UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya
In the Matter of The Kroger Company and Albertsons Companies, Inc.
Commission File No. D9428

January 2, 2025

Kroger's proposed $24.6 billion acquisition of Albertsons would have been the largest supermarket merger in U.S. history. The Commission's complaint alleged that the deal would have eliminated competition between two of the largest grocery chains in communities across the United States, leading to higher prices for groceries and other essentials for millions of Americans.[1] In a first for an FTC litigated enforcement action, the complaint also alleged that the proposed deal would have illegally harmed competition in labor markets, worsening wages and benefits for hundreds of thousands of grocery workers across the country.[2]

On December 11, Kroger and Albertsons announced an abandonment of their proposed merger.[3] The announcement followed a ruling by the U.S. District Court for the District of Oregon granting the Federal Trade Commission's request for a preliminary injunction halting the transaction.[4] In light of the abandonment, I joined my colleagues in granting the parties' motion to dismiss the administrative proceeding in this matter. I write separately to highlight several aspects of the district court's opinion, which advances antitrust analysis and vindicates the FTC's rigorous and reinvigorated approach to merger enforcement.

Throughout the opinion, the district court relied on the 2023 Merger Guidelines, adding to a line of cases where courts have treated the revised guidelines as persuasive authority.[5] When

[1] Complaint, *In re Kroger Co. & Albertsons Companies, Inc.*, Docket No. D-9428 (Feb. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.
[2] Compl. ¶¶ 57-62.
[3] Press Release, Albertsons, Albertsons Terminates Merger Agreement (Dec. 11, 2024), https://www.albertsonscompanies.com/newsroom/press-releases/news-details/2024/Albertsons-Terminates-Merger-Agreement/default.aspx. Shortly after announcing a termination of the merger agreement, Albertsons filed a lawsuit against Kroger claiming it breached the merger agreement and seeking to recover billions of dollars in damages. Press Release, Albertsons, Albertsons Files Lawsuit Against Kroger for Breach of Merger Agreement (Dec. 11, 2024), https://albertsonscompanies.com/newsroom/press-releases/news-details/2024/Albertsons-Files-Lawsuit-Against-Kroger-for-Breach-of-Merger-Agreement/default.aspx ("Kroger willfully breached the Merger Agreement in several key ways, including by repeatedly refusing to divest assets necessary for antitrust approval, ignoring regulators' feedback, rejecting stronger divestiture buyers and failing to cooperate with Albertsons.").
[4] The FTC was joined in its request for a preliminary injunction by the States of Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, Wyoming, and the District of Columbia. *FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *3 (D. Or. Dec. 10, 2024) [hereinafter Kroger Op.]
[5] *See Teradata Corp. v. SAP SE*, No. 23-16065, 2024 WL 5163082, at *4 (9th Cir. Dec. 19, 2024); *FTC v. Tapestry*, Inc., 2024 WL 4647809, at *7 n.3 (S.D.N.Y. 2024); *FTC v. Cmty. Health Sys., Inc.*, 2024 WL 2854690, at *20, *22 (W.D.N.C. 2024), vacated as moot sub nom. *FTC v. Novant Health, Inc.*, 2024 WL 3561941 (4th Cir. 2024); *Tevra*

assessing whether the proposed Kroger and Albertsons merger was presumptively unlawful, for example, the district court used the concentration thresholds outlined in the 2023 Guidelines to conclude that the "merger would lead to undue market concentration in multiple geographic markets."[6] While defendants' expert refused to apply the thresholds from the 2023 Merger Guidelines, the court rejected his claim that they are "unreasonably low," describing the FTC and DOJ's explanation for the change as "convincing."[7] "Encouraged by the fact that other courts have found the presumptions to be useful, persuasive authority when considering market concentration," the court wrote, it "sees no reason to reject the 2023 Merger Guidelines in favor of a previous edition."[8]

