Buyer Power and Economic Discrimination in the Grocery Aisle:
Kitchen Table Issues for American Consumers

The National Grocers Association

Introduction

The National Grocers Association (NGA) represents independent community grocers across the country, as well as their wholesaler partners. America's approximately 21,000 independent grocers are the true entrepreneurs of the grocery industry, passionately committed to their customers, their employees and the markets they serve. And they are at the heart of local communities, where they provide jobs and boost tax revenue while bringing choice, convenience and value to hard-working Americans.

Our members compete in markets that are increasingly dominated by a handful of national and international chains. These dominant chains wield tremendous economic power to the detriment of independent retailers and producers and the American consumer. For decades, they have used their "buyer power" to dictate terms and conditions to suppliers, which in turn forces suppliers to discriminate against independent grocers and drives consolidation throughout the supply chain. Buyer power also harms small and mid-sized producers, such as independent farmers and ranchers, who are paid prices far below competitive levels.

Although these problems are not new, the grocery power buyers have taken advantage of the COVID-19 pandemic to further entrench their economic power at the expense of smaller competitors and producers. Many independent grocers have struggled throughout the pandemic to stock must-have products—such as essentials like paper towels and toilet paper, cleaning supplies, and critical packaged foods like canned soup—while large national chains have exercised their buyer power to demand on-time, complete orders, and in some cases to secure excess supply. In those months that small businesses struggled to keep products on their shelves, dominant retailers such as Amazon, Costco, and Dollar General posted their largest profits ever, and Walmart doubled the size of its e-commerce business.[1]

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[1] Jeffrey Dastin & Akanksha Rana, *Amazon Posts Biggest Profit Ever at Height of Pandemic in U.S.*, REUTERS, July 30, 2020, https://www.reuters.com/article/us-amazon-com-results/amazon-posts-biggest-profit-ever-at-height-of-pandemic-in-u-s-idUSKCN24V3HL; Phil Wahba, *Walmart's E-Commerce Sales Nearly Double As Shoppers Go Beyond Groceries in Online Orders*, FORTUNE, Aug. 18, 2020, https://fortune.com/2020/08/18/walmart-ecommerce-sales-covid-doug-mcmillon; Jeremy C. Owens, *Costco Clears $4 Billion in Earnings For The First Time Amid Record Growth*, MARKETWATCH, Sept. 24, 2020, https://www.marketwatch.com/story/costco-clears-4-billion-in-earnings-for-first-time-amid-record-growth-but-the-stock-is-falling-11600979558, Micah Maidenberg, *Dollar General, Dollar Tree Draw in Consumers Amid Economic Weakness*, WALL ST. J., Aug. 27, 2020,

The result of increasing concentration and unchecked buyer power is a system that benefits a select few at the expense of everyone else, including consumers, workers, and independent retailers and suppliers: consumers have a narrowing range of choice to shop for the goods and services they need; entrepreneurs and independent businesses struggle to start and sustain businesses; and producers such as farmers and ranchers are forced to accept unfavorable economic terms, conditions, and prices imposed by the largest members of a consolidated supply chain.

America's buyer power problem was not inevitable. The antitrust laws were designed to address these very issues, including by protecting consumers and suppliers from firms with buyer power and by defending small businesses from the predatory tactics of large rivals. And for many decades they did.[2] It was only in the last 30 years that policymakers and courts adopted an orthodoxy that "mega"-sized firms are more efficient and better positioned to drive down consumer prices, sacrificing other considerations that animated the antitrust laws.

Today, a growing consensus is emerging that the antitrust laws are a critical tool in the economic toolbox to address rising levels of concentration and the harms that flow from these market structures. Congress—on a bipartisan basis—and the public are increasingly understanding that effective and timely antitrust enforcement should promote and protect competitive markets, including by ensuring a level playing field and preventing large competitors from acting to disadvantage smaller rivals and depriving consumers of the benefits of competitive markets.

This paper uses independent grocers as a case study to explore the problems that flow from increased retailer buyer power and economic discrimination in today's economy. Part I details the many benefits of independent grocers. Part II discusses the growing concentration in the grocery sector, and how dominant retailers threaten the health of the grocery ecosystem. Part III describes the ways in which dominant players in the grocery industry use their buyer power to impose discriminatory terms and conditions on suppliers that disadvantage smaller, independent grocers and harm consumers. Part IV explores how antitrust enforcement has failed to maintain a level playing field for independent businesses trying to compete against increasingly powerful rivals.

I. Independent Grocers Benefit Local Economies, Competition, and Consumers

Small and mid-sized independent businesses are critical drivers of competition, economic growth, and jobs in American communities. They compete on the basis of price, but also on other important dimensions of competition that are often overlooked by bigger players—

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https://www.wsj.com/articles/dollar-general-dollar-tree-draw-in-consumers-amid-economic-weakness-11598548959?mod=article_inline (reporting Dollar General quarterly sales rose by about 19% in the second quarter of 2020).

[2] *See* Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARVARD L. & POLICY REV. 235, 270 (2017) (citing the legislative history of the Sherman Act and the Clayton Act).

including by offering higher quality, better service, more convenient locations, and a greater diversity of products.

This is particularly true in the grocery sector. Independent grocers, which are family or employee-owned grocery retailers, account for close to one percent of the nation's overall economy and are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes.[3] These grocery stores act as an economic anchor in their communities, attracting consumers and generating foot traffic that creates opportunities for other area businesses.

Independent grocers are also strong competitors. In addition to price, independent grocers compete through food quality, variety, and availability; selection of healthy options; selection of locally produced foods; cleanliness; checkout speed; and availability of staff; as well as accessibility and convenience of location.[4] To remain competitive and keep food prices as low as possible, independent grocers operate with a median net profit margin of about 0.7 percent.[5]

Consumer sentiment reflects the benefits of independent and regional grocers. In a 2019 review of grocery stores, Consumer Reports found that consumers overwhelmingly preferred regional grocery stores over national chains, including the warehouse clubs and supercenters that dominate the space.[6] The regional grocery stores included in the survey outperformed national chains on a number of dimensions of competition, including price competitiveness, breadth of goods, and produce quality.[7]

Independent grocers also play a crucial role in ensuring food access and in meeting local demand. Independent grocers serve smaller, rural communities as well as high density urban ones. These stores are particularly important to inner-city and rural communities, many of which would otherwise suffer from a lack of access to healthy foods.[8] A 2017 study found that from 2005 to 2015, the number of independent grocery stores in rural counties and in counties with

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[3] How COVID-19 Impacted Small Businesses Across the Food System: Hearing Before the House Small Business Comm., 116th Cong. (2020) (statement of Jimmy Wright, Owner, Wright's Market On Behalf of the National Grocers Association), https://smallbusiness.house.gov/uploadedfiles/09-30-20_mr._wright_testimony.pdf [hereinafter Testimony of Jimmy Wright].

[4] *Best Grocery Stores and Supermarkets*, CONSUMER REPORTS, Apr. 16, 2019, https://www.consumerreports.org/grocery-stores-supermarkets/best-grocery-stores-and-supermarkets.

[5] The average net profit for independent grocers in 2019 was 1.05 percent, and 35.1 percent of independent grocers reported negative profit results in 2019. *See* National Grocers Association & FMS Solutions, 2020 Independent Grocers Financial Survey, https://blog.fmssolutions.com/blog/eng/2019-performance-enabled-independent-grocer-success-amid-pandemic.

[6] Consumer Reports, *supra* note 4.

[7] *Id*.

