No.

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID L. WILLIAMS
MICHAEL N. SHANNON
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

QUESTIONS PRESENTED

The Robinson-Patman Act prohibits specified forms of price discrimination "between different purchasers" where the effect of "such discrimination" may be harm to competition "with any person who * * * knowingly receives the benefit of such discrimination." The questions presented are:

1. Whether an unaccepted offer that does not lead to a purchase – so that there is not "discriminat[ion] * * * between different purchasers" as the statutory language contemplates – may be the basis for liability under the Act.

2. Whether the Act permits recovery of damages by a disfavored purchaser that does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that "receives the benefit of" the defendant's price discrimination.

PARTIES TO THE PROCEEDING

The petitioner is Volvo Trucks North America, Inc., defendant-appellant in the courts below. The respondent, plaintiff-appellee in the courts below, is Reeder-Simco GMC, Inc.

RULE 29.6 STATEMENT

Volvo Trucks North America, Inc., is a wholly owned subsidiary of VNA Holdings, Inc., which is a wholly owned subsidiary of AB Volvo, a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Eighth Circuit (App., *infra*, 1a-32a) are reported at 374 F.3d 701. The district court's judgment (App., *infra*, 33a-34a) and order denying judgment as a matter of law (App., *infra*, 35a) are unreported. The district court's order on the jury verdict (App., *infra*, 36a-39a) and order granting summary judgment in part (App., *infra*, 40a-42a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2004. The order of the court of appeals denying rehearing (App., *infra*, 43a-44a) was entered on October 6, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it unlawful

> to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination.

STATEMENT

A divided panel of the Eighth Circuit has dramatically extended the reach of the Robinson-Patman Act (RPA), which prohibits certain forms of price discrimination. The RPA makes it unlawful, in defined circumstances, for a seller "to discriminate in price between different purchasers * * * where the effect of such discrimination may be * * * to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit of such discrimination." 15 U.S.C. § 13(a).

Before the Eighth Circuit's decision, courts consistently held that the RPA means what it says when it forbids discrimination between "purchasers" – liability cannot arise from a discriminatory *offer* to sell that does not result in a purchase. Moreover, discrimination between purchasers is not *per se* illegal. Even the most expansive interpretations of the RPA (before the Eighth Circuit's decision here) have construed the statute to protect only competition between favored and disfavored purchasers – not to protect disfavored purchasers from disadvantage when they are competing against other firms that do not purchase the defendant's products. The Eighth Circuit has extended the statutory prohibition beyond its settled meaning by ignoring both of those principles. *Every* incident of alleged discrimination in this case involved either a mere offer to sell (rather than a purchase) or a contention that the plaintiff lost sales or profits to a competitor that did not buy the defendant's products (rather than to a favored purchaser).

The court's errors expand the coverage of the RPA to encompass common and procompetitive pricing practices that previously had been regarded as categorically permissible under the RPA. The decision below comes dangerously close to stating a blanket condemnation of all price differences in the sale of products and conflicts with the plain language of the statute, the decisions of other courts of appeals, and the fundamental policies that underlie the antitrust laws.

The consequences of these errors extend far beyond this case and beyond the boundaries of the Eighth Circuit. The Chair of the Section of Antitrust Law of the American Bar Association observed in 2003 that "[a]rguably[] more business decisions are affected by the Robinson-Patman Act than by any other antitrust law because so many interstate sales and dealer-oriented promotions of commodities are subject to its terms." Robert T. Joseph, *From the Section Chair*, ANTITRUST, Summer 2003, at 3. Because any business that distributes its products

nationally may be sued for treble damages under the RPA in the Eighth Circuit, the decision may deter procompetitive discounting in a large portion of the economy.

A. Volvo's Product Distribution Practices

Petitioner Volvo Trucks North America, Inc. (Volvo) manufactures a broad line of heavy trucks for both highway and vocational (*e.g.*, dump trucks and mixer trucks) use, in competition with other manufacturers such as Freightliner, International, Peterbilt, and Kenworth. Volvo, like other heavy truck manufacturers, offers several different base models of trucks, each of which can be built to a user's precise specifications, using a variety of different engines, transmissions, brakes, axles, suspensions, and other components.

Volvo distributes its trucks throughout the United States through a network of independent dealers, who sell to retail customers such as trucking companies. These retail customers typically solicit competitive bids from several dealers representing different manufacturers, and then purchase from the dealer offering the most attractive bid. Most trucks are built to order after the retail customer has contracted to buy from a dealer. App., *infra*, 2a. It would be prohibitively expensive for a dealer to maintain an inventory of trucks sufficient to meet the widely diverse needs of its potential retail customers. Therefore, during the competitive bidding process Volvo *offers* to sell trucks to its dealers that will meet the retail customer's specifications, and its dealers offer to sell those trucks to the retail customer. A dealer *purchases* the trucks from Volvo only if the retail customer accepts the dealer's bid.

Volvo offers a base wholesale price to its dealers that is 80% of its published retail price. App., *infra*, 2a. During the competitive bidding process, however, dealers often seek an additional discount, or "concession," from the base wholesale price – a discount that permits the dealer, if it independently

decides to do so, to submit a lower bid to the potential retail customer. *Ibid.* Volvo's district sales managers are authorized but not required to offer such discounts up to amounts specified in a matrix that Volvo does not disclose to its dealers or to the public. C.A. ER 1600, 1610-1613. Higher-level personnel from Volvo's headquarters are authorized but not required to offer even larger discounts. See *id.* at 1619. Volvo decides on a case-by-case basis whether to offer a discount and how large such a discount will be, after considering the circumstances of a specific bidding situation. *Id.* at 1622-1623. For example, Volvo may offer a larger discount if its assembly plant is operating well below capacity or if industry-wide demand for trucks is declining. *Id.* at 1606, 1609. It may offer a larger discount for a retail customer that has historically purchased a different brand of truck, and may offer an even greater discount if that customer is expected to purchase a large number of trucks in the future. *Id.* at 1608-1609. Because of these and other factors that vary over time and from one retail customer to another, Volvo frequently offers a different discount – and hence a different price – to a dealer in connection with a bid to one retail customer than it offers to that dealer (or to another dealer) in connection with a bid to a different retail customer. *Id.* at 1617-1618; 1622-1623. Other truck manufacturers use similar pricing practices. *Id.* at 1609, 1612.[1]

When two or more Volvo dealers are competing to sell to the same retail customer, Volvo offers the same discount to each. C.A. ER 1620-1621. Head-to-head competition between Volvo dealers for the same customer, however, is the exception rather than the rule. *Ibid.* Most retail customers solicit a bid from only one Volvo dealer.

