No. 23-_____

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

PETITION FOR A WRIT OF CERTIORARI

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April 5, 2024

QUESTIONS PRESENTED

The Robinson-Patman Act, 15 U.S.C. § 13, prohibits "secondary line" price discrimination, which is "price discrimination that injures competition among" the "customers" of a "discriminating seller[]" of a commodity. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176-77 (2006). Below, a fractured panel of the Ninth Circuit created two circuit splits about what a private plaintiff must prove to win such a claim:

1. Whether a secondary-line price-discrimination plaintiff must prove that it competes with the allegedly favored firm for sales to the same customers, as four circuits have concluded, or not, as the Ninth Circuit held below.

2. Whether a claim of antitrust injury can be defeated by an analysis of consumer behavior showing that the allegedly favored firm and the plaintiff do not compete on price, as the Second Circuit has held, or whether that analysis instead is legally irrelevant to antitrust injury, as the Ninth Circuit held below.

PARTIES TO THE PROCEEDINGS

Petitioners Innovation Ventures, LLC and Living Essentials, LLC were the defendants in the district court and the appellees in the court of appeals.

Respondents 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 were the plaintiffs in the district court and the appellants in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners Innovation Ventures, LLC and Living Essentials, LLC state the following:

Innovation Ventures, LLC is the parent company of Living Essentials, LLC. There is no publicly held corporation that owns 10% or more of the stock in Innovation Ventures, LLC. There is no publicly held corporation that owns 10% or more of the stock in Living Essentials, LLC.

RELATED CASES

U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC, 89 F.4th 1126 (9th Cir. Dec. 22, 2023) (No. 21-55397)

U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC, 74 F.4th 960 (9th Cir. July 20, 2023) (No. 21-55397)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 617, 2021 WL 3418584 (C.D. Cal. Aug. 5, 2021)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 603 (C.D. Cal. Apr. 28, 2021)

U.S. Wholesale Outlet & Distrib., Inc. v. Living Essentials, No. Cv 18-1077 CBM (Ex), ECF No. 599 (C.D. Cal. Apr. 1, 2021)

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Petitioners Innovation Ventures, LLC and Living Essentials, LLC ("Living Essentials") petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The order and amended opinion of the court of appeals (App. 1a-46a) is reported at 89 F.4th 1126. The initial opinion of the court of appeals (App. 47a-90a) is reported at 74 F.4th 960. Relevant orders of the district court (App. 91a-115a) are not reported.

JURISDICTION

The court of appeals entered judgment on July 20, 2023, and denied petitions for rehearing on December 22, 2023 (App. 2a). On March 14, 2024, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including April 5, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Robinson-Patman Act and the Clayton Act are reproduced at App. 116a-129a.

INTRODUCTION

This case concerns the Robinson-Patman Act of 1936, 15 U.S.C. § 13 ("RPA" or the "Act"), which bars price discrimination that harms competition. Respondent wholesalers contend that petitioner Living Essentials violated the RPA by offering Costco Wholesale Corporation ("Costco") lower prices to buy 5-hour ENERGY® ("5HE") than Living Essentials offered to the wholesalers. In a sharply divided opinion, which departs from the holdings of other circuits and invites litigation that will punish the price competition that antitrust law aims to encourage, the Ninth Circuit held that Living Essentials could be enjoined from discounting its prices in selling its popular energy shots,

5HE. The Court should review that decision because it departs from the holdings of other circuits on a fundamental question of antitrust law: whether price discounts that enhance consumer welfare may be held illegal under the RPA solely to protect the interests of a putatively disfavored purchaser.

Courts consistently have held that, in order to prove liability under Sections 2(a) and 2(d) of the RPA, a plaintiff must establish that it is in actual competition with the allegedly favored customer – here, that the wholesalers actually compete with Costco for the sale of 5HE. But as the economy of the 1930s gave way to increasingly complex modern markets, the lower courts struggled to settle on a clear legal standard that a plaintiff must satisfy to prove that it competes with a favored purchaser. This Court sought to resolve that confusion when it held in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), that Section 2(a) requires competition among purchasers "*for the same customer*." *Id.* at 178. In today's economy, buyers do not necessarily view two firms as substitute suppliers simply because they simultaneously sell the same good at the same level in a supply chain and in the same geographic market. *See id.* at 177-79. They must instead sell to "*the same customer[s]*." *Id.* at 178.

