FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LA INTERNATIONAL CORP.; MANHATTAN WHOLESALERS, INC.; EXCEL WHOLESALE DISTRIBUTORS, INC.; VALVE DISTRIBUTOR, INC.; AKR CORPORATION; U.S. WHOLESALE OUTLET & DISTRIBUTION, INC.; SANOOR, INC., doing business as L.A. Top Distributor; PITTSBURG WHOLESALE GROCERS, INC.; PACIFIC GROSERVICE, INC.; BORDER CASH & CARRY, INC., *Plaintiffs – Appellees, / Cross – Appellants* v. PRESTIGE BRANDS HOLDINGS, INC.; MEDTECH PRODUCTS, INC., *Defendants – Appellants / Cross – Appellees*.	Nos. 24-3776, 24-5009, 24-5227 D.C. No. 2:18-cv-06809-MWF-MRW ORDER

Filed August 28, 2026

Before: Kim McLane Wardlaw, Salvador Mendoza, Jr., and Anthony D. Johnstone, Circuit Judges.

Order;
Dissent by Judge Forrest

SUMMARY*

Robinson-Patman Act / Attorney's Fees

The panel denied rehearing en banc in a case in which the panel (1) affirmed the district court's judgment in favor of wholesale purchasers in their action under the Robinson-Patman Act ("RPA") alleging that Prestige Consumer Healthcare, Inc. and its subsidiary Medtech Products, Inc. sold Clear Eyes Redness Relief Eye Drops at an impermissibly lower price to their larger competitors; and (2) vacated the district court's award of attorney's fees to the wholesale purchasers and remanded with instructions to enter a new fee award.

Dissenting from the denial of rehearing en banc, Judge Forrest, joined by Judge VanDyke, wrote that the Supreme Court has been clear that a distributor can only sue a manufacturer for being charged a higher price than the distributor's competition under Section 2(a) of the RPA when the distributor's ability to compete is *substantially* impaired. By affirming jury instructions that required only a finding that "some sales" were displaced, the panel wrote

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that substantiality requirement out of the statute and created a circuit split without any acknowledgment and cast aside the consensus view of the RPA within the antitrust field.

ORDER

A judge of this court requested a vote on whether to rehear this case en banc. A vote was taken, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. See Fed. R. App. P. 40.

Rehearing en banc is **DENIED**.

FORREST, Circuit Judge, joined by VANDYKE, Circuit Judge, dissenting from the denial of rehearing en banc:

The Supreme Court has been clear that a distributor can only sue a manufacturer for being charged a higher price than the distributor's competitor under Section 2(a) of the Robinson-Patman Act when the distributor's ability to compete is *substantially* impaired. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006). By affirming jury instructions that required only a finding that "some sales" were displaced, we have written that substantiality requirement out of the statute. *LA Int'l Corp. v. Prestige Brands Holdings, Inc.*, 168 F.4th 608, 620 (9th Cir. 2026). In doing so, we have also created a circuit split without any acknowledgment, *see, e.g.*, *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 210 (2d Cir. 2015), and cast aside the consensus view of the

Robinson-Patman Act within the antitrust field, *see infra* Discussion § A.4.

"The law under the Robinson-Patman Act is convoluted enough" without our errant revision. *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642, 652 (1969) (Marshall, J., concurring in part and dissenting in part). By denying rehearing en banc, we have invited distributors to sue manufacturers over the most inconsequential of decisions about what to charge for their products. This is a mistake.

BACKGROUND

This case is about pricing practices related to "Clear Eyes Redness Relief eye drops in the Handy Pocket Pal container," a 0.2-ounce bottle sold to distributors in sets of four twelve-count boxes. Clear Eyes is manufactured by Prestige Consumer Healthcare, Inc. and its wholly owned subsidiary Medtech Products, Inc. (collectively, Prestige). Prestige sells Clear Eyes to two kinds of purchasers: (1) warehouse stores, including Costco, and (2) wholesale distributors. Plaintiffs are wholesale distributors of Clear Eyes and—under the panel's analysis—compete directly with Costco in reselling Clear Eyes to pharmacies and other retailers.

