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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of ARIZONA RULES OF EVIDENCE, ARIZONA RULES OF CRIMINAL PROCEDURE	**Petition No. R-10-0035** **COMMENT OF THE ARIZONA TRIAL LAWYERS ASSOCIATION/ARIZONA ASSOCIATION FOR JUSTICE TO THE PETITION SEEKING TO AMEND THE ARIZONA RULES OF EVIDENCE—SPECIFICALLY COMMENTING ON THE PROPOSED CHANGES TO ARIZONA RULE OF EVIDENCE 702**

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Preliminary Statement

The Arizona Trial Lawyers Association/Arizona Association for Justice—acting on a resolution of its Board of Directors and through its Amicus Committee—comments on and objects to that part of the petition proposing changes to Arizona Rule of Evidence 702.

In civil cases, the existing version of Rule 702 works well, allows juries to perform their traditional, constitutional work of determining the credibility and reliability of all witnesses, and gives no inherent advantage to any party. In civil cases, the proposed changes to Rule 702 will bar juries from determining credibility and reliability of expert witnesses and give an inherent advantage to defendants.

The proposed changes to Rule 702 unwisely adopt a version of the *Daubert* standard for all civil cases—not just for those cases involving novel scientific or technical principles. The *Daubert*-inspired changes to Rule 702 shift power from juries to judges by letting judges perform the traditional, constitutional jury functions of determining witness credibility and reliability, including the credibility and reliability of experts. In Arizona, that is a historic—and unconstitutional—shift in power and discretion. Moreover, in civil cases, credible studies confirm that the *Daubert* approach implicit in the proposed changes to Rule 702 gives a demonstrable advantage to defendants.

Evidence rules should always be evenhanded. The proposed changes to Rule 702 are not evenhanded, but partial to the defense.

About all that can be said for the changes to Rule 702 is that they promote uniformity with the federal version of Rule 702. But uniformity is a poor trade for stripping from our state's juries their constitutional, traditional right to assess witness credibility and reliability. Moreover, uniformity that, in civil cases, skews the outcome in favor of either party is not uniformity. It is partiality. In its present form, Arizona Rule of Evidence 702 works well and impartially. Here, as so often in the law, "If it ain't broke don't fix it," is bad grammar and good policy.[1]

Legal Argument

The U.S. Supreme Court adopted a federal reliability test for admissibility of expert testimony in a series of three decisions beginning with the 1993 opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[2] In 2000, the Federal Rules Advisory Committee codified the *Daubert* trilogy in an amended Federal Rule of Evidence 702.[3] It is that *Daubert*-702 reliability test

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[1] *See, e.g.*, *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir. 1991) ("In litigation as in life, there is much to be said for maxims such as 'if it ain't broke, don't fix it' and 'quit while you're ahead.'").

[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. , Ltd. v. Carmichae*l, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

[3] FED. R. EVID. 702 & Advisory Committee's Note. Warnings about

that the Arizona Ad Hoc Committee on the Rules of Evidence has proposed for Arizona. "Given that expert testimony is crucial to modern civil and criminal litigation, the emergence of the *Daubert*-702 reliability test for expert testimony is likely the most radical, sudden, and consequential change in the modern history of the law of evidence." [4] Because the proposed *Daubert*-702 rule change for Arizona is really *Daubert* in codified form, the analysis of *Daubert* and its effect on civil litigation in jurisdictions that now follow it will help explain why the *Daubert*-inspired proposed change to Arizona Rule of Evidence 702 is unwise and unjust.

1. For decades, Arizona juries and trial courts have capably applied the principles of *Frye* and *Logerquist* under the present version of Arizona Rule of Evidence 702.

In the 2000 *Logerquist* opinion, this Court settled the "policy question for Arizona courts" on whether to apply *Frye* or *Daubert* to Arizona Rule of Evidence 702.[5] *Frye* was the District of Columbia Court of Appeals' landmark 1923 decision holding that expert testimony based on a novel

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the dangers of rapidly and unthinkingly incorporating *Daubert* into Federal Rule of Evidence 702 went unheeded. *See* Nancy S. Farrell, *Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify* Daubert v. Merrill Dow Pharmaceuticals, Inc., 13(2) J. CONTEMP. L. & POL'Y 523, 546-51 (Spring 1997).

