

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

Office of Commissioner
Andrew N. Ferguson

Dissenting Statement of Commissioner Andrew N. Ferguson
In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation
Matter Number 2210158

January 17, 2025

On the eve of its eviction from power at the hands of the American voters, the

or goods available to competing customers “on proportionally equal terms.”⁸ As Commissioner Holyoak explains, Sections 2(d) and 2(e) are anticircumvention rules that prevent firms from evading Section 2(a)’s prohibition on price discrimination by offering every customer the same price, but then providing side payments or services to favored customers.⁹ The Commission accuses Pepsi of having violated Sections 2(d) and 2(e), rather than Section 2(a).¹⁰

Congress adopted the Robinson-Patman Act in 1936, and the Commission enforced it vigorously for decades.¹¹ Many of its cases, however, were imprudent and protected large businesses from smaller competitors.¹² After the econometric turn in antitrust law, the academy, the bar, and the government all decided that the law was outdated and unsound.¹³ By the 1980s, the government had effectively ceased to enforce the Act because of disagreement with its underlying policy.

Last month, the Commission brought its first Robinson-Patman Act case in 25 years.¹⁴ I rejected the prevailing consensus that the government should never enforce the Act.¹⁵ It is a duly-enacted law that Congress has repeatedly declined to repeal. Whatever policy misgivings I may have with its underlying policy, the Constitution forbids me as an officer of the United States from treating a valid law as a nullity.¹⁶ I dissented from filing the *Southern Glazer’s* complaint, however, on two grounds. First, although Commission staff had conducted a comprehensive investigation, we lacked evidence that the defendant had engaged in the sort of price discrimination that the Act forbids, or that any competitors had suffered any injury from whatever differential pricing may have occurred.¹⁷ Second, even if we had such evidence, I would not have brought the suit because we lacked evidence that the favored retailers had market power, which meant that the suit ran a ser98 -0 [ucul6F

Ordinary litigation expenses consume tens of millions of dollars. Every conduct case thus entails real trade-offs. When we bring a conduct case, we are foreclosing other potential merger and conduct cases. Conduct cases therefore must be brought only after careful investigation and deliberation have confirmed that the defendant is seriously degrading competition in our markets, and that the Commission is likely to prevail in court.

The Democratic majority has done neither of those things. My Democratic colleagues permitted precious little pre-suit investigation. They have no evidence on any of the most critical elements of a Robinson-Patman Act case. But they nevertheless commit potentially tens of millions of dollars to this escapade, thereby denying those funds to the rest of our competition-enforcement mission.

Therein lies the tragedy. The Democratic majority has made it so that anticompetitive mergers will go unchallenged, and anticompetitive conduct unaddressed, because they have tied up our scarce resources in this politically motivated travesty. Three Democrats, on the cusp of losing power, decided they would rather spend the American people's money on a political lark than protect competition in our markets. That is a shameful trade off.

Perhaps discovery will uncover evidence sufficient to establish a violation of the Robinson-Patman Act that harmed competition. If it does, then the suit should proceed. I remain of the view that the Commission should enforce the Act where it has solid evidence of a violation, and the beneficiaries of the alleged discrimination enjoy market power sufficient to threaten competition in the relevant market. But the fortuitous discovery of evidence in litigation would not justify today's decision. We hold our resources in trust for the American taxpayer. That trust does not permit us to file politically motivated lawsuits and hope we uncover evidence justifying those suits years later.

The Democratic Commissioners will not suffer the consequences of this power grab. The Commission's staff and the American people will. Like Tom and Daisy Buchanan, the Democratic Commissioners on the eve of their loss of power carelessly smash up the Commission, our staff, and our public credibility, before retreating into the minority and leaving others to clean up their mess.²⁸

I dissent.

²⁸ F. Scott Fitzgerald, *The Great Gatsby* (1925) ("They were careless people, Tom and Daisy—they smashed up things and creatures and then retreated back into ... their vast carelessness or whatever it was that kept them together, and let other people clean up the mess they had made.").