

The Waterbed Effect and the Price of ‘Pricing Fairness’

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Executive Summary

Several states are considering legislation that would require large grocery suppliers to offer identical prices and contract terms to all retailers purchasing the same quantity of goods. New York Senate Bill S8563—the “Consumer Grocery Pricing Fairness Act”—is a leading example.

The proposal aims to prevent large national retailers from negotiating better wholesale prices than smaller independent grocers. Supporters argue that large retailers use their buying power to secure discounts unavailable to smaller stores, creating a “waterbed effect” in which suppliers recover lost revenue by charging smaller retailers higher prices. They contend that this dynamic harms independent grocers and contributes to food deserts in low-income communities.

This issue brief concludes that, while these concerns are understandable, the proposed legislation would likely raise grocery prices, reduce competition, and harm the consumers it intends to help.

S8563 would require large food manufacturers—those with more than \$6 billion in annual sales—to offer identical “terms of sale” to retailers purchasing the same volume of goods, defined as up to a single truckload. “Terms of sale” include prices, discounts, rebates, delivery terms, promotional allowances, and other contractual provisions. The bill would also require suppliers to disclose anonymized contract terms offered to dominant retailers upon request. Violations could trigger enforcement actions by the state attorney general or private plaintiffs, with penalties of up to three times actual damages.

In practice, the legislation establishes a mandatory price-parity rule. If a supplier offers a discount to one covered retailer, it must extend the same terms to all similarly situated buyers. Because any discount would immediately apply across the market, suppliers would have strong incentives to eliminate targeted discounts and adopt uniform, higher wholesale prices.

Price differences across buyers are common in competitive markets and often reflect legitimate efficiencies. Large retailers frequently receive lower wholesale prices because they purchase in higher volumes, place predictable orders, and reduce suppliers’ distribution and marketing costs. Those efficiencies lower suppliers’ per-unit costs and often translate into lower retail prices for consumers.

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Research shows that large-format retailers such as Walmart frequently offer lower grocery prices and that their presence can prompt competing stores to reduce prices as well.

Mandatory price uniformity weakens those competitive dynamics. Economic theory and historical experience—particularly under the Robinson-Patman Act—suggest that price-parity rules discourage discounting and push suppliers toward rigid, uniform pricing structures.

Supporters of the legislation rely heavily on the “waterbed effect,” the idea that discounts to large buyers force suppliers to charge higher prices to smaller ones. While this concept appears in economic theory, it arises only under specific market conditions and has limited empirical support. Suppliers typically set prices based on each buyer’s demand conditions and competitive alternatives, not to offset discounts offered to other customers.

The bill’s disclosure requirements raise additional concerns. By requiring suppliers to disclose anonymized contract terms from dominant retailers, the legislation could reduce incentives to negotiate discounts. Economic research shows that greater pricing transparency in concentrated markets can facilitate coordination and weaken price competition. Advances in artificial intelligence further complicate the assumption that disclosed contract terms can remain effectively anonymized.

The legislation is also justified as a response to food deserts and nutritional inequality. Empirical research, however, indicates that limited geographic access to grocery stores explains only a modest portion of observed differences in diet quality. Much of the disparity reflects differences in consumer demand, rather than wholesale pricing conditions.

If the legislation raises wholesale prices or reduces discounting, the resulting retail price increases are likely to fall disproportionately on low-income households that rely on high-volume, low-margin retail formats. Increased regulatory risk could also discourage investment in new stores, particularly in underserved communities.

Policies aimed at supporting small grocers and improving food access address legitimate concerns. Mandatory wholesale price uniformity, however, is a blunt instrument. The available economic evidence suggests that such legislation would reduce discounting, increase grocery prices, and ultimately harm consumers—particularly those with the fewest alternatives.

I. Introduction and Overview

New York Senate Bill S8563—the “Consumer Grocery Pricing Fairness Act”—would prohibit large grocery suppliers from offering different prices, rebates, promotional allowances, or contract terms to retailers purchasing equivalent quantities of the same goods.¹ The bill applies to suppliers with more than \$6 billion in annual sales and imposes additional restrictions on retailers with more than \$18 billion in annual sales operating in more than 20 states. Violations would carry civil penalties of up to three times actual damages, enforceable by the New York attorney general or by private plaintiffs. Several other states are considering similar legislation.

Sen. Cordell Cleare, the bill’s sponsor, argues that large retailers extract preferential wholesale terms from suppliers.² Suppliers then raise prices to smaller, independent grocers to offset those discounts, creating what she describes as a “waterbed effect.” In her view, this price discrimination drives independent grocers out of business and contributes to the emergence of “food deserts,” where low-income neighborhoods lack adequate access to grocery stores.

This issue brief evaluates those claims against the relevant economic literature. It concludes that S8563—and similar bills under consideration in other states—would likely produce the opposite of their stated objectives. By prohibiting the negotiated discounts through which competitive pressure operates in grocery supply chains, the bill would reduce discounting across the market, raise average wholesale costs, and ultimately increase retail prices. The burden would fall most heavily on low-income consumers who rely on high-volume, low-margin retail formats.

The bill’s food-desert rationale also rests on a misreading of the empirical literature on nutritional inequality. Its mandatory disclosure provisions introduce an additional risk by facilitating the sort of coordinated pricing behavior that antitrust law seeks to prevent.

S8563 closely resembles pending legislation in Minnesota, Arizona, and Rhode Island, suggesting a coordinated multistate effort to establish a *de facto* national pricing standard through state law. Each proposal shares the same structural flaw: they treat price differences as presumptively anticompetitive without requiring any showing of consumer harm. That approach inverts the core logic of modern antitrust analysis.

II. How the Bill Works

S8563 would add a new Article 22-C to New York’s General Business Law. Its core provision—Section 350-k—makes it unlawful for a “covered supplier” to fail to extend the same “terms of sale” to all buyers purchasing on the same “volume unit basis” in “reasonably contemporaneous sales.” The bill defines “terms of sale” broadly. It covers not only price, but also discounts, rebates, delivery

¹ S. 8563, 2025–2026 Reg. Sess. (N.Y. 2025), <https://legislation.nysenate.gov/pdf/bills/2025/S8563>.

² Sponsor’s Mem. (Cleare), Bill No. S. 8563 (N.Y. 2025), <https://www.nysenate.gov/legislation/bills/2025/S8563> [hereinafter Sponsor’s Memo].

terms, payment terms, package size, promotional allowances, marketing devices, merchandising arrangements, and distribution terms, all evaluated on a per-unit basis.

This structure differs sharply from contractual most-favored-nation (MFN) clauses. In ordinary commercial practice, an MFN clause is a negotiated contractual provision under which a seller agrees to give a particular buyer terms no worse than those offered to other buyers. S8563 would effectively impose a statutory MFN regime. Covered suppliers would be legally required to offer the same terms to every similarly situated retailer, regardless of the parties’ negotiated agreements.

The bill defines “volume unit basis” as a base unit of measurement that cannot exceed a single truckload. That definition has significant practical consequences. The law treats the first truckload sold to an independent grocer the same as the 500th truckload sold to a national chain. Suppliers therefore must offer identical per-unit terms to both buyers. They cannot price the difference in predictability, logistics simplicity, or long-term planning value that a 500-truckload relationship provides.

