Office of Commissioner
Alvaro M. Bedoya

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Commissioner Alvaro M. Bedoya
Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter
In the Matter of Southern Glazer's Wine and Spirits, LLC

FTC File No. 211-0155

December 12, 2024

I.

There are conveniences to large retail chains. Walking into the store, you have a pretty good idea what products they carry and how the store is laid out and organized, regardless of which location you visit. And, due to the economies of scale and cost-cutting measures of these firms, these stores often have the lowest prices available.

Small retailers also have many advantages that go well beyond price. When you visit one, you get much more than the products on the shelf. The owner herself is likely behind the counter or out on the floor answering your questions. She often is active in the community and supports local organizations and causes. And, as far as products go, you will likely find local merchandise on the shelves or rare brands that you can't find in the chain stores.

So why not shop there all the time? Well, the answer to that question is usually price:[1] If an independent buys less of a product, it can expect to pay more per unit to the supplier, and that cost penalty can be passed onto the consumers in the form of higher prices.

Congress recognized the critical services that small retailers offered to the communities they served. They wanted to ensure that small retailers had access to "the same square, fair deal" that larger retailers did.[2] So, in 1936, they passed a law that we now know as the Robinson-Patman Act to put limits on these price differences.[3] Under the Act, suppliers can provide different prices when those differences derive from greater efficiency and there is a legitimate cost savings to the

[1] Indeed, this was the case in 1934 on the eve of the passage of Robinson-Patman. *See* Senate Document, No. 4, 74th Congress—The Federal Trade Commission Final Report on the Chain Store Investigation at 66 (1934) [hereinafter "FTC Chain Store Report"] (conducting a survey of consumers and reported: "The most frequently stated reason for patronizing chain stores is lower prices, and no other one reason for buying from chains approaches it in importance.").
[2] 80 Cong. Rec. 5727 (statement of Rep. Patman) (April 20, 1936) ("We do not propose to make the chains pay a higher price. We do propose that the independents be given the same prices under the same conditions.").
[3] 15 U.S.C. § 13. The Robinson-Patman Act amended Clayton Act, Section 2, which also prohibited price discrimination.

supplier from supplying more of a product to a certain buyer. But suppliers are prohibited from simply rewarding size and power with lower prices, or letting larger retailers bully them into providing them discounts unavailable to their competitors.

Representative John Miller of Arkansas summed up the purpose and limits of the act in the 1936 debates:

> The price favors that [a supplier] grants to a few large buyers, thus mean inevitably corresponding burdens upon all the rest, and upon the consuming public who depend on them for the supply of its needs. All this has nothing to do with questions of relative efficiency. I am dealing only with those discriminations which lie beyond differences in efficiency. No one wants a system of equality that will require selling to every customer at the same price regardless of differing costs involved in the quantities purchased or the methods of service required. . . . I am dealing only with the excessive discrimination and price favors that *exceed those differences in cost*. It is those discriminations which represent an insuperable advantage to the large customers whom they are granted, and an impossible burden to the rest who must make up the deficit, and it is only those discriminations which the bill prohibits.[4]

Put simply, the Robinson-Patman Act bans price *discrimination*, not simple price differences. Congress understood that to allow discrimination in markets provides great advantages to the largest players and creates an unlevel playing field where the large would dominate and the small would disappear.

Congress wanted to avoid that outcome for America. They wanted to preserve competition on the merits, rather than abuses of size and power, as the backbone of the American economy. Robinson-Patman leveled the playing field for small business to compete.

Today, the Commission filed suit in the Central District of California against Southern Glazer's Wine and Spirits, LLC ("Southern"), the largest distributor of wine and spirits in the United States.[5] The complaint alleges that for many years, Southern has routinely violated the Robinson-Patman Act by selling spirits to small grocers and liquor stores at significantly higher prices than it did to large, national retailers like Costco, Kroger, and Total Wine & More.

Critically, the complaint alleges that many of those price differences cannot be explained by bona fide differences in the costs of "manufacture, sale, or delivery" resulting from the greater quantities purchased by those larger retailers.[6] This is exactly the conduct Congress intended to

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[4] 80 Cong. Rec. 6622 (statement of Rep. John E. Miller) (May 4, 1936) (emphasis added).
[5] *Southern Glazer's Wine & Spirits | Company Overview & News*, Forbes (last updated May 2024), https://www.forbes.com/companies/southern-glazers/?list=largest-private-companies.
[6] Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. ___ (C.D. Cal. Dec. 12, 2024) at [hereinafter "Compl."]. Robinson-Patman allows "for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a).

stop with the passage of the Robinson-Patman Act. The Commission is suing Southern so that small, family-run grocery and liquor stores can get the same prices as their billionaire competitors.

II.

This complaint is important on its own merits. But it bears special significance as the first Robinson-Patman action filed by the Federal Trade Commission—or any federal agency—in nearly a quarter century.[7] When it was passed, Robinson-Patman was seen, along with the Sherman Act of 1890 and the FTC and Clayton Acts of 1914, as the fourth pillar of antitrust law.[8] People called it the "Magna Carta" for small business.[9]

Then, for much of the last half-century, discussions of Robinson-Patman were dominated by confident and at times florid denunciations of the law's impact on competition. Robinson-Patman is "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory," proclaimed Judge Bork in *The Antitrust Paradox*.[10] More sober critiques, including from former chairmen and commissioners of the FTC, boil down to the argument that Robinson-Patman is an anticompetitive outlier in the antitrust laws that protects inefficient smaller retailers from the cost-cutting efficiencies of national businesses – raising prices to consumers.[11] Against this backdrop, law enforcers let the law fall dormant.

The claim that this law raises prices on consumers is stunningly untethered from any empirical research.[12] More importantly, these arguments are so hyperbolic that they make it hard to understand why Congress passed Robinson-Patman, and why they wrote it the way they did. That history reveals that Robinson-Patman was never aimed at protecting the inefficient. Instead,

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[7] McCormick & Company, Inc. | Federal Trade Commission, Fed. Trade Comm'n (last updated May 2, 2000), https://www.ftc.gov/legal-library/browse/cases-proceedings/9610050-mccormick-company-inc#:~:text=McCormick%20&%20Company%20agreed%20to%20settle%20charges%20that%20it%20violated.

[8] *See, e.g.*, 80 Cong. Rec. 6621 (statement of Rep. John E. Miller) (May 4, 1936) (citing the four laws, along with the Interstate Commerce Act of 1887, for the proposition that "[i]f laissez faire was once our prevailing political economic philosophy… [t]hat day has passed, and a series of Federal laws for the regulation of business have marked the history of the last half century in recognition of the growing responsibility of business itself to this fundamental ideal of equal opportunity.").

[9] *See, e.g.*, 94 Cong. Rec. 6808 (statement of Rep. Henry Gonzalez) (March 17, 1976) ("of a statute long known as the 'Magna Carta of small business.'"). FTC Chair Paul Rand Dixon said that the law "compares favorably with the Magna Carta or the Sherman Act." *See* MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY, at 328 (2019) (citing MARK GREEN ET AL., THE CLOSED ENTERPRISE SYSTEM: RALPH NADER'S STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT, at 407 (1972).

[10] ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, at 382 (1978).

[11] *See* Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, GEORGE MASON L. & ECON., Research Paper No. 18-15 (2018) at 22 (arguing that the federal government "inflicted large, unnecessary costs on the national economy . . . by enacting the Robinson-Patman Act to elevate the interests of inefficient companies over those of consumers . . . "); Commissioner Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921, 923–24 (1984) (criticizing the "protectionist, non-efficiency oriented nature of the legislation" and arguing that "[a]s with most protectionist legislation, it comes at a cost to the American consumer").

[12] *See infra* section II.C.

the law sought to ensure that large companies did not abuse their *power* to exploit legal loopholes and secure "secret discounts, secret rebates, and secret advertising allowances" unavailable to their competitors.[13] If anything, Robinson-Patman is a *pro*-consumer law that seeks to prevent the oligopoly prices of a market dominated by a small number of powerful retailers.

A.

Robinson-Patman was not the first time Congress attempted to address the problems of price discrimination. In 1887, it passed the Interstate Commerce Act, which was arguably the United States' first antitrust statute. It was passed to address the unfair practices of monopolies in interstate railroad transportation. Specifically, the Act prohibited "unjust discrimination" in freight pricing and made it unlawful to give "undue or unreasonable preference or advantage" to any customer or to subject any customer to any "undue or unreasonable prejudice or disadvantage[.]"[14]

In 1914, Congress revisited the issue of pricing discrimination. Section 2 of the Clayton Act, as originally enacted, made it unlawful for any person "to discriminate in price between different purchasers. . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly[.]"[15] The original Section 2 also included safe harbors for particular types of price differences including those accounting for "differences in the grade, quality, or quantity" of the product, or making "due allowance" for differences in costs in selling or transportation or price differences made "in good faith to meet competition."[16]

With Section 2 of the Clayton Act, Congress believed it had effectively addressed the problem of price discrimination in commodity markets. But after passage, the FTC "tepidly" enforced the law, and when it did, the courts intervened to reverse the Commission.[17] What's more, a powerful retailer, the Great Atlantic and Pacific Tea Company (the "A&P"), quickly discovered gaps in the law that it began to use to its advantage.