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[1] Ford's pricing practices, similar in all material respects, were held not to violate the RPA in *Metro Ford Truck Sales, Inc.* v. *Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

B. Reeder's Robinson-Patman Act Claims

Respondent Reeder-Simco GMC, Inc. (Reeder) is a truck dealer located in Fort Smith, Arkansas. App., *infra*, 2a. In 1995, Reeder entered into a five-year franchise agreement with Volvo, with provisions for automatic one-year extensions if Reeder met certain sales objectives that were to be unilaterally determined by Volvo. App., *infra*, 2a. Volvo placed Reeder on "probationary" status when it failed to meet those objectives in 1995 and 1996. C.A. ER 1109; 1138-1139; see *id.* at 1651. After Reeder failed to meet the objectives in 1997 and 1998, Volvo notified Reeder that, if it did not meet the 1999 objectives, its franchise would be terminated effective March 31, 2000. Reeder C.A. Br. 4-5; see also C.A. ER 1651. In February 2000, Reeder sued Volvo, alleging among other things that Volvo had violated the Robinson-Patman Act.[2] App., *infra*, 3a.

At trial, Reeder supported its RPA claim with evidence of selected transactions involving specific retail customers. Reeder produced evidence concerning its sales to four different retail customers and, for each sale, identified a *different* Volvo dealer that sold to a *different* retail customer in an entirely separate transaction. App., *infra*, 4a-6a. Reeder then compared the discount it received from Volvo in connection with its retail sale and the discount Volvo extended to the other Volvo dealer in connection with the other dealer's sale to a *different* retail customer. In each pair of transactions selected by Reeder for these "sales-to-sales" comparisons, Volvo's discount to Reeder was lower than its discount to the other dealer. *Ibid.* Reeder asserted that it would have earned greater profits on each of these sales if Volvo had granted to Reeder the same discount

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[2] Reeder also alleged a violation of the Arkansas Franchise Practices Act, Ark. Code Ann. §§ 4-72-201 to 4-72-209. App., *infra*, 2a. The district court entered a judgment in favor of Reeder on this claim that was affirmed by the court of appeals. That judgment is not challenged in this petition.

that it granted to the other Volvo dealer in connection with the different sale to which it was compared.

Reeder also introduced evidence concerning a large number of unsuccessful bids it submitted to potential retail customers. App., *infra*, 6a. For twelve of these unsuccessful bids, Reeder identified successful bids by other Volvo dealers that resulted in sales to *different* retail customers in unrelated transactions. In each of these "offers-to-sales" comparisons, Reeder was offered a discount (but did not purchase at that discount, because its bid to the customer was unsuccessful) that was less than the discounts at which other dealers purchased from Volvo for resale to *different* retail customers. *Ibid.* Reeder asserted that its bids would have been successful if Volvo had offered it the same discounts that Volvo granted to the other dealers in the separate transactions to which they were compared.

Reeder did not compete against another Volvo dealer in *any* of the bids that were examined in the sales-to-sales or in the offers-to-sales comparisons. In each of the offers-to-sales comparisons, Reeder claimed that it lost a sale *to a non-Volvo dealer* but could have made the sale if Volvo had offered a lower price. App., *infra*, 6a. In each of the sales-to-sales comparisons, Reeder claimed that its profits would have been greater if it could have paid a lower price to Volvo. *Id.* at 4a-6a; see also C.A. ER 149-157. Reeder made no claim that it reduced its price to the retail customer because of competition from another Volvo dealer, because there was no competing bid from another Volvo dealer for any of those sales.

Reeder claimed to have bid to sell more than 5000 trucks (C.A. ER 1159-1161), but it produced evidence of only two instances of claimed discrimination in which Reeder and another Volvo dealer were involved in "head-to-head" competition for the same potential sale. App., *infra*, 12a. In one of these head-to-head comparisons, Reeder competed with Southwest Missouri Truck Center to sell twelve trucks to Hiland Dairy. In

January 1999 Southwest requested and was offered a 7.5% discount; Reeder subsequently requested a 12% discount but was offered only the 7.5% that Volvo had previously offered to Southwest. *Id.* at 4a. Hiland did not make its purchasing decision until August 1999, however and in the intervening period Volvo increased its base wholesale price. Hiland indicated it would purchase from Southwest but demanded the price that had been quoted in January. In response, to compensate for the intervening increase in its base price, Volvo agreed to increase its discount to Southwest to 8.5%. C.A. ER 1627; see also App., *infra*, 4a.

In the only other head-to-head comparison Reeder identified – a bid to sell five trucks to Tommy Davidson (App., *infra*, 12a) – Volvo offered an 18.9% discount to Reeder and to the other Volvo dealer, but Reeder complained that it was offered the 18.9% discount too late, and lost credibility with the customer as a result. C.A. ER 1271-1272. Tommy Davidson chose not to purchase from either Reeder or the other Volvo dealer, but instead bought Freightliner trucks. *Id.* at 1272.

Thus, *all* of the incidents of alleged discrimination had one or both of two characteristics. First, in the sales-to-sales and offers-to-sales comparisons, Reeder did not compete against another Volvo dealer for the sale. For that reason, the alleged discrimination did not cause, and could not have caused, a diversion of sales or profits to a favored purchaser in any of these comparisons. Second, in the head-to-head and offers-to-sales comparisons, Reeder never purchased trucks from Volvo.

Reeder also produced evidence that Volvo adopted a business strategy, the "Volvo Vision," that included plans to reduce the number of Volvo dealers and to increase the average size of the regions that its dealers served. Reeder contended that Volvo limited the discounts it offered to Reeder in order to eliminate Reeder as a dealer. App., *infra*, 3a.

