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

**“Returning to Fairness”**

**Prepared Remarks of Commissioner Alvaro M. Bedoya  
Federal Trade Commission**

Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street  
Hosted by the Institute for Local Self-Reliance & the Open Markets Institute  
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Thank you for that kind introduction. Thank you to the Institute for Local Self-Reliance and the Open Markets Institute for organizing this conference, and for inviting me to speak. I would also like to thank my antitrust advisors – Max Miller, Catherine Sanchez, Bryce Tuttle, and Kate Conlow – I feel lucky to have them on my team. And thanks to all of you for coming today. I’ll offer the standard disclaimer that my remarks reflect my own views, not those of the Commission or any other commissioner.

**I. A call for fairness, a rule for efficiency.**

The President nominated me to this position roughly a year ago today. I spent a good bit of that time reading antitrust *treatises* cover to cover.

Doing that, I quickly read that the purpose of antitrust is to maximize *efficiency*.<sup>1</sup> I read that the Supreme Court declared it “axiomatic” that the antitrust laws were passed to protect competition, not competitors,<sup>2</sup> which is a way of saying that antitrust laws are not intended to protect the small and allegedly *inefficient*.<sup>3</sup>

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<sup>1</sup> Robert Bork wrote that “[t]he only goal that should guide interpretation of the antitrust laws is the welfare of consumers” and that “productive efficiency [is] the single most important factor contributing to that welfare.” THE ANTITRUST PARADOX (1978), at 405.

<sup>2</sup> See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.”) (internal citations omitted).

<sup>3</sup> See Tim Wu, *After Consumer Welfare, Now What? The ‘Protection of Competition’ Standard in Practice*, COMPETITION POL’Y INT’L, 2018, at 10 (describing “antitrust is meant to protect competition, not competitors” as capturing the critique that antitrust is not designed to “protect[] the inefficient against the efficient”). See also William J. Kolasky & Andrew R. Dick, U.S. Dep’t of Justice, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, <https://www.justice.gov/archives/atr/merger-guidelines-and-integration-efficiencies-antitrust-review-horizontal-mergers> (last updated Aug. 5, 2015) (“[I]t is efficiency, not competition, that is the ultimate goal of the antitrust laws. One of the Division’s senior economists put it very well recently: ‘efficiency is the goal, competition is the process.’”).

But I also used that time to read a lot of *history*, which told a very different story. I learned that small farmers pressed Iowa to pass the nation’s first antitrust law in 1888.<sup>4</sup> I learned that when Congress convened in 1890 to debate the Sherman Act, they did not talk about efficiency.<sup>5</sup> No, the most common complaint in the Sherman Act debates was that a cartel of meatpackers was cheating cattlemen out of a fair price for their livestock.<sup>6</sup> In 1936, Congress spent months debating a bill to protect small-town grocers being driven out of business by powerful chain stores who got secret payoffs from their suppliers.<sup>7</sup>

“What are we trying to get away from these chains?” asked one of the bill’s supporters. “What we are trying to take away from them is secret discounts, secret rebates, and secret advertising allowances. We are trying to take away from them those practices that are *unfair*.”<sup>8</sup>

It wasn’t just 1890 or 1936. Five times in 60 years, Congress passed antitrust laws that in letter or spirit demanded fairness for small business, often *rural* small business.<sup>9</sup> Yet today, it is *axiomatic* that antitrust does *not* protect small business. And that the lodestar of antitrust is not fairness, but efficiency.

How did this happen? What has this focus on efficiency meant for rural America? And what would it look like to return to fairness?

That is what I’d like to talk to you about today.

## II. A child in West Virginia.

Let’s start with health care. In many parts of rural America, *independent pharmacies* are the one place where you can fill your prescriptions, get your shots, and get answers to medical questions. Here’s a story I read on the website of the West Virginia state insurance commissioner about something that happened at one of those pharmacies.

