No. 06-848

IN THE

Supreme Court of the United States

CIGARETTES CHEAPER!,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY AND GMB, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding certain evidence pursuant to Federal Rule of Evidence 403?

CORPORATE DISCLOSURE STATEMENT

Reynolds American Inc., R.J. Reynolds Tobacco Holdings, Inc., and FHS LLC are the parent companies of respondents, and Reynolds American Inc. is a publicly traded company.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE OF EVIDENCE INVOLVED

In addition to the Robinson-Patman Act, Federal Rule of Evidence 403 is also relevant. That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT

Petitioner Cigarettes Cheaper! ("CC") filed a Robinson-Patman Act counterclaim against respondent R.J. Reynolds Tobacco Company and its subsidiary GMB, Inc. (collectively "RJR") for alleged price discrimination. After a five-week trial, a jury entered judgment in favor of RJR. CC's petition for certiorari concerns evidentiary rulings made during the course of that trial.

A. Factual Background

RJR sells Camel, Winston, Salem, and Doral cigarettes. Pet. App. 1a.[1] It competes with several other cigarette manufacturers, including Philip Morris, Lorillard, and Liggett. R.351 ¶ 14; RA539-40; RA1094; R.352 Exs. 3-8; R.370 ¶ 33 Resp. Because they may not advertise on television, radio, or billboards, cigarette manufacturers rely on retailers to promote their brands through product placement and point-of-sale signs and placards. Pet. App. 3a; R.351 ¶ 27; RA387-88. Competition for such retail "presence" is vigorous. RA396-97; RA410; RA420;

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[1] "Pet." refers to CC's petition for certiorari; "Pet. App." refers to the appendix thereto; "R." refers to the Record; "RA" refers to RJR's appendix in the Court of Appeals; and "CCBr." refers to CC's opening brief in the Court of Appeals.

R.371 Ex. 136 ¶¶ 3-8. There are hundreds of thousands of cigarette retailers nationwide (*e.g.*, grocery stores, gas stations, convenience stores), and cigarette manufacturers offer them myriad incentives, including direct payments, to provide things like better shelf placement and permanent advertising. RA296-97; RA409-10; RA415; RA420; RA541-47; R.371 Ex. 136; R.351 ¶ 29. Cigarette manufacturers also periodically offer discounts and promotions that retailers must pass along to customers. A typical discount is a "buydown" (*e.g.*, offering dollars off cartons and cents off packs); a typical promotion is a "buy-some-get-some-free" (*e.g.*, offering a free pack with the purchase of two packs). R.351 ¶¶ 29-32; RA392; RA541-42. These various discount and promotion programs "directly affect[] the retail prices at which cigarettes are sold." CCBr. 32.

During the relevant time period, Philip Morris was the largest cigarette manufacturer in the United States—its Marlboro brand alone had a larger market share (33 percent) than all of RJR's brands combined (25 percent). Pet. App. 3a-4a; R.351 ¶¶ 13-16; RA538-40; RA1094. In the mid-1990s, Philip Morris secured numerous contracts under which the retailer would agree to maximize the retail "presence" of Philip Morris products and, correspondingly, curtail the retail "presence" of competing cigarette manufacturers in return for higher discounts and other promotional payments from Philip Morris. R.371 Ex. 136 ¶ 5; RA1100; RA296-97; RA417-19; RA421-23; RA438; RA564-67. The most restrictive of those agreements was the "Philip Morris exclusive," in which the retailer guaranteed Philip Morris the most and best shelf space; the sole right to place permanent signage and displays; and the exclusive right to offer discounts and promotions during specified weeks each quarter. RA1057-65; RA419; RA422-23; RA372-73; R.351 ¶ 36.

RJR responded to this advertising and price competition from Philip Morris by offering retailers new contractual options, with greater incentives offered for greater retail "presence." R.351 ¶ 34; RA415-16; RA408; RA224-25. RJR generally required retailers receiving its promotional resources to allow RJR brands permanent (though, unlike Philip Morris, not exclusive) signage and to permit RJR to offer discounts and promotions whenever RJR deemed it competitively necessary. R.351 ¶ 33; RA414; RA420; RA446; RA449-50. Through these contracts, RJR also endeavored to meet, on a retailer-by-retailer basis, some of the discounts and promotions offered under the "Philip Morris exclusive" contracts. RA434-37; RA428-29; RA451; RA568-71; RA574-81; RA1501-12; RA582-83. In order to gauge Philip Morris's actual pricing discounts and to facilitate its market responses to those discounts, RJR identified the retailers that signed "Philip Morris exclusive" contracts, tracked the terms of those agreements, and gathered a wealth of information from the cigarette trade concerning the volume and timing of Philip Morris's promotional activities. RA401-A-403; RA1244; RA447; RA559-61; RA1513-27; RA435; RA398-99; RA401-08; RA574-80; RA549-50; RA300-07; RA1528-38; RA405-06.