TABLE I: Major Retailers Covered by State Bills

COMPANY	GROCERY REVENUE (\$B) ³	US STATES	NY	MN	AZ	RI	ME	SOURCE
Walmart U.S.	\$276.0	50	Yes	Yes	Yes	Yes	Yes	10-K
Amazon	150.0+	45 ⁴	Yes	Yes	Yes	Yes	Yes	Amazon News ⁵
The Kroger Co.	116.3	35	No	No	Yes	No	No	10-K
Costco (U.S.)	107.2	47	Yes	Yes	Yes	No	Yes	10-K
Albertsons Cos.	65.6	34	Yes	No	Yes	Yes	Yes	10-K
Sam's Club (U.S.)	60.0	44	Yes	Yes	Yes	No	Yes	Walmart 10-K
Target Corp.	55.6	50	Yes	Yes	Yes	Yes	Yes	10-K
Ahold Delhaize USA	43.4	23	Yes	No	No	Yes	Yes	Annual Report ⁶
Dollar General	33.4	48	Yes	Yes	Yes	Yes	Yes	10-K
Walgreens Boots Alliance	26.9	50	Yes	Yes	Yes	Yes	Yes	10-K
CVS Health	21.5	50	Yes	Yes	Yes	Yes	Yes	10-K
Trader Joe's Co.	19.8	42	Yes	Yes	Yes	Yes	Yes	Prog. Grocer ⁷

The bill’s thresholds target the largest participants in the national grocery market while nominally exempting smaller firms. A “covered supplier” is any entity that produces and sells “covered goods”

³ Figures reflect the most recently reported fiscal year.

⁴ Reflects Amazon’s ownership of Whole Foods Market stores.

⁵ Amazon Staff, *Amazon Doubles Down on Online Grocery Delivery and Whole Foods Market Expansion to Reach More Customers*, AMAZON NEWS (Jan. 27, 2026), <https://www.aboutamazon.com/news/company-news/amazon-fresh-go-stores-closing-expanding-whole-foods> (“Amazon is one of the top three grocers in the United States, with over \$150 billion in gross sales.”).

⁶ Koninklijke Ahold Delhaize N.V., Annual Report 2025 (2026), <https://cms.aholddelhaize.com/media/toibtccys/ahold-delhaize-annual-report-2025-interactive.pdf>.

⁷ See *The PG 100: Annual Ranking of Top Food Retailers*, PROGRESSIVE GROCER (May 19, 2025), <https://progressivegrocer.com/pg-100-annual-ranking-top-food-retailers>. The ranking includes revenue from non-grocery sales, such as fuel and general merchandise.

in New York with annual sales exceeding \$6 billion (adjusted for inflation).⁸ A “dominant covered retailer” is a retailer with more than \$18 billion in annual retail sales of covered goods and at least one storefront or distribution center in more than 20 states, including New York.

The \$18 billion retailer threshold captures Walmart, Costco, Ahold Delhaize, Whole Foods, Dollar General, and other national chains (Table 1). The \$6 billion supplier threshold captures nearly all major branded food manufacturers—companies like PepsiCo, Nestlé, Kraft Heinz, General Mills, Conagra Brands, and Tyson Foods.⁹

A. Mandatory Disclosure of Competitors’ Pricing Terms

Section 350-k(2) requires that, upon written request from any covered retailer or wholesaler, a covered supplier must provide—within 14 days—anonymized terms of sale from all contracts with dominant covered retailers for the same covered good and volume unit basis during the prior 180 days. The provision converts competitively sensitive pricing information from a private bargaining asset into a quasi-public document accessible to any buyer that asks for it.¹⁰

B. Conditional Limits on Suppliers’ Ability to Refuse to Deal

The bill prohibits covered suppliers from refusing to sell to a non-dominant covered retailer that has paid on time during the previous 12 months and has requested equal terms, unless the supplier can demonstrate a “commercially reasonable justification.” The bill includes a construction clause stating it does not “require” doing business with anyone. In practice, however, the commercially reasonable justification standard functions as a conditional duty to deal. That requirement departs from the general rule in U.S. antitrust law that firms retain broad discretion to choose their trading partners.

C. Enforcement and Treble-Damages Liability

The New York attorney general may bring enforcement actions, and any “injured person” may file a private lawsuit. Available remedies include injunctions and civil penalties of up to three times actual damages—a treble-damages structure that mirrors the private remedy available under federal

⁸ A “covered good” includes the typical inventory found in supermarkets. The bill defines the term broadly to include standard grocery items—specifically those classified as “eligible foods” under federal SNAP regulations, 7 C.F.R. § 271—as well as general consumer packaged goods. It excludes gasoline, prescription drugs, tobacco, and alcoholic beverages.

⁹ *Food Processing’s Top 100–2024*, FOOD PROCESSING (Aug. 2024), <https://www.foodprocessing.com/top100/2024chart>.

¹⁰ The provision may raise First Amendment concerns, though a full analysis lies beyond the scope of this issue brief. See, e.g., Petition for Writ of Certiorari, *PhRMA v. O’Day*, No. 25-1018 (U.S. Feb. 20, 2026), https://www.supremecourt.gov/DocketPDF/25/25-1018/396860/20260220123331355_PhRMA-OR-Petition%2002-20%20rtf.pdf. The petition challenges Oregon’s requirement that drug manufacturers publicly justify their pricing in reports intended to address “information asymmetries” and protect smaller retailers or consumers. It argues that compelled disclosure of pricing information violates the First Amendment and the Takings Clause by forcing the release of trade secrets. S. 8563 similarly targets “terms of sale” and “pricing differentials,” potentially requiring suppliers to disclose pricing terms offered to retailers. The Supreme Court’s resolution of whether such disclosure mandates trigger strict or intermediate scrutiny could therefore affect New York’s authority to enforce S. 8563’s reporting requirements.

antitrust law. The bill also imposes agency liability for violations committed by contracted third parties, meaning a supplier cannot avoid liability by routing transactions through intermediaries.

The bill includes several affirmative defenses. Suppliers may justify pricing differences that are “predominantly attributable” to genuine distribution or manufacturing efficiencies, distress sales of perishable or seasonal goods, or coercion by a dominant retailer. The coercion defense requires the supplier to demonstrate that it did not collude, would have suffered substantial harm by refusing the dominant retailer’s demands, and made a good-faith effort to report the conduct to the attorney general—effectively requiring suppliers to act as state informants against their largest customers.

III. Parallel Legislation in Other States

S8563 forms part of a broader multistate legislative effort built on nearly identical statutory language, definitions, and thresholds.

A. Minnesota House File 2149 and Senate File 2556

HF2149 was introduced in the Minnesota House of Representatives March 10, 2025, and referred to the Committee on Commerce Finance and Policy.¹¹ Its Senate companion, SF2556, was referred to the Committee on Commerce and Consumer Protection March 13, 2025.¹² Both bills replicate S8563’s core structure: a “same terms of sale” mandate, a 14-day disclosure window, a 180-day lookback period, and a treble-damages enforcement regime. Reporting in *Minnesota House Session Daily* describes supporters arguing that grocery-market concentration has contributed to “food deserts expanding in rural and underserved areas.”¹³

B. Arizona Senate Bill 1226 and House Bill 2948

SB1226 and HB2948 were introduced in the Arizona Legislature in 2026.¹⁴ Both adopt the same \$6 billion supplier threshold and \$18 billion retailer threshold. They also replicate the bill’s “volume unit basis” definition—capped at a single truckload—and the 14-day anonymized disclosure requirement. In their operative provisions, the Arizona bills are functionally identical to S8563.