In addition to updating the thresholds that trigger a presumption of illegality, the 2023 Merger Guidelines explained that mergers can independently violate the law by eliminating head-to-head competition. While defendants argued against this approach, the court affirmed that "a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition."[9] Reviewing the ordinary course documents, witness testimony, and economic analysis, the court found that the defendants "engage in substantial head-to-head competition and the proposed merger would remove that competition," and therefore that the proposed merger "is presumptively unlawful."[10]

As part of their rebuttal, defendants argued that the merger would generate efficiencies that would "mitigate the proposed merger's anticompetitive effects."[11] The court rightly noted that the "Supreme Court has never recognized efficiencies as a defense to a Section 7 claim and, on the contrary, has suggested that efficiencies cannot be a defense."[12] Quoting *Brown Shoe* and *Procter & Gamble*, the court recognized Congress' "desire to promote competition through the protection of viable, small, locally owned business,"[13] and noted that Congress "was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[14] While defendants claimed the merger would position them to better compete against larger firms, "[t]he overarching goals of antitrust law are not met . . . by

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Brands LLC v. Bayer HealthCare LLC, 2024 WL 1909156, at *3, *5, *7 (N.D. Cal. 2024); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2024 WL 1556931, at *13 & n.14 (E.D.N.Y. 2024) (relying on Herfindahl-Hirschman Index thresholds from a U.S. Department of Justice webpage that, in turn, cites the 2023 Merger Guidelines); *FTC v. IQVIA Holdings, Inc.*, 710 F. Supp. 3d 329, 368 n.19 (S.D.N.Y. 2023) (focusing on the 2010 Merger Guidelines because the 2023 Merger Guidelines were not issued until "after briefing and argument in this case had concluded"); *United States v. JetBlue Airways*, 712 F. Supp. 3d 109, 151 n.51 (D. Mass. 2024) (similar) (appeal dismissed), 2024 WL 3491184 (1st Cir. 2024); *FTC v. Meta Platforms, Inc.*, 2024 WL 4772423, at *9, 17-18, (D.D.C. 2024) (discussing the hypothetical monopolist test ("HMT") under the 2023 Merger Guidelines). *Cf. Ambilu Tech. AS v. U.S. Composite Pipe S.*, 2024 WL 993284, at *7 (M.D. La. 2024) (stating with respect to the 2023 Merger Guidelines that although they did not affect the party's standing argument, "the Court agrees with USCPS that these guidelines can be 'highly persuasive' to a court").

[6] Kroger Op. at 30.

[7] *Id.* at 28-29.

[8] *Id*.

[9] *Id.* at 31.

[10] *Id*. at 36.

[11] *Id*. at 37.

[12] *Id*. at 39.

[13] *Id*. (quoting 370 U.S. 294, 345 (1962)).

[14] *Id*. (quoting 386 U.S. 568, 580 (1967)).

permitting an otherwise unlawful merger in order to permit firms to compete with an industry giant."[15]

The court again drew on the 2023 Merger Guidelines, acknowledging that "[c]ognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly."[16] The court methodically scrutinized the precise source of the various efficiencies the parties were touting, ultimately finding that "a significant portion" of the claimed efficiencies were neither merger-specific nor verifiable.[17]

Notably, the court accorded little weight to defendants' promise that they would make a $1 billion "price investment" in the form of price reductions on key grocery items, given that "promise[s] can be broken at will."[18] Even if parties intend to follow through on their promises, "the business realities on the ground after the merger may change what defendants are able to invest or what is in their best interest to invest."[19]

Defendants' primary rebuttal concerned their proposed divestiture of 579 stores to C&S Wholesale Grocers, LLC ("C&S").[20] The court carefully reviewed the proposal, noting that a divestiture can only cure the illegality of a transaction if it "replace[s] the competitive intensity lost as a result of the merger."[21] Plaintiffs' economic analysis showed that—even assuming a perfectly successful divestiture with no sales lost or stores closed—the merger would still be presumptively illegal in more than 1,000 supermarket markets and over 500 large format stores markets around the country. Even defendants' economic expert found that there were markets that were not remedied by the divestiture. The court concluded that the economic evidence, alone, was "sufficient to find that the divestiture will not mitigate the merger's anticompetitive effect such that it is no longer likely to substantially lessen competition."[22]