[8] In 2009, the U.S. Department of Agriculture (USDA) began mapping food access to identify communities where there was low availability of affordable, nutritious foods. The USDA's most recent data estimates that approximately 17 million people live in food-desert communities. *See* Food Access Research Atlas, U.S. Dep't of Ag., Econ. Res. Serv., https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/#changes.

growing Black populations increased, while the number of chain stores decreased in these areas.[9] In one striking example, Detroit, Michigan, a city of 700,000 residents (78 percent of whom are Black), is served by only three locations of national chain grocery stores in its 143 square mile area, but approximately 70 independent grocery stores.[10] Studies have also shown that independent grocers are more likely to serve low-income areas, and that Supplemental Nutrition Assistance Program (SNAP) benefits are more likely to be redeemed at independently owned stores, particularly in rural areas.[11]

In small towns and urban neighborhoods that are not served by independent grocers, many consumers are left with no access to healthy food. For example, a 2018 study found that in northern Tulsa, Oklahoma, there is no full-service grocery store, and the only option for residents to buy groceries close to their home are dollar store chains.[12] Those stores offer only a narrow selection of processed foods, and there are no fresh vegetables, fruits, or meats on the shelves.[13]

In addition to offering competitive products and services, independent grocers also benefit communities by creating opportunities and serving populations that are overlooked by large chains. Independent businesses extend opportunities throughout rural, suburban and urban America and protect local communities from being overly dependent on one business or industry.[14]

Many independent grocers are family-owned or employee-owned businesses that have been in business for generations. Economic research has shown that a higher percentage of small businesses in a community is strongly associated with greater economic well-being, including employment growth.[15]

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[9] Clare Cho and Richard Volpe, *Independent Grocery Stores in the Changing Landscape of the U.S. Food Retail Industry*, ERR-240, U.S. Dep't of Ag., Econ. Res. Serv., Nov. 2017, https://www.ers.usda.gov/webdocs/publications/85783/err-240.pdf.

[10] Nathaniel Meyersohn, *How The Rise of Supermarkets Left Out Black America*, CNN BUSINESS, June 16, 2020, https://www.cnn.com/2020/06/16/business/grocery-stores-access-race-inequality/index.html.

[11] *See, e.g.*, Powell, L., S. Slater, D. Mirtcheva, Y. Bao, and F. Chaloupka, *Food Store Availability and Neighborhood Characteristics in the United States*, Preventive Medicine 44(3):189-195 (2007); King, R., E. Leibtag, and A. Behl, *Supermarket Characteristics and Operating Costs in Low-Income Areas*, Agricultural Econ. Rep. No. 839, U.S. Dep't of Ag., Econ. Res. Serv., 2004.

[12] Stacy Mitchell and Marie Donahue, *Report: Dollar Stores Are Targeting Struggling Urban Neighborhoods and Small Towns*, Dec. 6, 2018, https://ilsr.org/dollar-stores-target-cities-towns-one-fights-back/ (identifying various towns that have lost their only grocery store and observing that "[l]ocal grocers that survived Walmart are now falling to Dollar General"). There is growing evidence that these stores are not responding to economic distress—but rather causing it. In rural areas and urban centers, these dominant retailers have saturated communities with multiple outlets, forcing full-service grocery stores to close and making it impossible for new grocers to open. *Id.*

[13] *Id*.

[14] *See* Cho and Volpe, *supra* note 9 ("In addition to improving food access, independent stores provide job opportunities that may help attract residents and generate tax revenues that aid in development efforts.").

[15] *See, e.g.*, Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-Being?* (Fed. Res. Bank of Atlanta Community and Econ. Disc. Paper No. 01-13, 2013), https://www.frbatlanta.org/-/media/documents/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.pdf.

Independent grocers also foster innovation and new business growth at the supplier level by stocking products from local and small-scale businesses. For example, independent grocers are a critical distribution channel for local brands, many of which are not stocked at larger stores. NGA member Woodman's Food Market, which operates fifteen retail grocery stores located in Wisconsin and Illinois, carries Mad Dog and Merrill condiments, Bucky Badger snacks, and Huber jams and jellies that larger competitors do not distribute. In addition, various smaller suppliers, including suppliers of spices, seasonings, sauces, sausages, and salad dressing brands, have used independent grocers to enter the market before reaching the shelves of larger chains. And during the pandemic, local craft distillers around the country were able to shift their production capacity to manufacture alcohol-based hand sanitizer, a product they largely distributed to consumers through independent businesses.[16] Without independent grocers, these new entrants and smaller suppliers would lose a key channel to reach consumers and grow their businesses.

Small businesses also have a proven track record of supporting their employees during crises. According to a recent NGA and FMS Solutions study, about 85 percent of independent grocers paid "hero pay" to their workers by increasing overtime pay or paying employees above their normal rate of pay for working during the pandemic.[17] Wright's Market, a family-owned business serving the community of Opelika, Alabama, provided an extra week of pay to its employees early in the pandemic and provided bonuses and overtime pay as the pandemic continued.[18] Other small businesses have reporting staying open just to pay their employees, or at a minimum, to preserve their healthcare coverage during the pandemic.[19]

II. Dominant Retailers Threaten the Healthy Grocery Ecosystem

Despite the benefits of a robust independent retail grocery sector, grocery is becoming increasingly concentrated. Independent grocers are constantly losing ground to a handful of dominant retailers, to the disadvantage of both consumers and local communities.

Today, large, national chains increasingly control the grocery sector.[20] For example, Walmart alone currently captures one out of every four dollars Americans spend on groceries

[16] For example, New Holland Brewing Company quickly shifted its production to hand sanitizer at the start of the pandemic, produced 1,000 gallons of hand sanitizer by the end of March 2020. Its hand sanitizer was delivered to health care and emergency providers as well as grocery stores throughout West Michigan. *See Coppercraft, New Holland Produce 1,000 Gallons of Hand Sanitizer for Area Hospitals*, KTVB7, Mar. 27, 2020, https://www.ktvb.com/article/news/health/coronavirus/lakeshore-distilleries-create-1000-gallons-hand-sanitizers/69-2ee9b6de-3bf8-4164-8ea0-16acf518e90b.

[17] Testimony of Jimmy Wright, *supra* note 3, at 3.

[18] *Id*.

[19] Stacy Mitchell, *The Imminent Small-Business Collapse*, THE PROSPECT, Mar. 22, 2020, https://prospect.org/economy/imminent-small-business-collapse-coronavirus.

[20] *Courage to Learn: Agriculture*, AMERICAN ECON. LIBERTIES PROJECT, Jan. 11, 2021, https://www.economicliberties.us/our-work/ctl-agriculture (the market share of the top four grocers in the United States has increased from 25 percent in 1997 to 44 percent in 2018).

nationwide.[21] And in many areas Walmart's presence is even greater: According to a 2019 study, Walmart captured more than 50 percent of grocery sales in 43 metropolitan areas in the U.S., and more than 70 percent of grocery sales in 38 regions.[22]

These chains' dominance is even more striking given consumers' preference for regional grocery stores—where those stores exist—and consumers' negative views of the grocery shopping experience at large national chains. For example, in the Consumer Reports study, Walmart received a "disappointing" overall score, and it received the lowest score of *any store* included in the survey for employee helpfulness and attentiveness.[23]

In addition to degrading the consumer experience, growing concentration has contributed to stagnating wage growth and widening income inequality.[24] Large chains centralize employment opportunities in a small number of American cities, and pay high wages to a select few. Large, non-local businesses have a negative effect on income.[25] People who work for retail businesses with fewer than 100 employees make about 30 percent more than employees working at chains with more than 10,000 employees.[26] Even the smallest retailers—those with fewer than ten employees—pay more, on average, than large, national chains.[27]

Growing concentration has also harmed farmers, farm communities, and food production workers. Because of their bargaining leverage, dominant retailers can and do aggressively drive down the prices they pay to farmers, ranchers, meatpackers, and other suppliers.[28] The result is that dominant retailers are capturing a greater and greater share of each consumer dollar spent on food, while suppliers are forced to lower the prices they pay to farmers and the wages they pay to