The jury returned a verdict for Reeder on its RPA claim. It found that Reeder suffered actual damages of $1,358,000, and those damages were automatically trebled to $4,074,000. App., *infra*, 33a, 38a. Volvo moved for judgment as a matter of law, which the district court denied. *Id.* at 35a.

C. The Court of Appeals' Decision

A divided panel of the Eighth Circuit affirmed the judgment for Reeder. The majority opinion described the evidence of the offers-to-sales, sales-to-sales, and head-to-head comparisons, as well as the evidence of Volvo's strategy to reduce the number of dealers through which it would sell its trucks, then turned to the requisite elements of secondary-line RPA violations.

The majority indicated that "as a threshold matter Reeder had to show it was a 'purchaser' within the meaning of the RPA." App., *infra*, 8a. The majority also recognized that Reeder was required to show that it competed with favored Volvo dealers, a requirement the majority described as only a showing that "'the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market.'" App., *infra*, 11a (quoting *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578, 585 (2d Cir. 1987)). The majority indicated that the RPA required proof of competitive injury, which it described by quoting in part the language of the statute: "The RPA prohibits price discrimination 'where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition.'" App., *infra*, 14a (quoting 15 U.S.C. § 13(a)). The majority's quotation omitted the key phrase that follows the quoted language: "with any person who knowingly grants or receives the benefit of such discrimination." 15 U.S.C. § 13(a).

When it analyzed these essential elements of an RPA claim, however, the majority addressed each in isolation from the

others. It concluded that Reeder was a "purchaser" because, in the four sales-to-sales comparisons, it actually purchased trucks from Volvo. App., *infra*, 10a. In those comparisons, though, there was no competition between Reeder and another Volvo dealer. When the majority considered whether Reeder was in actual competition with favored purchasers, it relied on the two head-to-head comparisons (*id.* at 11a-12a), but in those comparisons it was clear that there was no "purchase" by Reeder. The majority also stated that Reeder competed against favored Volvo dealers on the basis of evidence that Reeder and other dealers competed (or could compete) in the same geographic area (*ibid.*), even though there was no evidence (other than the two head-to-head comparisons that failed to result in Reeder purchases) that Reeder and the other dealers competed *for the same customers* or that there had been *discrimination* by Volvo in connection with any other head-to-head bids.

The majority held that the evidence was sufficient to show competitive injury, which it described as "lost profits and sales to Reeder and other dealers, and that favored competitors received substantial price reductions over a substantial period of time." App., *infra*, 15a. As examples, it pointed to one of the head-to-head comparisons (Reeder's unsuccessful Hiland Dairy bid) and one of the sales-to-sales comparisons. *Id.* at 16a. The majority also relied on the evidence of Volvo's plans to reduce the number of dealers, stating that "the jury properly could infer [that] Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices." *Ibid.*

Judge Hansen dissented, describing the majority's opinion as an "attempt to fit a square peg into a round hole." App., *infra*, 27a. He observed that the market for heavy truck sales

> will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold. Indeed, where, at the time of the

> end purchase, only one possible seller and one possible buyer exist, competition is totally absent. It is the nature of competitive bidding, not price discrimination, that makes it so.

Id. at 27a-28a. Judge Hansen noted that "'purchaser status' is inextricably intertwined with the existence of actual competition and the potential threat thereto." *Id.* at 28a. In the heavy truck market, "although Reeder and other 'favored' dealers may have competed generally with each other in the larger market for obtaining bids, there is evidence of only two occasions where Reeder competed with a 'favored' Volvo dealer for an actual sale." *Id.* at 29a. The sales-to-sales comparisons were irrelevant "because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." *Ibid.* Judge Hansen also noted that RPA liability properly can be imposed "only where the factors necessary to state an RPA claim all are present in the same relevant transaction. To the extent that the court looks for the existence of one factor in one transaction and the existence of another factor in a second transaction, I conclude that the proof * * * is too tenuous." *Id.* at 30a. The absence of any evidence that sales or profits were diverted from Reeder to favored dealers was also a critical deficiency in Judge Hansen's view. "Although Volvo's conduct may have injured Reeder's ability to compete with non-Volvo dealers, Reeder must look outside the RPA for any relief for this claimed injury. Contrary to the court's assertion, such an injury is not the type of injury to competition that the RPA was intended to prevent." *Id.* at 29a-30a.

Volvo's petition for rehearing *en banc* was denied. Judges Gruender and Hansen dissented. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

This is the rare antitrust case that can be resolved simply by following the plain statutory language. In the two head-to-head

comparisons, Volvo did not "discriminate in price between different *purchasers* of commodities" (15 U.S.C. § 13(a) (emphasis added)), because Reeder did not purchase from Volvo in any of those transactions. In the sales-to-sales comparisons, Reeder competed only against dealers that bought trucks from suppliers *other than* Volvo, so there was no harm to "competition with any person who * * * knowingly *receives the benefit of* * * * *discrimination*" by the defendant. *Ibid.* (emphasis added). And, in the offers-to-sales comparisons, Reeder did not purchase from Volvo *or* compete against another Volvo dealer. That should have been the end of this case. Decision after decision from other courts of appeals – and from this Court – has followed the statutory language, and therefore conflicts with the decision below.

As Justice Scalia has observed, "sales of like goods in interstate commerce violate" Section 2(a) "if three conditions are met: (1) the seller discriminates in price between *purchasers*, (2) the effect of such discrimination may be to injure competition *between the victim and beneficiaries of the discrimination* or their customers, and (3) the discrimination is not cost based." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 577 (1990) (opinion concurring in judgment) (emphasis added). There is simply no doubt here that the two head-to-head comparisons fail the first condition, the sales-to-sales comparisons fail the second, and the offers-to-sales comparisons fail both. The decision below conflicts with the entire relevant body of RPA jurisprudence and erases two bright-line rules on which antitrust lawyers have relied for decades to assure clients that certain forms of competitive discounting are permissible. See, *e.g.*, 3 EARL W. KINTNER & JOSEPH P. BAUER, FEDERAL ANTITRUST LAW §§ 21.12, 22.12 (1983) (discussing two-purchase and competitive-injury requirements); ABA SECTION OF ANTITRUST LAW, A PRIMER ON THE FEDERAL PRICE DISCRIMINATION LAWS 4, 8 (2000) (same).

