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 Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondent Scapa Dryer Fabrics, Inc. hereby certifies that it is 100% owned by a non-publicly traded company called Porritts & Spencer, Ltd., which is in turn 100% owned by Scapa Group, PLC, which is a publicly-traded company.

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## BRIEF IN OPPOSITION

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

## INTRODUCTION

This is a 28 U.S.C. § 2106 scope-of-remand case, not, as the Petitioners would have it, a 28 U.S.C. § 2111 "harmless error" case. Under § 2106, appellate courts are afforded broad discretion in deciding how to dispose of an appeal. The court of appeals' disposition of this case was well within its discretion. Oddly, in making their misguided § 2111 argument, the Petitioners make no mention of this Court's most recent decision addressing that statute. *See Shinseki v. Sanders*, 556 U.S. 396 (2009). *Sanders* and § 2106 confirm that the special limited-remand rule that the Petitioners are urging this Court to adopt would not be appropriate. Courts of appeals are afforded considerable leeway in determining both whether error was harmful and how to dispose of a case in light of the character and degree of the lower court's error. The rigid rule proposed by the Petitioners, which would apply in a tiny fraction of cases, cannot be reconciled with that tradition.

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. There is no need for the Petitioners' proposed limited-remand rule.

Contrary to the Petitioners' claim, neither the Ninth Circuit nor the Tenth Circuit has an automatic-reversal rule for *Daubert* gatekeeping errors. Both Circuits have expressly recognized that reversal is unnecessary when the error is harmless. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 465 (9th Cir. 2014) (en banc); *Storage Craft Tech. Corp.*, 744 F.3d 1183, 1990-91 (10th Cir. 2014) (explaining that district court's insufficient gatekeeping findings may not warrant reversal if the error was harmless).

In its recent *Storage Craft* decision, not mentioned in the prior briefing, the Tenth Circuit named two situations where a new trial would be unnecessary: (i) when it is readily apparent from the record that the expert testimony *was* admissible; and (ii) when other competent evidence is sufficiently strong to permit the conclusion that the improper evidence had no effect on the decision. *Id.* at 1191. The en banc court in *Barabin* likewise recognized the necessity of finding harmful error before the mistake is deemed to require reversal. *Barabin*, 740 F.3d at 465. It also implicitly acknowledged that reversal would be unnecessary if the record on appeal demonstrated that the expert testimony was in fact admissible. *Id.* at 467.

In their effort to portray *Barabin* as adopting an automatic-new-trial rule, the Petitioners point to a post-*Barabin* Ninth Circuit decision. *See United States v. Christian*, 749 F.3d 806 (9th Cir. 2014). But they fail to mention important dicta in the opinion. *See id.* at 813 n.3. The court in *Christian* was careful to "emphasize that neither *Barabin* nor this decision requires a new trial *whenever* a district court errs in analyzing the admissibility of expert testimony." *Id.* The court observed that "under different circumstances . . . a limited remand remains available." *Id*. For example, the court stated, a limited remand on the question of prejudice might be proper under some circumstances. *Id.*

Thus, it is incorrect to suggest that the Ninth Circuit is construing *Barabin* as imposing an automatic-new-trial rule.

Relying on a chimerical circuit split, the Petitioners urge that a special limited-remand rule is needed. This rigid rule would come into play in the rare situation where a district court fails to perform its *Daubert* gatekeeping duty, and the court of appeals cannot deem the error harmless. Thus, the rule would apply in such a case only where both (i) it is *not* readily apparent from the appellate record that the expert testimony was either admissible or inadmissible, and (ii) other competent evidence is *not* sufficiently strong to permit the conclusion that the improper evidence had no effect on the decision. In that infrequent situation, the Petitioners' special rule would *require* the court of appeals to remand to the

district court not for a new trial, but for the limited purpose of performing the *Daubert* analysis that it neglected to perform in the first instance.[1]

Notably, if the court of appeals had ordered such a limited remand in this case, the district court's decision could have gone either way. That is, the court could have determined that the expert testimony in question was inadmissible, which, of course, would require judgment for the Respondents. That said, the limited remand the Petitioners are requesting appears to be impossible. The court of appeals found the record too sparse for a court to make the admissibility determination. As such, the Petitioners must be advocating a highly-unusual remand proceeding, one in which the district court would conduct an entirely new *Daubert* gatekeeping hearing with new evidence and arguments submitted by the parties.