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[21] Stacy Mitchell, *Walmart's Monopolization of Local Grocery Markets*, INST. FOR LOCAL SELF-RELIANCE, June 2019, https://ilsr.org/wp-content/uploads/2019/06/Walmart_Grocery_Monopoly_Report-_final_for_site.pdf.
[22] *Id*.
[23] *Id*.
[24] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AMER. SOCIOLOGICAL REV. 2 (2018), https://journals.sagepub.com/doi/full/10.1177/0003122418762441 (analyzing panel data on publicly traded companies and concluding that "[t]he spread of unequal bargaining relations between corporate buyers and their suppliers has slowed wage growth for workers").
[25] Stephan Goetz & David Fleming, *Does Local Firm Ownership Matter?*, 25 ECON. DEV. Q. 277 (2011), https://journals.sagepub.com/doi/abs/10.1177/0891242411407312 ("Economic growth models that control for other relevant factors reveal a positive relationship between density of locally owned firms and per capita income growth but only for small (10-99 employees) firms, whereas the density of large (more than 500 workers) firms not owned locally has a negative effect.").
[26] Stacy Mitchell, *Why Small Businesses Matter for Workers*, INST. FOR LOCAL SELF-RELIANCE, April 18, 2018, https://ilsr.org/how-small-businesses-benefit-workers.
[27] *Id*.
[28] United Food and Commercial Workers International Union, Report: Ending Walmart's Rural Stranglehold ("Walmart's entry into the retail grocery market in the early 1990s, and the company's meteoric rise to become the number one grocery retailer, gave it unprecedented buyer power over the packers to continue exerting strong downward pressure on prices paid to suppliers, preventing the meatpackers, workers and farmers from recovering their previous share of the consumer meat retail dollar.")

workers, and market participants throughout the supply chain have less money to invest in expanding their businesses.[29] All of this has a devastating impact on rural communities.[30]

Historically, some have argued that the relentless drive to reduce labor and supply costs by national chains is economically beneficial, and that a concentrated grocery sector is more efficient and more innovative.[31] But in reality, industries with more small businesses are consistently and significantly *more* innovative than industries dominated by a few large companies.[32] And the purported tradeoff between efficiency and small and midsized businesses is false. Smaller and medium-sized grocers often purchase products through cooperatives and other mid-sized wholesalers to take advantage of the same economies of scale in distribution and best practices in inventory management as national chains.[33] Grocery wholesale cooperatives like Wakefern, Topco, and other NGA wholesale members provide scale economies that allow grocers to match the efficiency of large chains while preserving the benefits of independent businesses. For example, these wholesale cooperatives combine purchases to buy in the most efficient manner possible (by the truckload) and provide other services at scale, including advertising, technology, and risk management.[34] At bottom, the claim that power buyers deliver greater benefits to consumers because they are more efficient is simply wrong.

Moreover, economic research suggests that dominant players do not pass their efficiencies on to consumers. For example, one study examining the impact of grocery consolidation on food prices in major urban centers found that while consolidation may have generated economies of scale for supermarkets, those benefits are not being passed on to consumers, and many markets are vulnerable to significant price increases due to high levels of concentration.[35]

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[29] *See id*. at 2-4, 7-8.

[30] *Id*. at 19 ("[T]his inevitably leads to lower wages for workers, less money for farmers, growers and ranchers and fewer choices for consumers. Instead of providing rural economic development, Walmart stores become wealth extraction points that bleed our rural communities dry.")

[31] The FTC has approved several major mergers between large grocery chains in recent years, including Kroger and Harris Teeter in 2014 and Albertsons and Safeway in 2015. In some cases, the FTC has required divestitures to address competitive harm caused by the mergers, only to see those divestitures fail. For example, the FTC required Safeway and Albertsons to sell off 168 stores as a condition of the merger. Months after the sale, however, one of the major buyers of the stores declared bankruptcy and shuttered the divested stores. Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J., Oct. 9, 2015, http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

[32] Wilfred Dolfsma & Gerben van der Velde, *Industry Innovativeness, Firm Size, and Entrepreneurship: Schumpeter Mark III?*, 24 J. EVOLUTIONARY ECON. 713 (2014), https://www.researchgate.net/publication/272591124_Industry_innovativeness_firm_size_and_entrepreneurship_Schumpeter_Mark_III ("[W]e find that, in a number of different and robust model specifications, the contribution of a presence of large firms to industry innovativeness is distinctly negative for industry innovativeness . . . . Small firms, however, consistently, positively and significantly contribute to industry innovativeness.").

[33] *See* Steve W. Martinez, *The U.S. Food Marketing System: Recent Developments, 1997-2006*, U.S. Dep't of Ag., Econ. Res. Serv., May 2007, https://www.ers.usda.gov/webdocs/publications/45818/11562_err42_1_.pdf?v=4803.8.

[34] *Id*.

[35] Kyle W. Stiegert, *Impacts of Nontraditional Food Retailing Supercenters on Food Price Changes*, Food System Res. Group, Dep't. of Ag. and Applied Econ., U. of Wisc.-Madison, FSRG Monograph Series No. 20, Feb. 2006,

All of this raises the question: if a concentrated retail grocery sector is harmful to consumers, the economy, and local communities why are dominant retailers growing their control of the sector?

III. Retail Buyer Power and Economic Discrimination in Grocery

In the grocery sector, demands from power buyers impose disadvantageous terms, conditions, and prices on independent grocers. This economic discrimination reduces the smaller rivals' competitiveness through higher costs or reduced product supply or quality, and directly harms competition, consumers, and the economy. Retail buyer power has also driven increased concentration in the grocery supply chain, reducing alternatives for independent retailers, producers, and consumers alike. This makes the supply chain more vulnerable to disruption, ultimately raising prices and threatening supply, and creating a vicious cycle that enhances the power of dominant retailers.

Buyer-side market power exists when a purchaser can use its bargaining leverage to secure sub-competitive prices from its suppliers—i.e., prices or terms below those that would exist in a competitive market—or impose discriminatory terms on the purchaser's rivals—i.e., obtain price or supply concessions that are not available to its competitors.[36] In the grocery sector, the large national chains have buyer power because of their significant bargaining leverage over suppliers.[37] This leverage exists because the national chains are critical "gatekeepers" between grocery suppliers and consumers. These retailers control a substantial proportion of the shelf space—whether physical or digital—that provides the key distribution channel for suppliers' products.[38] For example, the top four national grocery chains controlled 44 percent of grocery sales in 2018.[39]

Critically, this dependency is asymmetric; the dominant grocery retailers are not nearly as dependent on a particular supplier as the supplier is on the retailer. This is because a particular grocery supplier's products generally represent only a small fraction of a grocery retailer's sales, which may encompass tens of thousands of products.[40] And a dominant retailer often enjoys several potential branded suppliers for a particular product in addition to selling its own, private label brand versions. As a result, a dominant retailer has a substantial advantage over its

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https://www.researchgate.net/publication/228790460_Impacts_of_nontraditional_food_retailing_supercenters_on_food_price_changes (examining pricing data from 1993 through 2003 for 23 demographic metropolitan areas and concluding "our findings suggest if supermarkets did receive efficiency gains from mergers, they did not pass cost savings on to consumers").

[36] John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L. J. 625, 652 (2005).

[37] Sofia Berto Villas-Boas, Vertical Relationships Between Manufacturers and Retailers: Inference with Limited Data, 74 REV. OF ECON. STUDIES 625, 647 (2007) (analysis of U.S. wholesale and retail yogurt prices consistent with "high bargaining power of retailers" relative to manufacturers).

[38] Paul Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L. J. 2, 555 (2005).

[39] Claire Kelloway and Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Institute, Mar. 27, 2019, http://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system.

[40] *Id.*

suppliers in a negotiation because the risk for the retailer, if the supplier refuses its demands and no deal results, is substantially smaller than it is for the supplier.[41]

The paradigmatic example for this one-sided bargaining dynamic is Walmart. Its ability to unilaterally demand concessions from suppliers is legendary. For example, in 2017, Walmart announced a new requirement that suppliers for Walmart stores and Walmart's e-commerce business must provide on time and in full deliveries 75 percent of the time.[42] Since then, Walmart has repeatedly tightened this requirement, raising the bar for on time, in full deliveries from 75 percent to 85 percent and then to 87 percent in 2019.[43] In September 2020, while manufacturers and suppliers throughout supply chains were struggling to safely meet demand during the COVID-19 pandemic, Walmart raised the bar again, demanding 98 percent on time, in full deliveries.[44] Walmart punishes suppliers that fail to meet its demands by charging a penalty of 3 percent of the cost of goods sold—a devastating penalty in an industry already operating with razor-thin margins.[45]

Likewise, in its report on competition in the digital markets, the U.S. House Judiciary Committee found that Amazon exercises significant market power over suppliers.[46] In one striking example, the Committee found that Amazon and Walmart ignore minimum advertised prices set by brand manufacturers, by which other sellers must abide.[47] One anonymous source explained that suppliers have "no realistic threat" against Amazon, because they have no other path to reach their customer base.[48] And the Committee cited internal Amazon documents showing that it does not fear the consequences of failing to comply with suppliers' policies.[49]

Two of the anticompetitive effects that flow from unchecked retail buyer power in the grocery sector are economic discrimination and supply chain concentration.

