Power Buyers, Economic Discrimination, and the Grocery Supply Chain

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On Behalf of the National Grocers Association

Hearing on "Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America's Food Supply"

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Good morning Chairman Cicilline, Ranking Member Buck and members of the House Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law. Thank you for holding this critical hearing on Addressing the Effects of Economic Concentration on America's Food Supply. There is no more dramatic illustration of this impact than in grocery stores today, all across America, in rural and urban neighborhoods.

My name is Michael Needler, Jr. and I'm the President, CEO and Majority Shareholder of Fresh Encounter, Inc. I want to note that my professional career started on Capitol Hill when I interned for the late Congressman Michael G. Oxley, and then spent a second summer interning for the House Financial Services Committee. Both summers taught me how difficult your jobs are and I am grateful for each of you.

We operate 100 grocery stores in Ohio, Indiana, Kentucky and Florida. I am a 3rd generation grocer. My grandfather started the grocery business in 1964 after he bought 5 stores in Northwest Ohio throughout several rural small towns. My mother and father acquired the business from him in 1995 and my sister and I acquired the company from him a little over 10 years ago. Our company's mission is to Delight our Customers, Nourish our Communities and Inspire Pride in our Team. We operate with a culture rooted in Positivity, Appreciation and Resilience.

It is an honor to appear before you today to provide the independent grocer perspective on America's food supply challenges. Grocers have a unique perspective on food supply. We are the last link of the supply chain that connects American consumers to the producers of fresh produce, meat and dairy, consumer goods like paper products, frozen foods, and countless other items. Collectively my stores carry over twenty-five thousand different SKUs or products for our customers. As you are aware, grocers have been on the front lines of the COVID-19 pandemic to keep Americans fed and safe.

The view from where the independent grocer sits is this: America's food supply chain problems are a result of increasing concentration and unchecked buyer power by dominant retail chains who force suppliers to discriminate against independent grocery. The result is a system that benefits a select few at the expense of everyone else, including consumers, workers, and independent retailers and producers. 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.

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. Independent grocers like me 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. Meanwhile, large national chains have exercised their buyer power to demand on-time, complete orders, and in some cases to secure excess supply.

I am here today to explain how many, if not all, independent retailers are forced to compete in an unfair playing field. I want to be clear that I'm not here to ask for new laws nor am I here to ask for any financial assistance. I am here to shine a light on the lack of Federal Trade Commission enforcement of the Robinson Patman Act, a law written in this very committee over 80 years ago to prohibit anticompetitive economic discrimination against independent businesses, and allow the free market to work.

The rules prescribed in Robinson-Patman essentially aim to enable buyers the ability to buy goods at the same prices their competition does, so long as they are buying in similar quantities. What we are seeing in our markets is that our big-box competition has grown so large that they have the ability to exert considerable buyer power over the Consumer Packaged Good (CPG) companies. They can dictate pricing, payment terms, product packaging, product delivery quantities and frequencies that are nearly untouchable to operators like myself. To be clear, we feel that many CPG companies would be in favor of FTC enforcement because it would take the away the concentration of power from a few power-buyers and remove the burden of balancing the favoritism. What happens in most cases is that when the CPGs bend for the power-buyers they have no choice but to make up the difference on the rest of their book of business. This higher pricing first negatively impacts consumers in the rural and inner city markets we serve. But it ultimately harms all consumers when independent competition is eliminated.

Unfortunately, the Robinson-Patman Act hasn't been enforced in over 20 years. Today, I hope this Committee can shed light on this failure and urge the Federal Trade Commission and Department of Justice to chart a new course.

Taking a step back, please allow me set the stage for what is at stake here. Grocery is an approximately trillion-dollar retail segment of the U.S. economy. There are about 38,000 supermarkets across the country, employing approximately 5 million Americans. Independent grocers and wholesalers generate approximately 33 percent of American grocery sales, or $253 billion in sales. The independent grocery sector generates 1.1 million jobs, $42 billion in wages, and $36 billion in taxes. According to the Food Industry Association, the supermarket industry as a whole invested over $24 billion due to COVID-19 to help keep our employees and customers safe.

The size of independent grocery stores serving America's communities varies widely. A store in an urban area like New York City may be 5,000 square feet, a store in small rural area of Colorado may be 20,000 square feet, while a grocery store in a Chicago suburb may be over 60,000 square feet. Independent grocers have diverse owners, diverse customers, and diverse locations.

If a small rural town or a high-density urban neighborhood has a grocery store, chances are it is an independent grocer. Independent grocers cater to the communities they serve and have positively differentiated their businesses through their offerings, service, quality, and freshness of products, and by being a local business with a heart for the communities they serve. Many independent grocers are family-owned or employee-owned businesses that have been in business for generations. In many markets, we provide an outlet for small and local producers who are overlooked by the big players.