[4] David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 452 (2007-2008).

[5] *Logerquist v. McVey*, 196 Ariz. 470, 471 ¶ 2, 1 P.3d 113, 114 ¶ 2 (2000).

scientific theory or process would only be admissible if the principle or process was "sufficiently established to have gained general acceptance in the particular field in which it belongs."[6] This Court first applied *Frye* to evidence issues in 1962, and has consistently used *Frye* ever since.[7]

Logerquist declined to abandon *Frye* and adopt *Daubert*, noting that "leading commentators and authorities in the field of evidence have criticized [*Daubert*]."[8] In fact, Arizona is not alone in its reluctance to adopt *Daubert*. Other jurisdictions that have not adopted *Daubert* include California, Florida, Illinois, Kansas, Maryland, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Utah, and Washington.[9]

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[6] *Frye v. United States*, 293 F. 1013, 1014 (D.C. App. 1923). In *Frye*, the District of Columbia Court of Appeals excluded evidence from a lie-detector test. But in this one case, the distrust of lie-detector tests was wrong. Long after James Alphonse Frye, an African-American, was convicted of second-degree murder and sentenced to life in prison, the real murderer confessed to the crime. William Wicker, *The Polygraphic Truth Test and the Law Of Evidence*, 22 TENN. L. REV. 711, 715 (Feb. 1953); Charles McCormick, *Deception-Tests and the Law of Evidence*, 15 CAL. L. REV. 484, 499 (1927). For a crime he did not commit, James Frye was in prison for 18 years. JAMES A. MATTÉ, THE ART AND SCIENCE OF THE POLYGRAPH TECHNIQUE 690 (1980). *See also Rely on 'Lie Test' in Appeal*, WASHINGTON POST 10 (July 22, 1922); *James Frye, Slayer of Dr. Brown, Files Appeal*, CHICAGO DEFENDER (March 24, 1923).

[7] *State v. Valdez*, 91 Ariz. 274, 277, 371 P.2d 894, 896 (1962); *State v. Davolt*, 207 Ariz. 191, 209-10 ¶¶ 67-68, 84 P.3d 456, 474-75 ¶¶ 67-68 (2004) (applying *Frye* to DNA testing).

[8] *Logerquist v. McVey*, 196 Ariz. 470, 482 ¶ 39, 1 P.3d 113, 125 ¶ 39 (2000).

[9] *See* Alice Lustre, *Post*-Daubert *Standards for Admissibility of*

Logerquist emphasized that Arizona's experience with the *Frye* rule "has not been bad."[10] Arizona's use of the *Frye* rule, limited by our appellate cases to applying a "novel scientific principle or technique formulated by another, has been strict enough to enable our trial judges to reject the truly questionable while enabling them to admit those principles and techniques based on generally accepted scientific theory."[11] *Logerquist* accurately noted that Arizona's "trial and appellate judges have been commendably able in making prompt and accurate *Frye* determinations in even the most difficult and arcane disciplines. Thus, although we recognize that *Frye* is not perfect, we believe it is a necessary and generally helpful rule."[12] *Logerquist* held that, as Arizona courts had construed, limited, and applied Frye, there was no reason to adopt *Daubert*.[13] Eleven years after *Logerquist*, nothing has changed to counter that conclusion.

2. The proposed changes to Rule 702 are adaptations of *Daubert* (and its progeny). Arizona will need years of litigation and appeals to settle the issues clinging to the *Daubert* standard.

The proposed versions of Arizona Rule of Evidence 702 adopt Federal

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Scientific of Other Expert Evidence in State Courts, 90 A.L.R.5th 453 (2001 & Supp. 2010).

[10] *Logerquist v. McVey*, 196 Ariz. 470, 485 ¶ 47, 1 P.3d 113, 128 ¶ 47 (2000).

[11] *Id*. (citations omitted).

[12] *Id*. at 485-86 ¶ 47, 1 P.3d at 128-29 ¶ 47.

[13] *Id*. at 486 ¶ 47, 1 P.3d at 129 ¶ 47.