Economic Discrimination: For decades, dominant players in the grocery industry have used their buyer power to impose discriminatory terms and conditions on suppliers that disadvantage smaller, independent grocers and harm consumers. More recently, e-commerce giants have

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[41] *Id.*

[42] Jennifer Smith & Sarah Nassauer, *Walmart Toughens Delivery Demands for Suppliers*, WALL ST. J., Mar. 6, 2019, https://www.wsj.com/articles/walmart-toughens-delivery-demands-for-suppliers-11551914501.

[43] *Id*.

[44] Thad Rueter, *Walmart Pressures Suppliers on Delivery Times*, PROGRESSIVE GROCER, Sept. 4, 2020, https://progressivegrocer.com/walmart-pressures-suppliers-delivery-times.

[45] *Id*.

[46] Investigation of Competition in Digital Markets Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 258 (2020).

[47] Brand manufacturers often establish minimum prices to prevent retailers from freeriding off of other stores' investment and promotions, product displays, and expertise. *Id*. at 258-259; *see also* n.1584 (citing an Amazon internal document asking "Why did Walmart break MAP and we didn't?").

[48] *Id*.

[49] *Id*. at 259 & n.1584 (citing an internal Amazon document to "audit that we are price matching . . . any diapers.com pricing. If this puts us in the soup with P&G on their pampers map price, so be it").

emerged using the same playbook. Because these powerful buyers are the gatekeepers to consumers, suppliers are left with virtually no leverage to negotiate.[50]

Examples of economic discrimination in the grocery sector include:

- Price discrimination: charging one purchaser a more favorable price than other purchasers for the same product. Price discrimination in grocery can take the form of failures to provide price promotions or packaging with a lower per unit cost. It also comes in the form of less favorable payment terms. For example, certain power buyers demand and receive "scan-based payment" terms from suppliers, meaning they only pay once a product has been scanned for final sale to a customer. Meanwhile, the same suppliers require independent grocers to pay for products upon receipt (or within a fixed period of receipt), shifting the risk that a product sits on the shelves to the grocers. These terms provide significant advantages for dominant retailers, who in effect receive free credit on their purchases and can stock a greater diversity of products, without taking on any risk that the products will take time to sell, or will not sell at all.

- Product supply discrimination: refusing to supply products to independent grocers that are made available to powerful buyers, or favoring power buyers on allocations or delivery terms. For example, suppliers often enforce arbitrary minimums on certain products to effectively make them exclusive to power buyers. For example, one NGA member wanted to carry a 36-count jumbo pack of a popular, high-end toilet paper, which is regularly available at Sam's Club. The manufacturer said they could only offer the product if the member committed to 2,380 pallets of the jumbo packs—a volume that would have exceeded all of the member's sales of that product in the previous year. Independent grocers have also been told that they cannot purchase "test" products for months or even years after they have become widely available at Walmart or other large chains.

- Packaging discrimination: refusing to provide certain package sizes or promotional packaging to certain grocers, while providing them to competing retailers. Some manufacturers have stopped supplying large package size versions of products—that some consumers associate with greater value—to independent grocers while providing them to big box retailers or club stores. In addition, Dollar General has used its buyer power to demand "cheater size" products, which include smaller amounts in a package that can then be sold at a lower price. These "cheater size" products create a false impression among

[50] *See, e.g.*, Albert Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?*, AAI Working Paper No. 16-02 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Working-Paper-No.-16-02.pdf (detailing laws related to abuse of superior bargaining position outside the United States and arguing that "a serious gap exists in the law regulating vertical relations" in the U.S.).

> consumers that they are paying a lower price for the same product they see at independent grocers.

Economic discrimination has a two-fold effect on smaller competitors such as independent grocers: First, the powerful buyer secures more advantageous terms for itself. Second, the powerful buyer imposes higher purchasing costs or other disadvantages on its rivals, as suppliers seek to make up for the discounts and other advantages they are forced to extend to the powerful buyer with higher charges to other buyers. In many cases, the wholesale price offered to independent grocers is higher than the *retail* price at wholesale clubs like Costco. As a result, independent grocers often resort to buying entire pallets of must-have products from their competitors.[51]

Economists call this phenomenon "the waterbed effect," and have explained how it harms consumers as well as rivals:

> While a large and powerful firm improves its own terms of supply by exercising its bargaining power, the terms of its competitors can deteriorate sufficiently so as ultimately to increase average retail prices and, thereby, reduce total consumer surplus. Such consumer detriment from the waterbed effect is more likely if the adversely affected firms are already sufficiently squeezed, due to relatively higher wholesale prices and, consequently, lower market shares.[52]

Economists have observed this effect in the grocery industry, explaining that buyer power allows dominant players to enter into a "virtuous circle" in which they use their power to undercut smaller rivals and gain market share, which they then exploit to further undercut smaller rivals and capture even more market share.[53]

There is a foreseeable outcome of Walmart's exercise of buyer power, described above, in demanding ever higher requirements for on time and in full deliveries: Suppliers focus on fulfilling Walmart's shipments at the expense of Walmart's competitors because Walmart is the indispensable customer. Smaller grocers receive fewer on time, full deliveries, and are forced to over-inventory products, which raises their costs and damages their ability to fairly and

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[51] For example, one NGA member purchased over $2 million in various products from Sam's Club in 2015 and 2016, and over a $1 million from January through July of 2017, when Sam's Club made the decision to stop selling to its rival. Even with Sam's Club's markup and the added transportation costs, the retail price at Sam's Club was still lower than the price available to the independent—even through cooperative wholesalers that buy in large volume.

[52] Roman Inderst & Tommaso M. Valletti, *Buyer Power and "The Waterbed Effect,"* LIX J. INDUST. ECONOMICS 1, 2, (2011); *see also* Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 336-37 (2008) (discussing the circumstances that can give rise to the waterbed effect, and how the phenomenon can distort downstream competition and harm consumers).

[53] *See* Dobson, *supra* note 38 (noting that the circle is only "virtuous" for the dominant retailer but "vicious" for the smaller, independents).

effectively compete. As a result, consumers lose access to lower prices at their local grocers, and in many cases lose access to must-have products from local grocers entirely.

Amazon has also exercised its economic power to impose prices on suppliers that are significantly lower than the prices independent grocers pay. In many cases, Amazon's retail price is lower than independent grocers' wholesale price. In fact, one NGA member tried to offer diapers to an employee at cost, only to learn that the employee was paying a lower price for diapers on Amazon than the NGA member was paying at wholesale.[54]

The economic discrimination imposed by Amazon through its suppliers is also apparent in the delivery space. On Cyber Monday 2020, UPS notified drivers across the U.S. to stop picking up packages from a group of retailers, including Gap, Nike, L.L. Bean, and Macy's, due to surging demand and limited capacity.[55] There were no reports that UPS imposed similar restrictions on Amazon, its largest customer.[56]

Competition authorities outside the United States have investigated the problems associated with buyer power and economic discrimination in the grocery industry.[57] For example, in 2000, the U.K.'s Competition Commission released a study of the grocery industry that identified 52 practices by dominant grocery retailers that could have potentially distorting effects on supplier and/or retailer competition. The Commission concluded:

> These practices, when carried on by any of the major buyers, adversely affect the competitiveness of some of their suppliers with the result that the suppliers are likely to invest less and spend less on new product development and innovation, leading to lower quality and less consumer choice. This is likely to result in fewer new entrants to the supplier market than otherwise. Certain of the practices give the major buyers substantial advantages over other smaller retailers, whose competitiveness is likely to suffer as a result, again leading to a reduction in consumer choice.[58]

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[54] For a detailed look at how Amazon became the dominant e-commerce supplier of diapers, *see* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) ("Through its purchase of Quidsi, Amazon eliminated a leading competitor in the online sale of baby products. Amazon achieved this by slashing prices and bleeding money, losses that its investors have given it a free pass to incur—and that a smaller and newer venture like Quidsi, by contrast, could not maintain.").

