EXHIBIT 1

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 Southern Glazer's Wine and Spirits, LLC
Matter Number 211-0155

December 12, 2024

The Commission today authorizes the filing of a Complaint against Southern Glazer's Wine and Spirits, LLC ("Southern"). The Complaint alleges that Southern violated the Robinson-Patman Act[1] by selling wine and spirits to small, independent businesses at prices much higher than those Southern charged to large national and regional chains.[2]

The Commission has not brought a Robinson-Patman Act claim in nearly a quarter century and has not litigated one to judgment for far longer. The government has not failed to enforce the Act because everyone has been complying with it. Rather, the government simply was not interested in enforcing the law. For decades, a bipartisan, anti-enforcement consensus has prevailed among federal antitrust enforcers, the bar, and the academy. The Act's opponents have argued that the Act rests on bad economics and that enforcement would injure consumers by denying them the benefits of vigorous price competition.

The Executive Branch should not categorically and publicly refuse to enforce laws that Congress has passed and the President has signed. The separation of powers forbids the suspension of the laws merely because of a policy disagreement with that law. But the Commission must soundly exercise discretion about when to enforce a law. The Commission exercises its discretion poorly by bringing this case. The Commission is unlikely to prevail even on its own theory of the Act, and it would be an imprudent use of the Commission's enforcement resources even if it were likely to prevail. I therefore respectfully dissent.

I

In most markets, market forces dictate supply chain structure. If supply chains have middlemen like wholesalers, it is generally because those wholesalers perform some valuable service that manufacturers and retailers cannot. The alcohol markets are not so straightforward. The Twenty-First Amendment,[3] the Federal Alcohol Administration Act of 1935,[4] and state laws mandate a three-tier system that requires alcohol supply, distribution, and retail to be performed by different companies.[5] Alcohol suppliers may not sell directly to retailers like grocery stores,

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[1] 15 U.S.C. § 13.
[2] Compl. ¶1.
[3] U.S. Const. amend. XXI.
[4] 27 U.S.C. §§ 201 *et seq*.
[5] See U.S. Dep't. of Treasury, Competition in the Markets for Beer, Wine, and Spirits at 10–19 (Feb. 2022), https://home.treasury.gov/system/files/136/Competition-Report.pdf.

big-box stores, and liquor stores. Instead, suppliers must sell their products to an independent distributor. The distributor, in turn, resells and delivers the alcohol to retailers at a wholesale price set by the distributor, not the supplier. Suppliers often contract with the same distributor for distribution in multiple States, generally through exclusive distribution agreements that give the distributor the sole right to sell a supplier's products within a designated territory. Distributors, by contrast, often purchase alcohol from many suppliers that offer competing products.

With annual sales of $26 billion,[6] Southern has been the largest U.S. distributor of wine and spirits for decades.[7] Southern distributes one out of every three bottles of wine or spirits sold in the United States.[8] And it is the exclusive distributor in some States for many extremely popular products like Patrón Silver Tequila, Jim Beam Bourbon, Jameson Irish Whiskey, Bacardi Rum, and Grey Goose Vodka.[9]

The Complaint alleges that Southern violated the Robinson-Patman Act[10] and harmed small, independent retailers by charging them substantially more than it charged chain stores for the same products. These price differentials allegedly "are not justified by differences in Southern's cost of providing goods to the large chain retailers and the independent retailers," nor by Southern's bona fide attempts to meet prices offered by a competing distributor.[11] The Commission claims that Southern's price discrimination injured competition between the chain retailers and the independent retailers. It does not allege that the price discrimination injured any consumer by leading to higher prices, lower output, diminished product quality, less product choice, a reduction in services, or a decline in product innovation. Instead, the Commission alleges that the discrimination permitted the large chain retailers to offer lower prices to consumers than the independent retailers could offer.[12] These lower prices drove consumers to purchase alcohol from the large chains rather than the independent retailers, which in turn led to lost sales and lower profits for the independent retailers.[13]

II

To determine whether Southern violated the Robinson-Patman Act, we must first address what the Act prohibits. Stated generally, the Act prohibits price discrimination that injures competition—that is, it prohibits a seller from charging competing buyers different prices for commodities of the same grade and quality, if the effect of that differential pricing may be to injure competition. I am convinced that some differential pricing has taken place during the course of Southern's business. Indeed, given the millions and millions of transactions covered by the Complaint, it would be shocking if none ever had occurred. The question, then, is whether that differential pricing had the sort of anti-competitive effects prohibited by the statute. I therefore turn first to determining what sort of effects on competition the Act proscribes.

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[6] Compl. ¶ 2.
[7] Compl. ¶¶ 2, 13.
[8] Compl. ¶ 2.
[9] Compl. ¶ 14.
[10] 15 U.S.C. § 13(a).
[11] Compl. ¶ 33.
[12] Compl. ¶ 76.
[13] Compl. ¶ 78.

A

1

The Act was a product of a unique moment in American history, and that history is relevant to understanding what the Act prohibits. Commissioner Holyoak lays out the Act's pre-enactment history in voluminous detail, and I have little to add to her work.[14] I discuss the history here only briefly to illuminate the dispute over the meaning of the Act's language defining the prohibited competitive injury.

Fearing increased market concentration and the power of dominant firms, Congress enacted this Commission's enabling legislation and the Clayton Act in 1914. It did so in part because Supreme Court decisions created uncertainty over whether the Sherman Act reached price discrimination.[15] Section 2 of the Clayton Act made it illegal to "to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale … where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[16] The courts of appeals originally interpreted Section 2 not to reach price discrimination that injured the competitors of the firm that received the favorable price.[17] They instead understood Section 2 to prohibit price discrimination only if it injured competition between the discriminating seller and its competitors. The Supreme Court later abrogated those cases[18] but, in doing so, interpreted Section 2 to "immunize price differences when quantities delivered were different, regardless of whether the quantity difference was material—that is, resulted in lower costs to the supplier, justifying a lower price."[19] In other words, the

[14] See Dissenting Statement of Comm'r Melissa Holyoak, *In the Matter of Southern Glazer's*, Matter No. 211-0155, Part I (Dec. 12, 2024) (hereinafter "Statement of Comm'r Holyoak").

[15] See, e.g., *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 42 (1911) (noting that the United States alleged that the Standard Oil trust "obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business"); Richard Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 21 (1971) (noting that the courts avoided addressing price discrimination in *Standard Oil*); *id.* at 23 ("Dissatisfaction with the Supreme Court's opinion in the *Standard Oil* case was apparently a major factor in the enactment three years later of the Clayton Act and the Federal Trade Commission Act.").

[16] Clayton Act, ch. 323 § 2, 38 Stat. 730 (1914) ("That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selling their own customers in bona fide transactions and not in restraint of trade.").

[17] See Mark Glick et. al, Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent, 60 Antitrust Bull. 279, 281–82 (2015) (discussing *Mennen Co. v. FTC*, 388 F. 774 (3d Cir. 1923), and *National Biscuit Co. v. FTC*, 299 F. 733, 739 (2d Cir. 1924)).

[18] *George VanCamp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929).

[19] Glick et al., *supra* note 17, at 282.

Supreme Court interpreted Section 2 to permit price discrimination if the discriminating seller delivered different quantities of goods when it did the discriminating, even if the discrimination had nothing to do with the differing quantities. Many in Congress viewed this as having taken all of the teeth out of Section 2's bite.[20]

As the courts grappled with Section 2, chain retailers began to dominate American markets. For many decades, Americans bought their dry goods, hardware, produce, and alcohol from local retailers.[21] Those retailers in turn purchased their wares from wholesalers and other middlemen, who in turn purchased them from the manufacturers.[22] Chain retailers cut out the middlemen and purchased directly from the manufacturer, reducing costs and thereby lowering prices for consumers.[23] This new system of distribution led to a chain-store boom. The top twenty chain retailers nearly quadrupled their store count, going from 9,912 to 37,524 stores between 1920 and 1930.[24] Chain stores' share of overall national retail sales grew "to 20%, and their total share of grocery sales to 40%."[25] No chain retailer thrived more than the Great Atlantic and Pacific Tea Company ("A&P"); at its height, in 1930, its store count reached a level that no retailer had matched seventy years later.[26]

Chain stores and traditional retailers engaged in political warfare in the 1920s and 1930s.[27] Traditional retailers claimed that chain stores were using their immense buyer market power to extract discounts from suppliers that were not extended to local stores.[28] In 1928, Congress directed the Commission to analyze the chain store system of marketing and distribution.[29] Six years later, the Commission produced a report that credited chain stores' "lower selling prices [as] a very substantial if not the chief factor in the[ir] growth."[30] This price advantage, the Commission claimed, came from chain stores' more efficient operations and, crucially, their "ability … to obtain [their] goods at lower cost than independents."[31] The Commission then recommended the enactment of a law that prohibited price discrimination that could not be justified by cost savings.[32]

Congress responded to the Commission's recommendation with the Robinson-Patman Act of 1936.[33] It modified Section 2 of the Clayton Act to add a third, alternative injury requirement that prohibited price "discrimination [that] may be substantially … to injure, destroy, or prevent

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[20] *Ibid*.
[21] Richard C. Schragger, The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940, 90 Iowa L. Rev. 1011, 1020–21 (2005); see also Lucia Foster, et. al, The Evolution of National Retail Chains: How We Got Here, Handbook on the Economics of Retailing and Distribution, 7–37 (2016).
[22] Schragger, *supra* note 21, at 1021–22.
[23] *Ibid*.
[24] Glick et. al, *supra* note 17 (citing Godfrey Lebhar, Chain Stores in America, 1859–1962 (1958)).
[25] Schragger, *supra* note 21, at 1013.
[26] *Ibid*.
[27] See Statement of Comm'r Holyoak, *supra* note 14, at Part I.B–C.
[28] Glick et. al, *supra* note 17, at 284 (quoting "a brief on behalf of the United States Wholesale Grocers' Association" that condemned chain retailers' "abuse of the larger buying power to extract price preferences *not* justified by any sound economics" (cleaned up)).
[29] S. Res. 224, 70th Congress, 1st Session (1928).
[30] FTC, Final Report of the Chain Store Investigation, 53 (1934).
[31] *Id*. at 24.
[32] *Id*. at 97.
[33] Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified at 15 U.S.C. § 13).

competition *with any person*."[34] While the statute's objective generally remained the same as the original Clayton Act's—to protect competitive markets—the Robinson-Patman Act's new injury requirement reflected concerns that, in prior price-discrimination cases, courts had "in practice been too restrictive in requiring a showing of general injury to competitive conditions."[35] By prohibiting price discrimination that boosted major retailers and harmed smaller rivals, the third injury requirement was intended to prevent further retail market consolidation on the theory that "[o]nly through such injury [to smaller rivals] can the larger, general injury [to competition] result."[36]

2

Section 2 of the Clayton Act thus now makes it illegal for "any person engaged in commerce" to "discriminate in price between purchasers of commodities of like grade and quality … where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[37] To "discriminate in price" means merely to charge a different price to two different people for a good "of like grade or quality."[38] But the statute "could not, and does not, ban all price differences charged 'to different purchasers of commodities of like grade and quality.'"[39] It prohibits price discrimination "only to the extent that it threatens to injure competition."[40]