Much like the Sherman Act cannot be fully understood without understanding the depredations of Standard Oil, the Robinson-Patman Act is best understood as a direct response to the actions of the A&P.[18] The A&P, the first grocery chain in the United States, began with offerings of tea and coffee. Over time, it added other grocery items such as baking powder, condensed milk, sugar, and other spices. Founded in New York City, it expanded to Chicago after

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[13] 80 Cong. Rec. 8131 (remarks of Rep. John Robsion) (May 27, 1936).
[14] 49 Cong. Ch. 104, February 4, 1887, 24 Stat. 379-380.
[15] 63 Cong. Ch. 323, October 15, 1914, 38 Stat. 730.
[16] *Id.*
[17] Brian Callaci, Daniel Henley & Sandeep Vaheesan, *The Robinson Patman Act as Fair Competition Measure*, TEMP. L. REV. (forthcoming) (manuscript at 13-15) available at https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/6568fa5f34008167eee53dc4/1701378656147/The+Robinson-Patman+Act+as+a+Fair+Competition+Measure+-+11-28-23.pdf.
[18] *Cf.* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST, at xii (2020) (explaining that the history of John D. Rockefeller and Standard Oil "provided much of the motivation for an antitrust law and gave this area of law its name.").

the Great Fire of 1871 and launched in 16 more cities by 1875.[19] By 1900, it operated approximately 200 stores and brought in $5 million in revenue.[20] In 1912, its first A&P "economy" store opened in Jersey City, the success of which permitted rapid expansion.[21] By 1915, A&P operated over 1,800 stores, and doubled the number over the next two years.[22] Also in 1915, the company tested a newly passed price discrimination statute, suing Cream of Wheat for violations of the Sherman Act and Section 2 of the Clayton Act for refusing to sell to A&P due to its pricing practices.[23] It lost the case, but subsequently set a course of expansion and anticompetitive conduct that eventually prompted Congress to strengthen Section 2 with the Robinson-Patman Act.

Many of the practices that fueled the A&P's growth would today be clear consumer protection violations. In the 1860s and 70s, The Great American Tea Company (as it was called then) sold "short weights" of tea that fell short of the advertised amount, cut the tea leaves with willow leaves, and ground chicory into their coffee.[24] In marketing its stores and mail order business, the company made advertisements look like genuine news articles to confuse readers and made false claims about the size of its inventory.[25] As growth continued in the 1870s, the newly published *American Grocer* levied criticisms that the company was making false claims about the quality of its teas, instead buying damaged and adulterated teas at discount and drying and coloring them to sell to unsuspecting consumers.[26] During the Bank Panic of 1907, A&P President John A. Hartford bought his place at the front of the line to be the first to withdraw the company's money from a failing bank, saving the company in the process.[27]

While its initial success (and survival) may have resulted from unscrupulous practices, once it achieved size and scale, A&P focused instead on leveraging its buyer power to propel its success. As the A&P Economy Stores flourished, the company used its size to demand special privileges with suppliers. First, the company demanded lower prices from manufacturers, sometimes using the threat of entering the market as a manufacturer or threatening to elevate other products in its stores to secure the exclusive discounts.[28] Next, the company required suppliers to ship directly to A&P warehouses, cutting out wholesalers in the process, but still demanded standard wholesaler commissions for its purchases.[29] In essence, A&P was having suppliers pay it for the service of selling products to itself. This amounted to a secret discount from suppliers that competitors could not access.

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[19] MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA, at 28–29, 2nd Ed. (2019).
[20] *Id.* at 48.
[21] *Id.* at 62.
[22] *Id.* at 70.
[23] Ironically, it does appear that the first private enforcement of Section 2 came from the A&P. *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.,* 224 F. 566, 571 (S.D.N.Y.), *aff'd*, 227 F. 46 (2d Cir. 1915).
[24] LEVINSON, *supra* note 19, at 21.
[25] *Id.* at 22.
[26] *Id.* at 27.
[27] *Id.* at 53.
[28] *Id.* at 105.
[29] *Id.* at 68.

In 1926, the A&P incorporated a subsidiary known as the Atlantic Commission Company ("ACCO"), which functioned as both a purchasing agent for A&P and a sales agent for suppliers.[30] Members of Congress would later refer to these kind of intermediaries as "dummy brokers."[31] The absurdity of the arrangement was more than clear. Senator Marvel Logan of Kentucky recounted that:

> In order to evade the provisions of the Clayton Act… it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer and in that way a price discrimination was brought about.[32]

In addition to collecting brokerage fees from suppliers as their "agent," the company would sell the products to competing grocers and wholesalers at higher prices than it charged to A&P.[33] Transactions with A&P competitors accounted for about 30% of ACCO's sales, putting it in the "awkward situation of being an important supplier to competing grocers."[34] In 1946, the Eastern District of Illinois, had harsher words for the conduct of ACCO, declaring the firm's actions "corrupt" and "rotten."[35]

But A&P did not limit itself to demanding false brokerage fees from its suppliers. The company demanded that major brands pay advertising fees for carrying their products in A&P stores. Called "allowances," the fees were yet another discount on products unavailable to competitors. By 1929, these advertising allowances accounted for 25% of A&P's pretax profit.[36]

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[30] *U.S. v. New York Great Atlantic & Pacific Tea Co*., 67 F. Supp. 626, 655 (E.D. Ill. 1946).
[31] *See* S. Rep. No. 1502, 74th Cong., 2d Sess., at 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess., at 14–15 (1936).
[32] 80 Cong. Rep. 6281 (remarks of Senator Marvel M. Logan) (April 28, 1936).
[33] *New York Great Atlantic,* 67 F. Supp. at 655.
[34] LEVINSON, *supra* note 19, at 106.
[35] The court's full conclusion stated:

> It is probably true that many actions of defendants of which the Government complains, standing alone, are devoid of wrongful character, but when the fabric woven from them is considered as a whole and it appears contaminated by a corrupt thread running throughout the completed texture, the whole becomes a tainted product and all partaking in its creation, having voluntarily contributed to the structure, are charged with responsibility for the fabrication. The conduct of Acco is the rotten thread of the fabric, and it so permeates the entire texture and ties together the other threads as to result in an imperfect, an illegal product,- unreasonable interference with competition and power to monopolize.

U.S. v. New York Great Atlantic 67 F. Supp. at 678.
[36] LEVINSON, *supra* note 19, at 104.

The conduct elevating A&P and other chain businesses was concerning enough that Americans began to act. In 1928, small and independent business owners of this country lobbied Congress to address the problems of rapidly expanding chain stores. Congress then passed a resolution instructing the Federal Trade Commission to investigate the chain store retail market.[37]

The FTC spent six years investigating the market, and in December 1934 delivered its final report. Among its findings were that 33 manufacturers interviewed had received "threats" and "coercion" from large buyers to receive special treatment.[38] Commenting on this part of the report during the Robinson-Patman debates, Representative Charles Wolverton of New Jersey noted, "it can readily be seen that the manufacturers and wholesalers themselves are as much in need of protection and as anxious for it as the independent merchants."[39] The report concluded that "serious economic and social problems grow out of price concessions made to large chain-store organizations with resources vastly in excess of most individual independents. . . .Whether the resulting competitive advantage should be curbed by new legislation may ultimately prove to be an important social and economic question."[40]

Congress took up that question, and the result was the Robinson-Patman amendments to Section 2 of the Clayton Act, passed in 1936. Notably, the provisions of the law responded directly to the tactics that the A&P had used to exploit the existing prohibitions of the Clayton Act. Section 2(a) clarified that the Clayton Act's existing prohibition on price discrimination would permit price differences related to bona fide efficiencies resulting from bulk purchases—specifically, lower costs stemming from the "manufacture, sale, or delivery" of large quantities of goods—but made clear that other price discrimination would be prohibited. That section is the subject of this lawsuit.

Section 2(c) prohibited the kind of kickbacks demanded by ACCO. Sections 2(d) and (e) prohibited the ad "allowances" and other hidden discounts offered to the A&P, so long as they were not accorded to all buyers on proportionally equal terms. Section 2(f) prohibited a buyer from pressuring its suppliers into offering it discriminatory prices, precisely as the A&P had done.

B.

Despite the extensive record of "rotten" and "corrupt" anticompetitive conduct that the law was intended to address, a caricature persists that the law was aimed at protecting the parochial interests of ineffective local retailers at the expense of consumers.[41] In reality, the record shows

[37] S. Res. 224, 70th Congress, 1st Session (1928).
[38] FTC Chain Store Report at 24.
[39] 80 Cong. Rec. 10048 (statement of Rep. Charles Wolverton) (June 18, 1936).
[40] FTC Chain Store Report at 91.
[41] *See* Roger D. Blair and Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson Patman Act*, 57 J.L. & ECON. 201 (2014) ("Chain stores began to make life difficult for *small, inefficient, locally owned stores*. The source of this 'problem' of low prices allegedly was the purchasing power of the chains. In 1936, the Robinson-Patman Act (15 U.S.C. sec. 13) amended section 2 of the Clayton Act in an effort to protect mom-and-pop stores from the large retail chains. *Such protectionism was ill-advised since consumers obviously preferred the lower prices of the more efficient chains* to the higher prices offered by smaller, owner-operated stores.") (emphasis

that the congressmen who debated and passed Robinson-Patman were keen to protect the interests of *customers* who were often ill-served by chain stores.

The 1934 FTC report that spurred passage of Robinson-Patman shows how local groceries offered their customers a series of services tailored to the needs of rural communities. Specifically, the Commission found that people who preferred independent groceries over the chains tended to patronize them for three reasons: credit, delivery, and a loyalty to locally owned enterprise.[42]

In boom-and-bust agricultural economies, credit was more than convenient; it was a lifeline. Representative John Nichols of Oklahoma explained:

> No chain store in my community has ever carried the widow Jones and her two little kids on their books for 30 days or 60 days or any length of time while she was getting together a few pennies to pay for the things which she had to buy from the store. Our farmers go on a credit basis. They only pay their bills once a year. You destroy the independent merchant in Oklahoma and you destroy the cotton farmer. He cannot finance himself. No chain store will carry him on their books for 9 or 10 months. The only one who will do that is the man who has a real interest in the community, the man who has raised a family there, the man who has invested his capital and who gets his living in that little community.[43]

Moments after Representative Nichols shared this anecdote and perhaps after hearing his colleague, Representative Theodore Moritz of Pennsylvania stood to tell the chamber that his own family had relied on credit to survive. "I do not know what our family would have done when I was a child if we had not used the book of the independent store," he said. "We waited until dad got paid and then paid the bill. You cannot do that at the chain store."[44] Indeed, the FTC report verified that most chain stores operated on a cash basis.[45]

Like the members of the public surveyed by the FTC, Congress also understood that independents provided a distinct economic benefit to small towns across the country. The FTC found that independent retailers paid their employees more than the chains.[46] Representative Wright Patman of Texas, one of the law's authors and probably its most ardent supporter, explained that—by traveling from the pocket of the independent business owner to the employee, to his gardener, to his butcher, and so on—one dollar spent at an independent "will do the work of $20, $30, or $50 before it leaves town."[47] Meanwhile, spending that same dollar at a chain store means

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added); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L.REV, 2064, 2066 (2015) (the Act "protects inefficient competitors rather than consumers").

