No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

The Court may refer to the Rule 29.6 statement in respondent Reeder-Simco GMC, Inc.'s ("Reeder") brief in opposition to the petition for certiorari.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Asserting that academic comment on a case is a "late authorit[y]" entitling it to file a supplemental brief, Sup. Ct. R. 25.5, Volvo argues that the 2006 edition of Professor Hovenkamp's *Antitrust Law* treatise supports its position. We welcome the filing of the supplemental brief because it shows that opponents of the decision below base their arguments entirely on policy in derogation of the plain language of the Robinson-Patman Act ("RPA") and the precedents of this Court and the Federal Trade Commission. The RPA does not limit how a plaintiff may prove injury to competition with rivals. This Court has enforced the RPA from its enactment according to its plain language, not shifting conceptions of economic policy, which are the province of Congress. Not only are Professor Hovenkamp's proposed policy-based limitations legally irrelevant, but also they make no sense.

Professor Hovenkamp's error arises principally from his failure to account either for the full language of the statute (which he selectively quotes) or for the interpretations of that language by this Court, the lower courts, and the FTC. Professor Hovenkamp argues that a plaintiff proves an RPA violation only if "the effect of the discrimination *must be* to 'injure, destroy, or prevent competition with any person who either grants of [sic] knowingly receives the benefit of such discrimination.'" 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c, at 109 (2d ed. 2006) (emphasis added) (quoting 15 U.S.C. § 13(a)). From that reading of the statute, he concludes that the only competition that the RPA protects from injury is the competition to resell the specific goods purchased at discriminatory prices. He reasons that Volvo's discrimination on Reeder's 102 truck purchases could not have injured Reeder because, having resold those trucks to the customer who asked for the bid, Reeder never "lost the opportunity to make a resale because of a lower price obtained by a rival dealer." *Id.* ¶ 2333b4, at 104. He further states (without cita-

tion) that a dealer cannot suffer competitive injury if its market rivals "earned higher margins" on the goods they purchased at a favorable, discriminatory price. *Id.*; see also *id.* ¶ 2333c, at 109.

Professor Hovenkamp ignores the relevant statutory language in multiple respects. The RPA outlaws price discrimination "*the effect of*" which "*may be* … to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or *with customers of either of them*." 15 U.S.C. § 13(a) (emphases added). This Court has interpreted the italicized language in the first clause to require a "prognosis of the probable *future* effect" of the proscribed activity on competition with rivals in the market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332 (1962); *Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 742 (1945) (RPA violated if "there is a reasonable possibility that [price discriminations] 'may' have such an effect."). Nothing in the language of the statute limits the RPA's protection to one aspect of market competition between rivals: *i.e.*, the competition to resell the specific commodity to a customer who may be shopping among certain dealers. Indeed, the RPA broadly prohibits price discrimination as to "commodities . . . sold for use, consumption, or resale" so long as they are of "like grade and quality," 15 U.S.C. § 13(a), which forecloses any claim that potential competitive injury is limited to competition in a single transaction to resell the specific, identified commodity. Finally, by insisting that the RPA requires injury to competition with the "knowing" recipient of the benefit of the discrimination, 14 Hovenkamp, *supra*, ¶¶ 2333c, 2342e, Professor Hovenkamp disregards the statutory language (and the FTC's longstanding rule) that an RPA violation may be shown in regard to competition with any "customers" of the discriminating supplier (here Volvo). 15 U.S.C. § 13(a); Resp. Br. 40.

Professor Hovenkamp is an unsparing critic of the RPA as enshrining bad policy, and a zealous advocate of legislative

amendment to limit the scope of actionable RPA injury.[1] The Congress is where such policy-based arguments belong. The RPA, unlike some antitrust statutes, does not grant judges common-law power to resolve cases according to their conceptions of optimal policy. Cf. *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 731-33 (1988) (justifying "dynamic" judicial creation of rules of reason using "economic analysis" because of the Sherman Act's adoption of common-law term "restraint of trade"). No amorphous common-law term appears in the RPA. To the contrary, this Court has rebuffed requests to engage in RPA "'policy-making'" and instead consistently enforces the statutory language and the intent of the Congress. *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 170 (1983). Congress in 1936 defined the policy of the Act by its plain terms, and this Court should enforce those terms.