The statute includes a number of exceptions from its prohibition on anticompetitive price discrimination, which the courts have long understood as affirmative defenses.[41] First, the statute expressly excludes from its reach any "differential" pricing that reflects "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such producers sold or delivered."[42] This exception is known as the cost-justification defense, and it permits price discrimination if the discriminatory pricing reflects differences in the costs of serving the two competing customers.[43] Second, the statute excludes

[34] 15 U.S.C. § 13(a) (emphasis added).
[35] H.R. Rep. No. 2287, pt. 1, 74th Cong., 2d Sess. 8 (Mar. 31, 1936).
[36] *Id*.; see also Glick et. al, *supra* note 17 ("The bill aimed only to address the 'abuse of the larger buying power ... to extract ... price preferences ... not justified by any sound economics.'" (quoting language from a Robinson-Patman Act proponent at the House Hearings on the bill, Earl W. Kintner and Joseph P. Bauer, Federal Antitrust Law, A Treatise on the Antitrust Laws of the United States, at 2933 (Anderson Publications 1989))).
[37] 15 U.S.C. § 13(a).
[38] *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).
[39] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).
[40] *Ibid*.
[41] Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2320 (rev. ed. 2024) (hereinafter "Areeda & Hovenkamp") (describing "'cost justification' and 'meeting competition' [as] … affirmative defenses").
[42] 15 U.S.C. § 13(a).
[43] See *United States v. Borden Co.*, 370 U.S. 460, 466 (1962) ("preventing such sellers from passing on economies to their customers … [would be] at war with Congress' language and purpose").

price differentials that the seller "made in good faith to meet an equally low price of a competitor."[44] This defense is known as the meeting competition defense.[45]

Robinson-Patman price-discrimination cases typically come in two forms. The first is "primary-line" discrimination, which involves price discrimination that injures the competitors of the discriminating seller.[46] The second is "secondary-line" discrimination, which involves price discrimination that injures the "disfavored" competitors of the "favored" purchaser that received the lower price.[47] The Commission's Complaint alleges secondary-line discrimination in favor of large chain retailers that injured small, independent retailers.

B

To prevail, the Commission must establish that the effect of Southern's alleged price discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[48] We therefore must determine what sort of competitive injuries the Robinson-Patman Act proscribes. But the Act's text, and the prevailing judicial interpretations of that text, do not provide a ready answer to that question.

1

The antitrust laws generally protect "competition." Neither the Sherman nor Clayton Acts expressly define competition (the two most important sections of the Sherman Act do not use the word at all), nor do they elaborate on which market participants are the intended beneficiary of the laws' protections. But over the last several decades, courts have generally settled on the policy view that "competition" refers to the economic performance of a market and whether the market is promoting the welfare of consumers.[49] The prevailing consumer-welfare-maximizing

[44] 15 U.S.C. § 13(b).

[45] See *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 438 (1983) ("The meeting-competition defense at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." (cleaned up)).

[46] *Brooke Grp. Ltd.,* 509 U.S. at 214.

[47] See *Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 558 n.15 (1990).

[48] 15 U.S.C. § 13(a).

[49] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)); see also *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 106 (2021) ("markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare"); *FTC v. Actavis, Inc.*, 570 U.S. 136, 161 (2013) (Roberts, J., dissenting) ("The point of antitrust law is to encourage competitive markets to promote consumer welfare"). Courts also use the term "competition" to refer to the economic forces that promote the welfare of input suppliers, such as workers. For ease of discussion, this statement refers to the antitrust laws' promotion of consumer welfare, though the discussion usually applies equally to the promotion of input supplier welfare. See *Alston*, 594 U.S. at 86–87 (explaining that an employee challenging a labor-market restraint need show competitive injury only in the market for labor); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) ("The Sherman Act … applies … to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony.…

conception of competition is distinct from protecting competition by protecting competitors—that is, protecting competition by "preserving a market structure that permits small firms to enter and profit freely, even if this entails forcing larger firms not to compete too strenuously lest the smaller ones be unable to survive."[50] Thus, courts frequently say that the antitrust laws protect competition, rather than competitors.[51] The focus of modern judicial antitrust precedents is on protecting the economic force which keeps firms behaving in a way that maximizes the welfare of consumers, rather than on ensuring some quantum of competing firms in a market.[52]

But that has not always been the case. Before the 1980s, courts interpreted the antitrust laws to promote values beyond the competitive force that pushes firms to act consistently with the welfare of consumers.[53] By the late 1970s, however, the courts moved toward a largely consumer-welfare-focused understanding of competition under the Sherman Act and Clayton Acts.[54] That conception now dominates the judicial interpretation of the antitrust laws.

Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.").

[50] Areeda & Hovenkamp, *supra* note 41, at ¶ 100a.

[51] See, e.g., *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) ("The purpose of the antitrust laws, by contrast, is 'the protection of *competition*, not *competitors*.'" (emphasis in original) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the [Clayton] Act protects.").

[52] *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (Thomas, J.) ("The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis."); Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof, 127 Yale L.J. 1996, 2000 (2018) ("[T]he goal of merger policy is to promote 'consumer welfare' by protecting consumers against high prices or reduced output, product variety, product quality, or innovation."); Herbert Hovenkamp, Antitrust Harm and Causation, 99 Wash. U.L. Rev. 787, 813 (2021) ("[T]he maintenance of competitive markets is consistent with large firms that operate in large markets. It favors economies of scale and scope, provided that the overall structure of the market is competitive.").

[53] E.g., *Brown Shoe Co.*, 370 U.S. at 344 ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."); *Albrecht v. Herald Co*., 390 U.S. 145, 158 (1968) (Harlan. J., dissenting) ("It has long been recognized that one of the objectives of the Sherman Act was to preserve, for social rather than economic reasons, a high degree of independence, multiplicity, and variety in the economic system."); D. Francis & C. Sprigman, Antitrust: Principles, Cases, and Materials, 271–72 (2d ed. 2024) ("At certain times in the history of antitrust, judicial treatment of vertical restraints has been strongly influenced by concerns about exploitation of power asymmetries, the domination of a weaker party by a stronger, and discrimination… This theme is embroidered throughout earlier vertical cases.").

[54] *Brooke Grp. Ltd.,* 509 U.S. at 221 (noting concern that a precedent was "at odds with antitrust laws' traditional concern for consumer welfare and price competition"); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is 'especially costly' because 'cutting prices in order to increase business often is the very essence of competition.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 594 (1986)); D. Francis & C. Sprigman, Antitrust: Principles, Cases, and Materials, 271–72 (2d ed. 2024) ("[S]ince the 1970s, courts have focused antitrust analysis on the creation and maintenance of market power, rather than on its exploitation or on discrimination as such.").

That is not true, however, of the Robinson-Patman Act. Whereas judges have reinterpreted the Sherman Act and other sections of the Clayton Act since the 1980s to promote competition as a means of advancing the interests of consumers in markets, the Robinson-Patman Act's judicial evolution toward consumer-welfare-maximization has been far less pronounced. Almost from the very beginning, the Commission and the judiciary interpreted the Act primarily to protect "competition" by ensuring the survival of "competitors."[55] To "injure, destroy, or prevent competition with any person" in the context of price discrimination was not understood to require an injury to the forces constraining decisions in the markets, but rather the loss of sales to a competitor—the seller's competitors in primary-line discrimination cases, or the buyer's competitors in secondary-line discrimination cases.[56] The judiciary's understanding of injury to competition as an injury to competitors is embodied in the Supreme Court's decision in *FTC v. Morton Salt Co.*,[57] a secondary-line case involving a salt manufacturer's discounts to large chain grocers. The Court there explained that the Act "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'"[58] The Court went on to hold that a plaintiff was entitled to an inference of injury to competition merely by showing substantial price discrimination between competing purchasers over time.[59] Courts applied "the *Morton Salt* inference broadly, concluding that the statutory language of 'competitive injury' in the Robinson-Patman Act refers solely to an individual competitor, not overall competition in a relevant market."[60]

Armed with the *Morton Salt* inference, the government undertook an intense program of Robinson-Patman Act enforcement. The Commission brought over a dozen such cases, on average, each year for decades, and Robinson-Patman Act complaints dominated the Commission's

[55] *FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948) ("[I]n enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses" and the Act's revised competitive injury "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'").

[56] See, e.g., Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government,* 59 Antitrust L.J. 765, 770 (1991) (discussing scholarly consensus that Congress's objective in the Act was to protect small businesses in secondary-line cases); Areeda & Hovenkamp, *supra* note 41, at ¶ 2302 ("[I]t is difficult to understand how Congress could be so opposed to cost savings in distribution. But at the time the elimination of a broker or other link in the distribution chain was regarded as an affirmative evil because it enabled the large firm who had reduced its distribution costs to undersell the numerous small firms who could not attain similar cost savings. Clearly, the class targeted for protection was not consumers, who benefitted from the chains' success; rather, the class comprised the various small businesses and intermediaries who lost market share, profits, or in some cases their entire businesses as a result of more efficient distribution methods.").

[57] 334 U.S. 37 (1948).

[58] *Id.* at 49 (quoting S. Rep. No. 74–1502, at 4 (1936)).

[59] *Id.* at 46, 50–51; see also *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983).

[60] Antitrust Modernization Commission, Report and Recommendations, 321 (Apr. 2007); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1446 & n.18 (9th Cir. 1995) ("The purpose of [the Robinson-Patman Act's added competitive injury] passage was to relieve secondary-line plaintiffs … from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors"); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Co.*, 79 F.3d 182, 192 (1st Cir. 1996) (quoting same language from *Rebel Oil*); *George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 144 (2d Cir. 1998) ("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").

antitrust workload.[61] In 1963, the Commission issued 260 decisions and orders in competition cases; of these, 218 were Robinson-Patman Act cases.[62] "In none of these cases … did the Commission suggest … monopsony (buying) power at the distributor level of the industries involved,"[63] notwithstanding that Congress's concerns about retailers with buyer market power extracting discriminatory prices had animated the Act's passage.[64] Indeed, a huge number of small businesses found themselves the targets of the Commission's Robinson-Patman Act campaign.[65]

But the Act and the Commission's enforcement regime came under heavy criticism, which continues to this day. The thrust of the criticism is that the Act is difficult to reconcile with the consumer-welfare-maximizing interpretation of "competition" that the courts began applying to the other antitrust laws in the 1970s.[66] Courts now understand the Sherman Act and Clayton Act to protect competitive forces in markets as a means to protect consumer welfare.[67] Price cutting is, generally, in the interests of consumers because lower prices preserve more of consumer surplus. Lower prices are not in the interests of competitors *qua* competitors, who must either cut their own prices in response to their competitors' price cuts—potentially eating into their profits—or risk losing sales and market share.[68] But courts and the Commission interpreted the Act to prohibit differential pricing if it diverted sales either from the price cutter's competitors or from its favored buyers' competitors without regard to the effect of that price cutting on consumers.[69] As the courts

