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**Federal Trade Commission**

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**Prepared Remarks**

# <u>Inflated Claims: Hot Air about Rising Prices, Corporate Greed, and Antitrust</u>

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Thank you, and thanks to GCR. It's a pleasure to be here in Miami at GCR Live, speaking with all of you today. I'll start by saying that the views I express today are my own and do not necessarily reflect those of the FTC or any other Commissioner; but that should be clear already.

Inflation is at its highest level in 40 years, with prices for consumer goods like food, automobiles, and gasoline rising 7% since December 2020.[1] These price increases are hitting Americans hard, particularly the poor. They are erasing the wage gains from the hottest labor market in recent memory.[2] The economic woes wrought by high inflation are also creating a political problem, as Americans' confidence in the Administration's economic policy is at an all-time low.[3]

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[1] Rachel Siegel and Andrew Van Dam, *December prices rise 7 percent compared with a year ago, as 2021 inflation reaches highest in 40 years*, WASH. POST (Jan. 12, 2022, 8:31 AM), https://www.washingtonpost.com/business/2022/01/12/december-cpi-inflation/; Press Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Consumer Price Index – December 2021 (Jan. 12, 2022), https://www.bls.gov/news.release/pdf/cpi.pdf.

[2] Abha Bhattarai, *'That raise meant nothing': Inflation is wiping out pay increases for most Americans*, WASH. POST (Jan. 22, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/01/22/wages-inflation/.

[3] *See, e.g.*, Thomas Franck, *Biden disapproval hits new high as voters give him bad grades on economy, new CNBC/Change poll says*, CNBC (Jan. 4, 2022, 7:30 AM), https://www.cnbc.com/2022/01/04/biden-disapproval-

What do these macroeconomic and political trends have to do with our topic here in Miami, antitrust? Two important things:

> *First*, for a variety of reasons, the Administration and its progressive allies are touting antitrust as the solution to inflation.[4]
>
> *Second*, inflation is once again focusing policymakers' attention on prices, a focus that antitrust reformers have maligned for years.[5] Consumers, of course, never stopped paying, attention or with hard-earned cash.

Antitrust will not solve the problem of inflation; and high prices crushing American workers and consumers stand as a stark reminder why reforms that raise prices in the service of other goals are the wrong direction for antitrust policy.

**The Debate**

The crux of the antitrust-to-fight-inflation argument is that the high prices American consumers now face are attributable to "corporate greed". There are several versions of the story, including criminally illegal or tacit collusion in concentrated industries[6] and opportunistic gouging somehow facilitated by lax antitrust policy.[7] Thus, the White House sees "mounting evidence of anti-consumer

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rating-high-voters-blame-him-on-economy-cnbc-poll.html; Mark Murray, *Biden ends first year as president with 'bleak, discouraging' marks from the public*, NBC NEWS (Jan. 20, 2022, 6:00 AM), https://www.nbcnews.com/politics/meet-the-press/biden-ends-first-year-president-bleak-discouraging-marks-public-n1287751.

[4] *See*, *e.g.*, Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2022), https://www.nytimes.com/2021/12/25/business/biden-inflation.html.

[5] *See*, *e.g.*, *infra* notes 28-29 and accompanying text; *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power Before the H. Subcomm. on Antitrust, Com. and Admin. L.*, 117th Cong. (Mar. 18, 2021) (opening statement of David N. Cicilline, Subcomm. Chair), https://cicilline.house.gov/press-release/cicilline-opening-statement-antitrust-hearing-monopoly-power ("courts have systematically weakened the antitrust laws, limiting the analysis of competitive harm to focus primarily on price and output rather than protecting the competitive process").

[6] *See*, *e.g.*, Robert Reich, Opinion, *We need to talk about the real reason behind US inflation*, GUARDIAN (Nov. 11, 2021, 9:14 AM), https://www.theguardian.com/commentisfree/2021/nov/11/us-inflation-market-power-america-antitrust-robert-reich.

