No. 23-1972

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PENINSULA PATHOLOGY ASSOCIATES,

Petitioner-Appellee,

v.

AMERICAN INTERNATIONAL INDUSTRIES,

Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia, No. 4:22-mc-00001-AWA-DEM
Hon. Arenda L. Wright Allen, U.S. District Court Judge

BRIEF OF *AMICUS CURIAE* THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLANT AMERICAN INTERNATIONAL INDUSTRIES

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Dated: December 20, 2023

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1972 Caption: Peninsula Pathology Associates v. American International Industries

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Tort Reform Association
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Cary Silverman Date: December 20, 2023

Counsel for: American Tort Reform Association

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CONSENT STATEMENT PURSUANT TO RULE 29

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby states that all parties have indicated that they consent to the filing of this brief.

/s/ Cary Silverman

Cary Silverman
Counsel for Amicus Curiae
American Tort Reform Association

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. Among its efforts, ATRA has striven to ensure that all aspects of an expert's opinion is tested for reliability before admission in court through application of Rule 702, which requires district court judges to act as gatekeepers, carefully evaluating whether their testimony is based on sound scientific principles or is simply bought-and-paid for "junk science." For over three decades, ATRA has filed *amicus* briefs in appellate cases that have addressed important issues regarding the admissibility of expert testimony and civil liability issues. ATRA is concerned that the district court's order quashing the Appellant's subpoena in this case will effectively allow a made-for-litigation study to escape needed scrutiny and go unchallenged in court.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored the brief in whole or in part; (ii) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, blaming a plaintiff's development of mesothelioma on traces of asbestos in cosmetic talc products, relies on a published study indicating that 75 anonymous individuals in other cases developed mesothelioma and their only potential exposure to asbestos came from cosmetic talc. The Appellant, American International Industries' (AII), seeks to evaluate whether that assertion is, indeed, true and, if not, to challenge expert testimony relying upon it as unreliable and inadmissible.

AII subpoenaed Peninsula Pathology Associates (PPA) for the names of the article's subjects, which it suspects were exposed to asbestos from other sources. The district court, however, granted PPA's motion to quash that subpoena, purportedly to protect the confidentiality of the study's subjects. It did so despite the lack of any doctor-patient relationship or identification of any applicable medical ethics rule limiting disclosure, and despite the study's subjects disclosing their health conditions through their own public case filings.

This order ties a defendant's hands to investigate the accuracy of a study that is critical to plaintiffs' experts' testimony on causation in a

complex product liability case and allows a party to sidestep the judicial gatekeeper. This Court should reverse the district court's order and provide AII with access to this information.

ARGUMENT

I. COURTS MUST SEPARATE SOUND SCIENCE FROM MADE-FOR-LITIGATION RESULTS

"Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993). The ability to test scientific claims is particularly critical when made-for-litigation science is at issue, which can skew the incentives away from a neutral search for the truth.

As this Court has recognized, Federal Rule of Evidence 702 appoints trial judges as "gatekeepers of expert testimony" to protect the judicial process from "the potential pitfalls of junk science." *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 275 (4th Cir. 2021). Abdicating that role risks "exposing jurors to dubious scientific testimony that can ultimately sway their verdict," a risk that is amplified in product liability

cases in which expert witnesses are critical to establishing liability. *Id.* (internal quotations and alterations omitted).

The scientific endeavor does not function if "scientists" conceal, manipulate, or make up their data. Under National Institute of Health regulations, for example, "falsification" and "fabrication" of data constitutes "research misconduct," including "changing or omitting data or results such that the research is not accurately represented in the research." 42 C.F.R. § 93.103(b).

For example, a federal court diligently exercised its gatekeeping role to dismiss thousands of scientifically-unsupported claims in multidistrict litigation alleging that a common heartburn medication's active ingredient causes cancer. *See In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp.3d 1075 (S.D. Fla. 2022). In that instance, the lawsuits were filed simultaneously with a private laboratory's announcement that its testing revealed dangerously high levels of the harmful ingredient in the drug and the complaints heavily relied on those findings. *See id.* at 1093. It was later revealed that the laboratory that conducted these experiments had, in fact, created the cancer-causing substance by heating the substance to 266 degrees Fahrenheit and

adding a level of sodium nitrite far in excess of the range found in the human body. *See id.* at 1092-93. The laboratory, unsurprisingly, was reportedly linked to plaintiffs' law firms. *See* Editorial, *A Legal Shakedown Exposed*, Wall St. J., Feb. 16, 2023. Ultimately, the court excluded plaintiffs' general causation experts under Rule 702 because "there is no scientist outside this litigation who concluded ranitidine causes cancer, and the Plaintiffs' scientists within this litigation systemically utilized unreliable methodologies with a lack of documentation on how experiments were conducted, a lack of substantiation for analytical leaps, a lack of statistically significant data, and a lack of internally consistent, objective, science-based standards for the evenhanded evaluation of data." 644 F. Supp.3d at 1094.

Unfortunately, as that case indicates, made-for-litigation science is not uncommon. This case appears to present another example. Prior to publishing her article, "Mesothelioma Associated with the Use of Cosmetic Talc" ("Moline Article"), courts routinely precluded Dr. Jacqueline Moline from telling juries about her litigation case

review.[2] The Moline Article served not just as a way to attempt to fill the gap in cosmetic talc end user mesothelioma epidemiology, but also as a litigation tactic to circumvent court rulings. The article published by Drs. Theresa S. Emory, John C. Maddox, and Richard L. Kradin that followed, "Malignant Mesothelioma Following Repeated Exposures to Cosmetic Talc: A Case Series of 75 Patients," 63 Am. J. Ind. Med. 484 (2020) ("Emory Article") simply copied Dr. Moline's approach. By publishing their litigation opinions in a scientific journal and claiming "confidentiality"—the Emory Article's authors attempt to evade federal courts' "indispensable" gatekeeping role under Rule 702 to evaluate the study's reliability. *Sardis*, 10 F.4th at 285. The Court should not permit this by insulating the study's data from scrutiny.