As the Ninth Circuit's decision in this case illustrates, courts of appeals are confused about how to implement the *Volvo* standard, which is now nearly two decades old. The Ninth Circuit majority decision expands the reach of the RPA by concluding that, for the "typical chainstore-paradigm case," App. 32a, a Section 2(d) plaintiff may prove that it is "competing" with an allegedly favored purchaser by satisfying a so-called "functional-level" test: showing that it operates

in the same geographic market, at the same time, and at the same level of the supply chain as that purchaser – regardless of whether they sell to "the same customers." As Judge Miller's dissent recognized, the majority's standard creates a circuit split regarding the definition of competition under the RPA and engenders confusion regarding the reach of *Volvo* beyond its factual circumstances.

The Ninth Circuit's decision also opens another circuit split on a related issue: antitrust standing. The panel majority initially forgot to address that core element. After Living Essentials' rehearing petition alerted the panel, it issued an amended opinion. But the majority adopted an antitrust-injury standard that, taken to its logical conclusion, can be read as excusing private plaintiffs in Section 2(d) cases from ever confronting empirical evidence proving they do not compete with the allegedly favored firm. The conclusion that Section 2(d) plaintiffs are exempt from the antitrust-injury requirement creates a direct conflict with the Second Circuit and renders the RPA an outlier among the antitrust laws.

Left uncorrected, the decision below will encourage inefficient sellers hoping to increase consumer prices to turn to price-discrimination litigation – inviting cases that undermine modern antitrust law's "traditional concern for consumer welfare and price competition." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993). The antediluvian functional-level test the Ninth Circuit majority reanimated is a throwback to a time when antitrust courts segmented distribution chains by label – a standard too simplistic for today's economy. And the majority's gutting of antitrust injury ignores decades of this Court's cases confirming that the Clayton Act

does not invite private litigation aiming to *increase* consumers' prices. Because the Ninth Circuit's decision will undermine this Court's settled teaching that antitrust law is "a consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox* 66 (1978)), the Court should grant the petition.

STATEMENT

A. Statutory Background

1. Passed in 1936, the RPA was Congress's attempt "to target the perceived harm to competition" when powerful buyers are able to purchase goods at prices disproportionately lower than other buyers in certain circumstances. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006). "Mindful of the purposes of the Act and of the antitrust laws generally," however, this Court has held that the RPA "does not ban all price differences," but instead "proscribes price discrimination only to the extent that it threatens to injure competition." *Id.* at 176 (cleaned up). As the Court has explained, the "'Act should be construed consistently with broader policies of the antitrust laws,'" including their "traditional concern for consumer welfare and price competition." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220, 221 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)). Those policies are of paramount importance because "'[l]ow prices benefit consumers regardless of how those prices are set'" – a principle this Court enforces "'regardless of the type of antitrust claim involved.'" *Id.* at 223 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

Section 11 of the Clayton Act generally empowers the Federal Trade Commission ("FTC") "to enforce

compliance with" the RPA. 15 U.S.C. § 21(a). The Clayton Act also authorizes private plaintiffs injured by an RPA violation to sue for damages under Section 4, *see id.* § 15, and those subject to the threat of future injury to seek an injunction under Section 16, *see id.* § 26. A prevailing plaintiff also is entitled to attorney's fees from the defendant. *See id.* §§ 15(a), 26.

The RPA claims at issue here concern "secondary line" liability. Secondary-line liability captures the idea that a seller may not favor one purchasing customer over another by forcing the disfavored customer to pay higher prices and thereby injure its ability to compete with a favored customer. As a result, such claims "involve price discrimination that" (allegedly) "injures competition among the discriminating seller's customers" – that is, customers in "actual competition" with each other. *Volvo*, 546 U.S. at 176-77. This case concerns alleged secondary-line liability under two subsections of the Act.

The first is Section 2(a). It requires proof (among other things) that the challenged price discrimination "'may . . . injure, destroy, or prevent competition' to the advantage of a favored purchaser, *i.e.*, one who 'received the benefit of such discrimination.'" *Id.* (quoting 15 U.S.C. § 13(a)) (cleaned up).

Volvo settled that the term "competition" in Section 2(a) means competition for the same customer. There, the Court "granted certiorari to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act 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 lower court there focused on

whether the plaintiff and the allegedly favored competitors had competed "at the same functional level" – which is to say, had been retailers, wholesalers, or manufacturers – "and within the same geographic market." *Id.* at 178. But the Court rejected that test, concluding that the "selective comparisons" that the plaintiff mustered did "not show the injury to competition targeted by the Robinson-Patman Act," given that Section 2(a) addresses competition "*for the same customer*." *Id.* The Court held that the plaintiff could not satisfy that burden without comparisons supported by a "systematic study" of competition. *Id.*

The second provision at issue here is Section 2(d). It prohibits manufacturers from paying "customers" that are "competing" with each other disproportionate amounts for "services or facilities" that those customers provide. 15 U.S.C. § 13(d). Years ago, this Court stated on review of an FTC order that, "[u]nlike § 2(a)," Section 2(d) does not "require[], as proof of a prima facie violation, a showing that the illicit practice has had *an injurious or destructive effect on* competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959) (emphasis added). That is because "the antitrust laws are not strangers to the policy of nipping potentially destructive practices before they reach full bloom." *Id.* at 68.

