

Congress of the United States

Washington, DC 20515

March 28, 2024

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Chair Khan,

We write to urge the Federal Trade Commission (FTC) to revive enforcement of the Robinson-Patman Act (RPA). Nearly every step of the food supply chain is highly concentrated, causing higher prices to consumers and harming farmers and small businesses.¹ This consolidation happened after RPA enforcement fell into disuse in the 1970s. But the RPA is still the law of the land and can be a critical tool to promote fair competition in the food industry. The FTC should investigate potential RPA violations and, when merited, bring lawsuits under the RPA to protect small businesses, farmers, workers, and consumers.

Congress passed the Robinson-Patman Act to create a level playing field for retailers by ensuring that both small and large firms pay the same price for comparable products.² The RPA prohibits sellers from engaging in price discrimination and prevents sellers and buyers from skirting around the price discrimination ban by giving more favorable commissions, brokerages, processing fees, handling fees, or other similar schemes to certain buyers. Strong enforcement of the RPA in the years after its passage succeeded in promoting competition between small and independent retailers and larger chain stores.³ Unfortunately, misguided theories of antitrust popularized in the 1970s and 1980s led to the RPA's disuse, and the law has essentially laid dormant for the last 40 years.⁴ Despite this shift by enforcers and courts, the RPA is still law and all the precedents that enabled the prior era of successful RPA enforcement still stand.

¹ Yale Law and Policy Review, "Kickbacks and Corporate Concentrating: How Exclusionary Discounts Limit market Access for Community-Based Food Business," Claire Kelloway & Matthew Jinoo Buck, December 23, 2023, p. 90, https://yalelawandpolicy.org/inter_alia/kickbacks-and-corporate-concentration-how-exclusionary-discounts-limit-market-access.

² The Antitrust Bulletin, "Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent," Mark A. Glick et al., 2015 <https://doi.org/10.1177/0003603X15602397>.

³ Open Markets Institute, "The Robinson-Patman Act as a Fair Competition Measure," Brian Callaci et al., December 2023, p. 2, <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/6568fa5f34008167eee53dc4/1701378656147/The+Robinson-Patman+Act+as+a+Fair+Competition+Measure+-+11-28-23.pdf>.

⁴ *Id.* at p. 40.

Given the RPA's successful record, and the high levels of concentration in the food and retail industries, the FTC must use this valuable authority to investigate and police potential violations. Today, the food industry is more consolidated than when Congress adopted the RPA.⁵ Currently, four food retailers account for over a third of national grocery sales.⁶ Grocery suppliers are also highly concentrated—four firms controlled more than 60 percent of sales in most grocery categories in 2019, and some categories are almost entirely controlled by a single food company.⁷

Because of this concentration, dominant retailers can extract more favorable prices and terms from suppliers, beyond what might be justified by economies of scale.⁸ Suppliers are often forced to make up their losses by charging higher prices to independent, smaller grocery stores. This phenomenon, called the “waterbed effect,” requires independent stores to internalize the higher costs or pass them onto consumers.⁹ Price discrimination can therefore hurt small and medium businesses and hike up food prices for consumers. The harm to consumers may be greatest in communities most likely to be served by independent groceries and pharmacies, such rural communities or areas with higher levels of poverty.¹⁰

Consolidation and preferential pricing for large chains also inflict harms beyond those seen on a store receipt. Independent grocery stores benefit their community as employers and by attracting foot traffic to other local businesses.¹¹ In contrast, large grocery chains often direct these benefits outside of the communities where they are located.¹² Large chains can obtain enough control of a local market to reduce wages, benefits, or their workforce

⁵ Yale Law and Policy Review, “Kickbacks and Corporate Concentrating: How Exclusionary Discounts Limit Market Access for Community-Based Food Business,” Claire Kelloway & Matthew Jinoo Buck, December 23, 2023, https://yalelawandpolicy.org/inter_alia/kickbacks-and-corporate-concentration-how-exclusionary-discounts-limit-market-access.

⁶ U.S. Department of Agriculture, Economic Research Service, “A Disaggregated View of Market Concentration in the Food Retail Industry,” January 2023, p. 6, <https://www.ers.usda.gov/webdocs/publications/105558/err-314.pdf?v=9764.2>.

⁷ Food & Water Watch, “The Economic Cost of Food Monopolies: The Grocery Cartels,” November 2021, p. 2, https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf.

⁸ Open Markets Institute, “Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act,” Daniel Hanley, November 29, 2023, p. 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648660.