[7] David Dayen, *Fighting the Inflation Profiteers*, AM. PROSPECT (Nov. 24, 2021), https://prospect.org/economy/fighting-the-inflation-profiteers-biden-kennedy/; Hans G. Despain, Opinion, *Price gouging the* [sic] *real cause of inflation*, MASSLIVE (Dec. 29, 2021, 12:58 PM), https://www.masslive.com/opinion/2021/12/price-gouging-the-real-cause-of-inflation-guest-viewpoint.html; *CNBC Transcript: Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C. Today*, CNBC (Jan. 19, 2022, 12:30 PM), https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-

behavior" by large oil and gas companies, like ExxonMobil and Chevron.[8] At least one progressive politician is calling to break up large meat producers.[9] And so on. Beyond including food producers in the "break them up" bucket hitherto reserved mostly for the largest technology companies, antitrust-inspired solutions range from initiating investigations to government price regulation.

Are corporate greed and monopoly driving the highest inflation in four decades? While the Administration and senior policymakers are buying in, other voices across the spectrum are opting out. The Economist magazine recently dubbed the "greedy corporations and rigged markets" theory "snake oil".[10] The Washington Post editorial board called it "bizarre".[11] Their friends at the Wall Street Journal told the President to go "back to Econ 101".[12] Larry Summers, among many things Secretary of the Treasury under President Clinton, called it "science denial".[13] On and on.[14] To be fair, while the White House continues to advance the theory

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chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html.

[8] Letter from Joseph R. Biden Jr., President of the U.S., to Lina M. Khan, Chair, Fed. Trade Comm'n (Nov. 17, 2021), https://www.nytimes.com/interactive/2021/11/17/us/ftc-gas-prices.html.

[9] Elizabeth Warren (@SenWarren), TWITTER (Jan. 3, 2022, 12:13 PM), https://twitter.com/SenWarren/status/1478051819255382022.

[10] Editorial, *Beware snake oil, Mr. President*, ECONOMIST (Jan. 8, 2022), https://www.economist.com/leaders/2022/01/08/democrats-seem-drawn-to-hare-brained-schemes-to-control-inflation.

[11] Editorial, *The White House once again offers a bizarre message on inflation*, WASH. POST (Jan. 10, 2022, 1:16 PM), https://www.washingtonpost.com/opinions/2022/01/10/white-house-again-offers-bizarre-message-inflation/.

[12] Editorial, *Carving Up Biden's Inflation Beef*, WALL ST. J. (Jan. 7, 2022, 6:38 PM), https://www.wsj.com/articles/carving-up-bidens-inflation-beef-meat-producers-tyson-prices-11641587628.

[13] Lawrence H. Summers (@LHSummers), TWITTER (Dec. 26, 2021, 5:21 PM), https://twitter.com/LHSummers/status/1475230223985786889.

[14] *See, e.g.*, Joseph Zeballos-Roig, *A former top Obama economist throws cold water on the Biden administration's favorite inflation argument: 'Corporate greed is a bad theory'*, BUSINESS INSIDER (Jan. 16, 2022, 3:23 PM), https://www.businessinsider.com/former-obama-economist-biden-inflation-argument-corporate-greed-2022-1 ("'Corporate greed is a bad theory of inflation,' Jason Furman, a former top economist for President Barack Obama, said in an interview, adding, "I think almost everything other than the Federal Reserve is a sideshow when it comes to the dynamics of inflation.'"); Jeff Stein, *White House allies split over inflation plan as Biden trains attacks on corporate greed*, WASH. POST (Jan. 10, 2022, 6:00 AM), https://www.washingtonpost.com/us-policy/2022/01/10/white-house-inflation-strategy/ ("'I don't think corporate consolidation explains the jump in prices,' said Dean Baker, a liberal economist who endorsed Warren's presidential candidacy in 2020. Baker said he had relayed this skepticism to the White House. 'I don't see a good story here in blaming inflation on concentration.'").

publicly, according to reporting in the Washington Post it is under considerable internal debate.[15]

As the stark language from across the ideological spectrum hints, the narrative is simply not persuasive. For one, there are much better explanations, having do to with the forces that normally drive prices: supply and demand. The spread of COVID-19, its impact, and the government response to both provide an ample and far more plausible explanation than the competition problems that concern antitrust. The novel coronavirus and our efforts to control it clearly caused massive disruptions to production around the world, hamstringing factories, shuttering businesses, and driving people out of work. At the same time, pent-up demand accumulated, as Americans saved more, deferred purchases, and received stimulus checks, unemployment aid, and tax credits from the government. Those same fiscal stimuli slowed the return to work, as did restrictions intended to protect public health. Consumers shifted spending from services like restaurants and hospitality to goods.[16] Supply chains snarled. Now, that demand is unleashed while substantial shortages of goods and labor persist.[17] Although there is reason to hope that supply will catch up with demand, it will take time, especially as the virus and responses to it continue to hobble production and shipping around the world.[18] Economists are debating and will continue to debate which of these factors are the principal drivers of inflation, and which policies are most likely to temper it. But, as

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[15] Stein, *supra* note 14.