¹¹ H.F. 2149, 94th Leg., Reg. Sess. (Minn. 2025), <https://www.revisor.mn.gov/bills/94/2025/0/HF/2149>.

¹² S.F. 2556, 94th Leg., Reg. Sess. (Minn. 2025), <https://www.revisor.mn.gov/bills/94/2025/0/SF/2556>.

¹³ Lisa Kaczke, *Supporters Say Pricing Fairness Bill Would Level Playing Field for Local Grocers*, MINN. HOUSE OF REPS.: SESSION DAILY (Mar. 26, 2025), <https://www.house.mn.gov/sessiondaily/Story/18654>.

¹⁴ S.B. 1226, 57th Leg., 2d Reg. Sess. (Ariz. 2026), <https://www.azleg.gov/legtext/57leg/2R/bills/SB1226P.pdf>; H.B. 2948, 57th Leg., 2d Reg. Sess. (Ariz. 2026), <https://www.azleg.gov/legtext/57leg/2R/bills/HB2948P.pdf>.

C. Rhode Island House Bill 7514

Introduced Feb. 6, 2026, and referred to the House Committee on Corporations, H7514 follows the same legislative template: a same-terms mandate, anonymized disclosure of dominant-retailer contract terms, and enforcement by the state attorney general and private plaintiffs.¹⁵

D. Maine LD1894/HP1265

The Maine Legislature has considered related legislation.¹⁶ In the current session, however, the bill’s title reflects a conversion to a resolution establishing a study commission, rather than imposing a same-terms-of-sale mandate.¹⁷ Maine’s proposal remains conceptually related, but it does not currently replicate S8563’s operative structure.

The near-uniformity of definitions, thresholds, and enforcement mechanisms across these bills strongly suggests coordinated model-legislation drafting. Multistate enactment would create effects that extend beyond any single jurisdiction. A supplier operating in New York, Minnesota, Arizona, and Rhode Island would face substantial compliance risk if it offered differentiated terms to retailers in any one of those states. The most likely response would not be state-by-state compliance. Suppliers would instead adopt uniform national pricing—eliminating the competitive discounting that currently benefits consumers across all states, not just those that enact the legislation.

IV. The Robinson-Patman Act and S8563

The Robinson-Patman Act (RPA) of 1936, codified at 15 U.S.C. § 13, prohibits sellers engaged in interstate commerce from charging competing buyers different prices for goods of “like grade and quality” where the effect “may be substantially to lessen competition or tend to create a monopoly.” The statute also covers discriminatory promotional allowances and services under Sections 2(d) and 2(e). The Federal Trade Commission (FTC) administers the act and publishes compliance guidance, including the Fred Meyer Guides governing promotional allowances, codified at 16 C.F.R. Part 240.

Congress enacted the RPA in response to the competitive pressure that national grocery chains—particularly the Great Atlantic & Pacific Tea Company (A&P)—placed on smaller, independent grocers during the 1930s.¹⁸ Legislators worried that A&P’s buying power allowed it to secure supplier

¹⁵ H.R. 7514, 2026 Gen. Assemb., Jan. Sess. (R.I. 2026), <https://webserver.rilegislature.gov/BillText/BillText26/HouseText26/H7514.pdf>.

¹⁶ L.D. 1894, 132d Leg., 1st Spec. Sess. (Me. 2025) (as introduced May 5, 2025), <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP1265&item=1&snum=132>.

¹⁷ L.D. 1894, 132d Leg., 1st Spec. Sess. (Me. 2023) (Comm. Amend. H-____), <https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP1265&item=2&snum=132>.

¹⁸ See, e.g., Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495 (2020); see also John M. Yun, *From Discount to Discrimination: The Strange Economics of Anti-Competitive Antitrust*, TRUTH ON THE MKT. (Feb. 23, 2026), <https://truthonthemarket.com/2026/02/23/from-discount-to-discrimination-the-strange-economics-of-anti-competitive-antitrust>.

discounts unavailable to smaller rivals, giving it a retail price advantage that independent stores could not match.

A. Modern Robinson-Patman Doctrine and Enforcement

Federal enforcement of the RPA declined sharply beginning in the late 1970s. The U.S. Department of Justice (DOJ) stopped bringing RPA cases in 1977, and the FTC largely ceased enforcement by the 1990s.¹⁹ The Antitrust Modernization Commission, a bipartisan body established by Congress in 2002, issued a report in 2007 recommending outright repeal of the statute on the grounds that it discourages price discounting, raises consumer prices, and protects competitors, rather than competition:

By broadly discouraging price discounts, the Robinson-Patman Act potentially harms competition and consumers... the Act protects competitors, often at the expense of competition... All of these costs are likely to result in higher prices to consumers than would be the case if the Robinson-Patman Act were not on the books.²⁰

The Supreme Court has interpreted the RPA in light of broader antitrust principles. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court held that the act condemns price discrimination only when it threatens competitive injury.²¹ In *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, the Court further held that plaintiffs must demonstrate harm to competition among purchasers who actually compete with one another.²²

Recent enforcement activity suggests a tentative revival of the statute. In January 2025, the FTC filed suit against PepsiCo under the RPA, alleging that the company offered Walmart promotional pricing and marketing support unavailable to smaller retailers.²³ The FTC dismissed the case without prejudice in May 2025.²⁴ Similarly, in *FTC v. S. Glazer's Wine & Spirits, LLC*, the agency alleged that the distributor violated the RPA by offering large chains discounts unavailable to smaller retailers.²⁵ A district court denied the defendant's motion to dismiss in April 2025,²⁶ although the case continues to face challenges, including potential cost-justification defenses.

Private enforcement persists as well. In February 2026, the 9th U.S. Circuit Court of Appeals affirmed a district court judgment for wholesale purchasers in *LA Int'l Corp. v. Prestige Brands Holdings*,

¹⁹ D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015).

²⁰ Antitrust Modernization Comm'n, *Report and Recommendations* 317-18 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

²¹ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

²² *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

²³ *FTC v. PepsiCo, Inc.*, FTC Docket No. 9429 (2025).

²⁴ Press Release, Fed. Trade Comm'n, *FTC Dismisses Lawsuit Against PepsiCo* (May 22, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-dismisses-lawsuit-against-pepsico>.

²⁵ Complaint, *FTC v. S. Glazer's Wine & Spirits, LLC*, No. 8:24-cv-02684 (C.D. Cal. Dec. 12, 2024).

²⁶ *Id.* (order denying defendant's motion to dismiss) (Apr. 17, 2025).

Inc., involving promotional payment discrimination favoring Costco, while remanding on attorney’s fees.²⁷ Taken together, these developments suggest a modest resurgence of Robinson-Patman enforcement through both FTC activity and private litigation.