### 2. A limited-remand requirement would frustrate Congress's intent in 28 U.S.C. § 2106.

The Petitioners' proposed limited-remand rule would run afoul of Congress's expressed intent in 28

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[1] After *Barabin*, district courts in the Ninth Circuit are even less likely to abdicate their gatekeeping duties. *See, e.g., United States v. Pritchard*, 2014 WL 341091 at *3 (C.D. Cal. January 30, 2014) ("Before allowing the jury to hear expert testimony, a district court must carry out its gatekeeping role to determine that the expert testimony is admissible under Federal Rule of Civil Procedure 702.") (citing *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464-65 (9th Cir. 2014)).

U.S.C. § 2106. When a district court fails to comply with its *Daubert* gatekeeping duty, it commits error. What to *do* about that error is a matter that is committed to the appellate court's sound discretion under § 2106. *See United States v. Edwards*, 728 F.3d 1286, 1296-97 (11th Cir. 2013) (observing that under § 2106, courts of appeals have broad discretion to grant relief as may be just under the circumstances). The appellate court's exercise of that discretion, and its choice of remedies, is informed by the character and degree of harm resulting from the district court's error.

Under § 2106, it is left to the circuit courts to determine, after concluding that error has been committed, what further proceedings are "just under the circumstances." 28 U.S.C. § 2106. The Fifth Circuit, citing § 2106, has explained that "[o]nce jurisdiction attaches, Courts of Appeals have broad authority to dispose of district court judgments as they see fit." *GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 682, n.3 (5th Cir. 2012); *see also U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1145 (10th Cir. 2009); *Smith v. Washington Sheraton Corp.*, 135 F.3d 779, 783 (D.C. Cir. 1998). This includes the authority to, among other things, grant a new trial in the interest of justice. *Samuels v. Health & Hosp. Corp. of N.Y.*, 591 F.2d 195, 199 (2d Cir. 1979).

The First Circuit explained the difference between the § 2111 issue (whether there is harmful error) and the § 2106 issue (the remedy for lower

court error) in a case where the district court excluded an expert's testimony under *Daubert*. *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77 (1st Cir. 1998). The court observed that "when a trial court erroneously excludes evidence, and the exclusion meets the standard criteria of harmfulness, the harm is not cured by a mere possibility that other appropriate grounds for exclusion of the same evidence may later be found to exist." *Id*. at 88. Next, the court commented: "The question [of harm] is one of degree and the choice of remedies (including whether to remand for a new trial or merely remand for further findings) is ours." *Id*. (citing 28 U.S.C. § 2106).

The First Circuit's observations apply equally here, where the district court's *admission* of evidence ran afoul of *Daubert*. When a district court erroneously admits evidence, the harm is not cured by a mere possibility that appropriate grounds for admitting the evidence may later be found to exist. That said, the character and degree of harm informs the court's choice of remedies. And in this case, just as in *Ruiz-Troche,* the decision whether to remand for a new trial or merely remand for further findings was the court of appeals' choice to make under § 2106.

The courts of appeals do not, and should not be required to adhere to a rigid limited-remand rule when the district court has erred in making or failing to make a threshold admissibility determination. In some cases involving that type of error, a circuit court will, in the exercise of its broad discretion, conclude that although the district court's error was

not harmless, a limited remand is appropriate. *See, e.g., United States v. Johnson*, 388 F.3d 96, 102-03 (3d Cir. 2004); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In other cases, the court may properly exercise its discretion under § 2106 by concluding that a remand for a new trial is the appropriate remedy. *See United States v. Sriyuth*, 98 F.3d 739, 744 n.8 (3d Cir. 1996) (district court's failure to make proper threshold admissibility determination "may require remand to the court for such proceedings or even for a new trial."); *see also United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000).

The district court in *Smithers* erred by excluding expert testimony without first conducting a *Daubert* analysis. *Id*. at 315. The Sixth Circuit held it was not harmless error because "the complexion of the proceedings would likely have changed had the district court conducted a *Daubert* hearing and determined that Dr. Fulero's testimony was admissible." *Id*. at 317. Rather than ordering a limited remand for the district court to conduct the omitted *Daubert* analysis, the court reversed for a new trial. *Id*. at 318 & n.6. Again, "the choice of remedies (including whether to remand for a new trial or merely remand for further findings) is" left to the discretion of the court of appeals under § 2106. *Ruiz-Troche*, 161 F.3d at 88.

Similarly, the Seventh Circuit remanded for a new trial when the district court failed to conduct a proper *Daubert* analysis in *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996). The defendant sought to present expert testimony on false confessions and his

susceptibility to coercion. *Id*. at 1341. The district court excluded the testimony without any indication that it applied the *Daubert* framework. *Id*. at 1342. The court of appeals did not decide that the excluded testimony was admissible under *Daubert*. And it could have ordered a limited remand for the district court to make that determination. But instead, the court concluded that a new trial was necessary because "[t]he district court's failure to test the [proffered expert testimony] under [the *Daubert*] framework may have led to the exclusion of critical testimony for Hall." *Id*. at 1346.