This Court never has held that firms that are *not* in actual competition for purposes of Section 2(a) can still be "competing" for purposes of Section 2(d). On the contrary, in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), the Court concluded that the class of "customers competing *in the distribution of* [*the relevant*] *products or commodities*" addressed in Section 2(d) extends only to that subset of competing firms that compete "directly" – in the language typical of the time, at "the

same functional level." *Id.* at 343, 356-57. This class of competitors was, in the Court's view, *narrower* than that addressed in Section 2(a). *See id.* at 357.

2. Beyond their *prima facie* burden under Section 2(d), private plaintiffs seeking damages or an injunction must show an actual or threatened "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986) ("It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred."). That means the plaintiff must point to an injury (past or threatened) *to competition*, not only an injury to the plaintiff alone. *See Cargill*, 479 U.S. at 111. This rule ensures that private plaintiffs' interests are aligned with consumers' interests in lower prices; a contrary rule would have the "perverse result" of punishing the "vigorous competition" protected by the antitrust laws. *Id.* at 116; *see id.* ("To hold that the antitrust laws protect competitors from the loss of profits due to [vigorous] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.").

B. Factual Background

Living Essentials makes and distributes 5-hour ENERGY®. App. 48a. Respondents are seven consumer-goods wholesalers ("Wholesalers") that buy 5HE and resell it "to convenience stores and grocery stores, among other retailers." *Id.* Wholesalers sued Living Essentials, claiming that the prices Whole-

salers paid for 5HE were higher than those paid by Costco, "which purchases 5-hour Energy for resale at its Costco Business Centers – stores geared toward 'Costco business members,' such as restaurants, small businesses, and other retailers, but open to any person with a Costco membership." *Id.* As relevant to this petition, Wholesalers sought damages for price discrimination under Section 2(a) of the RPA and an injunction for disproportionate service payments under Section 2(d). App. 49a-50a.

C. Proceedings Below

1. At summary judgment, the district court found that Wholesalers proved all but one element of their Section 2(a) claim – whether they suffered a competitive injury, including whether they were in competition with Costco for the sale of 5HE. App. 51a. The parties tried the Section 2(a) claim to a jury and tried Wholesalers' Section 2(d) claim to the court. *Id.* Under both provisions, Wholesalers' claims require proof of actual competition between the alleged favored and disfavored purchasers. *See Volvo*, 546 U.S. at 177; *Fred Meyer*, 390 U.S. at 349; *see also* App. 116a-118a. The trial turned on whether Wholesalers compete with Costco. App. 51a. The parties relied on different types of evidence. Most notably, only Living Essentials proffered the testimony of an expert economist. As elaborated below, after examining Wholesalers' own sales data, the expert "opined that Plaintiffs and Costco were not competitors because 'none of the plaintiffs had an economically significant loss of customers associated with the [challenged] promotions of 5 hour energy.'" App. 107a (quoting Trial Tr. 107:17-110:20 (Oct. 16, 2019), ECF No. 548). In the economist's expert opinion, petitioners and respondents were not selling to the same customers.

The jury rejected Wholesalers' Section 2(a) claim, and the district court rejected Wholesalers' Section 2(d) claim. App. 53a. "[B]ased on its own independent review of the evidence," the court held "that the Wholesalers had 'failed to prove by a preponderance of the evidence that they competed with Costco for resale' of 5-hour Energy." *Id.* (quoting App. 110a-111a). Instead, the court found that "Defendants have proven the lack of competition." App. 97a (heading formatting removed). It also held that, "[h]aving concluded that Plaintiffs have not proven they competed with Defendants, it follows that Plaintiffs likewise cannot prove an antitrust injury." *Id.*

2. Wholesalers appealed. Judges Miller (who authored the controlling opinion regarding Section 2(a)) and Ikuta rejected Wholesalers' arguments challenging the jury verdict, over Judge Gilman's dissent. But over Judge Miller's dissent, Judges Ikuta and Gilman vacated the district court's ruling in favor of defendants under Section 2(d). Their disagreement concerned when "customers" are "competing" under that provision.