I. The Eighth Circuit's Holding That A Discriminatory Offer Can Violate The RPA Is Incorrect And Conflicts With Decisions In Other Circuits That The RPA Prohibits Only Discrimination Between "Purchasers"

The Eighth Circuit's decision is plainly incorrect – and squarely conflicts with decisions in other circuits – to the extent that it rests on alleged discrimination by Volvo in the prices that it *offered* to Reeder in the two head-to-head comparisons and in the offers-to-sales comparisons. The RPA makes it unlawful to discriminate in price "between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). That language uniformly has been understood to require proof of at least two consummated purchases at different prices. Discriminatory offers do not violate the RPA.

The "two-purchase" rule is such a fundamental aspect of RPA jurisprudence that it is often treated as "jurisdictional." See, *e.g.*, *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985). The rule has been applied strictly and literally to preclude RPA liability for discrimination in a wide range of transactions that do not result in two or more "purchases" at different prices. Courts have held, under this rule, that the RPA does not prohibit price discrimination in leases, licenses, product exchange transactions, or consignment arrangements. See, *e.g.*, *Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985) (consignments); *Export Liquor Sales, Inc.* v. *Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (leases), cert. denied, 400 U.S. 1000 (1971); *LaSalle Street Press, Inc.* v. *McCormick & Henderson*, 293 F. Supp. 1004, 1005 (N.D. Ill. 1968) (patent license agreement), aff'd, 445 F.2d 84 (7th Cir. 1971). See also 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2313b, at 20-23 (1999) ("By contrast [to the Sherman Act], the Robinson-Patman Act speaks only of 'purchasers' * * *."). The RPA does not prohibit outright refusals to sell at any price to a prospective

buyer, because a refusal to sell does not lead to a purchase. See *Black Gold, Ltd.* v. *Rockwool Indus., Inc.*, 729 F.2d 676, 682-683 (10th Cir.), cert. denied, 465 U.S. 854 (1984); *Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333-334 (3d Cir. 1939). See also 14 HOVENKAMP, *supra*, ¶ 2312c, at 24. And the Fourth and Fifth Circuits have held that the two-purchase requirement precludes RPA liability in precisely the situation presented in this case: where the defendant allegedly extended discriminatory offers to offerees that were bidding against one another, and where two purchases did not occur because the losing bidder-offeree never completed a purchase.

1. In *Terry's Floor Fashions*, the defendant offered to sell at list price to the plaintiff and at a discount from list price to one of plaintiff's competitors. Both the plaintiff and its competitor submitted bids to a retail customer, but there was only one purchase from the defendant arising from those bids. The Fourth Circuit affirmed the dismissal of the RPA claim because the plaintiff "had not shown, or even alleged, two comparable, completed sales and had therefore not satisfied one of the jurisdictional prerequisites for establishing a violation of Section 2(a) of Robinson-Patman." 763 F.2d at 615.

The Fifth Circuit in *M.C. Manufacturing Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976), reversed a judgment for the plaintiff where the defendant had offered to sell at different prices to plaintiff and one of its competitors, in connection with their competing bids for a government contract. The plaintiff and the favored offeree "were competitive *bidders* on the * * * contract." *Id.* at 1067 (emphasis in original). Even though their bids were in competition, "[t]hese bids alone cannot form the basis for a Robinson-Patman Act claim since they do not satisfy the two-purchaser requirement." *Id.* at 1067 n.17.

These holdings cannot be distinguished from the decision in this case on the basis of Reeder's "status" as a purchaser.

The plaintiffs in *Terry's Floor Fashions* and in *M.C. Manufacturing Co.* purchased from the defendants in *other transactions*. *Terry's Floor Fashions*, 763 F.2d at 615; *M.C. Mfg. Co.*, 517 F.2d at 1067; see also *Shaw's*, 105 F.2d at 333. Therefore, each of those plaintiffs had the same "status" as a "purchaser" that Reeder had here. The Fourth and Fifth Circuits recognized, though, that the two-purchaser requirement must be satisfied in the specific transaction on which RPA liability is predicated, while the Eighth Circuit ignored that requirement.

2. The two-purchaser rule reflects an important choice Congress made when it drafted the RPA. Congress did not enact an open-ended authorization for courts to protect the business opportunities of prospective buyers. It sought to address a specific set of circumstances: the perceived buying power of chain stores that were emerging to compete against single-store rivals in the 1930s. A prohibition against discrimination between "purchasers" addressed that specific problem (though the interpretation and enforcement of that prohibition also produced widely recognized practical problems and to some degree undermined the basic policies reflected in other provisions of the antitrust laws). Extension of the RPA beyond its express terms, to address forms of price discrimination unlike the paradigmatic practices that led to its enactment, would add to the costs associated with the statute even though Congress has never identified these other forms of price discrimination as a "problem" that needed to be addressed.

The two-purchaser rule therefore serves the important function of restricting the RPA's reach – and limiting the costs associated with its prohibitions – to the specific practices with which Congress was concerned. There is no reason to suppose that Congress intended to prohibit discrimination in the price of services (as opposed to "commodities") or discrimination in the terms of leases, licenses, consignments, and other commercial transactions that do not result in the purchase of a commodity.

Similarly, there is no indication that the statute was meant to address discriminatory refusals to deal or, as in this case, discriminatory offers to sell. Any attempt comprehensively to regulate the myriad forms of commercial "discrimination" would entail enormous complication and cost. Nothing in the RPA suggests that Congress wanted to go down that road.

The requirement of discrimination between "purchasers" can be also be viewed as a congressional decision not to prohibit "attempts." As Professor Hovenkamp explains:

> An unaccepted or uncompleted offer occurs when the seller is willing to quote a price, howbeit a higher price than the seller is charging to other buyers, but the plaintiff fails to purchase the product. Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid. This is simply another way of saying that there is no "attempt" offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated.