[55] Paul Ziobro, *UPS Slaps Shipping Limits on Gap, Nike to Manage E-Commerce Surge*, WALL ST. J., Dec. 2, 2020, https://www.wsj.com/articles/ups-slaps-shipping-limits-on-gap-nike-to-manage-e-commerce-surge-11606926669.

[56] In January 2020, UPS boasted a 9 percent growth in total volume across all products, and reported that its growth was led by its largest customer, Amazon. *See* Press Release, UPS Releases 4Q 2019 Earnings, Jan. 30, 2020, http://www.investors.ups.com/news-releases/news-release-details/ups-releases-4q-2019-earnings.

[57] *See, e.g.*, OECD, Competition issues in the Food Chain Industry (2013) (incorporating submissions from over 30 competition authorities).

[58] U.K. Competition Comm'n, *Supermarkets: A Report on the Supply of Groceries From Multiple Stores in the United Kingdom* at 7, https://web.archive.org/web/20070109000906/http://www.competition-commission.org.uk/rep_pub/reports/2000/fulltext/446c1.pdf. The 2013 OECD survey of market conditions in the

The harms to consumers from economic discrimination can be substantial. As described above, these practices may raise rivals' costs, causing them to charge their customers higher prices. Dominant retailers can raise their own prices if independent competitors are driven out of a particular geographic market. And beyond price, consumers also lose on other dimensions of competition—including convenience, service, and quality—when independent grocers are hobbled or forced to close.[59] Moreover, all of these problems disproportionately impact rural communities and urban centers, which are more likely to be served by independent grocers.

Dominant retailers such as national big box or club store chains often seek to justify discriminatory treatment targeting independent grocers—and avoid condemnation under the antitrust laws—by arguing that independent grocery stores are in a different "channel of trade" and therefore are not competitors. But these channel distinctions do not reflect reality. Independent grocery stores vary widely in size and format, including ones that rival the biggest national chains in size.[60] And the evidence shows that consumers see big box or club stores and "traditional" grocery stores as alternatives for an array of products, including core staples such as produce, packaged goods, paper products, and cleaning supplies.[61]

Although dominant retailers often tout the "efficiencies" of size and scale, there is little evidence that their market power as buyers actually translates into lower consumer prices. In fact, studies have found a link between higher levels of local retail concentration and grocery prices.[62] Rather than passing their savings on to consumers, power buyers squeeze their suppliers for greater margins. In other words, today's market structure allows dominant retailers to transfer wealth from farmers, manufacturers, suppliers, and consumers to their own bottom lines.[63] And dominant retailers may rest on their laurels and become less efficient once the independents are gone and competition reduced, destroying value entirely.[64]

Supply Chain Concentration: Buyer power is also increasing concentration throughout the grocery supply chain. Power buyers' demands on suppliers for lower costs are forcing consolidation among food and consumer goods manufacturers. For example, meat packing in

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food supply chain across 30+ countries concluded that "increasingly dominant retail firms" was an already common but increasing trend across many countries. OECD 2013, *supra* note 57, at 36.

[59] John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625 (2005).

[60] For example, NGA member Woodman's Food Market is believed to operate among the fifteen largest grocery stores in the world, averaging in excess of 235,000 square feet in size per store. *See* Complaint, *Woodman's Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016).

[61] *See Best Grocery Stores and Supermarkets*, CONSUMER REPORTS, Apr. 16, 2019, https://www.consumerreports.org/grocery-stores-supermarkets/best-grocery-stores-and-supermarkets (detailing grocery store attributes that are important to consumers).

[62] *See, e.g.*, Ronald W. Cotterill, *Antitrust Analysis of Supermarket Retailing: Common Global Concerns that Play Out in Local Markets*, Food Marketing Policy Center 5-7 (July 2005) (summarizing economic literature on price effects in the retail supermarket industry).

[63] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, AM. SOCIOLOGICAL REV., Mar. 27, 2018, https://journals.sagepub.com/doi/full/10.1177/0003122418762441 (discussing evidence that greater dependence on a small number of powerful corporate buyers leads to lower wages).

[64] *See* Kirkwood, *supra* note 36.

the United States is now concentrated among just four firms—Tyson Foods, JBS, Cargill, and National Beef. Similarly, just four companies—Archer Daniels Midland, Bunge, Cargill, and Dreyfus—control as much as 90 percent of the global grain trade,[65] and another "big four" dominates the global seed market.[66]

Supply chain concentration is particularly acute in private label manufacturing—the grocery supply sector that manufactures store brand versions of food products and consumer goods, such as paper products. Store brands are important alternatives to branded products for consumers and retailers alike. But under pressure from dominant retailers, the private label sector is consolidating dramatically. For example, today there is only a single major private label manufacturer of canned soups, and there is significant consolidation in private label manufacturing in a diverse list of other products from canned fruit and pasta, to snack foods, and paper products.

Concentration in the grocery supply chain does not insulate it from retailer buyer power; it makes suppliers even more beholden to leverage. As manufacturers consolidate, they become more dependent on the largest buyers, who represent a substantial portion of their sales. Meanwhile, small and mid-sized grocers see their relative value to manufacturers decline, even when they pool their purchasing through wholesale cooperatives. Although such cooperatives may be highly efficient, and place tens of millions of dollars in purchases with a supplier, those sales are a drop in the bucket compared to national retail grocery chains.

As a result, dominant retailers effectively dictate supply decisions to grocery suppliers. This has become particularly acute in private label. For example, private label manufacturers are forced to prioritize runs ordered by their biggest buyers, limiting capacity for products sought by independents. They have also narrowed their available products in order to serve demand from power buyers, reducing product diversity and consumer choice.

Invariably, products sought by independent grocers are the ones eliminated. Some private label manufacturers have largely dedicated their capacity to dominant national chain grocers, foregoing independents' business almost entirely. Not only does this harm independent grocers and their customers directly, through loss of these popular products especially for cost-conscious consumers, it also reduces independents' bargaining leverage with branded suppliers by eliminating alternative sources of product supply to which independents might switch. As a result, independent grocers are even less able to push back on discriminatory treatment imposed by retail power buyers.[67]

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[65] *See* Sophia Murphy, David Burch and Jennifer Clapp, *Cereal Secrets: The World's Largest Grain Traders and Global Agriculture*, OXFAM RES. REP., Aug. 2012, https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-cereal-secrets-grain-traders-agriculture-30082012-en_4.pdf.

[66] *See* Kristina "Kiki" Hubbard, *The Sobering Details Behind the Latest Seed Monopoly Chart*, CIVIL EATS, Jan. 11, 2019, https://civileats.com/2019/01/11/the-sobering-details-behind-the-latest-seed-monopoly-chart/.

[67] *See* Dobson, *supra* note 38 (describing private label as an important negotiating level for grocery retailers).

In addition to reduced product choice and increased prices for independent grocers and their consumers, greater concentration can result in anticompetitively low prices paid to independent producers, such as ranchers and farmers. And, as discussed below, manufacturer concentration can make the grocery supply chain more vulnerable to disruption due to natural disasters or a pandemic.

IV. The COVID-19 Pandemic has Exacerbated Economic Discrimination in Grocery

In 2020, the COVID-19 pandemic has exacerbated the impact of economic discrimination and buyer power in the grocery sector. Americans across the country experienced shortages of staples such as toilet paper, cleaning products, and canned soup. Behind the scenes, unchecked buyer power in the grocery sector made these shortages worse, and made their impact fall more heavily on independent grocers and their customers.

As described above, the buyer-side market power of dominant retailers has increased concentration in the grocery supply chain, making the system less resilient and more vulnerable to disruption and shortages.[68] As concentration among suppliers has increased, grocery manufacturing has also been consolidated to achieve the scale efficiencies demanded by power buyers. As a result, a smaller number individual factories—built on a massive scale—have become critical lynch pins in the supply chain. Closures of just a handful of meatpacking plants led to food shortages, and outbreaks at other food processing and dairy facilities continue to threaten future shortages.[69] A less concentrated supply chain with more distributed manufacturing would have mitigated these impacts.