One of the "Philip Morris exclusive" retailers leading the price competition was CC, which entered the cigarette retail market in 1994 and aspired to open 5,000 cigarette outlets by 2000. RA1209-10; R.370 ¶ 5 Resp. CC was one of the earliest retailers to sign the "Philip Morris exclusive" contract, and, from the outset, each of its stores received Philip Morris's highest level of promotional resources. RA1177-78; R.351 ¶¶ 35-36; RA1145; RA1147; RA1148; RA205-06; RA209-10; RA1175; RA1182; RA1209; RA1211-12; RA211-19. In return for lower prices on Philip Morris cigarettes, CC agreed to give Philip Morris the exclusive right to permanent advertising and three weeks each quarter in which only Philip Morris could offer discounts and promotions. R.351 ¶ 36; RA1057-92; RA278-79; RA372-73. Because CC physically relegated competing cigarette brands to the lowest shelves and prominently displayed Philip Morris cigarettes and advertisements, its stores looked like "Marlboro factory outlets." RA1553; RA1175, RA1209-10; RA217-18; RA1066-92; RA256-71; RA308-09; RA452-54; RA377; RA463-64. CC touted its close affiliation with Philip Morris and its top-selling Marlboro brand in a 1996 prospectus. RA1152-1216.

Between 1994 and 2000, RJR offered to enter into discount and promotion agreements with CC on many occasions. RA1248-65; RA285-88; RA1266-67; RA291-92; RA1268-83; RA280-82; RA309-12; RA1286-1304; RA313-31; RA455-58; RA1284; RA1309-11; RA465-78; RA1313-21; RA231-33; RA1322-37; RA336-39; RA479-93; RA342-51; RA1338; RA283-84; RA1340-62. CC rejected each of RJR's proposals (RA1305-08; RA331-32; RA458; RA461-62; RA470-71; RA476-78; RA336-39; RA342; RA350-51), even after RJR offered to relax certain of its retail "presence" requirements (RA1287-1304; RA1313-31; RA455-58; RA1284). A sticking point was RJR's standard requirement that it receive permanent advertising in return for its promotional resources. RA470-71; RA476-78. As CC's founder wrote, CC could not—consistent with its obligations under the "Philip Morris exclusive" contracts—give RJR permanent signage. RA1366; RA229-30. It was not until March 2000 that CC and RJR finally agreed upon a merchandising arrangement. RA1373-84; RA354-55.

B. Procedural Background

This litigation began in 1999 when RJR filed a Lanham Act suit against CC for trademark infringement, relating to the sale of "gray market" cigarettes. Pet. App. 2a. After a two-week trial on that Lanham Act claim, a jury awarded RJR approximately $4 million in damages. *Id.* at 2a-3a.

CC filed two antitrust counterclaims in RJR's Lanham Act suit: a Sherman Act claim alleging that RJR had joined a conspiracy with CC's retailer competitors to put CC out of business, 15 U.S.C. §§ 1 and 2, and a Robinson-Patman Act claim alleging that RJR engaged in illegal price discrimination by selling cigarettes to certain retailers at lower prices, *id.* § 13. The district court entered summary judgment in favor of RJR on CC's Sherman Act claim.

Both the Lanham Act verdict and the Sherman Act summary judgment grant were affirmed by the United States Court of Appeals for the Seventh Circuit and are not challenged in this Court. Pet. App. 3a-10a, 13a-17a.

The Robinson-Patman Act counterclaim went to trial and, after hearing evidence and argument for over a month, a jury rejected CC's counterclaim and entered a general verdict in favor of RJR. Pet. App. 2a; R.625. At trial, CC met its initial burden of showing that RJR sold its cigarettes to other retailers for lower prices. Pet. App. 10a. RJR responded with evidence (discussed p. 4 *supra*) showing that it had offered CC merchandising contracts similar to those that it had offered other retailers, and argued that there could be no claim of discrimination since the lower prices were "functionally available" to CC. *See Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir. 1981) ("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury.") (collecting cases). In addition, RJR presented evidence (discussed pp. 2-3 *supra*) in support of its affirmative "meeting competition" defense, showing that it had offered certain retailers lower prices in order to meet competition from Philip Morris and its "exclusive" retailers, like CC. *See* 15 U.S.C. § 13(b) (seller may rebut *prima facie* case "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor").

CC sought to introduce at trial certain "ill intent" evidence to show that RJR harbored a subjective intent to put CC out of business. *See* Pet. 3-5.[2] Almost all of this "ill intent" evidence came from a one-year period (1996), and it indicated in colorful and intemperate language (*e.g.*, "kill on the beach") the reaction of certain RJR employees to the price competition that CC had generated with its "Philip Morris exclusive" contracts. CC itself explained the reason for this competitive animus in its Seventh Circuit brief:

> CC's rapid expansion in 1995 and 1996 and low prices on Philip Morris's Marlboro and other brands threatened RJR's already-deteriorating market position. RJR was worried CC might expand to capture 20% of the U.S. cigarette m[ar]ket, selling vast quantities of low-priced Marlboros. Cheap Marlboros would force RJR to follow and drop prices on its brands, decreasing RJR's profits. . . . RJR feared that consumers, lured by Marlboro's premium image, would switch from RJR savings brand to Marlboro.

CCBr. 9-10 (record citations omitted). The Seventh Circuit similarly understood the basis for the "ill intent" evidence: "[CC] sold Marlboros for less than many outlets sold Camels and Winstons; neither [RJR] nor its retail outlets were willing to take this lying down. They responded with discounts of their own and generated reams of paper expressing unhappiness about the need to do so." Pet. App. 7a.