[61] Timothy Muris, Neo-Brandeisian Antitrust: Repeating History's Mistakes, American Enterprise Institute Working Paper, 36 (Jan. 2023).
[62] Richard Posner, The Federal Trade Commission, 37 U. Chi. L. Rev. 47, 54–55 (1969).
[63] *Id*. at 47, 55.
[64] *Anheuser-Busch*, 363 U.S. at 542 ("It is, of course, quite true—and too well known to require extensive exposition—that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary line competition of the burgeoning of mammoth purchasers, notably chain stores."); see also *Falls City Indus.,* 460 U.S. at 436 ("concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act."); Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business, 68 Antitrust L.J. 125, 135 (2000) ("As one of the principal non-Congressional drafters of the legislation explained at the hearings, '[t]he bill is based entirely upon the fact that large buyers, by the coercive use of their buying power, extract from the seller differentials greater than the cost differences between the two buyers warrant. That is the evil at which the bill is aimed.'") (quoting Statement of H.B. Teegarden, Counsel for the United States Wholesale Grocers Ass'n., Hearings on HR. 4995, H.R. 5062, and HR. 8442, Before the House Comm. on the Judiciary, 74th Cong., 1st Sess., at 217 (1935)).
[65] U.S. Dep't of Justice, *Dep't of Justice Report on The Robinson-Patman Act*, 97–98 (1977) (hereinafter "DOJ RPA Report") ("[T]he Robinson-Patman Act in ironic contradiction to the professed intentions of its sponsors has actually placed an unfair enforcement burden on smaller companies.").
[66] *Id.* at 250 ("Robinson-Patman is ineffective … in terms of its benefits to the welfare of society as a whole."); Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business, 68 Antitrust L.J. 125, 130 (2000) ("Very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act. It is practically accepted that the legislative history of the Robinson-Patman Act is anticompetitive and excessively concerned with the protection of small business at the expense of more efficient rivals."); Timothy Muris, Neo-Brandeisian Antitrust: Repeating History's Mistakes, American Enterprise Institute Working Paper, 12 (Jan. 2023) ("those who care for the welfare of consumers reject the FTC's new affection for this antitrust anachronism").
[67] See notes 49, 51, *supra*.
[68] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115 (1986) (rejecting, for lack of antitrust injury, plaintiffs' Clayton Act Section 7 claim alleging that the merged firm's price cuts would harm it because, "[t]o remain competitive, [plaintiff] would have to lower its prices; as a result, Monfort would suffer a loss in profitability.").
[69] See *Utah Pie Co. v. Cont'l Baking Co*., 386 U.S. 685, 691 n. 7, 702–03 (1967) (finding a plausible primary-line discrimination claim when the dominant incumbent's share of the local market declined following a competitor's local price decreases that put "downward pressure on the price structure" price); note 60, *supra* (listing cases stating that secondary-line injury only requires harm to competing buyers, not consumers).

shifted the focus of the other antitrust laws toward consumer welfare, the contrast between those laws' protection of competition and the Robinson-Patman Act's protection of competitors became particularly stark.

This criticism deeply affected federal enforcement policy. In a seminal 1969 report, the American Bar Association criticized the Commission's enforcement strategy and its "tendency" to "equate injury to a particular competitor with injury to the competitive process."[70] It concluded that the Robinson-Patman Act was unwise and recommended that the Commission attempt to reconcile it with other antitrust objectives.[71] The report encouraged the Commission to "study … the compatibility of the Robinson-Patman Act and its current interpretation to the attainment of antitrust objectives," and that the Commission "focus enforcement of the Act on instances in which injury to competition is clear, taking into account the consumer interest in vigorous price competition and the fact that the Act's principal purpose is to curb abuses of mass-buying power by large firms."[72] The Commission listened. Just a few years after the ABA's report, one leading scholar and critic of the Commission's previous enforcement strategy described the Commission's new enforcement policy as one "of seemingly deliberate neglect."[73] In 1977, the Department of Justice's Antitrust Division issued a monumental report denouncing the Robinson-Patman Act as a drag on healthy price competition.[74] The Division urged Congress to repeal the Act and indicated that even if it were not repealed, the Division would no longer enforce it.[75]

Sporadic Commission enforcement limped along for a while. But even as it did, the Commission acknowledged the widening gap between the consumer-welfare-maximizing judicial interpretation of the antitrust laws after the 1970s, and the "protectionist" objective of the Robinson-Patman Act's price-discrimination prohibition.[76] The Commission's last litigated Robinson-Patman Act enforcement action in federal court took place nearly forty years ago.[77] In 2000, the Commission issued a complaint and consent order against spice maker McCormick and Company.[78] That was the last time the Commission purported to enforce the Act.

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During the period of federal nonenforcement, the disparity between judicial interpretations of the Act and the rest of the antitrust laws has become less pronounced, particularly in primary-line cases.

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[70] American Bar Association, Report of the Commission to Study the Federal Trade Commission, 67 (Sept. 1969).
[71] *Id*. at 68 ("[W]e recommend that the FTC focus enforcement of the Act on instances in which injury to competition is clear."); *id* at 101 ("The wise exercise of administrative discretion should lead the Commission … to interpret the rather plastic language of the Act in a manner designed to make it harmonious with rather than subversive of antitrust policy.").
[72] *Id.* at 67–68.
[73] Richard Posner, The Robinson-Patman Act, 31 (1976).
[74] DOJ RPA Report, *supra* note 65, at 250 ("Robinson-Patman is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole. The greater the business community's compliance with Robinson-Patman, whether as a result of vigorous public or private enforcement, the greater the Act's deleterious impact upon competition.").
[75] *Id.* at 261 ("[S]erious consideration should be given to repealing the Robinson-Patman Act.").
[76] *In the Matter of Gen. Motors Corp.*, 103 F.T.C. 641, 695 (1984).
[77] *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127 (D.C. Cir. 1988).
[78] *In the Matter of McCormick & Co., Inc.*, No. 961-0050, 2000 WL 264190, at *3 (Mar. 8, 2000).

Before the 1990s, the courts had a uniformly protectionist understanding of the competitive injury requirement in primary-line cases. That is, the courts did not demand evidence that price discrimination injured competition as a market force, but rather that it injured a competitor of the price discriminator. In *Utah Pie Co. v. Continental Baking Co.*,[79] for example, a local pie manufacturer sued three national manufacturers that had begun selling pies in its territory, alleging that the national manufacturers had cut prices in its market (but not in others, hence the price-discrimination claim), and had done so for the purpose of eating up its market share.[80] The Court concluded that the differential pricing, when combined with the local manufacturer's loss in market share, satisfied the Act's injury requirement.[81] The Court did not inquire into the health or functioning of the markets; it asked only whether the price discrimination injured the discriminating manufacturers' competitor. This approach to competitive injury therefore treated an injury to a competitor and an injury to competition as one and the same.[82]

That changed in *Brooke Group*. There, a cigarette manufacturer alleged that a competing manufacturer had engaged in discriminatory volume rebates to wholesalers for the purpose of taking market share from its competitors in violation of Section 2(a).[83] The plaintiff manufacturer alleged as the injury the choice of pricing its own cigarettes well below cost in order to match the discriminating manufacturer's rebates or suffering a loss in market share.[84] Under the injury-to-competitor theory blessed in *Utah Pie Co.*, the plaintiff manufacturer should have prevailed. But the Court explained that *Utah Pie Co.* had misunderstood the injury inquiry. "Congress did not intend" in the Robinson-Patman Act "to outlaw price differences that result from or further the forces of competition."[85] It intended to prohibit only those price differentials that injured competition. To distinguish between lawful and injurious price differentials, then, the Court held that the Act "'should be construed consistently with the broader policies of the antitrust laws.'"[86] The Court looked to Section 2's predatory-pricing case law—the closest analogue in the other antitrust laws to primary-line discrimination—to govern primary-line cases.[87]

Section 2 does not prohibit price cutting even if the price cutter gains market share as a result. A firm violates Section 2 by setting low prices only if (1) the prices are set "below an appropriate measure of … costs," and (2) the firm has "a reasonable prospect, or, … dangerous probability of recouping its investment in below-cost prices."[88] "[C]utting prices in order to increase business often is the very essence of competition."[89] That increase in business will necessarily injure competitors who lose market share. But as *Brooke Group* understood the

[79] 386 U.S. 685 (1967).
[80] *Id*. at 698–99.
[81] *Id*. at 702–03.
[82] See, e.g., Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70, 73 (1967).
[83] *Brooke Grp. Ltd.,* 509 U.S. at 216–17.
[84] *Id.* at 217.
[85] *Id*. at 220 ("As the law has been explored since *Utah Pie,* it has become evident that primary-line competitive injury under the Robinson–Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act.").
[86] *Ibid*. (quoting *Great Atl. & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).
[87] *Id*. at 220.
[88] *Id.* at 222, 224.
[89] *Id.* at 226 (quoting *Cargill*, 479 U.S. at 122 n.17).

Robinson-Patman Act's injury requirement in primary-line cases, loss of market share is not enough. The price-cutting firm must be likely to achieve monopoly status from the price cuts in order to injure competition in the market.[90] The Court thus brought primary-line cases under the Act in line with the economic turn that had taken hold in the rest of the antitrust laws.

Secondary-line cases, however, are a different story. Notwithstanding *Brooke Group*, the lower courts continued to treat injury to disfavored retailers in secondary-line cases as an injury to competition even if the market remained competitive.[91] Courts of appeals thus declared after *Brooke Group* that "[i]t is hornbook law … that anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson–Patman Act; a price differential, direct or indirect, between secondary-line competitors is enough."[92]

More than a decade after *Brooke Group*, the Court had an opportunity to align the theory of competitive injury in secondary-line cases with primary-line cases in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[93] There, the plaintiff was an authorized dealer of the defendant's heavy-duty trucks.[94] The plaintiff dealer alleged that the defendant manufacturer offered the plaintiff dealer's competitors more favorable prices on trucks than the manufacturer offered the plaintiff dealer.[95] The plaintiff dealer sued, alleging that the lower prices had diverted sales to its competitors.[96]

The Supreme Court first announced the traditional four-part test for a prima facie case of secondary-line price discrimination: (1) sales of goods made in interstate commerce; (2) the sold goods were of "like grade and quality"; (3) the defendant "discriminated in price between" a favored buyer and the disfavored plaintiff; and (4) "the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of a favored purchaser."[97] The parties disputed only whether the plaintiff could show injurious discrimination.[98]

Unlike in *Brooke Group*, the Supreme Court did not revisit the longstanding test for competitive injury under the Robinson-Patman Act. To the contrary, it held that "[a] hallmark of requisite competitive injury … is the diversion of sales or profits from the disfavored purchaser to a favored purchaser."[99] And it reaffirmed the *Morton Salt* inference, permitting a plaintiff to satisfy

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[90] *Id.* at 224.
[91] Richard M. Steuer, *Volvo Trucks v. Reeder-Simco*: Bidding for a Rational Robinson-Patman Act, 20 Antitrust 61, 67 & n.84 (2006) ("[C]ourts in six circuits refused to apply *Brooke Group*'s injury to competition standard beyond primary line cases."); see also *Industrial Burner Systems, Inc. v. Maxon Corp.*, 275 F. Supp. 2d 878, 887 n.21 (E.D. Mich. 2003) (discussing cases).
[92] *George Haug Co., Inc.,* 148 F.3d at 140; see also *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997) (declining to extend *Brooke Grp.* to secondary-line cases because "the language added to the Clayton Act by the Robinson-Patman Act, and the legislative history that expresses Congress' solicitude for individual buyers, are still applicable in secondary-line cases, even though they are not applicable in primary-line cases after *Brooke Grp.*"); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 191–92 (1st Cir. 1996) (similar).
[93] 546 U.S. 164 (2006).
[94] *Id*. at 170.
[95] *Id*. at 171.
[96] *Ibid*.
[97] *Id.* at 176 (cleaned up).
[98] *Id.* at 177.
[99] *Ibid*.

its initial burden of showing competitive injury merely by showing "evidence that a favored competitor received a significant price reduction over a substantial period of time."[100] The Court said nothing like it said in *Brooke Group* about showing that the price discrimination injured the competitive process or consumers; it instead reiterated the longstanding interpretation requiring an injury to a *competitor*.