Rule of Evidence 702, which is just an adoption of the *Daubert* trilogy. But in codifying *Daubert*, the proposed changes to Arizona Rule of Evidence 702 adopt all of *Daubert*'s flaws and uncertainties. For instance, although it seems incredible now, *Daubert* was supposed to liberalize the evidence rules, allowing greater flexibility and leniency for novel scientific and technical principles. But in federal practice and caselaw, that supposed liberalization vanished. Thus, in the 2000 *Weisgram* opinion, just seven years after adopting the *Daubert* standard, the U.S. Supreme Court frankly admitted that, since *Daubert*, "parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."[14]

Daubert replaces *Frye* poorly. *First*, the *Frye* test is simpler, because under the *Frye* test a trial court only needs to find scientific consensus. Once a trial court determines that a scientific principle or method has, or lacks, general acceptance in the relevant scientific community, the inquiry ends.

Second, unlike *Daubert*, *Frye* does not expect trial judges to become ad

[14] *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). *See also* Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 861 n. 179 (March 2008) ("With the passage of time, however, it has become generally agreed that application of the *Daubert* test operates to exclude relatively more expert evidence than *Frye* or other state variants."); Joe S. Cecil, *Ten Years of Judicial Gatekeeping Under* Daubert, 95 AM. J. PUB. HEALTH S74 (2005) (After *Daubert*, "the standards for admissibility at trial of expert testimony have become more demanding.").

hoc scientists deciding the reliability of scientific methods and principles in a dizzying array of fields and specializations. By making general scientific acceptance the standard, *Frye* recognizes that *scientists* should assess the merits of scientific evidence. As a commentator has explained, "acceptance by the current scientific community is the sole rational basis for contemporaneous judicial determinations of whether proffered scientific testimony is in fact scientific."[15]

In rejecting *Daubert* in 2003, the Pennsylvania Supreme Court also recognized that, because *Frye* rests on general acceptance, it "is more likely to yield uniform, objective, and predictable results among the courts, than is the application of the *Daubert* standard, which calls for a balancing of several factors."[16] Indeed, under *Frye*, "decisions of individual judges, whose backgrounds in science may vary widely, will be similarly guided by the consensus that exists in the scientific community on such matters."[17]

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[15] Adina Schwartz, *A "Dogma of Empiricism" Revisited:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *and the Need to Resurrect the Philosophical Insight of* Frye v. United States, 10 HARV. J. L. & TECH. 149, 196 (Winter 1997). *See also* Comment, *Admitting Doubt: A New Standard for Scientific Evidence*, 123 HARV. L. REV. 2021, 2023 (June 2010) ("So, unlike *Frye*, which essentially outsources admissibility determinations to scientific communities, *Daubert* tasks judges with separating good science from bad.").

[16] *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1045 (Pa. 2003).

[17] *Id*. *See also Goeb v. Tharaldson*, 615 N.W.2d 800, 812 (Minn. 2000) ("However, in repossessing the power to determine admissibility for the

Third, *Daubert* gives too much power to a trial judge to exclude scientific evidence based on that judge's individual, varying, non-scientific opinion. And once a trial court has made a *Daubert* decision, unlike a *Frye* decision, the *Daubert* decision is almost invulnerable. After all, the appellate standard of review for the *Daubert* admissibility decisions is abuse of discretion.[18] That standard is nearly impossible to satisfy. One researcher has concluded that "adhering to an abuse of discretion standard of review" means that appellate courts in *Daubert* jurisdictions have not restrained trial judges who abuse the power conferred by *Daubert* by falling back "on strict guidelines, which were not intended to serve as such, for the admission of expert testimony."[19]

The situation is different when the *Frye* standard is at issue. Appellate courts "review de novo the trial court's determination that a scientific principle meets the *Frye* requirement of general acceptance in the relevant scientific community."[20] In fact, when reviewing a trial court's *Frye* determination, an appellate court may, in addition to considering the trial-

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courts, *Daubert* takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific.").

[18] *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997).

[19] Cassandra H. Welch, *Flexible Standards, Deferential Review:* Daubert's *Legacy of Confusion*, 29(3) HARV. J. L. & PUB. POL'Y 1086, 1104 (Summer 2006).

[20] *State v. Marshall*, 193 Ariz. 547, 549 ¶ 5, 975 P.2d 137, 139 ¶ 5 (App. 1998).

court record, independently "survey" and "consider outside sources such as scientific literature, legal articles, and decisions of other jurisdictions."[21] On appeal from a *Frye* determination, the de novo standard offers a solid chance to correct trial-court errors on general acceptance.