[16] Demetrio Scopelliti, *COVID-19 causes a spike in spending on durable goods*, BUREAU OF LAB. STAT. (Nov. 2021), https://www.bls.gov/opub/mlr/2021/beyond-bls/covid-19-causes-a-spike-in-spending-on-durable-goods.htm; Alison Felix and Samantha Shampine, *Consumer Spending Declines, Shifts in Response to the Pandemic*, FED. RSRV. BANK OF KAN. CITY (Feb. 17, 2021), https://www.kansascityfed.org/research/economic-bulletin/consumer-spending-declines-shifts-in-response-to-the-pandemic/.

[17] *See, e.g.*, Wendy Edelberg, *What does current inflation tell us about the future?*, BROOKINGS INST. BLOG (Nov. 16, 2021), https://www.brookings.edu/blog/up-front/2021/11/16/what-does-current-inflation-tell-us-about-the-future/; Jeanna Smialek, *Inflation Has Arrived. Here's What You Need to Know*, N.Y. TIMES (Jan. 10, 2022), https://www.nytimes.com/article/inflation-definition.html; Megan Leonhardt, *Here's how the worker shortage is contributing to sky-high inflation*, FORTUNE (Dec. 15, 2021, 2:13 PM), https://fortune.com/2021/12/15/worker-shorter-inflation-more-expensive/.

[18] *See, e.g.*, David J. Lynch, *Omicron fallout and tough labor talks likely to rattle supply chains and fuel inflation*, WASH. POST (Jan. 15, 2022, 3:05 PM), https://www.washingtonpost.com/business/2022/01/15/omicron-supply-chain-inflation/.

the strong reaction to proposing antitrust as the answer suggests, lessened competition is not among them.

The other big problem with the narrative is its holes. "Corporate greed," such as it is, and market power were just as much at play when inflation was low. Companies are not charities: they seek to make money. The incentive to do so has incredible benefits, as firms compete and innovate and grow to meet demand. They follow price signals, which is how a market economy works. Responding to changes in costs and consumer demand is not a bad thing, and it did not start at the beginning of COVID-19.

As we entered the pandemic, with annual inflation around 2%,[19] businesses were free to exercise whatever market power they had to charge whatever prices maximized their profits. To do otherwise would have been irrational. The relevant question is what, if anything, changed. Is the claim that businesses are somehow trying maximize profits more today than before the pandemic? Were they leaving money on the table nine months ago? While it is plausible this took place idiosyncratically, I have yet to see evidence; and supposing economy-wide irrational behavior simply strains credulity. The same logic applies to market power. Prices are rising across the board, not just in industries where there is reason to believe market power either pre-existed the pandemic or increased during it. In fact, some of the inflation drivers are in industries that are typically not considered particularly concentrated, like automobiles.[20] The story makes little sense.

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[19] Press Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Consumer Price Index – January 2019 (Feb. 13, 2019), https://www.bls.gov/news.release/archives/cpi_02132019.pdf.

[20] Anne Sanders & Lance Lambert, *What to expect in the 2022 used car market*, FORTUNE (Nov. 1, 2021, 7:00 AM), https://fortune.com/2021/11/01/used-car-prices-high-carmax-2021/; Paul L. E. Grieco et al., *The Evolution of Market Power in the US Auto Industry* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29013, July 2021), https://www.nber.org/system/files/working_papers/w29013/w29013.pdf ("We find that although prices rose over time, concentration and market power decreased substantially. Consumer welfare increased over time due to improving product quality and falling marginal costs. The fraction of total surplus accruing to consumers also increased.").