The Court concluded that the plaintiff had failed to establish a competitive injury for two reasons. First, it failed to demonstrate that it was in fact competing with any of the favored purchasers for most of the sales it allegedly lost to them.[101] Second, for the few sales it lost to favored purchasers and for which it was directly competing against those favored purchasers, the discrimination was insubstantial and therefore did not violate the Act.[102] The Court thus held that the plaintiff failed to prove a violation of the Act because it failed to demonstrate an injury to itself, not because of a failure to show an injury to the competitive process.

The Court closed its opinion, however, by noting that "[i]nterbrand competition … is the 'primary concern of antitrust law,'" and that "[t]he Robinson-Patman Act signals no large departure from that main concern."[103] Notwithstanding that it had just stated the Act's injury requirement as a question of injury to a disfavored competitor, the Court then said that it "would resist interpretation [of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*."[104] It explained: "In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands."[105] The Court's refusal to extend the Act's "governance" to a case involving these factors thus ensured the "continue[d]" construction of "the Act 'consistently with the broader policies of the antitrust laws.'"[106]

The Court's analysis of the Act's injury requirement in secondary-line cases is a bit hard to square with its closing remark that it interprets the Act consistently with the broader policies of the antitrust laws. The Court's analysis of competitive injury required only a showing of injury to a competitor rather than injury to the competitive process.[107] But the "broader policies of the

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[100] *Ibid.* (citing *Morton Salt Co.*, 334 U.S. at 49–51, and *Falls City Indus.*, 460 U.S. at 435).
[101] *Id.* at 178–79.
[102] *Id.* at 179–80.
[103] *Id.* at 180–81 (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 51–52 n.19 (1977)). This is a curious statement. The Robinson-Patman Act is concerned almost exclusively with intrabrand competition between buyers of the same product. Areeda & Hovenkamp, *supra* note 41, at ¶ 2333b. Indeed, the Act requires that the sellers have purchased *the same product* at different prices. 15 U.S.C. § 13(a) ("It shall be unlawful … to discriminate in price between different purchasers of commodities of like grade and quality[.]"); Areeda & Hovenkamp, *supra* note 41, at ¶ 2315a ("Secondary-line injury envisioned a supplier who sells essentially the same or at least closely competing commodities to two different purchasers at different prices, thus placing the disfavored, or high-price, purchaser at a disadvantage.").
[104] *Id.* at 181 (emphasis added).
[105] *Ibid*.
[106] *Ibid*. (quoting *Brooke Grp. Ltd.*, 509 U.S. at 220).
[107] *Id.* at 177.

antitrust laws," at least as the Court now understands them, focus primarily on protecting the competitive process to the benefit of consumers, rather than protecting competitors.[108]

The best way to square this circle is to read *Volvo* as having left unchanged the traditional injury requirement for ordinary secondary-line cases. "In the usual secondary-line setting, the favored and disfavored customers have already purchased the defendant's products, and thereafter, hold the products in inventory to compete with each other in *reselling* these products."[109] *Volvo*, by contrast, did not involve dealers who were competing to resell the same products to the same customers.[110] The plaintiff dealer argued that the defendant manufacturer gave it worse pricing for certain bids than the defendant manufacturer gave to other dealers competing for *different* bids to *different* customers.[111] This competitive-bidding situation thus entailed a novel proposed application of the Act, and one difficult to square with the longstanding interpretation of the Act to require that the favored and disfavored purchasers compete with one another.[112] Because the plaintiff did not "compete with beneficiaries of the alleged discrimination *for the same customer*" in its examples of price discrimination, the Court concluded that the plaintiff could not establish the traditional Robinson-Patman Act injury in these circumstances.[113] The Court's discussion of buyer market power and the broader policies of the antitrust laws indicated only that insofar as ambiguities arose when a plaintiff attempted to apply the Robinson-Patman Act to a novel economic situation, those ambiguities would be resolved in favor of the broader policies of the antitrust laws rather than against them.[114] But it 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.[115]

No lower court has reached a contrary conclusion since *Volvo*.[116] For example, nine years after *Volvo*, the Second Circuit considered a case that turned on whether plaintiffs could establish

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[108] *Brooke Grp. Ltd.*, 509 U.S. at 224 ("It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*." (emphasis in original)); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (Sherman Act Section 2 "plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.) ("the proper focus of section 2 isn't on protecting competitors but on protecting the process of competition, with the interests of consumers, not competitors, in mind.").

[109] John B. Kirkwood, The Robinson-Patman Act and Consumer Welfare: Has *Volvo* Reconciled Them?, 30 Seattle Univ. L. Rev. 349, 351–52 (2007).

[110] *Volvo*, 546 U.S. at 169.

[111] *Ibid*.

[112] *Id.* at 178 ("We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chainstore paradigm. Here, there is no discrete 'favored' dealer comparable to a chainstore or a large independent department store" (internal citations omitted)); see also Steuer, *supra* note 91, at 66–67.

[113] *Volvo*, 546 U.S. at 178.

[114] Kirkwood, *supra* note 109, at 371–74.

[115] Areeda & Hovenkamp, *supra* note 41, at ¶ 2333b ("The more traditional secondary-line case involving more systematic price discrimination and larger numbers of sales would seem not to be affected" by *Volvo*. … "[T]he real bite of this decision comes in the more idiosyncratic case where the number of transactions is very small and the price is individually formulated with respect to specific customers.")

[116] See, e.g., *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 210 (2d Cir. 2015) ("In *Volvo*, the Court made clear that in a secondary-line Robinson-Patman case the 'hallmark of the requisite competitive injury' is the diversion of sales from a disfavored purchaser to a favored purchaser." (quoting *Volvo*, 546 U.S. at 177)); *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 (3d Cir. 2007) (requiring evidence only of injury to a competitor rather than competition).

a competitive injury because the defendants "freely admit[ted]" to the price discrimination.[117] The Court applied a standard fully consistent with decades of pre-*Volvo* precedent and focused on injury to the disfavored competitors, not to consumers: "Plaintiffs attempting to establish competitive injury generally have two routes available to them: showing substantial discounts to a competitor over a significant period of time, known as the *Morton Salt* inference, or proof of sales lost to favored purchasers."[118] The defendants prevailed because plaintiffs' "loss of customers [to favored retailers was] *de minimis* and therefore insufficient to demonstrate competitive injury."[119] Consistent with over a half century of pre-*Volvo* caselaw, the opinion never considered whether the price discrimination had any effect on consumers or the competitiveness of any retail markets.

C

Brooke Group and *Volvo* have created a rather thorny problem for determining what counts as a competitive injury in price-discrimination cases under the Robinson-Patman Act. The statutory text forbids price discrimination "the effect of" which "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[120] Two of these injuries—the substantial lessening of competition and tendency toward monopoly—are familiar to antitrust law. They were in the original Section 2 of the Clayton Act, and in Sections 3 and 7 of the same Act.[121] Courts have interpreted these phrases in both Sections 3 and 7 to require an injury to competition as a market force rather than to a particular competitor.[122] There is thus good reason to interpret those phrases the same way in Section 2.[123]

But that rule does not take us very far. The Robinson-Patman Act introduced a brand-new type of competitive injury in 1936: price discrimination that may "injure, destroy, or prevent competition with any person." Congress does not idly add new language in amendments.

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[117] *Cash & Henderson Drugs, Inc.,*799 F.3d at 210.
[118] *Ibid*.
[119] *Id.* at 211.
[120] 15 U.S.C. § 13(a).
[121] 15 U.S.C. §§ 14, 18.
[122] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (denying a competitor's Section 7 claim challenging a transaction that would harm it by increasing competition because "the antitrust laws, however, were enacted for the protection of competition not competitors," and "it is inimical to the purposes of these laws to award damages for the type of injury claimed here." (cleaned up)); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp*., 910 F.2d 139, 151 (4th Cir. 1990) ("As with other antitrust causes of action, a claim advanced under § 3 of the Clayton Act must allege injury to competition, not just to one competitor.").
[123] See, e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) ("The rule of in pari materia—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. … The rule is but a logical extension of the principle that individual sections of a single statute should be construed together, for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject. Given this underlying assumption, the rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time." (cleaned up)); *Azar v. Allina Health Servs.*, 587 U.S. 566, 576 (2019) (describing the "normal presumption that, when Congress uses a term in multiple places within a single statute, the term bears a consistent meaning throughout"); *Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (describing the "normal rule of statute construction that identical words used in different parts of the same act are intended to have the same meaning" (cleaned up)).

"Differences in language like this convey differences in meaning,"[124] and "we must give effect, if possible, to every clause and word of the statute."[125] If the phrases "may be substantially to lessen competition or tend to create a monopoly" already prohibited price discrimination that injured the general competitive process, then the phrase "injure, destroy, or prevent competition with any person" must refer to price discrimination that does something else.[126]

Lower courts have interpreted the latter phrase to cover injuries to competitors independently from injury to competition, which Section 2 covered before the Robinson-Patman Act amended it. The First Circuit, for example, explained that the "single word 'with' makes a considerable practical difference. It means that the Act protects *those who compete* with a favored seller, not just the overall competitive process. Hence, in many circumstances, the Robinson-Patman Act forbids selective but nonpredatory price cutting."[127] The Third Circuit similarly concluded that the Act's new injury language was intended to cover injuries to competitors rather than to competition generally.[128] Other courts have reached the same conclusion.[129] This reading is consonant with the traditional view of the statute's legislative history as embodying Congress's desire to expand the statute's reach to injuries to competitors, rather than competition, in secondary-line cases.[130]

The Supreme Court in *Brooke Group* did not confront this textual issue when it interpreted the Act to require an injury to the competitive process in primary-line cases. Indeed, the opinion barely discusses the text at all. It instead held that reading the Act to permit recovery in primary-line cases on the basis of an injury to a competitor rather than to the competitive process would conflict with the general purposes of the other antitrust laws, and their "traditional concern for consumer welfare and price competition."[131] It therefore held that primary-line discrimination should be governed by the same competitive-injury requirement as its closest analogue in the other antitrust laws—predatory pricing under Section 2 of the Sherman Act.[132] But this holding did not rest on a careful parsing of the text. It did not chart the changes wrought to Section 2 by the

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[124] *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017).
[125] *Fischer v. United States*, 603 U.S. 480, 486 (2024) (cleaned up).
[126] Andrew I. Gavil, Secondary Line Price Discrimination and the Fate of *Morton Salt*: To Save It, Let It Go, 48 Emory L.J. 1057, 1092 (1999) ("Second, and perhaps more importantly, the [*Brooke Grp.*] Court's insistence that 'all of the words of the Act,' including the disjunctive 'or,' should carry 'adequate meaning' strongly supports the view that the third, alternative injury standard added by the Robinson-Patman amendments must add something to the first two. That 'something,' of course, is the injury to a competitor standard for secondary line price discrimination cases.")
[127] *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1989) (Breyer, J.).
[128] *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532–33 (3d Cir. 1990) (parsing text and legislative history); see also *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990) ("With secondary-line [Robinson-Patman Act] violations, the competition/competitor distinction tends to fade. As a price discrimination incipiency statute designed to 'catch the weed in the seed,' S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936), 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.").
[129] See note 135, *infra*.
[130] See, e.g., 3 Fed. Antitrust Law §§ 19.6, 22.4; Areeda & Hovenkamp, *supra* note 41, at ¶ 2342 ("It is practically a commonplace that the legislative history of the Robinson-Patman Act is anticompetitive and excessively concerned with the protection of small business at the expense of more efficient rivals.").
[131] *Brooke Grp. Ltd.,* 509 U.S. at 221.
[132] *Id.* at 221–22.