B. How S8563 Goes Beyond the Robinson-Patman Act

S8563 and similar state bills share the RPA’s core premise: that large buyers extract supplier concessions unavailable to smaller competitors, creating cost disadvantages that affect downstream retail competition. Like the RPA, the state-level “grocery pricing fairness” bills extend beyond list prices to cover promotional allowances, marketing devices, and merchandising arrangements—the same conduct addressed by Sections 2(d) and 2(e) of the RPA and the Fred Meyer Guides. The state proposals also incorporate familiar affirmative defenses, including cost justification and meeting competition, placing the burden on defendants to show that pricing differences reflect legitimate business reasons.

Despite these similarities, S8563 departs from the RPA in several important ways that make it substantially more restrictive.

First, the bill eliminates the competitive-injury requirement that limits RPA liability. The federal statute applies only when a pricing difference “may be substantially to lessen competition or tend to create a monopoly.” Courts interpreting this language require plaintiffs to demonstrate actual competitive harm; price differences alone do not suffice. S8563 imposes no such screening mechanism. A covered supplier violates the statute whenever it fails to offer identical terms to similarly situated buyers, regardless of whether the difference produces any competitive harm at the retail level. This categorical rule removes the central constraint that courts have used to prevent the RPA from condemning efficient, pro-competitive pricing.

Second, the bill’s truckload cap on the “volume unit basis” definition diverges sharply from established RPA doctrine. Under federal law, suppliers may offer volume discounts that reflect genuine economies of scale—lower per-unit costs resulting from larger, more predictable orders, simplified logistics, or reduced inventory risk. Courts and the FTC recognize these efficiencies as legitimate cost justifications.²⁸ S8563 forecloses that flexibility. Because the volume unit basis cannot exceed a single truckload, the law requires suppliers to offer the same per-unit terms to a buyer ordering one truckload as to a buyer ordering hundreds. A supplier that processes 500 weekly

²⁷ *LA Int’l Corp. v. Prestige Brands Holdings, Inc.*, Nos. 24-3776, 24-5009, 24-5227, slip op. (9th Cir. Feb. 24, 2026), <https://cdn.ca9.uscourts.gov/datastore/opinions/2026/02/24/24-5009.pdf>.

²⁸ See, e.g., *Bruce’s Juices, Inc. v. Am. Can Co.*, 330 U.S. 743, 752–53 (1947) (“The [Robinson-Patman Act] does not prohibit all quantity discounts, but expressly permits them under certain conditions. ... Quantity discounts are among the oldest, most widely employed, and best-known discount practices.”); see also Statement of Comm’r Alvaro M. Bedoya, Joined by Chair Lina M. Khan & Comm’r Rebecca Kelly Slaughter, In the Matter of *S. Glazer’s Wine & Spirits, LLC*, FTC File No. 211-0155 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-joined-by-khan-slaughter-southern-glazers.pdf (“Section 2(a) clarified that the Clayton Act’s prohibition on price discrimination permits price differences reflecting bona fide efficiencies from bulk purchases—specifically, lower costs associated with the ‘manufacture, sale, or delivery’ of large quantities of goods.”).

truckload orders from a national retailer—allowing it to plan production runs, reduce waste, and minimize carrying costs—must offer the same per-unit price to a local grocer placing irregular orders, regardless of the difference in planning value between the two relationships.

Third, the bill imposes a disclosure obligation that has no counterpart in the RPA. Federal law does not give buyers the right to compel disclosure of the terms a supplier offers to other customers. S8563’s 14-day disclosure requirement would convert competitively sensitive pricing information into a quasi-public document. The economic implications of this mandate are discussed in Section VI.

Fourth, S8563 introduces a conditional duty-to-deal rule that extends beyond the RPA’s framework. The RPA regulates discriminatory pricing, but it does not generally require suppliers to sell to any particular buyer. By contrast, S8563 prohibits suppliers from refusing to sell to certain non-dominant retailers unless they can demonstrate a “commercially reasonable justification.” In practice, this provision creates a *de facto* obligation to deal. U.S. antitrust law has long treated unilateral refusals to deal as legitimate business decisions, subject to narrow exceptions, as recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*²⁹ S8563 significantly narrows that discretion.

Finally, the bill applies only to firms above specified revenue thresholds—\$6 billion for suppliers and \$18 billion for retailers. The RPA contains no such size limitations; it applies to all sellers engaged in interstate commerce. By targeting firms based on scale alone, S8563 reflects a “big is bad” approach that sits uneasily with the competitive-effects analysis that governs modern antitrust law.

V. The ‘Waterbed Effect’: Theory, Evidence, and Misapplication

The central economic justification offered for S8563 rests on the “waterbed effect”—the theory that price concessions to large buyers force suppliers to raise prices for smaller buyers. The sponsor’s memo asserts that “suppliers make up lost profits from discounted sales to dominant buyers by charging higher prices to smaller buyers,” contributing to the affordability pressures facing independent grocers.³⁰

The metaphor derives from the behavior of a water-filled mattress: pressing down in one place causes another part to rise. Applied to retail markets, the concept suggests that lowering prices for one group of buyers may cause prices to increase for others.

²⁹ *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

³⁰ Sponsor’s Memo, *supra* note 2.

A. The Waterbed Effect in Economic Theory

The modern formulation of the waterbed effect in retail markets originates with Roman Inderst and Tommaso Valletti.³¹ Their 2011 paper provides the primary theoretical framework for the claim.³²

Their model describes a market in which a large buyer negotiates a lower wholesale price from a supplier. The lower input cost allows the large buyer to reduce its retail price and capture market share from smaller rivals. As smaller retailers lose volume, their bargaining power with the supplier weakens. Because lower sales volume reduces the supplier's incentive to maintain favorable terms, the supplier may charge those smaller buyers higher wholesale prices. Those higher input costs may then be passed through to consumers shopping at smaller stores.

Inderst and Valletti also identify the conditions under which a waterbed effect could harm consumers overall. Consumer harm occurs only if the price increase paid by customers of smaller retailers exceeds the price decrease enjoyed by customers of the large retailer. That outcome requires two conditions:

1. smaller retailers must account for a substantial share of the market, and
2. the large retailer must pass through its wholesale savings to consumers at a relatively low rate.

Absent those conditions, the price reductions offered by large retailers dominate the effect of any higher prices faced by smaller stores.

B. Antitrust Courts Treat Waterbed Claims Skeptically

Courts have generally treated waterbed claims with skepticism. In *DeHoog v. Anheuser-Busch InBev*, plaintiffs argued that Anheuser-Busch InBev's acquisition of SABMiller would produce a waterbed effect in the market for beer ingredients.³³

Under the plaintiffs' theory, the newly enlarged ABI would gain substantial bargaining power over suppliers of hops, a key input in brewing. Suppliers forced to lower prices for ABI would supposedly recoup those losses by charging higher prices to smaller brewers, including craft breweries.

The court rejected the theory as speculative. The judge noted that antitrust law primarily protects the suppliers who might be squeezed by a large buyer, not the buyer's competitors. The court also observed that the claim was internally inconsistent. If suppliers truly faced persistent price pressure from large brewers, they could simply shift production toward more profitable varieties of hops rather than accept lower prices indefinitely.