**Fueling Inflation?**

Consider the back-and-forth over higher prices at the pump. Back when inflation was being dismissed by some as non-existent or transitory, Americans were noticing higher prices. The White House took notice, too. In August, Brian Deese, Director of the National Economic Council, sent a letter to FTC Chair Lina Khan, asking the FTC to explore whether "anti-competitive or other illegal practices" were at work.[21] To his credit, and consistent with studies the FTC conducted following similar requests over the years, Mr. Deese acknowledged that "many factors can affect gas prices".[22] (In 2006, for example, the Bush Administration's efforts to address high prices at the pump involved the FTC. After a year-long investigation, however, the agency concluded that observed gaps between costs and prices stemmed not from anticompetitive activity, but from changes in supply and demand and other market trends.[23])

Gas prices continued to rise. In November, President Biden wrote to Chair Khan, claiming "mounting evidence of anti-consumer behavior by oil and gas companies", citing profits at the largest oil and gas companies, and urging the FTC to act against any "anti-competitive or otherwise potentially illegal conduct".[24] (He also ordered the release of 50 million barrels of oil from the Strategic Petroleum Reserve.[25]) Writing missives like these to the FTC when prices at the pump go up is, at this point, a time-honored tradition of U.S. presidents. And to be clear: if there

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[21] Letter from Brian Deese, Dir., Nat'l Econ. Council, to Lina M. Khan, Chair, Fed. Trade Comm'n (Aug. 11, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Chair-Khan-Federal-Trade-Commision.pdf.

[22] *Id.*

[23] Press Release, Fed. Trade Comm'n, FTC Releases Report on its Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (May 22, 2006), https://www.ftc.gov/news-events/press-releases/2006/05/ftc-releases-report-its-investigation-gasoline-price-manipulation.

[24] Letter from Joseph R. Biden Jr., *supra* note 8.

[25] Press Release, White House, President Biden Announces Release from the Strategic Petroleum Reserve As Part of Ongoing Efforts to Lower Prices and Address Lack of Supply Around the World (Nov. 23, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/23/president-biden-announces-release-from-the-strategic-petroleum-reserve-as-part-of-ongoing-efforts-to-lower-prices-and-address-lack-of-supply-around-the-world/.

is, in fact, evidence of anticompetitive conduct, I want to know. That is why Commissioner Wilson and I wrote to Mr. Deese later in November to request the "mounting evidence".[26]

Was failing competition fueling inflation at the pump? Commissioner Wilson and I received no response, and I haven't seen evidence from elsewhere. Only one month after President Biden's letter, after gas prices dropped, Jared Bernstein, a member of the White House Council of Economic Advisors, claimed credit for the Administration. Speaking on Yahoo!News, he attributed the decline in prices in part to the President's letter to Chair Khan.[27] Yet nothing at the FTC had changed; what had were supply and demand.

An antitrust investigation predicated on fumes would have wasted resources and proved a distraction from the inflationary forces causing real harm.

**Seeking Inflation**

I am concerned. Not just that antitrust enforcers will waste precious resources on fruitless investigations. Not just that public officials and others are making arguments they must know are wrong. Not just that those arguments distract from discussions that need to happen about inflation. I am concerned about all of that. But I am also concerned that the same antitrust reformers who claim inflation stems from competition problems have been pushing and will continue to push for policy solutions that exacerbate the problem. Willfully or otherwise—and I suspect there is a bit of both—antitrust reformers are, and have long been, advocating *against* the focus on lower prices.

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[26] Letter from Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, to Brian Deese, Dir., Nat'l Econ. Council (Nov. 23, 2022); Noah Joshua Phillips (@FTCPhillips), TWITTER (Nov. 23, 2021), https://twitter.com/FTCPhillips/status/1463177222919962624.

[27] *White House economic advisor talks inflation, gas prices, and labor markets*, YAHOO!NEWS (Dec. 10, 2021), https://news.yahoo.com/white-house-economic-advisor-talks-163138673.html.

Two examples:

> Barry Lynn, long a critic of big business, claimed in 2006 that "[t]o defend Wal-Mart for its low prices is to claim that the most perfect form of economic organization more closely resembles the Soviet Union in 1950 than twentieth-century America."[28]
>
> Last September, Tim Wu, Special Assistant on competition policy in the White House, said that caring only about the consumer "is very challenging for the kind of broader economic goals that we have" and called for "a broader view . . . that takes into account much more than just the laser-like focus on the prices paid by consumers."[29]

The message is a little muddled, and couched in terms of goals like fighting corporate power; strengthening labor; or rectifying "power asymmetries" in markets.[30] But the message of antitrust reformers has been consistent: stop focusing on price.