14 HOVENKAMP, *supra*, ¶ 2300, at 27 (footnotes omitted). The Eighth Circuit wholly failed to understand this basic principle of RPA law.

II. The Eighth Circuit's Decision Conflicts With Decisions Of Other Circuits That Permit RPA Liability Only If The Discrimination Is Likely To Divert Sales Or Profits From Disfavored Purchasers To Favored Purchasers

As the RPA's words make clear, it protects competition "with any person who * * * knowingly receives the benefit of such discrimination" (15 U.S.C. § 13(a)), *i.e.*, of discrimination

in price "between different purchasers."[3] The Eighth Circuit ignored this limitation by imposing liability for discrimination in transactions in which Reeder did not compete against a favored purchaser, but competed only against non-Volvo dealers.

This radical extension of the RPA – construing the Act to protect disfavored purchasers' ability to compete against *any* firm in the market, not just against the favored purchasers specifically mentioned in the statute – effectively transforms price discrimination into a *per se* violation of the antitrust laws,

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[3] In "secondary-line" cases involving effects on customers of the defendant-seller, courts of appeals have long been divided on whether the RPA requires proof of anticompetitive effects similar to the effects required by other antitrust provisions. The D.C. Circuit, in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), emphasized the need to avoid unnecessary inconsistencies between the RPA and other antitrust statutes that are construed to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Therefore, the D.C. Circuit held that injury to *competition* is required. *Id.* at 1143. The Ninth Circuit has explicitly disagreed with *Boise Cascade,* holding that "the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected." *Chroma Lighting* v. *GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir.), cert. denied, 522 U.S. 943 (1997). The Third Circuit has reached the same conclusion (*J.F. Feeser, Inc.* v. *Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)), and the Eighth Circuit is aligned with the Third and Ninth Circuits. *Richard Short Oil, Inc.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986). In the Eighth Circuit, the requisite effect on "competition" may be established if price discrimination may "substantially lessen the ability of unfavored buyers to continue to compete." *Ibid.*; see also *Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 386 n.3 (8th Cir. 1987) (requisite harm to "competition" is shown if plaintiff and other similarly situated purchasers lost sales or profits because of discrimination). Although the Eighth Circuit's view of what constitutes harm to "competition" under the RPA presents a broad conflict with the D.C. Circuit that is implicated by this case, and could be resolved through a grant of certiorari in this case, the Eighth Circuit's decision is plainly wrong – and in conflict with the decisions of other circuits – under *any* conception of competition, including mere harm to a competitor, because the other statutory requirements are not met.

in contravention of this Court's observation that "the statute as a practical matter could not, and does not, ban all price differences." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). As the leading treatise explains (14 HOVENKAMP, *supra*, ¶¶ 2333a-2333b, at 88-89):

> The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures the disfavored purchaser[] in its ability to compete with the favored purchaser. * * * [T]he mere payment of a higher price than someone else pays for something is insufficient to support the injury requirement. The disfavored purchaser must be injured in its ability to compete with the favored purchaser. For example, suppose that General Motors sells automobiles to a small dealer in Decatur, Michigan, at a higher price than it does to a large dealer in Atlanta, Georgia. But the two dealers each operate in their own geographic areas and never compete for sales to the same customers. We can certainly say that the Decatur dealer has suffered an injury in the sense that it would be better off if it could purchase cars more cheaply, paying the same price that the Atlanta dealer pays. But this is not the injury that the Robinson-Patman Act contemplates. The injury is not merely in the higher purchase price that would injure any purchaser of an input, but in the loss of ability to compete effectively with the favored purchaser. A plethora of decisions have asserted this basic proposition.

This basic proposition is reflected in two complementary principles of RPA jurisprudence. First, other circuits have held that a disfavored purchaser-plaintiff must prove that it competes against favored purchasers because such competition is an essential predicate for the kind of competitive injury – diversion of sales or profits from disfavored to favored purchasers – that is required for a secondary-line RPA violation. Second, other circuits have held that disfavored purchaser-plaintiffs cannot

recover damages unless they show that the discrimination diverted sales or profits from disfavored to favored purchasers.

1. Decisions in the Second and Fifth Circuits have squarely held that plaintiffs in secondary-line RPA cases must prove that there is competition between favored and disfavored purchasers, such that the discrimination may cause the diversion of sales or profits to favored purchasers. The decision below conflicts with those holdings.[4]

In *Best Brands Beverage*, 842 F.2d 578, the Second Circuit reversed a judgment in favor of a disfavored purchaser. Observing that "price discrimination (or pricing on a non-equal basis) standing alone is not illegal per se," the Second Circuit held that plaintiffs must also prove "the likelihood of competitive injury resulting from the alleged discrimination." *Id.* at 584. This competitive injury is dependent on proof that the disfavored purchaser "was engaged in actual competition with the favored purchaser(s)." This "competitive nexus" is

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[4] This Court's decisions plainly assume – even if they do not hold – that competition that could lead to a diversion of sales or profits from disfavored purchasers to favored purchases is a *sine qua non* of secondary-line RPA liability. For example, *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), held that an inference of competitive injury may be drawn from evidence that producers "sell their goods to some customers substantially cheaper than they sell like goods *to the competitors of these customers*." *Id.* at 50 (emphasis added). *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), observed that actionable RPA injury "is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.* at 436. See also *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 570 ("to the extent that" favored purchasers competed against plaintiffs, *Morton Salt* presumption of competitive effect was appropriate); *id.* at 571-572 (evidence of diversion of customers to favored purchaser); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 569-570 (1981) (Powell, J., dissenting) (to recover damages RPA plaintiff must show that unlawful discrimination "allowed a favored competitor to draw sales or profits from him, the unfavored competitor").

required because, "[i]n a secondary-line case, plaintiff must show that the probable effect of the discrimination would be to allow the 'favored competitor to draw sales or profits from him, the unfavored competitor.'" *Id.* at 584-585 (quoting *J. Truett Payne Co.*, 451 U.S. at 569-570 (Powell, J., dissenting in part)).

