No. 23-1099

IN THE
Supreme Court of the United States

INNOVATION VENTURES, LLC AND
LIVING ESSENTIALS, LLC,
Petitioners,

v.

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC.;
TREPCO IMPORTS AND DISTRIBUTION, LTD.;
L.A. INTERNATIONAL CORPORATION;
CALIFORNIA WHOLESALE; YNY INTERNATIONAL, INC.;
EASHOU, INC., DBA SAN DIEGO CASH AND CARRY;
AND SANOOR, INC., DBA L.A. TOP DISTRIBUTOR,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Petitioners' Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The petition presents two important questions that have confused and divided the circuit courts: what "competition" means in the RPA, and whether evidence showing absence of price competition is relevant to RPA antitrust injury.

On the first question, respondents confirm that only this Court can clarify what a private plaintiff must prove in a secondary-line price-discrimination case after *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006). Respondents deny any disagreement, yet misread the majority opinion below; disregard (at 19-21) what other circuits have unambiguously said in requiring proof of competition "*for the same customer*," 546 U.S. at 178; and embrace circuit-level precedent *Volvo* expressly rejected (*compare* BIO 19-20 *with* 546 U.S. at 178). Respondents also err in their defense of the majority's holding below. The opposition brief merely underscores that this Court alone can supply the certainty that litigants, the lower courts, and businesses need.

On the second question, respondents largely ignore the petition's showing (at 22-24) that this case would have come out differently in the Second Circuit. They instead deny (at 2) understanding the relief petitioners seek, given the majority's remand to the district court for further proceedings. But they ignore the blinders the majority put around the antitrust-injury analysis: as a matter of law, courts in RPA cases must (says the majority) ignore empirical customer-switching evidence if the plaintiff proffers evidence that would show actual competition under pre-*Volvo* law. That conflicts with the law in the Second Circuit, so this Court should grant certiorari, reverse, and restore the district court's correct rejection of respondents' claims.

ARGUMENT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S SECTION 2(d) HOLDING

A. The Ninth Circuit's Decision Conflicts With Cases Holding That The RPA Requires Competition For The Same Customer

Consistent with *Volvo*, four circuits have held that two firms are in competition under the RPA only if they are competing for the same customer. Over Judge Miller's dissent, the majority below rejected that view and limited *Volvo* to its facts. Only this Court can resolve that disagreement. Pet. 13-17.

Respondents erroneously contend (at 17) the Second, Third, and Fifth Circuits "follow the exact same test followed by the Ninth Circuit." Respondents assert (at 20-23) those circuits follow the standard set forth in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987), and other pre-*Volvo* cases. But that is the ***exact standard*** *Volvo* considered and rejected. *See* 546 U.S. at 178. In *Volvo*, the Court "granted certiorari to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the [RPA] in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer?" *Id.* at 175 (citation omitted). The Court explained that the lower court had held, relying on *Best Brands*, that the relevant firms were in actual competition because "the favored and disfavored purchasers competed at the same functional level and within the same geographic market." *Id.* at 173-74 (cleaned up). The Court rejected that test, holding that "competition" under Section 2(a) means competition "*for the same customer*." *Id.* at 178.

Respondents suggest (at 20) the Second Circuit has defied *Volvo* by citing *Best Brands* once on a different point (the meaning of "price discrimination") in *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015). But *Cash & Henderson Drugs* did not revive *Best Brands*' functional-level test. Rather, the Second Circuit read *Volvo* to "focus" on "the existence and degree of actual competition among different purchasers," without hinting at the test the Ninth Circuit resurrected. *Id.* at 210-11.

Repeating the same mistake, respondents assert (at 21) the Third Circuit "adopt[ed] the *Best Brands* standard verbatim" 13 years before *Volvo*. But the Third Circuit rejected the *Best Brands* test after *Volvo* in *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2010), clarifying that "two parties are in competition only where, after a 'careful analysis of each party's customers,' we determine that the parties are 'each directly after the same dollar.'" *Id.* at 197 (citation omitted). That test, and the court's holding that the plaintiff failed to establish it "compete[d] for the same dollar" with the allegedly favored purchaser, *id.* at 206, are inconsistent with the Ninth Circuit's holding below.