As Josh Wright and I recently explained in the Wall Street Journal, the Administration and its allies in Congress are pursuing competition policies that would drive prices even higher and inflict more economic pain on Americans—especially the poor. While reformers employ the *language* of competition, which suggests that the policies will be deflationary, the truth is the opposite.[31]

*First*, the big critique: antitrust is focused solely on prices. That's wrong. Antitrust law also accounts for consumers' interests in output, quality, service,

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[28] Barry C. Lynn, *Breaking the Chain*, HARPER'S MAG., July 1, 2006, at 29.

[29] Matthew Perlman, *White House Adviser Touts 'Revitalization Of Antitrust'*, LAW360 (Sep. 30, 2021, 7:04 PM), https://www.law360.com/articles/1426882 (quoting Tim Wu's remarks at Fordham University School of Law's annual conference on international antitrust law and policy).

[30] *See*, *e.g.*, Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to the Staff of the Fed. Trade Comm'n 1-2, (Sep. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[31] Noah Joshua Phillips & Joshua D. Wright, Opinion, *As Inflation Rises, Antitrust 'Reformers' Target Lower Prices*, WALL ST. J. (Dec. 20, 2021, 6:17 PM), https://www.wsj.com/articles/inflation-rises-antitrust-reformers-lower-prices-competition-consumer-benefit-brandeis-biden-11640032926.

variety, and innovation. Courts say so; the merger guidelines say so; and these facts are reflected in recent enforcement actions filed by the antitrust agencies.[32] But as the public horror at inflation reminds us, prices remain very important to American consumers. In public policy like in the rest of life, there's no such thing as a free lunch. Policy involves tradeoffs. And serious discussion about policy recognizes those tradeoffs. But far too little of the gallons of ink lately spilled on antitrust makes clear what the tradeoffs are. When reformers argue that antitrust should be less concerned about the welfare of consumers—less concerned, among other things but above all of them, about price—what they mean is that we should accept higher prices in the service of other goals: labor, fighting corporate power, protecting democracy, etc.

I want to leave aside the claim that pursuing preferred distributional outcomes is consistent in all cases with protecting competition, which I hope everyone can agree is the point of antitrust law. The claim is wrong, as there is no reason to assume that competition unfettered by anticompetitive practices will result in such outcomes. (That's why we have taxation and social welfare and regulation.) But my point for now is that, if you subordinate price considerations, you police price less and fail to credit efficiencies that reduce price. It may be all well and good politically to make these arguments while focusing on zero-price

[32] *See*, *e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act . . . rests on premise that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country, the lowest prices, the highest quality and greatest material progress"); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("Direct evidence of anticompetitive effects would be proof of actual detrimental effects such as reduced output, increased prices, or decreased quality in the relevant market") (internal quotations and citations omitted); United States v. Anthem, Inc., 855 F.3d 345, 358 (D.C. Cir. 2017) ("The record shows that, by its own account, Cigna has been unable to match Anthem's volume-based discounts and instead has had to compete on quality and innovation."); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 1, 2.2.1, 4, 6.4, 10 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; Complaint at 2-3, 9, Otto Bock HealthCare North America, Inc., No. 9378 (F.T.C. Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; Complaint at 11, Illumina Inc./Pac. Biosciences of California, No. 9387 (F.T.C. Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf; Complaint at 7, Illumina, Inc., and GRAIL, Inc., No. 9401 (F.T.C. Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf; Complaint at 2-3, Nvidia/Arm, No. 9404 (F.T.C. Dec. 6, 2021), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

technology markets and the firms that dominate them, but generational inflation really should make people stop and think.

The second area is creating liability for lower prices, which is to say discouraging price cutting. Some of the same people claiming that we should use antitrust to combat inflation are also trying to stop practices that lower prices to consumers. For example, the 2019 report of House Judiciary Antitrust Subcommittee's Democratic staff called to expand liability for predatory pricing by doing away with the recoupment requirement.[33] Other antitrust reformers have also pushed for this change.[34] The 2019 report also endorsed enforcement of the Robinson-Patman Act, which President Biden's executive order on competition last year echoed.[35] Yet these changes would drive prices up—the last thing you want if you're trying to ease the burdens of inflation.