[42] FTC Chain Store Report at 66-67 ("The reason most often advanced for buying from independents is credit, followed by delivery service, and by loyalty to local enterprise.").

[43] 80 Cong. Rec. 8135 (statement of Rep. John C. Nichols) (May 27, 1936).

[44] 80 Cong. Rec. 8136 (remarks of Rep. Theodore Moritz) (May 27, 1936).

[45] FTC Chain Store Report at 74 (citing chain store savings from operating "a cash business with no credit losses").

[46] FTC Chain Store Report at 72 (relaying the "distinct conclusion… that, for the period studied, the independents paid their store employees more than did the chains").

[47] 79 Cong. Rec. 11706 (statement of Rep. Wright Patman) (1935).

it "goes back to New York City" and "has left the community." [48] In Representative Patman's view, as well as others in Congress, protecting a level playing field for small business was critical to the economic life of rural America.[49]

Representative Patman and his colleagues were right. As the FTC abandoned the law Congress passed to help small businesses and small towns across America, there has been a parallel decline in economic activity and well-being in those communities. Between 1997 and 2012, approximately 108,000 local grocers and other retailers disappeared; so did the economic opportunities they provided. This was a drop of 40% as compared to what one would expect with population growth.[50] Since 2009, local grocery stores have been closing across rural America and are being replaced by convenience and dollar stores and retail supercenters.[51] As recently as 40 years ago, the term "food desert" did not exist. Now it is almost a synonym for rural and urban America.[52]

Health and economic problems have followed. Rural Americans have higher rates of obesity; rates of severe obesity in rural men tripled between 2001 and 2016.[53] After declining steadily between 1959 and 1980 (a time when the FTC aggressively enforced the Robinson-Patman Act), the poverty rate in rural America crept back up through the 80s and 90s, reaching a 30 year high of 18.4% in 2013.[54]

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[48] *Id.*

[49] This was especially true in times of crisis. Representative John M. Robsion of Kentucky articulated how important small business was for local labor wages and how in times of great community need, when chain stores may refuse to assist, "each community has always been free to call upon the home merchants, the small wholesale house, and their officers for help." 80 Cong. Rec. 8130 (statement of Rep. John M. Robsion) (1936). There is also evidence that Rep. Patman's multiplier claim remains true in modern times. *See*, Civic Economics, *Economic Impact Analysis: A Case Study*, (December 2002), https://d3n8a8pro7vhmx.cloudfront.net/liveablecityatx/pages/65/attachments/original/1398826884/lcfullreport.pdf?1398826884.

[50] Stacy Mitchell, *The View from the Shop - Antitrust and the Decline of America's Independent Businesses*, 61 ANTITRUST BULL. 498, 502 (2016).

[51] *See* Alexander Stevens, et al., *The Food Retail Landscape Across Rural America*, USDA ERS (June 2021), https://www.ers.usda.gov/webdocs/publications/101356/eib-223.pdf?v=4902.6.

[52] Stacy Mitchell, *The Great Grocery Squeeze: How a federal policy change in the 1980s created the modern food desert*, THE ATLANTIC, December 1, 2024 ("More food deserts exist now than in 2010, in the Great Recession."); Paula Dutko, et al., *Characteristics and Influential factors of Food Deserts*, USDA ERS (Aug. 2012), https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf ("Areas with higher poverty rates are more likely to be food deserts regardless of rural or urban designation. This result is especially true in very dense urban areas where other population characteristics such as racial composition and unemployment rates are not predictors of food desert status because they tend to be similar across tracts.").

[53] Lisa Esposito, *Obesity Keeps Ballooning in U.S., With Rural Areas Seeing Biggest Spikes*, U.S. NEWS & WORLD REPORT, Jul. 11, 2018, https://health.usnews.com/health-care/patient-advice/articles/2018-07-11/obesity-keeps-ballooning-in-us-with-rural-areas-seeing-biggest-spikes.

[54] *USDA ERS - Rural Poverty & Well-Being*, https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/#historic; Institute for Research on Poverty, *Many Rural Americans Are Still "Left Behind"* (Jan. 2020), https://www.irp.wisc.edu/resource/many-rural-americans-are-still-left-behind/#_ednref5.

Many factors produced these changes. But we must ask how the abandonment of Robinson-Patman has helped hollow out small towns and inner cities across the country.

C.

The loudest critique of Robinson-Patman is that it will raise prices for consumers.[55] The law is "antithetical to consumer welfare," critics claim.[56] The Department of Justice claimed in a 1977 report that the Robinson-Patman Act "can be shown to have many adverse effects on the economy."[57] In 2007, the Antitrust Modernization Commission stated that the "harm [Robinson-Patman] inflicts on U.S. consumers is great."[58]

Such bold pronouncements are normally backed by ample evidence. Strangely, when it comes to laying out that evidence, critics sound less confident. The authors of the 1977 DOJ report wrote that their estimates of harm were not based on empirical evidence, but were the product of "economic logic" and "reasonable inference."[59] The Antitrust Modernization Commission was more explicit: "In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited."[60]

Here is the reason for this hemming and hawing: There are no empirical studies demonstrating that Robinson-Patman enforcement raises prices for consumers.[61]

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[55] *Cf.* Dissenting Statement of Commissioner Melissa Holyoak, *In the Matter of Southern Glazer's Wine and Spirits, LLC* (Dec. 11, 2024) [hereinafter "Holyoak Dissent"] at ii ("the proposed remedy would likely impede price competition and harm consumers").

[56] Terry Calvani and Gilde Breidenbach, *An Introduction to Robinson Patman and Its Enforcement by the Government*, 59 ANTITRUST L. J. 765 (1990), https://www.jstor.org/stable/40841343?seq=1.

[57] DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 8 (1977) [hereinafter "1977 DOJ REPORT"], available at https://www.justice.gov/atr/media/1378486/dl?inline.

[58] Antitrust Modernization Comm'n, Report and Recommendations, at 417 (2007) [hereinafter "AMC"], available at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[59] *See* 1977 DOJ REPORT, *supra* note 57, at 37, 39–40.

[60] AMC, *supra* note 58, at 322.

[61] Commissioner Holyoak cited the 1977 Department of Justice report to support the claim that "the Commission's approach to the Robinson-Patman Act likely raised retail prices by one-half to one percent, totaling approximately $6 billion in additional costs to consumers in 1977." Holyoak Dissent at 11 (citing 1977 DOJ REPORT at 40). However, the DOJ has since withdrawn this report, stating, "[t]his report is out of date and is retained for historical purposes. Although it remains accessible on the Antitrust Division website, the report no longer reflects contemporary economics or market realities and should not be relied on for current matters related to the Robinson-Patman Act." 1977 DOJ REPORT, *supra* note 57, at 1. Furthermore, the "evidence" for this claim in the report is testimony by a lawyer, not an economist, who uses "logic and reasonable inference" to reach this conclusion. Even with these suspect underpinnings, the claim was that the loss was "in the neighborhood of $3 to $6 billion" not "approximately $6 billion" as Commissioner Holyoak claims. Regardless, there have been no empirical studies supporting this claim or even demonstrating that Robinson Patman enforcement raises consumer prices. *See* Erik Pienert and Katherine Van Dyk, *The Needless Desertion of Robinson-Patman*, PROMARKET, Oct. 10, 2022 ("[T]here is *no* systematic empirical evidence that RPA enforcement will lead, or ever has led, to higher prices for consumers.") (emphasis in original). Daniel P. O'Brien, *The Welfare Effects of Third-Degree Price Discrimination*

This might make sense if this were a new and untested law. This one has been on the books for 89 years, was actively enforced for 60 of them, and was at one point the Commission's most frequently prosecuted antitrust statute.[62] In that context, the absence of empirical support for claims of price increases is disqualifying.[63]

For its part, Congress was indeed concerned about price increases – not from enforcing Robinson-Patman, but from *failing* to check the anticompetitive effects of price discrimination. The House Judiciary Committee explained in its Report on the bill:

> It is not believed that the restoration of equality of opportunity in business will increase prices to consumers. Unfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have

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in Intermediate Good Markets: The Case of Bargaining, 45 RAND J. ECON. 92, 108 (2014) ("A formal study of the effects of the Robinson-Patman Act on prices has not been conducted, to my knowledge."); Christina DePasquale, *The Robinson-Patman Act and the Consumer Effects of Price Discrimination,* 60 ANTITRUST BULL. 402, 412 (2015) ("To the best of my knowledge, no empirical studies find unambiguous positive effects of price discrimination on consumer surplus. There are a few, however, that find a neutral or ambiguous effects."). *See also* Thomas W. Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & ECON. 243, 243 (1984) (acknowledging that Robinson-Patman's "poor reputation owes more to theory than to evidence").

[62] *See* Timothy J. Muris, Chairman, Fed. Trade Comm'n, How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy (Nov. 19, 2003) (between 1961-1968, RPA was enforced over 10 times as often as all other nonmerger enforcement actions). *See also* Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 54–55 (1969) (of 260 orders issued by the Commission in 1963, 244 involved a Robinson-Patman claim.).