The majority read pre-*Volvo* circuit precedent to hold "that, to establish that 'two customers are in general competition,' it is 'sufficient' to prove" three elements: "(1) one customer has outlets in 'geographical proximity' to those of the other; (2) the two customers 'purchased goods of the same grade and quality from the seller within approximately the same period of time'; and (3) the two customers are operating 'on a particular functional level such as wholesaling or retailing.'" App. 65a (quoting *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 708 (9th Cir. 1964)). Reversing the district court, the majority relied primarily on lay witness testimony, a marketing expert's discussion of ordinary-course evidence, and a store-location map to

hold the first and third of these satisfied, remanding the timing question for further proceedings. App. 70a-73a.

Judge Miller dissented on the ground that "a common position in the supply chain in a shared geographical market is not sufficient, by itself, to establish actual competition." App. 84a (Miller, J., dissenting in relevant part). Instead, he explained, *Volvo* requires a plaintiff to show that the businesses were competing "for the same customer." *Id.* Put differently, as "other circuits have held," "'two parties are in competition only where, after a "careful analysis of each party's customers," [a court] determine[s] that the parties are "each directly after the same dollar."'" App. 84a-85a (quoting *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 197 (3d Cir. 2010); citing other cases).

Judge Miller also explained why Wholesalers could not satisfy that standard. First, they could not prove "that Costco sold to the *same* retailers as the Wholesalers," in light of "substantial differences in operations" that "may well have appealed to different customers." App. 85a. These comparisons included (for example) Costco's business practice of pre-set pricing and most Wholesalers' willingness to negotiate, and Costco Business Centers' openness "to any consumer with a Costco membership, some of whom were" (unlike Wholesalers' customers) "end-consumers." *Id.*

Second, Judge Miller pointed to the analysis performed by Living Essentials' economic expert – again, the only antitrust economist to testify at trial. That expert examined Wholesalers' sales data and found no evidence that Wholesalers and Costco competed on

price. App. 85a-87a. More specifically, as Judge Miller explained, the expert's analysis showed that some Wholesalers had higher prices than Costco did, but did not see "any economically significant customer loss" to Costco: "the maximum level of customer switching across the Wholesalers and Costco was ten times lower than the switching attributable to ordinary customer 'churn.'" App. 42a. Reinforcing this evidence "that the Wholesalers' customers did not treat Costco as a substitute supplier of 5-hour Energy," Judge Miller explained, the expert found "that even the opening of three new Costco Business Centers had no statistically significant effect on the Wholesalers' 5-hour Energy sales." *Id.* Their customer bases may have differed, the expert posited, because "the Wholesalers might draw customers interested in buying on credit" (which Costco did not offer) or "in the unique products the Wholesalers offer." App. 42a-43a.

The majority seemed to agree that "it is not clear [Costco and Wholesalers] sold to the same buyers." App. 74a. But it minimized that issue by limiting *Volvo* to what it called an "unusual circumstance": one in which there is no "possibility of competition between customers" because each of them sells to a "'separate and discrete' buyer" or "group of buyers." App. 69a, 76a. In contrast, the court viewed this case as "a typical chainstore-paradigm case where the Wholesalers and Costco carried and resold an inventory of 5-hour Energy to all comers," and distinguished *Volvo* on that ground. *Id.*

It further held the operational differences between Costco and Wholesalers were irrelevant because "customers may compete for purposes of section 2(d) even if they operate in different manners." App. 73a-74a. According to the majority, "the question whether

one business lost buyers to another does not shed light on whether the businesses are in competition, but only on whether there has been an injury to competition, meaning that the seller's price concessions caused buyers to switch from one business to another." App. 75a. That is so, held the majority, because "a plaintiff" need not "show potential injury to competition . . . to make a claim under section 2(d)." *Id.* Accordingly, the majority stated, expert "testimony about a lack of switching between Costco and the Wholesalers does not undermine the Wholesalers' claim that they are in competition with Costco for resales of 5-hour Energy." *Id.*

3. Living Essentials petitioned for rehearing. Echoing Judge Miller, it argued that the panel's decision is contrary to *Volvo* and other circuits' decisions. To illustrate the Ninth Circuit's conflict with the other circuits, Living Essentials cited decisions from multiple circuits holding that proving competition requires "'careful analysis of each party's customers'" to determine whether the two firms are "'each directly after the same dollar.'" *Feesers*, 591 F.3d at 197 (quoting *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n.20 (5th Cir. 1975)). Living Essentials also explained that the panel had overlooked the district court's antitrust-injury holding (even though Living Essentials' brief had defended it), and highlighted that the court's decision directly conflicted with a decision of the Second Circuit.