Cutting prices is the archetypal form of market competition. That is why the law on predatory pricing imposes a two-part test for liability, requiring that prices fall below some appropriate measure of the price-cutter's cost and that the price-cutter is reasonably likely to recoup its losses.[36] The recoupment requirement exists to ensure that price cutting is condemned only when it is likely to harm consumers. To change the law of predatory pricing without consumer welfare as our guide is to court or even encourage a truly perverse outcome: chilling price competition—or, put differently, higher prices.

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[33] STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 396-97 (Comm. Print 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[34] *See*, *e.g.*, Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7; Zephyr Teachout, Comments in the H. Judiciary Comm. Investigation into Competition in Digital Markets 12 (Apr. 23, 2020), https://judiciary.house.gov/uploadedfiles/submission_from_zephyr_teachout.pdf.

[35] MAJORITY STAFF REPORT, *supra* note 33, at 391-92; Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987, 36993 (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

[36] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-25 (1993).

That is what the Robinson-Patman Act did. The law was intended to protect small retail businesses from larger, more efficient chain stores.[37] High inflation during and after World War I accelerated the growth of chain stores, which leveraged better logistics and substantial cost savings from bulk purchasing to offer consumers lower prices and a greater selection than independent mom-and-pop stores.[38] American consumers voted with their feet, and their wallets. But small businesses had already organized and launched a persistent lobbying campaign against the chains, aided by among others Louis Brandeis, who urged Congress to ban quantity discounts and to allow manufactures to set retail prices.[39] For consumers to be free in their purchasing decisions, he asserted, "there must be removed from the mind of the potential purchasers the thought that probably at some other store he could get that same article for less money".[40] Chew on that for a minute.

Although Robinson-Patman is typically described as a law against discriminatory prices, it functions as a law against low prices because it limits discounting. Historians, lawyers, and economists generally agree on the impact: American consumers paid more money for groceries and household products.[41] This is not new. In 1969, the Report of the White House Task Force on Antitrust Policy concluded that "the Robinson-Patman Act requires a major overhaul to make it

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[37] ANTIRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 311 (Apr. 2007), https://digital.library.unt.edu/ark:/67531/metadc1228317/m2/1/high_res_d/amc_final_report.pdf.

[38] RICHARD VEDDER & WENDELL COX, THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY 39-41 (AEI Press 2006), https://www.aei.org/wp-content/uploads/2014/03/-walmart-revolution_104444796470.pdf?x91208; Gene Smiley, *The U.S. Economy in the 1920s*, EH.NET, https://eh.net/encyclopedia/the-u-s-economy-in-the-1920s/; MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA 70-73 (2011).

[39] VEDDER & COX, *supra* note 38, at 41; LEVINSON, *supra* note 38, at 64-67; Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1120-24 (1983); ANTIRUST MODERNIZATION COMM'N, *supra* note 37, at 313.

[40] *To Prevent Discrimination in Prices and to Provide for Publicity of Prices to Dealers and the Public: Hearings on H.R. 13305 Before the H. Comm. on Interstate and Foreign Com.*, 63rd Cong. 14 (1915) (statement of Louis D. Brandeis, Att'y at Law, Mass.)

[41] For an overview and discussion of criticisms of Robinson-Patman, *see generally* Roger D. Blair & Christina DePasquale, *'Antitrust's Least Glorious Hour': The Robinson-Patman Act*, 57 J.L. & ECON. S201 (2014); ANTIRUST MODERNIZATION COMM'N, *supra* note 37, at 317-26.

consistent with the purposes of the antitrust laws."[42] A 1977 report from the Department of Justice raised "serious questions whether the Act advances the competitive goals of other antitrust laws" and recommended that "serious consideration" be given to its repeal.[43] Thirty years later, eleven of twelve members of the Antitrust Modernization Commission endorsed repeal.[44] Neither the FTC not the Antitrust Division has seriously enforced the law since the 1970s.[45]

There is no reason to think consumers will fare any better if Robinson-Patman enforcement is revived today. Empirical evidence indicates that the presence of large chains, which typically get better deals from suppliers, lowers prices to consumers.[46] And there are legitimate reasons why different retailers might get charged different prices for the same or similar products, for example because large orders allow a seller to realize scale economies in manufacturing or delivery, making them less expensive to fill. Manufacturers also offer discounts to get on the shelves of new retailers. When Americans are paying nearly 30% more for eggs and meat,[47] now is exactly the wrong time for the government to discourage low prices. I understand that some people do not like chain stores, but they are popular because they drive prices down. Intervening to disrupt efficient operations and chill discounting is the wrong medicine for our inflation woes.