[2] *See* JA932-933 (citing *Fong v. Johnson & Johnson*, No. BC675449 (Cal. Super. Ct., Los Angeles County); *Hayes v. Colgate-Palmolive Co.*, No. 16-CI-003503 (Ky. Cir. Ct., Jefferson County); *Olson v. Brenntag N. Am., Inc.,* No. 190328/2017 (Sup. Ct. N.Y., N.Y. County); *Pipes v. Johnson & Johnson,* No. CJ-2017-3487 (Okla. Dist. Ct., Okla. County); *Lanzo v. Cyprus Amax Minerals Co.*, No. MID-7385-16 AS (N.J. Super. Ct., Middlesex County); *Weirick v. Brenntag N. Am., Inc.*, No. BC656425 (Cal. Super. Ct., Los Angeles County)).

II. FOR COURTS TO DILIGENTLY EXERCISE THEIR GATEKEEPING RESPONSIBILITY, PARTIES NEED THE ABILITY, THROUGH DISCOVERY, TO PROBE THE BASIS OF A PROPOSED EXPERT'S TESTIMONY

For courts to diligently exercise their gatekeeping responsibility, parties need the ability, through discovery, to probe the basis of a proposed expert's testimony and present significant flaws or misrepresentations revealed through a Rule 702 motion. The law recognizes only very limited types of information that—because of a privacy or other interests—may be shielded from discovery as privileged. Attorney-client privilege is, of course, a familiar example. But in cases where the claims are based on state law, state legislatures decide how to weigh when an interest in privacy is so paramount as to outweigh the general need to discover relevant facts for a lawsuit. *See* Fed. R. Evid. 501 ("[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.").

In a variety of contexts, disclosing information *just to a third party* waives a privilege or privacy interest. For example, under New York law, "a client waives the [attorney-client] privilege if a communication is made in confidence but subsequently revealed to a third party." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). The

same is true of other privileges as well, such as doctor-patient privilege, marital privilege, and clergy-penitent privilege. *See Carrion v. City of New York*, No. 01CIV.02255, 2002 WL 523398, at *2 (S.D.N.Y. Apr. 8, 2002) (doctor-patient); *In re Candor Diamond Corp.*, 42 B.R. 916, 921 (Bankr. S.D.N.Y. 1984) (spousal); *People v. Harris*, 934 N.Y.S.2d 639, 647 (Sup. Ct. 2011) (clergy).

The same fundamental and obvious concept that confidentiality is waived when information is disclosed holds true in even very different contexts. In Fourth Amendment cases, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" with only limited exceptions. *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). "That remains true even if the information is revealed on the assumption that it will be used only for a limited purpose." *Id.* (internal quotation marks omitted). "As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Id.*

Here, the court below never concluded any privilege applied, nor any other law prohibiting disclosure. AII is correct that no confidentiality concerns exist given that every individual in the Emory Article made

public the fact that they developed mesothelioma. *See Bell v. Am. Int'l Indus.*, 627 F. Supp. 3d 520, 537 (M.D.N.C. 2022) ("Here, that study participant chose to publicly expose the fact of her mesothelioma by filing a complaint."). The individuals in the Emory Article did not just disclose the fact of their mesothelioma to a third party, they filed complaints disclosing their mesothelioma, and, in some instances, may have participated in public trials discussing the issue. As the *Bell* Court recognized, any "interest in confidentiality belongs primarily to the study participant, not the researcher or sponsoring facility." *Id.* at 537. As a result, here, no one can have any confidentiality interest whatsoever.

The potential impact of tying a defendant's hands to probe the basis of an expert's opinion and challenge it in court cannot be overstated. For example, a state appellate court recently reversed a $223.8 million verdict, in a similar case attributing asbestos in talc for a plaintiff's mesothelioma. That verdict occurred after a trial court failed to perform its gatekeeping role in evaluating the methodology and underlying data Dr. Moline used to form her opinion, among other errors in admitting expert testimony. *See Barden v. Brenntag N. Am., Inc.*, No. A-0047-20, 2023 WL 6430088, at *9 (N.J. Super. App. Div., Oct. 3, 2023).

Courts cannot close the gates to junk science if expert witnesses are allowed to place blindfolds on judges by concealing data to sneak past the gatekeeper. The core of both science and litigation is transparency. This discovery request does not involve some speculative fishing expedition. AII's brief presents strong reasons supporting its belief that the Emory Article is based on falsely presented data. This Court should permit AII to obtain the identities of the Emory Article's subjects so that AII can defend itself, the trial court can fully examine the reliability of the proposed expert testimony, and, if that evidence is admitted, a jury can weigh the strengths and weaknesses of the claims after considering *all* the facts.

CONCLUSION

The Court should reverse the district court's August 14, 2023 order granting PPA's motion to quash and require production of the sought information.

Respectfully submitted,

/s/Cary Silverman

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Dated: December 20, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7), because it contains 1,885 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Cary Silverman
Cary Silverman

Date: December 20, 2023