Several years ago, Prestige began offering Costco a 5% discount on Clear Eyes that it did not offer to Plaintiffs. Prestige occasionally paired this discount with a $3.00 instant-rebate program and various marketing benefits that it, again, offered only to Costco. Even though Prestige's competitors sold alternatives to Clear Eyes that Plaintiffs might have traded in instead, Plaintiffs assert that they were financially harmed by the price difference based only on the fact that their sales of Clear Eyes declined over the period during which these discounts were offered to Costco. Over the same period, Costco's sales of Clear Eyes increased.

After learning about the discounts, Plaintiffs sued Prestige, arguing that the discounts it offered to Costco violated Section 2(a)'s prohibition on charging competing distributors different prices for the same product. The case proceeded to trial.

In the lead-up to trial, Prestige proposed an instruction that would have required the jury to find "that the effect of th[e] price discrimination was to substantially lessen competition between each individual [p]laintiff and [Costco]." Prestige's proposed jury instructions also emphasized the need for proof "that the discriminatory pricing may substantially harm competition" and clarified that "a *de minimis* (or insignificant) number of lost customers is insufficient to demonstrate competitive injury." The district court rejected Prestige's proposal on the understanding that Section 2(a) only required proof of "some" lost sales, not a substantial effect on each plaintiff's ability to compete.

Based on the jury instructions it was given, the jury returned a verdict finding Prestige liable for violating Section 2(a). It found that, over the nine-year period after Prestige began offering Costco discounts, Plaintiffs suffered a combined $350,000 in damages. The individual awards themselves ranged from $0 to $100,000. These findings meant that, over that same period, five of the plaintiffs lost just $2,777.78 per year on average due to the price difference. All these numbers were calculated on the assumption—expressed in the jury instructions—that substitutes for Clear Eyes were irrelevant to the analysis.

A plaintiff who successfully sues under Section 2(a) is entitled to treble damages and attorney fees plus costs. *See* 15 U.S.C. § 15(a). Accordingly, Plaintiffs were collectively awarded over $1 million in treble damages in addition to over $3 million in attorney fees and costs.

Prestige moved for a new trial based on the district court's failure to instruct the jury that it needed to find proof that each Plaintiff was substantially affected by the discounts given to Costco. The district court denied the motion. Defendants appealed. A three-judge panel of this court then affirmed, again based on the view that a defendant may violate Section 2(a) even when its act of charging a lower price to one purchaser than to another does not substantially affect the allegedly disfavored purchaser's ability to compete. *LA Int'l*, 168 F.4th at 620. Prestige then petitioned for rehearing en banc, which the court now denies.

DISCUSSION

My point in dissenting from our denial of rehearing en banc is straightforward: there can be no liability under Section 2(a) of the Robinson-Patman Act absent a showing that the defendant's pricing practices had a substantial real-world effect. I begin by addressing the overwhelming support for that proposition, then turn to where the panel went wrong.

But first, some context. Section 2(a) is a prohibition on price discrimination, which is the practice of offering to one purchaser of a product a different price than to another purchaser. Section 2(a) does not, however, prohibit all forms of price discrimination—just those that Congress has seen fit to condemn. The statute provides:

> It shall be unlawful . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or 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). Price discrimination can only be unlawful under Section 2(a) when it has one of the statutorily prohibited effects.

The caselaw on Section 2(a) distinguishes between "primary-line" and "secondary-line" cases. A case arises from the "primary line" when it is brought by the defendant's competitor on the theory that the defendant has used price discrimination to unlawfully acquire market power. Primary-line cases require proof of an injury to competition generally and not just an injury to a competitor. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–23 (1993). The plaintiff in a secondary-line case, by contrast, is a distributor who purchases and resells the defendant's product. In those cases, the relevant injury has often been understood as the secondary-line plaintiff's ability to compete with other distributors. *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 656–57 (9th Cir. 1997). The question is, how much injury does a distributor need to demonstrate?