Likewise, in a case reminiscent of *United States v. Downing*, the Fifth Circuit exercised its discretion under § 2106 in a case where the district court failed to decide a threshold question of admissibility. *See United States v. Lang*, 8 F.3d 268, 271 (5th Cir. 1993). The court could have ordered a limited remand for the district court to decide the admissibility issue, as in *Downing*, but instead the court ordered a new trial. On the other hand, in a different case the Fifth Circuit decided that a limited remand *was* appropriate so that the district court could determine the admissibility issue in light of a new federal agency report issued after the district court made its initial admissibility determination. *LeBlanc v. Chevron USA, Inc.*, 275 Fed. Appx. 319, 321 (5th Cir. 2008).

Finally, the District of Columbia Circuit considered whether to issue a limited remand for a hearing on the admissibility of evidence excluded at trial and, exercising its discretion under § 2106, decided against

it. *Coleman v. United States*, 397 F.2d 621 (D.C. Cir. 1966). The court held that "a remand for hearing on the issue of admissibility alone is inappropriate" because "the trial judge's reasons for refusing to resolve the admissibility issue were highly prejudicial." *Id*. at 621.

In short, under § 2106, it is up to the circuit courts to decide, on a case-by-case basis, and in the exercise of broad discretion, the proper disposition of a case on appeal. *See Kosty v. Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963) ("28 U.S.C. § 2106 grants this Court broad discretion in the disposition of a case on appeal."); *see also Morgan Guaranty Trust Co. of N.Y. v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972) (same).

Thus far, the Ninth Circuit has concluded that a limited remand is not appropriate for errors involving threshold admissibility rulings. "When the district court has erroneously admitted or excluded prejudicial evidence, we remand for a new trial. We do so even if the district court erred by failing to answer a threshold question of admissibility. We have no precedent for treating the erroneous admission of expert testimony any differently." *Barabin*, 740 F.3d at 466. Other circuits vary in their approaches, sometimes ordering a limited remand, sometimes remanding for a new trial. The outcome depends on case-specific factors. Imposing a rigid limited-remand rule would thwart the discretion that § 2106 affords to courts of appeals in deciding how to dispose of a case.

### 3. Adopting a rigid limited-remand rule would frustrate Congress's intent in 28 U.S.C. § 2111.

The Petitioners' proposed special rule – that a limited remand is required to complete the harmful-error analysis – would also frustrate the purpose of the very statute they rely on. In 28 U.S.C. § 2111, Congress has expressed its preference for determining harm by "case-specific application of judgment, based upon examination of the record." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009); *see also Kotteakos v. United States*, 328 U.S. 750, 761 (1946) (observing that proper application of the harmless error rule requires "judgment transcending confinement by formula or precise rule.").

The harmful-error analysis is intended to be flexible and without "rigid rules." *Sanders*, 556 U.S. at 407. "The factors that inform a reviewing court's 'harmless-error' determination are various. . . ." *Id*. at 411. Case-specific factors include an "estimation of the likelihood that the result would have been different" and a "consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings. . . ." *Id*. at 411-12. Appellate courts must not generalize too broadly about particular kinds of errors and bear in mind that "the specific factual circumstances in which the error arises may well make all the difference." *Id.* at 412.

Under this flexible analysis, appellate courts may properly find harmful error in the situation presented here, and they may do so without a limited remand to

the district court so that it may determine admissibility. After all, establishing harmful error is not "a particularly onerous requirement." *Id*. at 410. And allowing a verdict to be based on expert testimony that has not first been vetted under *Daubert* plainly implicates the appellant's substantial rights. *Cf. United States v. Downing*, 753 F.2d 1224, 1226, 1243 (3d Cir. 1985) (refusing to hold that district court's error in failing to make threshold admissibility determination was harmless error).

An error is prejudicial when there is a reasonable probability that the error affected the outcome of the trial. *United States v. Marcus*, 560 U.S. 258, 262 (2010). In cases like this one, where the testimony is critical to the plaintiff's case, the error plainly affects the outcome of the proceeding. *Cf. Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 814 (7th Cir. 2012) (holding that district court's failure to perform *Daubert* gatekeeping analysis was harmful error because the expert testimony played a substantial role in the district court's class certification ruling).

In all cases, the district court's failure to abide by its *Daubert* gatekeeping duty affects "the perceived fairness, integrity, or public reputation of judicial proceedings." *Sanders,* 556 U.S. at 411-12. That alone may not be sufficient to require reversal, but under the elastic harmful-error analysis, it is a factor to be considered. As this Court has said, "Often, the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful. . . ." *Id*. at 410. Ultimately, it is up to the courts of appeals

to make the harmful-error decision on a case-by-case basis. *See id*. at 407-08.

