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

Office of Commissioner
Alvaro M. Bedoya

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. When walking into the store, you have a pretty

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.[13] 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/9610059-mccormick-company-inc#:~:text=McCormick%20&%20Company%20agreed%20to%20settle%20charges%20that%20it%20violated

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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 cle.3 (.)-2-1.133g3uc and(h)-3.8 (an)-3.8

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 Pennsylh(or)2.6 (1J 0.001 Tc -0.001 tbis)4 (t)22 (hoodc -0.09

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 supp1 (p95 (o3-4. (c)-1.1 (i)0.-29)-5 (e)-1$ [(1942i.007 T

> 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 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 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]

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III.

Southern Glazer's Wine and Spirits sells one of every three liquor bottles in the United States. Southern is one of the country's 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

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," or 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.[82] In the 21st century, this has happened on just a handful of occasions. When commissioners have done so, they often explain why they decide to break this norm—and they are brief.[83] Perhaps our

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 nearly 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 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., 97 F.T.C. 76 (Feb. 11, 1980). Commissioner Pitofsky

law does not support the idea that simply being an independent intrastate distributor ends the "in commerce" inquiry. To make her argument, Commissioner Holyoak calls on the Fifth Circuit's 1969 decision in

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 (1) it 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:

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Courts have consistently recognized the importance of this language and intent for secondary-meaning cases in Congressional intent. The Supreme Court clarified

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

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 [illegible] differing [illegible]

Note in this example, the requirement is for a target number of sales, independent of a sale to any

In any event, however the court may rule on that 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 cost justification 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 differentiation is cost justified. [illegible]

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 a 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

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 Peterka, 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 of 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 Klement, Lau Patterson, Ross Steinberg, Mike Baker, Shira Steinberg, Maia Perez, Coleman Watts, Aviv Nevo, Aileen Thompson, Ben Heebsh, Aaron Fix, Kevin Hahn, and Dhanya Srikanth.