A

To ensure that the jury could properly assess whether Plaintiffs had proven their Section 2(a) claims against

Prestige, the jury should have been instructed that it needed to find that any lower prices offered by Prestige to Plaintiffs' competitors had substantially affected Plaintiffs' ability to compete. This follows from the statutory text, how it has been interpreted by the Supreme Court and the circuit courts, and common sense. This approach also aligns with the antitrust academy and bar's widely held understanding of Section 2(a) of the Robinson-Patman Act, as evidenced by decades of treatises and law review articles.

1

When reading Section 2(a), the Supreme Court has instructed us to "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, 546 U.S. at 181. "[I]t is our duty to reconcile [the Robinson-Patman Act's] interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 63, 74 (1953); *see Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979) ("More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."). Those policies include the principle that courts are "ill suited" "to act as central planners, identifying the proper price . . . of dealing," *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (disfavoring judicial scrutiny of prices rather than conduct), which is what an expansive reading of Section 2(a) would entail.

With these principles in mind, it is apparent that the statutory text uses the word "substantially" to modify not just "to lessen competition or tend to create a monopoly" but also "to injure, destroy, or prevent competition." It is a rule of "ordinary English grammar" that a modifier appearing before a series of words applies to each of the words in the series. *Rehaif v. United States*, 588 U.S. 225, 230 (2019); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). Grammatically, it does not matter whether the words being modified appear alone or as phrases, so long as there is a discrete unit to which the modifier can attach. Here, there are only two phrases in the series: (1) "to lessen competition or tend to create a monopoly" and (2) "to injure, destroy, or prevent competition." The word "substantially," in turn, modifies each phrase. No effect is unlawful under Section 2(a), in other words, unless it is substantial.

Statutory history supports this reading. We do not expect Congress to take unnecessary steps when amending statutes, so "a change in phraseology creates a presumption of a change in intent." *Crawford v. Burke*, 195 U.S. 176, 190 (1904). In adopting Section 2(a) of the Robinson-Patman Act, Congress built atop an earlier statute—Section 2 of the Clayton Act—which restricted price discrimination only "where the effect of . . . discrimination may be to substantially lessen competition or tend to create a monopoly." Clayton Antitrust Act of 1914, Pub. L. 63-212, 38 Stat. 730. In addition to introducing the "to injure, destroy, or prevent competition" language at issue here, the enactment of Section 2(a) also moved the word "to" from before "substantially" to after it. If Congress had kept "to" *before* "substantially," a reader would have to conclude that "substantially" was only relevant to "lessen competition or tend to create a monopoly." But by moving "to" *after* "substantially," Congress signaled that "substantially" was meant to modify both "to lessen competition or tend to create a monopoly" *and* "to injure, destroy, or prevent competition."

2

The requirement that a secondary-line plaintiff must demonstrate a substantial effect to establish liability under Section 2(a) has been recognized by the Supreme Court as well as our sister circuits. Where there is a dispute of fact as to whether the requisite competitive injury was substantial, these cases suggest that a jury is entitled to consider the issue.

In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the plaintiff was a dealer of trucks manufactured by Volvo. 546 U.S. at 170. The typical practice in that market was for a prospective customer to solicit bids from dealers to see who could make the best offer, with a dealer's offer based, in part, on the price of purchasing the truck from its manufacturer. *Id.* at 170–71. In two reverse auctions, Volvo offered the plaintiff's competitor a better price for the same truck than the one it offered the plaintiff. *Id.* at 179–80. The Court acknowledged that this constituted price discrimination for purposes of Section 2(a) but nevertheless held that those facts "did not establish that [the plaintiff] was *disfavored* vis-à-vis other . . . dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial." *Id.* at 180. The yardstick for liability was, in other words, not whether there was *some* effect on the plaintiff's ability to compete but whether there was a *substantial* effect.

Likewise, in *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, the Second Circuit recognized that a plaintiff's Section 2(a) claim could fail where its ability to compete was only trivially impaired. 799 F.3d at 208–13. There, the court dealt with a Section 2(a) claim that had been dismissed at summary judgment based on the plaintiffs' failure "to show more than *de minimis* evidence of customers lost to [the defendant's] favored purchasers." *Id.* at 208–09. The Second Circuit properly understood the analysis in *Volvo* to center on whether the plaintiff's ability to compete was substantially affected by the price discrimination rather than the extent of the difference in price itself. *Id.* at 210. As it explained, "[t]o accept . . . minimal evidence of displaced sales" without a showing of substantiality "as creating an irrebuttable presumption of competitive injury makes little sense because it introduces theoretical rigidity into an area of the law that aims to respond to economic reality." *Id.* at 212–13.