Notably, the court continued its analysis—penning one of the more rigorous assessments of a proposed divestiture in recent antitrust history. The court looked at the scope of the divestiture, noting C&S would receive a hodgepodge of assets rather than a "standalone, fully functioning company."[23] It noted, in particular, the risk associated with "rebannering" stores—which just under half of the 579 divested stores would need to undergo.[24] The court noted that C&S would have limited access for a few years to some of Kroger's and Albertsons' private labels—an important source of margin for grocery retailers—and then would have to replace

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[15] *Id.* at 70.
[16] *Id*. at 39 (citing DEPT. OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023) at § 3.3).
[17] *Id.* at 44.
[18] *Id*. at 44 (quoting *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1, 50 (D.D.C. 2022); see also *id*. (citing *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 937 (N.D. Cal. 2023) ("[S]ubjective corporate testimony is generally deemed self-serving and entitled to low weight.")).
[19] *Id.*
[20] The court rejected defendants' argument that plaintiffs bear the burden of accounting for the divestiture in their *prima facie* case, concluding instead that the divestiture is more appropriately considered as part of defendants' rebuttal. *Id*. at 45.
[21] *Id*. at 44 (quoting *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017)).
[22] *Id*. at 47.
[23] *Id.*
[24] *Id.* at 50.

them all.[25] The court also noted that C&S would have temporary rights to customers' preexisting loyalty programs for up to a year—and then C&S customers would have to enroll in a new program.[26] The court noted the divestiture would not give C&S support for various other aspects of grocery retail, such as retail media capabilities, which C&S estimated would take it three years to fully develop.[27] "The structure of the divestiture package," the court wrote, "creates many risks for C&S that could make it difficult to compete."[28]

The court continued, reviewing whether C&S had a track record of successfully running grocery stores. While C&S is an established player in wholesale, it lacks experience running a large portfolio of retail grocery businesses. It presently operates just 25 retail grocery stores, the court noted, and while it acquired 334 retailer grocery stores between 2001 and 2012, by 2012 it had shut down or sold off all but three of those stores. What stores do remain, the court noted, seemed to be "performing below expectations."[29]

The court noted that C&S would remain dependent on Kroger/Albertsons for many years after purchasing the divested stores. Kroger would provide sales forecasting data and a base pricing plan to C&S for a period of time—and, strikingly, C&S would need to go through Kroger in order to adjust its own prices. This degree of entanglements between the divestiture buyer and the merging parties, the court noted, "poses a significant issue for the success of the divestiture" as it is not set up to create a truly independent competitor right away. Lastly, the court noted that C&S had agreed to buy the divested assets for $2.9 billion—a low price that the FTC argued suggested C&S's long-term plans were to sell the stores and retain the assets that could be repurposed to support its wholesale business.[30]

Ultimately the court found "ample evidence" that "the divestiture is not sufficient in scale to adequately compete with the merged firm and is structured in a way that will significantly disadvantage C&S as a competitor."[31] The court continued:

> C&S' history of unsuccessful grocery store ventures and its continuing dependence on defendants throughout the TSA [transition services agreement] period also suggest that the divestiture will not adequately restore competition. The deficiencies in the divestiture scope and structure create a risk that some or all of the divested stores will lose sales or close, as has happened in past C&S acquisitions. While many markets remain presumptively anticompetitive assuming the divestiture functions perfectly, a relatively small loss of sales or closure of stores short of a failure would still significantly increase the number of presumptively unlawful markets. It is unlikely that the proposed divestiture would sufficiently mitigate the anticompetitive effects of the merger.[32]

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[25] *Id*.
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] *Id.* at 51.
[30] *Id*. at 54.
[31] *Id*.
[32] *Id.* at 54.