The Ninth Circuit subsequently issued an amended opinion and otherwise denied rehearing. App. 2a. The amendments did not alter the Section 2(d) holding. But they did address Wholesalers' burden to "show a threat of antitrust injury." App. 5a. In a new footnote, the majority held that, "[o]n remand, the district court

should consider whether there is any violation of the antitrust laws that threatens loss or damage to the Wholesalers" – but on the new premise that the majority's application of pre-*Volvo* precedent also governed the meaning of "competition" for antitrust-injury purposes. App. 32a n.7.[1]

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S HOLDING THAT SECTION 2(d) PLAINTIFFS NEED NOT PROVE THEY ARE COMPETING WITH ALLEGEDLY FAVORED CUSTOMERS FOR THE SAME BUYERS

A. The Ninth Circuit's Judgment Conflicts With Decisions Of Other Circuits About *Volvo*'s "Same Customer" Standard

The Ninth Circuit's decision creates a circuit split regarding the meaning of "competition" under the RPA. In *Volvo*, this Court granted review to address a question regarding Section 2(a) that is virtually identical to the one addressed below regarding Section 2(d): whether evidence that two firms operated "at the same functional level and within the same geographic market," 546 U.S. at 178 (cleaned up), is sufficient to show they were in "competition" under Section 2(a) "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. The Court held that it is not, because "competition" under Section 2(a) means competition "*for the same customer*." *Id.* at 178.

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[1] The court of appeals also amended a portion of its opinion regarding a different issue (the district court's treatment of functional discounts, *see* App. 15a-16a), but those amendments do not bear on the questions presented.

The majority below limited *Volvo* to its facts and revived the "functional level" test for Section 2(d) cases. As a result, throughout the Ninth Circuit, firms not in "competition" under Section 2(a) still can be "competing" under Section 2(d). That decision breaks from other courts of appeals' holdings that apply *Volvo* to mean that two firms are in competition under the RPA only if they *actually* compete for the same customers.

First Circuit. In *The Shell Co. (Puerto Rico) Ltd. v. Los Frailes Service Station, Inc.*, 605 F.3d 10 (1st Cir. 2010), a gas station franchisee alleged that Shell violated Section 2(a) of the RPA by offering other gas stations more favorable prices on fuel. *Id.* at 14, 25. To support its argument that it was competing with the favored gas stations, the franchisee relied on evidence that three of the favored gas stations were within two miles of the franchisee's gas station. Yet the First Circuit demanded more specific proof that the stations competed for the same customers. *See id.* at 25-26. The court held that the franchisee lacked that proof, reasoning that the franchisee had not "explained why consumers would in practice choose among these stations." *Id.* at 26. Because the franchisee failed to show it was in actual competition with the favored gas stations, the court affirmed the district court's grant of summary judgment rejecting the franchisee's Section 2(a) claim. *Id.*

Second Circuit. In *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015), independent retail pharmacies claimed that pharmaceutical manufacturers had violated (as relevant here) Sections 2(a) and 2(d) by giving better pricing to (among others) "pharmacy benefit managers" – organizations that "sometimes engage in retail sales

directly or through mail-order pharmacies that they control." *Id.* at 206. The Second Circuit read *Volvo* to have looked to "the existence and degree of actual competition among different purchasers" – and, "[i]n particular," to "the number of instances in which plaintiff and a favored purchaser competed head-to-head, [seeking] instances where sales had been diverted from the former to the latter." *Id.* at 210-11.

The Second Circuit did not view as necessary an analysis of whether the firms in question operated on the same functional level (retail) and in the same places (through mail-order or otherwise). It instead affirmed the lower court's grant of summary judgment on the plaintiffs' Section 2(a) claim because data documenting patient behavior showed that independent pharmacies had lost virtually no patients to the allegedly favored purchasers. *See id.* at 207-08, 211-13. It also held that the same evidence doomed the plaintiffs' Section 2(d) claim for the *separate* failure to prove antitrust injury (addressed below). *Id.* at 215.

Third Circuit. In *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191 (3d Cir. 2010), a plaintiff food distributor alleged that the defendant sold egg and potato products to a food service management company at a lower price. *Id.* at 193. To determine whether those firms were competing, the court analyzed whether the parties were "'directly after the same dollar.'" *Id.* at 197 (quoting *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 214 (3d Cir. 2007)). The court concluded they were not, because the relevant competition between the companies occurred during a bidding stage, which was "*prior* to [the defendant's] sales of food products" to the companies. *Id.* at 203. The competition at that stage was "irrelevant to the sales made by [the defendant] after that competition

was complete." *Id.* Because the subsequent resales of the defendant's products by each company were part of "mutually exclusive commitments," the court held that the plaintiff and the food service management company did not "compete for the same dollar." *Id.* at 206.