[63] Setting aside empirical evidence, even the theoretical literature on this topic is mixed, at best, and recent scholarship points to a clear consumer benefit to Robinson-Patman enforcement. *See* Aslihan Asil, *Can Robinson-Patman Enforcement be Pro-Consumer* (2024) https://www.aslihanasil.com/sources/rpa_mac.pdf (predicting that discriminatory pricing results in an annual consumer welfare loss of $4.91 per individual, totaling $529 million in a year across the industry). One reason the conclusions are mixed is because it seems economists have a difficult time accurately applying the parameters of Robinson-Patman in economic modeling. The law permits price differentials when the differences are attributable to genuine cost savings, *i.e.*, "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities." 15 U.S.C. § 13(a). But economists have tended to build models assuming that uniform pricing is required by the law. *See*, *e.g.*, Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 AM. ECON. R. 154, 160 (1987); Patrick DeGraba, *Input Market Price Discrimination and the Choice of Technology*, 80 AM. ECON. R. 1246, 1247 (1990); Roman Inderst & Tommaso Valletti, *Price Discrimination in Input Markets*, 40 RAND J. ECON. 3 (2009). This is troubling, as the studies' conclusions cannot be said to accurately capture reality. Even with this unfavorable assumption applied in models, however, the conclusions are mixed, with some finding welfare reductions and others finding welfare improvements, and still others finding different outcomes under different scenarios. *Compare* Katz at 156 (finding that allowing price discrimination in intermediate good markets may reduce output and decrease welfare) and Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman Act*, 10 J. L., ECON & ORG. 297 (1994) ("In contrast to Katz, our model implies that, ceteris paribus, Robinson-Patman unambiguously reduces welfare."), *with* Inderst & Valletti ("In the short run, where efficiency levels are exogenous, our model predicts that consumers could be better off if price discrimination were banned. . . . In the long run, however, our model predicts that the imposition of uniform pricing may reduce both consumer surplus and welfare, as it stifles downstream firms' incentives to improve efficiency.").

> been symbolic of lower wages, longer hours, lower prices paid producers, coercion of independent manufacturers, domination of that field of industry and in the end high prices to consumers and large profits to the owners.[64]

Representative Thomas Ford warned of incipient consolidation in the grocery sector, and put its result in starker terms: "While [price discrimination] may be to the consumers' advantage for the period during which the chain was forcing the small dealer out of business, ultimately, as soon as the small dealers are eliminated, the chain stores. . . are going to dictate to the consumer the price he pays; and, let me tell you, this price will be all the traffic will bear."[65]

In the absence of recent Robinson-Patman enforcement, some of Representative Ford's predictions may have come to pass.[66] After holding relatively constant through the 1960s and 1970s, the market share of independent grocery retailers began dropping in the 1980s.[67] Between 1982 and 2017, the market share of all independent retailers in the United States shrank from 53% to 22%.[68] Meanwhile, people living in rural and urban America have suffered.[69]

Ultimately, the core argument against Robinson-Patman is that it is "bad economics" – or, more accurately, bad *theoretical* economics.[70] But the Constitution does not provide for an economic veto over democratic law. The Supreme Court explained to a defendant who made that very argument that it was "not in a position to review the economic wisdom of Congress[.]"[71] Neither are we.

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[64] H.R. Rep. No. 2287, *supra* note 31.

[65] 80 Cong. Rec. 8125 (May 27, 1936) (statement of Rep. Thomas Ford). For further discussion of how pricing discrimination fuels monopoly power, and how it can actually lead to decreased economic output, *see* Max M. Miller & Bryce Tuttle, *Stopping Excessive Market Power Before It Grows Into Monopoly*, THE AMERICAN PROSPECT, Aug. 13, 2024. *See also* Aslihan Asil, *supra* note 63 (Asil's model "shows that while chain stores often secure wholesale discounts under discriminatory pricing, this advantage can drive independent stores out of the market, ultimately reducing competition and harming consumers.").

[66] Sergio Ocampo & Dominic A. Smith, *The Evolution of U.S. Retail Concentration,* CES 22-07, U.S. Census Bureau, Center for Economic Studies (Mar. 2022), https://www2.census.gov/ces/wp/2022/CES-WP-22-07.pdf (finding that local concentration of retail has been increasing and "local concentration raised retail markups by 2.1 percentage points between 1992 and 2012, one-third of the increase in markups found in the Annual Retail Trade Survey (ARTS).").

[67] *See* Stacy Mitchell, *The Policy Shift That Decimated Local Grocery Stores*, Institute for Local Self-Reliance (Nov. 2024), https://ilsr.org/wp-content/uploads/2024/11/ILSR-GroceryMarket-Graph-Final.pdf.

[68] *See* Stacy Mitchell, *The Great Grocery Squeeze, supra* note 52 ("The suspension of the Robinson-Patman Act had created an imperative to scale up. A massive die-off of independent retailers followed. Squeezed by the big chains, suppliers were forced to offset their losses by raising prices for smaller retailers, creating a 'waterbed effect' that amplified the disparity.").

[69] For a discussion of the harmful impacts of non-enforcement, *see* Max M. Miller and Bryce Tuttle, *A Trip to Pine Ridge: A Forgotten Antitrust Law and Its Promise for Rural America*, COMPETITION POL'Y (January 2023); *see* Stacy Mitchell, *The Great Grocery Squeeze, supra* note 52.

[70] *See supra* note 63 (describing theoretical literature).

[71] *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). *Cf. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 187–88 (2006) (Stevens, J., dissenting) ("As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of

III.

Southern Glazer's Wine and Spirits sells one out of every three liquor bottles in the United States. Southern is one of the country's ten largest privately held companies.[72] Its power in some states appears to allow it to be a gatekeeper of liquor distribution. The complaint alleges that Southern "routinely charges small, independent retailers [significantly] more for the same bottles of certain wine and spirits than national and regional chains in the exact same geographic area."[73]

When price discrimination injures the rivals of a supplier, it is called "primary-line" discrimination. When it injures firms that compete against a *buyer* that receives a discriminatory price, it is referred to as "secondary-line" discrimination. This is a secondary-line discrimination case under Section 2(a) of the Robinson-Patman Act. After a careful investigation, the Commission has built a case that I believe will more than satisfy the requirements set out by the Supreme Court for such an action.[74]

Commissioners Holyoak and Ferguson vote against issuing a complaint. They have issued lengthy dissents setting out their views. This section addresses those dissents.

A.

Unfortunately, the filing of the first Robinson-Patman action in a generation is not the only milestone marked today. For the first time in living memory, a Federal Trade Commissioner sitting as a prosecutor has drawn on the knowledge she has *as a Commission prosecutor* to publish what look like turn-by-turn directions to defeat a Commission complaint. Commissioner Holyoak's dissent could be copied and pasted into a defense brief. This effort will fail; the directions lead to roads that do not exist. But the consequences of this action cannot be ignored. And so, before I discuss the substance of the dissenting arguments, I address *how* they are being made.

By congressional design, FTC commissioners have three distinct jobs: prosecutor, rule-maker, and adjudicator.[75] As Chief Judge Boasberg has explained, each of those roles has different

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serious debate, but may well merit Judge Bork's characterization as 'wholly mistaken economic theory.' I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.") (footnote omitted).

[72] *Southern Glazer's Wine & Spirits | Company Overview & News*, *supra* note 5.

[73] Compl. para. 3.

[74] *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176–177 (2006).

[75] *See FTC v. Facebook, Inc*., 581 F. Supp. 3d 34, 62 (D.D.C. 2022) ("The Court… notes the unique circumstances in which the FTC operates as an agency that may bring suit, conduct rulemaking, and act as an adjudicator.").

ethical requirements.[76] This makes sense: By statute, each of those jobs has dramatically different responsibilities.

When, as here, commissioners vote to file a complaint in federal court, our job is simple. If we have "reason to believe" that any person or company is violating or is about to violate the laws we enforce, and that such an action would be "in the interest of the public," Congress has authorized us to file a complaint to stop that.[77] This is a low bar. In fact, the Supreme Court has described the "reason to believe" standard to be a "threshold determination that further inquiry is warranted and that a complaint should initiate proceedings."[78]

That's it—that's our job. Congress does not direct us to publicly "review" the strength of the Commission's case. It does not direct us to publicly "weigh[] the equities and consider[] the Commission's likelihood of ultimate success," nor does it direct us to weigh the "proof" to make a final or permanent ruling on the Commission's case.[79] Congress has reserved all of *those* jobs for Article III district court judges.[80]

For this and many other reasons,[81] it is rare for sitting commissioners to publicly expound on what they claim to be the weaknesses of a federal court complaint upon its issuance. In the 21st century, this has happened on just a handful of occasions.[82] When commissioners have done so, they often explain why they decide to break this norm—and they are brief.[83] Perhaps our

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[76] *Id.* at 63–64.

[77] 15 U.S.C. § 53(b)(1)-(2) (process for filing a complaint in federal court).

[78] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980). In *Standard Oil*, the Court discusses the "reason to believe" standard in the context of the filing of an administrative complaint in the FTC's internal tribunal, an action taken under 15 U.S.C. § 45(b). *Id*. But the "normal rule" in statutory construction is that "identical words used in different parts of the same act are intended to have the same meaning." *See, e.g.*, *Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994). *See also* Antonin Scalia & Bryan Garner, *Reading Law* 170 (2012).

[79] 15 U.S.C. § 53(b)(1)-(2).

[80] This is why commissioner statements accompanying federal court complaints repeatedly use the word "allegedly" when describing facts cited in the complaint; the district court alone can make those findings. *See, e.g.*, Concurring Statement of Commissioner Melissa Holyoak Joined by Commissioner Alvaro M. Bedoya (Part I Only), *Gravy Analytics, Inc*. (Dec. 3, 2024) (using "alleged," "alleges," "allegedly," and "allegations" on 11 different occasions in the body of the statement).

