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

BRIEF IN OPPOSITION

APEX LAW APC

THOMAS N. FITZGIBBON
100 Wilshire Blvd., Suite 700
Santa Monica, CA 90401
T: (310) 230-5280
F: (310) 496-3175

Counsel for Respondent StarSteve, LLC

GREENBERG TRAURIG, LLP

DAVID SPENCER BLOCH
blochd@gtlaw.com
MICHAEL HOGUE
hoguem@gtlaw.com
101 Second Street, Suite 2200
San Francisco, CA 94105
T: (415) 655-1300
F: (415) 707-2010

Counsel for Respondents Zoove, Inc., Virtual Hold Technology, LLC, VHT StarStar LLC

GREENBERG TRAURIG, LLP

ELIZABETH G. "HEIDI" BLOCH
Counsel of Record
State Bar No. 02495500
blochh@gtlaw.com
300 West 6th Street, Suite 2050
Austin, TX 78701
T: (512) 320-7228
F: (512) 320-7210

Counsel for Respondents Zoove, Inc., Virtual Hold Technology, LLC, VHT StarStar LLC

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that the jury's verdict was supported by substantial evidence because Petitioner, as an antitrust plaintiff, factually failed to meet its burden of proving the existence of two distinct relevant markets.

2. Whether the Ninth Circuit correctly held that a qualified expert is permitted to attack the methodology of a competing expert.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Zoove, LLC (formerly Zoove, Inc.) is 100% owned by VHT StarStar, LLC. VHT StarStar, LLC is 91% owned by Virtual Hold Technology, LLC, with 6% owned by StarSteve, LLC and 3% owned by Tom Turley. Virtual Hold Technology has no parent corporation and no publicly held corporation owns 10% or more of Virtual Hold Technology's stock. StarSteve, LLC has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This is a case about an antitrust plaintiff's burden of proof. Petitioner Sumotext failed to meet its factual burden to prove the existence of two narrowly-defined relevant antitrust markets—one market for leasing ** numbers and a separate market for servicing ** numbers.[1] The jury's verdict on this threshold issue was supported by substantial evidence presented during a two-week trial. *See* App. 8-9 ("The jury's verdict is supported by substantial evidence" and therefore "must stand").

There is no circuit split on either of the two alleged "issues" presented by Sumotext. 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. And even if there were a circuit split on either issue, the Ninth Circuit's opinion in this case would not implicate it. In this case, the district court and the Ninth Circuit expressly relied on settled law—*Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702—to admit the testimony of economist Dr. Debra Aron. App. 5. Likewise, the district court and the Ninth

[1] Zoove was authorized by the four major mobile phone carriers to lease ** numbers (or star star numbers), mobile dial codes that begin with **. Mobile dial codes are abbreviated phone numbers that begin with *, **, #, or ##, and are a shorthand way to make a call from a mobile phone. Businesses use mobile dial codes as a form of "call to action"—a way to connect with potential customers.

Circuit relied on settled law—*Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018), *Brown Shoe Co. v United States*, 370 U.S. 294 (1962), and others—to conclude that Sumotext bore the burden of proof and hence that Dr. Aron was entitled to highlight Sumotext's failure to carry its burden without offering an affirmative market definition of her own. App. 8.

In truth, Sumotext does not identify a circuit split at all. Its argument goes deep into antitrust weeds, boiling down to this: 1) proving a relevant market requires a market analysis, including identifying which economic substitutes exhibit cross-elasticity of demand with the product at issue; and 2) because Respondents' expert did not conduct her own market analysis, she should not have been allowed to criticize Sumotext's expert. But Sumotext omits a vital fact in its Petition to this Court: Sumotext's own expert failed to conduct the market analysis Sumotext now advocates. It was Sumotext's burden to prove its two proffered narrow markets—a burden that, per the jury, Sumotext failed to carry. Contrary to Sumotext's argument, an antitrust defendant does not bear the burden to prove a different or broader market.