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<sup>4</sup> Max M. Miller, *America Needs Farmers and Farmers Need Better Antitrust Law*, CPI ANTITRUST CHRON. (June 2020).

<sup>5</sup> See Herbert Hovenkamp, PRINCIPLES OF ANTITRUST (2021) at 39 (“[O]nly a few statements in the debates leading up to the Sherman Act sound even remotely like efficiency arguments.”).

<sup>6</sup> Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST (2020) at 197 (“The most often heard complaint in the Sherman Act debates was that the Beef Trust depressed the prices paid to farmers for their cattle.”).

<sup>7</sup> See, e.g., 80 Cong. Rec. 8111-12 (1936) (statement of Rep. Wright Patman describing “dummy brokerage” and a secret contract with a large corporate chain buyer); see also 80 Cong. Rec. 7759-60 (1936) (statement of Rep. Wright Patman describing large manufacturers being coerced into price reductions under the guise of advertising allowances).

<sup>8</sup> 80 Cong. Rec. 8131 (1936) (statement of Rep. John M. Robsion).

<sup>9</sup> See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 130 (2000) (rebutting the assumption that, except for the Robinson-Patman Act, the “general history” of the antitrust laws was “dominated by a concern for low cost, low prices, and high output,” explaining that, to the contrary, “[t]he legislative histories of the Sherman Act, the Clayton Act, and certainly the 1950 Amendments to Section 7 of the Clayton Act were fairly dominated by a . . . strong desire to protect small business . . .”). See also Robert Pitofksy, *The Political Content of Antitrust*, 27 U. PENN. L. REV. 1051, 1058-59 (1979) (describing legislative history of the Sherman Act, Robinson-Patman Act, and the Celler-Kefauver Amendments to the Section 7 of the Clayton Act as evincing a focus on “the disappearance of small independent entrepreneurs and their displacement by massive corporations,” which he described as a “twin goal” of Congress opposite the desire to “preserve competition”).

A family walks into a pharmacy. Their child has cancer. The pharmacist has the child's medicine behind the counter, ready to dispense. But when that pharmacist calls the pharmacy benefit manager, or PBM, for the family's insurance company, they are *denied* authorization to give the family that medicine. Instead, they are told that the medicine can only be dispensed by the PBM's *own* mail order specialty pharmacy. The family was to go home and wait up to two weeks to receive the medicine for their child in the mail.<sup>10</sup>

How did this happen?

Picture a set of 39 companies. Some pharmacies, some PBMs, some insurers. Twenty years ago, these were all separate. Today, those 39 companies have merged into just three vertically integrated entities.<sup>11</sup> And so today, when most people fill a prescription, just one of three entities mediates what medicine they get, what they pay for it, and how they will get it – and that corporate entity makes money by making sure that prescription is filled by its own pharmacy.<sup>12</sup> Even, apparently, when it is cancer medicine. And even, apparently, when doing that will force a child to wait for two weeks.

How did *this* happen? This change from 39 companies to just three?

Merging companies usually predict that the merger is going to save them money by merging. They then predict that they will pass those predicted savings onto consumers via lower prices. For many years, however, it was not a mainstream idea that those predicted price reductions could offset the harm of a merger that increases market power.<sup>13</sup>

That started to change in the 1970s and '80s. The idea took hold within enforcement agencies that mergers, particularly vertical ones, were presumptively good for the economy and good for consumers. This idea was given the greatest weight for vertical mergers, the kind of mergers that help make it so that a pharmacy middleman has an interest in steering a patient to their own pharmacy.<sup>14</sup>

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<sup>10</sup> After the pharmacist contacted the Office of the West Virginia Insurance Commissioner, the matter was escalated to the insurer's management team, and within a few hours the local pharmacist was authorized to dispense the prescription. Press Release, West Virginia Offices of the Insurance Commissioner, *Insured Receives Urgently Needed Medication* (Aug. 9, 2021), [https://www.wvinsurance.gov/Portals/0/pdf/pressrelease/Drug%20Complaint%20Press%20Release%20Draft%208.8.2021-FINAL%20\(1\).pdf?ver=2021-08-10-092804-300](https://www.wvinsurance.gov/Portals/0/pdf/pressrelease/Drug%20Complaint%20Press%20Release%20Draft%208.8.2021-FINAL%20(1).pdf?ver=2021-08-10-092804-300).

