

**Barry Lynn
Executive Director
Open Markets Institute
Questions for the Record
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QUESTIONS FROM SENATOR BOOKER

1. During the COVID-19 pandemic we saw brittle global supply chains implode while many local and regional food systems showed a greater capacity to adapt and thrive. Can you contrast the resilience of competitive, decentralized local and regional food systems with the lack of resilience in the larger hyper-consolidated food system? What lessons can Congress learn from this?

The main lesson Congress should learn is that all concentrations of keystone capacity are dangerous, and some pose threats that are almost existential in nature. This is true of advanced semiconductors in Taiwan, it is true of Personal Protective Equipment (PPE) in China, and it is true of farming and food systems right here at home. Such concentration means higher prices, lower market prices and wages for the people who do the actual work, more pollution and other forms of waste, and less real variety and quality in our food. It also means that when we lose access to a key manufacturing or processing plant, the result can be the crash of entire systems, with no easily available alternatives.

Congress should also keep two other points in mind. First, monopolists are very good at keeping things exactly as they are. I personally first published a major article about these problems in June 2002, and the American people have now been exposed to innumerable supply chain breakdowns that prove my original thesis. Unfortunately, with a few exceptions, the monopolists have managed to avoid any consequences. Second, although more aggressive antitrust is essential to fixing this problem in the long term, we should also be considering other forms of pro-competition policy as well. One example of such policy is the Inflation Reduction Act, in which Congress used public investment to speed the building of new capacity.

2. One specific area within our food system where we have seen growing consolidation is in the grocery sector. When suppliers offer favorable prices and contract terms to dominant retailers, both independent grocers and consumers suffer. Independent grocers are unable to compete and stay afloat without passing higher prices along to American consumers. Earlier this year, the Federal Trade Commission (FTC) released its “Report on Grocery Supply Chain Disruptions” and suggested using antitrust laws such as the *Robinson Patman Act* to hold accountable suppliers who price discriminate. Why is price discrimination in the grocery sector such a serious problem for both independent grocers and American consumers? Do you think Congress should consider updating the *Robinson*

Patman Act to ensure that regulators such as the FTC have the tools they need to address this issue?

This is a hugely important issue, and an excellent question.

Monopoly buyer power, plus a license to discriminate in the treatment of different sellers, provides big retailers with an unfair advantage vis-a-vis retail rivals, thus promoting further concentration of power and control, less real variety, less service, and higher overall prices for consumers. This one-two punch of power plus a prerogative to discriminate also results in large retailers wielding their power in ways that both drive consolidation among suppliers and ultimately also strips the overall system of wealth and capacity.

The foundation of antimonopoly is non-discrimination law. This means that any corporation that controls access to any essential good, component, or service must treat every individual and business that depends on them the same. Such laws date not merely to the foundation of the United States but to Roman times. In the United States, at the federal level, we see these principles at work most dramatically in the Interstate Commerce Act of 1887, which over the years was ultimately applied to most transportation and communications corporations.

In the 1930s Congress also applied these same principles to both powerful retailers and powerful producers, through the Robinson Patman Act. The RPA proved to be extremely effective, and helped to ensure the distribution of both retail and production capacities into the 1980s, when the Reagan Administration essentially stopped enforcing the law.

RPA today remains on the books, and since 2006 our team at Open Markets has been in the vanguard of efforts to convince U.S. antitrust agencies to actually enforce the RPA. We did so in the article “Breaking the Chain: The Antitrust Case Against Walmart,” in *Harper’s* in 2006, and in the book “Cornered: The New Monopoly Capitalism and the Economics of Destruction,” in January 2010.

More recently, Daniel Hanley of our team published an important paper on the topic, “Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act,” in the *Hofstra Law Review*. And Brian Callaci, Daniel Hanley, and Sandeep Vaheesan of our team also published a second important paper on the topic, titled “The Robinson-Patman Act as a Fair Competition Measure,” in the *Temple Law Review* (Forthcoming). Open Markets also co-hosted an event in Minneapolis in September 2022 promoting stronger enforcement of the law, and hosted a speech by FTC Commissioner Alvaro Bedoya on the issue.

In all of these writings and events, we have made clear that we believe the FTC and DOJ both have sufficient authority to enforce the law effectively right now. We also made clear that we believe that there are many ways Congress can strengthen and improve the law.