After *in limine* briefing and argument, the district court excluded the "ill intent" evidence from CC's case-in-chief, reasoning that the Sherman Act conspiracy claim for which

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[2] CC did not originally offer this "ill intent" evidence in support of its Robinson-Act price discrimination claim, but instead in support of its Sherman Act conspiracy claim. R.404 pp. 3-4. Only after the district court granted summary judgment to RJR on that Sherman Act claim did CC argue that this "ill intent" evidence was also relevant to its Robinson-Patman Act claim. RA3-4.

that evidence was originally offered had been dismissed and that CC did not need the evidence to establish its *prima facie* case under the Robinson-Patman Act. RA3-15. The district court noted that the "ill intent" evidence might not be admissible under Federal Rule of Evidence 403 (RA15), but deferred deciding that issue until both parties had presented their evidence, at which time the facts and theories of the case would be clearer (RA3; RA21-22). When CC renewed its motion to admit the "ill intent" evidence at the rebuttal stage, the district court determined that "[t]he prejudice of such evidence is apparent and substantial; and, in my view, far exceeds any probative value." RA587. Recounting that each side had been able "to present its position, in terms of what was done, what was said, what was offered and what was not offered," the district court held:

> There is a voluminous evidentiary record in this case with respect to the statements of the parties, promotions, discounts and other benefits which were offered or not offered to [CC], and those offered or not offered to other retailers who can arguably be viewed as competitors of [CC]. . . . These matters are the essence of the Robinson-Patman issues involved in this case. . . . Consequently, conspiracy-type evidence and other similar ill-will evidence would add little, if any, probative value to the existing evidentiary record. That stands in stark contrast to the prejudicial effect of such evidence.
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> *   *   *
>
> There is a substantial risk . . . that because of the potential inflammatory nature of some of this evidence, particularly—and I will give you an example: "Kill them on beach"—that is an expression that is incendiary. Quite frankly, that expression can be used with respect to lawful conduct on the part of a party and it could be expressive of unlawful conduct. For the jury to hear . . . an expression of a thought process,

> uncoupled with some later conduct . . . would, I think, exalt the importance of that—would channel the jury's attention to issues not particularly relevant, . . . and get them off on a wild good chase and possibly decide this case for the wrong reasons.
>
> * * *
>
> That is a substantial [Rule] 403 violation and I am convinced of that more than ever.

RA586-89. The district court similarly "excluded ill-will-type evidence sought to be admitted by [RJR] against [CC]," barring RJR under Rule 403 from introducing diary entries of one of CC's officers that showed that CC had no intent to reach a merchandising agreement with RJR. RA587. Despite their relevance to the functional availability issue, the district court excluded the diary entries because they contained some "highly insulting" remarks and very negative characterizations of RJR personnel. RA22-23.

On appeal, the Seventh Circuit held that the district court's rulings on CC's proffered "ill intent" evidence were not an abuse of discretion. Pet. App. 11a-12a. In full, the Court of Appeals reasoned:

> [CC] wanted to introduce the "intent" evidence that we have discussed briefly. The district judge excluded it. The Robinson-Patman Act prohibits certain price differences; a bad intent is not part of the plaintiff's *prima facie* case under § 13(a), and a "good" intent (apart from its bearing on the statutory justifications) does not excuse price discrimination. Even if marginally relevant to some issue (which we doubt), the sort of evidence that [CC] wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words. Keeping this evidence out enabled the court to focus jurors' attention on the statutory requirements and defenses. The district judge

> sensibly relied on Fed. R. Evid. 403, which authorizes the exclusion of evidence whose tendency to create prejudice substantially outweighs any benefit; this was not an abuse of discretion.
>
> Taking another tack, [CC] proposed to use this evidence to impeach [RJR]'s witnesses, some of whom testified (as part of [RJR]'s theory that discounts were available to any outlet) that [RJR] would have been happy to cooperate with [CC], the better to sell more cigarettes. This led to the response that [RJR] wanted to "kill" rather than "help" [CC]. The district court should have kept *all* claims about motive or intent out of evidence; whether [RJR] was "trying to help" [CC] or just engaging in grudging compliance with its legal obligations is neither here nor there. The instructions did not call on the jury to resolve any dispute about the intent with which [RJR] acted. This means that any error in not allowing impeachment on the subject of intent was harmless.

Id.

REASONS FOR DENYING THE PETITION

The central premise of CC's petition for certiorari is demonstrably false. Despite CC's hyperbolic claims to the contrary, the Seventh Circuit has not ruled that "intent" evidence is *per se* irrelevant in Robinson-Patman Act cases, or even that such evidence was irrelevant in this particular case. Rather, the Seventh Circuit simply stated that it "doubted" that evidence about RJR's intent was relevant to any issue here. It did not, however, elaborate or come to closure on this point because it held that the district court had not abused its discretion in excluding the "ill intent" evidence proffered by CC pursuant to Federal Rule of Evidence 403. The factbound application of Rule 403 in this case creates no split of authority and obviously does not warrant this Court's review.

