No. 23-1099

IN THE

Supreme Court of the United States

INNOVATION VENTURES, LLC, *ET AL.*,

Petitioners,

v.

U.S. WHOLESALE OUTLET & DISTRIBUTION, INC., *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Retail Litigation Center, Inc. (RLC) is the only trade association dedicated to representing the retail industry in the courts.[1] The RLC seeks to provide courts with the retail industry's perspective on important legal issues affecting its members. Those members include many of the country's largest and most innovative retailers, and they collectively employ millions of workers nationwide, provide goods and services to tens of millions of consumers, and generate tens of billions of dollars in annual sales. Since its founding in 2010, the RLC has filed more than 200 amicus briefs, and this Court and others have favorably cited its briefs. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

This case is of great significance to the RLC and the retail industry. Manufacturers often offer payments—known as promotional funding—to resellers of their products to subsidize services that encourage more sales of the products, such as product displays or demonstrations. Promotional funding benefits competition because it can enable the reseller to sell more of the manufacturer's products at lower prices to consumers. Nevertheless, Section 2(d) of the Robinson-Patman Act (RPA) restricts the ability of a manufacturer to offer promotional funding to one reseller if it does not offer proportionally equal

[1] No counsel for a party authored any part of this brief, and no person other than the RLC, its members, or its counsel made any monetary contribution intended to fund its preparation or submission. The parties' counsel of record received timely notice of the RLC's intent to file this brief.

funding to other resellers "competing" to resell the manufacturer's products. 15 U.S.C. § 13(d). In the decision below, to determine whether resellers are "competing" under Section 2(d), the Ninth Circuit adopted an overbroad *per se* test, which disregards material evidence that particular resellers are not actually competing with one another because customers do not treat them as substitutes. The RLC submits this *amicus* brief to highlight why the Ninth Circuit's legally flawed holding will impose economic harms at every level of the supply chain and ultimately harm competition, rather than benefit it. This Court should grant certiorari and reverse.

SUMMARY OF ARGUMENT

Section 2(d) of the RPA restricts the ability of manufacturers to offer promotional funding to resellers of their products:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d). Critically, this nondiscrimination mandate to offer "proportionally equal" promotional

funding to resellers applies only insofar as the resellers are actually "competing" with each other to resell the manufacturer's products. *Id.*

The Ninth Circuit held that it is "sufficient to establish … actual competition" if the following three-prong test is satisfied: "(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." Pet.App. 21a, 28a-29a (cleaned up). As Judge Miller recognized, the result of this holding is to "mak[e] any other evidence" as to the presence or absence of competition "irrelevant." Pet.App. 44a (Miller, J., dissenting in part). Such a *per se* rule is both wrong and worthy of certiorari, as well explained by Petitioners. The RLC submits this *amicus* brief to emphasize two additional reasons why this Court's intervention is especially warranted here.

First, the Ninth Circuit's *per se* test ignores economic realities and thus would inflict economic harms. Even where resellers are geographically proximate, are contemporaneously purchasing goods of same grade and quality, and are operating at the same functional level, they may not actually be in competition with one another. A variety of additional factors—such as a reseller's range of product offerings and average price points—could cause customers not to view two resellers as competitive substitutes. Applying Section 2(d) to such resellers under the Ninth Circuit's *per se* test would impose significant costs with no countervailing benefits. On the one hand, Congress passed the RPA to protect smaller resellers from price-related discrimination favoring their larger competitors, but resellers need no protection from those with whom they are not competing at all. They thus will derive no legitimate benefit from courts restricting the ability of manufacturers to offer better promotional funding to their non-competitors. On the other hand, manufacturers, resellers, and consumers will all be injured by such gratuitous restrictions. The most likely consequence is that manufacturers will reduce the amount of promotional funding available, leading to decreased sales of the manufacturer's products and/or increased promotional costs borne by resellers and potentially passed onto consumers.