The Petition reveals Sumotext's continuing attempt at trial and on appeal to avoid its burden to prove the existence of its two claimed relevant markets. *See* App. 6 (Ninth Circuit: "Sumotext challenges the application of the burden of proof"), App. 8 (Ninth Circuit: "We reject Sumotext's attempt to disclaim its burden of proof"), App. 44 (District Court: "Sumotext is attempting to shift the burden of proof"). As an

antitrust plaintiff, Sumotext had the strategic choice how to define the relevant markets to support its claims. Sumotext tried but failed to convince the jury that it should disregard all other calls to action and conclude that ** numbers do not compete with any other products or services that businesses use to engage consumers.

Among the many reasons to deny the Petition, two stand out:

First, Sumotext contends that analyzing cross-elasticity of demand is *required* in defining a relevant market, yet Sumotext's expert failed to examine cross-elasticity of demand or conduct any other type of recognized market analysis.

Second, even if—contrary to the most basic Anglo-American norms of jurisprudence—Dr. Aron should not have been allowed to criticize the failures of Sumotext's expert, the Ninth Circuit correctly concluded that any such error was harmless because Sumotext's own efforts to prove its two relevant markets fell short. App. 5 (any error in admitting Dr. Aron's testimony "was harmless" as "it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted").

The Court should deny the Petition.

STATEMENT

Petitioner Sumotext Corporation sued for damages under the Sherman Act on the theory that Respondents Virtual Hold Technology LLC, VHT StarStar LLC, Zoove LLC, and StarSteve LLC abused their alleged monopoly power in distinct markets for ** number leasing and ** number servicing.[2]

I. Background

Businesses use ** numbers, as well as other mobile dial codes, as a form of "call to action"—a way to connect with potential customers. App. 50-51, 62. At trial, there was significant evidence about other calls to action and forms of mobile engagement that compete with ** numbers, including other abbreviated dial codes such as # numbers or * numbers, 10-digit telephone numbers, 1-800 numbers, text messages, social networks, web searches, and mobile phone apps. App. 51-52, 62.

In June 2010, Zoove secured the exclusive right to lease and support ** numbers (but not other mobile dial codes) on behalf of AT&T, Verizon, T-Mobile, and Sprint. App. 6. After pursuing several unsuccessful business models, Zoove's owners sold the business to Mblox in 2014. App. 6, 80. Mblox chose to implement a

[2] Sumotext also sued Mblox, Inc., Zoove's former owner. Mblox is represented by separate counsel, was dismissed from the case at the pleading stage, and had no role at trial. While Sumotext challenged Mblox's dismissal on appeal to the Ninth Circuit, it does not revive that argument here.

different business model relying heavily on resellers like Sumotext.

Sumotext became a Zoove customer just before the sale to Mblox and was Zoove's most successful ** number reseller during the 18 months Mblox owned the company.[3] App. 6, 80. But Zoove itself was still not profitable, not least because Sumotext was able to capture virtually all the economic value associated with a leased ** number, leaving Zoove to act as little more than a conduit between Sumotext and the mobile phone carriers. App. 80.

Because Mblox was unable to operate Zoove profitably, it sold Zoove to VHT StarStar LLC (a wholly owned acquisition subsidiary of Virtual Hold Technology LLC) in December 2015. App. 122-24. The new owners changed Zoove's business model yet again, altering ** number prices and the terms of its contracts with resellers such as Sumotext. App. 80. As was its right, VHT StarStar notified Sumotext that it would terminate Sumotext's ** number leases and offered new contract terms. Sumotext refused to negotiate new terms, instead filing suit. App. 86-87.