In *Best Brands Beverage*, the disfavored purchaser and the favored purchaser operated in adjacent geographic areas. The plaintiff produced evidence that transshipping between adjacent areas with different prices was "a pervasive practice," but such evidence was held insufficient to support RPA liability because there was no evidence that transshipping occurred in response to the *specific* price differentials that the plaintiff invoked as a basis of liability, and because the plaintiff did not demonstrate the impact of any transshipping on inter-territory competition. *Id.* at 586. This was a fatal defect, according to the Second Circuit, because competition between "Best [the disfavored purchaser] and Southland [the favored purchaser]" was an "essential element of a price discrimination claim." *Ibid.*

The Fifth Circuit applied the same principle in *M.C. Manufacturing Co.*, 517 F.2d 1059, and in *Infusion Resources, Inc.* v. *Minimed, Inc.*, 351 F.3d 688 (5th Cir. 2003), cert. denied, 124 S. Ct. 2881 (2004). In *M.C. Manufacturing Co.*, the plaintiff contracted to sell a product to the government and paid 32.5 cents per unit to the defendant (a subcontractor) for an input needed to make the product. 517 F.2d at 1062. In connection with a subsequent government procurement, the defendant sold the same product (again as a subcontractor) for 31 cents to a different purchaser. *Ibid.* The Fifth Circuit held that this price difference did not violate the RPA because the lower price could not have diverted sales to the favored purchaser.

> It is the government's unavailability to [plaintiff] as a customer of any of the government's needs under the [second] contract, and its similar unavailability to [the favored purchaser] on the [first contract,] which prevents

> purchases made in performance on one from being in competition with those made under the other. Each contract represented a separate, distinct market open only to a single producer. Once it was awarded the bid * * * [plaintiff's contract] was assured to it to the exclusion of all other suppliers regardless of any discrepancy in prices paid on underlying subcontracts.

Id. at 1067. The plaintiff and the favored purchaser "were not competing for the same consumer dollar" in their activities under the two contracts. *Id.* at 1068.

In *Infusion Resources*, applying the principle that favored and disfavored purchasers must be competing "for the same dollar," the Fifth Circuit rejected an RPA claim because the plaintiff, though it competed with a favored purchaser, did not compete at the time of the price discrimination. 351 F.3d at 692-693.

2. A plaintiff seeking damages for a violation of the RPA must prove "actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.*, 451 U.S. at 562. Plaintiffs must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 (1977) (emphasis in original). The First and Third Circuits have held that, because of this antitrust injury requirement, damages cannot be recovered for a violation of the RPA without proof that the price discrimination harmed the plaintiff's ability to compete *against favored purchasers*. The Eighth Circuit's decision conflicts with those holdings.

In *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), a directed verdict for the defendant was affirmed, in an opinion by then-Judge Breyer, even though the evidence was assumed to be sufficient to show that the defen-

dant charged higher prices to the plaintiff than to its competitors. Such price differences were not enough to show actual injury caused by the price discrimination, the First Circuit held, because there was no indication that the price differences "could lead *the benefitted competitors* to lower their prices to the point where they could attract significant numbers of Allen Pen's customers or that Allen Pen's overall profitability could be significantly affected." *Id.* at 21 (emphasis added).

In *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), cert. denied, 516 U.S. 1172 (1996), the plaintiff proved the existence of substantial differences between the price it paid to the defendant and the price that favored purchasers paid, and also proved that its sales had declined during the period of the discrimination. *Id.* at 1272-1273. The Third Circuit nevertheless reversed a judgment for the plaintiff because there was no proof that the defendant's price discrimination had caused plaintiff to lose sales to favored purchasers. *Id.* at 1276. The district court had denied the defendant's motion for judgment as a matter of law, relying on hearsay testimony that some customers said they could and did buy from a favored purchaser, rather than from the plaintiff, because of its lower prices. *Id.* at 1274. The Third Circuit held that this hearsay testimony was inadmissible to prove the truth of the matter asserted and reversed a judgment for the plaintiff in the absence of any other evidence that the discrimination caused it to lose sales to a favored competitor. *Id.* at 1274-1276.

When a disfavored purchaser loses sales to a competitor that does not buy or sell the defendant's products, rather than to a favored purchaser, the lost sales cannot be said to flow from that which made the defendant's acts unlawful, *i.e.*, the *discrimination* in price. The discrimination could be eliminated by raising prices to the favored purchaser, leaving the unfavored purchaser in exactly the same position *vis-à-vis* the competitor

to which the sale was lost. The absolute level of the price charged to the plaintiff (compared to the price charged by an entirely different seller to the competitor that captured the sale) – *not* the defendant's discrimination – affects the plaintiff's competitive opportunities. As Judge Hansen's dissent explains, "Although it is possible that Reeder lost sales or profits to non-Volvo dealers because it did not receive a sufficiently high concession from Volvo * * *, the *difference* in concessions offered to Reeder and the 'favored' Volvo dealers did not cause the lost sales or profits on those deals." App., *infra*, 31a (emphasis in original). See also *M.C. Mfg. Co.*, 517 F.2d at 1065 (no injury resulting from discriminatory pricing when – even without the complained-of pricing conduct – sale would have been lost to a competitor other than the favored purchaser).

3. In this case, the majority below recognized that Reeder was required to show that it competed against favored Volvo dealers, but failed to comprehend the reason for that requirement: to show that the discrimination could cause the diversion of sales or profits to favored purchasers. The majority concluded that Volvo could be liable for discrimination in the sales-to-sales and offers-to-sales comparisons – where there was no competition between Reeder and other Volvo dealers, and therefore no possibility that sales or profits could be diverted from Reeder to a favored purchaser – because Reeder competed against other Volvo dealers for *other* sales. The court divorced the question whether Reeder competed with favored purchasers from the question whether the discrimination affected that competition, treating the former as a question about Reeder's status, unrelated either to the requisite competitive effect or to the causal link between the discrimination and that effect.