The broad language of the RPA does not restrict plaintiff's proof of potential competitive injury to showing that it "lost the opportunity to make a resale because of a lower price obtained by a rival dealer," as the Professor insists. 14 Hovenkamp, *supra*, ¶ 2333b, at 104. Nor can he support his claim that a jury cannot infer potential competitive injury if the plaintiff's market rivals "earned higher margins" on like goods that they purchased at a favorable, discriminatory price. *Id.* The courts and the FTC, giving the RPA its proper scope, uniformly hold that earning lower profit margins than rivals on resold goods because of substantial discrimination meets the injury requirement. Resp. Br. 26-29. Indeed, in the prior edition of his treatise, Professor Hovenkamp rightly summarized the law as holding that "simply making a lower markup than one's rivals is the kind of injury contemplated by the statute." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c2, at 104

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[1] H. Hovenkamp, *Antitrust Modernization Commission: Written Testimony on the Robinson-Patman Act* (July 2, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/Hovenkamp.pdf (advocating amendments on competitive injury that would be favorable to Volvo).

(1999), *quoted in* Resp. Br. 26. Attempting to reconcile this law with his preferred policy outcome in this case, he has now changed that sentence to "simply making a lower markup than one's rivals *on sales to the same purchasers can be* the kind of injury contemplated by the statute," such that reduced profit margin only causes competitive injury if it resulted from resale price competition with a favored rival. 14 H. Hovenkamp, *Antitrust Law* ¶ 2333c2, at 116 (2d ed. 2006) (emphasis added). But neither the statute nor the precedents have changed in the interim, and the FTC and courts have long ruled that "profit impairment of resellers paying more for the product [is] competitive injury *even in the absence of resale price competition*." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* § 8.4, at 183 (1962) (emphasis added; emphasis in original omitted); Resp. Br. 27-28 & n.7.

Not only is Professor Hovenkamp's proposed policy-based limitation contrary to the statutory language and precedent, but also it is logically incoherent. First, it virtually never happens that favored and disfavored dealers will simultaneously sell the very goods that they purchased at discriminatory prices to the same customer; Professor Hovenkamp's limitation of the profit-margin rule to that circumstance effectively abrogates it. Second, in his desire to limit the RPA to protecting only the competition to resell the specific commodity, he ignores how diminished profit margin affects competition. Profit margin is earned *upon* the resale of the commodity; reduced profit margin thus can never injure the competition *to resell* the specific good. Reduced profit margin from price discrimination always affects *future* competition with market rivals for *subsequent* sales to *different* customers, by limiting the ability of the victim to invest capital in customer acquisition and to price competitively in the market to win those sales. Resp. Br. 26-29. Reeder's claim is squarely

within the terms of the RPA, and the inference of potential competitive injury was an issue of fact for the jury.[2]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[2] On the separate question of the test for determining whether actual competition exists among purchasers, Volvo mischaracterizes the Hovenkamp treatise. Volvo Supp. Br. 1-2. As he did in his prior treatise, *see* Resp. Br. 25, Professor Hovenkamp correctly maintains that "the Robinson-Patman inquiry typically differs from the general relevant market inquiry" only in that courts need not inquire whether "one seller's competition is sufficient to restrain the other's ability to set price above the competitive level." 14 H. Hovenkamp, *Antitrust Law* ¶ 2333b1, at 96-99 (2d ed. 2006). Indeed, on this point, Professor Hovenkamp recites without criticism the holding below that "the jury was entitled to find that [Reeder] and the favored dealers were in actual competition" under the RPA because they competed for customers in the same geographic market. *Id.* ¶ 2333b3, at 104.