Second, the Ninth Circuit's *per se* test exacerbates the tension between the RPA and the rest of antitrust law. Modern antitrust principles seek to protect competition for the benefit of *consumers*, typically by restricting conduct that is likely to lead to *increased* prices (or decreased output). By contrast, the RPA is geared to protecting *smaller resellers* from the disadvantage of manufacturers offering better price discounts and subsidies to larger competing resellers, notwithstanding that such effective price *reductions* tend to benefit consumers rather than harm them. Accordingly, this Court has repeatedly emphasized, in decisions spanning more than half a century, that the RPA should be narrowly construed to mitigate this tension. The Ninth Circuit's holding does the exact opposite: it broadly construes the RPA to prohibit price-related discrimination that benefits consumers even where the resellers are not actually competitors.

ARGUMENT

I. The Ninth Circuit's *Per Se* Test For Competition Under The RPA Ignores Economic Realities And Thus Would Inflict Economic Harms

The antidiscrimination requirement that Section 2(d) of the RPA imposes on a manufacturer when offering promotional funding to resellers of its product applies only if the resellers are actually "competing" with each other for the same customers. 15 U.S.C. § 13(d). Whether particular resellers compete turns on the "economic realities" of the situation, not theoretical constructs. *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). Namely, based on a "careful analysis of each parties' customers," are "the parties each directly after the same dollar"? *See* Pet.App. 40a (Miller, J., dissenting in part) (citing cases) (cleaned up). The Ninth Circuit, however, failed to consider all indicia of whether such competition exists, instead adopting a *per se* test limited to three factors. This overbroad rule will sweep in resellers who are not viewed as potential competitive substitutes by their actual customers in light of additional factors that the rule disregards. Extending Section 2(d)'s restriction on promotional funding to such non-competing resellers would serve no procompetitive purpose, but would harm manufacturers, resellers, and consumers.

A. The Ninth Circuit's Three-Prong Test Compels A Finding Of Competition Even When Resellers Are Not Actually Competing For The Same Customers

Under the Ninth Circuit's *per se* test, it "is sufficient to establish … actual competition" that two resellers of the same product "operated at the same functional level," "in the same geographic area," "within approximately the same period of time." Pet.App. 28a-29a. To be sure, those factors are undoubtedly relevant to whether resellers are actually competing, and may well be necessary for such competition to exist. *See, e.g.*, *E. Auto Distribs., Inc. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329, 335 (4th Cir. 1986) (if "two retail customers" are "located in separate geographic markets," they generally will "not compete for the same consumers"). But it does not follow that resellers who meet those three factors will *always* be competing for the same consumers, or that no other factors may be relevant in refuting the existence of such competition. *See* Pet.App. 41a-45a (Miller, J., dissenting in part).

For example, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006), this Court held that, in the context of "a customer-specific competitive bidding process" for "a product subject to special order," the plaintiff dealer could not show that it "compete[d] with beneficiaries of the alleged discrimination *for the same customer*." *Id.* at 170, 178; *accord Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 197-207 (3d Cir. 2010). As Judge Miller explained, that holding forecloses the Ninth Circuit's *per se* test, which would have been satisfied on *Volvo*'s facts. Pet. App. 39a-40a (dissenting in part). Unable to dispute this point, the panel majority tried to limit *Volvo* to the custom-bidding context. *See id.* at 31a-32a. But the fundamental flaw with the *per se* test that *Volvo* illustrates cannot be so cabined.

"[T]he economic reality" is that "markets can be segmented by more than simply functional level, geography, and grade and quality of goods" purchased at the same time. Pet.App. 44a (Miller, J., dissenting). Depending on the context, material differences in additional factors like price point and product selection may show that two resellers are not actually "competing … for the same customers." *Fred Meyer*, 390 U.S. at 356; *accord Volvo*, 546 U.S. at 178. The Ninth Circuit's *per se* rule thus improperly precludes "consider[ing] all the evidence," by giving a subset of relevant evidence dispositive weight. *USPS Bd. of Govs. v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

1. Start with price point. Product pricing is relevant even under the Ninth Circuit's test, given the requirement that resellers be marketing "goods of the same grade and quality." Pet.App. 21a. As other courts have recognized, seemingly similar products may not be of the same grade and quality if, among other things, they "pricewise are not competitive," as there often will be "little cross-elasticity of demand" between products at different price points. *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 n.5 (2d Cir. 1958). For example, if a car manufacturer offers an allowance for promotional displays to a retailer that purchases its top-end model, it does not necessarily need to offer an allowance to another retailer that purchases only its entry-level model. *See id.*

