harmless. The Ninth Circuit so determined. *Id.* at 14a and n.5. Indeed, Petitioners themselves repeatedly admitted as much, explaining that without the questioned expert testimony, the result would be "game over" and "a judgment in favor of the defendants." *Id*. at 14a. This case was founded on the Petitioners' experts' attempt to construct an asbestos-causation case on the theory that "every asbestos fiber is causative," with questionable use of simulation studies and without performing any assessment of the dose. *See id.* at 20a. The district court failed to review the reliability of that expert testimony as required under *Daubert. See id*. The expert testimony, erroneously admitted, was "critical" to Petitioners' case and "severely prejudiced [Respondents] because the Barabins' claim depended wholly upon the erroneously admitted evidence." *Id*. at 15a. Therefore, "the error was not harmless." *Id*.; *see also id.* at 20a ("error was prejudicial because the erroneously admitted evidence was essential to the Barabins' case.").

In sum, the *en banc* panel applied a harmless error standard and determined that the judgment had to be vacated. Petitioners' complaint is about the directions

[1] In an attempt to minimize it, Petitioners repeatedly misstate the trial court's error. The district court did not merely "fail to make particularized findings," but rather failed to undertake the necessary review in the first place.

on remand. Petitioners argue that the Court of Appeals was required to remand with directions to the district court to reopen the *Daubert* inquiry and then reinstate the verdict if the testimony was found admissible. Petitioners leave it unclear whether they believe they should be allowed on this proposed remand to supplement the evidentiary record, which the Court of Appeals determined to be "too sparse," as it presently exists, to determine whether the expert testimony could meet *Daubert* standards.

The *en banc* panel majority declined to endorse any such procedure. *Id.* at 19a-20a. Based on the *existing* record and its determination that the error was not harmless, it ordered a new trial. *Id.* at 20a. In connection with that new trial, the district court will, of course, be required to conduct a proper *Daubert* inquiry based on the expert testimony tendered for that trial.

3. Petitioners cite no direct precedent from any Circuit for reopening the record on the reliability of erroneously admitted expert testimony, after trial and after appeal. This Court's *Daubert*-related cases certainly do not support the proposition that this type of post-appeal, post-hoc determination is even available, let alone that it is required.

In *Weisgram v. Marley Co.*, 528 U.S. 440, 443-47 (2000), this Court explained the consequences of improperly admitting expert testimony. On the one hand, the appellate court may remand to the district court to determine, on the existing record, whether a new trial is required, or whether judgment should be entered for defendant. 528 U.S. at 441. Nothing in *Weisgram* supports Petitioners' notion that if the existing record is "too sparse" for a *Daubert* determination, the proper procedure (even assuming it is an

*available* procedure) is to direct the district court to determine post-trial, post-appeal – indeed, long after the trial of the case – whether the improperly admitted expert testimony could have met *Daubert* standards.

*Weisgram* went on to hold that rather than remand, the appellate court may itself determine whether the expert testimony was reliable, and if not, whether the verdict was sustainable without it. *Id.* at 457. So long as the plaintiff sponsoring the evidence had the chance to present evidence in support of the questioned expert testimony, judgment may be entered against the plaintiff if the evidence in the record cannot sustain the verdict. *Id.* at 455-56. There is no right to a second bite at the apple to sustain the verdict.

Indeed, citing *Weisgram*, Respondents *in this case* asserted that it was clear that Petitioners' expert testimony was not reliable, that it should have been excluded, and that without it, Petitioners' verdict could not be sustained, – thus warranting reversal, and entry of judgment for defendants, not merely a new trial.[2] *See* Pet. App. 19a. By modifying its precedent to the extent it had required a remand in every instance, the Ninth Circuit *en banc* panel ensured that its practice was in accord with *Weisgram*.

The *en banc* panel here nevertheless declined to enter judgment for Respondents under *Weisgram*, and held that a new trial was proper because the record as it existed was simply "too sparse" to determine the reliability under *Daubert* of the expert testimony in question. *Id.* Since the record was too sparse to allow

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[2] Indeed, in light of *Weisgram*, the remand for a new trial in this case is exceedingly generous to Petitioners. Only the sparseness of the record here kept the appellate court from entering judgment against Petitioners on the existing record.

judgment to be entered, the Ninth Circuit remanded for a new trial. *Id.* at 20a. That was perfectly appropriate under *Weisgram*. Nothing in this Court's *Daubert* precedent suggests the required course following a district court's failure to make a required *Daubert* determination is to allow the district court to reopen the record and attempt to make such a determination post-verdict and post-appeal.

4. The Ninth Circuit *en banc* panel surveyed its *own* precedent on related evidentiary issues and simply found no support for a post-trial, post-appeal remand of the kind Petitioners proposed. Pet. App. 19a-20a.