Robinson-Patman Act, nor did it purport to distinguish the new injury requirement from the original injury requirements. It was instead rather purposivist.[133]

Interpretive methodology aside, *Brooke Group* seemingly should have generated a similar outcome for secondary-line cases. After all, nothing in the Act expressly distinguishes between primary-line and secondary-line cases; both types of competitive injuries in Section 2(a) apply equally in both cases. If the Act requires an injury to the competitive process in primary-line cases because such an injury is consistent with the consumer-welfare-maximizing purpose of the antitrust laws, then the Act should require the same sort of injury in secondary-line cases as well.[134]

But courts have consistently reached the opposite conclusion. After *Brooke Group*, courts parsed the Act's statutory text and interpreted it so that Section 2's original language requires an injury to the competitive process in primary-line cases, while the Act's additional injury language requires merely an injury to competitors in secondary-line cases.[135] In *Volvo*, the alleged victim of the discrimination asked the Court to do for secondary-line cases what it had done for primary-line cases in *Brooke Group* and require an injury to competition rather than to competitors.[136] But

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[133] The Court did note that the phrase "may be substantially to lessen competition or tend to create a monopoly" ought to be given the same injury-to-competition construction in Section 2 that it had in Section 7 of the Clayton Act, *Brooke Grp.* at 229–30, but it did not address at all the meaning or effect of the other language that the Robinson-Patman Act added in 1936, see Gavil, *supra* note 126, at 1091.

[134] See, e.g., Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business, 68 Antitrust L.J. 125, 135 (2000) ("[T]he Supreme Court's *Brooke Grp.* decision has read the general competitive concerns of the antitrust laws into the primary-line interpretation of the Robinson-Patman Act. Unless that decision is wrong, secondary-line interpretation requires the same revision. Otherwise, we have precisely the same statutory words assessing two standards in the two different situations."); but see Gavil, *supra* note 126, at 1086–91 (arguing that there are good reasons to distinguish between the injury requirements in primary- and secondary-line cases).

[135] See, e.g., *Rebel Oil*, 51 F.3d at 1447 & n.18 ("While the framers of the Sherman and Clayton Acts intended to proscribe only conduct that threatens consumer welfare, the framers of the Robinson–Patman Amendments intended to punish perceived economic evils not necessarily threatening to consumer welfare *per se.* Fairness and protection of secondary-line purchasers are the concerns of the Robinson–Patman Act, a conclusion that is confirmed by the language of the statute, legislative history and judicial precedent. Accordingly, we have held that a secondary-line plaintiff can demonstrate antitrust injury if the price discrimination caused him to lose sales and profits; he need not demonstrate any injury to consumer welfare."); *Chroma Lighting*, 111 F.3d at 657. ("We are persuaded that the language that the Robinson–Patman Act added to § 2(a) of the Clayton Act—"to injure, destroy, or prevent competition"—expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination. … [T]he legislative history confirms that Congress amended the Clayton Act specifically to extend its protection to individual competitors."); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1272–73 (3d Cir. 1995) (requiring proof only of injury to a competitor in secondary-line cases under Section 2(a)); *George Haug Co.*, 148 F.3d at 143–44 (declining to extend *Brooke Grp.* to secondary-line cases on the ground that the text and history of the Robinson-Patman Act distinguish between the injury that plaintiffs must establish in primary- and secondary-line cases); *Coastal Fuels of Puerto Rico, Inc.*, 79 F.3d at 192–93 (similar).

[136] Br. of Pet'r 13, *Volvo Trucks N.A., Inc. v. Reeder-Simco GMC*, 546 U.S. 164 (2006) ("This Court in [*Brooke Grp.*] took the occasion to correct lower courts' overreading of the decision in [*Utah Pie Co.*] to suggest in primary-line cases that competitors and not competition should be protected. In this case the Court should similarly take occasion to correct lower courts' overreading of *dicta* in [*Morton Salt*] to protect competitors and not competition in secondary-line cases."); *id.* at 33–34 ("[S]ome courts have disregarded *Brooke Grp.,* a case involving primary-line price discrimination and below-cost price discrimination, when deciding secondary-line cases brought by distributors rather than competitors. … There is no basis for that distinction in the opinion in *Brooke Grp.* …. Moreover, the same misunderstanding of 'competition' that currently prevails in some of the lower courts in secondary-line cases also prevailed in some of the lower courts in *primary*-line cases before this Court cleared up the confusion in *Brooke*

the Court declined, and retained the protectionist formulation of the injury requirement and the *Morton Salt* inference in secondary-line cases.[137]

Determining what injury a plaintiff must show in a secondary-line discrimination case thus presents a difficult question of statutory interpretation. On the one hand, the phrase "injure, destroy, or prevent competition with any person" must refer to some sort of injury other than the sort of injuries to the competitive process that are covered by the language "may be substantially to lessen competition or tend to create a monopoly." Collapsing the Act's third injury requirement into the other two would render it effectively superfluous, violating fundamental principles of statutory interpretation.[138] The judiciary has reached the same conclusion, interpreting the Robinson-Patman Act's competitive-injury language to require an injury to a competitor rather than to the competitive process.[139] On the other hand, interpreting the Robinson-Patman Act to protect competitors rather than competition in secondary-line cases places it at odds with the broader purposes of the other antitrust laws, against which the Supreme Court has repeatedly advised.[140]

I reserve the resolution of this statutory-interpretation question for another day. Even assuming that the Act requires only an injury to competitors rather than competition in secondary-line cases, I believe that the Commission is unlikely to prevail in litigation. And even if it were likely to prevail, I would nevertheless dissent from the filing of this Complaint because it is an imprudent use of our limited enforcement resources.

III

Before addressing the specific case against Southern, I must briefly address the government's longstanding refusal to enforce the Robinson-Patman Act because of disagreement with its underlying policy.

Grp."); *id.* at 34–40 (urging Court to reject *Morton Salt* inference and require injury to competitive process in secondary-line cases); see also Br. of the Am. Petroleum Inst. as Amicus Curiae Supporting Pet'r 12 n.7, *Volvo*, 546 U.S. at 164 (urging court to require showing of injury to competition in secondary-line cases).

[137] *Volvo*, 546 U.S. at 177.

[138] See, *e.g.*, *TRW Inc. v. Andrews*, 543 U.S. 19, 31 (2001) ("It is a fundamental principle of statutory construction that a statute ought, upon the whole, to be so construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (cleaned up)); *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

[139] See *supra* note 135.

[140] See, e.g., *Volvo*, 546 U.S. at 181 ("[W]e continue to construe the Act consistently with broader policies of the antitrust laws." (internal citations omitted)); *Brooke Grp. Ltd.*, 509 U.S. at 220 ("[T]he Robinson–Patman Act should be construed consistently with broader policies of the antitrust laws.") (quoting *Great Atl. & Pacific Tea*, 440 U.S. at 80 n.13)); *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 74 (1953) ("[I]t is our duty to reconcile such interpretation [of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.").

A

Our Constitution gives Congress, and Congress alone, the power to enact and repeal federal laws.[141] It vests "the executive Power" in the President,[142] with the knowledge that he relies on subordinates, including federal agencies, for assistance in carrying out his executive duties.[143] The executive power is broad.[144] The Constitution's Take Care Clause also imposes on the President an affirmative duty to "take care that the laws be *faithfully* executed."[145] This is not empty language. It is a constitutional imperative, deliberately imposed by the Framers, to safeguard the separation of powers. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[146] Instead, "[t]he Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[147]

The Take Care Clause was a direct response to the tyranny the American colonies endured under the British monarch. In the seventeenth century, the Stuart Kings suspended enforcement of laws that they opposed.[148] After deposing James II, Parliament in the 1689 Bill of Rights repudiated "the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament."[149] The Declaration of Independence similarly denounced George III for having suspended the laws in the colonies.[150] And after declaring independence, several States adopted constitutions that expressly "prohibited executive suspension of laws."[151]

At the Constitutional Convention, the States unanimously rejected a proposal that would have permitted the President to suspend the laws in some circumstances.[152] The Framers instead added the Take Care Clause, with its mandate that the President "shall take care that the laws be faithfully executed."[153] Many scholars understand the Clause as a form of anti-suspension

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[141] U. S. Const., art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States").
[142] U. S. Const., art. II, § 1, cl. 1.
[143] *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020).
[144] See *Trump v. Vance*, 591 U.S. 786, 800 (2020) (The President's "duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth.").
[145] U. S. Const., art. II, § 3 (emphasis added).
[146] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).
[147] *Ibid.*
[148] See *Texas v. Biden,* 20 F.4th 928, 979–80 (5th Cir. 2021), rev'd on other grounds, 597 U.S. 785 (2022); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 691 (2014).
[149] *United States v. Texas*, 599 U.S. 670, 732 (2023) (Alito, J., dissenting).
[150] National Archives, Declaration of Independence: A Transcription, https://www.archives.gov/founding-docs/declaration-transcript.
[151] See *Texas*, 599 U.S. at 733 (Alito, J., dissenting) ("By 1787, six State Constitutions contained provisions prohibiting the suspension of laws"); Va. Decl. of Rights § 7 (1776) (declaring that "all power of suspending laws … is injurious to their rights and ought not to be exercised.").
[152] Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 693 (2014).
[153] U. S. Const., art. II, § 3.

principle,[154] and the limited contemporary evidence available supports this view.[155] The judiciary similarly has long interpreted the Constitution to deny the President the power to ignore laws that Congress has lawfully passed.[156]

But the denial of the suspension power does not mean the President has no discretion in the enforcement of the laws. Quite to the contrary, the President has immense discretion to allocate the limited resources Congress has given him "to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'"[157] Given competing demands and limited resources, federal agencies cannot pursue every potential law violation and must instead trade off among competing enforcement priorities.[158] Such an "agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise" and unsuitable for judicial review.[159] But the power to exercise prosecutorial discretion does not mean that the unelected bureaucrats within the Executive Branch may effectively suspend a law because those bureaucrats disagree with Congress's policy decision.