<sup>11</sup> Complaint at 72, *Arkansas v. Eli Lilly et al.*, No. 22-2976 (Ark. Pulaski County Ct. filed May 11, 2022).

<sup>12</sup> Adam J. Fein, *The 2021 Economic Report on U.S. Pharmacies and Pharmacy Benefit Managers* (March 2020), at 143 (estimating that in 2020 “about three-quarters of all equivalent prescription claims were processed by three companies: CVS Health (including Caremark and Aetna), the Express Scripts business of Cigna, and the OptumRx business of UnitedHealth Group”).

<sup>13</sup> See generally Kolasky & Dick, *supra* note 3.

<sup>14</sup> For a discussion of cognizable efficiencies see generally U.S. Dep't. of Justice, Non-Horizontal Merger Guidelines (1984) § 4.24 (“As in the case of horizontal mergers, the Department will consider expected efficiencies in determining whether to challenge a vertical merger . . . An extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration. Therefore, the Department will give relatively more weight to expected efficiencies in determining whether to challenge a vertical merger than in determining whether to challenge a horizontal merger.”). See also Kolasky & Dick, *supra* note 3 (describing impact of 1984 guidelines). The FTC joined those guidelines a few years later, with modest amendments. See U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (1992).

There are certainly many factors in merger analysis. But it is inescapable that this presumption of efficiency significantly contributed to making 39 separate companies into the three vertically integrated firms that exist today.<sup>15</sup>

Today, rural independent pharmacies are closing one after another after another.<sup>16</sup> Right here in Minnesota, from 2003 to 2018, thirty rural zip codes lost their only pharmacy.<sup>17</sup>

### III. Cattlemen in Iowa.

I was in Des Moines last month for a conference; I asked our team to set up a listening session with some cattlemen and corn growers. It was about nine or ten people. Every one was in crisis.

The prices of seeds, feed, fertilizer, and farm equipment were going up. The prices of their products were going down. Farmers used to make 40 cents on every dollar spent at the grocery; they make 16 now.<sup>18</sup> They are going out of business by the thousands.<sup>19</sup> “We have a noose around our necks and we’re standing on an ice cube,” said one. “It’s like being picked apart by a chicken,” said another.

The group talked about a lot of factors behind these changes, but they kept returning to consolidation. Fertilizer, seeds, grain buying, meatpacking: There used to be dozens of firms, sometimes over a hundred, in each of these sectors. Now each is dominated by just four; depending on the region, there may now be just one supplier of a key input, or just one meatpacking plant.<sup>20</sup>

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<sup>15</sup> Notably, the public statements around many of the mergers highlight claimed efficiencies. *See, e.g.*, CVS/Caremark., *Presentation: The CVS/Caremark Merger Is in the Best Interests of Shareholders*, SEC File No. 001-14200 (Jan. 31, 2007), at Slide 14, 16 (citing \$400-\$500M in “cost synergies,” the “[b]ulk” of which is related to “purchasing efficiencies”); CVS Health, *CVS Health Completes Acquisition of Aetna* (Nov. 28, 2018) (describing a “new innovative health care model that is local, easier to use, [and] less expensive”); Aetna, *Integration Is the Answer* at 1 (2018), [https://www.aetna.com/content/dam/aetna/pdfs/aetna.com/pdf/Integrated\\_pharmacy.pdf](https://www.aetna.com/content/dam/aetna/pdfs/aetna.com/pdf/Integrated_pharmacy.pdf) (concluding that “[e]vidence shows integrating pharmacy with medical leads to durable cost containment”); Halfmoon Parent Inc. (Cigna Subsidiary), S-4 SEC Filing (2018) (citing “reduc[ed] costs” as a result of Cigna-ESI merger).