Buyer power and economic discrimination have come into play in another way during the pandemic: the shortages have not affected all grocery retailers equally. Dominant retailers and e-commerce giants have used their buyer power to pressure suppliers into prioritizing their shipments over other retail customers, including independent grocers. In many cases, these powerful buyers have secured inventory at the expense of other retailers. As one group of sellers reported to the FTC, "Amazon's hold over sellers effectively took food from the shelves of neighborhood grocery stores . . . and moved it to Amazon's own warehouses, where it earned fees for Amazon."[70]

NGA members have been told by numerous manufacturers that, as a result of pandemic supply challenges, they would receive reduced allocations or no allocations of popular staples and essential products such as paper towels, toilet paper, cleaning and disinfecting products,

[68] See Michael Pollan, *The Efficiency Curse*, WASH. POST, Feb. 5, 2021, https://www.washingtonpost.com/outlook/2021/02/05/pandemic-food-resilience/?arc404=true.

[69] *Id.*; *see also* Mike Dorning, *Coronavirus Spreads Beyond Meat Plants With Outbreaks at 60 US Baking, Agricultural, Dairy Facilities, Raising Specter of Food Shortages*, CHICAGO TRIB., June 10, 2020, https://www.chicagotribune.com/coronavirus/ct-nw-coronavirus-food-meatpacking-plants-shortages-20200610-qvgfl5cxt5crtjuye6oi23xeui-story.html.

[70] Investigation of Competition in Digital Markets Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 258 (2020) (citing July 23, 2020 letter from International Brotherhood of Teamsters, Communications Workers of America, United Food, Commercial Workers International Union, and Change to Win to the FTC).

aluminum foil, and canned soup—meanwhile, after some initial shortages at the start of the pandemic, those same products have been fully stocked at Amazon and on the shelves of big box national chain retailers.

Independent grocers have also faced increased price discrimination, favoring dominant players, as a result of the pandemic. The periodic price promotions that independent wholesalers and grocers receive from suppliers, which allows them to discount at or below the prices charged by dominant retailers, have frequently been suspended or cancelled during the pandemic. And to make matters worse, some independent grocers that were forced to pass their increased costs on to consumers were wrongly accused of price gouging.[71]

Dominant retailers and e-commerce giants quickly recovered from supply chain shortages and other challenges brought on by the pandemic. Dominant firms such as Walmart, Amazon, Target, and Dollar General have reported surging profits and captured significant market share during 2020.[72] But smaller retailers, including independent grocers, continue to experience higher prices and shortages of key high-demand products. Due to the pandemic, independent grocers have increasingly resorted to buying entire pallets of must-have products from wholesale clubs like Costco, because their own wholesale costs from the supplier are higher than Costco's retail price (a problem that preceded the pandemic).

For example, in January 2021, an NGA member reported that its wholesale price for a popular packaged food product was over 19 percent higher than the *retail* price for the equivalent sized product at a local Walmart. Similarly, the independent grocer's wholesale price for a branded cake mix was 53 percent higher than the Walmart retail price. And the wholesale price for a staple branded cracker, on a per ounce basis, for the independent retailer was nearly 20 percent higher than the retail price at Dollar General. Other NGA members have reported paying higher wholesale prices than the retail prices available at large chains for many of their top private label products, including salsa, ketchup, mustard, barbeque sauce, peanut butter, canned fruit, soup, broth, vegetable oil, granulated sugar, flour, and coffee, and numerous members reported paying higher wholesale prices than the retail price for other popular branded products.

This economic discrimination is driven by the demands of the power buyers. Rather than provide the same price to all of their customers, suppliers are forced to extend discounts and

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[71] Testimony of Jimmy Wright, *supra* note 3, at 5. For example, suppliers drastically increased the prices independent grocers pay for must-have products like eggs and protein. Egg prices in particular soared to historic levels, including a nearly $2.00 increase between March and April, despite a lack of evidence that suppliers faced increased price or lower output at that time.

[72] Jeffrey Dastin & Akanksha Rana, *Amazon Posts Biggest Profit Ever at Height of Pandemic in U.S.*, REUTERS, July 30, 2020, https://www.reuters.com/article/us-amazon-com-results/amazon-posts-biggest-profit-ever-at-height-of-pandemic-in-u-s-idUSKCN24V3HL; Phil Wahba, *Walmart's E-Commerce Sales Nearly Double As Shoppers Go Beyond Groceries in Online Orders*, FORTUNE, Aug. 18, 2020, https://fortune.com/2020/08/18/walmart-ecommerce-sales-covid-doug-mcmillon; Melissa Repko, *Target Reports A Monster Quarter*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/target-tgt-q2-2020-earnings.html.

other advantageous terms to the dominant retailers and make up for their losses by charging higher prices to other buyers.

V. Antitrust's Failures to Address Buyer Power and Economic Discrimination

Prior to the late 1970s, the antitrust laws reached the harms that flow from buyer power. As the Supreme Court recognized repeatedly in rulings across several decades of the 20th Century, Congress passed the Sherman Act and the Clayton Act with the goal of dispersing concentrated power and protecting the economic rights and freedoms of Americans as both consumers and producers. An express goal of these laws was to ensure that small, independent producers had the ability to compete without being unfairly muscled aside by big businesses.[73] For example, in 1945, Judge Learned Hand wrote in *United States v. Alcoa* that Congress was motivated to pass the Sherman Act due to a preference for "a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of the few."[74] And in 1962, the Supreme Court recognized that Congress passed the antitrust laws to combat a rising tide of economic concentration, hoping to preserve local control over industry and small business.[75]

However, since the late 1970s, the antitrust laws have been increasingly eroded in significant respects through court decisions and agency practice that rely on mistaken orthodoxies regarding "business efficiency."[76] This orthodoxy wrongly assumes that independent businesses cannot achieve equivalent economies of scale, and it ignores the tradeoffs that so-called "efficiencies" imposed by dominant firms have for consumers, producers, and independent competitors.[77]

The elevation of "business efficiency" over other goals has led to at least three failures of enforcement that contribute to America's buyer power problem: (1) a lack of attention to buyer-side market power, (2) a lack of scrutiny of vertical restraints, and (3) a failure to enforce the Robinson-Patman Act.

1. Antitrust's Failure to Address Buyer-Side Market Power

[73] *See, e.g.*, Bd. of Trade v. United States, 246 U.S. 231, 240-41 (1918) (enumerating the benefits of a traderegulation that allowed country dealers and farmers to participate in wholesale markets in Chicago on more favorable terms) (Brandeis, J.).
[74] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[75] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315-16, 333 (1962) (discussing the legislative history of the Sherman Act and explaining "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.").
[76] For a discussion of this shift in jurisprudence, *see, e.g.,* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 270 (2017); Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 921–26 (2014).
[77] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES" A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015) (discussing evidence that mergers justified on efficiencies grounds have neither lowered prices nor led to efficiency gains); Stacy Mitchell, *Monopoly Power and the Decline of Small Business*, Aug. 10, 2016, https://ilsr.org/monopoly-power-and-the-decline-of-small-business/ ("Small businesses deliver distinct consumer and market benefits, and in some sectors provide more value and better outcomes than their bigger competitors. And they often achieve these superior results because of their small scale, not in spite of it.").

The Sherman Act and the Clayton Act were passed in the late 19th and early 20th Centuries in response to concerns that powerful sellers were acting in various ways to harm consumers and small businesses. But as detailed above, economic power in today's retail economy is concentrated in the hands of powerful buyers who act as gatekeepers to consumers.

Despite the growing buyer power problem, courts have made it exceedingly difficult to bring a case challenging the anticompetitive exercise of buyer power, and these types of cases are extremely rare. One example is the Supreme Court's 2007 decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*. In that case, a lumber supplier challenged predatory bidding practices by Weyerhaeuser, a powerful buyer in the market for sawlogs.[78] The supplier alleged that Weyerhaeuser's bidding strategy was part of a scheme to drive its competitors out of business. The Supreme Court set the same high bar for a predatory bidding claim that applies to predatory pricing: in order to prove that the conduct was anticompetitive, the supplier would need to show that (i) Weyerhaeuser bid below its costs, and (ii) there was a dangerous probability that Weyerhaeuser would recoup its losses (through higher prices in the future). Thus, under the Court's reasoning, driving the lumber supplier out of business alone would not be sufficient to bring a case—instead, the Court would only find harm to competition if there was proof that Weyerhaeuser's predatory bidding would result in sustained, supracompetitive prices.