[81] *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Qualcomm, Inc.* (Jan. 17, 2017) (explaining that the policy of not dissenting against Commission complaints "preserves the integrity of the agency's mission, recognizes that reasonable minds can differ, and supports the FTC's staff, who litigate demanding cases for consumers' benefit.").

[82] *See id*. *See also* Dissenting Statement of Commissioner Christine Wilson, *In the Matter of Facebook, Inc.* (Aug. 19, 2021); Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Endo Pharmaceuticals Inc.* (March 31, 2016); Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, *In the Matter of Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey, Inc.* (Apr. 2001).

[83] *See generally,* the statements cited in footnote 80. To put this in context: In 2017, Commissioner Maureen Ohlhausen explained in six paragraphs her "no" vote in the *Qualcomm* litigation and indicated that those six dissenting paragraphs resulted from "extreme circumstances" that required her to break with a policy that "preserves the integrity of the agency's mission, recognizes that reasonable minds can differ, and supports the FTC's staff, who litigate demanding cases for consumers' benefit." Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In*

predecessors knew that the Commission is at its best when commissioners and Commission staff can candidly debate the merits of a case, even when they disagree.[84]

In writing his dissent, Commissioner Ferguson has broken this norm but has done so in a spirit similar to then-Commissioner Ohlhausen: His discussion of the evidence found in this investigation covers three pages, and even expressly permits that additional evidence may arise in discovery.[85]

If Commissioner Ferguson breaks with this norm, Commissioner Holyoak shatters it. In doing so, she threatens the candor from staff on which we as commissioners rely. It is hard to characterize exactly what she has done. Commissioner Holyoak's 88-page monograph most resembles a district judge's decision in favor of a defendant's motion for summary judgment.

Even this analogy fails. There has been no briefing—yet she reaches numerous conclusions of law.[86] There has been no discovery—yet she repeatedly gestures to materials outside of the public record that were made available to her as a prosecutor.[87] She makes argument after argument in favor of the defendant, but clearly does not draw all inferences based on that record in the light most favorable to the Commission, which in this peculiar exercise would be the non-moving

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the Matter of Qualcomm, Inc. (Jan. 17, 2017). In a separate 1980 dissent cited by Commissioner Holyoak, Commissioner Robert Pitofsky wrote a dissenting statement on a Robinson-Patman action, stating that "I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment." Dissenting Statement of Commissioner Robert Pitofsky, *In the Matter of Boise Cascade Corp.*, 107 F.T.C. 76 (Feb. 11, 1986). Commissioner Pitofsky was much more verbose; his dissent took approximately 30 paragraphs. Commissioner Holyoak has written 89 pages, over 300 paragraphs, and over 30,000 words.

[84] In 1984, under Chairman Jim Miller, the Commission adopted a policy that individual commissioners cannot quote directly from or reveal pre-decisional advice from a staff member without the consent of a majority of participating Commissioners. *See* 140 Commission Minutes 674–675 (July 25, 1984). The reason the Commission took this action was "to protect the deliberative privilege regarding materials submitted by staff and *to reaffirm the need as a body for full and frank staff debate for FTC decisions*." *Id*. (emphasis added).

[85] *See* Statement of Commissioner Andrew Ferguson, *In the Matter of Southern Glazer's Wine and Spirits, LLC* (Dec. 11, 2024) [hereinafter "Ferguson Dissent"] at 24 ("it is possible that discovery may reveal some differently price, pairable transactions…").

[86] *See, e.g.*, Holyoak Dissent at iv (Table of Contents); *id.* ("The Majority's Complaint Fails as a Matter of Law Because it Cannot Satisfy the Jurisdictional 'In Commerce' Requirement"); *id.* ("The Alleged Price Discrimination Did Not Occur 'In Commerce'"); *id.* ("The Majority's Complaint Fails to Allege Competitive Injury").

[87] *See, e.g.*, Holyoak Dissent at 24–25 ("my understanding is that the vast majority of Southern Glazer's inventory purchases are generally based on its experience and knowledge of the relevant state markets within which it operates"); *id.* at 26 ("[N]ever does [the Complaint] allege that a favored retailer such as Costco competes with a specific disfavored retailer and that competition between those retailers was harmed. Nor am I aware of any such evidence."); *id.* at 35 ("[T]he evidence the Commission has received suggests the 'existence of facts…'"). My understanding is that Commissioner Holyoak has solicited and obtained written consent from Southern to allow her to make public certain confidential or compulsory process information that the agency obtained from Southern during the course of the investigation. While this was reportedly done pursuant to FTC rules under 16 C.F.R. § 4.10(d), I am not aware of any other instance during my time at the Commission in which this has occurred.

party.[88] She advances, then adopts, a new economic theory to evaluate liability.[89] And she denies the Commission the ability to rely on established Supreme Court precedent, precedent that the Ninth Circuit recognizes as valid.[90]

Commissioner Holyoak is acting as a prosecutor, counsel for the defendant, district court judge and Supreme Court majority personified—*all at once* and without following the rules that apply to any of these functions. There is no name for this combination because it has no place in our statutes or in the American legal system.

B.

By dissenting in such length and detail, our colleagues have effectively created a litigation before the actual litigation. This is a way of taxing the FTC's ability to hold lawbreaking corporations to account. But since the dissents variously promote selective readings of case law, put forth novel interpretations of the Robinson-Patman statutory language, abandon established precedent, and rely on incomplete and incorrect factual assertions and assumptions, we are required to respond.

1.

Section 2(a) of Robinson-Patman extends liability to discriminatory sales that are made "in [interstate] commerce."[91] Commissioners Holyoak and Ferguson both believe that the Staff's complaint does not meet this requirement.[92] This position is dependent on ignoring the contours of the case law and selectively viewing the facts in the case.

Commissioner Holyoak's argument depends on her assertion that, when it engages in transactions, Southern is a wholly independent, *intra*state distributor.[93] There are allegations in this case that raise questions about that assertion, but even if it were factually accurate, the case

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[88] *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("On summary judgment, the inferences to be drawn from the underlying facts… must be viewed in the light most favorable to the party opposing the motion.") (cleaned up).

[89] *See, e.g.*, Holyoak Dissent at 78 ("In sum, the plain text and structure of Section 2's competitive effects language, consistent with how analogous conduct is evaluated under other antitrust statutes suggest secondary-line theories of harm such as those alleged in the Complaint *should be analyzed* under the raising rivals' costs framework.")(emphasis added); *id.* ("The threshold question… is whether a favored retailer's receipt of the alleged discriminatory price from Southern Glazer's increases a competing disfavored retailer's per unit cost of the relevant product.").

[90] *See Volvo Trucks*, 546 U.S. at 177 (recognizing the "permissib[ility]" of the *Morton Salt* inference that "competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time"); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1446 & n.18 (9th Cir. 1995) (citing H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936)) (emphasis added); *See also*, Ferguson Dissent at 14 (arguing that, in *Volvo*, the Supreme Court "left undisturbed decades of precedent dating back to Morton Salt requiring, in the mine run of secondary-line cases, evidence of injury to a competitor rather than to the competitive process").

[91] 15 U.S.C. § 13(a).

[92] Holyoak Dissent at 15; Ferguson Dissent at 26–27.

[93] *See, e.g.*, Holyoak Dissent at 19–20.

law does not support the idea that simply being an independent intrastate distributor ends the "in commerce" inquiry. To make her argument, Commissioner Holyoak relies on the Fifth Circuit's 1969 decision in *Hiram Walker, Inc. v. A & S Tropical, Inc.*[94] A series of cases following *Hiram Walker*, however, challenge her conclusions.

The Supreme Court, citing *Hiram Walker,* established a general rule that Section 2(a) of the RPA "applies only where 'at least one of the two transactions which, when compared, generate a discrimination . . . cross(es) a state line."[95] But before and after this decision, courts in the Fifth and Ninth Circuits have established an important, relevant exception, known as the "flow of commerce test." This test recognizes that goods in an intrastate sale can remain within the "practical, economic continuity" of an *inter*state transaction—and therefore satisfy the "in commerce" requirement—when they are shipped from an out-of-state supplier to a distributor's warehouse as a result of the actual, understood, or anticipated needs of a specific customer.[96] These factors—whether the shipment resulted from the actual, understood, or anticipated needs of a customer—can be referred to as the "PEC factors." The relevant inquiry is whether the shipment to the warehouse was intended for a particular customer, and the PEC factors help determine that.

For example, in an alcohol-related matter subject to Fifth Circuit precedent, the U.S. District Court for the Northern District of Alabama held that plaintiff satisfied the "in commerce" requirement when it plausibly pled the PEC factors by alleging the defendant distributor sourced the beer from an out-of-state manufacturer based on specific customers' actual, understood, and anticipated needs, and subsequently sold the beer at allegedly discriminatory prices to those customers.[97]

Commissioner Holyoak fails to engage substantively with flow of commerce case law in the present case. Instead, she labels the "flow of commerce" cases as "inapplicable" and questions "the continued viability" of the flow of commerce test.[98] She also misconstrues the Ninth Circuit's precedent in *Zoslaw*, arguing that it broadly rules that interstate commerce is broken with a sale to an independent distributor.[99]

But the flow of commerce test is available regardless of whether the distributor is independent or vertically integrated.[100] The commissioner seems to miss the fact that the *Zoslaw* court provided two separate avenues to satisfy the "in commerce" requirement.

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[94] 407 F.2d 4 (5th Cir. 1969).

[95] *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

[96] *See Hampton v. Graff Vending Co.*, 516 F.2d 100, 102–03 (5th Cir. 1975); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 210 (5th Cir. 1969); *see also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 877–78 (9th Cir. 1982).

[97] *Fast and Easy Food Stores, Inc. v. Greene Beverage Co., Inc.*, No. 7:11-CV-1929-MHH, 2013 WL 12136610, at *3–4 (N.D. Ala. Nov. 4, 2013).

[98] Holyoak Dissent at 20–21.

[99] *Id.* at 23-24.