We have lately witnessed the danger of the Executive Branch refusing to enforce laws which Congress has passed. Over the course of the last four years, the Executive Branch effectively abdicated the enforcement of the immigration laws. It terminated a multitude of successful border and immigration policies implemented by President Trump. And the result was that millions and millions of aliens unlawfully entered the United States.[160] The Biden Administration went even

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[154] See *Texas*, 599 U.S. at 733 (Alito, J., dissenting) (citing 1 Works of James Wilson 399, 440 (R. McCloskey ed. 1967)); *Texas v. Biden,* 20 F.4th 928, 981 (5th Cir. 2021), rev'd on other grounds, 597 U.S. 785 (2022) ("Scholars also broadly agree that the Constitution ruled out the suspending and dispensing powers"); *Casa De Maryland v. U.S. Dep't of Homeland Sec*., 924 F.3d 684, 715 (4th Cir. 2019) (Richardson, J., concurring in part and dissenting in part) ("[W]riting in 1792 about enforcing unpopular tax laws, President Washington explained that it was his 'duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it'" (quoting Letter from President George Washington to Sec'y Alexander Hamilton, U.S. Dep't of the Treasury (Sept. 7, 1792) in 32 Writings of George Washington 144 (John C. Fitzpatrick ed., 1939)).

[155] See *Texas,* 20 F.4th at 981, rev'd on other grounds, 597 U.S. 785 (2022) ("George Nicholas could conclude during Virginia's ratification debate that '[t]he English Bill of Rights provides that no laws shall be suspended. The Constitution provides that no laws shall be suspended, except one, and that in time of rebellion or invasion, which is the writ of habeas corpus.'") (quoting 3 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 246 (2d ed. 1881)).

[156] See, e.g., *United States v. Midwest Oil Co*., 236 U.S. 459, 505 (1915) ("The Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts."); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.").

[157] *Texas*, 599 U.S. at 671 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021)).

[158] See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("An agency generally cannot act against each technical violation of the statute it is charged with enforcing.").

[159] *Ibid.*

[160] E.g., *Texas*, 599 U.S. at 674 (describing Secretary of Homeland Security Mayorkas's 2021 "Guidelines for the Enforcement of Civil Immigration Law," which limited when the Department of Homeland Security would arrest criminal noncitizens); Megan Hogan, Trump vs. Biden on immigration: A side-by-side policy comparison, Peterson Inst. for Int'l Econ. (June 24, 2024) (summarizing immigration policies of the Trump and Biden administrations), https://www.piie.com/blogs/realtime-economics/2024/trump-vs-biden-immigration-side-side-policy-comparison; U.S. House of Representatives Homeland Security Committee, Startling Stats (Oct. 24, 2024) ("Since the start of Fiscal Year (FY) 2021 in October 2020, Customs and Border Protection (CBP) has recorded more than 10.8 million

further than mere nonenforcement. It continued President Obama's policy of purporting to grant lawful status to illegal aliens to whom Congress had denied such status.[161] The economic, social, and political consequences of the Executive Branch's all-but-categorical refusal to enforce the immigration laws that Congress passed are difficult to calculate.

B

The Commission and Antitrust Division have generally refused to enforce the Robinson-Patman Act over the last several decades because of a bipartisan consensus that the Act is bad policy. The purpose of the antitrust laws is to promote competition in order to protect the welfare of consumers in markets, so the argument goes. The Robinson-Patman Act is inconsistent with that purpose because it protects competitors in markets irrespective of the effect of that protection on the welfare of consumers.[162] Not only is the Act therefore inconsistent with the policy objective of the rest of the antitrust laws, it may even undermine that policy. If suppliers cannot discount their prices because of the Robinson-Patman Act, consumers may pay higher prices than they would without the Act.[163] Others argue that the Act may be self-defeating. Suppliers may entirely refuse to do business with small businesses—the Act's putative beneficiary—if the sort of uniform pricing compelled by the Act makes selling to small businesses unprofitable.[164]

Refusing to enforce the statute because of disagreement with the statute's policy raises three problems. The first is that the Constitution does not permit the Executive Branch to suspend the enforcement of a law on policy grounds. The Executive Branch can, and should, balance the deployment of its resources across all of its enforcement obligations. And the President can, and should, rely on his own policy goals and preferences in making those resource-allocation decisions. Indeed, exercising discretion to make resource-allocation decisions is a key feature of the executive power vested in the President alone.[165] But this substantial constitutional authority does

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encounters nationwide, including more than 8.72 million at the Southwest border. By contrast, CBP recorded around 3 million encounters nationwide, including 2.37 million at the SWB, from FY2017–2020."), https://homeland.house.gov/wp-content/uploads/2024/10/September-24-Startling-Stats.pdf.

[161] See Dep't. of Homeland Sec., 87 Fed. Reg. 53152 (Aug. 30, 2022) (rule establishing regulations to preserve and fortify the Deferred Action for Childhood Arrivals (DACA) policy to defer removal of certain noncitizens); Hogan, *supra* note 160 (summarizing Biden Administration's DACA policies).

[162] Antitrust Modernization Commission, Report and Recommendations, 320 (Apr. 2007). ("The Robinson-Patman Act Harms Consumer Welfare by Protecting Competitors, Rather than Competition[.]"); *Rebel Oil*, 51 F.3d at 1446 & n.18. ("The purpose of [the Robinson-Patman Act's added competitive injury] passage was to relieve secondary-line plaintiffs … from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors").

[163] See, e.g., Antitrust Modernization Commission, Report and Recommendations, 311 (Apr. 2007) ("In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would."); Alden Abbott & Satya Marar, The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare, Mercatus Center Policy Brief, 2 (June 2023) (Robinson-Patman Act enforcement "risks harming consumers by deterring potentially procompetitive conduct. For instance, a retail chain that is prevented from securing a lower price (relative to its rivals) from a willing supplier by negotiating discounts likely will need to raise prices for its retail products.").

[164] See Statement of Comm'r Holyoak, *supra* note 14, at 45–46 (After the Supreme Court's *Morton Salt* decision, Morton Salt "eliminated all small quantity sales of salt, harming the small purchasers who relied on these smaller quantity purchases, along with the consumers who ultimately purchased from the small purchasers.").

[165] *Heckler*, 470 U.S. at 831 (recognizing "that an agency's decision not to prosecute or enforce … is a decision generally committed to an agency's absolute discretion").

not extend to categorical suspension merely because of disagreement over the policy embodied in the law.[166] (The outcome is different for laws the President concludes are unconstitutional. He not only may, but must, disregard such laws.[167])

Second, the potential inconsistency between the competitive-injury requirement for secondary-line cases and the consumer-welfare-maximizing policy of the rest of the antitrust laws is no reason to suspend the Act. Nothing requires Congress to develop an economically coherent body of antitrust law. Congress may address some economic problems differently than it addresses others. Even if Congress generally intends to promote competition for the benefit of consumers in its antitrust laws, nothing prohibits it from enacting protectionist legislation on secondary-line price discrimination.[168] Economists may be right that such legislation is unsound, even self-defeating. And if that critique proves true, the people can vote for a change in the law by electing politicians who promise to reform or repeal the Act. But Congress's apparent decision to treat price-discrimination differently than other forms of business conduct is simply no reason to suspend the Act. Congress is fully aware of the criticism leveled at the protectionist interpretations of the Act. There have been at least four attempts to repeal or substantially overhaul the Robinson-Patman Act, in 1955, 1969, 1977, and, most recently, with the 2007 Antitrust Modernization Commission.[169] But Congress has not obliged. We must respect Congress's choice.

Finally, the evidence on the effects of Robinson-Patman Act enforcement is mixed.[170] Some research suggests that imposing a uniform input price, where price-discrimination would

[166] *Id.* at 833, n.4 (noting that it did not involve "a situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" (internal citations omitted)); see note 156, *supra*.

[167] Statement of Comm'r Andrew Ferguson Dissenting in Part and Concurring in the Denial of the Motion, *In the Matter of H&R Block*, Docket No. 9427, 17 (Oct. 18, 2024) ("When a federal statute conflicts with the Constitution, the executive branch must obey the superior law of the Constitution.").

[168] See, e.g., *United States v. Hutcheson*, 312 U.S. 219, 231 (1941) (describing how Congress passed the Norris-LaGuardia Act of 1932 to immunize certain labor activities from antitrust scrutiny); see also, D. Francis & C. Sprigman, Antitrust: Principles, Cases, and Materials, 552–77 (2d ed. 2024) (summarizing various statutory antitrust exemptions involving labor, agricultural cooperatives, and insurance).

[169] Antitrust Modernization Commission, Report and Recommendations, iii (2007).

[170] See Germain Gaudin & Romain Lestage, Input Price Discrimination, Demand Forms, And Welfare, 70 J. Indus. Econ. 1033, 1044–1050 (2022) (showing characteristics of the curvature of downstream demand that determine the welfare effects of imposing a uniform price when price would otherwise be discriminatory with an emphasis on the sum of the curvature and quantity pass-through rate of downstream demand); Youping Li & Jianhu Zhang, The Welfare Effects of Input Price Discrimination Revisited, 95 Int'l J. Indus. Org. 103083, *7–8 (2024) (showing characteristics of the curvature of downstream demand that determine the welfare effects of imposing a uniform price when price would otherwise be discriminatory with an emphasis on the convexity or concavity of downstream demand). Commissioner Bedoya downplays the applicability of this economic literature to the Robinson-Patman Act because, in his view, "the [economic literature] conclusions are mixed" because "economists have tended to build models assuming that uniform pricing is required by the law," which is an "unfavorable assumption" because the law allows "genuine cost savings" to be reflected in price differences. Statement of Comm'r Alvaro Bedoya, *In the Matter of Southern Glazer's*, Matter No. 211-0155, note 63 (Dec. 12, 2024) (hereinafter "Statement of Comm'r Bedoya "). Not so. The economic literature typically assumes that there are no cost justifications for input price discrimination. It makes this assumption in order to isolate the consequences of imposing a uniform input price *absent* cost justifications (i.e., like the Robinson-Patman Act). In fact, the very studies that Commissioner Bedoya cites expressly "assume that there are no supply-side economies of scale" "[s]ince [the authors'] interest … is in price discrimination, not price differentials." Michael Katz, The Welfare Effects of Third-Degree Price Discrimination in Intermediate

otherwise occur, may lead to higher retail prices.[171] Other research suggests that imposing a uniform input price may lead to lower retail prices in some circumstances.[172] Of course, even if the research unequivocally proved that enforcing the Act would injure consumer welfare, the Executive Branch still could not simply suspend the law. But given the mixed evidence on its effects, the breathless warnings of the catastrophe that will follow the return of the Robinson-Patman Act seem decidedly overstated, if the Act is sensibly enforced.[173]

The upshot is that unelected bureaucrats cannot take it upon themselves to repeal a law. We must of course prioritize our enforcement resources consistently with the public interest. But the power to prioritize does not carry with it the power to suspend. We have a constitutional obligation to treat the Robinson-Patman Act as valid law, and to make enforcement decisions accordingly.