Petitioners assert that the reason the Ninth Circuit declined to direct the district judge to engage in a post-hoc *Daubert* determination was its view that a district court that had already decided to delegate the issue to the jury could not be trusted to judge the issue after the jury had reached a determination. Pet. 5. But the Ninth Circuit *en banc* panel itself did not offer that rationale for its decision. If it had, it would have been perfectly reasonable. It is difficult to envision that the same district judge, who earlier declared that the parties should be allowed to try their case to the jury, and that he or she would leave issues concerning the reliability of the expert testimony to the jury, could be asked to convene a post-appeal hearing, long after the fact. The temptation for the district court to vindicate its initial determination and the jury's determination, by holding the expert testimony reliable, *nunc pro tunc*, would assuredly be great.[3] In any event, this is

[3] Petitioners suggest that the Court of Appeals could re-assign the *Daubert* determination to a different district judge. Pet. 17. But Petitioners' reassignment proposal only highlights why this case is a poor certiorari candidate. Reassignment is a matter

a matter – whether and on what terms to remand – on which the Courts of Appeals are uniquely situated to make reasoned judgments, as did the Ninth Circuit here.[4]

5. Petitioners' proposed remand rule would create all the wrong incentives. The Federal Rules of Evidence and this Court's cases require a district court to act as a "gatekeeper" with respect to expert testimony. But Petitioners' approach would allow a district court which, as here, opts for the pre-*Daubert*, "old school" approach (leave it up to "each party to try its case to the jury," Pet. App. 13a, and delegate the responsibility to determine the reliability of the expert testimony to the jury), to do so. On Petitioners' theory, if the district court deemed it expedient, the district court could decline the gatekeeper role, send the case to the jury, and deal with *Daubert* post-trial, if necessary. If the jury ruled for the plaintiff, the *Daubert* hearing and analysis could be conducted after

squarely within the Circuit Court's supervisory power on which the Circuit Courts properly enjoy wide discretion – as is the precise question here. In any event, reassignment carries with it any number of additional impracticalities. A new judge assigned to the matter would, of course, have to approach the issue afresh. Moreover, if the evidence failed the new *Daubert* test, perhaps only in part, that newly-assigned judge would have to make a harmless error determination, without the benefit of having tried the case.

[4] Courts of Appeals have broad discretion in addressing remand: 28 U.S.C.A. § 2106 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

the fact, knowing that the jury had already accepted the questioned testimony. That approach would, of course, fundamentally undermine the gatekeeper role that the Federal Rules of Evidence prescribe for the trial court. A clear rule that the verdict will not stand without a *Daubert* determination having been made provides positive incentives for the parties on both sides to insist that the *Daubert* inquiry is properly conducted before trial.

6. In any event, certiorari is not warranted here because the Ninth Circuit's ruling is narrow and reflects a circumstance that will rarely arise. The holding applies by its terms only if the trial court has declined to conduct a *Daubert* analysis (not simply erred in conducting that analysis). Moreover, it applies only if the record is "too sparse" to allow the *Daubert* issue to be resolved.

Thus, the circumstances presented here are unlikely to arise with any frequency, indeed, perhaps not at all. *Daubert* analysis is by now a firmly established duty imposed on a district court. Thus it will be rare that a district court wholly fails to fulfill that duty. Moreover, as this Court observed in *Weisgram*, the parties have every incentive to submit their *Daubert* evidence when the issue is first raised. 528 U.S. at 455-56. Therefore, it will be rarer still to find the existing record "too sparse" to allow a determination to be made about whether the testimony should have been admitted.

7. Petitioners identify no Circuit conflict. To the contrary, Petitioners cite only one other Circuit that has faced this issue, albeit long ago, the Tenth, which

resolved the issue the same way as the Ninth.[5] Given the fact that most district judges now appreciate the importance of the *Daubert* inquiry, no conflict is likely to arise in the future.

8. Finally, Petitioners assert that the decision below is in tension with *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008). *See* Pet. 19. But that case did not involve a district court failure to conduct the *Daubert* inquiry, or a *Daubert* issue at all. Indeed, that case did not state any sort of general rule concerning remands, or suggest a duty to try to salvage a jury verdict. In that case, the Court of Appeals for the Tenth Circuit had mistakenly held that the district court had applied the wrong evidentiary standard in excluding certain evidence. 552 U.S. at 383. The Court of Appeals then applied the correct balancing test and found the excluded evidence admissible – granting a new trial. *Id*. This Court reversed, but not on any theory that granting a new trial was *per se* improper. To the contrary, this Court determined that the Tenth Circuit had erred in its predicate finding that the district court applied an incorrect legal standard, and therefore, it was improper for the Court of Appeals to engage in its own

[5] Petitioners suggest that the Ninth Circuit's approach departs from settled practice. But Petitioners' prime "example" of accepted practice, *Deputy v. Lehman Brothers, Inc.*, 345 F.3d 494 (7th Cir. 2003), is wholly inapposite. It is true, as Petitioners say, that in *Deputy* the Seventh Circuit remanded to the district court to conduct a *Daubert* analysis. 345 F.3d at 509. But *Deputy* did not involve an effort to reconstruct a *Daubert* ruling post-hoc, after trial. To the contrary, the expert testimony rulings were essentially in the context of summary judgment. *Id.* at 497. There had been no trial. Thus, on remand, the district judge was simply to conduct a *Daubert* hearing and *then* proceed to trial (if appropriate) in the ordinary course.

balancing inquiry. *Id.* at 387. This Court determined that the district court's ruling was, at best, "unclear." *Id*. at 383. Therefore, a remand was necessary to allow "the district court to clarify its order." *Id*. at 386-87.

This case is *not* comparable to *Mendelsohn*. Here, every appellate judge to examine the record concluded that the district judge had failed to conduct the necessary *Daubert* analysis. There was nothing "unclear" about it; indeed, Petitioners do not suggest otherwise. Thus, *Mendelsohn* provides no support at all for Petitioners' suggestion that the Ninth Circuit erred in remanding for a new trial where the trial judge erroneously declined to conduct a *Daubert* analysis and the record was insufficient to allow the appellate court to analyze the *Daubert* issues.

This is not an appropriate case for certiorari.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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