

23-2226, 23-2234

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MARK A. BARRY

Plaintiff-Appellant,

v.

DEPUY SYNTHES COMPANIES

Defendant

DEPUY SYNTHES SALES, INC., trading as DePuy Synthes Spine,
MEDICAL DEVICE BUSINESS SERVICES, INC.,
DEPUY SYNTHES PRODUCTS, INC.,

Defendants-Appellees

**PLAINTIFF-APPELLANT'S RESPONSE TO DEFENDANTS-APPELLEES'
PETITION FOR REHEARING EN BANC**

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Mark A. Barry certifies the following:

1. The full names of all entities represented by undersigned counsel.

Mark A. Barry

2. Provide the full names of all real parties in interest for the entities.

None.

3. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more of the stock in the entities.

None.

4. List all law firms, partners and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

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Courtney Dabbieri – former Kilpatrick Townsend & Stockton LLP

5. Provide the case titles and numbers of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case.

Barry v. Depuy Synthes Companies, 2023-2234, United States Court of Appeals for the Federal Circuit

Dr. Mark A. Barry v. SeaSpine Holdings Corp., et al., No. 1:20-cv-01787-RGA-SRF (D. Delaware)

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None.

Date: May 15, 2026

Respectfully submitted,

/s/ D. Clay Holloway

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INTRODUCTION

Neither the 2023 Amendments to Rule 702 (“Amendments”) nor this Court’s decision in *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (Fed. Cir. 2025) changed the law on what constitutes reliable, and thus admissible, expert testimony. No other circuit has taken *en banc* a Rule 702 case post-Amendments, and this Court need not do so again.

Contrary to DePuy’s assertions, the majority did not “re-label[] reliability defects as ‘weight’ and ‘credibility’ matters.” *Compare* Op.10, 26-27 with Dissent.2, 9-10 and Pet.9-10, 13. The majority properly tested whether (1) as a legal matter Dr. Yassir contradicted the district court’s pre-trial pronouncements on claim scope; and (2) Barry demonstrated by a preponderance of evidence that Dr. Neal had “good grounds” to rely on his survey method. Finding Yassir did not contradict the court’s construction and Neal had “good grounds,” the majority held, based on Rule 702, and consistent with *EcoFactor* and governing Third Circuit law, the testimony was reliable, and the district court abused its discretion in excluding it, going beyond policing unreliable testimony and answering correctness and credibility questions reserved for the fact-finder.

DePuy and amici accuse the majority of contradicting the 2023 Advisory Committee Notes’ (“Notes”) warning to not short-circuit gatekeeping by labeling challenges to the factual sufficiency or reliability of expert opinions jury issues.

But the majority did no such thing. Unlike in *EcoFactor*, the district court exercised its gatekeeper function pre-trial, properly explaining its allowance of Barry’s experts. But, as the majority recognized, the district court erred at trial by excluding testimony based on conclusions it reached on the opinions. The district court contravened the Notes’ guidance that “by deciding the disputed facts, the jury can decide which side’s experts to credit.”

DePuy’s assertions this case will “destabilize patent litigation” and “chill[]” trial courts’ application of gatekeeping duties are unfounded. Pet.15, 17, 19. Rather, DePuy and amici seek to change the law, expanding *EcoFactor* to give district court judges unchallengeable reign over what is admissible under the guise of “reliability” assessments. That is not what the *Daubert*-trilogy mandates, much less proper application of Rule 702 under Third Circuit law, as the Notes confirm:

[P]roponents ‘do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable...The evidentiary requirement of reliability is lower than the merits standard of correctness.’

(citing *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994)).

Yassir did not contradict constructions or pre-trial rulings on claim scope. DePuy spins as construction Yassir’s explanation of *how* parts of the infringing tools satisfy the court’s plain English definition of “handle means”—“a part that is designed especially to be grasped by the hand.” Yassir explained *how*, as a surgeon

and engineer, one knows a part is designed especially to be grasped by the hand. Appx1238 (126:2-127:6); Appx1239 (131:12-21). Application is not contradiction; persuasiveness is for the jury.

Likewise, the faulty exclusion of Neal's survey was based on DePuy's criticisms of Neal's extensively detailed methodology made without any evidence the criticisms applied or led to faulty methodology or unreliable results. Op.24-25. The district court credited DePuy's criticisms, usurping the fact-finder's role—weighing and deciding the relative persuasiveness of conflicting expert testimony. Notes (“It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts.”). While DePuy and the district court characterize Neal's methodology support as *ipse dixit*, the record shows it was not. Op.26-27. Neal consistently explained how and why his method was acceptable, including why DePuy's criticisms were unfounded for the survey necessary here. Appx1164-68 (59:5-74:19).