Even assuming *arguendo* that the Seventh Circuit held that the "ill intent" evidence here was irrelevant, that holding was surely correct, creates no split of authority, and does not warrant this Court's review. The Court of Appeals found that CC had *established* a *prima facie* case under the Act by showing an ongoing price differential. Any "intent" evidence to *bolster* this already-established *prima facie* showing was necessarily superfluous and its exclusion inherently could not *harm* CC, since it successfully made its *prima facie* case without such evidence. Nor was the "ill intent" evidence relevant to RJR's affirmative defense of "meeting competition." As the evidence before the jury showed and as CC concedes, Philip Morris was offering discounts through retailers like CC to which RJR responded with similar discounts. Having thus established the meeting competition defense, RJR could not have lost it simply because some of RJR's employees expressed competitive animus against those (Philip Morris and CC) that forced RJR to lower its prices. Finally, the subjective intent of certain RJR employees towards CC is plainly irrelevant to the objective question whether RJR's lower prices were, in fact, offered to, and therefore "functionally available" to, CC.

I. THE SEVENTH CIRCUIT DID NOT "REWRITE" THE ROBINSON-PATMAN ACT; IT AFFIRMED THE DISTRICT COURT'S APPLICATION OF FEDERAL RULE OF EVIDENCE 403

In strident tones, CC claims that the Court of Appeals has taken "a dramatic leap outside the bounds of this Court's earlier precedent" and has set itself "clearly against the law as developed in the other circuits." Pet. 25. According to CC, the Seventh Circuit "has re-written the Robinson-Patman Act," *id.* at 27-28, by holding "that intent evidence is irrelevant in *all* types of Robinson-Patman Act claims," *id.* at 8 (emphasis in original). But the entirety of CC's petition for certiorari is premised upon a fundamental mischaracterization of the Seventh Circuit's opinion.

The Seventh Circuit plainly did not hold that intent is always irrelevant under the Act. Rather, the Seventh Circuit only expressed its "doubt" whether RJR's subjective intent was relevant: "Even if marginally relevant to some issue (which we doubt), the sort of [intent] evidence that [CC] wanted to introduce could have played little role beyond confusing jurors who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words." Pet. App. 11a. The Court did not resolve the question whether the "ill intent" evidence was irrelevant. Rather, it found that the district court did not "abuse [its] discretion" in excluding this evidence under "Fed. R. Evid. 403" since the trial court "sensibly" concluded that its "tendency to create prejudice substantially outweighs any benefit." *Id.*

The Seventh Circuit, in other words, had no cause in this case to resolve conclusively whether a defendant's subjective intent is relevant to establishing or rebutting a *prima facie* case under the Robinson-Patman Act because it determined that the district court had properly excluded CC's proffered "ill intent" evidence under Federal Rule of Evidence 403. It merely held that, even if subjective intent evidence is marginally relevant under the Robinson-Patman Act, it is subject to the strictures of Rule 403.

CC does not and cannot maintain that subjective intent evidence *must* be admitted in a Robinson-Patman Act trial regardless of its probative value, its inflammatory nature, or its potential to confuse the issues. That is fatal to its petition. It is settled law that "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules," and that its application of Rule 403's balancing test is reviewed only for "abuse[] [of] discretion." *United States v. Abel*, 469 U.S. 45, 53-54 (1984). The deference accorded the trial judge reflects the fact that "the considerations arising under Rule 403 are susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues." *R.B.*

Matthews, Inc. v. Transamerica Transp. Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (internal quotation marks and citation omitted).

The district court considered the "ill intent" evidence at issue here both at the outset of trial and again at the rebuttal stage, at which point it was intimately familiar with the evidence supporting CC's counterclaim and RJR's affirmative defense. It determined that each side had been able "to present its position, in terms of what was done, what was said, what was offered and what was not offered" (RA588); that the "conspiracy-type evidence and other similar ill-will evidence would add little, if any, probative value to the existing evidentiary record" (RA586-87); and that the "inflammatory" and "incendiary" nature of the proffered evidence might cause the jury to "decide this case for the wrong reasons" (RA588). The Seventh Circuit agreed with that cogent analysis, concluding that the district court "sensibly" invoked Rule 403 to exclude CC's proffered "ill intent" evidence so that the jurors would "focus . . . on the statutory requirements and defenses" under the Robinson-Patman Act. Pet. App. 11a.

In an apparent effort to confuse this point, CC focuses (Pet. 6) on the sentence in the Seventh Circuit's opinion stating that "a bad intent is not part of the plaintiff's *prima facie* case under § 13(a) [of the Act], and a 'good' intent (apart from its bearing on the statutory justifications) does not excuse price discrimination." Pet. App. 11a. This sentence does not, in isolation or (especially) in context, suggest that intent is *per se* irrelevant in Robinson-Patman cases. The statement that intent is "not part of" the plaintiff's *prima facie* case is plainly correct and *reduces* plaintiff's burden by clarifying that it need not show such intent to establish a presumptive violation. Indeed, CC benefited from this ruling because it was found to have established a *prima facie* case here without such evidence. Similarly, the opinion's statement that "good intent (*apart* from its bearing on the statutory justifications) does not excuse price discrimination" indicates, as CC itself admits, that evidence of "intent plays some role *at least* with respect to the affirmative defenses." Pet. 6 (emphasis in original). In all events, whatever this sentence may imply in isolation, the following sentence, as noted, plainly establishes that the Seventh Circuit was only expressing "doubt" about the relevance of the "ill intent" evidence, not resolving that issue.[3]

In short, the Seventh Circuit's holding represents the application of settled (and highly deferential) law to the particular facts of this case. It cannot possibly warrant this Court's review.