The court's conclusion that the proposed divestiture raised enough red flags so as to be too risky is extraordinarily significant—and vindicates the FTC's unwillingness to accept the divestiture as a "fix" that could cure the illegality of the Kroger/Albertsons merger. Informed by failed remedies over the past decade,[33] the Commission in recent years has adopted a more stringent approach to reviewing proposals from merging parties. While the Commission has continued to review carefully any proposed divestiture put before us,[34] it has rejected remedies that either failed to resolve the underlying competition harms or posed too high a risk of failure.[35] This approach has meant that the Commission has chosen to litigate to challenge deals in lieu of accepting inadequate remedies—resulting in a record number of merger litigations over the last year.[36]

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[33] For example, in 2015 the Commission unanimously voted to allow the $9.3 billion Safeway/Albertsons merger to proceed after agreeing to their proposed divestiture. While the Commission had reason to believe that the proposed deal would amount to a merger to monopoly or merger to duopoly in over 50 markets, with American families paying the price, it accepted a plan where Safeway/Albertsons sold over 168 stores to four separate buyers. One of these buyers, Haggen, had operated 18 supermarkets—and then purchased 146 from Albertsons as part of the divestiture agreement. Within months, Haggen declared bankruptcy and sold many of the stores it had purchased from Albertsons back to Albertsons. *See id.* at 5 (recounting that the Safeway/Albertsons merger "involved a divestiture of 146 stores to Haggen, a small grocery retailer operating in Oregon and Washington. Haggen subsequently sold twenty-seven stores and filed for bankruptcy. Albertsons reacquired fifty-four of the divested stores as part of an agreement to purchase Haggen.") (internal citations omitted). *See also* Leah Nylen & Christopher Cannon, *Kroger-Albertsons Deal Is Haunted by 'Spectacular' Past Failure*, BLOOMBERG (July 17, 2024), https://www.bloomberg.com/graphics/2024-albertsons-kroger-merger/; Brent Kendall & Jacqueline Palank, *How the FTC's Hertz Antitrust Fix Went Flat*, WALL ST. J. (Dec. 8, 2013), https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951.

[34] For example, in March 2023 the FTC sued to block the merger between ICE and Black Knight after rejecting a proposed divestiture that the Commission believed would not replace the competitive intensity that would be lost through the merger. After the parties overhauled the proposed divestiture, the Commission ultimately accepted a consent order. Press Release, Fed. Trade Comm'n, FTC Acts to Block Deal Combining the Two Top Mortgage Loan Technology Providers (Mar. 9, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-acts-block-deal-combining-two-top-mortgage-loan-technology-providers; Press Release, Fed. Trade Comm'n, FTC Secures Settlement with ICE and Black Knight Resolving Antitrust Concerns in Mortgage Technology Deal (Aug. 31, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-secures-settlement-ice-black-knight-resolving-antitrust-concerns-mortgage-technology-deal. Similarly, in May 2023 the Commission sued to block Amgen's acquisition of Horizon. It later accepted a consent order that would address the exclusionary rebating practices at issue. Press Release, Fed. Trade Comm'n, FTC Sues to Block Biopharmaceutical Giant Amgen from Acquisition That Would Entrench Monopoly Drugs Used to Treat Two Serious Illnesses (May 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat; Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

[35] For example, the FTC successfully blocked the merger of Sysco and US Foods, the nation's two largest food distributors, by arguing that firms' proposed divestiture would fail to replicate the competitive intensity of US Foods. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 73 (D.D.C. 2015). The FTC also successfully blocked the proposed merger of Illumina and Grail by arguing that the firms' proposed remedy was inadequate to redress the competitive harm. *Illumina v. FTC*, 88 F.4th 1036 (5th Cir. 2023).

