February 7, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 2058

Re: Competition Concerns Raised by the Proposed Kroger-Albertsons Merger

Dear Chair Khan:

The American Antitrust Institute (AAI) has long advocated for antitrust enforcement and competition policy that promotes competition and protects consumers in the food sector.[1] In this letter, AAI provides analysis and perspective supporting the concern that the merger of supermarket chains Kroger and Albertsons is likely to substantially lessen competition. This could result from eliminating head-to-head competition *and* tightening the supermarket oligopoly, thus enhancing incentives to coordinate, rather than compete. The Kroger-Albertsons merger raises seller market power concerns for consumers. But it could also change the terms of trade with input suppliers by enhancing Kroger-Albertsons buyer power, including both monopsony and bargaining power. The effects of the merger could be felt in every part of the supply chain. Consumers could face higher food prices, less choice, and lower quality; input suppliers could see lower input prices from the exercise of buyer power; and smaller, independent grocery rivals that already struggle with higher input prices could be further disadvantaged.

This letter proceeds with an overview of the proposed merger, followed by analysis of how the public rationale for the merger conceals its real economic motivation. That is, namely, to garner significantly more monopsony and bargaining power over input suppliers. The letter then turns to why the efficiencies claimed by Kroger-Albertsons are unlikely to pass muster under the Horizontal Merger Guidelines ("Guidelines"), or be passed through to consumers.[2] The analysis concludes with arguments for why, should the Federal Trade Commission ("FTC" or "Commission") find the merger to be illegal, the Commission should seek to enjoin it rather than accept a remedy. This approach stands in contrast to repeating the mistake in Safeway-Albertsons of settling an illegal merger with an ineffective remedy. The costs of such failed remedies are borne by consumers and facilitate rising concentration in a critical sector.

[1] The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization. Its mission is to promote competition that protects consumers, businesses, and society. For more information, please visit www.antitrustinstitute.org and https://www.antitrustinstitute.org/issues/airlines/.
[2] U.S. Department of Justice and the Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10 ("Guidelines").

I. Major Conclusions and Recommendations

- **A Kroger-Albertsons merger would significantly increase concentration in already highly concentrated markets.** Past grocery mergers indicate that local markets for the retail sale of food and other grocery products in supermarkets are highly concentrated. This will inevitably be the case in Kroger-Albertsons as well. The merging parties' up-front fix is, therefore, an admission of the merger's presumptive illegality. The merger is also likely to lead to large increases in the merged company's buyer power in input supply markets, where adverse effects could be felt both regionally and nationally.

- **If the genuine rationale for the Kroger-Albertsons merger is to expand distribution, then the merging parties would be acquiring other players, not each other.** A brief review of consolidation in the retail grocery sector, including supermarkets and supercenters, indicates that combining Kroger and Albertsons will do little to advance "omnichannel" distribution, including making inroads into E-commerce and delivery, for the benefit of consumers. If this were the genuine motivation for the deal, as they attest, Kroger and Albertsons would be better off making different types of acquisitions, not merging with each other.

- **The merger will significantly enhance Kroger-Albertsons' buyer power in input supply markets.** A close look at the efficiencies projected by the merging parties reveals the not-so-hidden motivation for the merger. That is, namely, to amass monopsony and bargaining power vis-à-vis input suppliers with which Kroger and Albertsons do business. The merger would enhance the ability and incentive for a larger and more powerful Kroger-Albertsons to exercise enhanced buyer power, to the detriment of input suppliers, with adverse knock-on effects on smaller, independent rival grocers.

- **Projected merger-related efficiencies are unlikely to meet the rigorous standards in the Horizontal Merger Guidelines, or be passed on to consumers.** The cost efficiencies claimed by the merging parties are unlikely to pass muster under rigorous Guidelines standards, for a variety of reasons. That includes claimed cost savings that are likely to result not from genuine efficiencies but from anticompetitive reductions in output in input supply markets. Moreover, in a litigated merger challenge the parties would for basic economic reasons be unable to demonstrate the pass-through of cost savings consumers to a court's satisfaction.

- **The burden on a remedy to restore competition sacrificed by a Kroger-Albertsons merger is unacceptably high.** Given the concentrative nature of the Kroger-Albertsons merger, the risk of a failed remedy is commensurately high. An attempt to create a new rival out of stores spun-off from Albertsons pits a tiny, unproven competitor against a tighter oligopoly of large grocers. Evidence of previous failed remedies proves that the costs of failure are borne by consumers. Moreover, the parties' divestiture proposal does nothing to address buyer power concerns. A Commission move to enjoin the merger is, therefore, likely to be the only effective remedy for preserving competition.