Judge Hansen's dissent recognized this point. "Reeder's attempt to compare a sale that it made to one end user to a sale made by a 'favored' Volvo dealer to another end user with whom Reeder had no relationship simply is not relevant to

proving a violation of the RPA because there was no actual competition between the two dealers at the time of the sales to the separate and different end users." App., *infra*, 29a. Evidence that Reeder and favored dealers "competed generally with each other" is insufficient because "where alleged lost sales or profits were not diverted from Reeder to 'favored' Volvo dealers, but rather to other non-Volvo dealers, it is unclear how any difference in price offered by Volvo to its two dealers could possibly injure actual competition between them." *Ibid.* An RPA violation could be shown only "where the factors necessary to state an RPA claim all are present in the same relevant transaction." *Id.* at 30a; accord *Hasbrouck*, 496 U.S. at 556; *id*. at 577 (Scalia, J., concurring in the judgment).

The conflict between the majority's decision in this case and the decisions in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.* cannot be reconciled by the observation that Reeder competed to some degree against favored purchasers. There was similar evidence of competition between the plaintiffs and favored purchasers in *Best Brands Beverage*, *M.C. Manufacturing Co.*, *Allen Pen*, and *Stelwagon Manufacturing Co.*, but in those decisions the critical issue was understood correctly to be whether the discrimination could cause diversion of sales or profits from the disfavored to the favored purchaser. That issue cannot be resolved merely by asking whether the plaintiff and favored purchasers compete with one another; courts also must ask whether and how the alleged *discrimination* could *affect* that competition. The other circuits correctly understood that, if the discrimination does not affect the plaintiff's ability to compete against favored purchasers, there can be no violation of the RPA. The Eighth Circuit missed the point.

4. The Eighth Circuit believed that evidence of Volvo's business strategy to reduce the number of Volvo dealers sup-

ported an inference of the requisite competitive injury. That belief is plainly incorrect.

The antitrust laws have long recognized that a manufacturer may limit the number of firms that distribute its products. A manufacturer's outright refusal to deal with a potential distributor is permissible, except in the most extraordinary circumstances. See *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). The RPA prohibits certain forms of price discrimination between different purchasers, but places no restraints on a manufacturer's freedom to choose the number, the identity, the location, or the characteristics of distributors to which it will sell or on a manufacturer's freedom to terminate any distributor at will. The majority based its decision on a belief that "the elimination of some dealers like Reeder * * * is precisely the type of injury the antitrust laws were meant to prevent." App., *infra*, 19a (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)). That belief was clearly wrong. See also, *e.g.*, *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (upholding termination of price-cutting dealer in the absence of an express or implied agreement with another dealer on price).

Nor does Volvo's business strategy shed any light on its motive or intent that supports an inference of competitive injury. As a preliminary matter, there is no reason Volvo would want to divert sales from Reeder to non-Volvo dealers. See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, in *Symposium: Antitrust at the Millennium*, 68 ANTITRUST L.J. 125, 126 (2000) ("[A] manufacturer cannot profit by weakening its own distribution system or reducing that system's competitiveness.").

More important, as a matter of law, the question whether Volvo discriminated, let alone the question of why it discriminated, has no bearing on the *effect* of the discrimination. Even on the dubious assumption that a desire to eliminate Reeder as

a Volvo dealer provided a motive for discrimination, Reeder was still required to show that the discrimination impaired its ability to compete against a favored purchaser. That essential element of any RPA violation requires proof that the discrimination occurred where there is a competitive relationship between Reeder and the favored dealers. In the absence of any such relationship, Volvo's practices cannot produce the requisite competitive effects, regardless of motive or intent. For that reason, Reeder's sales-to-sales and offers-to-sales comparisons are insufficient, as a matter of law, to support RPA liability.

III. The Eighth Circuit's Decision To Extend The RPA Will Be Harmful To Competition, Even Outside Of The Eighth Circuit

The decision below will be harmful to competition and consumers, and those effects will extend well beyond the boundaries of the Eighth Circuit.

1. Courts have a duty to be faithful to congressional intent when interpreting the RPA and "are not free to consider whether or how the statute should be rewritten." *Texaco Inc.* v. *Hasbrouck*, 496 U.S. at 568 n.27. Such restraint is especially important when interpreting the RPA because interpretations that "extend beyond the prohibitions of the Act * * * give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (quoting *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 63 (1953)). Congress drafted the RPA to forbid only certain kinds of price discrimination. "[T]he statute as a practical matter could not, and does not, ban all price differences." *Brooke Group*, 509 U.S. at 220.

2. By extending the RPA to permit recovery for sales lost to any competitor, not just sales lost to a favored purchaser, the decision creates a serious risk of treble-damage liability for any seller that charges different prices to different customers, even

if those differences occur over time and in disparate geographic areas. Under a correct reading of the RPA, manufacturers can adjust their prices to reflect the changes in costs, demand, and competitive conditions, so long as they ensure that those price differences do not tilt the playing field on which their purchasers compete against each other. This is a workable standard because manufacturers have some power to predict whether price differences will lead to a substantial diversion of sales or profits from disfavored to favored dealers. The antitrust laws also permit manufacturers to control the risk of such diversion to a considerable degree, for example, by limiting the geographic areas or the categories of customers that individual dealers will be permitted to serve. The RPA imposes real constraints but does not completely eliminate pricing flexibility.

If RPA liability can arise when sales or profits are diverted to *any* firm that competes against a purchaser, as the Eighth Circuit permits, this flexibility will be greatly reduced. Manufacturers will incur substantial risks of treble-damage liability from *any* price difference. Every distributor of a manufacturer's products will be able to show that it could compete more successfully in the market – that it could sell more units or earn higher profits – if it could pay less when purchasing the products it resells. Whenever a manufacturer charges different prices to different customers, customers who pay the higher price will be able to show this phantom RPA injury.

That risk can arise under the Eighth Circuit's decision even if a manufacturer takes care – as Volvo does – to charge uniform prices to all distributors *within* a market, if the manufacturer nonetheless charges different prices in one market than in another. That is because a distributor operating in both markets will be able to demonstrate its "status" as a competitor to other purchasers in the lower-price market, and demonstrate lost sales or profits to other competitors (who do not purchase from the discriminating manufacturer) in the high-price market.

