NO. 21-1187

In the Supreme Court of the United States

SUMOTEXT CORPORATION,
Petitioner,

v.

ZOOVE, INC., VIRTUAL HOLD TECHNOLOGY, LLC, STARSTEVE, LLC, VHT STARSTAR LLC, AND MBLOX, INC.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents do not attempt to harmonize a single case from the petition highlighting either split. Instead, respondents just say the "Ninth Circuit does not apply an 'unduly lax standard' for identifying economic substitutes in antitrust market analyses, nor for the admission of expert testimony" (BIO.1). But Ninth Circuit's decision below indisputably shows otherwise.

1. Whether characterized as primary or rebuttal testimony, Dr. Aron asked the jury to accept her competing economic theory of a broader relevant product market—even though her expert opinion was unsupported by economic evidence, analysis, or testing. There is no exception to Rule 702 for such inexpert testimony regardless if it is labeled "rebuttal expert" testimony (BIO.14). All proponents of all expert witnesses are required to prove their expert's opinion has satisfied *all four* explicit criteria set forth in Rule 702 by a preponderance of the evidence. Fed. R. Evid. 702.

Before trial, Dr. Aron testified that she had no opinion on the scope or boundaries of the relevant markets in this case. *See* App.63 (District Court: "At her deposition, Dr. Aron testified expressly that she was not asked to perform an independent market analysis or to define the relevant markets in this case, and that she did not engage in either task . . . or opine as to which products constitute adequate substitutes for StarStar numbers"). But during trial, Dr. Aron said that Dr. Sullivan's relevant market definitions were all wrong—that other economic substitutes for StarStar numbers existed. *See e.g.,* App.35 (District Court: "Dr. Aron identified many products that

appear to perform a similar function, and meet a similar need, to StarStar numbers"); *Id*. ("she expressed her view that 'it's not plausible that none of these calls to action compete with StarStar numbers'").

But what economic methodology did Dr. Aron base her opinion on? Because her testimony was not the product of any analysis or testing, under Rule 702 as it is applied in other circuits, Dr. Aron's testimony was inadmissible. This Court should grant certiorari to review this impermissibly lax and divergent admissibility standard.

2. Respondents say this case is really about "an antitrust plaintiff's burden of proof" and that "Sumotext failed to meet its factual burden to prove the existence of two narrowly-defined relevant antitrust markets". BIO.1. But that was not the grounds for the Ninth Circuit's decision. The Ninth Circuit did not say that the jury's verdict was supported by a *lack* of economic evidence—or even that Dr. Aron's testimony provided the substantial evidence the court was looking for in the record. The Ninth Circuit said: "Testimony from industry executives provided substantial evidence showing that the relevant markets were broader than Sumotext proposed". App.8.

Under the evidentiary standards applied in other circuits and in this Court, the speculative and conclusory economic theories of lay witnesses are not substantial evidence. *See Biestek v. Berryhill,* 139 S. Ct. 1148, 1159 (2019) (GORSUCH, N. dissenting) (citing Supreme Court authority) ("If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either"). And that is especially

so in this case, considering that each of these same "industry executives"—*i.e.,* the defendants' own C-Suite—admitted on cross-examination that each one of the purported economic substitutes were actually "complimentary to" and "did not replace" StarStar numbers; that customers used them all concurrently; and that no customer had ever been known to abandon one for the other.

Moreover, the evidentiary record also shows the actual behavior of the customers at issue after the respondents seized control of the National Mobile Dial Code Registry, eliminated their rivals, and dramatically raised prices—*i.e.,* they did not "switch" to any substitutes. Rather, the customers paid the respondents' supracompetitive prices. Both the applicable jury instruction (App.179-182) and controlling economic principles and legal authority are clear that such data is issue-dispositive. That the Ninth Circuit allowed speculation and intuition to overcome empirical economic evidence highlights an important, and often case-dispositive evidentiary standard that warrants review by this Court.