The Court's treatment of predatory bidding is misguided because it assumes that the only conceivable harm to competition could be sustained, supracompetitive prices. This focus on price effects overlooks other key dimensions of competition, including the various ways that the exercise of buyer power can harm quality, service, consumer choice, and the ability and opportunity for entry by smaller competitors.[79] It also ignores empirical research, which has shown various ways that dominant firms use predation strategies to limit and deter competition and increase their market power.[80]

Further, even where a plaintiff can point to price discrimination that harms competition, courts have barred claims. In *Boise Cascade Corp.*, for example, the D.C. Circuit overturned an FTC decision finding a distributor/retailer of office supplies liable for exercising its buyer power to extract discounts to the detriment of disfavored retailers.[81] In concurrence, Judge Williams boldly declared that "it is black letter economics that price discrimination *cannot occur* if the favored customers can resell to the disfavored."[82] But this ivory tower "black letter economics" ignores the real world impact of price discrimination on less powerful buyers (who bear a disproportionate share of the seller's total costs of production) as well as the downstream impact

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[78] *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).
[79] *See* Kirkwood, *supra* note 36.
[80] Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 82 (2015) (discussing evidence of predation in various industries, including the airline, coffee, oil, shipping, sugar, telecommunications, and tobacco industries, among others).
[81] Boise Cascade Corp. v. F.T.C., 837 F.2d 1127, 1148 (D.C. Cir. 1988).
[82] *Id*. at 1149 (emphasis added).

this has on consumers.[83] And as Judge Mikva explained in dissent, the D.C. Circuit reached this decision despite evidence that profit margins were higher for the powerful buyer than for its disfavored competitors, and even though the defendant failed to provide any evidence that the price differences were justified by a lower cost associated with selling to the powerful buyer.[84]

Although the U.S. antitrust agencies have brought a small number of merger cases premised on buyer power,[85] they have not made buyer power an enforcement priority, much less challenges to retailer buyer power. For example, a 2012 FTC retrospective study on the impact of grocery store mergers on competition did not even address retail buyer power.[86]

2. Antitrust's Failure to Scrutinize Vertical Restraints

The antitrust laws distinguish between horizontal restraints (which flow from agreements among competitors) and so-called "vertical restraints." Vertical restraints refer to agreements and arrangements among market participants at different levels of the supply chain. Classic vertical restraints include resale price maintenance, exclusive dealing or distribution arrangements, discriminatory pricing agreements, and tying arrangements that condition the sale of one product on the purchase of a different (or "tied") product.

The late 1970s and early 1980s marked a sea change in the application of antitrust to vertical restraints. Prominent antitrust commentators, including Robert Bork, Richard Posner, and Frank Easterbrook, argued that the antitrust laws should only be concerned with horizontal restraints, and called for per se *legality* of all vertical restraints.[87] These commentators pushed a pro-big business policy towards vertical restraints, arguing that antitrust enforcement had wrongly overlooked "business efficiencies" created by vertical arrangements.[88] According to these commentators, vertical restraints would promote interbrand competition (i.e., competition

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[83] By Judge Williams' mistaken logic, competition and consumers would be equally well off if independent grocers supplied themselves wholly through local dominant competitors such as Costco or Amazon rather than direct relationships with suppliers.
[84] *Id*. at 1153.
[85] *See, e.g.,* United States v. George's Foods, No. 5:11-cv-00043 (W.D. Va. May 10, 2011), http://www.justice.gov/atr/case/us-v-georges-foods-llc-et-al.; United States v. JBS S.A. & Nat'l Beef Packing Co., No. 08CV5992. (N.D. Ill. Oct. 20, 2008), http://www.justice.gov/atr/case/us-and-plaintiff-states-v-jbs-sa-and-national-beef-packing-company-llc; United States v. Anthem, Inc. & Cigna Corp*.,* No. 16CV01493 (D.D.C. July 21, 2016), https://www.justice.gov/atr/file/903111/download.
[86] Daniel Hosjen, Luke M. Olson, Loren K. Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, Fed. Trade Comm'n Bureau of Competition Working Paper (Dec. 2012). For example, the FTC's analysis of Walmart's acquisition of the Supermercado Amigo chain in Puerto Rico apparently did not examine whether the transaction would give the combined firm increased bargaining leverage to the detriment of competing grocery stores or competition. *See* FTC Letter to Albert A. Foer, President of the American Antitrust Institute (Feb 27, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/02/ftc.gov-letterfoer.htm.
[87] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288 (1978) ("Analysis shows that every vertical restraint should be completely lawful."); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158 (1984).
[88] *See id*.

between suppliers of different brands) more than they suppressed intrabrand competition (i.e., competition among distributors or retailers of the same branded product).[89]

By 1977, advocates for so-called business efficiency reached the Supreme Court: In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court ruled that non-price restrictions would no longer be treated as per se illegal, but would instead by analyzed under the rule of reason.[90] The Court reasoned that potential competitive harm posed by vertical restraints can be checked by interbrand competition, and that courts should therefore conduct a fact-intensive inquiry into the net effects of a given restraint on competition. While the Court's decision in *Sylvania* was limited to territorial restrictions, the case led to a seismic shift to the rule of reason for almost all conduct other than horizontal price agreements.

In 1991, Judge Douglas Ginsberg examined how appellate courts were applying the rule of reason to vertical restraints under *Sylvania*.[91] Judge Ginsberg examined every case that cited *Sylvania* on the merits and found that defendants prevailed in more than 90 percent of the cases.[92] He concluded that "courts of appeals are generally not engaging in the balancing of gains in interbrand competition against losses in intrabrand competition that the Supreme Court envisioned," and that markets where there is any interbrand competition "have been effectively freed from antitrust regulation of vertical nonprice restraints."[93]

Sylvania and its progeny also led to a significant decline in investigations and enforcement actions against vertical restraints by the antitrust agencies. These changes had a predictable effect: large firms became more aggressive as they realized that there was little to no risk associated with conduct that had once been condemned as per se illegal.

In the grocery industry, this doctrinal shift allowed dominant players to emerge and use their size to harm competition through vertical arrangements with suppliers, including by exercising buyer power to disadvantage smaller rivals. And in the grocery space in particular, the law's current assumption that interbrand competition offsets restraints on intrabrand competition is misguided: certain branded products are viewed as "must-haves" by consumers and the ability to display a variety of brands—e.g., more than one brand of canned soup or cold cereal—is important to independent stores' competitiveness. NGA members' experience during the pandemic has shown that independent grocers lose business when they cannot carry must-have products.

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[89] *See id*.
[90] 433 U.S. 36 (1977).
[91] Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. (1992).
[92] *Id*. at 71.
[93] *Id.* at 67, 76; *see also* D. Daniel Sokol, *The Transformation Of Vertical Restraints: Per Se Illegality, The Rule Of Reason, And Per Se Legality*, 79 ANTITRUST L.J. 1003, 1007 (2014), http://scholarship.law.ufl.edu/facultypub/546 (explaining that in practice, the rule of reason has led to "presumptive or even per se legality").

3. Hostility to the Robinson-Patman Act

Congress recognized the benefits of independent retail and the threats posed by power buyers when it enacted the Robinson-Patman Act, which it intended to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."[94] Among other things, the statute makes it unlawful to "discriminate in price between different purchasers of commodities of like grade and quantity" if the purchasers are competitors.[95] Leading up to passage of the statute, Congress found that in certain cases large retail chains used their size to coerce suppliers to sell products to them at significantly lower prices, or on better terms, than those provided to their smaller competitors.