[100] The *Zoslaw* court explicitly acknowledged that jurisdiction could be proper over an independent intrastate distributor: "[T]he cases relied on by the district court and cited by appellees primarily involve sales by out of state producers to distributors or retailers who then resell the goods intrastate at the allegedly discriminatory price... In

The first avenue asks whether the sales to the intrastate distributor meet the PEC factors. The court in *Zoslaw* explicitly held that "[i]n gauging the point of destination courts consider whether goods coming from out of state respond to a particular customer's order or anticipated needs. If so, the sales meet the 'in commerce' requirement *even though the goods may be stored in a warehouse before actual sale to the buyer*."[101] As noted above, it's the *intent* for the goods that is relevant in determining whether an intrastate sale was still in the flow of commerce.[102] Critically, the decision does not turn on the independence of the distributor, but instead, on the intent for the goods. The court held that the goods in question were not intended for a specific customer, but were intended for *general* inventory.[103] Because the flow of the goods was to general inventory, the PEC factors were not met, and the flow of commerce test was inapplicable.

With the first avenue for jurisdiction unavailable, the Court analyzed a second path to establish the in commerce requirement. Specifically, the court explored whether the local distributors were under the control of the out of state suppliers. The Court's analysis was based on the Supreme Court's ruling in *Standard Oil v. FTC*, where an interstate oil producer refined oil out of state and shipped the gasoline for storage in a local storage facility for sale to in-state customers. The Court ruled that the "temporary storage of the gasoline . . . does not deprive [it] of its interstate character."[104] In other words, goods remained in commerce where a company manufactured the goods out of state, moved them to the state of eventual sale, temporarily stored the goods, and then sold the goods at allegedly discriminatory prices.[105] The Court insisted that "[a]ny other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns."[106] After the *Zoslaw* court discussed and interpreted *Standard Oil*, it ruled that sales by subsidiaries of interstate producers can remain in commerce if the producer controls the pricing and marketing decisions of the subsidiary.[107]

Read correctly, *Zoslaw* provides two separate avenues for an independent distributor to meet the "in commerce" element under Robinson-Patman: (1) if the PEC factors are met by sales through an independent or vertically integrated distributor, satisfying the "flow of commerce" test; and (2) if an independent distributor is, in fact, controlled by an out-of-state entity from whom the goods are sourced. These two routes to jurisdiction are ignored by Commissioner Holyoak; she

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such cases the analysis of intent is useful in determining whether the initial sale from the out of state producer bears sufficient relationship to the subsequent allegedly discriminatory sale to conclude that the latter sale, is part of a continuous interstate transaction and hence in commerce." *Zoslaw,* 693 F.2d at 879 (citations omitted).

[101] *Zoslaw,* 693 F.2d at 878 (emphasis added) (citations omitted). However, if the goods are stored for general inventory, without a particular customer in mind, the flow of commerce is broken. *Id*. (emphasis added).

[102] *Id*. at 878–879.

[103] *See id*. at 878.

[104] *Standard Oil v. FTC*, 340 U.S. 231, 238 (1951).

[105] *See also Zoslaw*, 693 F.2d at 879 (interpreting *Standard Oil* "to indicate that interstate producers of goods produced out of state do not meaningfully interrupt the flow of commerce by simply storing them in the state of eventual sale").

[106] *Standard Oil*, 340 U.S. at 237-238.

[107] *Zoslaw*, 693 F.2d at 879.

appears to argue that the PEC factors are only available for satisfying the flow of commerce test if the distributor is vertically integrated with the supplier.[108]

I have reason to believe that the Commission has the evidence to allege the PEC factors and will establish jurisdiction under the flow of commerce test.[109] I also believe that the Commission separately has evidence to establish jurisdiction under the second path outlined in *Zoslaw* and *Standard Oil*, and that the complaint alleges that Southern's national distribution process generally fits within this framework (though Southern does not manufacture the alcohol it sells).[110]

Although *Zoslaw* and *Standard Oil* have not yet been applied to a national, interstate distributor like Southern, the framework established in each case should keep a substantial portion of Southern's transactions in the flow of commerce.

2.

Commissioner Holyoak argues that the complaint fails to allege specific pairings of favored and disfavored retailers, and instead "effectively relies on price differences across broad geographic regions."[111] With the breadth and pervasiveness of the price discrimination covering *thousands* of retail pairings, the complaint pleads allegations common to all instances covering each element of Section 2(a).

I am not aware of any pleading requirement under Rule 8 or the Clayton Act that would require the individualized pleading Commissioner Holyoak proposes, and the commissioner provides no case law support for her heightened pleading requirement.

Instead, she relies on the Supreme Court's analysis in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[112] But *Volvo Trucks* did not concern pleading standards in a Robinson-Patman complaint. It concerned a post-trial motion for Judgment as a Matter of Law following a jury finding of Robinson-Patman liability.[113] The case analyzed the evidentiary standards for a finding of liability, not pleading standards in a complaint. Commissioner Holyoak is trying to suggest that the Commission must try the entire case in the pleading.

The commissioner also asserts that she is not "aware of any… evidence" that favored retailers and independents compete.[114] By this logic, I am not aware of any lakes in Minnesota.

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[108] *See* Holyoak Dissent at 24 ("Southern Glazer's is not vertically integrated so such analysis does not apply here.").
[109] The complaint also adequately pleads the necessary facts. *See* Compl. paras 79-84.
[110] *See* Compl. paras 79–82.
[111] Holyoak Dissent at 25-28.
[112] 546 U.S. 164 (2006).
[113] *Id*.
[114] *See* Holyoak Dissent at 26.

3.

Commissioner Holyoak argues that the text of Section 2(a) requires that the Commission plead that favored retailers *knew* they were receiving the discriminatory price.[115] But I am aware of no court that has found retailer knowledge of illegal price discrimination to be a requirement under Section 2(a). When the Supreme Court listed the elements of a secondary-line claim in *Volvo Trucks*—a case cited throughout Commissioner Holyoak's dissent—it did not include a knowledge requirement. The Court stated that plaintiff must "show that (1) the relevant [product] sales were made in interstate commerce; (2) the [products] were of like grade and quality; (3) [the seller] discriminated in price between [the disfavored purchaser] and another purchaser of [the product]; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of a favored purchaser, *i.e.*, one who received the benefit of such discrimination."[116]

Furthermore, courts have treated the knowledge requirement as a separate, additional element in Section 2(f) claims. As Commissioner Holyoak's dissent explains, the word "knowingly" appears twice in the Robinson-Patman Act, once in Section 2(a) and once in Section 2(f).[117] But when courts have analyzed the elements of a 2(f) claim, they have treated the knowledge requirement as an extra element beyond what must be proven to sustain a 2(a) claim – which is a predicate for 2(f) liability. For example, in *Delta Marina, Inc. v. Plaquemine Oil Sales, Inc*., the Fifth Circuit explained that "a violation of Section 2(f) generally requires*, in addition to a violation of Section 2(a) by the seller*, knowledge by the buyer that the circumstances enumerated in Sections 2(a) and 2(b) of the Act that allow discriminatory prices do not obtain."[118]

The Ninth Circuit has similarly articulated the knowledge requirement as an additional element for a Section 2(f) claim, requiring "proof that the sale would violate § 2(a) *and* proof that the buyer knew this and that 'knowing full well that there was little likelihood of a defense for the seller, [the buyer] nevertheless proceeded to exert pressure for lower prices' than those known to be given his competitors."[119] This language would be incoherent if a knowledge requirement already applied in Section 2(a).

As with retailer pairings, the commissioner's argument would invent a new standard for Robinson-Patman pleadings, this time with a novel reading of the statute.

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[115] *Id.* at 27.
[116] *Volvo Trucks*, 546 U.S. at 176-177 (quoting 15 U.S.C. § 13(a)) (cleaned up); *accord Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990).
[117] Holyoak Dissent at 27.
[118] 644 F.2d 455, 458 (5th Cir. 1981) (emphasis added).
[119] *Tex. Gulf Sulphur Co. v. J. R. Simplot Co*., 418 F.2d 793, 803 (9th Cir. 1969) (citing *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74-79 (1953)) (emphasis added); *see also, e.g.*, *Millcraft Paper Co. v. Veritiv Corp.*, 2016 U.S. Dist. LEXIS 93007, at *12 (N.D. Ohio July 14, 2016) ("[w]ith a Section 2(a) claim adequately plead, the [p]laintiff must also show that [the buyer] 'knowingly [induced] or [received] . . . a discrimination in price which is prohibited'" to state a Section 2(f) claim); *Flash Elecs. v. Universal Music*, 312 F. Supp. 2d 379, 400 (E.D.N.Y. 2004) ("having adequately alleged a section 2(a) claim against [the seller], plaintiffs must show that [the buyers] 'knowingly [induced] or receive[d] a discrimination in price which is prohibited'" to allege a Section 2(f) claim).

4.

Commissioner Holyoak devotes 22 pages to an attack on the Supreme Court precedent in *Morton Salt* and the clear legislative intent of Congress. Commissioner Holyoak argues that Robinson-Patman is *not* intended to protect against harm to competitors, but instead general competition.[120] This position is contrary to the plain reading of the statute, well-established case law, and the express statements of the people whom the Constitution empowers to write American law.

Section 2(a)'s competitive injury element is established by showing that the effect of the discrimination may be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[121] The plain meaning of this clause is that it (1) targets harm that arises from discriminatory pricing that benefits a favored purchaser, and (2) prevents the injury to those who compete with that favored purchaser.

If that is not clear, then listen to Congress. The Senate report accompanying the bill explained that:

> [The original Section 2 of the Clayton Act] has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; *whereas the more immediately important concern is in injury to the competitor victimized by the discrimination.* Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.[122]

The House report said the same thing:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas *the more immediately important concern is in injury to the competitor victimized by the discrimination*. Only through such injury in fact, can the larger, general injury result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved.[123]

Commissioner Holyoak's argument would revert Congress' signature protection against price discrimination to a prior version that both the House and the Senate found to be "too restrictive." This is not subtle. Yet the commissioner somehow bends these words to argue against themselves.