³¹ For a history of the development of the economics of the "waterbed effect," see Eric Fruits, *Sloshing Around with the 'Waterbed Effect'*, TRUTH ON THE MKT. (Sept. 5, 2023), <https://truthonthemarket.com/2023/09/05/sloshing-around-with-the-waterbed-effect>.

³² Roman Inderst & Tommaso M. Valletti, *Buyer Power and the "Waterbed Effect"*, 59 J. INDUS. ECON. 1 (2011).

³³ *DeHoog v. Anheuser-Busch InBev*, SA/NV, No. 1:15-CV-02250-CL, 2016 U.S. Dist. LEXIS 137759 (D. Or. July 22, 2016).

A similar claim arising in grocery markets would likely face the same doctrinal obstacles. Antitrust law addresses monopsony concerns primarily to protect suppliers, not competing retailers. Absent clear evidence of consumer harm, allegations that wholesale prices may shift across buyers would likely be treated as conjectural.

C. Empirical Evidence from Competition Authorities

Empirical evidence for a waterbed effect in retail markets remains limited. The United Kingdom's competition authorities have repeatedly examined the theory in grocery-sector investigations and found little support for it.

In its 2003 investigation of the Safeway merger, the U.K. Competition Commission concluded there was "little evidence" of an immediate waterbed effect and insufficient data to suggest that further consolidation would exacerbate price disadvantages for smaller retailers.

Overall, therefore, there is little evidence of an immediate or short-term "waterbed" effect. ... [O]ur surveys produced insufficient evidence on this point for us to conclude that any waterbed effect would be exacerbated by any of the mergers.³⁴

Similarly, the Office of Fair Trading reported in 2006 that significant theoretical questions remained unresolved. These included why suppliers would persistently price below cost for large supermarkets or how they could charge smaller retailers above-market prices without being undercut by competing suppliers.³⁵ UK authorities ultimately viewed the waterbed effect as a theory lacking both a robust empirical foundation and practical applicability to the complex dynamics of grocery retail markets.

D. Why the Sponsor Memo Misapplies the Theory

The S8563 sponsor's memo appears to conflate two distinct arguments.

The first is the Inderst–Valletti equilibrium model, which predicts a waterbed effect only under specific market conditions. The second is a simpler "subsidy" claim—that suppliers must raise prices for smaller buyers in order to recoup losses from discounts granted to larger buyers.

The subsidy claim is not consistent with standard microeconomic theory. Suppliers set prices for each buyer based on the demand conditions and competitive alternatives associated with that particular relationship. If a supplier could profitably charge higher prices to small grocers, profit-maximizing behavior predicts it would already do so—regardless of the terms offered to large retailers such as Costco, Walmart, or Target.

³⁴ U.K. Competition Comm'n, *Safeway plc and Asda Group Ltd. (owned by Wal-Mart Stores Inc); Wm Morrison Supermarkets plc; J Sainsbury plc; and Tesco plc: A Report on the Mergers in Contemplation* ¶ 2.246 (2003), https://webarchive.nationalarchives.gov.uk/ukgwa/20120119144540/http://www.competition-commission.org.uk/rep_pub/reports/2003/481safeway.htm#full.

³⁵ U.K. Office of Fair Trading, *The Grocery Market: The OFT's Reasons for Making a Reference to the Competition Commission* (OFT845) ¶ 6.13 (2006), <https://assets.publishing.service.gov.uk/media/555de47840f0b669c4000141/of845.pdf>.

A discount granted to one buyer does not create a “gap” that must be filled by charging higher prices to another. Bruce Kobayashi and Timothy Muris describe this subsidy framing as an “incoherent notion” that misunderstands how profit maximization operates in markets with heterogeneous buyers.³⁶ Suppliers facing buyers with different demand elasticities naturally engage in price discrimination. The resulting pattern of higher and lower prices reflects differences in demand conditions, not cross-subsidization between buyers.

While the Inderst–Valletti model identifies conditions under which a waterbed effect could harm consumers, the drafters of S8563 make no attempt to assess whether those conditions exist in New York grocery markets. The legislation cites no empirical evidence regarding the market share of independent grocers, the rate at which large retailers pass wholesale savings through to consumers, or the magnitude of wholesale price differences attributable to bargaining power, rather than cost.

Absent that analysis, the waterbed theory functions less as an empirical finding than as a rhetorical justification for the legislation.

VI. The Disclosure Mandate and the Risk of Coordination

Section 350-k(2) of S8563 requires covered suppliers to disclose contract terms to requesting buyers. Within 14 days of a written request, a supplier must provide anonymized terms of sale from all contracts with dominant covered retailers for the same covered good and volume unit basis during the prior 180 days. The provision operates as a transparency rule. Armed with information about what Target, Stop & Shop (Ahold Delhaize), or Acme Markets (Albertsons) paid for a truckload of branded cereal, a regional independent grocer can demand equivalent terms.

A. The Bill’s Disclosure Requirement

The disclosure rule converts competitively sensitive pricing information into a shared market reference point. A supplier must reveal the terms offered to dominant retailers whenever another covered retailer asks for them. The bill assumes that these disclosures can be effectively anonymized.

That assumption may be unrealistic. Recent research shows that large language models can reidentify individuals or entities from ostensibly anonymized text by extracting identity-relevant features and matching them with external data sources.³⁷ With only a small number of retailers subject to the bill’s disclosure requirements, the risk of reidentification increases substantially. Even if supplier contracts omit retailer names, market participants may still infer which chain received which terms.

³⁶ Bruce H. Kobayashi & Timothy J. Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination*, COMPETITIVE ENTER. INST. (Feb. 18, 2026), <https://cei.org/wp-content/uploads/2026/02/Stop-Making-Sense-260218-FINAL.pdf>.

³⁷ See, e.g., Simon Lermen, Daniel Paleka, Joshua Swanson, Michael Aerni, Nicholas Carlini & Florian Tramèr, *Large-scale Online Deanonimization with LLMs*, ARXIV (Feb. 18, 2026), <https://doi.org/10.48550/arXiv.2602.16800>.

B. Transparency, Information Exchange, and Coordination Risk

The economics literature has long recognized that increased price transparency can weaken competition. George Stigler's classic paper, "A Theory of Oligopoly," shows that sustained coordination among firms depends on the ability to detect and punish deviations from a shared pricing norm.³⁸ Greater transparency makes that monitoring easier. When firms can observe pricing behavior more clearly, the threat of retaliation becomes more credible and the incentive to undercut rivals declines.

Competition authorities have reached similar conclusions. The OECD Competition Committee's 2010 roundtable on information exchanges among competitors concluded that enhanced transparency can facilitate collusion, particularly when pricing information becomes widely observable.³⁹ The risk depends on several factors, including market structure, the nature of the information exchanged, and the frequency of disclosure. In its submission to the OECD roundtable, the United States likewise observed that, while information sharing may generate efficiencies, exchanges involving pricing data can create coordination risks and therefore receive rule-of-reason scrutiny under U.S. antitrust law.⁴⁰

C. The Disclosure Rule Might Suppress Competitive Discounting

S8563's disclosure mechanism operates through a vertical channel—supplier to retailer—rather than the horizontal information exchanges typically discussed in antitrust literature. The underlying economic logic nonetheless applies. Only a small number of firms qualify as dominant covered retailers—roughly a dozen chains listed in Table 1. In such a concentrated environment, anonymized disclosures may still allow market participants to infer which retailer received which price.