II. THE "ILL INTENT" EVIDENCE WAS NOT RELEVANT IN THIS CASE; THERE IS NO SPLIT

Even assuming *arguendo* that CC is correct in maintaining that the Seventh Circuit held that "ill intent" evidence was irrelevant, such a holding cannot be gainsaid in this case and does not merit this Court's review. CC claims that the "ill intent" evidence was necessary to establish the competitive injury element of its *prima facie* case (Pet. 9-16), to rebut RJR's meeting competition defense (*id.* at 17-19), and to

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[3] The Seventh Circuit did rule that intent evidence was irrelevant to the specific question whether RJR's price "discounts were [functionally] available to any outlet," including CC. Pet. App. 11a. Such intent evidence, good or bad, was "neither here nor there" on the objective factual question whether the discounts were actually offered to CC. *Id.* Introducing evidence of RJR's benign intent (without impeachment by CC) was nevertheless "harmless" error because the "instructions did not call on the jury to resolve any dispute about the intent with which Reynolds acted." *Id.* at 11a-12a. As discussed in Part II.C *infra*, this "functional availability" ruling is plainly correct and unworthy of the Court's review because no court has suggested that evidence of the seller's subjective intent bears on the objective question whether price discounts are, in fact, offered and therefore functionally available to the buyer.

show that RJR's lower prices were not functionally available to CC (*id.* at 19-20).

None of these claims withstands scrutiny, and none of the cases that CC cites mandates a different result here. Indeed, the central holding of all of those cases, even as interpreted by CC, is that a determination whether intent evidence should be allowed is a "'flexible and pragmatic concept'" which necessarily turns on the particular facts and circumstances of the case. Pet. 18 (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 441 (1983)); *accord id.* at 21 (quoting *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 163-64 (4th Cir. 1999)). The Seventh Circuit's *application* of that "flexible and pragmatic" standard in circumstances markedly different from the cases cited by CC cannot possibly conflict with those precedents or otherwise set forth a general legal rule meriting this Court's review.

A. Competitive Injury Element

CC devotes eight pages of its petition to the proposition that, in a secondary line (as opposed to primary line) Robinson-Patman Act case, evidence of the seller's intent is relevant to establishing the "last element of the *prima facie* case—that the *effect* of the discrimination may be to injure, destroy or prevent competition." Pet. 10 (citing *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, ___, 126 S. Ct. 860, 869 (2006)) (emphasis added). This convoluted argument is academic since CC in fact satisfied that element of its *prima facie case* with objective evidence relating to competitive effect, and therefore had no need to add evidence of subjective intent.

The Seventh Circuit concluded that CC *successfully* established that "[RJR] sold to other retailers for less than it sold to [CC]," which "threw on [RJR] the burden to establish a justification." Pet. App. 11a. Because CC established the competitive harm element of its *prima facie* case on objective evidence, the result could not have changed even if the "ill intent" evidence had been admitted. CC thus suffered no conceivable prejudice by being denied the opportunity to gild the lily with the inflammatory "ill intent" evidence.

Indeed, CC seems affirmatively to embrace the Seventh Circuit's view that intent is not an element of a price discrimination *prima facie* showing in secondary line cases. Like the Seventh Circuit, CC believes that "a *mere difference in price* . . . will have the *effect* against which the Robinson-Patman Act is designed to protect," without regard to the seller's *reasons* for the price differential. Pet. 14 (emphases added). Thus, CC's attack amounts to the baffling complaint that, though the Seventh Circuit ruled that CC established a *prima facie* case with objective evidence relating to competitive effect, the court should have also opined that it could have established that case through "intent" evidence, even though resolution of that issue was unnecessary and even though exclusion of such evidence did not prejudice CC in making its case.

In any event, to the extent it matters or is even disputed by CC, it is clear that the competitive injury requirement may be established without any detour into the seller's subjective intent. As this Court noted in *Volvo Trucks*, "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time." 126 S. Ct. at 870 (citing *Falls City*, 460 U.S. at 435, and *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)). There was no question that other retailers were receiving lower prices from RJR during the six-year period from 1994 to 2000; indeed, RJR put on extensive evidence that it unsuccessfully made similar offers to CC. *See* p. 4 *supra*. Whether CC "was not given something that its competitor was given" is, as the district court noted, an objective fact that "can be proved . . . every day of the business week in every court in the land, without regard to motivation." RA13. Having shown that other retailers had received lower prices over the six-year period, CC was entitled to and received the inference of competitive harm described in *Volvo Trucks*. CC was not required also to establish scienter, and the Seventh Circuit was merely stating a truism when it noted that "a bad intent is not *part* of the plaintiff's *prima facie* case under § 13(a)." Pet. App. 11a (emphasis added).