Indeed, other federal courts have long accepted that substantiality is a requirement for purposes of Section 2(a)—though they have not always been clear about what that entails. *See, e.g.*, *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1540 (3d Cir. 1990) ("[A]n inference may be drawn, from the wording of the statute, that de minimis violations are *not* actionable."); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1130 (D.C. Cir. 1988) (explaining that Section 2(a) "calls for an inquiry into whether the effect of a price discrimination has been or 'may be substantially to lessen . . . injure, destroy or prevent competition'" (citation omitted)); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 586 n.2 (2d Cir. 1987) ("[T]he likelihood of *substantial* competitive injury . . . is necessary to establish a price discrimination violation."); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (suggesting that Section 2(a) extends only to injuries that "will with reasonable probability substantially lessen the ability of unfavored buyers to continue to compete"); *Bargain Car Wash, Inc. v. Standard Oil Co. (Ind.)*, 466 F.2d 1163, 1174 (7th Cir. 1972) ("Requisite to the establishment of a Section 2(a) violation is proof that the price discriminations shown . . . create a reasonable probability of substantial injury to competition."); *Nat'l Dairy Prods. Corp. v. FTC*, 395 F.2d 517, 522, 524 (7th Cir. 1968) (implying that competitive injury turns on whether "the effect of [the defendant]'s price discriminations might be substantially to injure competition"); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 681 (5th Cir. 1965) (distinguishing a previous case in which there had been no "evidence of a substantial impairment of the ability of the unfavored dealers to compete"); *United Biscuit Co. of Am. v. FTC*, 350 F.2d 615, 620–21 (7th Cir. 1965) (discussing Section 2(a)'s "'substantiality' requirement" for establishing competitive injury); *Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963) ("The adverse effect upon competition requisite to establish the Section 2(a) violation . . . is that the price discrimination creates a reasonable probability of substantial injury to competition . . . ."); *Minneapolis-Honeywell Regul. Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951) (finding no Section 2(a) violation where the effect of defendant's practices was not "substantially to injure competition").

This body of precedent points in one direction. Before liability will attach for secondary-line price discrimination under Section 2(a), a substantial effect on the disfavored purchaser's ability to compete must be proven. A defendant, conversely, may show the existence of market conditions that would make it hard for a jury to infer that the defendant's pricing practices had anything more than a negligible effect on the plaintiff's ability to compete.

3

Drawing the line at substantiality also makes sense on a practical level. It may well be the case that every instance of price discrimination leads to some inconvenience for secondary-line competitors. *See Volvo*, 546 U.S. at 186 (Stevens, J., dissenting) (explaining that a jury may infer liability under Section 2(a) where "discriminatorily high prices" plausibly mean that a secondary-line competitor will be "forced either to accept lower profit margins than . . . favored [purchasers] or to pass on the higher costs to its customers (who then might well go to a different [secondary-line competitor] the next time)"); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 50–51 (1948) (explaining that an adverse effect on competition may be inferred from circumstantial evidence). But the Robinson-Patman Act does not care about inconveniences, it cares about substantial injuries.

Though this might seem like a purely technical point, it has consequences. Most notably, recognition of a substantiality requirement aligns liability under Section 2(a) with the situations where price discrimination is most likely to hurt distributors such as Plaintiffs. As the Federal Trade Commission once observed, a substantial injury is most easily inferred where "disfavored purchasers . . . ha[ve] few, if any, alternative sources from which to purchase comparable goods at prices and terms equivalent to those which [the defendant] provide[s] to the favored purchasers." *In re McCormick & Co.*, No. 961-0050, 2000 WL 264190, at *14 (F.T.C. March 8, 2000); *see id.* at *2, *3.