Once disclosed, the price becomes a market benchmark. A regional grocer that receives anonymized data showing that a dominant retailer paid \$X per unit for a particular product can demand that same price. Because the statute requires disclosure within 14 days and applies to all similarly situated buyers, any discount offered to one retailer effectively becomes available to every retailer that requests it.

³⁸ George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

³⁹ Organisation for Econ. Co-operation & Dev. (OECD), *Information Exchanges Between Competitors under Competition Law*, DAF/COMP(2010)37, at 10 (2010), https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/07/information-exchanges-between-competitors-under-competition-law_bd644d8b/327f7dd3-en.pdf ("Notwithstanding its benefits, enhanced transparency can also facilitate the attainment of collusive equilibria among competitors or result in non-coordinated anticompetitive effects.").

⁴⁰ Note by the United States, *Roundtable on Information Exchanges Between Competitors under Competition Law*, DAF/COMP/WD(2010)117 ¶ 3 (Oct. 2010), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1010informationexchanges.pdf> ("The antitrust concern is that information exchanges may facilitate anticompetitive harm by improving competing sellers' ability either to collude or to tacitly coordinate in ways that lessen competition. For example, exchanges about price may lead to illegal price coordination. Information exchanges may also facilitate collective behavior by downstream firms against upstream suppliers.").

The result is a practical floor on competitive discounting. The lowest price offered to any dominant retailer becomes the minimum price that other buyers can demand. Suppliers therefore have little incentive to negotiate deep discounts with any individual buyer, because those concessions cannot remain private.

Evidence from other markets illustrates a similar mechanism. Research on pay transparency in labor markets finds that when wages become widely observable, employers often respond by compressing wage differences rather than maintaining individualized negotiations. Zoë Cullen and Bobak Pakzad-Hurson find that increased wage transparency leads firms to offer lower average wages in order to avoid triggering costly renegotiations across workers.⁴¹

The same logic applies to wholesale grocery pricing. When discounts cannot remain private, the equilibrium response is fewer discounts.

VII. Pricing, Competition, and Consumer Welfare

The central economic problem with S8563 and similar same-terms mandates is that they transform competitive discounts into compulsory across-the-board price concessions. Under current law, a supplier may offer Walmart a 12% discount because Walmart's scale, logistics capabilities, and purchasing predictability reduce the supplier's costs. Bilateral negotiation—backed by Walmart's credible ability to switch suppliers or expand private-label offerings—creates competitive pressure that ultimately benefits consumers. The resulting discount reflects firm-specific efficiencies and market bargaining dynamics.

S8563 eliminates that firm-specific character. If a supplier grants a 12% discount to Walmart on a truckload purchase, the supplier must extend that same discount to any covered buyer purchasing on the same "volume unit basis," regardless of whether those buyers generate comparable cost savings or strategic value. The discount ceases to be a targeted response to a particular buyer's efficiencies and instead becomes a legally mandated public price term.

Faced with that rule, suppliers cannot confine discounts to transactions that justify them economically. Any discount offered to one major buyer automatically propagates to others. The rational response is therefore to reduce or eliminate targeted discounts and move toward a higher uniform price. Rather than protecting small retailers, the statute risks suppressing the bargaining process that produces lower prices for consumers.

A. Why Same-Terms Mandates Differ from MFNs

This mechanism differs fundamentally from a most-favored-nation (MFN) clause. An MFN is a privately negotiated contractual provision that ties a seller's pricing across particular sales channels

⁴¹ Zoë Cullen & Bobak Pakzad-Hurson, *Equilibrium Effects of Pay Transparency*, 91 *ECONOMETRICA* 765 (2023) ("Our model predicts that transparency reduces workers' individual bargaining power, leading to lower average wages. Employers credibly refuse to offer higher wages to any one worker to avoid triggering costly renegotiations with others.").

or counterparties. It does not require a seller to offer a discount; it merely restricts selective price reductions once granted.

A same-terms mandate operates differently. It is a statutory, market-wide obligation imposed on suppliers regardless of their contractual preferences. It applies to all covered transactions, eliminates the ability to tailor pricing to buyer-specific efficiencies, and transforms negotiated concessions into mandatory system-wide pricing commitments.

In short, MFNs operate within individual contracts and limit how a seller may vary prices among specific counterparties. Same-terms mandates apply across the market and shape how suppliers set wholesale prices more broadly. By requiring that discounts offered to one buyer be extended to others, same-terms mandates alter suppliers' incentives to offer negotiated discounts in the first place.

B. Evidence from Robinson-Patman Enforcement

Historical experience with the Robinson-Patman Act illustrates this dynamic. The Antitrust Modernization Commission's 2007 report concluded that price-discrimination liability often discouraged firms from offering discounts and instead pushed them toward rigid, uniform pricing to avoid litigation risk.

It is difficult to know the frequency and amounts of price discounts and corresponding savings for consumers that the Robinson-Patman Act has deterred. ... Nonetheless, anecdotal evidence and informed judgment based on economic theory suggests that the additional costs to consumers of seventy years of forgone discounts are likely substantial. The Act's continued existence can discourage firms from taking procompetitive actions because doing so might lead to litigation asserting Robinson-Patman Act claims that, even were the litigation to be resolved in the company's favor, would involve distractions, expenses, and risks that make the procompetitive course of action not worth the cost of pursuing it.⁴²

The commission concluded that the statute's chilling effect on discounting likely increased retail prices relative to a world without Robinson-Patman enforcement.

C. Who Bears the Cost?

The distributional consequences of reduced discounting are not neutral. Emek Basker's review of the literature on Walmart's role in grocery markets finds that Walmart's grocery prices are, on average, about 10% lower than those of its competitors. The entry of a Walmart Supercenter typically prompts competing grocery stores to reduce their prices by roughly 1% to 3%.⁴³ Walmart's presence

⁴² Antitrust Modernization Comm'n, *supra* note 20, at 322.

⁴³ Emek Basker, *The Causes and Consequences of Wal-Mart's Growth*, 21 J. ECON. PERSP. 177 (2007).

therefore lowers prices not only for its own customers but also for consumers who shop at competing stores.⁴⁴

Jerry Hausman and Ephraim Leibtag similarly estimate, using household panel data, that the expansion of large-format supercenters generates substantial consumer-welfare gains. Low-income households benefit disproportionately because they shop at price-sensitive formats more frequently than higher-income households.⁴⁵

If S8563 leads suppliers to reduce or eliminate volume discounts in order to avoid market-wide matching obligations, the price advantage currently offered by high-volume retailers will narrow or disappear. The consumers most affected by that change will be those who rely on low-price retail formats and have the fewest alternatives—the same population the sponsor's memo identifies as the bill's intended beneficiaries.