⁹ Washington Monthly, “Everyday High Prices: How Discounting Led to Inflation, Shortages, and Inequality,” Phillip Longman, January 8, 2023, <https://washingtonmonthly.com/2023/01/08/everyday-high-prices/>.

¹⁰ Institute for Local Self-Reliance, “Boxed Out,” Stacy Mitchell & Ron Knox, September 2022, pp. 10-11, <https://cdn.ilsr.org/wp-content/uploads/2022/09/Boxed-Out-Report-ILSR-2022.pdf>; *see also* WCVB5, “Walgreens closure leaves Boston’s Roxbury neighborhood without a local pharmacy,” Rhondella Richardson, January 31, 2024, <https://www.wcvb.com/article/roxbury-boston-massachusetts-walgreens-pharmacy-closing/46598794>; Boston Globe, “Teens investigating equity find Stop & Shop charges more in Jackson Square than at more affluent suburb,” Tiana Woodard, June 5, 2023, <https://www.bostonglobe.com/2023/06/05/metro/were-being-ripped-off-teens-investigating-equity-find-stop-shop-charges-more-jackson-square-than-more-affluent-suburb/>.

¹¹ The National Grocers Association, “Buyer Power and Economic Discrimination in the Grocery Aisle: Kitchen Table Issues for American Consumer,” p. 3, <https://www.nationalgrocers.org/wp-content/uploads/2021/06/NGA-Antitrust-White-Paper.pdf>.

without the risk of meaningfully decreasing their bottom line.¹³ Additionally, large grocery and retail chains regularly outsource production to overseas firms that produce lower-quality goods with less workplace regulations and lower wages than those in the United States.¹⁴

Concentration in retail also incentivizes competing firms to consolidate. Food retail has experienced an uptick in mergers and acquisitions to match the trend toward consolidation in other parts of the food supply chain. Kroger Company's proposed \$24.6 billion acquisition of Albertsons Companies, Inc. would result in a duopoly with Walmart. The two corporations would control more than 70 percent of the grocery market in over 160 cities, increasing their ability to lower wages and unfairly exert pricing power.¹⁵ Further consolidation of food retailers, such as the Kroger-Albertson's merger, fuel the vicious cycle of concentration and price discrimination.

The FTC should use the RPA to combat price discrimination and concentration. Congress enacted the RPA to address these exact problems in the food and retail industry. The RPA is an effective tool to promote fairness and competition and to protect small businesses. The FTC should also use the RPA to combat creative, subtler forms of price discrimination that have emerged in recent years, namely slotting fees and volume-based rebates. These practices harm small retailers and producers and may exclude new entrants from the food retail market.

The FTC should explore whether discriminatory slotting fees violate the RPA. In recent decades, producers and suppliers began paying food retailers slotting fees to secure shelf space for their products.¹⁶ Retailers may also charge "display," "promotional," "end cap," or "pay to stay" fees for product placement. The fees are ostensibly used to help cover the cost of restocking shelves.¹⁷ But the largest food brands can offer retailers large slotting fees that smaller producers cannot match, unfairly excluding emerging companies from obtaining or increasing their shelf space.

¹² Washington Monthly, "Everyday High Prices: How Discounting Led to Inflation, Shortages, and Inequality," Phillip Longman, January 8, 2023, <https://washingtonmonthly.com/2023/01/08/everyday-high-prices/>; Los Angeles Times, "An Empire built on Bargains Remakes the Working World," Abigail Goldman and Nancy Cleeland, November 23, 2003, <https://www.latimes.com/news/la-fi-walmart23nov23-story.html>.

¹³ See Vox, "More and more companies have monopoly power over workers' wages. That's killing the economy," Suresh Naidu et al., April 6, 2018, <https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality>.

¹⁴ Washington Monthly, "Everyday High Prices: How Discounting Led to Inflation, Shortages, and Inequality," Phillip Longman, January 8, 2023, <https://washingtonmonthly.com/2023/01/08/everyday-high-prices/>; Los Angeles Times, "An Empire built on Bargains Remakes the Working World," Abigail Goldman and Nancy Cleeland, November 23, 2003, <https://www.latimes.com/news/la-fi-walmart23nov23-story.html>.

¹⁵ Institute for Local Self-Reliance, "'Americans Don't Need Another Mega-Grocer.' Stacy Mitchell Responds to Kroger's Bid to Buy Albertsons," October 14, 2022, <https://ilsr.org/statement-kroger-albertsons-merger/>.