Fifth Circuit. In *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), both the plaintiff and another company manufactured military hardware. *Id.* at 1061. After a bidding process, each company separately contracted to produce it for the government. *Id.* at 1061-62. To create the product, both companies purchased a component from the same subcontractor. *Id.* at 1061. The plaintiff alleged that the subcontractor charged the plaintiff a higher price than the other company. *Id.* The court reasoned that the "government's selection under both [contracts] of a single producer for each precluded the possibility of competition between these suppliers as a matter of law." *Id.* at 1066-67. Although the government was the ultimate buyer under each of the contracts, the court concluded that the companies "were not competing for the same consumer dollar." *Id.* at 1068; *see also id.* at 1068 n.20 ("'Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.'") (quoting *Ag-Chem Equip. Co. v. Hahn, Inc.*, 350 F. Supp. 1044, 1051 (D. Minn. 1972), *aff'd in part, vacated in part on other grounds*, 480 F.2d 482 (8th Cir. 1973)).

Similarly, in *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), the Fifth Circuit affirmed a grant of summary judgment because the plaintiffs failed to show "actual competition with a favored purchaser," which the court explained

required a showing that the favored and disfavored purchasers were "'directly after the same dollar.'" *Id.* at 692-93 (quoting *M.C. Mfg.*, 517 F.2d at 1068 n.20).

B. The Ninth Circuit's Aberrant Reading Of *Volvo* Is Erroneous And Will Sow Confusion

1. The Ninth Circuit's Decision Is Erroneous

Under a proper understanding of *Volvo* and the majority approach among the circuits, this is a straightforward case. Wholesalers proffered only anecdotal evidence that Wholesalers and Costco were competing for the same customers. *Volvo*, however, requires more robust economic analysis. Here, the only empirical study of consumer substitution in the record shows that petitioners and Wholesalers were *not* competing for the same customers. The district court and Judge Miller therefore correctly rejected Wholesalers' Section 2(d) claim.

The majority erred in relying on pre-*Volvo* circuit precedent focusing on whether firms operated at the same "functional level" and in the same place. *Volvo* rejected that test because, as Judge Miller explained, it "is contrary to the economic reality 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); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2363c2 (2023) ("Areeda & Hovenkamp, *Antitrust Law*") ("Even two resellers of the same product are not necessarily in competition with one another. For example, they may . . . serve different types of customers . . . ."). Put differently, much more than two blocks separates Pineapple and Pearls from the Eastern Market Starbucks in any competition to sell coffee – and the Ninth Circuit's Section 2(d) test ignores all of it.

The Ninth Circuit's opinion could be read to suggest that *Volvo* governs only Section 2(a) cases (like *Feesers* and *M.C. Mfg.*), in which harm to competition is an element of a *prima facie* case. That holding also would be erroneous. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), held that the class of firms "competing" under Section 2(d) is *narrower* than the class of firms "competing" under Section 2(a) – limited to those that compete "at the same functional level." *Id.* at 356-57. Under the statutory text, there is no plausible argument that Section 2(d) *broadens* the set of "competing" firms beyond the limits of Section 2(a). *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 2363c ("Section 2(d) of the Robinson-Patman Act refers to 'competing' commodities in such a way as to make that idea analogous to . . . the general secondary-line requirement that the favored and disfavored purchasers be in competition with one another."); *see also NCUA v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998) (applying "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning").

Indeed, the majority's departure from *Volvo* constitutes a more fundamental error of antitrust law. The majority opinion states that "the question whether one business lost buyers to another does not shed light on whether the businesses are in competition." App. 6a, 30a-31a. But courts long have considered evidence showing how buyers respond to different sellers' pricing relevant "to recogniz[ing] competition where, in fact, competition exists." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-27 (1962). Indeed, both merger and conduct cases often turn on evidence about the substitutes that consumers choose in response to price increases. *See*, *e.g.*, U.S. Dep't of Justice & Fed.

Trade Comm'n, *Merger Guidelines* § 4.2.A, at 35-36 (2023) (in subsection regarding "Generally Applicable Considerations" in "Evaluating Competition Among Firms," explaining that "[c]ustomers' willingness to switch between different firms' products is an important part of the competitive process" and that "[e]vidence commonly analyzed to show the extent of substitution among firms' products includes," among other things, "how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions"), https://www.justice.gov/atr/2023-merger-guidelines; *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992) (similar); *Brown Shoe*, 370 U.S. at 325 (same; further concluding that "sensitivity to price changes" may support a narrower "submarket"). The Ninth Circuit identified no reason to treat the evidence regularly used to determine the boundaries of competition in antitrust cases as *irrelevant* under the RPA, and no such reason exists.