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. To remain competitive and keep food prices as low as possible. Independent grocers operate with a net profit margin if 1 to 2 percent on average, one of the lowest margin industries in the economy.

My own stores serve a broad spectrum of markets, ranging from rural communities to inner-city neighborhoods. In many cases, our departure from the markets would deprive that community of access to healthy and affordable food, creating a food desert. We operate under several banners, because my growth strategy has been built around acquiring similarly challenged independent retailers who have run out of time, energy or in some cases run out of money. When I was named President in 2010 I was 28 years old and we had about 30 stores and we were facing very difficult decisions. Frankly, our back was against the wall. Our margins continued to experience pressure and our sales volumes were under constant siege. In many cases, we would see retail prices at the competition that were well below our acquisition costs. I determined that there was only one way to survive, and that was to grow.

My thesis for growth was that it would give us the ability to buy better, spread our overhead over more stores and hopefully enable us to survive. I took a big risk, leveraged the company and provided personal guarantees that we would be successful. We doubled our revenue with the acquisition of a struggling company operating in contiguous markets. Once we felt we had properly integrated with that company, we found ourselves again at the table working on saving a third company, and then again a fourth company which was being sold in bankruptcy. With each transaction, our size, scale and sophistication grew. In 2021 we acquired another 51 stores in the Tampa market under the Save A Lot banner. Our Save A Lot stores offer limited assortment grocery shopping in smaller footprints than our stores in Ohio, Indiana and Kentucky. That brings us to where we are today, 100 stores over four states, employing approximately 3,500 teammates.

In spite of our growth and supply chain enhancement, we still see that the road to sustainable competition is steep and potentially insurmountable. The retail grocery playing field is increasingly dominated by a handful of national and international chains. The top players are Wal-Mart, which alone captures close to one in three grocery dollars that Americans spend on groceries. Kroger, Amazon, Albertson’s, and Dutch grocer Ahold Delhaize round out the top five. We estimate that over 60 percent of American grocery sales are concentrated among these top five retailers. And this doesn’t include sales by big club store chains, such as Costco and B.J.'s, or dollar stores, such as Dollar General and Family Dollar, chains that are growing forces in the retail grocery industry.

Now, again, big isn’t always bad. As I said earlier, growth to achieve scale and efficiencies was our strategy to compete and thrive. But the problem is that the dominant grocery retailers have become so massive that they have “buyer power.” What do I mean by that? These companies control so much of the U.S. retail grocery spend that they have become essential gatekeepers for America’s food suppliers.

Walmart is a prime example. It controls approximately 30 percent of America's grocery spend. That's a single company that can, with a single email, grant or deny a food supplier's access to 30 percent of American households. The other big four grocery giants together control a little more than 30 percent of U.S. grocery sales. This gives these dominant grocer retailers the power to dictate terms and conditions to suppliers. When a customer can threaten that much of your sales in one stroke, you have to listen.

Walmart's ability to unilaterally demand concessions from suppliers is legendary. For example, in 2017, it 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. 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.

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. Walmart punishes suppliers that fail to meet its demands by charging a penalty of 3 percent of the cost of goods sold—a huge penalty in an industry with razor-thin margins.

They can get away with it because the dominant grocery retailers are not nearly as dependent on a particular supplier as the supplier is on the retailer. Think about it, even if a food supplier has a substantial number of products compared to the overall number of products for sale in any grocery store (in the tens of thousands), the total amount provided by a single manufacturer is only a fraction of a grocery retailer's sales. And a grocery power buyer often enjoys a choice between potential branded suppliers for a particular product in addition to selling its own, private-label versions of the same product. A dominant retailer has a substantial advantage over its 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. As a result, the power buyer can extract discriminatory terms—better prices, more favorable terms, unfair allocations of products.

In fact, this Committee has verified this anticompetitive behavior. In its report on competition in the digital markets, this Committee found that power buyers can exercise significant market power over suppliers. For example, the Committee found that Amazon ignored minimum advertised prices set by brand manufacturers, by which other sellers must abide. One anonymous source explained that suppliers have "no realistic threat" against Amazon, because they have no other path to reach their customer base. And the Committee cited internal Amazon documents showing that it does not fear the consequences of failing to comply with suppliers' policies.

New e-commerce entrants are also getting a "channel of trade" pricing advantage that further play favor to their online channel over traditional channels like mine. "Channels of trade" is a term coined by industry to justify discrimination. Traditional grocery gets segmented into a grocery "channel" that supposedly doesn't compete with e-commerce giants and big box stores. But consumers don't recognize artificial "channels" and we compete with these outlets every day.