Section 2(a), of course, does not require a reseller to exit a market simply because that market is a small part of its overall business model. *Morton Salt*, 334 U.S. at 48–49. But it is unclear why we should care if a reseller starts selling another manufacturer's eyedrops instead, so long as doing so does not put the reseller at a clear disadvantage relative to its competitors. Where a manufacturer offers a discount to one distributor over another and the disfavored distributor's ability to compete is not substantially impaired, those facts will tend to show that the motivation for the price discrimination was not favoritism toward specific distributors but rather competition between manufacturers. Such "[i]nterbrand competition . . . is the primary concern of antitrust law," from which Section 2(a) "signals no large departure." *Volvo*, 546 U.S. at 180–81 (citation omitted).

Consider the facts of this case. During the period when price discrimination is alleged to have occurred, there were multiple eyedrop brands on the market, including eyedrops made by well-established companies such as Johnson & Johnson and Bausch & Lomb. And the nine wholesalers who brought this case actively traded in those potential substitutes. One might think that the rational response on their part to price discrimination would be to stop reselling Clear Eyes and start reselling one of its potential substitutes instead—perhaps even at a discounted price. But if Section 2(a) imposes no requirement on plaintiffs to establish that their ability to compete was *substantially* impaired, facts like these are meaningless. In that world, a distributor would get to recover one way or another because almost any instance of price discrimination will have "some" impact on its sales.

4

Until now, the idea that Section 2(a) imposes a substantiality requirement had been uncontroversial. The vast majority of antitrust treatises recognize that substantiality is a requirement under Section 2(a). *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application (CCH)* ¶ 2331c (last accessed Aug. 4, 2026) (recognizing that courts "have assumed that the word 'substantially' modifies all three forms of injury"); 3 Earl W. Kintner et al., *Federal Antitrust Law* § 22.6 (Lexis 2025) (stating that Section 2(a)'s text "makes it clear that a mere trivial effect on competition (or competitors) does not fall within the scope of the Act" and that "the statute requires that the anticompetitive effect be 'substantial'"); 3 Julian O. von Kalinowski, Peter Sullivan & Maureen McGuirl, *Antitrust Laws and Trade Regulation* § 37A.05 (2d ed. Lexis 2026) ("The word 'substantially' as used in Section 2(a), has judicially been construed to modify . . . injury, destruction, or prevention of competition. Given all this, the meaning of 'substantially' becomes all important to determining the legality of a particular pricing practice . . . ."); Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 6.4, at 125 (S. Chesterfield Oppenheim ed., 1962) ("The word 'substantially' qualifies not only the requisite lessening of *competition in an entire line of commerce*, but also serves to modify the subsequent terminology relating *to the impairment of competition with any person* involved in a discrimination."); Cyrus Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* 42 (2d ed. 1959) ("The word 'substantially', carried over from old Section 2, also limits the words added by the Robinson-Patman Act. The discrimination must be one the effect of which may be *substantially* to injure, destroy or prevent competition."); 1 *Callmann on Unfair Competition, Trademarks & Monopolies* § 7:32 (4th ed. Westlaw 2025) ("The injury, whether actual, possible or probable, must be substantial; a trivial or temporary deterrent to competition will not suffice."); 1 *Antitrust Law Developments* 5C-5-b (9th ed. Lexis 2022) (recognizing a substantiality requirement for establishing secondary-line competitive injury under Section 2(a)); *A Primer on the Federal Price Discrimination Laws* § II.B (5th ed. Lexis 2025) ("Price discrimination violates the Act only if it *may substantially* injure competition."); Austin T. Stickells, *Federal Control of Business: Antitrust Laws* § 131 (Westlaw 2026) (explaining that all forms of competitive injury identified by Section 2(a) "are limited in scope by the adverb 'substantially'").