[36] From October 2023 through October 2024, the FTC litigated five merger trials: IQVIA/Propel Media; Novant Health/Community Health Systems; Tapestry/Capri; Kroger/Albertsons; and Tempur Sealy/Mattress Firm. *FTC v. IQVIA Holdings*, 710 F.Supp.3d 329 (S.D.N.Y. 2024); *FTC v. Cmty. Health Sys.*, 2024 WL 2854690 (W.D.N.C. 2024); *FTC v. Novant Health, Inc.*, 2024 WL 3561941 (4th Cir. 2024); *FTC v. Tapestry, Inc.*, 2024 WL 4647809 (S.D.N.Y 2024); *FTC v. Kroger Co.*, 2024 WL 5053016 (D. Or. 2024); *FTC v. Tempur Sealy Int'l*, No. 4:24-cv-02508 (S.D. Tex. 2024).

The red flags posed by the proposed divestiture in this matter should continue to guide both the Commission's and courts' assessment of proposed divestitures in merger challenges. These include:

- Composition of the divested assets: whether the divestiture involves a hodgepodge of assets rather than a full, standalone business;
- Completeness of the divestiture: whether the divestiture resolves competition harms in each of the markets where the merger is presumptively illegal, or whether it leaves many markets unaddressed;
- Divestiture buyer's experience: whether the buyer has a demonstrated record of successfully operating assets similar to those that it would be buying, or whether the buyer would be standing up entirely new or nascent lines of business;
- Size of the divested assets relative to size of the divestiture buyer: whether the proposed divestiture would mean the buyer is drastically growing its holdings at a scale it has never before successfully operated;
- Continued entanglements: whether the divestiture buyer would remain entangled with or dependent on the merged firm rather than function as a real rival and competitive check on day one.

Additional factors may be relevant dependent on the specifics of the transaction.[37] But ultimately, a key question is whether a divestiture would quickly restore the competitive intensity lost through a merger.

Divestitures can involve significant risk. When antitrust enforcers accept a divestiture, they are effectively assuming that risk on behalf of the public. Indeed, when a merger remedy fails, it is the American public—not the merging firms—that bear the cost. Layoffs can set families back for years, while grocery store closures can turn neighborhoods into food deserts. Indeed, communities in Washington, Arizona, Nevada, and California continue to reel from the failure of the Safeway/Albertsons merger—even a decade on.[38] Continuing to build on the

[37] For example, during his time on the Commission, former Commissioner Rohit Chopra wrote extensively about merger remedies and the factors that enforcers should look to when considering a proposed divestiture. *See, e.g.*, Statement of Comm'r Rohit Chopra In the Matter of Linde AG, Praxair, Inc., & Linde plc (Oct. 22, 2018), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-chopra-matter-linde-ag-praxair-inc-linde-plc; Dissenting Statement of Comm'r Rohit Chopra In the Matter of AbbVie, Inc./Allergan plc (May 5, 2020), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-rohit-chopra-matter-abbvie-inc-allergan-plc; Dissenting Statement of Comm'r Rohit Chopra In the Matter of Eldorado Resorts and Caesars Entertainment (June 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577363/dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_eldorado-caesars_1910158.pdf; Statement of Comm'r Rohit Chopra Regarding a Petition to Modify an Agreement in the Matter of CoreLogic (Nov. 30, 2020), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioner-rohit-chopra-matter-corelogic-inc.

[38] When attorneys general across various states convened town halls to collect community feedback on the proposed Kroger/Albertsons merger, a striking number of people expressed anxieties about the deal in light of their experience with the Safeway/Albertsons transaction and its aftermath. *See, e.g.,* Eshaan Sarup, *Attorney General Kris Mayes, FTC Chair Lina Khan Hear Concerns On Kroger-Albertsons Merger*, AZCENTRAL (Oct. 24, 2023), https://www.azcentral.com/story/money/business/2023/10/24/arizona-union-workers-host-town-hall-on-kroger-albertsons-merger/71285855007/; Jessica Gibbs, *Colorado AG Weiser, FTC Chair Hold Town Hall On Proposed Kroger-Albertsons Merger*, DENVER GAZETTE (Nov. 2, 2023), https://denvergazette.com/news/weiser-holds-

Commission's successful experience in this matter—and being willing to reject risky divestitures, even when it means litigating—will help ensure the public is not unfairly bearing the risk of failed remedies.