Fourth, conducting *Daubert* hearings, sometimes several times in one case, has drastically increased litigation costs. As a 2010 study explained, "*Daubert* hearings are often costly, and wealthier parties may use them to make litigation prohibitively expensive."[22] Likewise, a 2009 analysis found that , through "significantly increasing the cost of expert testimony to meet its reliability standards, *Daubert* and its progeny (particularly its progeny) made thousands of products liability cases much more expensive to litigate, thus rendering many medium-value claims financially unviable for plaintiffs."[23] A

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[21] *State v. Garcia*, 197 Ariz. 79, 83 ¶¶ 20, 22, 3 P.3d 999, 1003 ¶¶ 20, 22 (App. 1999), *review denied* (Oct. 31, 2000).

[22] Comment, *Admitting Doubt: A New Standard for Scientific Evidence*, 123 HARV. L. REV. 2021, 2031 (June 2010). *See also* Michelle M. Mello & Troyen A. Brennan, *Demystifying the Law/Science Disconnect*, 26 J. HEALTH POL. POL'Y & L. 429, 434 (2001) (Daubert hearings are "a hallmark of mass tort litigation, used by relatively well-heeled defendants to increase the costs of litigation for plaintiffs."); Wendy E. Wagner, *Importing* Daubert *to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589, 607 (2004) ("Daubert has been criticized for causing greater imbalance in adversarial processes because of the high costs associated with mounting and defending Daubert challenges.").

[23] Richard L. Cupp, Jr., *Preemption's Rise (and Bit of a Fall) as Products Liability Reform:* Wyeth, Riegel, Altria, *and the Restatement (Third)'s Prescription Product Design Defect Standard*, 74 BROOK L. REV.

2005 comment agreed that: "Preparing for and litigating *Daubert* issues has undoubtedly made litigation even more expensive than before."[24]

Fifth, perhaps the most troubling ramification of adopting *Daubert* through the proposed changes to Arizona Rule of Evidence 702 is the fact that the *Daubert* approach will now apply to *all* expert evidence, and not just to novel scientific and technical principles. Jurisdictions using *Daubert* have applied it to discrimination, employment, intellectual property, lost-income, class-action, insurance, criminal, commercial, environmental, and other issues.[25] Exactly how to apply *Daubert* to all cases involving expert evidence is murky—something that our appellate courts will have to resolve in repeated appeals over many years.

Under the proposed changes to Rule 702, a trial judge can now find that any particular scientific or technical principle is unreliable in many kinds of cases, even if the relevant scientific and technical community has long accepted the reliability of that scientific and technical principle.[26] And once

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727, 756 (Spring 2009).

[24] Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking* Daubert, 104 MICH. L. REV. 257, 267 (2005).

[25] Daniel J. Herling, Gene M. Williams & Jeffrey T. Wise, *Non-Traditional Uses of* Daubert*: A Review of Recent Case Law*, 60(1) FDCC Q. 69 (Fall 2009).

[26] For instance, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), a majority of the U.S. Supreme Court found that a tire-failure-analysis opinion by a respected tire expert was unreliable, although the opinion was

the trial judge makes an unreliability decision—even if incorrectly—the abuse-of-discretion standard makes the odds of reversing that decision poor to nonexistent.

3. The proposed changes to Rule 702 would unconstitutionally take issues of credibility and reliability from juries.

The Arizona Constitution, both in spirit and in text, guarantees trial by jury and gives juries the right to determine questions of credibility and reliability. For example, Article 6, § 27 prevents judges from commenting on—expressing an opinion on—the evidence.[27] A trial judge violates Article 6, § 27 if the trial judge expresses an opinion on evidence that "interferes with the jury's independent evaluation of that evidence."[28] Thus, under Article 6, § 27, no Arizona judge can tell the jury that the testimony of any expert witness is incredible or unreliable.

If our state constitution forbids a judge from telling the jury that he or she thinks the evidence is unreliable, how can it authorize the even more draconian power of entirely precluding testimony for that very reason? It is simply an end run around the state constitution for a judge to bar otherwise

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routine, was based on generally accepted scientific and technical principles, and would have been unobjectionable under the *Frye* test.