II. Procedural history

During a 2-plus-week jury trial, Sumotext and Respondents each called multiple fact and expert

[3] Respondent StarSteve, another reseller, did not turn a profit on its ** number leases. App. 82. Much later, it bought a minority stake in VHT StarStar LLC. App. 79.

witnesses. The district court instructed the jury on the law, using instructions agreed to by the parties. App. 7. After being instructed, the jury asked only one question during deliberations: "Is question no. 1 asking: 'Did Sumotext prove by a preponderance of the evidence a relevant market for leasing ** numbers in the United States' and ONLY ** numbers?" App. 15 (emphasis in original). The court—with the agreement of the parties—answered: "*yes*." *Id*. Not long after, the jury returned its verdict, answering "*no*" to the following questions:

- "Did Sumotext prove by a preponderance of the evidence a relevant market for *leasing* ** numbers in the United States?"

  and

- "Did Sumotext prove by a preponderance of the evidence a relevant market for *servicing* ** numbers in the United States?"

App. 183, 187. The district court then entered a take-nothing judgment against Sumotext and later denied Sumotext's motion for new trial. App. 11.

The Ninth Circuit, in an unpublished memorandum opinion, affirmed in all respects. App. 1.

A. Trial evidence regarding the relevant markets

1. Sumotext's expert—Dr. Sullivan

Sumotext attempted to meet its burden to define the relevant market through the expert testimony of

economist Dr. Ryan Sullivan, who opined—without having conducted any traditional market analysis—that there are two relevant markets for ** numbers nationwide: one for leasing ** numbers and a separate one for servicing ** numbers. App. 13.

While Dr. Sullivan acknowledged the existence of other customer calls to action such as 10-digit telephone numbers, 1-800 numbers, short codes, text messaging, internet apps, and other mobile dial codes (*, #, and ## numbers), he concluded that no other forms of mobile engagement belonged in the same market as ** numbers. App. 27. In his view, "there are no other economic substitutes that are reasonably interchangeable" with ** numbers. App. 27.

Under cross-examination, Dr. Sullivan admitted that he had not performed a SSNIP test[4] or any industry or market surveys (App. 28-29, 32, 35), and had not analyzed cross-elasticity of demand[5] between ** number pricing and any other forms of consumer engagement. (ER1645: "I did not calculate across [sic] elasticity. That's not feasible here, nor is it necessary"). As the district court correctly noted, Dr. Sullivan

[4] SSNIP is an acronym for "small but significant nontransitory increase in price." App. 28. A SSNIP test is a common technique for determining the extent to which competing goods are substitutable for one another. *See St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015).

[5] "Cross-elasticity of demand" is a way to measure the "reasonable interchangeability of use" between two products, indicating they may be substitutes for each other. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018).

"provided very little information regarding his determination that servicing [**] numbers is a distinct market" from leasing ** numbers, and never described his methodology for determining that there were two distinct markets. App. 33, 35-36. That failure alone doomed Sumotext, which insisted the two markets were separate and distinct, and that each was confined to ** numbers, with no economic substitutes or competitors of any kind.

2. Respondents' expert—Dr. Aron

To rebut Dr. Sullivan, Respondents proffered Dr. Debra Aron. She did not provide her own definition of a relevant market (because she had no obligation to do so), but instead challenged Dr. Sullivan's failure to properly define the markets he proposed. Among other things, Dr. Aron opined that Dr. Sullivan "did not apply any accepted or standard or recognizable methodology" in defining the alleged relevant markets. App. 30. She also criticized his conclusions and opinions. App. 29, 31-32, 34.

The jury and the district court rightfully credited Dr. Aron's testimony that Dr. Sullivan "did not use any recognized methodology to define the relevant markets." App. 35.

3. Industry participants

Although Respondents had no burden to prove a relevant market, they presented substantial evidence

from several industry witnesses that ** numbers compete with other types of mobile engagement, including 10-digit telephone numbers, 1-800 numbers, short codes, MMS or SMS texting, social networks, web and search, and other abbreviated dial codes such as # numbers or * numbers. App. 45-46.