The advantages the chains received were not necessarily based on their greater efficiency, but were sometimes due to the chains' ability to leverage their role as gatekeepers to large swathes of consumers. The discriminatory advantages demanded and obtained by these buyers included not only demands that suppliers sell to smaller, independent rivals only at higher prices, but also that such competitors be denied promotional benefits that enhanced the large stores' sales. Congress determined that these practices should be prohibited, and that the then-existing provisions of the Sherman Act and the Clayton Act were inadequate to do so.

To accomplish these "broad goals," Congress passed the Robinson-Patman Act (15 U.S.C. § 13).[96] Across its multiple subsections, the Act prohibits different methods by which suppliers can discriminate among their competing customers. Section 2(a) of the Act prohibits certain discrimination over terms connected to the initial sale of a product to a wholesaler or retailer (e.g., discrimination in prices charged, terms of credit, etc.), while Sections 2(d) and (e) prohibit discrimination over terms promoting resale of the product to the end consumer (e.g., discrimination in advertising allowances, provision of in-store displays, etc.).[97] Congress intended these sections, taken together, to be a comprehensive framework to "eliminate these inequities" that put "independent stores . . . at a hopeless competitive disadvantage" against large "chain buyers." *Id.*

Despite Congress's broad goals in 1936, enforcement against buyer power-driven economic discrimination, including violations of the Robinson-Patman Act, has largely lapsed at the DOJ Antitrust Division, the Federal Trade Commission, and by private plaintiffs. The DOJ Antitrust Division has not enforced the Robinson-Patman Act since the 1970s, and has not brought a criminal case under Robinson-Patman since the 1960s.[98] The FTC brought its last Robinson-

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[94] FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968); *see also* Volvo Trucks N. America, Inc. v. Reeder-Simco GMC, 546 U.S. 164 (2006) ("Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.").
[95] 15 U.S.C. § 13(a).
[96] *Fred Meyer*, 390 U.S. at 349.
[97] FTC v. Simplicity Pattern Co., 360 U.S. 55, 69 (1959).
[98] Antitrust Modernization Commission, Report and Recommendations 316 (2007).

Patman enforcement action more than 20 years ago.[99] The agencies have not recently pursued economic discrimination in the retail sector using the other antitrust laws either.

The hostility to enforcement against economic discrimination is not limited to the antitrust agencies. In the last few decades, the courts have "read the 1936 Robinson-Patman Act almost out of existence" by imposing heightened standards on price discrimination actions that disregard the statute's text.[100]

For example, Section 2(a) of the Robinson-Patman Act prohibits price discrimination against retailers where the conduct may "substantially [] lessen competition or tend to create a monopoly in a line of commerce"—a standard similar to that applied to other unlawful conduct under the antitrust laws, such as monopolization or anticompetitive mergers.[101] Meeting this standard is a high bar under current interpretations of the antitrust laws, typically requiring the plaintiff to prove market-wide harm to competition in a well-defined relevant market.[102] But Section 2(a) also prohibits economic discrimination in cases where these showings are not met, so long as the effect of the conduct may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."[103] Under this standard, price discrimination that prevents one retailer from effectively competing with another is also a violation.

Recent decisions by the U.S. Supreme Court and lower courts ignore and even contradict this part of the statute. The courts have held that proving a Robinson-Patman Act violation requires the same challenging burden as other antitrust cases—proof of substantial, market-wide harm to competition.[104] Courts have rejected Robinson-Patman Act claims based on economic discrimination where the plaintiff's evidence failed to meet this high standard, even where there is evidence that the conduct harmed the competitiveness of the disfavored retailer.[105] Some commentators have even argued that economic discrimination "ought to be very, very

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[99] *See* Decision and Order at 1, McCormick & Co., Docket No. C-3939 (F.T.C. Apr. 27, 2000) (finding 3-2 a narrowly applied Robinson-Patman violation by suggesting that market power should be viewed as a prerequisite for the application of the Morton Salt inference); *see also* D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 6, 2073 & n.77 (noting "McCormick might be better characterized as an exclusive dealing case masquerading as a Robinson-Patman case. McCormick had a market share of about eighty percent and was foreclosing competitors from shelf space.").
[100] Daniel Crane, *Antitrust Antitextualism*, NOTRE DAME L. REV. at 4 (forthcoming).
[101] *Compare* 15 U.S.C. § 13(a) with 15 U.S.C. §§ 2, 7.
[102] Ohio v. American Express Co., 138 S. Ct. 2274, 2288 (2018) (describing the three-step, burden-shifting framework that applies under the rule of reason and concluding that plaintiff's did not carry the initial burden of proving that the challenged conduct had an anticompetitive effect).
[103] 15 U.S.C. § 13(a).
[104] *See, e.g.*, Brooke Group Ltd. v. Brown and Williamson Tobacco Co., 509 U.S. 209, 222-23 (1993); Volvo Trucks N. America, Inc. v. Reeder-Simco GMC, Inc. 546 U.S. 164, 181 (2006).
[105] Cash & Henderson Drug, Inc. v. Johnson & Johnson, 799 F.3d 202, 213 (2d Cir. 2015) (rejecting discrimination claims for failure to show harm to competition generally); Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 864 (6th Cir. 2007); Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 227 (3d Cir. 2008).

presumptively innocent," applying Chicago School's presumptions that all vertical restraints are efficient.[106]

In so doing, the courts and antitrust agencies are contradicting Congress's policy judgment to disfavor economic discrimination as presumptively anticompetitive. As evidenced by the Robinson-Patman Act, Congress determined that discriminatory treatment imposed by buyer-side market power was pernicious and should be prohibited.

Conclusion

Independent grocers have worked hard during the pandemic to continue to deliver a high-quality, low-price shopping experience to consumers; but dominant buyer power threatens their ability to do so. Many consumers have lost access to products at their local grocers. Moreover, rural areas and urban centers that are served by independent grocers have suffered a disproportionate impact, with consumers being forced to travel longer distances to find products they need at more crowded large chain retailers.

Buyer power and economic discrimination will continue to threaten independent businesses and American consumers and producers long after the pandemic is over—unless we change course. Specifically, we propose:

- Investigations and Hearings. Through congressional investigations and hearings, Congress should shine a bright light on anticompetitive practices in the food marketing/grocery sector—with a particular focus on the discriminatory impacts on rural and urban consumers, producers, and businesses.

- Congressional Oversight. Congress should use its inherent oversight and authorization powers to hold antitrust enforcers accountable if they continue their lax enforcement to check retailer buyer power and its effects.

- Legislation. The Sherman Act, the Clayton Act, the Robinson-Patman Act, and state antitrust laws provide the tools enforcers need to curb discriminatory practices by dominant retail chains. However, because of lax enforcement by the antitrust agencies, a number of courts have barred private actions to enforce the same antitrust prohibitions. Congress may need to step in to restore the original purposes and vigor of the antitrust laws when directed at striking economic discrimination in all sectors of the economy.

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[106] U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, 2008, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-5#N_96 (summarizing commentary from panelists at joint FTC and DOJ hearings on Section 2 enforcement); *see also* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44-45 (2006) (observing that "price discrimination may provide evidence of market power" but "it is generally recognized that it also occurs in fully competitive markets").

- Enforcement and Agency Action. The FTC, DOJ, and states attorneys general should investigate the arrangements between grocery power buyers and suppliers to determine whether dominant retailer bargaining leverage is imposing discriminatory prices, terms, and supply on independent grocers. This should include the important issue of whether "channels of trade" distinctions among competing grocery businesses are being used to evade laws against economic discrimination.

    - The FTC should immediately use its authority under 6(b) of the Federal Trade Commission Act to study competition and concentration in the grocery supply chain, including private label, and the impacts on independent grocers and producers, such as farmers and ranchers. This should include an inquiry into whether retail buyer power is driving concentration throughout the supply chain.

    - In these and other inquiries, antitrust enforcement should look beyond price effects to include other dimensions of competition, including impacts on quality, service, and convenience as a result of dominant retailer buyer power, economic discrimination, and increasing consolidation. This should include consideration of these issues in merger investigations in the grocery supply chain.

    - Other federal agencies such as the Small Business Administration and the Department of Agriculture can also address these issues by studying the benefits of small business to competition and the role of independent grocers and farmers and ranchers in ensuring broad access to healthy foods.