Apart from that fundamental flaw, CC's discussion of the competitive harm, or effect, element is also badly confused and shows no split of authority. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, this Court held that the competitive harm element requires "objective evidence" that the seller's conduct had a real prospect of harming competition "through anticompetitive means"; a subjective "desire" to harm competition does not suffice. 509 U.S. 209, 241 (1993). CC attempts to evade *Brooke Group* by saying that it was a primary line case and its holding applies only in primary line cases. Pet. 13-15. That makes little sense. The question resolved in *Brooke Group* was what type of evidence satisfies the Robinson-Patman Act's competitive harm requirement, and the statutory language is identical for both primary and secondary line cases. *See* 15 U.S.C. § 13(a) (price discrimination must "injure, destroy, or prevent competition").[4] But even accepting *arguendo* that primary line cases are not relevant here, that only serves to hoist CC by its own petard, for it is *primary line* cases upon which CC mainly relies in its attempt to show that intent is relevant in meeting the competitive harm requirement. Pet. 11-12 (citing *Utah Pie Co. v. Cont'l Baking Co.*, 386

[4] In the Sherman Act context, the law focuses on anticompetitive effect, not commercial animus. *See, e.g., Bus. Elecs. Co. v. Sharp Elecs. Co.*, 485 U.S. 717, 726 (1988). As this Court recently noted in *Volvo Trucks*, "[i]nterbrand competition . . . is the primary concern of antitrust law," and "[t]he Robinson-Patman Act signals no large departure from that main concern." 126 S. Ct. at 872 (internal quotation marks and citation omitted).

U.S. 685 (1967) (primary line case); *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 105 (3d Cir. 1992) (primary line case); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987) (primary line case)). CC's reliance on these primary line cases is both internally inconsistent and incoherent since they were concededly modified by *Brooke Group*'s subsequent holding on the value of intent evidence in primary line cases. *See* Pet. 13, 16.

The two secondary line cases cited by CC regarding the competitive harm element are patently inapposite. In *Perkins v. Standard Oil Co.*, this Court sustained a jury's finding of competitive harm given the existence of evidence that the challenged price differential allowed the plaintiff's competitor to undercut the plaintiff on the price of gasoline. *See* 395 U.S. 642 (1969). The Court pointed out that the jury's conclusion was supported by evidence that the defendant was "aware that [plaintiff's] business was in danger of being destroyed by [defendant's] discriminatory practices." *Id.* at 649. But finding sufficient evidence to support a jury's verdict is a far cry from saying that subjective intent is always relevant to showing competitive harm. The subjective intent evidence at issue in *Perkins*, moreover, was qualitatively different and substantially more relevant than that at issue here. A seller's acknowledgment that its conduct is causing competitive harm obviously bolsters a claim that such harm occurred. The "ill intent" evidence here, however, does not show that RJR was *aware* that its promotions and discounts caused any competitive harm to CC. In point of fact, most of the intemperate remarks at issue here were made in 1996, the very year that CC was publicly predicting that it would acquire up to 20 percent of the cigarette retail market by 2000. RA1209-10; R.370 ¶ 5. Rather, as the district court found, the "ill intent" evidence was merely an "expression of a thought process, uncoupled with some later conduct" (RA588), and such evidence has no logical relationship to whether competitive harm actually occurred. *Perkins* therefore does not speak to this case, particularly considering that CC had established its *prima facie* case of competitive harm through objective evidence. Indeed, notwithstanding its earlier claim that the Seventh Circuit's holding "runs directly contrary . . . to the jurisprudence of this Court" (Pet. 8), CC eventually concedes that "this Court has never explicitly addressed the relative importance of the objective versus subjective evidence of a defendant's predatory intent in the context of a *secondary-line* case" (Pet. 16 (emphasis in original)).

In the other secondary line case CC cites, *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp*, the Eighth Circuit upheld a jury's finding of competitive harm based, in part, on evidence that the seller "wanted to cut the number of its dealers in half" and that it "was aware [its] discriminatory practice could destroy [plaintiff's] business." 374 F.3d 701, 712-13 (8th Cir. 2004). That holding is substantively identical to, and no more relevant than, *Perkins*. *Reeder-Simco* suffers from the additional flaw of having been reversed by this Court last Term. *See Volvo Trucks*, 126 S. Ct. at 873 n.4 (rejecting significance of seller's "decision to reduce the number of its dealers" because the "Robinson-Patman Act does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations").

B. Meeting Competition Defense

CC argues that evidence of RJR's subjective desire to harm CC is relevant to the "good faith" aspect of the meeting competition defense. *See* Pet. 17-18. It is undisputed, however, that RJR was facing genuine price competition from Philip Morris through CC and that lowering its prices in response to this threat was prudent and necessary. The fact that RJR's price discounts were needed to meet Philip Morris's competitive pricing is therefore supported not merely by a "good faith" belief, but by compelling evidence. Introducing additional evidence relating to the subjective attitude of certain RJR employees about Philip Morris's competitive threat would not add anything relevant to RJR's knowledge of, and reaction to, this competitive effect. It would reflect only that, in meeting competition, businesses often are intent on winning the marketplace battle. This hardly detracts from or undermines the objective fact that RJR actually needed to meet, and responded to, competition.

Although CC suggests that the meeting competition defense turns upon the seller's "actual intention" in offering lower prices (Pet. 17), this Court's precedents are clear that the defense is established where the seller "show[s] the existence of *facts* which would lead *a reasonable and prudent person* to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 82 (1979) (internal quotation marks and citations omitted; emphases added); *accord Falls City*, 460 U.S. at 438. Such facts establish "good faith" for purposes of the meeting competition defense, regardless whether they are accompanied by animus towards the competitor. The evidence before the jury here (*see* pp. 2-3 *supra*) showed that RJR took numerous steps to verify, and then match on a retailer-by-retailer basis, the lower prices offered by Philip Morris through its "exclusive" retailers, like CC. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 455 (1978) ("good faith" shown where seller "had received reports of similar discounts from other customers" and made "[e]fforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data"); *accord Great Atl.*, 440 U.S. at 84 n.17. Under this Court's precedents, that is all that RJR needed to show to establish that it was meeting competition.