<sup>16</sup> Abiodun Salako, Fred Ullrich & Keith Mueller, *Update: Independently Owned Pharmacy Closures in Rural America, 2003-2018*, at 1 (July 2018), <https://rupri.public-health.uiowa.edu/publications/policybriefs/2018/2018%20Pharmacy%20Closures.pdf>.

<sup>17</sup> *Ibid* at 5.

<sup>18</sup> USDA Econ. Research Serv., *Food Dollar Series: Documentation*, <https://www.ers.usda.gov/data-products/food-dollar-series/documentation> (last visited Sept. 19, 2022) (“For calendar year 2020, the farm share was 16.0 cents of each food dollar expenditure.”). Between 1952 and 1980, the farmer’s share of the food dollar generally remained above or below 3 cents of a 40-cent share. Howard Elitzak, USDA Econ. Research Serv., *Food Cost Review, 1950-97*, 780 USDA AG. ECON. REPORT 4-5, 27 (June 1999), [https://www.ers.usda.gov/webdocs/publications/41035/15335\\_aer780\\_1\\_.pdf?v=7424.4](https://www.ers.usda.gov/webdocs/publications/41035/15335_aer780_1_.pdf?v=7424.4).

<sup>19</sup> Alana Semuels, *They’re Trying to Wipe Us Off the Map. Small American Farmers Are Nearing Extinction*, TIME (Nov. 27, 2019) (“The nation lost more than 100,000 farms between 2011 and 2018; 12,000 of those between 2017 and 2018 alone.”).

<sup>20</sup> Brian Deese, Sameera Fazili & Bharat Ramamurti, *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, THE WHITE HOUSE BLOG (Sept. 8, 2021),

What is it like to be down to just one place to sell your livestock? We've known since 1890 that it can depress farmers' prices. But it's more than that. One of the cattlemen described through tears how he had to gas a warehouse full of cattle when the *one* processing plant accessible to him was shut down because of COVID. Another described animal abuse on the lot that he said was unheard of in competitive markets.<sup>21</sup>

But maybe the most shocking thing was how scared they were that something they said would somehow get back to their suppliers or their purchasers and that they would pay for it.<sup>22</sup>

How did this happen?

The merger wave began in the 1980s.<sup>23</sup> Tellingly, when farmers have raised alarms about the consolidation of input and product markets, economists have answered that the consolidation “unquestionably enhance[s] efficiency.”<sup>24</sup>

When antitrust was guided by fairness, these farmers' families were part of a thriving middle class across rural America. After the shift to efficiency, their livelihoods began to disappear.

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<https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families> (“In 1977, the largest four beef-packing firms controlled just 25% of the market, compared to 82% today. In poultry, the top four processing firms controlled 35% of the market in 1986, compared to 54% today. And in pork, the top four hog-processing firms controlled 33% of the market in 1976, compared to 66% today.”).

<sup>21</sup> The producer described a cow that he raised being bolted in the head, killed, dragged out of a trailer with a log chain and dumped in the garbage because the cow had slipped in the trailer on the drive to the processing plant. The producer pleaded with the lot worker to take the cow home instead so she would have time to recover and heal, but the worker informed the producer that no livestock leaves the premises. The cow was given a couple of minutes to try and get up and was then shot. The producer then asked what they did with the newborn baby calves if no livestock leaves the premises; the employee answered that they would be given the same treatment: they would be captive bolted to the head and thrown in the dumpster. The producer explained that calves born on the lot were traditionally returned to producers to take home and raise, rather than being killed.

<sup>22</sup> The producer cited in footnote 24, *supra*, was upset that the protocol was so abusive. They wanted to record the incident but were afraid of retaliation from the processor. They were also concerned that they would not have a market to sell cows if this processor did not allow them back. Therefore, this producer decided to say nothing.