B. The pretrial rulings Sumotext cites are irrelevant and misleading

Sumotext attempts to bolster Dr. Sullivan's testimony by quoting two statements of the district court in denying Respondents' motion for summary judgment. Pet. at 10, citing App. 97-98 ("Dr. Sullivan provides a cogent explanation" regarding interchangeability with other consumer engagement products, and "Dr. Sullivan also indicates that he conducted a significant non-transitory increase in price ('SSNIP') test, commonly used in economic analysis of antitrust to define the relevant market").

But a non-moving party's burden to raise a fact issue at summary judgment is very different than a plaintiff's burden of proof at trial. And the testimony the jury heard was quite different. At trial, Dr. Sullivan gave *no* cogent explanation of his self-defined markets based on any recognized methodology, and he admitted that he had *not* performed a traditional SSNIP test. When measuring the evidence to support a jury's verdict, the testimony at trial controls, not evidence in opposition to a pretrial motion for summary judgment.

REASONS TO DENY THE PETITION

I. This case does not reveal a circuit split regarding how to define a relevant market

This case is not about an incorrect or inconsistent application of the law. It is about Sumotext's failure at trial to present enough evidence to convince a jury that its two proposed relevant markets exist. Even if there were the circuit split Sumotext imagines, the Ninth Circuit's opinion here does not fall on either side of it. Instead, with respect to the relevant market, the opinion simply affirms that Sumotext had the burden of proof and failed to meet it. App. 8-9.

A. Sumotext's own expert failed to conduct the market analysis Sumotext now says is "required"

Sumotext argues that the Ninth Circuit has a more "lax standard" than other circuits because it allegedly "does not require admissible evidence of cross-elasticity" when defining a relevant market. Pet. at i, 19, 23. But a "lax standard" would have benefitted Sumotext, as the party with the burden of proof. Sumotext now argues that an analysis of cross-elasticity of demand is "required," yet its own expert admittedly failed to conduct that analysis, labeling it unnecessary. (ER1645: "I did not calculate across [sic] elasticity. That's not feasible here, nor is it necessary.")

In other words, even if Sumotext is correct that analyzing cross-elasticity of demand is *required* in every

case, Sumotext failed to analyze or present evidence of cross-elasticity of demand.

B. Testimony of industry participants is admissible and relevant

Sumotext next contends that the Ninth Circuit should not have credited the testimony of numerous industry executives regarding what products they believed competed with ** numbers. Pet. at 19-20. Yet the jury instructions *agreed to by Sumotext* correctly allowed jurors to consider "the perceptions of either the industry or the public as to whether the products or services are in separate markets" and "the views of Sumotext and Defendants regarding who their respective competitors are." App. 181. The jury was entitled to credit the testimony of percipient industry witnesses when considering whether Sumotext had met its burden of defining the relevant antitrust markets.

Moreover, Dr. Aron correctly considered the testimony of industry participants while Dr. Sullivan ignored it. In antitrust cases, it is not only permissible but prudent for an economic expert to consider the testimony of industry participants regarding the scope of a relevant market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (pointing out that "the definition of the relevant market" must "correspond to the commercial realities of the industry"); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (the market definition could "be

determined only after a factual inquiry into the 'commercial realities' faced by the consumers").

C. The Ninth Circuit's discussion of the relevant market is consistent with the holdings of this Court and other circuits

Sumotext advances the idea that a cross-elasticity of demand analysis is rigidly required in every antitrust case, regardless of the facts and the context. But as this Court noted in *Brown Shoe*, "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336-37 (quotations and citations omitted).

Without citing any Ninth Circuit opinions, Sumotext contends that the Ninth Circuit does not require admissible evidence of cross-elasticity to establish a relevant market while other circuits do. Pet. at 19-21. Even if Sumotext were correct about the existence of a circuit split (it is not), the Ninth Circuit's opinion here does not speak to this issue or even mention cross-elasticity. That is because Sumotext wholly failed to prove the existence of its two proposed relevant markets. *If* Sumotext had been required to perform a market analysis including cross-elasticity of demand to establish its relevant markets, as Sumotext now asserts, it would have failed even more profoundly.