ARGUMENT

I. This Case Embodies The Ninth Circuits' Unduly Lax Admissibility Standard

A. The Ninth Circuits' Divergent Standard Warrants Review

Guided by its policy preference for admitting expert testimony, Ninth Circuit caselaw instructs its courts to take a more permissive approach to

gatekeeping than other circuits—with its precedent placing a "great emphasis" on the idea that such analysis "should be applied with a liberal thrust favoring admission".[1] As a result, gatekeepers in the Ninth Circuit have become notorious for their reliance on custom admissibility criteria derived from caselaw as opposed to the explicit criteria set forth in Rule 702.[2] "The end result in such cases is to relegate to the jury the very decisions Rule 702 contemplates to be beyond jury consideration." *See* Hon. Thomas D. Schroeder (head of the Fed R. Evid. 702 Rules Committee), *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2043 (2020). But Rule 702, and not any other source of law, provides the relevant test that courts must use to assess whether an expert's testimony is admissible. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (identifying Rule 702 as establishing the criteria under which "an expert may testify").

The decision below is emblematic of how courts err when they develop their own admissibility standards by analyzing prior decisions, rather than Rule 702. And in this case, that permitted an unqualified

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[1] Lawyers for Civil Justice Amicus Br. 11 (re: *Monsanto Co. v. Edwin Hardeman*, Petition No. 21-241). *See also Id.* at 10-14. (analyzing the origin and frequency of this "re-cast" standard since it was first declared in *Messick v. Novartis Pharms. Corp.,* 747 F.3d 1193, 1196 (9th Cir. 2014)).

[2] *Id. See generally e.g.,* Lawyers for Civil Justice Br. 3-14; Washington Legal Foundation Br. 7-15; Atlantic Legal Foundation Br. 3-15.

witness to provide a false imprimatur of expertise and testify to very economic issue she admitted she did not analyze before trial.

B. The Ninth Circuit Invoked Five Of Its Divergent Criteria Below

Respondents have already admitted to the substantive legal standards underlying the issue:

- "The relevant market consists of the goods or services in dispute and their economic substitutes." Appellees' Joint Answer Brief, Docket No. 44 at 16.
- "[C]ross-elasticity of demand" is "the principle most fundamental to product market definition". Defendants' MIL #4, ECF 387 at 6.
- "To opine on an antitrust product market, [the expert] must determine the cross-elasticity of demand for the products or services in question". *Id*. at 3.
- The district court "acts as a 'gatekeeper' for experts and should exclude testimony that is untested". *Id*. at 2.

Sumotext's *Daubert* motion highlighted the economic theories that Dr. Aron intended to opine at trial. *See e.g.,* ECF 347-3 (Filed 9/13/19); *Id*. at 5 ("numerous products are substitutes for StarStar numbers, including "10-digit phone numbers, mobile short codes, text messages, Quick Response ('QR') codes, and search engine optimization ('SEO')"); *Id.* at 6 ("StarStar numbers are part of a larger market for call to action technologies"); *Id*. ("there is no cognizable product market limited to StarStar numbers").

Sumotext's *Daubert* motion then highlighted Dr. Aron's express admission that she did not submit any of these broader relevant market theories to economic scrutiny before trial:

> **Q**. Okay. But my question was simpler. I'm just reaffirming that while you make these observations [regarding substitutes], you're not proffering an affirmative opinion on the scope of the market here, correct?
>
> **A**. Correct. That wasn't my burden. I didn't perform the analysis required.

ECF 347-3 at 7 (quoting from Ex.3).

But on appeal, the Ninth Circuit affirmed the denial of Sumotext's *Daubert* motion—citing five of its caselaw-derived criteria as bases to excuse Dr. Aron's failure to test her theories on product substitutability:

- "Rule 702 inquiry is flexible and should be applied with a liberal thrust favoring admission". App.4
- Showing "relevancy" is a "low bar" App.6.
- "Expert testimony is relevant if 'it logically advances a material aspect of the proposing party's case'". App.5.
- An expert's testimony is deemed "sufficiently reliable" by the "knowledge and experience of [his/her] discipline". App.5
- Challenges to "market definitions, as well as [] methodology" are part of the "battle of expert witnesses" that is "properly reposed in the jury." App. 9.

Left unanswered—both in the Ninth Circuit's analysis and in the opposition brief—is the actual question posed by Rule 702: Were Dr. Aron's opinions "based on sufficient facts or data"? Were they the "product of reliable principles and methods"? And were those principles and methods "reliably applied the to the facts of the case"?