The majority's decision goes further than the test rejected in *Volvo* for another reason Judge Miller identified. *Volvo* held that a Section 2(a) plaintiff's "functional level" evidence was legally insufficient even to support a jury verdict that it had won – rejecting the post-trial judgments of both the district judge and the court of appeals. But under the decision below, "a defendant is barred from *rebutting* the inference of competition" supported by that test "by presenting evidence that two resellers at the same functional level and in the same geographic area are not, in fact, in actual competition with each other." App. 44a (Miller, J., dissenting in relevant part) (emphasis added). Even if evidence satisfying the "functional level" test can support a reasonable

inference (e.g., under Rule 12(b)(6)) that two firms are in competition in some circumstances, an empirical study of consumers' behavior must remain relevant as rebuttal evidence: that behavior may (as it did in *Volvo* and here) reveal a market that is "segmented by more than simply functional level, geography, and grade and quality of goods." *Id*

The Ninth Circuit is the *only* court of appeals to hold that empirical economic evidence of the kind used routinely in antitrust cases is *legally irrelevant* to whether firms are "competing" under Section 2(d). That holding will embolden those who hope to cleave the RPA from the "'broader policies of the antitrust laws,'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979))[2] – harming the consumers the antitrust laws protect. It thus warrants review.

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[2] *See*, *e.g.*, *Prepared Remarks of Commissioner Alvaro M. Bedoya*, FTC, "Returning to Fairness," Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street at 1-2 (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf; *see id.* at 8 ("I think we need to step back and question the role of efficiency in antitrust enforcement. . . . I think it is time to return to fairness" by, among other things, pursuing RPA cases.); Brian Callaci, Daniel A. Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure* at 59, Open Markets Institute (Dec. 6, 2023) (arguing for expanded RPA enforcement and contending that "competition is not a categorical good"), https://www.openmarketsinstitute.org/s/The-Robinson-Patman-Act-as-a-Fair-Competition-Measure-11-28-23.pdf.

2. The Ninth Circuit's Decision Resurrects The Confusion *Volvo* Sought To Resolve

The majority below sought to limit *Volvo* to the "unusual circumstance" in which there is no "possibility of competition between customers" because each of them sells to a "'separate and discrete' buyer" or "group of buyers." App. 24a, 31a-32a. The majority similarly read the same limitation into the Third Circuit's precedent. App. 26a (reasoning that *Feesers* "suggest[ed] that there may be no actual competition where customers are selling to 'two separate and discrete groups' of buyers"). The majority thus concluded that *Volvo* has nothing to say about "a typical chainstore-paradigm case." App. 31a-32a.

But that is backwards. What drove *Volvo* is that modern distribution chains are more complicated than the functional-level test can capture. That is as true of "chainstores" as it is of others; that label proves nothing about whether the City Center Hermès is competing with the T.J. Maxx, Macy's, and Nordstrom Rack locations a short walk away. Far from being a fact-bound outlier, *Volvo* exemplifies the Court's effort to "refine[]" its reading of the RPA "over the course of several decades," *Cash & Henderson Drugs*, 799 F.3d at 210, as antitrust law has replaced hoary formalism like the functional-level test with modern economics to better capture these subtler competitive dynamics.

By inventing its limitation on *Volvo*, the Ninth Circuit's decision creates confusion regarding the applicability of *Volvo* beyond its facts. For example, the Ninth Circuit attempted to distinguish this case from *Volvo* by concluding (erroneously) that "the Wholesalers and Costco carried and resold an inventory of 5-hour Energy to all comers." App. 32a. That reasoning directly conflicts with the First Circuit's decision in *Shell*, where the customers at issue were all retail

gas stations selling gasoline to the general public. *See Shell*, 605 F.3d at 25. The First Circuit did not find it sufficient that the gas stations were selling to all consumers; instead, the court looked for evidence the stations were actually competing for the same customers. *Id.* at 25-26. Yet under the Ninth Circuit's reasoning, the fact that the gas stations were all retailers selling to the general public in the same geographical area would mandate a finding that the gas stations were competing, regardless of the lack of evidence of actual competition. The Ninth Circuit thus has created uncertainty for upstream firms deciding whether to grant discounts in instances where their customers sell to the general public, even if those customers do not compete with each other for the same consumers.

Accordingly, the Court should grant the petition and resolve the confusion about *Volvo*'s applicability.

II. THE NINTH CIRCUIT'S ANTITRUST-INJURY HOLDING WARRANTS REVIEW

The panel majority below also incorporated its erroneous understanding of "competition" under the RPA into its analysis of antitrust injury. That holding likewise warrants review because it created an additional circuit split.