Already, every displeased party on Rule 702 issues seeks *en banc* review claiming *EcoFactor* fouls. It remains an abuse of discretion to disallow testimony applying the court's construction and meeting the low preponderance standard of “good grounds.”

BACKGROUND

A. Pre-Trial Rulings.

Yassir opined on infringement and Neal provided evidence of inducement and quantified infringing procedures. Op.28 n.9. The district court performed its gatekeeper role by addressing *Daubert* challenges to both. Appx15227-59; Appx15263-92. DePuy challenged Yassir’s application of “handle means,” alleging contradiction of the construction. Appx15231-59. The district court disagreed, finding DePuy’s challenge went to “conclusions, which are not the proper subject of a Daubert motion” and, foreshadowing the majority, “[a]ny arguments that, contrary to Yassir’s opinions, DePuy’s derotation tools do not have a ‘part that is designed especially to be grasped by the hand’ goes to the weight of Yassir’s testimony, not its admissibility.” Appx15651.

For Neal, DePuy raised two challenges: the “principles” underlying the questions in the survey and the representativeness of the surveyed universe. Appx15657. The district court rejected both, finding “technical unreliability” of the survey to be questions for the jury and Barry met his preponderance burden of showing the universe surveyed was proper. Appx15658-59.

B. Fact Finding Reversals.

During trial, Yassir and Neal testified *without objection* as the court permitted pre-trial, consistent with the *Daubert* Order. *See, e.g.*, Appx1238-40 (125:10-133:18); Op.11 n.3, 12-19; Appx1162 (49:24-51:11); Appx1164 (57:18-25), Appx1172-73 (91:14-95:9). After Neal’s testimony—including extensive cross-examination from the court¹—the court invited DePuy to raise *Daubert* challenges to Neal. Appx1162 (50:1-51:1); Appx1225 (74:1-10). Despite representing the renewed challenge would “be more focused” than the two previously rejected grounds, DePuy’s motion² “offered new arguments contesting the reliability of Neal’s survey, even though the contents of the survey, and Neal’s opinions regarding them, remained consistent throughout the litigation.” Op.23 n.5; *see also* Appx1262 (221:22-222:5). DePuy moved for JMOL and reversal of pretrial *Daubert* rulings. Appx15817-56. The court granted both. Appx30; Appx61-62.

C. The Panel Opinion.

The majority reversed the exclusions. Judge Stark—joined by *EcoFactor* majority member Judge Taranto—found the mid-trial reversals abuses of discretion

¹The court’s questioning deviated from Third Circuit guidance that court questioning of credentials and methodology not taint the jury. Op.25 n.7.

²Reversing on other grounds, the majority declined to reach whether DePuy’s raising new *Daubert* issues was waived. Op.23 n.5. It was. Dkt. 15, 70.

as the testimony was reliable under the applicable burdens and the proffered criticisms were questions of weight, not admissibility.

The majority found the district court properly framed “the issue of whether Yassir’s opinion contradicted the court’s construction of ‘handle means’ [as] a question of admissibility and, thus, was for the district court and not the jury to decide.” Op.22. The majority analyzed the five statements held contradictory and determined the testimony was consistent application. Op.12-18. Yassir’s testimony was unchanged throughout: “DePuy, thus, all along understood (and feared) that the opinion it eventually elicited from Yassir on cross-examination...is **consistent** with the court’s construction, not **contradictory** of it.” Op.16 n.4³. The majority—citing *EcoFactor*—held “tensions and ambiguities” were cross-examination and argument fodder. Op.20. Anything more “inadvertently invite[s] district courts to dismantle parties’ cases at trial based on ordinary evidentiary imperfections.” *Id.*

For Neal, the majority could not discern how the “district court could know, as opposed to speculate, that any of these matters,” cited for exclusion, “would be of concern to an expert in the field of surveys, much less render the entire project unreliable” given Neal’s described method and Rule 702’s Amendments. Op.26-28.

³ Emphasis in quotes added unless otherwise noted.