¹⁶ Yale Law and Policy Review, "Kickbacks and Corporate Concentrating: How Exclusionary Discounts Limit market Access for Community-Based Food Business," Claire Kelloway & Matthew Jinoo Buck, December 23, 2023, https://yalelawandpolicy.org/inter_alia/kickbacks-and-corporate-concentration-how-exclusionary-discounts-limit-market-access.

¹⁷ *Id.*

A supplier may violate the RPA if it pays a large slotting fee to a big chain, but offers to pay less to competing, smaller retailers.¹⁸ A large buyer may violate Section 2(f) of the RPA or Section 5 of the Federal Trade Commission Act if it encourages such discrimination. Slotting fees may also be considered an illegal brokerage under section 2(c) of the RPA.¹⁹ And, when food producers and wholesalers pay slotting fees to dominant retailers in exchange for better shelf space or other preferential treatment, these payments may violate sections 2(d) and 2(e) if the supplier is not offering these same payments to competitors.²⁰

The FTC should also consider whether certain rebate practices violate the RPA. Food manufacturers and suppliers sometimes offer distributors or retailers large rebates in return for ordering a set sales volume or a set percentage of all the buyer's purchases within a food category.²¹ These rebates can have the implicit or explicit effect of excluding competition.²² Grocery stores and other food retailers have grown to depend on these rebate revenues.²³ But smaller, independent stores often cannot obtain large enough rebates to compete with the revenue boost obtained by existing dominant suppliers.²⁴ Rebates also figure heavily into the business models of food service management companies,²⁵ which leads to smaller suppliers being excluded from large swaths of food offerings at large organizations, such as business headquarters, colleges, or hospitals.²⁶ These rebates may be impermissible under Section 2(c) of the RPA.²⁷

Unfair competitive practices and high concentration in the food industry harms small businesses, workers, and consumers. Dominant food retailers and wholesalers can use their purchasing power to drive out independent grocers, small businesses, and other competitors. By limiting competition, the largest firms can raise the price of food and lower worker's wages. Congress enacted the Robinson-Patman Act to give the FTC the

¹⁸ See American Antitrust Institute, "AAI Presses Creative Responses to Slotting Fees in the Grocery Industry, as Skitol Testifies in Senate," Albert A. Foer, September 14, 1999, <https://www.antitrustinstitute.org/work-product/aai-presses-creative-responses-to-slotting-fees-in-the-grocery-industry-as-skitol-testifies-in-senate/> and, Conor Nolan and Sandro Steinbach, "Hungry for Change: Retail Discounters and Food Deserts in America" Reforming America's Food Retail Markets: Conference Compendium (June 2022). https://law.yale.edu/sites/default/files/area/center/isp/documents/grocery-compendium_may2023.pdf.

¹⁹ American Antitrust Institute, "AAI Presses Creative Responses to Slotting Fees in the Grocery Industry, as Skitol Testifies in Senate," Albert A. Foer, September 14, 1999, <https://www.antitrustinstitute.org/work-product/aai-presses-creative-responses-to-slotting-fees-in-the-grocery-industry-as-skitol-testifies-in-senate/>.

²⁰ *Id.*

²¹ Yale Law and Policy Review, "Kickbacks and Corporate Concentrating: How Exclusionary Discounts Limit market Access for Community-Based Food Business," Claire Kelloway & Matthew Jinoo Buck, December 23, 2023, https://yalelawandpolicy.org/inter_alia/kickbacks-and-corporate-concentration-how-exclusionary-discounts-limit-market-access.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ American Antitrust Institute, "AAI Presses Creative Responses to Slotting Fees in the Grocery Industry, as Skitol Testifies in Senate," Albert A. Foer, September 14, 1999, <https://www.antitrustinstitute.org/work-product/aai-presses-creative-responses-to-slotting-fees-in-the-grocery-industry-as-skitol-testifies-in-senate/>.

authority to prevent these related risks of price discrimination and local businesses being driven from the marketplace. By enforcing the RPA, the FTC can prevent dominant market players from further eroding the economic and social benefits that independent stores provide to their communities. We urge the FTC to fulfill Congress's intent and enforce the Robinson-Patman Act.

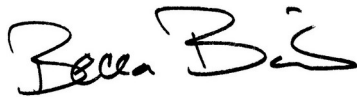
Sincerely,



Elizabeth Warren
United States Senator



Mary Gay Scanlon
Member of Congress



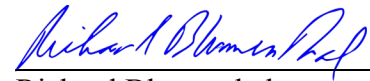
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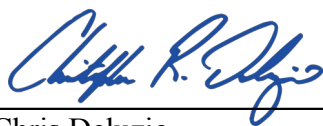
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