A private plaintiff may bring an antitrust case only to redress harm "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (similar); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572 (1990) (similar). This limitation on private plaintiffs applies with full force to Section 2(d).

To be sure, the FTC can prove "a prima facie violation" of Section 2(d) without also proving "that the illicit practice has had an injurious or destructive effect on competition." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). But Congress's supervisory power can ensure the FTC wields that prophylactic rule "'consistently with broader policies of the antitrust laws.'" *Brooke Grp.*, 509 U.S. at 220 (quoting *Great Atl. & Pac. Tea*, 440 U.S. at 80 n.13). There is no such screen in private litigation, which is why the antitrust-injury doctrine exists – to stop a plaintiff from weaponizing antitrust litigation to pursue interests that run counter to consumers'. *See Atlantic Richfield*, 495 U.S. at 342 (explaining that the antitrust-injury requirement "ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place"). Section 2(d) cases present that risk at its acme: raising consumer prices is often precisely what an RPA plaintiff wants to accomplish through a court order raising another firm's costs.

The Second Circuit's decision in *Cash & Henderson Drugs* illustrates the proper application of antitrust injury in a Section 2(d) case. As explained above, that court held that a Section 2(a) claim failed on the merits because the plaintiffs did not lose a substantial number of customers to allegedly favored rivals. 799 F.3d at 213. The court also held that "[i]t follows" from that failure to prove competitive injury that the plaintiffs "also fail to raise a question of material fact with respect to whether their injuries are the type of injury contemplated by the [RPA], as required to prove antitrust injury. The *de minimis* loss of sales, as well as of customers, to the favored purchasers is a powerful indication that price discrimination did not harm competition." *Id.* at 214 (citation omitted). The court

went on to hold that the same reasoning extended to the plaintiffs' Section 2(d) claim because, "[a]lthough Section 2(d) does not require plaintiffs to establish competitive injury, it does require them to establish antitrust injury." *Id.* at 215. The court reasoned that, because the "plaintiffs failed to show competitive or antitrust injury with regard to their Section 2(a) claim, summary judgment is appropriate with respect to their" Section 2(d) claim. *Id.*

The Ninth Circuit's treatment of antitrust injury squarely conflicts with *Cash & Henderson Drugs*. After initially overlooking the issue, the majority (in its amended opinion) relied on its merits reasoning to conclude that Wholesalers could establish the existence of competition for purposes of antitrust injury under the same "functional level" test, as well. App. 32a n.7 In other words, in the Ninth Circuit, the "functional level" test now permits a Section 2(d) plaintiff to show antitrust injury even if empirical evidence of diverted sales shows that it and the allegedly favored customer are *not* competing on price in the first place.

This hollowing-out of antitrust injury in Section 2(d) undermines the principle that the RPA "'should be construed consistently with broader policies of the antitrust laws.'" *Brooke Grp.*, 509 U.S. at 220 (quoting *Great Atl.*, 440 U.S. at 80 n.13). That conclusion merits review, as well.

III. THIS COURT SHOULD RESOLVE BOTH QUESTIONS IN THIS CASE

This is an excellent case in which to decide both questions. It arrives on appeal from the rare price-discrimination case tried to both a jury and a judge. The record starkly presents the issues, and the questions have been aired ably by disagreeing opinions below.

The issues also are important, for much the same reasons the Court granted review in *Volvo*. To manage complex modern distribution chains, upstream firms need certainty about when a decision to grant a downstream firm a discount – something the antitrust laws ordinarily *encourage* them to do – will invite private antitrust litigation from a disgruntled trading partner hunting for treble damages, an intrusive injunction, and attorney's fees at the other side's expense. By attempting to distinguish this case as emblematic of the "chainstore paradigm," App. 32a, the Ninth Circuit belies the complexity and variety of modern distribution chains and greatly reduces the flexibility of upstream firms. Any firm that sells its products to a chainstore now risks liability if it grants that chainstore a procompetitive discount, even if the firm takes care to offer the same discount to its other purchasers that compete for the same customers by offering similar services as the chainstore.

The Ninth Circuit's decision holding rigorous empirical evidence of competition irrelevant in Section 2(d) cases will invite what *Volvo* turned away: RPA cases based on "selective comparisons" and "mix-and-match, manipulable" evidence, rather than evidence that the favored and disfavored firms "in fact competed for the same . . . sales." 546 U.S. at 178-79. And by doing the same for antitrust injury, the Ninth Circuit has invited Section 2(d) cases that will punish price competition and harm consumers. The Court should not let that outcome stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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