<sup>23</sup> See Mary Hendrickson & William Heffernan, CONCENTRATION OF AGRICULTURAL MARKETS, DEPT. OF RURAL SOCIO. UNIV. MO. (Feb. 2005), [https://www.iatp.org/sites/default/files/258\\_2\\_60439.pdf](https://www.iatp.org/sites/default/files/258_2_60439.pdf); Roger A. McEowen, Peter C. Carstensen & Neil E. Harl, *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. OF AGRIC. L. 1, 2–7 (2002), <http://www2.econ.iastate.edu/faculty/harl/The2002SenateFarmBill.pdf> (providing data on concentration, primarily in beef markets, that began in the 1980s); Anton Bekkerman, Gary W. Brester & David Ripplinger, *The History, Consolidation, and Future of the U.S. Nitrogen Fertilizer Production Industry*, 2 CHOICES MAGAZINE, (2019–20) at 1, 2–3 (“As of 2018, the four largest U.S. ammonia producers represented 75.3% of total U.S. output.”); Sonja Begemann, *10 Years of Seed Industry Mergers, Acquisitions and Retired Brands*, THE SCOOP (July 10, 2019), <https://www.thedailyscoop.com/news-markets/10-years-seed-industry-mergers-acquisitions-and-retired-brands> (documenting the consolidation of seed companies each year since 1997 with data on consolidation going back to the late 1980s); see also Deese, Fazili & Ramamurti *supra* note 20.

<sup>24</sup> Tina L. Saitone & Richard J. Sexton, *Concentration and Consolidation in the U.S. Food Supply Chain: The Latest Evidence and Implications for Consumers, Farmers, and Policymakers*, KA. CITY FED. ECON. REV. 25, 52 (Special Issue 2017), [https://www.kansascityfed.org/documents/764/Concentration\\_and\\_Consolidation\\_in\\_the\\_U.S.\\_Food\\_Supply\\_Chain\\_The\\_Latest\\_Evidence\\_and\\_.pdf](https://www.kansascityfed.org/documents/764/Concentration_and_Consolidation_in_the_U.S._Food_Supply_Chain_The_Latest_Evidence_and_.pdf).

#### IV. A grocer in South Dakota.

That shift didn't just affect farmers. It also affected the communities that depend on them and their products.

Like independent pharmacies, *independent groceries* serve places that bigger companies do not. The lower the income, the lower the population, the more likely it is to be served by an independent.<sup>25</sup>

I recently watched video testimony of an independent grocer named R.F. Buche, who I'm pleased to say is speaking here today. Mr. Buche owns 21 stores in South Dakota. All of them are in Indian country. Mr. Buche's family has been serving Indian country for 117 years. Many of his stores are the only place where locals can easily get fresh milk and produce. Many of them are over an hour's drive from the nearest big box store.<sup>26</sup>

Yet Mr. Buche faces challenges that those big box stores do not. Manufacturers sell products to the big box stores in sizes and packages that they don't offer to him.<sup>27</sup> When he *is* offered the same products, he cannot get the same prices for them. And that's not because of quantity.

Like most independent grocers, Mr. Buche works with a wholesaler. By bundling the orders of multiple independent grocers, that wholesaler can often meet the order sizes of the big box stores. But even then, his wholesaler is not given the same price. That price is kept secret.<sup>28</sup>

When the pandemic hit, manufacturers cut supplies to Mr. Buche and his wholesaler. "Picture this, please," he told Congress. "Pine Ridge, one of the poorest counties in the nation, not having WIC items like formula for babies on their grocery store shelf."<sup>29</sup>

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<sup>25</sup> Clare Cho & Richard Volpe, USDA Econ. Research Serv., *Independent Grocery Stores in the Changing Landscape of the U.S. Food Retail Industry*, USDA ECON. RESEARCH REPORT NO. 240 at 1 (2017), <https://www.ers.usda.gov/publications/pub-details/?pubid=85782>; see also Katharine Yang Bao et al., *Urban Food Accessibility and Diversity: Exploring the Role of Small Non-Chain Grocers*, 125 APPLIED GEOGRAPHY (2020) at 26-27.