C. Respondents Improperly Conflate The Parties' Respective Burdens Of Proof

Citing the challenged rulings in lieu of controlling legal authority, respondents say that Sumotext "misplaces the burden of proof" (BIO.14) and that "Dr. Aron was entitled to highlight Sumotext's failure to carry its burden without offering an affirmative market definition of her own" (BIO.2). This argument impermissibly conflates Sumotext's prima facie burden under the Sherman Act (to prove harm to competition in a legally cognizable relevant product market) with respondents' prima facie burden under Rule 702 (to prove that its expert's opinion were relevant and reliable). The respective burdens of proof are independent of the other. Instead of answering the question presented, respondents ask the Court to answer a completely different question. *See* BIO.1:

Question Presented	**Respondents' Version**
Whether the Ninth Circuit applies an unduly lax standard for showing whether an expert's testimony is relevant and reliable, in conflict with the standard set forth in Federal Rule of Evidence 702 and as applied in other Circuits and in this Court.	Whether the Ninth Circuit correctly held that a qualified expert is permitted to attack the methodology of a competing expert.

But respondents' question glaringly presupposes the challenged testimony has already passed the very gatekeeping inquiry that Rule 702 militates. There can be no "battle of expert witnesses" (App.9) if one of the proposed witnesses failed to meet the standards set forth in Rule 702. It is not left to a jury to decide whether a proposed expert has applied a reliable methodology; that is for the court at the admissibility stage. It is only *after* a proposed witness has been validated as an expert that the jury gets to choose between competing opinions supported by competing methodological tests that have each passed the 702 threshold. Otherwise, the jury is left with precisely the danger of being misled and confused that the *Daubert* line of cases squarely rejects.

Expert witnesses—especially expert economists in antitrust cases—are supposed to do the work that others are not qualified to do; to bring something to the

table beyond *ipse dixit,* or a bald assertion of authority. When considering Dr. Aron's express admission ("I didn't perform the analysis required"), it's hard to imagine that her testimony on the scope of the relevant markets in this case would pass muster in any other circuit. *Cf. Electra v. 59 Murray Enterp., Inc.*, 987 F.3d 233, 254 (2d Cir. 2021) ("To decide 'whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.'") (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)).

In summary, while the respondents assure the Court, in conclusory fashion, that "the Ninth Circuit analyzes the admissibility of expert testimony under the proper *Daubert* standards to ensure both reliability and relevancy" (BIO.13), the panel's decision below both contravenes Rule 702's explicit text *and* its application in other circuits—where simply invoking Rule 702 "is not some incantation that opens the *Daubert* gate." *See Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010).

II. This Case Embodies The Ninth Circuits' Unduly Lax Standard For Identifying Economic Substitutes

Respondents incorrectly offer two reasons why "even if the Ninth Circuit erred in agreeing that Dr. Aron's testimony was admissible, it rightly concluded that any such error would be harmless". BIO.14 (citing App.5).

A. Economic Evidence Established Both Product Markets Below

First, respondents say the erroneous admissibility ruling was "harmless" because Dr. Sullivan "did not apply any accepted or standard or recognizable methodology in defining the alleged relevant markets" (BIO.8). This assertion is both legally flawed and flatly contradicted by the evidentiary record.

Economists hired to earnestly search for the proper product market in an antitrust dispute can apply a variety of proven methodologies—but each shares the common central purpose of better understanding and explaining the behavior of the actual customers at issue.[3] *See* Areeda and Hovenkamp, *Antitrust Law*, 530a, 929a (2d ed. 2002) (explaining why a hypothetical monopolist test around a group of buyers is a "helpful methodology" in identifying relevant markets). Contrary to respondents' claims that "testimony the jury heard was quite different" (BIO.9), Dr. Sullivan thoroughly explained the results of his independent relevant market analysis to the jury—including the *many* economic methodologies he applied to

[3] Like hard sciences, economics "prizes reason and evidence above dogma and authority. Its practitioners seek with open minds and unobstructed intellectual give-and-take to better understand the operation of systems of human exchange — including, of course, the operation of commercial markets". Donald J. Boudreaux, *The Science of Economics* (2013), https://www.mercatus.org/expert_commentary/science-economics

the facts of this case. *See e.g.,* Docket No. 22-8 at 124-213 (Dr. Sullivan's Trial Testimony):