D. Effects on Non-Price Competition

S8563's definition of "terms of sale" extends beyond price. The statute covers marketing devices, merchandising arrangements, and distribution terms—the full range of non-price benefits that suppliers provide retailers as part of broader supply relationships.

These arrangements are not interchangeable across retailers. National chains operate sophisticated retail media networks—digital advertising platforms through which suppliers purchase targeted placements based on consumer purchase data. A retailer such as Walmart can offer suppliers advertising placements on its digital platform that a neighborhood grocery store with 500 weekly customers cannot replicate.

Requiring that these arrangements be offered on "proportionally equal terms" does not create equivalent access. Instead, it creates legal exposure for any supplier that offers specialized programs to dominant retailers. The predictable response is to withdraw those arrangements altogether or remove them from supplier contracts with dominant retailers to avoid disclosure and matching obligations.

Consumers bear the cost of that withdrawal. Retail media revenue helps subsidize grocery prices at large retailers by offsetting other operating costs. Eliminating those arrangements reduces the ability of retailers to pass those savings through to shoppers.

VIII. Litigation Risk and Compliance Costs

S8563's treble-damages enforcement structure exposes covered suppliers to substantial litigation risk. The statute authorizes enforcement actions by the New York attorney general and private plaintiffs.

⁴⁴ *Id.* at 188.

⁴⁵ Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPL. ECON. 1157 (2007).

As a result, routine pricing decisions could become the basis for lawsuits alleging unlawful price discrimination.

This exposure is significant because the statute regulates not only list prices but also discounts, rebates, promotional allowances, merchandising arrangements, and other “terms of sale.” Each difference in pricing or contractual treatment across buyers could become a potential cause of action. The combination of broad substantive coverage and treble damages creates strong incentives for litigation.

A. The Difficulty of the Cost-Justification Defense

The statute includes a cost-justification defense that allows suppliers to defend pricing differences by showing that they are “predominantly attributable” to genuine cost efficiencies. In practice, however, this defense has proven difficult to apply.

As John Yun explains in the context of the Robinson-Patman Act:

[W]hile the [RPA] permits cost differences as a defense for differential pricing, reliably separating cost-justified differences from price discrimination is difficult. What if 80% of a price difference is explained by costs but 20% is not? Is that still a violation? This line-drawing problem is not trivial. It imposes (a) significant evidentiary and administrative burdens on firms, enforcers, and courts and (b) social costs related to false positives, given that quantity discounts are ubiquitous in a market economy.⁴⁶

These evidentiary challenges create legal uncertainty even when pricing differences reflect legitimate efficiencies. Suppliers may struggle to demonstrate precisely how logistical, manufacturing, or administrative cost savings translate into specific price differences across transactions.

B. Operational Compliance Costs

The practical burden of complying with the statute would be substantial. Covered suppliers selling hundreds of products to dozens of retailers in New York would need to maintain detailed documentation explaining the cost basis for every pricing difference across buyers.

That documentation would need to track the logistical, manufacturing, and administrative cost drivers associated with each product, buyer, and transaction. Without such records, suppliers would face significant litigation risk in private treble-damages actions—even when their pricing decisions reflect legitimate economic considerations.

Maintaining this level of transaction-specific cost documentation would impose significant administrative costs. Those compliance expenses ultimately flow through supply chains and into retail prices, reducing any consumer benefits the legislation’s proponents anticipate.

⁴⁶ Yun, *supra* note 18.

IX. Food Deserts: Evidence and Policy Mismatch

S8563's sponsor memo asserts that pricing practices by dominant retailers have forced independent grocers to close, leaving low-income neighborhoods without access to fresh, nutritious food. This claim links the bill to a body of public health and food-policy research on "food deserts"—areas where residents have limited access to affordable, nutritious food.

A. What 'Food Deserts' Are—and How Common They Are

The U.S. Department of Agriculture's (USDA) Economic Research Service (ERS) defines low-income, low-access census tracts as areas where at least 500 residents, or 33% of the population, live more than one mile from a supermarket in urban areas or more than 10 miles from a supermarket in rural areas.⁴⁷ The ERS estimated in its 2009 Report to Congress that roughly 23.5 million Americans live in low-income, low-access areas. At the same time, only about 2.3 million households—roughly 10% of that population—both lack access to a vehicle and live more than one mile from a supermarket.⁴⁸

These figures highlight an important point: while geographic access to grocery stores varies across communities, most households in low-income, low-access areas retain the ability to travel to supermarkets outside their immediate neighborhoods. Limited food access therefore reflects a combination of transportation constraints, residential patterns, and consumer behavior—not simply the absence of nearby stores.

B. What the Research Shows About the Causes of Food Deserts

The empirical literature finds that wholesale pricing differentials play only a limited role in determining where supermarkets locate or why nutritional inequality persists.

Hunt Allcott and his co-authors combine evidence from supermarket entry events and household moves across neighborhoods with a structural model of grocery demand to simulate the effects of equalizing access to stores and prices across income groups.⁴⁹ Their counterfactual simulation finds that giving low-income households the same grocery access and prices as higher-income households would reduce nutritional inequality—measured by the healthfulness of food purchases—by roughly 10%. The remaining 90% of the gap reflects differences in demand patterns across income levels.

This finding does not render food access irrelevant. It instead suggests that access constraints are a secondary driver of nutritional inequality. Policies that operate only through the access channel—such as legislation intended to improve independent grocers' wholesale purchasing conditions—

⁴⁷ Michele Ver Ploeg *et al.*, *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences*, USDA ECON. RESEARCH SERV., Report to Congress (AP-036, 2009), https://ers.usda.gov/sites/default/files/laserfiche/publications/42711/12716_ap036_1_.pdf?v=32613.

⁴⁸ *Id.*

⁴⁹ Hunt Allcott, Rebecca Diamond, Jean-Pierre Dubé, Jessie Handbury, Ilya Rahkovsky & Molly Schnell, *Food Deserts and the Causes of Nutritional Inequality*, 134 Q.J. ECON. 1793 (2019).

address a margin that explains only a small portion of the observed disparity. S8563 also operates even further upstream: it targets wholesale pricing practices, rather than retail access itself.

Steven Cummins, Ellen Flint, and Stephen Matthews provide additional evidence from a natural experiment involving the opening of a new supermarket in a Philadelphia food desert.⁵⁰ Using a controlled pre-post quasi-experimental longitudinal design, they find that the new store improved residents' perceptions of food access. Six months after the store opened, however, residents' fruit and vegetable consumption and body mass index showed no measurable change. Improvements in retail infrastructure alone therefore may not produce the expected changes in consumption patterns.

C. How S8563 Could Worsen Food Access

The mechanisms described in earlier sections suggest that S8563 could worsen the very access problems it aims to address. The same forces that raise retail prices under a mandatory parity regime—reduced supplier discounting, withdrawal of promotional support, and compliance-driven price standardization—raise costs for all retailers.

Stores operating on thin margins in low-income urban neighborhoods face particularly high operating costs, including security, spoilage, and insurance. These stores are therefore more sensitive to increases in wholesale prices than supermarkets serving higher-income, higher-volume suburban markets. If S8563 compresses the wholesale price advantages currently available to high-volume retailers, it simultaneously raises cost pressures on the marginal stores most likely to close—small independent grocers operating in underserved communities.