The dissent would have found construction contradiction despite Yassir repeatedly using the construction throughout. Dis.7. The dissent emphasized “designed especially” language without reconciling the court’s pre-trial holdings: “my claim construction contemplates an embodiment of Plaintiff’s invention in which the surgeon grasps the shaft or lever *rather than a separate part strictly designed* for handling.” Appx15642. Regarding Neal, the dissent would have found the unsubstantiated critiques DePuy raised to concern reliability, not persuasiveness. Dis.10. The dissent cites cases where members of the target population are knowable and reachable—probability studies—as opposed to the type of survey Neal needed to perform given the target population has no census-level metrics.⁴ Consequently, the dissent wrongly agreed that response rate casts doubt on representativeness. This mirrored the district court’s fact-finding error.

ARGUMENT

A. *En Banc* Is Extraordinary and Not Required.

Contrary to DePuy’s assertions, the extraordinary measure of *en banc* review is not necessary here to “secure uniformity in this Court’s decisions or to resolve

⁴*In re Autozone, Inc.*, 2016 WL 4208200, at *17 (N.D. Cal. Aug. 10, 2016) (evidencing known class makes probability studies available); *Chavez v. IBP, Inc.*, 2004 WL 5520002, at *8-11 (E.D. Wash. Dec. 8, 2004) (evidencing known employees makes probability studies available; noting expert failed to use independent modes of verification); *M2M Sols. LLC v. Motorola Sols., Inc.*, 2016 WL 767900, at *6 (D. Del. Feb. 25, 2016) (finding survey unrelated to patented technology; noting administered by unqualified survey expert).

an exceptionally important question.” Pet.8. Post-*EcoFactor*, the Court’s rulings regarding Rule 702 are uniform; *Ecofactor* did not change the law.

1. This Court Consistently Applies Rule 702.

The majority properly assessed Yassir’s conformance to the construction of “handle means,” finding, in context, it was not contradictory and thus was reliable. Op.18. It did not, as DePuy suggests, characterize “claim construction departure” as “a ‘credibility’ dispute for the jury.” Pet.17.

Likewise, the majority did not “relabel” DePuy’s alleged defects in Neal’s methodology as “matters of ‘weight.’” Pet.13. It considered the proffered method and determined Neal demonstrated “good grounds.” Op.26-27. It properly recognized DePuy’s critiques as advocacy for a different methodology directed to correctness. *Paoli*, 35 F.3d at 744 (“[T]he reliability requirement must not be used as a tool by which the court excludes all questionably reliable evidence.”) (citations omitted).

The unanimous opinion in *Willis Elec. Co. v. Polygroup Ltd. (Macao Commercial Offshore)*, authored by Chief Judge Moore and joined by Judge Stark, affirmed allowance because the challenge went “to the weight to accord to her testimony, not its admissibility” and was “best addressed by cross examination and not by exclusion.” 166 F.4th 1363, 1373 (Fed. Cir. 2026). Just as the majority here held, “[w]hether averaging *was the best approach is a matter on which*

reasonable minds could differ, but it does not undermine the reliability of her methodology to the point of exclusion.” *Id.* at 1378. *Willis* reaffirmed the “role of assessing the reliability of the testimony based on the full breadth of information before it” extends throughout,⁵ but “[o]nce a district court has determined the methodology is reliable, challenged testimony does not become unreliable simply because a party believes an expert should have presented information to the jury differently.” *Id.* at 1377.

In *Exafer Ltd. v. Microsoft Corp.*, authored by Chief Judge Moore and joined by *EcoFactor* and *Barry* majority member Judge Taranto, the Court reversed exclusion because the “facts here illustrate the methodological soundness of” the opinion. 169 F.4th 1089, 1093 (Fed. Cir. 2026). As in *Exafer*, the lower court here was corrected after improperly excluding testimony by presuming, without support, method criticisms tarnished the results. *Id.*

Despite this Court’s proper and consistent application of Rule 702, the losing sides in *Willis* and *Exafer* sought *en banc*, arguing—like DePuy⁶—

⁵Amici writes the “majority suggested that it was not appropriate for the district court to question the proffered experts and then to revisit its pretrial admission decisions.” Dkt. 68, 9-10. The majority said the opposite. Op.21, 28.

⁶Despite the Amendments neither tightening admissibility nor increasing the burden for demonstrating reliability, DePuy routinely alleges a “sea change” in the law. “[DePuy] Defendants do themselves no favors by asserting that a case should be discounted every time a court reasons that an argument goes more to weight than admissibility.” *McCoy v. DePuy Orthopaedics, Inc.*, 2024 WL 1705952, at *9 n.7 (S.D. Cal. Apr. 19, 2024).