But the Ninth Circuit's test fails to grasp that the same economic dynamic applies even to identical products if the resellers differ in some other material way that causes them to be situated at vastly different, non-competing price points. As Judge Miller cogently observed, "[i]n the New York geographic market, you can order a Coke both at Le Bernardin and at McDonald's, but no one thinks they are engaged in actual competition." Pet.App. 44a-45a (dissenting in part). So too, a luxury department store and a dollar store a few blocks away may meet the Ninth Circuit's categorical criteria for at least some products that they each happen to sell, but they are unlikely to be in *bona fide* competition for the same consumers even for those shared products. Yet the decision below would conclusively deem them to be competitors in this implausible respect.

2. Likewise, the Ninth Circuit's *per se* test ignores that retailers offering dramatically different product selections may not be in competition even with respect to particular products they both sell. Depending on the facts, consumers may not view these retailers as competitive substitutes.

Take *Lewis v. Philip Morris, Inc.*, where the Sixth Circuit held that summary judgment was inappropriate to resolve an RPA claim by vending machine operators alleging that they competed with convenience stores in selling cigarettes. 355 F.3d 515, 519, 530-33 (6th Cir. 2004). As courts have recognized, "vending machine clientele" may be different from "counter customers" at stores for various reasons, including whether they are making a spur-of-the-moment purchase, looking to buy only one type of product, etc. *See Simplicity Pattern Co. v. FTC*, 258 F.2d 673, 683 n.20 (D.C. Cir. 1958), *rev'd in part on other grounds*, 360 U.S. 55 (1959). In *Lewis*, the Sixth Circuit allowed the vendors to go to trial only because they presented specific evidence of actual competition, offering expert analysis as to the considerations that influence cigarette purchasers and also testimony of vendor losses after "customers kept leaving the premises to buy cigarettes at nearby convenience stores." 355 F.3d at 531-33. The clear corollary was that summary judgment *against* the vendors would have been appropriate if they had *not* proffered such evidence. *See id.* And at trial, the jury ultimately rejected the vendors' Section 2(d) claims. *See* Dkt. No. 451, *Lewis v. Philip Morris, Inc.*, No. 3:99-cv-99 (M.D. Tenn. July 14, 2005) (jury verdict).

In conflict with the Sixth Circuit's fact-intensive decision, the Ninth Circuit's *per se* rule would disregard such material evidence of consumer behavior. It would be sufficient to establish actual competition that the vendors and convenience stores both sold directly to consumers, were geographically proximate, and purchased the same cigarettes at roughly the same time. All of the vendors' evidence, as well as the consideration of that evidence by the Sixth Circuit and the jury, would be superfluous. So the vendors would prevail even if they had not made any such evidentiary showing, and even if the cigarette manufacturer had offered substantial countervailing evidence of the economic realities. *Cf. Lewis*, 355 F.3d at 531 ("a cross-elasticity study … would be helpful" to assess whether competition exists).

3. This case vividly illustrates the significant evidence of non-competition that the Ninth Circuit's *per se* inquiry improperly rejects. Petitioners highlighted evidence of "distinct features" separating the Respondent Wholesalers from Costco's wholesale sales, which "may well have appealed to different customers" and eliminated any actual competition between the two. Pet.App. 41a (Miller, J., dissenting in part). For example, unlike Costco, the Respondent Wholesalers offered customers in-house credit, a wider flavor inventory, and the ability to negotiate on pricing. *Id.* The parties also presented "dueling expert[]" testimony, analyzing issues such as whether customers had switched between Costco and the Respondent Wholesalers when there were price differences. *Id.* at 41a-42a. Yet the panel majority brushed aside all this evidence as "not relevant to determining whether Costco and the Wholesalers are 'customers competing'" under Section 2(d). Pet.App. 29a-31a.