This tremendous economic power concentrated in the hands of a few grocery giants harms independent retailers and producers, the American consumer, and the U.S. economy in at least two ways relevant to today's hearing: It results in economic discrimination on independent competitors and it increases food supply chain concentration.

I'll start with economic discrimination. The massive grocery chains with buyer power force suppliers to discriminate against independent grocers on price, terms, and product availability. For years, I have seen the dominant grocery chains receive exclusive access to certain products and product packaging and charge retail prices far below the wholesale prices I can get from suppliers. A few examples:

- Price Discrimination—Price discrimination has taken many forms where we miss out on 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 for suppliers, meaning they only pay once a product has been scanned for final sale to a customer. Meanwhile, we pay for products upon receipt (or within a fixed period), shifting the risk that a product sits on the shelves to me. 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.

- Package discrimination—Certain package sizes or promotional packaging is only offered to certain grocers, but not independents like myself. Some manufacturers have stopped supplying large package size version of products—that consumers associate with greater value—to independent grocers while providing them to big box retailers or club stores. In additional, dollar stores use 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 consumers that they are paying a lower price for the same product they see at independent grocers.

Although the pandemic did not cause this discriminatory treatment, which has been occurring for many years, the pandemic's challenges to the food supply chain have brought these issues to the forefront. As the pandemic began and panic buying ensued, grocers' shelves were decimated. When suppliers could not produce the quantities of products necessary to supply all retailers with their requested volumes, suppliers placed allocations and restrictions on product flow to retailers and wholesalers.

Unfortunately, they did not apply these allocations equally. Independent grocery stores did not receive their fair share. We observed numerous examples of products that we could not get in adequate quantities, or simply could not get at all, for our stores. But those same products would be available in abundance on the shelves of our big box chain competitors—often on aisle end caps where a grocer promotes products by giving them special visibility. This included hand sanitizer, disinfecting wipes, paper towels, toilet paper, as well as food items. For example, we were the last segment to regain access to products like canned vegetables, soups, dried pasta, and even private label products compared to our largest chain competitors who commanded priority delivery.

Unfair product allocation was not the only problem that grew worse during the pandemic. Discrimination in pricing became even more rampant. The dominant grocery chains generally operate on an "every-day-low-pricing" model with their suppliers. That means they always receive the lowest possible price from the supplier, and generally don't receive additional discounts. Independent grocers and their wholesalers generally cannot get every-day-low-pricing from suppliers. Instead, they rely on promotional allowances from suppliers that are used to offset higher wholesale prices. That, together with ultra-low margins, allow independents like my stores to stay price competitive most of the time. But even with promotional allowances my wholesale prices are often higher than the retail prices I see in my big box competitors on many items.

During the pandemic, pricing discrimination got even worse. Suppliers eliminated promotional allowances to independent grocery stores on many products. As a result, independents weren't able to offer the in store promotional prices that our customers expect. But that was only half of the problem. Although suppliers ended promotional allowances to independents, they did not change their every-day-low-price programs with the dominant chains. While our wholesale prices went up, the big chains' wholesale prices changed the same.

Why does this discrimination happen? It's simple. The big chains with buyer power demand treatment from suppliers that suppliers can't afford to give to everyone. Remember, many food and consumer good suppliers have thin margins, too. To afford the treatment that their dominant customers demand, they have to shift those costs to costs to customers who don't have the power to make take-it-or-leave it offers to their suppliers. It's like pushing down on one side of a waterbed. Pressure on one side just shifts the water to the other side of the bed.

As I mentioned before, in September 2020 when I was struggling to get any supply for certain products on my shelves, Walmart sent its letter to suppliers demanding 98 percent on time, in full deliveries and threatened a penalty of 3 percent of the cost of goods sold on suppliers that failed to comply. So suppliers did what they had to do to keep their lights on, they kept Walmart happy and passed the bill on to the independent grocer and the American consumer.

In the current cycle of food price inflation and supply chain disruptions, this problem has only worsened. During the holiday rush we braced ourselves for customer dissatisfaction as our vendors notified us of significant wholesale price increases and told us to expect fewer product deliveries. We were stunned in November when Walmart gave its quarterly earnings report and forecasted that supply disruptions and inflation would have a minimal impact on availability of product and retail pricing. What became apparent was that Walmart was not only using its muscle to demand priority access to consumer products, but it also resisted inflationary increases by refusing to pay more when suppliers increased costs. Again, just like a waterbed, Walmart's squeeze on suppliers meant they had no choice but to limit product offerings and demand inflationary increases on their smaller customers. For us, inflation and supply chain challenges represent a threat to our business and our customers. For dominant chains, it represents an opportunity to gain even more market share.