The legislation may also discourage the expansion of high-volume retail formats in New York. Hausman and Leibtag show that the entry of supercenters produces consumer-welfare gains that disproportionately benefit low-income households.⁵¹ If national chains conclude that New York's regulatory environment makes aggressive wholesale negotiation legally risky, the expected returns from opening new stores in the state decline. Communities with limited retail infrastructure are the most dependent on such entry.

Finally, suppliers responding to the bill's same-terms mandates may simplify their pricing structures by offering fewer products in fewer configurations. Because complex, differentiated contracts create legal exposure, standardization reduces litigation risk. The result could be narrower product assortments across retail formats. A statutory parity mandate thus creates incentives for suppliers to reduce differentiation, sacrificing variety in order to minimize compliance risk.

⁵⁰ Steven Cummins, Ellen Flint & Stephen A. Matthews, *New Neighborhood Grocery Store Increased Awareness of Food Access but Did Not Alter Dietary Habits or Obesity*, 33 HEALTH AFF. 283 (2014).

⁵¹ Hausman & Leibtag, *supra* note 45.

X. Error Costs and Antitrust Policy

A central concern in law & economics analysis of antitrust policy is the cost of errors—specifically, the asymmetric consequences of condemning efficient conduct (a false positive, or Type I error) versus failing to condemn genuinely harmful conduct (a false negative, or Type II error). Antitrust rules that cast too wide a net risk deterring procompetitive behavior, while rules that are too permissive risk allowing genuinely anticompetitive practices to persist.

Because competitive markets rely on experimentation in pricing, contracting, and distribution, false positives tend to impose especially high costs. When lawful conduct is mistakenly condemned, firms often respond by abandoning practices that benefit consumers, even if those practices ultimately would have been upheld in court. The result is a chilling effect on competitive behavior.

A. The Risk of False Positives Under S8563

S8563 and similar legislation increase the risk of false positives by treating any difference in terms of sale between buyers on the same volume unit basis as presumptively unlawful. Under this framework, every negotiated discount, customized promotional arrangement, or logistics-adjusted rebate becomes a potential statutory violation—regardless of whether the pricing difference reflects legitimate cost savings, demand differences, or ordinary competitive bargaining.

The consequences of a false positive under the statute are substantial. A covered supplier found liable faces treble damages, injunctive relief requiring it to restructure its pricing across all buyers in the state, and the legal and compliance costs associated with defending the litigation. Even suppliers that ultimately prevail at trial must bear the cost and uncertainty of the process.

These incentives encourage defensive behavior. Firms may abandon competitive discounting practices simply to reduce litigation exposure. As discussed in Section VIII, the Antitrust Modernization Commission documented precisely this response in the context of Robinson-Patman enforcement. Firms often adopted rigid, uniform pricing rather than risk litigation over selective discounts. S8563's private right of action and treble-damages structure create at least as strong an incentive for such defensive pricing strategies.

B. False Negatives Are Already Addressed Under Existing Law

The cost of a false negative in this setting—failing to detect a case in which a dominant retailer coerces a supplier into offering discriminatory terms that harm competition—is comparatively limited because existing legal tools already address such conduct.

The Robinson-Patman Act remains available to challenge discriminatory pricing practices that threaten competition. More broadly, anticompetitive uses of buyer power can be pursued under Section 2 of the Sherman Act or under Section 5 of the FTC Act. These statutes allow regulators and private plaintiffs to challenge conduct that produces genuine competitive harm without imposing a categorical ban on negotiated pricing differences.

The relevant policy question is therefore not whether any instance of buyer-power abuse might escape scrutiny under existing law. The relevant question is whether a categorical prohibition on price differences—one that eliminates the competitive-effects screen used in modern antitrust analysis—produces a better balance of error costs than targeted enforcement under existing statutes. The available evidence suggests that it does not.

XI. More Effective Policy Alternatives

The concerns motivating S8563 and similar bills—rising grocery prices, declining viability of independent grocers, and inadequate food access in low-income neighborhoods—are real. The legislation’s diagnosis of those problems, however, is incomplete. More targeted policy instruments exist to address each concern directly.

A. Targeted Antitrust Enforcement

Existing antitrust law already provides tools to address coercive conduct by dominant retailers. Practices such as credible threats to delist suppliers who refuse exclusionary terms, demands for payments lacking a plausible efficiency justification, or contractual arrangements designed to raise rivals’ costs can be challenged under current law.

The FTC, state attorneys general, and private plaintiffs all possess authority to bring such cases. Targeted enforcement against specific anticompetitive practices addresses genuine abuses of buyer power without imposing a categorical prohibition on negotiated pricing differences that often reflect legitimate efficiencies.

B. Direct Policies to Improve Food Access

Food access challenges in particular communities stem largely from transportation constraints and the costs of operating grocery stores in underserved neighborhoods. The USDA’s 2009 Report to Congress emphasizes the importance of these factors in shaping food access patterns.

Policies that directly address those constraints are more likely to improve outcomes. Zoning reforms that reduce barriers to grocery-store entry and transportation investments that connect residents to existing retail locations can improve access without distorting wholesale pricing relationships.

New York already operates programs designed to address these issues, including tax incentives and financing initiatives that encourage grocery investment in underserved areas. These targeted interventions operate directly on the factors that determine store entry and access, making them more effective tools than a statewide mandate governing supplier pricing practices.

C. Targeted Enforcement Against Harmful Information Exchanges

Anticompetitive information exchanges can also be addressed through existing antitrust tools. Competition authorities in the United States and abroad have identified specific practices that raise

coordination concerns, including coordinated price announcements, exchanges of forward-looking pricing information, and hub-and-spoke arrangements that facilitate collusion.

Targeted enforcement against these practices addresses genuine risks to competition. By contrast, S8563 mandates broad disclosure of pricing information as a remedy. Rather than preventing harmful exchanges, the statute risks creating the very transparency conditions that can facilitate coordination among market participants.

XII. Conclusion

State-level grocery “pricing fairness” legislation attempts to address concerns about grocery affordability and food access by restricting how suppliers and retailers negotiate prices. The economic evidence, however, suggests these bills misunderstand how pricing works in competitive supply chains. Discounts offered to large retailers are not simply transfers that disadvantage smaller stores. They often reflect cost savings, bargaining dynamics, and operational efficiencies that translate into lower retail prices for consumers.

By requiring suppliers to offer identical terms across buyers, S8563 would likely discourage these discounts and push suppliers toward uniform, higher wholesale prices. The bill’s disclosure requirements and litigation risks could further weaken competitive negotiation and increase compliance costs. Those costs would ultimately be passed through the supply chain to consumers.

For these reasons, S8563 and similar proposals risk producing outcomes that run counter to their stated goals. Rather than protecting small grocers or improving food access, the policy could raise grocery prices, reduce product variety, and discourage investment in high-volume retail formats that currently deliver some of the lowest prices for low-income households.

Addressing concerns about market power, grocery affordability, and food deserts requires more targeted policy tools. Policymakers seeking to improve consumer outcomes would be better served by strengthening existing enforcement mechanisms and pursuing policies that directly address transportation, zoning, and investment barriers in underserved communities.