7-ER-1609-10 (his analysis of prices before and after the challenged conduct); 7-ER-1610-11 (his analysis of the other national registries with separate registrars); 7-ER-1611-13 (his analysis of various forms of mobile engagement); 7-ER-1613-15 (why *leasing* and *servicing* are not substitutes and therefore in separate relevant markets); 7-ER-1615-16 (Dr. Aron's failure to test any of her client's theories); 7-ER-1619-22 (his analysis on the HHI market concentration index before and after the challenged conduct); 7-ER-1622-23 (his analysis on barriers to entry before and after the challenged conduct); 7-ER-1623-26; 1641 (his analysis of direct evidence of price increases and output reductions); 7-ER-1627-30 (his analysis of harm to competition); 7-ER-1641-45 (his analysis of the lack of functional substitutability or cross-elasticity of demand between StarStar numbers and other forms of mobile engagement).

B. The Testimony Cited Below As "Substantial Evidence" Was In Fact "Economic Nonsense"

Second, respondents say the erroneous admissibility ruling was harmless because the Ninth Circuit said: "Testimony from industry executives provided substantial evidence showing that the relevant markets were broader than Sumotext proposed" (App.8). But, in other circuits, the self-serving testimony of a party's own executives is not a suitable replacement for economic evidence proffered with expert foundation. The First and Eighth Circuit have spoken

directly to this question. *See Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1056-57 (8th Cir. 2000) ("actual behavior of customers more important than 'self-serving testimony' of plaintiffs own officers") (citing *SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.,* 188 F.3d 11, 19-20 (1st Cir.1999). Besides that, each of the same witnesses recanted their flawed economic theories on cross-examination.

As shown in Appellant's Reply Brief (Docket No. 59 at 16-18), each of the Joint Defendants' own executives admitted under cross-examination that each of the purported "economic substitutes" (*i.e.,* the internet, mobile apps, social media, text messaging, and 10-digit phone numbers) were in fact "complimentary to" and "did not replace" StarStar numbers. *See e.g.,* 6-ER-1431 (Mblox EVP: "**Q**. Was it your testimony that the StarStar number was a complement to these services? **A**. Yes."); 6-ER-1306-07 (Zoove CTO: **Q**. Is that because these are complementary services to each other, they are not replacements for one another? **A**. I think that's fair. **Q**. They are complementary services; correct? **A**. Yes").

According to economic scholars, "Grouping complementary goods into the same market" is "**economic nonsense**". *See* 2B Areeda & Hovenkamp, *Antitrust Law* ¶ 565a, at 431 (4th ed. 2013) (emphasis added). Moreover, the same witnesses also admitted that most customers used all of these disparate marketing channels concurrently; and no witness was able to identify a single customer that had ever abandoned one for the other. For example, Tim Keyes, COO of StarSteve and VHT, was asked if StarStar customers

had ever dropped their website or Facebook page after leasing a StarStar number:[4]

> **Q**. Highly unlikely; correct?
>
> **A**. Not likely.
>
> **Q**. In fact, you've never seen it; correct?
>
> **A**. I've never seen it, no.
>
> **Q**. Thank you.

7-ER-1590-92

C. The Customers At Issue Did Not "Switch"

But most importantly, the evidentiary record also revealed the actual behavior of the customers at issue after respondents seized control of the Registry, eliminated their rivals, and dramatically raised prices—*i.e.,* they did not "switch". *See* App.37 (District Court: "Evidence of Price Increases"). *See also Ohio v. American Express Co.*, 138 S. Ct. 2274, 2295 (2018) (BREYER, J. dissenting) ("The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices."); *accord*, App.179-182 (Jury Instruction No. 35: Relevant Market).

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[4] *See United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990). ("It is always possible to take pot shots at a market definition (we have just taken one), and the defendants do so with vigor and panache. Their own proposal, however, is ridiculous.")

And Dr. Sullivan also explained the importance of this economic data to the jury. *See* 7-ER-1623 ("Mr. Keyes [VHT StarStar COO in his earlier trial testimony] was explaining that a goal of their change in plans and change in policies and pricing was to increase the prices on average, and that's not surprising and that's what we see in the data and so it's confirmed).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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