I want to address a few of myths about economic discrimination up front:

Myth number 1: The dominant chains get special treatment because they are more efficient. Not true. They buy by the truck load; I buy by the truckload. Achieving efficient scale was critical for my own business. And as I mentioned earlier, I determined that there was only one way to survive, and that was to grow. Like many independent grocers, we use two national wholesalers that together purchase approximately 30 billion of dollars of product from grocer suppliers every year. They aggregate the demand of thousands of independent grocery stores and handle logistics and distribution. For example, independent wholesalers operate highly efficient billion-dollar-plus warehouse facilities, just like the big chains. This allows independent grocers to achieve the same economies of scale that the dominant grocery firms boast about. Economic discrimination is about market power, not efficiency.

Myth number 2: The dominant chains get special treatment because they are just better at moving product. In fact, the opposite is true. The pandemic brought this dramatically to light. My own stores' growth dramatically outperformed my big box competitors' stores, including Walmart's, during COVID-19 on many products categories. I think a lot of consumers were looking to stay closer to home and appreciated our attention to customer service and efforts to keep them safe. And we have great prices and customer service every day, pandemic or no pandemic. Yet suppliers would not give us fair allocation of product. Isn't it a just little suspicious that suppliers were favoring the underperformers, who just happen to be the partners that they can't refuse?

Myth number 3: Economic discrimination is ok because the dominant chains will pass through the savings and at least their customers will get the lowest prices. Wrong again. Walmart and the other big grocery chains don't offer low prices out of the goodness of their hearts. They offer low prices for the same reason we do: to compete and win customers. When their independent competitors get driven out of business, or compete with higher costs, the big chains face weaker or no competition. What do they do? They just increase their margins and charge higher prices. Independent wholesalers have crunched the numbers and it verifies what common sense tells you: in markets where the big chains face no grocery competition, they charge higher prices to the consumer. All consumers lose from anticompetitive economic discrimination against independent grocers.

The other way retail concentration and buyer power damages the American economy is that it increases concentration throughout the grocery supply chain. When the big grocery chains drive out independent competitors, it increases concentration in grocery retail markets. This increases the buyer power of the dominant grocery companies. But it drives greater consolidation upstream in the grocery supply chain as well.

Power buyers' demands on suppliers for lower costs are forcing consolidation among food and consumer goods manufacturers. A 2021 investigation by the Guardian newspaper found that 79 percent of the groceries in a basket of 61 everyday types of food and drink are being sold by four companies or fewer. For example:

- Three firms control 79% of the dry pasta market.
- Four firms control 61% of the fresh bread market.
- Three firms control 93% of the carbonated soft drink market.
- Four firms control 79% of the beer market.
- Four firms control 69% of the wine market.
- Four firms control 68% of the coffee market.
- Three firms control 82% of the baby food market.

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.

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. Because of their bargaining leverage, dominant retailers can and do aggressively drive down the prices they pay to farmers, ranchers, and other suppliers. 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 workers, and market participants throughout the supply chain have less money to invest in expanding their businesses. All of this has a devastating impact on rural communities.

We've all seen how important a diversified food ecosystem is, especially in the face of the pandemic. Allowing a few players to exert power will result in a less diverse food system. Concentration also makes the food supply chain less resilient and more vulnerable to disruption and shortages. As concentration among suppliers has increased, grocery manufacturing has also been consolidated. 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.

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The consumer benefits when there is competition. Healthy competition forces all of us to get better. We can all agree though that when the rules are fair, the best players will play, and compete. We can win in retail grocery by offering service, quality, technology solutions, great shopping experiences and many more delightful attributes. However, when the rules of the game are not enforced, and those with the largest budgets dictate the rules of supply, then the smaller players will not be provided a fair opportunity to compete on the highest consumer decision point – price. Unfortunately, this ultimately ends poorly for the consumer as the smaller firms exit. Without true price competition, consumers ultimately pay more at the grocery checkout.

The number of independent grocers in America is declining due to the relentless economic discrimination and concentration imposed by dominant grocery chains with buyer power. When independent grocers leave, small towns begin to fall apart, and our government spends billions trying to reverse the food deserts that form.

It's too late after the independent grocers leave. Prevention is the only way to stop this erosion. Over eighty years ago, Congress, led by this Committee, wrote antitrust laws like the Robinson-Patman Act to prohibit anticompetitive economic discrimination against independent businesses. Those laws are still on the books, but the Federal Trade Commission and Department of Justice have not brought a Robinson-Patman case in over 20 years. It's time to dust off these tools and go to work to protect the free market, independent businesses, the food supply chain, and America's consumers.

Thank you for taking time to hear from an entrepreneurial retailer today. There are many pressing issues in our Country, and I feel that having a fair and balanced food supply ecosystem is as important to our Country as most topics we face. I welcome any questions you might have.