<sup>26</sup> *Ending Hunger in America: Food Insecurity in Rural America Before H. Comm. on Rules*, 117th Cong. (2021) (oral testimony of R.F. Buche, President, Buche Foods), <https://www.youtube.com/watch?v=ACQp7q0refA&t=2220s>, ("Buche Oral Testimony"); see, e.g., Locations of Buche Foods Gregory, Buche Foods Mission, Buche Foods Pine Ridge. Buche Foods, *Contact: Buche Foods*, <https://www.buchefoods.com/contact> (last visited Sept. 20, 2022).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Beefing up Competition: Examining America's Food Supply Chain Before the S. Comm. on the Judiciary*, 117th Cong. (2021), (written testimony of David Smith, President & CEO, Associated Wholesale Grocers) <https://www.judiciary.senate.gov/imo/media/doc/Smith%20-%20Testimony.pdf>; (oral testimony of David Smith, President & CEO, Associated Wholesale Grocers) at 1:16:30, <https://www.judiciary.senate.gov/meetings/beefing-up-competition-examining-americas-food-supply-chain>.

<sup>29</sup> Note that this was months before the baby formula shortages caused by the Sturgis plant in Michigan. Abbott's formula plant in Sturgis, Michigan, closed in February 2022; Mr. Buche testified in December 2021. Sasha Pezenik, *Abbott Restarting Production of Its Largest, Most Popular Formula After Months on Hiatus*, ABC NEWS (August 26, 2022), <https://abcnews.go.com/Health/abbott-restarting-production-largest-popular-formula-months-hiatus/story?id=88915048>.

The only way Mr. Buche could keep products like baby formula, ground beef, or Pedialyte on his shelves was by driving over a thousand miles each week to move essential products between his low-volume and high-volume stores. Yet when Mr. Buche would walk into a big box store 50 or 100 miles from his own, those shelves would be full of those products.<sup>30</sup>

What is happening to Mr. Buche is happening to independent groceries around the country. They are closing, by the thousand, creating food deserts across rural America.<sup>31</sup>

How did this happen?

Efficiency happened. In 1936, Congress passed the Robinson-Patman Act, the law I talked about earlier that bans “unfair practices” like “secret discounts” and “secret rebates,” available only to the large and powerful.<sup>32</sup> When it passed that law, Congress went out of its way to “keep open the door of opportunity for the small-business man as well as large.”<sup>33</sup> For decades, Robinson-Patman was a mainstay of FTC enforcement. It arguably prohibits many of the practices Mr. Buche is experiencing.

Then, as efficiency gained ground in the mid-1980s, a view took hold among enforcers and then courts: First, that Robinson-Patman was an *outlier* among antitrust statutes because the Congress that passed it focused on harms to supposedly inefficient small businesses. Second, that the law raised consumer prices.<sup>34</sup> Enforcement slowed to a trickle, and then stopped completely.

Those claims are unproven or incorrect. To my knowledge, some 86 years after its passage, there is not one empirical analysis showing that Robinson-Patman actually raised consumer prices.<sup>35</sup> And none other than Professor Herbert Hovenkamp has explained that

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<sup>30</sup> See Buche Oral Testimony, *supra* note 26.

<sup>31</sup> See generally Bao et al., *supra* note 25 (on food deserts and independent grocers).

<sup>32</sup> See *supra* note 26.

<sup>33</sup> *Ibid.*

<sup>34</sup> See, e.g., Commissioner Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921, 923-24 (1984) (criticizing the “protectionist, non-efficiency oriented nature of the legislation” and arguing that “[a]s with most protectionist legislation, it comes at a cost to the American consumer”); *ibid* at 925-26 (explaining contemporaneous case law circumscribing Robinson-Patman); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (justifying restrictive reading of the statute based on a need to construe the statute “consistently with broader policies of the antitrust laws”); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (same); Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, GEORGE MASON L. & ECON., Research Paper No. 18-15 (2018) at 22 (arguing that the federal government “inflicted large, unnecessary costs on the national economy . . . by enacting the Robinson-Patman Act to elevate the interests of inefficient companies over those of consumers . . .”).