Respondents similarly claim (at 22-23) the Fifth Circuit "follows the *Best Brands* evidentiary test." But the Fifth Circuit repeatedly has held that determining competition requires "careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975); *accord Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692-93 (5th Cir. 2003). That standard conflicts with the Ninth Circuit's functional-level test,

which renders irrelevant here the only "careful analysis of each party's customers" in the record. Respondents dismiss (at 22) the standard used by the Fifth Circuit as "shorthand for what 'competition' means." But that concedes petitioners' point: because competition under the RPA means competition for the same dollar, the applicable test must analyze whether two firms are "directly after the same dollar."

Respondents admit (at 17-18) the First Circuit did not apply the Ninth Circuit's test in *The Shell Co. (Puerto Rico) Ltd. v. Los Frailes Service Station, Inc.*, 605 F.3d 10 (1st Cir. 2010). They instead ask (at 18) the Court to re-rationalize what they describe as the First Circuit's "curt disposition of" the actual-competition "issue – without reference to *any* authority" – as though it were "simply a fact-specific holding" consistent with the functional-level test. But *Shell* cited *Volvo*. *See* 605 F.3d at 25. And even though the customers at issue were in geographic proximity (three of the allegedly favored gas stations were within two miles of the allegedly disfavored gas station), purchased the same good (gasoline) over the same time period, and operated at the same functional level (retail), the First Circuit affirmed the grant of summary judgment for lack of proof that those firms competed for the same customers. *See id.* at 25-26 (crediting evidence of geographic proximity but holding that the allegedly disfavored station nonetheless failed to establish competition because "proximity does not per se show actual competition"). The decision below binds Ninth Circuit courts to the opposite methodology.

Respondents also contend (at 2) there is no circuit split because other circuits, like the Ninth Circuit, have limited *Volvo* to its facts and apply *Volvo* only in

cases involving custom bidding markets. As explained below, that argument suffers from the same error made by the Ninth Circuit.

B. The Ninth Circuit Misread *Volvo*

The Ninth Circuit erred by departing from *Volvo* and overturning the district court's independent factual finding that respondents "had 'failed to prove by a preponderance of the evidence that they competed with Costco for resale' of 5-hour Energy." App. 8a. On respondents' own account (at 16, 22), the Ninth Circuit's decision creates two different tests for determining competition under the RPA: (1) a default functional-level test applicable in the "general RPA context," and (2) a *Volvo* exception applicable only in a "custom-bidding market[]." That approach misunderstands *Volvo* and entrenches the lower courts' division.

1. This Court granted certiorari in *Volvo* to reject the functional-level test because it improperly excuses RPA plaintiffs from making any "showing that the [defendant] manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer." 546 U.S. at 169. *Volvo*'s holding is not limited by the custom-bidding market at issue there; that fact illustrates *Volvo*'s insight that markets can be "segmented by more than simply functional level, geography, and grade and quality of goods." App. 44a (Miller, J., dissenting in relevant part). Respondents offer no principled reason why courts can consider evidence that two firms are not actually competing for the same customers in one type of market, but find the same evidence legally irrelevant in other markets. *See also*, *e.g.*, *Feesers*, 591 F.3d at 197-98 ("In application, the competing purchaser

requirement will vary based on the nature of the market and the timing of the competition.").[1]

Respondents are mistaken to claim (at 16) that applying *Volvo* to all RPA cases would "swallow the very rule to which *Volvo* had been described as the exception" (what rule, respondents do not say). Under *Volvo*, nothing prevents a plaintiff that operates at the same functional level and in the same geographic region as an allegedly favored buyer from showing that the two firms compete for the same customers. *See* App. 43a (Miller, J., dissenting in relevant part). But just as plaintiffs can demonstrate competition even apart from the Ninth Circuit's functional test, *see*, *e.g.*, *Godfrey v. Pulitzer Pub. Co.*, 276 F.3d 405, 411 (8th Cir. 2002), so, too, must a defendant be able to introduce evidence to prove the opposite. The question then is for the fact-finder, which resolved it against respondents here.