Indeed, CC *concedes* that RJR faced genuine price competition. In its Seventh Circuit brief, CC acknowledged that "[c]heap Marlboros would force RJR to follow and drop prices on its brands, decreasing RJR's profits." CCBr. 10. And in its petition for certiorari, CC reaffirms that *it* was the source of RJR's price competition: "Because CC sold Philip

Morris's cigarettes for such a low price, CC was threatening RJR's market position, driving down the price RJR would be able to charge other retailers for RJR cigarettes in future." Pet. 5 n.4. Thus, under CC's *own* view of the evidence, CC's alliance with Philip Morris forced RJR to lower its prices to meet competition.

RJR was indisputably responding to "a situation of competitive necessity" as would any "prudent businessman," and accordingly met the "good faith" requirement of the meeting competition defense. *Falls City*, 460 U.S. at 441. That "complete defense," *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951), is not somehow lost simply because the competition being met was so intense that it also engendered harsh comments by employees of the seller. Even CC acknowledges that such "ill intent evidence" can be "dismiss[ed]" as a "spirited rivalry when directed at a *competitor*." Pet. 5 n.4 (emphasis in original). But, of course, a seller can have a "spirited rivalry" with those, like CC, who align themselves with the seller's principal competitor to engage in price discounts. The "spirited rivalry" evidence here should therefore similarly be dismissed as the natural byproduct of an intense effort to meet competition. CC cannot cite a single case endorsing its view that "ill intent" evidence can invalidate a "meeting competition" defense where, as here, the seller is actually responding to genuine price competition.

Indeed, the Fourth Circuit case cited by CC (Pet. 20-22) as supposedly creating a split, *Hoover Color*, plainly establishes that acting to meet competition is a complete defense, *regardless* of the seller's intent or motives. The court there reversed a grant of summary judgment for the seller based upon the meeting competition defense because the plaintiff had offered evidence that the seller's "sole" motive was "not to meet a competitor's price, but rather to develop . . . large volume of sales." 199 F.3d at 167. The Fourth Circuit recognized that a jury could ultimately find that the seller acted to meet competition *and* to increase its volume of sales, in which case the seller would win. *See id.* But it could not sustain the grant of summary judgment because "a fact-finder could reasonably conclude" that the seller offered lower prices "*simply* to grow its business." *Id.* (emphasis added); *see also id.* at 168 (explaining that "a factfinder could reasonably determine that [seller] did not need or intend the volume discounts to match competing offers"). *Hoover Color* thus stands for the commonsensical notion that where there is evidence to show that the seller was in fact matching the lower price of a competitor, the meeting competition defense prevails, even if the seller had additional reasons for lowering its price. The Fourth Circuit made plain that the plaintiff could win at trial only if the "sole" basis for reducing price was unrelated to price competition. Since the evidence here concededly showed that RJR was matching Philip Morris's prices, it satisfied the Fourth Circuit's test because such price competition was at least part of the reason for the differential pricing.[5]

CC submits that this is one of those rare cases noted in *Falls City* where, "'despite the availability from other sellers of a low price, it may be apparent that the defendant's low

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[5] Both *Hoover Color* and *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990), the other circuit court decision allegedly creating a split on the meeting competition defense (discussed further on p. 22 *infra*), involved summary judgment motions, not jury verdicts. Those decisions are therefore distinguishable in that the courts of appeals were reviewing the evidence *de novo* and drawing all inferences in favor of the non-movant plaintiffs. *See generally Barr Labs.*, 978 F.2d at 105 (noting that "complex antitrust litigation infrequently merits summary judgment because of its fact-intensive nature"). Here, in contrast, there was a five-week trial and the jury granted judgment to RJR. As the verdict holder, RJR is entitled to have the evidence and all reasonable inferences therefrom viewed in its favor, *see Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), and there was abundant evidence showing that RJR was responding to the price competition of Philip Morris. Thus, the facts, posture, and standard of review in this case are materially different from those in *Hoover Color* and *Alan's of Atlanta.*

price was not a good faith response.'" Pet. 18 (quoting *Falls City*, 460 U.S. at 439). CC reads the quoted language as allowing a plaintiff to rebut a valid meeting competition defense where the seller "had some ulterior motive" in lowering its price. Pet. 18. It does no such thing. As the Court explained in the next sentence of the *Falls City* opinion, *see* 460 U.S. at 440, the quoted language was a reference to the holding in *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1978), which is not remotely applicable here. The sellers in *Staley* were found to be lowering their prices not as part of any actual price competition, but rather as part of a price fixing conspiracy under which low prices were set in some areas in order to establish artificially high prices elsewhere. *Id.* at 756. The *Staley* Court accordingly held that the sellers' "price discriminations were not made to meet a 'lower' price and consequently were not in good faith." *Id.* at 758. As this Court further explained in *Falls City*, there was no "good faith" in *Staley* because the sellers' low prices "could be seen *only* as part of a collusive pricing system designed to exact artificially high prices throughout the country." 460 U.S. at 440 (emphasis added). The quoted language in *Falls City* thus refers to situations in which there is no price competition at all, and the meeting competition defense is instead being used as a pretext to conceal or otherwise justify conspiratorial conduct. The Eleventh Circuit case cited by CC (Pet. 22-24) is plainly distinguishable for the same reason. *See Alan's of Atlanta*, 903 F.2d at 1417 (reversing grant of summary judgment for seller where district court "chose to ignore" plaintiff's evidence that the seller thought that its pricing scheme "bordered on illegality" and therefore instructed relevant employees "to be familiar with three contrived explanations for their actions" in order "[t]o avoid legal troubles"). In any event, as noted, RJR's alleged hostility towards CC was not "ulterior" to RJR's need to meet its competitor's price discounts—it *stemmed* from this competition.