Likewise, decades of law review articles have repeatedly recognized that the requisite competitive injury under Section 2(a) must be substantial. *See, e.g.*, Constance K. Robinson, *Fitting A Square Peg into A Round Hole? Competitive Bidding & Price Discrimination*, 7 Sedona Conf. J. 57, 61 (2006) ("[U]nder 2(a) of the RPA, plaintiffs must show a 'reasonable possibility' or 'probability' of substantial competitive injury."); Barbara O. Bruckmann, *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act*, 68 Antitrust L.J. 253, 277 n.102 (2000) ("The issue under § 2(a) is whether the alleged discrimination had a reasonable possibility of substantially injuring competition."); Samuel L. Perkins, Charles F. Phillips, Jr. & Geoffrey B. Schwartz, *A Place for Fair Competition Acts in Motor Fuel Marketing*, 26 N. Ky. L. Rev. 211, 223 (1999) ("As with a case under the Sherman Act, evidence of below cost pricing is not alone sufficient to prove a violation. Rather, a plaintiff under the Robinson-Patman Act must show 'a reasonable possibility' of substantial injury to competition through market power." (citation omitted)); Sherie L. Coons, *Robinson-Patman Act*

Jurisdiction over Retail Sales: A Reexamination of the Cases and the Case for Reform, 21 J. Corp. L. 541, 542 (1996) ("Price discrimination is illegal . . . under the Robinson-Patman Act[] when the discrimination has a 'reasonable possibility of substantial injury to competition.'" (citation omitted)); Michael M. Briley, *Price Discrimination Under the Robinson-Patman Act*, 27 U. Tol. L. Rev. 401, 407–08 (1996) ("If . . . the discrimination is only a small difference in price . . . , an isolated event, or involves a short-term 'introductory' discount to new customers or for new markets, there will be no presumption of injury to competition."); Julian Chung, *The Robinson-Patman Act Sections 2(d) and 2(e): Promotional Allowances and the Per Se Rule of Illegality*, 16 Cardozo L. Rev. 1795, 1838 (1995) ("[P]laintiffs in [S]ection 2(a) cases are required to prove more than the existence of individualized injury or predatory behavior; plaintiffs must prove some demonstrable injury to competition."); Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the* Morton Salt *Rule Be Retired?*, 48 SMU L. Rev. 1917, 1918 (1995) (recognizing that plaintiffs must show "a 'reasonable possibility' of substantial injury to competition" for all forms of competitive injury covered under Section 2(a)); Robert J. Koch, *The Robinson-Patman Act: Back Where It Started?*, 30 Duq. L. Rev. 79, 80 (1991) ("[T]he plaintiff must demonstrate that it is reasonable that substantial competitive injury *may* occur."); Robert T. Joseph, *Functional Discounts and the Robinson-Patman Act After* Texaco, Inc. v. Hasbrouck, 10 Franchise L.J. 3, 3 (1990) ("Section 2(a) of the act prohibits a discrimination . . . where 'the effect of such discrimination may be substantially' (a) to lessen competition or tend to create a monopoly, or (b) to injure, destroy, or prevent competition." (citation omitted)); Chris

S. Coutroulis, *The Increasingly Pivotal Competitive Injury Requirement in Secondary Line Cases Under the Robinson-Patman Act: Relevant Factors in Today's Environment*, 57 Antitrust L.J. 935, 936–37 (1989) ("The showing required is that there be a reasonable possibility or probability . . . of substantial competitive injury."); Milton Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1407 (1978) (implying that price discrimination only violates Section 2(a) "if the discrimination is likely to result in substantial injury to competition"); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 32 (1971) ("Section 2(a) makes it unlawful to discriminate in price between competing purchasers when the discrimination is likely to result in substantial injury to competition."); Edward C. Kemper & Donald V. Moorehead, Note, *Territorial Price Discrimination: The Competitive Injury Requirement Reconsidered*, 36 Geo. Wash. L. Rev. 164, 169 (1967) ("A temporary loss of sales by a competitor, occasioned by short-run sales below cost discrimination . . . may not meet the 'substantial injury' requirement of [S]ection 2(a)."); Robert C. Brooks, Jr., *Injury to Competition Under the Robinson-Patman Act*, 109 U. Pa. L. Rev. 777, 786 (1961) ("Sporadic and unsystematic price discrimination, unless it is predatory, will not substantially injure competition at any level."); Frederick M. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 Colum. L. Rev. 584, 602–04 (1959) (describing the FTC's "*de minimis* doctrine," which allowed for small non-cost-justified price differences where they "could not *substantially* lessen, injure, destroy or prevent competition" (citation modified)); Henry D. Ostberg, *The Meaning of the "Injury to Competition"*

Provision of the Robinson-Patman Act, 32 St. John's L. Rev. 26, 29 (1957) ("Section 2(a) applies only when there is a potential injury of a substantial and serious nature . . . ."); Note, *Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation*, 67 Harv. L. Rev. 294, 306 (1953) ("The threatened *injury to competition* must also be *substantial*; the FTC has dismissed several complaints because the amounts involved were *de minimis*.").