IV

I arrive, then, at the Commission's case against Southern with two principles in mind. First, the prevailing judicial interpretation is that the Commission need show only that price discrimination caused a substantial diversion of sales from the disfavored retailer to a competing favored retailer in order to satisfy the Act's competitive-injury requirement in secondary-line cases. Although this injury requirement is inconsistent with the judiciary's understanding of the policies underlying the rest of the antitrust laws—including primary-line discrimination under the same statute—it has been the prevailing interpretation since the Act's adoption, and the Supreme

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Good Markets, 77 Am. Econ. Review 154, 157 (1987); see also, Daniel O'Brien & Greg Shaffer, The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman, 10 J. Law Econ. & Org. 296, note 3 (1994) ("One of the traditional criticisms of the Robinson-Patman Act is that discrimination under the law is not the same thing as economic discrimination…Our model abstracts from these difficulties by ruling out cost differences from the start."). These do not, as Commissioner Bedoya contends, assume uniform pricing is required regardless of cost justifications.

[171] See O'Brien & Shaffer, *supra* note 170 at 307–309 (showing that imposing various uniform pricing schemes increases all input prices, in a model where input prices would otherwise be two-part tariffs); Roman Inderst & Greg Shaffer, Market power, Price Discrimination, and Allocative Efficiency in Intermediate-Goods Markets, 40 RAND J. Econ. 658, 667 (2009) (where imposing a uniform price in a model of non-linear upstream pricing raises final goods prices and lowers consumer welfare). See also Roman Inderst & Tommaso Valletti, Price Discrimination in Input Markets, 40 RAND J. Econ. 1, 13 (2009) (showing the potential for imposing uniform input prices to cause consumer harm in the long-run, even when there are short-term benefits, because of a reduction the incentives of both the high-cost firm and competing low-cost firm to lower their intrinsic costs, since doing so no longer yields as large of a competitive advantage).

[172] See Katz, *supra* note 170, at 161–163 (showing that a larger buyer's superior upstream outside option of backward integration can shield a smaller buyer from an input price increase when uniform input prices are imposed, since the uniform input price may be set to the larger buyer's lower discriminatory price); Inderst & Valletti, *supra* note 171, at 5–13 (showing that Katz's results extend in the short run to the case where either downstream firm can use an upstream outside option at a fixed cost, when demand is linear).

[173] I do not argue that the Commission's policy before it abandoned enforcement by the 1980s was sensible. To the contrary, the Commission's enforcement policy was extremely imprudent. The Commission focused its enforcement efforts on protecting larger businesses from smaller ones. See note 65, *supra* (quoting DOJ RPA Report at 97–98). It did so without any regard to whether the favored purchasers in secondary-line cases had any market power, thereby maximizing the risk that enforcement was likely to degrade competition and injure consumers while protecting inefficient competitors. See notes 63, 65, *supra*. A sensible enforcement policy would focus on secondary-line cases in which the favored purchaser enjoys substantial market power—precisely the situation where competition is most at risk. See Part IV.B, *infra*.

Court has declined to alter it. Second, that disagreement with the protectionist bent of the Robinson-Patman Act is not a ground to decline to enforce it. Congress sets the country's antitrust policy, and the Executive Branch cannot categorically ignore a statute that Congress lawfully adopted.

With those principles in mind, I dissent from the filing of this Complaint for two reasons. First, I do not believe the Commission is likely to prevail even under the traditional, protectionist understanding of the Robinson-Patman Act. Second, even if it were likely to prevail, this case is a poor use of the agency's resources. The Commission should focus its enforcement efforts on price discrimination in the heartland of the concern that animated the Act's passage—large retailers with buying power. This is not such a case.

A

The Commission's staff has worked diligently on this mammoth case. But, on the evidence before me, I am unconvinced that the Commission will prevail on the merits for at least three reasons.

1

First, Southern appears likely to succeed on a cost-justification defense. The Robinson-Patman Act does not prohibit every difference in price.[174] Section 2(a) expressly excepts from the Act's anti-discrimination prohibition "differentials which 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."[175] Southern has argued persuasively that the price differences of which the Commission complains are justified by two different types of costs. The first are supplier-supported discounts. These are discounts that alcohol manufacturers extend to Southern if it sells the manufacturers' brands at a sufficiently high volume.[176] If Southern meets the manufacturer's sales-volume target for large individual sales to a single retailer, then the manufacturer extends a rebate to Southern for those volumes, thereby reducing Southern's costs of acquiring the alcohol that it sold to that retailer. This rebate is a reduction in Southern's "cost of … sale" to that retailer.

The Complaint rejects this reduced cost as a justification for any price differences in sales to retailers of sufficient volume to trigger the supplier-supported discount.[177] It alleges that the discounts do not count as a "cost" for purposes of the cost-justification defense because they are

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[174] See Part II.A.2, *supra* (describing various exceptions from the Robinson-Patman Act's prohibition on price discrimination).

[175] 15 U.S.C. §13 (a).

[176] For a more extensive discussion of Southern's supplier-supported discounts, see Statement of Comm'r Holyoak, *supra* note 14, at Part II.C. Commissioner Bedoya characterizes these supplier discounts as "general sales goals for the distributor, not tied to the sale to any particular buyer." Statement of Comm'r Bedoya, *supra* note 170, at 25. That is not my understanding of the supplier-supported discounts that Southern may cite to support a cost justification defense. Given the possibility that this issue will be contested in litigation and subject to additional discovery, I will withhold further comment regarding the apparent divergence between my and Commissioner Bedoya's understandings of the evidence before us on supplier-supported discounts.

[177] Compl. ¶¶ 33, 36.

not "associated with any efficiency derived from the differing methods or quantities in which the wine or spirits are manufactured, sold, or delivered to favored large chains."[178] But the statute does not say anything about efficiencies as a prerequisite for cost-justification. (There is some irony in the Commission's view that its prima facie case requires no showing of injury to the forces of competition, but the cost-justification defense reaches only cost differences that arise from the forces of competition.) The statute says that price "differentials" due to "differences in the cost of … sale" are excluded from the Act's prohibition.[179] In calculating those costs, we must consider the "true indicia of the cost of dealing with" the customers to whom Southern sold its goods.[180] When Southern sells alcohol to a retailer at a level sufficient to trigger a supplier-supported discount, its costs of selling that alcohol to that retailer are indisputably lower than the costs of selling the same alcohol to a different retailer at a level that does not trigger the discount. Nothing in the Act prohibits Southern from passing on that reduction in the cost of acquiring inventory—a component of the cost of selling that inventory—to the retailer who purchased the lower-cost inventory. Ignoring these "true indicia" of the costs of sale would risk interpreting the Act to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[181]

Moreover, many of the price differentials of which the Commission complains are due to the differences in costs associated with serving large chain stores rather than independents. Large orders, infrequently delivered in bulk to loading docks at central distribution centers, are less costly per unit to deliver than small orders, frequently delivered to individual stores—often to individual shelves or refrigerator units.[182] The Act does not impose liability for pricing differently on the basis of those costs.

To be sure, given the monumental sweep of the Commission's Complaint, it is possible that discovery may reveal some differently priced, pairable transactions for which the price differential cannot be fully cost justified. But isolated instances of unjustified price discrimination do not violate the Act. Only "substantial price discrimination" violates the Act,[183] that is, price discrimination "of such magnitude as to affect substantially competition between" the favored and disfavored retailers.[184] The evidence presented to me does not lead me to the conclusion that such extensive, unjustified discrimination has taken place.

2

Second, I have not seen sufficient evidence of diversion to demonstrate more than a *de minimis* injury to competition. Diversion of sales from the disfavored purchaser to the favored purchaser is the "hallmark" of competitive injury in secondary-line cases.[185] But the Commission

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[178] *Id.* ¶ 36.
[179] 15 U.S.C. § 13(a).
[180] *Borden*, 370 U.S. at 470.
[181] *Great Atl. & Pacific Tea Co.*, 440 U.S. at 80 (quoting *Automatic Canteen*, 346 U.S. at 63).
[182] See Statement of Comm'r Holyoak, *supra* note 14, at 31 ("Southern Glazer's sales are often delivered in bulk to chains' centralized distribution centers, from which the retail chains make their own deliveries to individual locations—as opposed to Southern Glazer's more costly small volume deliveries to numerous independent stores.").
[183] *Falls City Indus.*, 460 U.S. at 435.
[184] *Volvo*, 546 U.S. at 180.
[185] *Id.* at 171.

must establish both that the diversion was "substantial" and that the diversion was caused by the price discrimination, even assuming that the Commission is right that it need prove only injuries to competitors rather than competition to state a prima facie violation of Section 2(a).[186] I simply have not seen evidence that any diversions, much less substantial diversions, are attributable to lower prices offered by the favored purchasers, let alone ones attributable to lower input prices.

The mere coincidence of any diversions from a disfavored retailer simply is not enough to satisfy the competitive-injury requirement of the Act. The Act addresses diversion between substantially differentiated retailers. Shifts in sales of a common final product therefore will not establish price-driven competition between those differentiated retailers. Consumers may purchase spirits from large retail chains rather than in small liquor stores because of lower prices. But they may also do it because of some other feature of the favored retailers' business—for example, the convenience of buying alcohol alongside other household goods and groceries. The Commission will have to demonstrate that the discriminatory prices caused the diversion. I am unconvinced that the evidence will bear the weight.

3

Finally, I expect the Commission will mostly fail to satisfy the stringent statutory requirement that the discriminatory sales take place "in [interstate] commerce."[187] Unlike the Sherman Act, the Robinson-Patman Act does not cover intrastate activities that merely affect interstate commerce.[188] Instead, the Act "applies only where at least one of the two [discriminatory] transactions … cross(es) a state line."[189] The alcohol industry's unique regulatory structure—its mandatory three tier system and heavy state regulation—will prevent many of these transactions from crossing state lines. As state laws often require, Southern stores products in warehouses that serve only customers in the same State as the warehouses. The sale of alcohol from Southern to a retailer, then, often occurs entirely within a single state. Predictably, most Robinson-Patman Act cases against alcohol distributors have failed on interstate commerce grounds.[190] In one, the Fifth Circuit held that any discriminatory liquor sales made by "an

[186] *Cash & Henderson Drugs*, 799 F.3d at 211 (holding that Section 2(a) requires evidence of substantial evidence of lost sales, and *de minimis* evidence of lost sales is insufficient to state an injury in secondary-line cases); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) ("[A] plaintiff must demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him."); *Falls City Indus.*, 460 U.S. at 435 (The *Morton Salt* inference "may be overcome by evidence breaking the causal connection between a price differential and lost profits."); *Feesers, Inc.*, 498 F.3d at 213 (The *Morton Salt* inference may be "rebutted by defendants' proof that the price differential was not the reason that [the disfavored purchaser] lost sales or profits.").

[187] 15 U.S.C. § 13(a); *McCallum v. City of Athens*, 976 F.2d 649, 657–58 (11th Cir. 1992) (noting plaintiff's failure to recognize the "Robinson-Patman Act's stringent interstate commerce requirement.").

[188] *McCallum,* 976 F.2d at 655 ("In contrast with the Sherman Act, in which Congress exercised the utmost extent of its Constitutional power in restraining trust and monopoly agreements, the distinct 'in commerce' language of the Robinson–Patman Act denotes only activities within the flow of interstate commerce." (cleaned up)); *Gulf Oil Corp. v. Copp Paving Co*., 419 U.S. 186, 199–200 (1974) (noting that Congress removed proposed "effects on commerce" language from the Robinson-Patman Act).

[189] *Copp Paving*, 419 U.S. at 200–01.