[120] Holyoak Dissent at 36 (citing *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)).
[121] 15 U.S.C. § 13(a).
[122] S. Rep. No. 1502, *supra* note 31, at 4.
[123] H.R. Rep. No. 2287, *supra* note 31, at 8.

Courts have consistently recognized this congressional intent. The Supreme Court clarified the importance of this language and intent for secondary-line cases in *Morton Salt*:

> [I]n enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very [phrase] of the old Clayton Act [that the effect of the discrimination may be "substantially to lessen competition"]. The committee reports on the Robinson-Patman Act emphasized a belief that [Section] 2 of the Clayton Act had 'been too restrictive in requiring a showing of general injury to competitive conditions.' The new provision, here controlling, was intended to *justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination*.'[124]

Morton Salt has been affirmed repeatedly by the Supreme Court.[125] Even in *Volvo Trucks*, the case relied upon by the dissent, the Court did not question the holding, but instead set it aside for considering facts bearing "little resemblance to large independent department stores or chain operations[.]"[126] The Court even included harm to competitors in its recitation of the elements of a secondary-line Robinson Patman claim.[127]

Circuit courts are also in agreement that harm to competitors is the relevant harm under the Act.[128] The Ninth Circuit provided controlling precedent for this matter, explaining in *Rebel Oil*:

> While the Clayton Act only proscribed conduct that may 'substantially lessen competition or tend to create a monopoly[,]' the new law [the RPA] added the following crucial passage: '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.' The purpose of this passage was to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition

[124] *Morton Salt*, 334 U.S. at 49 (citing S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)) (emphasis added).
[125] *Falls City Indus., Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 435-36 (1983); *Texaco, Inc. v. Hasbrouck,* 496 U.S. 543, 559 (1990).
[126] *See Volvo Trucks*, 546 U.S. at 168.
[127] *Id*. at 176-77 ("To establish the secondary-line injury [under section 2(a)], Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of 'like grade and quality'; (3) Volvo 'discriminate[d] in price between' Reeder and another purchaser of Volvo trucks; and (4) 'the effect of such discrimination may be . . . to *injure, destroy, or prevent competition' to the advantage of a favored purchaser, i.e., one who 'receive[d] the benefit of such discrimination*.'") (emphasis added).
[128] *See, e.g.*, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Co.*, 79 F.3d 182, 192 (1st Cir. 1996) (explaining that the purpose of the RPA was "to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects on individual competitors"); *George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 144 (2d Cir. 1998) (explaining that "section 2(a) 'was intended to justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination'") (quoting *Morton Salt*, 334 U.S. at 49); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1540-41 (3d Cir. 1990) (finding that, "[a]s distinguished from the Robinson-Patman Act, the target of [the Sherman Act] is the protection of competition, not competitors") (internal citation omitted); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990) (explaining that "the injury to secondary-line competition the RPA seeks to prevent is analogous, if not identical, to an injury to competitors of a favored buyer").

> marketwide, allowing them instead to impose liability simply by *proving effects to individual competitors*.[129]

Commissioner Holyoak's dissent relies on *Brooke Group* to support her argument that Robinson-Patman does not recognize harm to competitors in secondary-line cases.[130] This reliance is misplaced. First, "the holding of the *Brooke Group* opinion on its face applies only to primary-line cases, not secondary-line cases."[131] I am aware of no instance in which a court has applied *Brooke Group* in a secondary-line price discrimination case.

Second, lower courts have consistently held that the Supreme Court's holding in that case is not applicable to secondary-line cases.[132] Courts have done this because "the statutory structure that prohibits primary-line price discrimination stands on an entirely different footing than the statutory scheme that proscribes secondary-line discrimination."[133] As the court explained in *Coastal Fuels*:

> Congress first forbade primary-line price discrimination with the Clayton Act . . . which originally condemned discrimination that might 'substantially . . . lessen competition or tend to create a monopoly' . . . [and] was intended to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying marketwide competition. . . . By contrast, secondary-line discrimination is forbidden by the Robinson-Patman Act . . . [which] stemmed from dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining volume discounts from big suppliers, at the disadvantage of small retailers who competed with the chains.[134]

Thus, Robinson-Patman's purpose of "protect[ing] individual competitors, not just market competition" is "still applicable in secondary-line cases, even though [] not applicable in primary-line cases after *Brooke Group*."[135]

This reasoning is made clearer when one considers the species of harm that *Brooke Group* confronted. *Brooke Group* concerned predatory pricing, conduct separately proscribed by Sherman

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[129] *Rebel Oil,* 51 F.3d at 1446 & n.18 (9th Cir. 1995) (citing H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936)) (emphasis added).
[130] Holyoak Dissent at 51–56 (citing *Brooke Group Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).
[131] *Coastal Fuels*, 79 F.3d at 193; *George Haug*, 148 F.3d at 144.
[132] *See, e.g.*, *George Haug*, 148 F.3d at 142-44; *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997); *Coastal Fuels*, 79 F.3d at 191-93.
[133] *Coastal Fuels*, 79 F.3d at 192 (quotation omitted); *see also Chroma Lighting*, 111 F.3d at 658 (declining "to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims").
[134] *Coastal Fuels*, 79 F.3d at 192 (citations omitted).
[135] *Chroma Lighting*, 111 F.3d at 658; *accord Coastal Fuels*, 79 F.3d at 192-93; *George Haug*, 148 F.3d at 143-44.

Act. Thus, a primary-line plaintiff bears the "same substantive burden as under the Sherman Act, that is, the plaintiff must show that the predator stands some chance of recouping his losses."[136]

There is no such "predator" in secondary-line cases. There is no firm alleged to be pricing below its own costs or doing so in an effort to (and with a dangerous probability of) excluding its own rivals. Instead, the potential effect occurs in a market *different* from the one in which the seller operates. This is why "the same analogy [to predatory pricing cases] may not be made to secondary-line price discrimination claims," and *Brooke Group* is inapplicable.[137]

5.

Section 2(a) of Robinson-Patman provides a defense when a supplier's discriminatory discounts "make *only* due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are *to such purchasers* sold or delivered." [138] This is known as the "cost justification" defense, and it reflects the fact that Congress had no problem with the fact that it might be cheaper to make, sell, or deliver products in bulk to a specific buyer, and made clear that those lowered costs could be passed on to that buyer in the form of lower prices. After all, Congress wanted to prohibit price *discrimination,* but allow for differences reflecting "more economic processes of manufacture, methods of sale, and modes of delivery[.]"[139]

Commissioners Holyoak and Ferguson have argued for a novel interpretation of this defense.[140] They ask for it to be read broadly to include discounts stemming from upstream sale deals struck between the distributor (Southern) and its suppliers (e.g., a liquor producer), rather than being limited to the cost savings resulting from Southern's sales to its retailers (e.g., Costco or a grocery and liquor store). Commissioner Holyoak describes these supplier discounts as "cumulative quantity discounts" that are "tethered to specific volume goals." She offers a helpful illustration:

> Suppose supplier X agrees to provide a $2,000 discount to Southern Glazer's each time [Southern] sells 500 cases or more of Y liquor. Southern Glazer's is only able to procure the [discount] payment after it sells 500 cases. Each time Southern Glazer's receives the discount, it reduces Southern Glazer's costs of acquiring the inventory with respect to Y liquor by $2,000.[141]

[136] *Coastal Fuels*, 79 F.3d at 191; *see also Brooke Group,* 509 U.S. at 222-23 (requiring evidence that "the prices complained of are below an appropriate measure of its rivals' costs" and "a dangerous probability of recouping its investment in below-cost prices").
[137] *Chroma Lighting*, 111 F.3d at 658.
[138] 15 U.S.C. § 13(a) (emphasis added).
[139] H.R. Rep. No. 2287, *supra* note 31, at 9; S. Rep. No. 1502, *supra* note 31, at 5.
[140] *See* Holyoak Dissent at 28–32; Ferguson Dissent at 24–25.
[141] *See* Holyoak Dissent at 30.

Note in this example, the requirement is for a target number of sales, independent of a sale to any specific buyer. Southern gets the $2,000 rebate if it sells all 500 cases to one buyer, or if it sells 100 cases to five different buyers, or if it sells one case to 500 different buyers.

A supplier is, of course, permitted to provide Robinson-Patman-compliant quantity discounts to its distributors. But if these discounts result from general sales goals for the distributor, not tied to the sale to any particular buyer, they are properly viewed as general overhead costs that are not attributable to the "methods or quantities" involved in the sale or delivery to any particular buyer. In fact, Congress articulated at the time of passage that this cost justification language was "designed" to prevent the granting of a discriminatory price to a particular buyer based on the "whole saving in cost resulting to the seller's *entire volume of business* as augmented by that customer's patronage."[142]

These are precisely the kinds of discounts at play here. As the dissenters acknowledge, the quantity discounts from suppliers to Southern allegedly are contingent on total sales volumes of Southern.[143]

Put another way, the supplier-funded discounts are alleged to represent arbitrary price differences negotiated by the supplier and Southern based on Southern's total sales to its retailers, untethered to any cost savings that may run from the "manufacture, sale, or delivery" to those specific retailers. It's just an incentive for Southern to sell more product, with no reference to the efficiencies inherent in any of those transactions.

The functional effect of this maneuver is that suppliers appear to be paying Southern to engage in price discrimination. Were suppliers to sell directly to retailers in this fashion, the suppliers' conduct would clearly constitute a *prima facie* violation of Section 2(a). The fact that a middleman makes the discriminatory sales to retailers does not change the illegality of these sales; it merely shifts liability from the supplier to the middleman.