[27] *State v. Barnett*, 111 Ariz. 391, 393, 531 P.2d 148, 150 (1975) ("The word 'comment' as used in the constitutional provision has been construed to mean the expression of an opinion.").

[28] *State v. Rodriguez*, 192 Ariz. 58, 63 ¶ 29, 961 P.2d 1006, 1011 ¶ 29 (1998).

admissible evidence for a reason (perceived unreliability) that our state constitution forbids the judge from even mentioning to the jury.

The *Daubert* approach inherent in the proposed changes to Rule 702 gives to any trial judge the authority to preclude an expert witness from testifying at all merely because the trial judge thinks that the testimony is incredible or unreliable. That would interfere with the jury's independent evaluation of the evidence. Indeed, it would bar any jury's independent evaluation. As this Court explained in *Logerquist*, *Daubert* held that the existing version of Federal Rule of Evidence 702 "incorporated a reliability screen, authorizing the trial judge to determine reliability (and eventually, in *Kumho*, essential credibility) of a qualified expert's testimony as a prerequisite for the jury's determination of the same issues."[29]

Article 6, § 27 does not operate in a vacuum. For instance, Article 18, §§ 5 and 6 give important questions of mixed law and fact to juries, although most states let trial judges make findings on these matters and take those issues from the juries. Our constitutional framers placed great faith in juries. We should not abandon that faith, especially when there is no evidence that juries are acting without principle.

For 99 years, the Arizona Constitution has trusted jurors to assess the

[29] *Logerquist v. McVey*, 196 Ariz. 470, 485 ¶ 44, 1 P.3d 113, 128 ¶ 44 (2000).

reliability and credibility of all witnesses, including expert witnesses. Indeed, the Arizona Constitution gives the jury an "exalted role."[30] Our state constitution trusts jurors to assess witness reliability and credibility, and uniquely provides special protections for the right of action to seek redress for personal injury, for access to the courts, for the right of trial by jury, and for many other constitutional rights too numerous to list or discuss in detail in this comment. The framers of our unique state constitution sought to protect the right to pursue actions seeking redress for wrongs and to protect the right of juries to decide those actions. The proposed modifications to Rule 702 undermine many of the Arizona Constitution's strong, unique protections.

4. If there are problems with the present version of Rule 702 in criminal cases, the solution is to address those particular problems, not to impose *Daubert* on all types of cases.

Some critics have suggested that *Frye* has worked poorly in criminal cases because some types of generally accepted scientific principles—such as the principle that no two people can have identical fingerprints—have never been established with peer-reviewed scientific rigor.[31] Some criminal

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[30] JOHN D. LESHY, THE ARIZONA CONSTITUTION: A REFERENCE GUIDE 160 (1993).

[31] *See*, *e.g.*, Nathan Benedict, *Fingerprints and the* Daubert *Standard for Admission of Scientific Evidence: Why Fingerprints Fail and a Proposed Remedy*, 46 ARIZ. L. REV. 519, 548 (2004) (Because of the *Daubert* standard, the ability of forensic experts to rely on the admissibility of fingerprint-comparison evidence "will soon expire."); Simon A. Cole, *Is Fingerprint*

defendants and commentators rejoice that *Daubert* may allow attack on such generally accepted scientific principles as handwriting-comparison analysis, the distinctiveness of DNA, and the uniqueness of fingerprints.[32] But those extreme cases are not a reason to abandon general acceptance of scientific and technical principles as a valid test for challenging supposedly novel expert evidence. That is especially true for civil cases.

Paradoxically, many researchers have concluded that the real problem is that courts are applying *Daubert* stringently against plaintiffs in civil cases and generously in favor of prosecutors in criminal cases.[33] If that split is

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Identification Valid? Rhetorics of Reliability in Fingerprint Proponents' Discourse, 28(1) L. & POL'Y 109, 111 (2006) ("If forensic fingerprint identification cannot demonstrate its validity, it may be grounds for exclusion under *Daubert* and its progeny cases.).

[32] *See*, *e.g.*, Robert Epstein, *Fingerprints Meet* Daubert: *The Myth of Fingerprint 'Science' Is Revealed*, 75 S. CAL. L. REV. 605 (2002).