Finally, the court broke new ground in its assessment of the FTC's labor markets theory. The Commission's complaint alleged that the merger would substantially lessen competition for union grocery store labor. Defendants argued that the theory was not cognizable under the Clayton Act because Section 6 states that "[t]he labor of human being is not a commodity or article of commerce." The court rightly rejected this novel argument, noting that Section 6 protects labor organizing from antitrust prosecution and does not create a safe harbor for mergers that unlawfully lessen competition for workers.[39] While the 2023 Merger Guidelines are the first to expressly discuss labor markets, "the concept of antitrust protections that extend to workers, not just consumers is not [new]."[40]

The court reviewed the FTC's qualitative and quantitative evidence that the market for unionized grocery jobs is distinct from the labor market as a whole. Union grocery workers testified that they receive wages and benefits that non-union grocery workers do not, primarily because unionized workers enjoy the protections secured by their collective bargaining agreement. They detailed the many ways that unionized contracts can differ, including, for example, by guaranteeing better pensions, representation during termination proceedings, the accrual of seniority preference for scheduling, and the ability to maintain seniority when switching between employers.[41] While defendants argued that the difference between unionized and non-unionized grocery work was insignificant, workers who took the stand disagreed.[42]

The court also noted that union grocery workers are not interchangeable with workers in non-grocery retail jobs.[43] Evidence shows that unionized grocery workers are more likely to receive training to serve in specialized roles such as meat cutters, cake decorators, bakery heads, or deli department clerks.[44] Defendants' expert argued that workers employed in union grocery positions have "general skills" that are also valued in other retail settings, and hence that these workers can be expected to move freely between unionized and non-unionized jobs.[45] But the

townhall-on-kroger-merger/article_d9cbdcb2-7907-11ee-b72b-0b8855531dda.html; Casey Harrison, *FTC Chairwoman To Attend Las Vegas Meetings On Proposed Grocery Store Merger*, LAS VEGAS SUN (Sept. 12, 2023), https://lasvegassun.com/news/2023/sep/12/ftc-chairwoman-to-attend-las-vegas-meetings-on-pro/; *see also* Leah Nylen & Christopher Cannon, *supra* note 33.

[39] Kroger Op. at 56.

[40] *Id.* at 55; *see also* at Dissenting Statement of Commissioner Andrew N. Ferguson, *In the Matter of Guardian Service Industries, Inc.* (Dec 4, 2024) at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/guardian-ferguson-dissenting-statement-final.pdf ("The Commission is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.").

[41] Kroger Op. at 58.

[42] *Id.* at 59 (*See, e.g.*, Tr. 648:19-649:1 (McPherson) (Kroger executive testifying that "the driving discussion at the bargaining table is wages."); *c.f.* 677:11-17 (Clay) (President of UFCW Local 555 testifying that at bargaining he is "very concerned about health and welfare coverage and pension coverage; and then, you know, protections in the workplace for our members as well.").

[43] *Id.*

[44] *Id.*

[45] *Id.* at 60.

court found that some movement between union grocery and other jobs could be explained by a range of factors, including the fact that "there may not always be sufficient, consistent employment opportunities for all workers who prefer union grocery work."[46] Ultimately the court recognized the FTC's proposed union grocery labor market as "a plausible, relevant market for antitrust purposes"—even as it observed that the economic tools and methods available to gauge relevant labor markets are relatively under-developed.[47]