The panel's blinkered approach defies this Court's repeated directive in the antitrust context to focus on "economic realities." *Fred Meyer*, 390 U.S. at 349; *accord, e.g.*, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 198 (1974); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968). The Court has made clear that *per se* antitrust rules should be the rare exception, adopted only in areas where the courts have had "considerable experience" and "can predict with confidence" that a bright-line rule would yield the right outcome in "all or almost all instances." *Leegin Creative Prods. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007). But as the facts of this case and the examples in this brief reflect, the Ninth Circuit's rule falls well short of that high bar; indeed, it ignores obvious countervailing factors. The fact-specific nature of the question whether resellers are in competition only underscores why this Court's antitrust precedents generally demand a focus on "demonstrable economic effect rather than … upon formalistic line drawing." *Id.* at 887 (quoting *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 58-59 (1977)).

B. The Ninth Circuit's Overbroad Test Serves No Valid Purpose, But Would Injure Manufacturers, Resellers, And Consumers

The Ninth Circuit's *per se* test is both unnecessary and harmful. Restricting manufacturers from offering unequal promotional funding to resellers does not serve any purpose in leveling the competitive playing field where the resellers are not competing on the same field at all. Instead, applying the RPA to such resellers under the Ninth Circuit's overbroad test will simply burden the use of promotional funding in enabling selected resellers to sell more of the manufacturer's products at lower prices to consumers.

On the one hand, extending Section 2(d) to cases where resellers are not in actual competition with each other is contrary to the RPA's purpose. Congress enacted the statute to protect smaller resellers from the perceived unfair advantages that larger competing resellers could gain "by virtue of their greater purchasing power." *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). Where large chain stores and smaller merchants were in competition, the former's ability to "gain[] discriminatory preferences" in promotional allowances and other manufacturer concessions was viewed as "threatening the continued existence of the independent merchant." *Fred Meyer*, 390 U.S. at 349-50. But of course, resellers face no such threat from other resellers with whom they are not competing, and they will derive no legitimate benefit from restricting the promotional funding available to those other resellers. Unequal promotional funding between such resellers will not impact where their respective customers choose to purchase because, by definition, customers do not view non-competing resellers as substitutes. That is why Section 2(d) is limited to "competing" resellers, 15 U.S.C. § 13(d), and why Congress never intended the statute to apply when resellers are "not in competition," 80 Cong. Rec. 8213, 8230 (May 28, 1936) (Rep. Boileau).

On the other hand, extending Section 2(d) to such cases would inflict harm at each level of the supply chain, from manufacturers through consumers. Manufacturers provide resellers "significant amounts of money" for promotional funding "to get their goods on the retailers' shelves, to obtain prominent placement, or to fund discounts, among other strategies" to better compete against rival manufacturers. FTC Staff Report, *Feeding America In A Time of Crisis: The United States Grocery Supply Chain and the COVID-19 Pandemic* 18 (Mar. 21, 2024), https://tinyurl.com/4vadbfkb. Efficient allocation of promotional funding is essential to maximizing those competitive benefits. The Ninth Circuit's erroneous expansion of Section 2(d)'s scope further restricts manufacturers' ability to efficiently promote their products against rivals. Instead, they must decide whether to (i) reduce their use of promotional funding altogether, (ii) spread their promotional-funding budget to equally cover even non-competing resellers, or (iii) increase their spending on promotional funding to equally cover those resellers, at the expense of lower pricing or other business priorities. In all cases, there would be no improvement in competition among resellers for the manufacturer's product, while the entire supply chain would be harmed.

Although any of these outcomes would be harmful, especially given the lack of countervailing benefits, the most likely net result is that manufacturers would provide less promotional funding. As historical experience with Section 2(d) reflects, manufacturers often are loath to spread their promotional funding across additional resellers, as doing so will require spending on situations where "the expense of the program" would outweigh the "benefit to the seller." Dep't of Justice, *Report on the Robinson-Patman Act* 92-93 (1977) [hereinafter DOJ Report]. And it often will be "too expensive" to increase the total amount of promotional funding. *See* 14 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2340b1 (2022). Thus, manufacturers will in many cases be forced to forego promotional funding even though it would otherwise be "both useful and desired." DOJ Report, *supra*, at 92; *cf.* Areeda & Hovenkamp, *supra*, ¶ 2340b1 ("[t]he empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all").