As a general matter, the Commission should not support the idea of corporations playing accounting games in order to escape accountability under federal law. Southern should not be permitted to use the regulatory structure of the alcohol industry as a weapon to indirectly implement price discrimination clearly forbidden by Robinson-Patman.[144]

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[142] S. Rep. No. 1502, *supra* note 31, at 5 (emphasis added). *See also* H.R. Rep. No. 2287, *supra* note 31, at 10 (The clause "precludes differentials based on the imputation of overhead to particular customers, or the exemption of others from it, where such overhead represents facilities or activities inseparable from the seller's business as a whole and not attributable to the business of particular customers or of the particular customers involved in the discrimination.").

[143] *See* Holyoak Dissent at 30; Ferguson Dissent at 24.

[144] As the Second Circuit explained in *FLM Collision Parts, Inc. v. Ford Motor Co*., "[w]e do not suggest or imply if a manufacturer grants a price discount or allowance to its wholesalers (whether or not labelled 'incentive'), which has the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it." 543 F.2d 1019, 1027 (2d Cir. 1976) (emphasis added).

In any event, however the court may rule on this matter of law, it does not end the inquiry of whether Southern engaged in illegal price discrimination in this case. I anticipate that the evidence presented in litigation will demonstrate that violations of law have occurred regardless of whether supplier-funded discounts are accepted as costs of sale under Section 2(a).

The dissenting Commissioners note that Southern has produced evidence of operational cost savings resulting from serving large retailers over independents.[145] Commissioner Ferguson claims these cost savings account for "many," but not all, of the price differentials, and Commissioner Holyoak claims that "the price or margin differences between independents and chains—where they exist—are substantially narrowed once discounts and operating costs are properly accounted for," and that substantial narrowing allows defendants to meet the cost justification test.[146]

I do not dispute the existence of operating cost variances associated with selling to different chain and independent purchasers. However, I am not aware of any case that has adopted a "substantial narrowing" standard for evaluating whether price discrimination is cost justified. Under Section 2(a), the pertinent inquiry for evaluating any cost justification defense is whether the price reductions given to favored purchasers "make *only* due allowance" for such cost savings. That is, a defendant must show that "the price reductions given did not exceed the actual cost savings" by more than a *de minimis* amount.[147] Here, there is a substantial basis to allege that across states and products, cost differences far exceed supplier-funded discounts and any cognizable operating cost savings.

Given the sheer volume and breadth of products, the alleged significant variability and magnitude of price differentials, and the available qualitative and quantitative evidence, I believe that Southern will be unable to meet its burden to establish the cost justification defense for all or most instances of price discrimination in this case, regardless of whether supplier funding is treated as a cost of sale.

6.

Under Section 2(b), Robinson-Patman creates a defense to an otherwise valid claim of price discrimination if the seller can show that its lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.[148] So, Commissioner Holyoak argues

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[145] Holyoak Dissent at 31; Ferguson Dissent at 25.
[146] Holyoak Dissent at 31; Ferguson Dissent at 25.
[147] *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 561 n.18 (1990) (explaining that to establish the cost justification defense a "seller must show that the price reductions given did not exceed the actual cost savings"); *see also Morton Salt*, 334 U.S. at 44 ("[I]t was in furtherance of this avowed purpose—to protect competition from all price differentials except those based in full on cost savings—that" the cost-justification defense was included in the Robinson-Patman Act); *In re Am. Metal Prods. Co.*, 60 F.T.C. 1667, 1684 (1962) (finding all but a price difference of $.085 cost justified), *vacated as moot*, 60 F.T.C. 1667, 1689 (1962); *In re Thompson Prod., Inc.*, 55 F.T.C. 1252, 1273-74 (1959) (finding only part of price difference cost justified).
[148] 15 U.S.C. § 13(b).

that Southern's pricing discrimination resulted from a good faith belief that it was meeting competition.

Commissioner Holyoak effectively posits that Southern is entitled to blanket immunity because Southern presents evidence it faces competition in upstream supplier markets and downstream retail markets, and that competition to maintain its distribution through suppliers "affects" its pricing strategy.[149]

First, any *upstream* pressures to maintain distribution with certain suppliers is irrelevant to a Robinson-Patman meeting competition defense. Southern would be a buyer in upstream supplier markets; Section 2(b) provides that a *seller* may lower its price "to meet an equally low price of a competitor." The defense involves competition for a particular downstream buyer's business, and I am unaware of any precedent that allows Robinson-Patman defendants to credit upstream competition to excuse downstream price discrimination.

Second, Commissioner Holyoak's dissent offers no facts that support the idea that every price discrimination Southern engaged in resulted from the good faith belief it was meeting competition. The operative words in the statute are "meet" and "of a competitor." Professors Phillip Areeda and Herbert Hovenkamp explain that "the meeting competition defense would permit a seller to 'meet' the 'equally low price' offered by a rival, but not to go further. If the seller went further and offered a price lower than the rival's offer, then it would have to lower the price to other customers as well or else would not qualify for the defense."[150] Given this "meet, but not beat principle," Southern would have to demonstrate at least some basis that its prices were the result of pressure from a particular competitor and that it had reason to believe it was not exceeding the competitive pricing.

Take, for instance, the A&P case relied upon by the dissent.[151] In that case, which involved a Section 2(f) claim rather than Section 2(a), defendant presented evidence of exactly how Borden had a good faith belief that it was meeting competition with defendant's other potential supplier. The ultimate bid was the result of multiple rounds of negotiation, and the defendant made statements to Borden that led it to believe it had to double its offer.[152] Here, I have not seen any specific evidence that would begin to justify even one of Southern's discriminatory prices, let alone the alleged breadth of Southern's discriminatory conduct.

Commissioner Holyoak's reliance on *Standard Oil* for the proposition that competitive threats are sufficient to sustain a meeting competition defense is also misplaced.[153] In that case, defendant presented evidence of specific instances of its actual knowledge of lower, "cut rate"

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[149] Holyoak Dissent at 35.
[150] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2352(b).
[151] *Great Atlantic & Pacific Tea Co v. FTC*, 440 U.S. 69 (1979).
[152] *See id.* at 72-73.
[153] Holyoak Dissent at n. 280.

offers by competitors to lure away their jobbers, in what the Court deemed a "cutthroat" market.[154] Furthermore, the Court took note of evidence that Standard had lost over 40% of its jobbers in prior years due to lower rates offered by competitors.[155] I would be quite surprised if Southern was able to muster similar evidence for the full breadth of its allegedly pervasive discriminatory pricing practices.

IV.

Past critics of Robinson-Patman tried to repeal the law. They failed.[156] Having failed, they quietly struck it down through non-enforcement. Now that the law is revived, the dissenting arguments—and in particular Commissioner Holyoak's dissent—would use the courts to amend it in a way that would make it even harder to enforce.[157]

Commissioner Holyoak recently reminded the Commission "that Article I of the Constitution vests legislative powers in Congress, not with agencies."[158] I respectfully submit she apply that principle to Robinson-Patman.[159]

We live in a time of deep inequality, when a majority of Americans think that our economy is "rigged" against them and in favor of the wealthy.[160] Maybe that's because when powerful companies break the law, prosecutors give them the benefit of every shadow of every doubt—and when those companies' interests run up against legal norms or the rule of law, those rules are set aside or broken.

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[154] *FTC v. Standard Oil Co*., 355 U.S. 396, 402 & n.8 (1958).

[155] *Id.* at 403.

[156] Various reports by government agencies, including from the White House, the Department of Justice, and the Antitrust Modernization Commission have argued for reform or repeal of the RPA over years dating back to 1955. *See, e.g.*, Sokol, *supra* note 41, at 2066; 1977 DOJ REPORT, *supra* note 57; The AMC, *supra* note 58. Congress has never acted upon these recommendations.

[157] This is not a surprise given that antitrust scholars openly lament the failure of courts to revise the law in this way. *See* Herbert Hovenkamp, *The Robinson Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L. J. 125, 130 (2000) ("a great deal of revisionism has gone into our interpretations of the Sherman Act and Section 7 of the Clayton Act…[b]ut the courts often seem reluctant to treat the Robinson Patman Act the same way").

[158] *See* Dissenting Statement of Commissioner Melissa Holyoak, *In the Matter of the Negative Option Rule*, *FTC Matter No. P064202* (Oct. 16, 2024) ("Article I of the Constitution vests 'all legislative Powers herein granted' in Congress. 'By vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people.'").

[159] *See* Mark Meador, *Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers*, The Federalist Society (Jul. 9, 2024), https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers ("[C]onservatives and others who believe in our constitutional order and the rule of law should be deeply troubled by the suggestion that federal law enforcers can decide not to enforce a law simply because they disagree with the policy or outcomes it advances. That policy prerogative is reserved to Congress alone under Article I of the Constitution.").

[160] Ipsos, *Most Americans think the economy is rigged for the rich and powerful* (June 20, 2023) ("The majority of Americans think the American economy is rigged to advantage the rich and powerful (69%)").

The point of Robinson-Patman is that the same rules should apply to everyone. It is time to enforce it.[161]

[161] I am grateful to Max M. Miller for his partnership in this effort, and Sophia Reiss for her indispensable work as a paralegal. I would also like to thank Catherine Sanchez, Nathan Petek, Brett Wendling, Kate Conlow, and Bryce Tuttle for their support in researching the Robinson-Patman Act. Finally, I would like to thank the incredibly talented and dedicated staff in the Anticompetitive Practices Division and Bureau of Economics who investigated this important matter and filed today's complaint: Geoffrey Green, Patricia McDermott, Christina Brown, Dana Abrahamsen, Daniel Blauser, Wes Carson, Daniel Chozick, Joe Conrad, Stephanie Funk, Jordan Klimek, Lauren Patterson, Ross Steinberg, Mike Baker, Shira Steinberg, Maia Perez, Coleman Watts, Aviv Nevo, Aileen Thompson, Ben Heebsh, Aaron Fix, Kevin Hearle, and Dhanya Srikanth.