UNITED STATES OF AMERICA

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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]

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 counts, growing 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 (1930.) Tjees and tCai

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, within 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 th

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 ant

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

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[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 use of 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 early 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 with small 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); Pac. 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 concern 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 or 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

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

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

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-.72 0 TD .0001 Tcica, Inr52Tw 12 0 0 12 310.98 570.3 Tm .0006 Tc .030 T

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 long-standing 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

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 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 cases 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

"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"g,"

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

the Court declined, and retained the protection of the 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, a tension 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. Petrol. Inst. as Amicus Curiae Supporting Pet'r 12 *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, 534 U.S. 19, 31 (2001) ("It is a fundamental principle of statutory construction that a statute ought, upon the whole, to be 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)

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 the 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 interp

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 bipartisan consensus that the Act is bad policy. The purpose of the antitrust laws is to protect 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 beneficiaries—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 3.2 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 acting 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

otherwise occur, may lead

Court has declined to tolerate 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.

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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.

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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 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

[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 tested 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 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.

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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, as the 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 competiti

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 do

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 a favored purchaser enjoys market power. There, our enforcement more likely protects consumers and competition 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 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.