EcoFactor contravention. *Willis*, No. 24-2118, Dkt. 49 at 23 (Fed. Cir. Mar. 19, 2026); *Exafer*, No. 2024-2296, Dkt. 68 at 17-18 (Fed. Cir. May 6, 2026). Routine *en banc* review to ensure *EcoFactor* compliance is unnecessary and untenable.

En banc review being unnecessary is underscored by the arguments from DePuy and amici which advocate swinging the pendulum of gatekeeping beyond any Circuit’s jurisprudence. For example, DePuy posits “[t]he trial court *alone* can detect the gap between recitation and substance” (Pet.12); and amici suggest “[t]hat is why Rule 702 explicitly assigns the task of ensuring the reliability of expert testimony to district court judges *alone*” (Dkt. 61, 6).

By declaring the court’s exclusion reliability findings, DePuy attempts to shield them behind “gatekeeping.” Endorsing DePuy’s view of *EcoFactor* will require that district courts, not juries, decide who is *right* when disputed methodologies collide or err for failing their gatekeeping duties.

Amici’s hypothetical demonstrates this: “the expert retained to prove causation used the wrong amount of a reagent in the test to determine whether toxic substances were present.” Dkt. 68, 8. DePuy and amici argue such evidence should never go to the jury. But the only way the judge could know the method was “wrong” is if the opposing party claims—likely through a competing expert with evidence in support—that it is. In other words, the parties dispute the proper methodology to test for the substance.

At the *Daubert* stage, it is not the judge’s role to weigh the evidence and rule which method is correct, excluding the other. Of course, if the opposing party can prove in the scientific community the amount of reagent used was ***technically incorrect based on evidence***, i.e, junk science, that would be a different story.⁷ Short of that, the court cannot take critiques and advocacy as definitive, or pick the side it finds more credible, excluding the other. If the plaintiff presented methodological “good grounds” and the basis for using the reagent was supportable, Rule 702 requires ***the jury*** decide who is correct by crediting the proffered opinion or not.

2. *Overturing the Majority Would Bring this Court out of Alignment with the Circuits Whose Law this Court Applies.*

This Court should reject the invitation, *per-amici*, to strike out further in creating Rule 702 jurisprudence. Dkt. 68, 6. Regional circuit law applies. *Optis Cellular Tech., LLC v. Apple Inc.*, 139 F.4th 1363, 1378 (Fed. Cir. 2025). *Paoli*—the only non-Supreme Court opinion cited in the Notes—remains a seminal opinion on admissibility, consistently followed among circuits.

The Third Circuit continues following *Paoli* and *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999). *See, e.g., Cohen v. Cohen*, 125 F.4th 454, 461-62 (3d Cir.

⁷ The majority correctly recognized DePuy offered ***no evidence*** that Neal’s survey was incorrect. Op.24, 26. In fact, despite amici citing DePuy’s expert’s prior publications for its argument against non-probability surveys, DePuy never put it in the record. Dkt. 84, 12.

2025) (“[A]dmissibility does not hinge on ‘whether a particular scientific opinion has the *best foundation, or even whether the opinion is supported by the best methodology or unassailable research.*’”)(citations omitted). *Paoli* cautions against abuses in discretion from substituting court opinions for the jury’s on competing methodologies:

As *Daubert* indicates, “[t]he focus...must be solely on principles and methodology, not on the conclusions that they generate.” The grounds for the expert’s opinion merely have to be good, they do not have to be perfect. The judge might think that there are good grounds for an expert’s conclusion even if the judge thinks that there are better grounds for some alternative conclusion....

Paoli, 35 F.3d at 744 (quotations omitted).

Post-Amendments, other circuits align with the Third Circuit jurisprudence. *See, e.g., Engilis v. Monsanto Co.*, 151 F.4th 1040, 1047-50 (9th Cir. 2025) (reiterating its “precedent has long recognized the burden-of-proof principles that the amendment sought to clarify”).

The Eighth Circuit held “[a]s the gatekeeper, the district court’s role is to discern expert opinion evidence based on ‘good grounds’ from subjective speculation that masquerades as scientific knowledge.” *Sprafka v. Med. Devices Bus. Sols.*, 139 F.4th 656, 661 (8th Cir. 2025). The First Circuit made clear courts err when reaching their own assessment on “factual underpinning[s]” of the proffered opinion. *Rodrigues v. Hospital San Cristobal, Inc.*, 91 F.4th 59, 71-72 (1st Cir. 2024).