This consensus supports the commonsense idea—backed by statutory text, precedent, and the policies embodied in the antitrust laws—that Section 2(a) of the Robinson-Patman Act requires a secondary-line plaintiff to show that its ability to compete was substantially affected before a jury may find liability. A jury told that something less than a substantial effect is enough has not been instructed properly.

B

The panel's deletion of substantiality from secondary-line claims under Section 2(a) is the culmination of three mistakes: first, its reliance on a flawed reading of the statutory text; second, its dependence on out-of-context statements from past decisions; and third, its emphasis on legislative history to justify an outcome at odds with antitrust law.

1

Because the panel did not engage with the discussions of substantiality in *Volvo* and *Cash & Henderson*, it treated the issue as a question of first impression. Even though "to injure, destroy, or prevent competition" follows "substantially," the panel reasoned that the former could not be modified by the latter. *LA Int'l*, 168 F.4th at 619. In the panel's view, this follows from the use of "or" to separate Section 2(a)'s prohibited effects:

> Interpreting Section 2(a), we hold that the district court correctly excluded "substantial" from the jury instructions because "substantially" does not modify the phrase "to injure, destroy, or prevent competition." Congress strung together the clauses in Section 2(a) with the disjunctive "or," which requires that we treat the clauses separately. Thus, "substantially" modifies "to lessen competition" but does not modify "tend to create a monopoly" or "to injure, destroy, or prevent competition."

Id. (citations omitted).

There are multiple problems with this approach. The first, as I have noted, is that we normally read modifiers to distribute *across* disjunctives absent contrary indications in the text. For example, when we read Section 10(b) of the Securities Exchange Act of 1934, which restricts using "any manipulative or deceptive device or contrivance" prohibited by regulation, 15 U.S.C. § 78j(b), we do not conclude that only devices and not contrivances must be manipulative or deceptive, *e.g.*, *Desai v. Deutsche Bank Secs. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). But that is how the panel reads Section 2(a).

The second—and arguably bigger—problem is that the panel's reading of Section 2(a) renders the statute awkward to read. By suggesting that the substantiality requirement extends only to the first of the three effects and not to the second or third, the panel effectively reads Section 2(a) to say either that "[i]t shall be unlawful . . . to discriminate in price . . . where the effect of such discrimination *may be* . . . tend to create a monopoly, or to injure, destroy, or prevent competition," or that "[i]t shall be unlawful . . . to discriminate in price . . . where the effect of such discrimination *may* . . . tend to create a monopoly, or to injure, destroy, or prevent competition."

Section 2(a) may be a "very badly drafted" statute, Areeda & Hovenkamp, *supra* ¶ 2340a, and "the misshapen progeny of intolerable draftsmanship," Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 382 (1978). But we should all be able to agree that it was not written to use such unconventional constructions as "may be tend to create a monopoly" or "may to injure, destroy, or prevent competition." Particularly where it can reasonably be read to address price discrimination when its effect "may be substantially to lessen competition or tend to create a monopoly," or "may be substantially . . . to injure, destroy, or prevent competition."

2

The panel tries to shore up its textual analysis with references to caselaw. These arguments are also unpersuasive. The panel suggests that decisions interpreting Section 2 of the Clayton Act did not understand "substantially" to modify "tend to create a monopoly." *LA Int'l*, 168 F.4th at 619 (citing *George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 253 (1929); *Lipson v. Socony Vacuum Corp.*, 76 F.2d 213, 216 (1st Cir. 1935); *Sidney Morris & Co. v. Nat'l Ass'n of Stationers, Off. Outfitters & Mfrs.*, 40 F.2d 620, 625 (7th Cir. 1930)). What the panel neglects to mention is that Section 2 of the Clayton Act did not prohibit price discrimination when its effect was "*substantially to* lessen competition or tend to create a monopoly"; rather, it prohibited price discrimination when its effect was "*to substantially* lessen competition or tend to create a monopoly." It is hardly surprising that courts interpreted the statute differently at a time when it was written differently.