<sup>35</sup> See Daniel P. O’Brien, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets: The Case of Bargaining*. 45 RAND J. ECON. 92, 108 (2014) (“A formal study of the effects of the Robinson-Patman Act on prices has not been conducted, to my knowledge.”); see also Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 ANTITRUST BULL. 733, 734 (1986) (“It is difficult to estimate accurately the effects of the Robinson-Patman Act . . . [M]any of the effects are unobservable and therefore particularly hard to estimate. . . . These conceptual problems are compounded by data problems.”); Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS (2007) at 322 (“In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.”).

Robinson-Patman was *not* an outlier. According to him, the congressional debates around each of the other major antitrust laws were *also* “fairly dominated . . . by a strong desire to protect small business.”<sup>36</sup>

## V. A return to fairness.

I think we need to step back and question the role of efficiency in antitrust enforcement.

If efficiency is so important in antitrust, then why doesn't that word, “efficiency,” appear anywhere in the antitrust statutes that Congress actually wrote and passed?

If efficiency is the goal of antitrust, then why am I charged by statute with stopping *unfair* methods of competition, and not “inefficient” ones?

We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness.

People may not know what is efficient – but they know what's fair. It may be efficient to send a child home to wait two weeks for their cancer medicine. We all know it isn't fair. It may be efficient to force cattlemen to sell their livestock to just one meatpacker. It may be efficient for Pine Ridge to go without baby formula. We all know that that's not what fair markets look like.

That visceral understanding of fairness has often been dismissed as ambiguous and “impressionistic.”<sup>37</sup> I disagree. Because Congress and the courts have told us, directly and repeatedly, how to implement protections against unfairness.

Certain laws that were clearly passed under what you could call a fairness mandate – laws like Robinson-Patman – directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.

But Congress did more than that. As Chair Khan explained last week at Fordham, Congress deliberately charged the FTC to go beyond the limits of the Sherman Act.<sup>38</sup> And then, the Supreme Court came in and repeatedly reaffirmed the idea that our Section 5 authority goes

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<sup>36</sup> See Hovenkamp, *supra* note 7, at 130-31. Of course, Professor Hovenkamp uses that argument to a different end; he argues that because Robinson-Patman was not an outlier in terms of legislative history, there is no reason not to effectively revise Robinson-Patman in the same way that comparable statutes have been revised to align with contemporary economic thinking. *See generally, ibid.*

<sup>37</sup> See Muris & Nuechterlein, *supra* note 35, at 1.

<sup>38</sup> See Remarks of Chair Lina M. Khan as Prepared for Delivery, Fordham Annual Conference on International Antitrust Law & Policy (Sept. 16, 2022) at footnotes 6-8 and accompanying text.



beyond Sherman.<sup>39</sup> So I support Chair Khan’s goal to reactivate enforcement under our unfairness authority, and to issue a policy statement setting out the scope of that authority.<sup>40</sup>

As for me, my focus is on people living paycheck to paycheck. For me, that’s what antitrust is about: your groceries, your prescriptions, your paycheck. I want to make sure the Commission is helping the people who need it the most. And I want to make sure we don’t leave rural America behind.

Thank you.

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<sup>39</sup> See, e.g., *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 477, 454 (1986) (noting that unfairness “encompass[es] not only practices that violate the Sherman Act and other antitrust laws, but also practices that the Commission determines are against public policy for other reasons” (internal citations omitted)); *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394 (1953) (noting that unfair methods of competition “are not confined to those that were illegal at common law or that were condemned by the Sherman Act”).

<sup>40</sup> See Remarks of Chair Lina M. Khan, *supra* note 38, at 4-5.