The Sixth and Seventh Circuits made similar pronouncements. *See Davis v. Sig Sauer*, 126 F.4th 1213, 1224-25 (6th Cir. 2025) (“[M]ere weaknesses in the factual basis of an expert witness’ opinion...bear on the weight of evidence rather than on its admissibility....[I]t is up to opposing counsel to inquire into the expert’s factual basis.”); *Gilbert v. Lands’ End, Inc.*, 158 F.4th 839, 849 (7th Cir. 2025) (“district court is tasked under Rule 702 with ‘determin[ing] that the expert used reliable methods,’ but this obligation ‘does not ordinarily extend to the reliability of the conclusions those methods produce...’”)(citations omitted).

B. To Avoid the District Court’s Error on Yassir, Contradictions Must Actually Be Contradictions.

The majority properly assessed whether Yassir conformed to the construction of “handle means” or gave excludable contradiction. Upon finding the testimony not contradictory, and thus reliable under 702, the majority correctly characterized the district court’s findings as improper credibility determinations reserved for the jury.

Claim construction violations are legal determinations based on pre-trial pronouncements of claim scope. *Liquid Dynamics Corp. v. Vaughn Co., Inc.*, 449 F.3d 1209, 1224 n.2 (Fed. Cir. 2006). That does not, as DePuy suggests, make the determinations unreviewable. Pet.12. It is still error to exclude testimony applying the verbatim construction simply because the expert’s explanation of *why* an element is satisfied is disputed.

DePuy mischaracterizes Judge Stark’s comments at oral argument concerning “effective cross” as contradictory construction. Oral Ar. 2:38-4:52. As explained, in context, each so-called contradiction was not; it was explanation for *why* DePuy’s tools had “handle means.” Op.13-18. DePuy could have sought clarification to potentially make the testimony contradictory, but it did not. *Id.*

In its *Markman* order and opinions thereafter, the court held Yassir’s application consistent with the construction and admissible application. *See* Appx15163 (holding at *Markman* “[t]here is no language in either specification that requires the shaft and handle to be ‘separate’ or ‘distinct’ objects”); Appx15638-39 (confirming Yassir’s application proper stating “I concluded that a handle or handle means refers to ‘a part that is designed especially to be grasped by the hand,’ *and left open the possibility that the vertical shafts might be so designed*”). The court adopted and reinforced the construction despite DePuy decrying the inevitable: the construed claims encompassed “anything that is designed to be grasped by hand—*even the end of a shaft.*” Appx16429; Op.16.

Yassir’s testimony explained *why*, as a surgeon and engineer, the end of DePuy’s levers were parts “designed especially to be grasped by the hand.” Appx1239 (131:12-21); Appx1238 (126:2-127:6); Appx1256 (198:14-200:10). That explanation was factual application for the jury to credit or not. *Mirror Worlds Techs., LLC v. Meta Platforms, Inc.*, 122 F.4th 860, 869 (Fed. Cir. 2024).

DePuy and the dissent’s fear that experts will simply say “I am applying the claim construction” is not what comes from the majority’s decision. Pet.18; Dis.6, It is DePuy’s requested outcome that would yield the *ipse dixit*-testimony rightly excluded—the expert simply recites, without explanation, their conclusion: “It is a part designed especially to be grasped by the hand because it is a part designed especially to be grasped by the hand.”

DePuy and the dissent accuse the majority of divesting the court of its gatekeeping role. Dis.2, Pet.11. That is a strawman argument. *Infra*, 6-7. DePuy and the dissent merely disagree with Yassir’s conclusion DePuy’s levers had “handle means,” alleging not enough weight was given to “designed especially.” Dis.3; Pet.10-11. Yet it is the jury’s role to credit or discredit **conclusions**. The majority never “conflat[ed] admissibility with whether evidence is sufficient to sustain a verdict.” Dis.4. It correctly recognized effective cross-examination might make a juror reject Yassir’s conclusion or rationale. (Appx1256 (198:14-200:8)). Op.20-22.