The risk of reduced promotional funding is a significant concern for resellers. Promotional funding from manufacturers is a "large and important source" of money that resellers use to subsidize their efforts to gain more sales. *See* FTC Staff Report, *supra*, at 18-19. A reduction in such funding would force retailers either to engage in fewer promotional activities like product displays and demonstrations, or to incur those costs themselves.

And that, in turn, would ultimately harm consumers. Consumers benefit from promotional activities that can, for example, "induce [them] to try new products." *See id.* at 18. And likewise, they benefit when resellers "pass … through directly to [them]" the cost savings from manufacturers' subsidization of promotional activities. *See id.* at 19. So consumers would be harmed if resellers curtailed their promotional activities or passed through their increased costs in performing them. *See* Areeda & Hovenkamp, *supra*, ¶¶ 2340a, 2340b1.

Neither law nor logic supports construing the RPA to inflict these harms on manufacturers, resellers, and consumers when the resellers receiving the favorable promotional funding do not even compete with the resellers who do not. But that is precisely what the Ninth Circuit's *per se* test does.

II. THE NINTH CIRCUIT'S *PER SE* TEST EXACERBATES THE TENSION BETWEEN THE RPA AND THE REST OF ANTITRUST LAW

The Ninth Circuit's overbroad test is particularly pernicious because it conflicts with this Court's long-standing policy of narrowly construing the RPA. The decision below is a paradigmatic example of the well-recognized risk that the RPA can be misapplied in ways that undermine settled antitrust principles.

Courts and commentators have long recognized that the RPA, if read loosely, sits in tension with general antitrust law. "[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively[.]" Areeda & Hovenkamp, *supra*, ¶ 100a. Accordingly, the typical application of antitrust law is to restrict conduct that is likely to harm *consumers* by leading to *increased* prices (or reduced output). *See, e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 107-08 (1984) (Sherman

Act bars certain agreements among competitors that would harm "consumer welfare" by making the "[p]rice … higher [or] output lower than they otherwise would be"); *Fla. Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374-75 (11th Cir. 1997) ("The objective in preventing certain mergers is to prevent the acquiring party from obtaining sufficient market power to raise prices." (cleaned up)). In contrast, the RPA seeks to protect smaller *resellers* from financial disadvantage by restricting manufacturers' ability to offer price discounts and subsidies to larger competing resellers, notwithstanding that such practices by manufacturers tend to *decrease* consumer prices. *See* Part I.B, *supra*; *accord, e.g.*, Robert H. Bork, *The Antitrust Paradox* 384 (1982) (criticizing the RPA for an "enormous" "destruction of national wealth"). Thus, if read in isolation, the RPA could become an "anti-competitive island" undermining antitrust law's focus on "pro-competitive efficiency and maximization of consumer welfare." *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988).

Over more than half a century, however, this Court has repeatedly "resist[ed]" expansive readings of the RPA and instead "continue[d] to construe the Act 'consistently with broader policies of the antitrust laws.'" *See, e.g.*, *Volvo*, 546 U.S. at 181 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 220 (1993)); *see also Feesers*, 591 F.3d at 198-99 (collecting additional cases, and "dutifully follow[ing] the Supreme Court's lead by narrowly construing the RPA"). The Court has thereby mitigated the risk that the RPA will "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). More specifically, this Court has warned against wielding the RPA with an excessive focus on "the protection of existing *competitors*" in the intrabrand resale of a single manufacturer's products, because "[i]nterbrand competition" between manufacturers of competing products "is the primary concern of antitrust law." *See Volvo*, 546 U.S. at 180-81 (cleaned up).

Yet the Ninth Circuit's *per se* test does the opposite and worse. Not only does it restrict manufacturers from efficiently allocating promotional funding to better compete with their rivals, but it does so by "protecting" resellers from discrimination favoring *non-competitors*. This unjustifiable extension of the RPA flouts the Judiciary's "duty to reconcile [the statute] … with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 74 (1953).

CONCLUSION

This Court should grant the certiorari petition.

June 6, 2024

Respectfully submitted,

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