II. Overview of the Kroger-Albertsons Merger

In October 2022, the nation's largest retail supermarket chain, Kroger, announced its acquisition of Albertsons, the second largest chain.[3] Anticipating antitrust concerns, the parties committed up front to divesting 100-375 stores.[4] Walmart, Kroger, Costco, and Albertsons are the four largest firms in a broad national retail food market, holding market shares of 35%, 14%, 12%, and 8%, respectively.[5] Should the Kroger-Albertsons merger proceed, it would put control of over 55% of the national retail food market in the hands of only two firms: Walmart and Kroger-Albertsons. Seventy percent of the market would be in the hands of three firms.

The merger will eliminate competition in local markets in numerous states, where concentration in local retail grocery markets is likely to increase significantly.[6] Consistent with its approach in the Safeway-Albertsons and Ahold-Delhaize mergers, the FTC is likely to allege narrower relevant markets for "retail sale of food and other grocery products in supermarkets."[7] This relevant market definition will produce even more highly concentrated local markets, reflecting the fact that online grocery delivery services, specialty food stores, hard-discounters, club stores, and other formats do not provide sufficient competition to effectively constrain supermarket pricing.[8]

The Kroger-Albertsons investor presentation explains that the merger will enable the company to provide fresher food faster, broaden its portfolio of brands, and offer customers a personalized, seamless, experience.[9] They highlight the goal of an accelerated "go-to-market" strategy, operationalized by creating a broader supplier base and national and local distribution networks, and enhancing private-label offerings and the company's "fresh" portfolio.[10] A major component of Kroger-Albertsons' professed strategy is to expand omnichannel distribution.[11] This includes building out a digital retail grocery ecosystem to maximize fulfillment and delivery services, presumably by harnessing the value of consumer data from grocery sales and "alternative profit" services.[12] Indeed, Kroger's CEO referred in his Senate testimony to the merger as necessary to

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[3] Investor Presentation, Kroger and Albertsons (Oct. 14, 2022), https://assets.website-files.com/6313a39c3c13ed1541dc24e1/63497445b7be8f45282920d4_Kroger-Albertsons-Companies-Merger-Investor-Presentation.pdf ("Investor Presentation").
[4] *Id.,* at 6.
[5] *The Economic Cost of Food Monopolies: The Grocery Cartels*, FOOD & WATER WATCH (Nov. 2021), at 2, https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf.
[6] Investor Presentation, *supra* note 3, at 8.
[7] Fed. Trade Commn. In the Matter of Cerberus Institutional Partners V, L.P.; AB Acquisition LLC and Safeway Inc., Complaint, Docket No. C-450 (Jan. 27, 2015), at Section IV, PP. 9, https://www.ftc.gov/system/files/documents/cases/150702cerberuscmpt.pdf; and Fed. Trade Commn., In the Matter of Koninklijke Ahold, N.V. and Delhaize Group, NV/SA, Complaint, Docket No. C-458 (Jul. 22, 2016), at Section IV, PP. 8, https://www.ftc.gov/system/files/documents/cases/161031delhaizecmpt.pdf.
[8] *Id.*, Complaint in Safeway-Albertsons, at Section IV, PP. 10 [noting that full-line retail grocery stores "enable consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in a number of major categories..."].
[9] Investor Presentation, *supra* note 3, at 9.
[10] *Id.,* at 10.
[11] *Id.,* at 13.
[12] *Id.,* at 18.

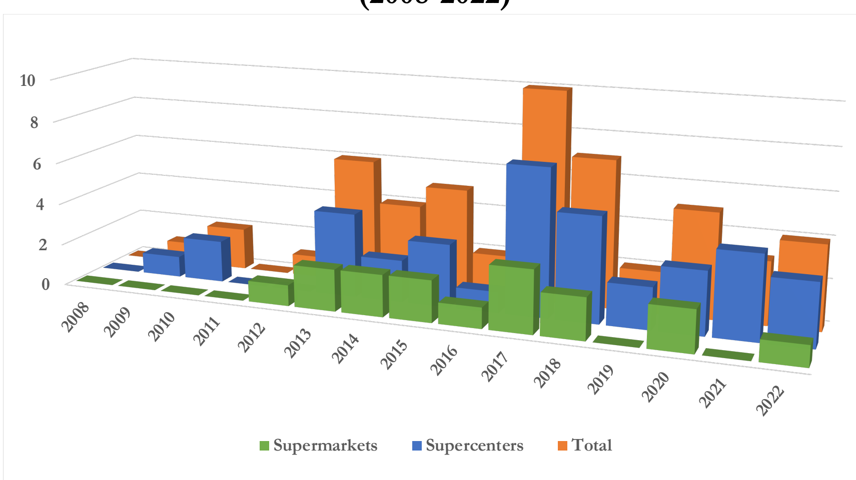
capitalize on the trend of a digital "transformation" in retail grocery.[13] Without doubt, a larger Kroger aims to compete with large players like Walmart, which has an established digital and delivery presence.