[190] See *Major Mart, Inc. v. Mitchell Distrib. Co*., 46 F. Supp. 3d 639, 667–68 (S.D. Miss. 2014), *Callahan v. A.E.V., Inc.,* 1994 WL 682756, at *7 (W.D. Pa. Sept. 26, 1994), *Royal Farms, Inc. v. Piels Bros., Inc.*, 1971 WL 508, at *5 (E.D.N.Y. Jan. 29, 1971). But see *Fast & Easy Food Stores*, No. 7:11-CV-1929-MHH, 2013 WL 12136610 (N.D.

autonomous local subsidiary or distributor" to local retailers were "beyond the commerce criteria" because they would have "arise[n] from a sale on the part of the intrastate distributor or subsidiary rather than the [out-of-state] supplier."[191]

Notwithstanding these unfavorable precedents, the Commission's goose may not be fully cooked. Intrastate sales meet the interstate commerce requirement if the distributor made those sales within the "'practical, economic continuity' of [an] interstate transaction."[192] This occurs when the distributor purchased or transferred the goods across state lines in response to actual or anticipated needs of a specific customer.[193] On the evidence before me, I expect the Commission may establish practical economic continuity for a fraction of the discriminatory transactions alleged in the Complaint. Most of the Commission's case, however, will likely fail to meet the Robinson-Patman Act's stringent interstate commerce requirement.

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Even if the Commission were likely to prevail on its claim against Southern, I would not concur in this Complaint. The Commission has limited resources. Every enforcement action we bring consumes a large chunk of those resources and may do so for many years as the case wends its way through the courts. We must be choosy about how we commit the taxpayers' resources and ensure that we get the biggest bang for their buck. Applying that principle to the Robinson-Patman Act, I conclude that we should bring secondary-line cases only when there is strong evidence that the favored purchasers possess market power.

The Act "is of general applicability and prohibits discriminations generally."[194] It therefore applies to competition-injuring discrimination in favor of large purchasers and small purchasers alike.[195] But there is no doubt that "concerns about the excessive market power of large purchasers were primarily responsible for the passage" of the Act.[196] Preventing discrimination in favor of

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Ala. Nov. 4, 2013) (finding that the plaintiff adequately pled the interstate commerce requirement in a Robinson-Patman Act suit against an intrastate beer distributor).

[191] *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir. 1969).

[192] *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 877 (9th Cir. 1982) (quoting *Copp Paving*, 419 U.S. at 195).

[193] See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 211 (5th Cir. 1969) ("Retail sales of goods shipped into a state may be considered to remain within the flow of commerce under three circumstances: (1) Where they are purchased by the retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; (2) where the goods are purchased by the retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer, although not for immediate delivery; and (3) where the goods are purchased by the retailer based on the anticipated needs of specific customers."); see also *Fast & Easy Food Stores*, 2013 WL 12136610 at *4 (holding that the complaint plausibly pled that sales made by an intrastate independent beer distributor were in the "flow of [interstate] commerce for the purposes of the [Robinson-Patman Act]" because the distributor allegedly purchased the beer from an out-of-state supplier with the intent that it was for the immediate, understood, or anticipated needs of specific customers).

[194] *FTC v. Sun Oil Co.*, 371 U.S. 505, 522 (1963).

[195] *Falls City Indus.*, 460 U.S. at 428.

[196] *Ibid.*; see also *Anheuser-Busch*, 363 U.S. at 543–44 ("It is, of course, quite true—and too well known to require extensive exposition—that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary line competition of the burgeoning of mammoth purchasers, notably chain stores."); American Bar Association, Report of the Commission to Study the Federal Trade Commission, 67 (Sept. 1969) ("[T]he Act's principal purpose is to curb abuses of mass-buying power by large firms."); Areeda &

purchasers with buyer market power therefore lies in the heartland of the policy embodied by Section 2(a) of the Act.

And for good reason. Price discrimination driven by the buyer market power of a large purchaser can harm the purchaser's competitors *and* consumers. It can harm upstream competition

> in at least five ways: (1) the buyer's exercise of countervailing power could diminish the returns that suppliers earn from research and development, curbing their incentive to innovate; (2) by depressing suppliers' profits, the exertion of countervailing power may cause suppliers to curtail the variety of products they offer, reducing consumer choice; (3) if the powerful buyer concentrates all its purchases in a single supplier, it could give that supplier monopsony power over small, powerless suppliers further upstream; (4) the exercise of countervailing power may turn into monopsony power if the structure of the supplying tier changes and suppliers lose their market power; and (5) the powerful buyer's exercise of its power may cause suppliers to collude in response, which may lead to higher consumer prices.[197]

It can similarly harm downstream competition

> in at least five different settings: (1) the large buyer may induce its suppliers to raise its rivals' costs, enabling it to increase prices or otherwise exploit consumers in downstream markets; (2) the buyer may extract price cuts or other concessions from its suppliers, who may react to the decline in their profits by increasing prices to the large buyer's rivals, allowing it to raise its prices or otherwise harm consumers; (3) the buyer may obtain discriminatory concessions that are so large and long-lasting that they enable it to drive out or greatly diminish the market share of smaller rivals, increasing downstream concentration and making tacit or explicit collusion more likely; (4) even if downstream prices never rise as a result of the elimination of the buyer's rivals, their destruction may deprive consumers of choices they preferred and depress overall consumer welfare; and (5) the discriminatory concessions induced by the buyer may permit it to become less efficient, less dynamic, and less responsive to changing consumer preferences.[198]

Focusing our enforcement efforts on cases involving buyer market power serves two important purposes. First, it directs our resources toward the conduct that most concerned Congress. The government could not fully enforce *any* statute against every discoverable violation given its resource constraints. Using limited resources to pursue violations that most irked

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Hovenkamp, *supra* note 41, at ¶ 2342c ("The Robinson-Patman Act was passed during a period that was witnessing the rise of the great chain stores and a serious economic depression that gave United States producers inordinate amounts of excess capacity. During a period of rapid expansion of efficient multi-store retailer operations and numerous distressed sellers who needed to keep their plants running, these large buyers may have wielded considerable buying power."); *id.* ¶ 2302 ("The central 'evil' targeted by the Robinson-Patman Act was the *buying* power of large chain stores such as A&P.").

[197] John B. Kirkwood, Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers, 60 Antitrust Bull. 358, 364 (2015).

[198] *Id.* at 368.

Congress is a sound way to deploy the enforcement resources that Congress has given us. In the context of the Robinson-Patman Act, there is no doubt that buyers with market power were Congress's chief concern.

Second, pursuing cases involving favored purchasers with market power maximizes the effect of the Commission's enforcement resources. When we enforce the statute in price-discrimination cases that do not involve purchasers with market power, we protect only the disfavored purchasers. And we may inadvertently cause other social harms. For example, aggressive enforcement of the Act when none of the buyers enjoy market power could harm consumers by depressing vigorous price competition.[199] In contrast, focusing enforcement on favored buyers with market power would concentrate our resources on cases where price discrimination potentially affects the competitive process and consumers. Economic research suggests that price discrimination that favors dominant, asymmetric buyers harms competition.[200] A focus on buyer market power as a guiding principle may also relieve some uncertainty for businesses and enhance sellers' incentives to lower prices to entrants and smaller competitors in particular, avoiding what is often identified as an egregious historical misstep of past Robinson-Patman Act enforcement.[201] The potential second-order consequences of enforcing the Act in cases where none of the buyers enjoy market power should cause us to stay our hand.

If government enforcement were the only method Congress devised for enforcing the Act, the resource-allocation calculation might be different. It would be harder for the Commission to argue that it should confine its enforcement efforts to cases where the favored purchasers enjoy market power, effectively rendering the statute inoperative for every other case. But Congress has given disfavored purchasers the right to bring their own lawsuits against discriminating sellers, and the right to recover treble damages and obtain injunctive relief gives them a powerful incentive to bring those suits.[202] In cases where the favored purchaser lacks market power, the disfavored

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[199] DOJ RPA Report, *supra* note 65, at 9 ("To the extent that the businessman sees extensive exposure to liability under the statute as a result of any pricing strategy that might involve lowering pricing selectively, it is reasonable to conclude that his inclination to adjust prices downward on a selective basis will be reduced.").

[200] See Roman Inderst & Tommaso Valletti, Buyer Power and the 'Waterbed Effect', 59 J. Indus. Econ. 1, 10 (2011) (showing in a model of pure buyer power that "the waterbed effect must be sufficiently large to give rise to possible policy concerns, which in turn holds only if the large buyer's advantage is already sufficiently substantial. For this to hold, it is in turn necessary that the large buyer be sufficiently larger in size..."); Germain Gaudin, Vertical Bargaining and Retail Competition: What Drives Countervailing Power? (2018). Vertical Bargaining and Retail Competition: What Drives Countervailing Power?, 128 Econ. J. 2380, 2406 (showing in a model where buyer power arises from increased market power that "[buyer] power generally does not translate into lower retail prices because of the heightened market power at the retail level.").

[201] E.g., DOJ RPA Report, *supra* note 65, at 257–58 ("Robinson Patman serves to hurt the small businessman when it prohibits suppliers from helping small retailers meet their competition from competitors' products when it cannot be positively shown whether the competing large retailer is simply lowering the price on its own, or is actually receiving a special allowance from its suppliers.").

[202] 15 U.S.C. § 15(a); *Reiter*, 442 U.S. at 344 ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130–31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659, 667 (5th Cir. 1974) ("The prospect of a damage award multiplied three-fold should provide an incentive for private parties to instigate costly and uncertain litigation ….").

purchasers can protect their own interests with private litigation. Congress has charged the federal government with "protecting the public interest under" the antitrust laws.[203] We protect the broadest swath of the public in cases where the favored purchaser enjoys market power. There, our enforcement more likely protects consumers and competitors alike while running a lower risk of raising consumer prices.[204]

The buyers at issue in this case do not appear to "possess[ ]" the "market power" of the "large independent department stores or chain operations" that animated Congress to pass the Act in 1936.[205] I have seen little evidence that the favored retailers possess substantial market power in any particular product or geographic market. This case therefore may protect the disfavored retailers who allegedly paid higher input prices than their competitors, but it may do so by raising prices for millions of hardworking Americans. Even assuming arguendo that the Act permitted this suit, I do not think we can square devoting our limited resources here with our general duty to protect the public from violations of the antitrust laws. By bringing this case, we are necessarily trading off other enforcement actions that may protect consumers, competitors, and the vibrancy of our markets all at once.

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Treating the Robinson-Patman Act as a nullity for decades offended the separation of powers. That offense is vitiated today. But the Commission ought not to revive enforcement of the Act merely for the sake of reviving enforcement. We must exercise sound judgment in deciding when to enforce the Act. We fail to do so here. We ought to enforce the Act where it will serve the broad public interest, and bring only those cases we are likely to win. This case checks neither box. I therefore respectfully dissent from the filing of this Complaint.

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[203] *Borden*, 347 U.S. at 518.

[204] I do not argue that the Commission should bring secondary-line cases under the Act only if a buyer's conduct would also violate some other provision of the antitrust laws. On the contrary, bringing cases where the favored purchasers possessed buyer market power would capture anticompetitive conduct that the other laws would not reach. See Kirkwood, *supra* note 197, at 371–75.

[205] *Volvo*, 546 U.S. at 181.