Lower courts have gelled the majority’s decision with other cases making DePuy’s alarmism overblown. In *Trudell Med. Int’l Inc. v. D R Burton Healthcare, LLC*, where contradiction was clear, unreliable testimony was excluded: “the district court construed the term ‘a vane’...to include ‘**one or more** vanes.’ Dr. Collins, however, opined...the patent ‘requires **more than one** vane.’” 127 F.4th

1340, 1350 (Fed. Cir. 2025). After *Trudell* and this case, the district court in *Lexos Media IP, LLC v. Overstock.com, Inc.* recognized “whether an expert’s opinion contradicts the court’s construction—and is, therefore, inadmissible—is squarely within the court’s gatekeeping function.” 2026 WL 656921, at *6 (D. Kan. Mar. 9, 2026). Informed by *Trudell* and this decision, that court recognized it “must determine whether [the expert’s] opinion is materially inconsistent with or genuinely contradicts the Court’s claim construction [] or instead whether the incorrect claim construction amounts to ‘mere tension, arguable inconsistency, or lack of persuasiveness.’” *Id.* Finding contradiction, the testimony was *excluded. Id.* at *8. The floodgates have not opened.

C. DePuy and *Amici* Seek Judicial Determinations of Correctness for Neal, Not Curbing Junk Science.

The majority found, because Neal established good grounds for his method, DePuy’s attacks were for the jury’s consideration. DePuy incorrectly suggests, in light of the Amendments, alleged technical defects courts have long held are methodology disputes going to weight are now necessarily reliability determinations not to be disturbed on appeal. Pet.15-16. This ignores the substantial authority these precise criticisms of Neal’s survey are widely held issues of weight. Dkt. 15, 64.

DePuy recycles misleading quotations of Neal’s testimony. *Compare* Pet.14 with Dkt. 18 at 47. According to DePuy, Neal had no support for

representativeness of his sample other than pure say so. *Id.* That is wrong. Dkt. 21 at 21-22, Op.26-27. While the majority found DePuy’s unsupported, hypothetical criticisms “may well have persuaded a reasonable jury” to discount the survey, it did not evidence the procedures Neal used were unreliable. Op.24.

DePuy incorrectly argues response rate⁸ always bears on representativeness. Pet.14. Neither DePuy nor the district court identified evidence showing Neal’s survey was not representative.⁹ Further, this criticism is inapplicable to the survey Neal conducted—a non-probability survey. Dkt. 15, 49-50, 54-55. U.S. spinal surgeons are not a census-defined population by any metric (age, location, years of practice, medical degree, etc...), a point DePuy conceded. Appx16004 (129:11-131:17). Given the inability to know the total universe, Neal explained an expert establishes representativeness of such population by clearly defining the target universe, recruiting unbiasedly, using neutral questions, and cross-checking the results against available market metrics. Appx1164 (57:15-25); Appx1166-67 (68:6-70:4); Appx1168-69 (73:20-77:19); Appx1171-72 (86:19-89:24);

⁸ Amici argues 4% “falls below” acceptable rates and “may” indicate poor design. Dkt. 84 at 12. This is another hypothetical critique of how a different survey might have been run, not an attack on the reliability of Neal’s method.

⁹ Amici essentially suggests non-probability surveys are unlikely to survive *Daubert*. See Dkt. 84 at 4-11. None of these arguments were of record and are inappropriate bases for suggesting *en banc*.

Appx15870; Appx1313 (86:22-87:19). Neal did this. *Id.* The majority held this “good grounds” for his methodology. Op.26-27.

DePuy argues the survey questions “undermin[ed] the survey’s reliability” and resulted in nonsensical results. Pet.14. Not so. In its late-trial *Daubert* brief, DePuy newly argued question wording was *susceptible* to different interpretations, despite un rebutted testimony “it’s actually relatively easy [for a surgeon] to apportion your cases into” the survey types. Appx1234 (109:21-110:11). The district court found this rendered the survey unreliable. Appx39-43. The majority recognized this for what it was: factually deciding—without evidence—how surgeons would understand the questions, and assuming what, if any, impact that would have on results. Op.24-25. That was the jury’s job.

CONCLUSION

The Court should deny DePuy’s request for *en banc* review.

Dated: May 15, 2026

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certified that this motion complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the portion exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), this motion contains 3,900 words, as counted by the word-processing system used to prepare the motion.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2026, I caused the foregoing Response to Petition for Rehearing *En Banc* to be electronically filed via CM/ECF with the U.S. Court of Appeals for the Federal Circuit, which electronically served the brief on all counsel of record.

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