The court also found "plausible" the FTC's explanation of how eliminating competition between Kroger and Albertsons would harm union grocery workers by reducing their bargaining leverage during negotiations. Delving into the mechanics of how unions negotiate and strike, the court recognized that having more than one grocery store employer gives unions the ability to use an agreement with one employer to extract similar concessions from the other. It recognized, too, the way that unions can more credibly threaten a strike when they can divert customers to an alternative union grocery, given that a strike would impair normal operations. The court noted:

> Plaintiffs' argument that increased market concentration and loss of head-to-head competition would result in decreased bargaining power, leading to worse CBA negotiation outcomes for workers, including reduced compensation, is plausible. Defendants seek an advantageous bargaining position…to mitigate the harm that unions can cause with strikes and to resist union demands, including for increased compensation. With only one union employer in many markets, defendants would be in a relatively stronger, and union grocery workers in a relatively weaker, bargaining position. That argument is certainly more plausible than defendants' assertion that an increased concentration in union grocery employers and the loss of direct competition between Kroger and Albertsons would not change the balance of power at the bargaining table and, on the contrary, would be beneficial for union grocery workers.[48]

Here, too, the court noted the relative dearth of economic modeling and both sides' reliance on "primarily anecdotal testimony"—concluding that the lack of economic guidance meant that the court could not rule that the FTC's labor market theory was an independent basis for granting the preliminary injunction.[49]

I commend the district court for analyzing the labor market theory even after finding for the FTC on the product market claim. Importantly, the court confirmed that a substantial lessening of competition in labor markets can be an independent basis for liability. And by identifying areas where courts may need further guidance, the court set out a roadmap for enforcers to pursue. These areas include: (a) how to measure employee diversion resulting from a hypothetical monopolist employer imposing a small but significant decrease in wages and

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[46] *Id.*
[47] *Id.* at 62 ("Given that this is a relatively unusual market definition, it lacks supporting economic analysis that would generally be undertaken to verify whether a market is appropriately bounded. However, the Court is not aware of any standard economic analysis used to measure employee diversion resulting from, for example, a hypothetical monopolist employer imposing a small but significant decrease in wages and benefits. The Court cannot demand that the parties undertake an analysis using economic models that do not exist.").
[48] *Id.* at 68.
[49] *Id.*

benefits;[50] (b) how to assess when a merger would lead to presumptively unlawful concentration in a particular labor market, and how the presumptive thresholds in the 2023 Merger Guidelines should apply;[51] and (c) how to conduct economic modeling of how wages, benefits, and other compensation might change as a result of changes in workers' bargaining power.[52] Additional work on these areas by labor market experts and others could help bolster both enforcers' and courts' analysis of whether a merger illegally threatens competition in labor markets.[53]

I commend the parties for their thorough briefing in this matter and the district court for issuing a careful opinion that advances merger analysis and ultimately protects communities around America from higher grocery prices and worse jobs.[54]

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[50] *Id.* at 62.
[51] *Id.* at 64.
[52] *Id.* at 68.
[53] Economists have already conducted some of this analysis, including in the context of this transaction. *See* Marshall Steinbaum, *Evaluating the Competitive Effect of the Proposed Kroger-Albertsons Merger in Labor Markets* (Nov. 11, 2023), https://marshallsteinbaum.org/wp-content/uploads/2024/09/kroger_albertsons_labor.pdf (noting that certain UFCW chapters, who opposed the transaction, provided support for the research). While the district court found that the labor market evidence presented at the preliminary injunction hearing was insufficient, I reserve judgment on whether complaint counsel would have been able to successfully develop this evidence had this matter proceeded to a full adjudication on the merits.
[54] Usefully, the court also clarified that the Supreme Court's recent analysis in *Starbucks Corp. v. McKinney*, 602 U.S. __ (2024), discussing the applicable test for preliminary injunctions filed pursuant to Section 10(j) of the National Labor Relations Act does not apply to Section 13(b) of the FTC Act. Noting the "unique 'public interest' standard" captured in Section 13(b), the court declined to depart from the text of the statute, which says that the preliminary injunction inquiry under 13(b) is whether "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." Kroger Op. at 2-3.