In short, neither *Falls City* nor any other case that CC cites stands for the proposition that the meeting competition defense is unavailable to a seller that responded to actual price competition simply because the seller's employees happened to have resented the fact that the seller had to lower its prices. Such a rule would, indeed, be perverse, since competitive animus is most likely to be found where price competition is fiercest. The greater the price competition in an industry, the lower the profit margins, the greater the stress on management, and the more likely that some employees will develop contempt for their competitors, even as those employees are responding to the competition with lower prices. In the end, of course, the lower prices that stem from the competition in such industries are good for consumers, the ultimate beneficiaries of antitrust laws. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). And the rule advocated by CC would serve only to deter participants in such markets from meeting competition with lower prices. Under CC's view of the law, even a seller responding to intense price competition would be defenseless against a Robinson-Patman Act claim if it turned out—after a team of lawyers had scoured all of the seller's internal memoranda—that some of the seller's employees had expressed hostility toward the competition. *Cf.* Pet. App. 16a ("A large firm such as [RJR] with thousands of employees, generates mountains of internal paper. Some of those employees are bound to take almost any view about almost every subject."). Such a rule cannot be squared with this Court's admonition that the "heart of our national economic policy long has been faith in the value of competition" and "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil*, 340 U.S. at 249.

C. Functional Availability

CC argues that it should have been permitted to use the "ill intent" evidence to somehow help establish that RJR's price discounts were not functionally available to it. *See* Pet. 19-20. The question of functional availability, however, turns on whether the discount that the seller gave to others was in fact available to the plaintiff. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998) ("[A] price discount equally available to all purchasers . . . is not price discrimination."); *accord Shreve Equip.*, 650 F.2d at 105. Whether the seller made an offer, and what the terms and conditions of that offer were, are knowable facts. There was ample evidence here that RJR made repeated offers that CC just as repeatedly rejected. *See* p. 4 *supra*. RJR's internal attitudes about CC cannot in any way affect those objective facts. Such intent evidence does not bear on whether an offer was made or on CC's reasons for rejecting it in favor of "Philip Morris exclusive" contracts, and is therefore plainly irrelevant to whether the offer was available.

There is, in any event, no split of authority on this question. Contrary to CC's assertion, this Court in *Morton Salt* made no reference whatever to whether the seller "actually intended to sell" (Pet. 19), but rather considered whether all customers, given their relative sizes, could, as a matter of fact, take advantage of the seller's volume discount offer. *See Morton Salt*, 334 U.S. at 42-43 (holding that quantity-based discounts were "[t]heoretically available to all" but "functionally they [we]re not" because some customers "made purchases in such small quantities that they could not qualify for any of [seller]'s discounts"). The only other case cited in this regard—an unpublished district court decision (Pet. 20)—is also notably silent about intent. Indeed, that court, like the Court in *Morton Salt*, looked at the "structure" of the promotional program to determine its functional availability. *Hygrade Milk & Cream Co. v.*

Tropicana Prods., Inc., No. 88 Civ. 2861 (SAS), 1996 WL 257581, at *7 (S.D.N.Y. May 16, 1996).

Although CC contended below that it should have been able to impeach RJR's evidence of its willingness to contract with CC, that factbound issue is obviously not worthy of this Court's review. Moreover, as the Seventh Circuit correctly ruled, whatever error the district court committed in allowing RJR's "good intent" evidence, it was plainly harmless because the "instructions did not call on the jury to resolve any dispute about the intent with which [RJR] acted." Pet. App. 11a-12a.

* * *

In all events, even assuming *arguendo* that the Seventh Circuit erred in assessing the relevance of intent evidence to some of the issues and defenses implicated in this case, any such ruling would necessarily be factbound and inherently unworthy of this Court's review. The opinion below contains no general discussion about the permissibility or relevance of subjective intent evidence under the Robinson-Patman Act, much less any clear rule completely barring such evidence under the Act. Thus, even if the opinion ruled that such evidence was irrelevant (as opposed to being properly excluded under Rule 403), that holding is necessarily case-specific and cannot reasonably be interpreted as broadly prohibiting intent evidence in all circumstances. Consequently, the opinion below contains no general legal principle warranting review, and certainly no principle in conflict with the holdings of other lower courts or this Court. To the contrary, even under CC's interpretation, these other cases stand, at most, for the proposition that the "'facts and circumstances of a particular case'" determine whether intent evidence is relevant. Pet. 21 (quoting *Hoover Color*, 199 F.3d at 163-64). Accordingly, any application of that flexible standard by the Seventh Circuit is consistent with the cases relied upon by CC and none of those cases involved facts remotely analogous to those present here. Thus, the Seventh Circuit did not either announce a legal rule, or even apply a legal principle in a manner, which conflicts with a decision of this Court or any other federal court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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