[33] *See*, *e.g.*, Munia Jabbar, *Overcoming Daubert's Shortcomings in Criminal Trials: Making the Error Rate the Primary Factor in Daubert's Validity Inquiry*, 85 N.Y.U. L. REV. 2034, 2046 (Dec. 2010) ("Use of the *Daubert* standard in criminal trials is problematic in that it undermines two main criminal justice goals: trial accuracy and consistency. Criminal cases have inherent adversarial biases that civil cases do not, and, in failing to account for these differences, Daubert causes unfair results for criminal defendants. In addition, *Daubert*'s lack of clarity has led to inconsistent admission of expert evidence.") (citations omitted); Jessica D. Gabel, *Forensiphilia: Is Public Fascination with Forensic Science a Love Affair or Fatal Attraction?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 248 (Summer 2010) ("I submit that *Daubert* has created significant hurdles for plaintiffs in civil cases trying to demonstrate causation through the use of expert testimony. In contrast, *Daubert* and its statutory contemporaries have opened the door and offered coffee and biscotti to similar evidence in

actually happening, or if Daubert is inherently tilted in favor of one side in criminal cases, that offers yet another reason to avoid importing the *Daubert* standard into our state's version of Rule 702.

If there are problems with using the present version of Arizona Rule of Evidence 702 in criminal cases, the solution is to make specific changes to Rule 702 or to devise other methods for addressing those problems.[34] The solution is not making changes that will affect civil cases as well. In civil cases, after all, *Frye* and the present version of Rule 702 have worked admirably.

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criminal cases."); Beth A. Riffe, *The Aftermath of* Melendez*: Highlighting the Need for Accreditation-Based Rules of Admissibility for Forensic Evidence*, 27 T.M. COOLEY L. REV. 165, 176 (2010) ("In addition to lacking scientific expertise, judges exercise the Daubert gatekeeping function in notably disparate ways in criminal trials as opposed to civil trials. While judges in civil cases tend to exclude proffered expert testimony, judges in criminal cases frequently treat expert testimony based on forensic science with deference, admitting it and allowing the jury to assess its weight.").

[34] *See, e.g.*, Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What's Wrong with Daubert and How To Make It Right*, 2007 UTAH L. REV. 131, 163 (2007) (trial courts or special masters could review and address pertinent scientific articles); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 469-73 (1997) (suggesting use of independent crime labs); Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107, S111-13 (2005) (use of independent auditing and national accreditation system to defeat bias); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 792-97 (2007) (proposing placing burden on government to show scientific technique's legitimacy and instituting threshold error rate for evidence admissibility).

5. History confirms that the Arizona Constitution has properly placed great trust on juries.

No evidence suggests that Arizona juries have abused the discretion that the Arizona Constitution has confided in them. There is no evidence of any jury abuse. Indeed, it would be hard for juries to run rampant. After all, trial judges have power to exclude evidence from unqualified witnesses under the present version of Rule 702, as well as under other rules, such as:

- Rule 104(a) (The trial court shall determine preliminary questions about the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.).
- Rule 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").
- Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

The present version of Rule 702 also gives the trial judge the ability to determine if a proffered expert witness has scientific, technical, and other

specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue—and whether that expert is qualified to testify as an expert. The internal safeguards of Rule 702—coupled with the protections of the other evidence rules—are enough to ensure that the trust the Arizona Constitution places in juries is not misplaced.

6. Research and commentary repeatedly confirm that the *Daubert* approach to evaluating expert evidence in civil cases skews results.

Since *Daubert*'s appearance in 1993, commenters and researchers have been investigating its effect on civil litigation. By now, there is a consensus that *Daubert*, as applied in civil cases, favors defendants. Examples of comment and research on the pro-defense bias of *Daubert* in civil litigation include the following:

- David M. Flores, James T. Richardson & Mara L. Merlino, *Examining the Effects of the Daubert Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. ILL. U. L.J. 533, 548 (Spring 2010) ("In summary, the results of this statistical analysis suggest that the brunt of *Daubert*'s effect, with respect to the number of experts retained, was experienced by plaintiff parties.").

- Herbert M. Kritzer & Darryn C. Beckstrom, *Daubert in the States: Diffusion of a New Approach to Expert Evidence in the Courts*, 4(4) J. EMPIRICAL LEGAL STUD. 983, 984-85 (2007) ("However, *Daubert* quickly proved to be more of a vehicle for excluding expert testimony than a vehicle for allowing in innovative science. Advocates of tort reform came to embrace *Daubert* as representing a positive step toward limiting the kinds of lawsuits those advocates had come to decry.").

- Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. Pitt. L. Rev. 281, 306 (2007-2008) ("Since the plaintiff ordinarily has the burden of proof in tort litigation, this aggressive invocation of the judge's new role as guardian of the purity of scientific evidence has had a disproportionate impact on plaintiffs.").

- Gary Edmond, *Supersizing* Daubert *Science for Litigation and its Implications for Legal Practice and Scientific Research*, 52 VILL. L. REV. 857, 863 (2007) ("Together, *Daubert* and its progeny have exerted a stultifying effect on tort and product liability suits filed in federal courts and beyond. Trial judges are encouraged to act as vigilant gatekeepers, and appellate courts are prevented from interfering unless trial judges clearly abuse their wide discretions. In consequence, plaintiffs frequently struggle to have their expert evidence admitted. The changes to practice have been so profound that it has become normal to have pre-trial admissibility hearings for expert evidence (now called *Daubert* hearings) upon which the fate of civil actions often depends. Plaintiffs who are unable to introduce expert evidence are often left without a viable cause of action.").

- Margaret A. Berger, *What Has a Decade of* Daubert *Wrought?*, 95(S1) AM. J. PUB. HEALTH S114, S59, S64 (Jan. 2005) ("*Daubert* has undoubtedly shifted the balance between plaintiffs and defendants and made it more difficult for plaintiffs to litigate successfully.").

- George P. Lakoff, *A Cognitive Scientist Looks at Daubert*, 95(S1) AM. J. PUB. HEALTH S114, S120 (Jan. 2005) (As applied in the courts, *Daubert* has upset the balance, "making our judicial system significantly less fair and more politically conservative.").

- Gary Edmond & David Mercer, Daubert *and the Exclusionary Ethos: The Convergence of* Corporate *and* Judicial *Attitudes Towards the Admissibility of Expert Evidence in Tort Litigation*, 26 LAW & POL'Y 231, 251 (2004) ("We would suggest that Daubert was intended to provide a jurisprudential platform for an exclusionary orientation.").

- Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589, 607 (2004) ("Daubert has been criticized for causing greater imbalance in adversarial processes because of the high costs associated with mounting and defending Daubert challenges.").

- Lloyd Dixon & Brian Gill, RAND Institute for Justice, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases since the* Daubert *Decision*, 8(3) PSYCH., PUB. POL'Y & LAW 251, 298 (2002) (The nonpartisan RAND organization determined that, in federal courts after *Daubert*, challenges to expert evidence increasingly resulted in summary judgment, with nearly 90% of the summary judgments going against plaintiffs.).

- Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8(3) PSYCHOLOGY, PUBLIC POLICY, AND LAW 309, 330 (2002) (After *Daubert*, judges are letting fewer cases proceed to trial without limits on the expert evidence.).

- D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000) ("This article shows that, as to proffers of asserted expert testimony, civil defendants win their *Daubert* reliability challenges to plaintiffs' proffers most of the time, and that criminal defendants virtually always lose their reliability challenges to government proffers. And, when civil defendants' proffers are challenged by plaintiffs, those defendants usually win, but when criminal defendants' proffers are challenged by the prosecution, the criminal defendants usually lose.").

This Court should not adopt the proposed changes to Rule 702 when those prosed changes will create unnecessary, unfair barriers to the impartial resolution of cases.

Conclusion

This Court should not adopt any of the proposed changes to Arizona Rule of Evidence 702—an impartial, sturdy evidence rule that Arizona trial judges have competently used for decades. As far as the present version of Rule 702 is concerned, nothing is broken. "If it ain't broke, don't fix it."

DATED this 20th day of May, 2011.

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Certificate of Service

On the above date, counsel electronically filed the original of this document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court, and mailed a copy to:

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Option A

Rule 702. Testimony by Experts [current Arizona version]

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Option B

Rule 702. Testimony by Expert Witnesses [restyled federal version]

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:

(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 principles and methods to the facts of the case.

Option C

Rule 702. Testimony by Expert Witnesses [restyled federal version without subsection (d)]

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:

(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; and
(c) the testimony is the product of reliable principles and methods.