Perhaps sensing the weakness of this authority, the panel further tries to ground its analysis in more recent caselaw. This includes two earlier decisions of this court—*Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987), and *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126 (9th Cir. 2023)—in which substantiality was not at issue. *LA Int'l*, 168 F.4th at 620. The panel also relies on the Supreme Court's omission of the word "substantially" when reciting the elements of a Section 2(a) claim in *Volvo*. *Id.* (citing *Volvo*, 546 U.S. at 176). But as the Supreme Court has explained, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). What matters more is that *Volvo*'s analysis actually turned on substantiality.

One wonders whether this mistake could have been avoided by looking more closely at what the Supreme Court did in *Volvo* rather than what it said. The panel simply does not discuss the aspects of *Volvo*'s analysis that depended on the substantiality of the plaintiff's injury. Had the panel engaged with the Second Circuit's decision in *Cash & Henderson*, the importance of substantiality in *Volvo* would have been obvious.

3

Finally, the panel errs in its reliance on legislative intent. If the panel is to be believed, the purpose of Section 2(a) "is to address competitor harms before they become widespread" and "to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition marketwide." *LA Int'l*, 168 F.4th at 620 (quoting *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995) (discussing the Robinson-Patman Act's legislative history)). From this, the panel infers that a plaintiff needs to "show only that the effects of [the defendant]'s discriminatory actions 'may be . . . to injure, destroy, or prevent competition.'" *Id.* (quoting 15 U.S.C. § 13(a)). The arguments against this kind of reasoning have been made time and time again—intentions of individual legislators stated at a high level of generality are not determinative of the proper interpretation of a statutory text enacted by a legislative body. "What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 306 (2017).

But even if we were to ignore Section 2(a)'s text and conclude that it is just a directive to protect small distributors at any cost, it is unclear why that goal would be at odds with a substantiality requirement. Where a competitive injury is not substantial, worries that small distributors will be driven out of the relevant resale market are likely unjustified, and enforcement of Section 2(a) will be unnecessary. Indeed, the panel's disregard for substantiality may hurt small distributors more than it helps them. Section 2(a) "is of general applicability and prohibits discriminations generally," which means that it can also be used by a large distributor to target discounts given to its smaller competitors. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983) (citation omitted); *see* 3 Kintner et al., *supra* § 31.3 n.17. Small distributors will presumably be able to demonstrate a substantial injury more easily than their larger competitors because they lack the flexibility to respond to price discrimination. As a result, the true beneficiaries of the panel's decision are the same large distributors supposedly disfavored by the statute.

CONCLUSION

Until now, it had been understood by most antitrust lawyers that a plaintiff could not prove secondary-line injury under Section 2(a) without proving a *substantial* injury to competition. Indeed, the same model jury instructions that the district court and panel drew on in justifying the *absence* of a substantiality requirement make clear that "there must be evidence of *substantial harm* to competition" in order "[f]or the inference of competitive injury to arise." ABA Model Jury Instructions in Civil Antitrust Cases, Robinson-Patman Act, Seller Liability—Section 2(a), Instruction No. 10 n.3 (emphasis added). And while "a price difference alone can create an inference of competitive injury, [a] defendant can rebut that inference by demonstrating that the number of diverted sales is not sufficient to prove substantial harm to competition." *Id.* (citing *Volvo*, 546 U.S. at 180; *Cash & Henderson*, 799 F.3d at 210–13).

After this decision, our circuit is likely to become the premier destination for plaintiffs eager to secure millions of dollars in treble damages and attorney fees based on technical violations of the Robinson-Patman Act. Rather than proceeding cautiously in response, the panel charges ahead, believing it is tilting at a giant: the goal of "address[ing] competitor harms before they become widespread." *LA Int'l*, 168 F.4th at 620. But it is actually tilting at a windmill: price discrimination that does not actually impact the ability of anyone to compete. I respectfully dissent from the denial of rehearing en banc.