In sum, this case (i) does not implicate any perceived circuit split on the evidence required to

establish a relevant antitrust market; and (ii) would be a poor vehicle for addressing the issue given Sumotext's wholesale failure of proof.

II. This case does not reveal a circuit split regarding admissibility of expert testimony

A. The Ninth Circuit does not have a "nonsense" standard for admissibility

Sumotext wrongly contends that the Ninth Circuit's test for admissibility of expert testimony excludes "only" "unreliable nonsense opinions." Pet. at 27. But the Ninth Circuit analyzes the admissibility of expert testimony under the proper *Daubert* standards to ensure both reliability and relevancy. *See United States v. Ray*, 956 F.3d 1154, 1157-58 (9th Cir. 2020) (per curiam); *United States v. Bacon*, 979 F.3d 766, 767 (9th Cir. 2020) (en banc).

Sumotext cites *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc*., 738 F.3d 960, 969 (9th Cir. 2013), as holding that a trial court's gatekeeping role is to "'screen the jury' only from 'unreliable nonsense opinions.'" Pet. at 27. But *Alaska Rent-A-Car* merely holds that nonsense opinions *should* be screened, not that they are the *only* types of opinions to exclude.

B. Sumotext advances a test for admissibility that its own expert failed to meet

Sumotext argues that Dr. Aron should have been prohibited from testifying because she failed to

conduct her own independent market analysis and failed to analyze cross-elasticity of demand. Pet. at 29. Yet Dr. Aron's critique of Dr. Sullivan is that *he* did not conduct a market analysis to support *his* conclusions. Despite Sumotext's representations to this Court, the evidence showed Dr. Sullivan did not perform the cross-elasticity analysis that Sumotext now contends is required. Sumotext's own expert failed to satisfy its proposed inflexible standard for admissibility.

Sumotext's argument misplaces the burden of proof. It was neither Respondents' nor Dr. Aron's burden to identify or define the relevant markets. It was Sumotext's burden to do so, and it failed. Dr. Aron's criticisms of Dr. Sullivan's methodology were reliable and relevant. *See TCL Commc'ns Tech. Holdings Ltd. v. Telefonaktenbologet LM Ericsson*, 2016 U.S. Dist. LEXIS 194814, 2016 WL 7042085, at *5 (C.D. Cal. Aug. 17, 2016) (rebuttal expert is permitted to challenge an experts' methodology and conclusions); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044 (2016) (criticizing party for failing to "discredit the evidence with testimony from a rebuttal expert").

Finally, 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. App. 5 (Dr. Aron's testimony did not prejudice Sumotext because the jury would have probably reached the same verdict).

This case does not implicate any perceived circuit split on admissibility of expert testimony and, given

Sumotext's evidentiary failures, would be a poor vehicle for addressing the issue.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

APEX LAW APC

THOMAS N. FITZGIBBON
100 Wilshire Blvd., Suite 700
Santa Monica, CA 90401
T: (310) 230-5280
F: (310) 496-3175

Counsel for Respondent StarSteve, LLC

GREENBERG TRAURIG, LLP

DAVID SPENCER BLOCH*
blochd@gtlaw.com
MICHAEL HOGUE
hoguem@gtlaw.com
101 Second Street, Suite 2200
San Francisco, CA 94105
T: (415) 655-1300
F: (415) 707-2010

Counsel for Respondents Zoove, Inc., Virtual Hold Technology, LLC, VHT StarStar LLC

GREENBERG TRAURIG, LLP

ELIZABETH G. "HEIDI" BLOCH
Counsel of Record
State Bar No. 02495500
blochh@gtlaw.com
300 West 6th Street, Suite 2050
Austin, TX 78701
T: (512) 320-7228
F: (512) 320-7210

Counsel for Respondents Zoove, Inc., Virtual Hold Technology, LLC, VHT StarStar LLC

* Ms. Bloch and Mr. Bloch are not related.