Perversely, the risk that a manufacturer will incur this newly created liability is greatest in precisely those markets where there is little, if any, risk of a true RPA injury, *i.e.*, in markets where inter-brand competition is intense and intra-brand competition has little competitive significance. In such markets, inter-brand competition drives prices towards costs, and price differences are likely to be based on differences in costs. When facing intense inter-brand competition, an individual manufacturer has no market power, and any attempt to charge an unreasonably high price to a distributor would be contrary to the manufacturer's own interests.[5] See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[T]he manufacturer cannot profit by making its distribution system more costly, by restricting the volume of product it is capable of handling, or by reducing its competitiveness against the products of other manufacturers."). It is in such markets, more than any others, that a manufacturer's price differences are least likely to produce the kinds of intra-brand effects the RPA was meant to address, but most likely to coincide with lost sales or profits to inter-brand competitors, the kind of "injury" that was the basis of liability in this case.

The decision below inevitably will push manufacturers toward greater price uniformity and rigidity. It is doubtful that this result will benefit any distributor in the long run; it is *certain* that it will be harmful to consumers. See Hovenkamp, *The Robinson-Patman Act*, *supra*, 68 ANTITRUST L.J. at 127 ("[W]henever anyone takes a longer view than the shortest one possible, incentive discounts further, rather than injure, competition."). Economists and antitrust scholars have achieved a

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[5] No doubt can exist in this case that Volvo does face intense competition from other brands of heavy trucks, and lacks market power in the antitrust sense. Volvo is one of many truck manufacturers and has only a ten percent share of sales. See http://www.todaystrucking.com/trucksales-us.cfm. Reeder made no claim to the contrary.

broad and durable consensus that generalized constraints on pricing flexibility are harmful to the competitive process and to the interests of consumers, regardless of their effects on the commercial interests of individual competitors. "[P]rices may be made more fluid and the general price level in the market *lowered* if the suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing power to force producers to grant price concessions." 1 ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue, et al. eds. 1980) (emphasis added) (citing U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 63-64 (1976)). Judge Bork has noted that "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly as possible." ROBERT H. BORK, THE ANTITRUST PARADOX 388 (1978). "[R]igid" prices and markets that are "less sensitive to changing demands and costs" are an unhappy result of precluding sellers from "rais[ing] or lower[ing] prices selectively." *Ibid.* See also *id.* at 389-390 (describing pricing flexibility as a protection against cartel behavior). Professor Hovenkamp's treatise summarizes the "voluminous literature" on the means by which price-discrimination laws, if wrongly construed, can "facilitate price rigidity, including oligopoly and collusion." 14 HOVENKAMP, *supra*, ¶ 2340b1, at 121-123.[6]

The Solicitor General, the Antitrust Division, and the Federal Trade Commission have correctly read this Court's precedents to require interpreting the RPA "in a manner that is consistent with the procompetition policies expressed in the antitrust laws." Merits Br. for the United States and Federal

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[6] Consistent with the intense competition among manufacturers (see n.5, *supra*), testimony at trial indicated Volvo's need to "adjust its prices to meet competition." "It's a fluid situation * * *. It varies a lot, and not having the ability to adjust to that, I just don't foresee us getting very many deals." C.A. ER 1622 (testimony of Volvo Sales Manager Michael P. Truta).

Trade Commission at 17, *Texaco Inc.* v. *Hasbrouck*, No. 87-2048, available at http://www.usdoj.gov/osg/briefs/1989/sg890525.txt. "[T]he Court has sought to reduce the friction between the [Robinson-Patman and Sherman Acts] by declining to expand the coverage of the Robinson-Patman Act in ways that would 'help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *Id.* at 18 (quoting *Automatic Canteen Co.*, 346 U.S. at 63).

3. Damage actions for RPA violations may be filed under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), in any district in which the defendant resides, is found, or has an agent. Under this liberal standard, every manufacturer that distributes its products nationally, or in any smaller region that includes a district within the Eighth Circuit, is subject to lawsuits that will be decided under the Eighth Circuit's erroneous interpretation.

The problem is not just that other defendants may be held liable for behavior that is legal. Far worse, manufacturers will change their pricing policies – by refusing to discount – to avoid the threat of treble-damage liability. All prudent manufacturers seek and follow legal advice to avoid RPA risks. See Joseph, *supra*, ANTITRUST, Summer 2003, at 3 (noting an extraordinary level of interest in publications and seminars devoted to RPA counseling). Faced with the Eighth Circuit's decision, lawyers properly will advise their clients that any price differences now entail serious risks of treble-damage litigation.

Manufacturers cannot avoid this risk merely by charging uniform prices within the Eighth Circuit. Even if they do so, they will still risk RPA liability if their prices within the Eighth Circuit differ from their prices elsewhere, so long as a potential plaintiff can demonstrate its "status" as a competitor to another purchaser, wherever located, that received a price that was different from the price charged in the Eighth Circuit. One predictable result will be less vigorous price competition between

sellers who operate in the Eighth Circuit, even when they are competing elsewhere. See 14 HOVENKAMP, *supra*, ¶ 2340b1. Another result will be to distort competition outside of the Eighth Circuit if one seller operates within the Eighth Circuit, and must adopt uniform pricing or risk RPA liability, while competing against a seller that does not operate in the Eighth Circuit, and thus is free to price flexibly in response to localized competitive conditions.

The RPA is "a statute regarded by many as the antitrust laws' illegitimate child" because it "often operates in ways that are inimical to the goals of the antitrust laws generally." 14 HOVENKAMP, *supra*, ¶ 2300, at 3 & n.1. To the extent that it is the Act itself – not judicial misinterpretation of it – that runs counter to sound antitrust policy, arguments for reform must be addressed to Congress. But cf. *Brooke Group*, 509 U.S. at 220 (quoting *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13) ("'[T]he Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'"). Where, as here, however, the Act has been interpreted in an anticompetitive manner only because a court *failed* to heed the intent of Congress as expressed in plain words – words other courts of appeals have understood well – it is this Court, not Congress, that can and should resolve the circuit split, correct the error, and prevent the widespread harm that the judicial error portends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID L. WILLIAMS
MICHAEL N. SHANNON
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

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