For example, the Sixth Circuit held that a district court's error in excluding expert testimony without first conducting a *Daubert* analysis was not harmless because "the complexion of the proceedings would likely have changed had the district court conducted a *Daubert* hearing. . . ." *United States v. Smithers*, 212 F.3d 306, 317 (6th Cir. 2000). The Seventh Circuit held that when the district court excluded evidence without conducting a full *Daubert* analysis, the error was harmful because it "may have led to the exclusion of critical testimony" for the defendant. *United States v. Hall*, 93 F.3d 1337, 1346 (7th Cir. 1996). And the First Circuit held that a district court's error in failing to conduct a *Daubert* analysis was harmful error because the court could discern no basis in the record other than the expert's testimony for the jury's damages award. *Smith v. Jenkins*, 732 F.3d 51, 65, 68-69 (1st Cir. 2013).

Courts also routinely find this sort of error to be harmless. The Tenth Circuit held that a district court's error in failing to make *Daubert* findings before admitting expert testimony was harmless where the jury could properly have found the defendant guilty even without the expert's testimony. *United States v. Roach*, 582 F.3d 1192, 1208 (10th Cir. 2009). The Sixth Circuit held that the district court's failure to conduct a formal *Daubert* hearing was harmless error because the expert's testimony was cumulative and there was overwhelming and diverse evidence

supporting the appellants' convictions. *United States v. Smith*, 27 Fed. Appx. 577, 582 (6th Cir. 2001).

Likewise, on several occasions the Ninth Circuit has held that a district court's *Daubert* gatekeeping error was harmless. In one case, for example, the district court admitted expert testimony without making a specific reliability finding. The Ninth Circuit held that this was harmless error in light of the expert's extensive academic qualifications and experience and the relevance and value of her testimony. *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2006); *see also United States v. Blaine County, Montana*, 363 F.3d 897, 915 (9th Cir. 2004) (holding that district court's failure to determine reliability of expert testimony was harmless error); *United States v. Williams*, 29 Fed. Appx. 486, 487 (9th Cir. 2002) (holding that district court's failure to perform *Daubert* gatekeeping duty was harmless error).

In short, the courts of appeals are doing precisely what this Court said they should be doing in *Shinseki v. Sanders*: deciding the harmless error issue on a case-by-case basis by considering case-specific factors and by not generalizing too broadly about particular kinds of errors. In recognizing that the granting of a new trial is the usual approach to remand in connection with the type of error at issue here, particularly where the record is insufficient to judge admissibility after the fact, the Ninth Circuit's flexibility in applying the rule is not in any manner out of step with other circuits. The inflexible limited-remand rule advocated by the Petitioners is simply not necessary

and certainly not appropriate in light of the views expressed by this Court in *Sanders* and, for that matter, *Kotteakos*.

**4. There is no conflict among the circuits.**

By now it should be apparent that there is no true circuit conflict. Both the Tenth Circuit and the Ninth Circuit agree that a *Daubert* gatekeeping error can be deemed harmless error in certain circumstances. The Petitioners do not point to a single case in which a circuit court has announced a rule *requiring* a limited remand when the district court fails to determine a threshold question of admissibility. *United States v. Downing*, which the Petitioners rely on heavily, did not hold that under these circumstances, harmful error cannot be found, and a remand for a new trial is not proper. On the contrary, the court held that admitting the testimony could *not* be deemed harmless error. 753 F.2d at 1226, 1243. And when the court remanded for a hearing on admissibility, it did so in the exercise of its discretion under § 2106, not because § 2111 *required* it to do so. In other words, it simply struck the court as the sensible thing to do in that particular case.

**5. A limited-remand rule would not serve judicial economy.**

Finally, the Petitioners' contention that the limited-remand rule they advocate would serve judicial economy is also incorrect. In fact, it would likely result in

three appeals in a single case. If a court of appeals were to order a limited remand for a *Daubert* gatekeeping analysis in a case like this one, the district court could conclude that the evidence was admissible. In that event, the losing party may again appeal from the district court's judgment, challenging the admissibility finding. *Cf. United States v. Holloway*, 740 F.2d 1373 (6th Cir. 1984), *cert. denied*, 469 U.S. 1021 (1984) (entertaining second appeal after case had been remanded to district court to make threshold admissibility determination regarding conspiracy evidence). If the court of appeals concludes the district court erred in finding admissibility, the court of appeals could then remand for a new trial, the results of which would be appealable. This creates the potential for three appeals. Whereas, had the court of appeals instead remanded for a new trial in the initial appeal, rather than ordering a limited remand, there would likely be only one additional appeal, from the judgment rendered after the second trial.

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## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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