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[42] Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11, 41 (1968-69).

[43] U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 260-63 (1977).

[44] ANTIRUST MODERNIZATION COMM'N, *supra* note 37, at 317 (recommending repeal and explaining that "the Act protects competitors, often at the expense of competition that otherwise would benefit consumers, thereby producing anticompetitive outcomes").

[45] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 775 (5th ed. 2016).

[46] Meilin Ma et al., *Market Concentration, Market Shares, and Retail Food Prices: Evidence from the U.S. Women, Infants, and Children Program*, 41 APPLIED ECON. PRESP. & POL'Y 542 (2019); *see also* Daniel Hosken et al., *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Fed. Trade Comm'n, Working Paper No. 313, 2012), https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf (finding that grocery store mergers in less concentrated markets are more often associated with price *decreases*).

[47] Jeffry Bartash, *High inflation is eating up the budgets of American households*, MARKETWATCH (Nov. 13, 2021, 10:32 AM), https://www.marketwatch.com/story/high-inflation-causes-meat-sugar-and-other-grocery-staple-prices-to-soar-11636726612.

Which brings me back to breakups. Now prominent politicians are calling to break up low-margin grocery chains, like Kroger?[48] We may have jumped the shark there. Leaving aside the absolute lack of any evidence or any theory of liability, how would that help? Is the claim that prices will be lower at less efficient stores? Or that efficiencies of scale and scope do not exist? The disinterest in how markets and businesses actually function may be proportional to inflation—that is, at historic highs. Inflation is a real issue, hurting people every day; and our policy discussion needs to rise to the occasion.

It may be getting worse. Against all of the experience and economic learning of the intervening years, progressives (including some familiar antitrust reformers) are putting price regulation back on the table.[49] Price controls beget hoarding and shortages. If your concern is competition, they are the opposite of that. While I doubt price regulation will get serious traction—and I pray it does not—to me the conversation shows just how far economics is being shunted aside and people are failing to grapple with the lessons of history.

## Conclusion

Inflation is very harmful, erasing wage gains and taxing the poor the most. We must take it seriously and get facts right, or we will end up with bad policy. Inflation was high around the time that antitrust law gained its present focus on

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[48] *See*, *e.g.*, Joe Lancaster, *Elizabeth Warren Blames High Food Prices on Grocery Chains' 'Record' 1 Percent Profit Margins*, REASON (Jan. 12, 2022, 11:50 AM), https://reason.com/2022/01/12/elizabeth-warren-blames-high-food-prices-on-grocery-chains-record-1-percent-profit-margins/.

[49] *See*, *e.g.*, *Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply Before the H. Subcomm. on Antitrust, Com. and Admin. L.*, 117th Cong. (Jan. 19, 2022) (opening statement of David N. Cicilline, Subcomm. Chair), https://cicilline.house.gov/press-release/chairman-cicilline%E2%80%99s-opening-statement-antitrust-subcommittee-hearing-food-supply ("And we need to strengthen worker protections, prohibit price gouging, and explore price controls as part of an industrial policy to address the outbreak of inflation for essential goods and services in industries that are plagued by profiteering. In short, we need an all-of-the-above approach to bring down costs and rebuild our economy."); Isabella Weber, Opinion, *Could strategic price controls help fight inflation?*, GUARDIAN (Dec. 29, 2021, 6:20 AM), https://www.theguardian.com/business/commentisfree/2021/dec/29/inflation-price-controls-time-we-use-it; Todd N. Tucker, *Latest Inflation Headlines an Opportunity to Revisit History of Price Controls as an Industrial Policy Tool*, ROOSEVELT INST. BLOG (Nov. 16, 2021), https://rooseveltinstitute.org/2021/11/16/latest-inflation-headlines-an-opportunity-to-revisit-history-of-price-controls-as-an-industrial-policy-tool/.

consumer welfare, and it should remind us today of why we would do well to maintain that focus. Adopting policies that lead to higher prices, or that prevent markets from working, is not the solution.