2. Respondents' attempts to undermine *Volvo* fall short. Respondents first improperly cite (at 11-12, 14) Section 2(a)[2] to contend that, under the RPA's text, two firms are "customers competing" under Section 2(d) if their customers, in turn, compete. While Section 2(a) liability extends to price discrimination that injures competition between customers of the relevant firms, analogous language does not appear in, or apply to, Section 2(d). *See FTC v. Fred Meyer, Inc.*, 390 U.S.

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[1] Respondents omit the first and last clauses of that sentence (at 14 n.4, 20, 22), asserting the Third Circuit has held that different markets are subject to different legal tests. The court's real point was Judge Miller's – that whether firms are in competition for RPA purposes turns on market realities, not labels.

[2] Respondents (at 14) attribute the language "customers of either of them" to 15 U.S.C. § 13(d). That language appears only in § 13(a), not § 13(d).

341, 356-57 (1968) ("[W]hen Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act[.]'"). The same error infects respondents' arguments (at 12-13) regarding *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969), a Section 2(a) case addressing harm to competition between customers of the favored and disfavored purchasers. *Id.* at 647.

Respondents next contend (at 11-12) that applying *Volvo* to this case would mean overturning *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), and *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Neither case is applicable here. Both cases address the standard for establishing a *prima facie* case of competitive injury under RPA § 2(a). "As every RPA practitioner knows, the question of the *existence* of competition is separate from" (in that it is logically prior to) "the question of whether the plaintiff has suffered a competitive *injury* from paying the higher price." BIO 19.

Respondents next argue (at 13) that, in *Fred Meyer*, the Court held that the retail chain Fred Meyer and two allegedly disfavored wholesalers were "customers competing" under Section 2(d). Because Fred Meyer and the wholesalers did not sell to the same end customers, respondents contend that the holding is incompatible with *Volvo*'s test for competition. But *Fred Meyer* did not hold that Fred Meyer and the wholesalers were "customers competing" under Section 2(d). Rather, the Court expressly held that Section 2(d) "does not mandate proportional equality between [Fred] Meyer and the two wholesalers," but instead that Fred Meyer's "retail competitors, rather

than the two wholesalers, were competing customers under the statute." 390 U.S. at 348-49.

3. Respondents deny (at 7-8, 28) the decision below creates a *per se* rule for competition – claiming that Judge Miller, petitioners and their *amicus*, and a post-petition application of the decision below[3] all misunderstood the majority's opinion in ways the majority never mentioned. The majority held that, "to establish that 'two customers are in general competition,' it is 'sufficient' to prove" the three elements of the court's functional-level test. App. 21a. Having concluded that respondents satisfied two of the three elements, the Ninth Circuit remanded for the district court to determine whether respondents could prove their Section 2(d) claim by satisfying "the only remaining *Tri-Valley* requirement." App. 32a; *see also* App. 44a (Miller, J., dissenting in relevant part) ("As the court reads *Tri-Valley Packing*, the 'confluence of facts' of operating on the same functional level, being in geographic proximity, and reselling goods of like grade and quality is sufficient to conclusively establish competition, making any other evidence irrelevant."). That is a *per se* rule limiting *Volvo* to its facts. If the majority thought otherwise, Judge Miller's challenge would have prompted it to say so.[4]

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[3] *See L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384, at *8 (C.D. Cal. May 20, 2024) (reading decision below to find "that 'potential operational differences' and 'whether one business lost buyers to another' are irrelevant to the analysis because generally 'two customers in the same geographic area are competing for resales to the same buyer or group of buyers,' except in the narrow factual circumstances presented in *Volvo*"), *appeal pending*, No. 24-3776 (9th Cir.). Three plaintiffs in that case are respondents here.

[4] Notably, respondents' position requires the Court to find not only that Judge Miller misunderstood the decision below,

Moreover, even a rebuttable version of the Ninth Circuit's functional-level test would conflict with *Volvo* and other circuits' decisions, because the Ninth Circuit held that evidence regarding customers' behavior is legally irrelevant to competition under Section 2(d). *See* App. 43a (Miller, J., dissenting in relevant part) ("In reversing the denial of an injunction, the court deems all of the evidence of lack of actual competition—and the district court's findings based on that evidence—to be irrelevant."). Respondents make the same error in their attempt (at 28) to diminish the evidence offered by petitioners' expert.[5] *See* App. 43a (Miller, J., dissenting in relevant part) (explaining that respondents' argument misreads testimony of expert, who opined, "[b]ased on his conclusion that [respondents'] customers were not sensitive to the price of 5-hour Energy, . . . that [respondents] and Costco did not compete '*for the same customer*'").

No other court of appeals has so startlingly dismissed customer-diversion evidence – for good reason, as that rule runs contrary to settled precedent putting

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but also that Justice Stevens misunderstood *Volvo*: his dissent read the majority opinion to endorse a general rule displacing functional-level analysis, not respondents' narrow exception to it. *See* 546 U.S. at 182 (Stevens, J., dissenting) (criticizing majority's "transaction-specific concept of competition").

[5] Petitioners' expert was the only expert economist to analyze all of respondents' sales data for determining whether respondents and Costco competed on price. Respondents' assertion (at 5) that "the district court nowhere made a finding that [respondents] and Costco do not sell to the same customers" overlooks the district court's finding that "the vast majority of Costco's sales were made to ultimate consumers," whereas "[respondents] are wholesalers that resell to convenience stores, jobbers, and other wholesalers, rather than to the ultimate consumer," App. 98a. Petitioners disagree with respondents' view of the evidence (at 3-5).

such evidence at the core of most antitrust cases. *See* Pet. 18-19 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-27 (1962), and U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* § 4.2.A, at 35-36 (2023)). These are not the musings of "laissez faire *lawyers*" (BIO 24). They are the principles courts nationwide apply in antitrust cases except in RPA cases now brought in the Ninth Circuit. *See* App. 42a (Miller, J., dissenting in relevant part) (confirming relevance of studies of price sensitivity for assessing existence of competition). That erroneous holding requires review.

II. THE DECISION BELOW CREATES A SPLIT REGARDING ANTITRUST INJURY

Respondents do not dispute that the Ninth Circuit's decision below imputes the court's understanding of "competition" under the RPA to its analysis of antitrust injury. Nor do respondents attempt to address the conflict between the decision below and the Second Circuit's decision in *Cash & Henderson Drugs*, 799 F.3d at 213, or even deny that this case would come out differently under that decision.

Respondents instead contend (at 10) petitioners are "asking this Court to take the first crack at the factual dispute over whether [respondents] can make out a threatened antitrust injury." That is mistaken. The district court previously held, "based on its own independent review of the evidence," that respondents "had 'failed to prove by a preponderance of the evidence that they competed with Costco for resale' of 5-hour Energy." App. 8a. The Ninth Circuit makes the evidence underlying that determination irrelevant to antitrust injury, as explained above. For reasons the petition explains (at 22-24), that decision is erroneous and should be reversed.

III. THE COURT SHOULD RESOLVE BOTH QUESTIONS IN THIS CASE

Respondents never deny the importance of the issues (on which the Retail Litigation Center's *amicus* brief has elaborated). They instead suggest (at 8-11) that the Court should wait until the district court decides fact-bound questions left open on remand.

But even setting aside that this Court is not primarily in the error-correction business, *see* Sup. Ct. R. 10, what matters for present purposes is what the Ninth Circuit did not leave open: the legal test mandated by *Volvo* and settled antitrust injury doctrine. Those issues are important and squarely presented now, and the majority below erred on both. The Court readily could say so itself, as the case arises from a full trial record. *See*, *e.g.*, *Ohio v. American Express Co.*, 585 U.S. 529, 539-40 (2018). Or it can correct the Ninth Circuit's erroneous legal standards and remand for the proper standards' application. *See*, *e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (affirming district court's dismissal following remand in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)). Either way, this case presents an ideal vehicle to resolve the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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