III. If the Genuine Rationale for the Merger Is To Expand Distribution and Become a Digital Player, Then Kroger and Albertsons Would Not Be Merging

The public rationale for the Kroger-Albertsons merger is to expand omnichannel distribution, a major prong of which is the buildout of a digital retail grocery ecosystem. The transformation envisioned by Kroger-Albertsons, in theory, rests on combining complementary assets to take advantage of economies of coordination and reducing costs across different levels of a supply chain. But projected efficiencies that would actually pass muster under the Guidelines appear to be focused exclusively on cost savings generated by economies of scale from combining *similar*, not complementary, assets. They also do not include efficiencies around consumer benefits, which are harder to realize, but more likely to support Kroger-Albertsons' motivation for expanding distribution.

A brief history of consolidation in retail grocery supports the foregoing story. At almost $25 billion, the deal is the largest supermarket merger ever proposed. It follows Albertsons' acquisition of Safeway ($9 billion) in 2015 and Ahold's acquisition of Dehaize ($28 billion) in 2016.[14] Both of these transactions were approved by the FTC with divestitures. The Kroger-Albertsons' deal comes on the tail of a 10-year cycle of consolidation for food retailers, including supermarkets and supercenters (e.g., Walmart, Target).[15] The figure below shows acquisitions by major players in the retail grocery sector from 2008-2022. Before 2008, there were brief upticks in M&A activity in the late 1990s and the mid-2000s. The 2010s, however, marked an M&A cycle beginning around 2012 and peaking in 2017-2018.

Acquisitions by Supermarkets and Supercenters (2008-2022)



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[13] Testimony Of Rodney McMullen, Chair and CEO, the Kroger Co., before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Nov. 29, 2022), at 3. https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20McMullen%20-%202022-11-28.pdf.

[14] Crunchbase.com, queried for retail grocery mergers.

[15] *Id.*

Over the period, we see a very different profile of consolidation in the supermarket versus the supercenter segment. Between 2008-2022, for example, supercenters made about 70% of total acquisitions, or an average annual increase of about 46%. Supermarkets, on the other hand, accounted for only 30% of total acquisitions, or an average annual increase of about 2%. Most of the disparity in growth is explained by the latter's aggressive buildout of E-commerce and delivery capability. For example, about 73% of acquisitions made by supercenters involved acquirees focused on advertising, cloud and analytics, E-commerce and delivery, and non-grocery products and services. But only about 50% of acquisitions made by supermarkets were in these areas. This is clear in the figures below, which show word clouds based on descriptors for the acquirees of supermarkets and supercenters from 2008-2022. The more recent acquisition strategy of supercenters has been on creating an E-commerce ecosystem. In contrast, supermarkets appear focused on the bricks and mortar grocery business with an E-commerce strategy that is a lesser and competing priority.

Acquisitions by Supermarkets (2008-2022)

Acquisitions by Supercenters (2008-2022)

The inconsistencies between the public rationale for the Kroger-Albertsons merger and the parties' efficiencies defense, as well as their acquisition histories, expose a clearly different reason for the merger. That is, namely, to combine the two largest supermarket players to amass monopsony and bargaining power in input supply markets.[16] The ability to wield enhanced power to force down input prices, to the detriment of smaller suppliers and ultimately to consumers, goes a long way to offsetting the company's narrowing margins and serving the interests of shareholders.[17] A major conclusion, therefore, is that if the Kroger-Albertsons merger was truly motivated by creating omnichannel distribution, then neither party would be proposing to merge with each other. Instead, they would be investing in organic growth, or focused an acquisition strategy targeting businesses designed to create complementarities across distribution channels.

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[16] *Policy Roundtables: Monopsony and Buyer Power*, OECD (2008), https://www.oecd.org/daf/competition/44445750.pdf.

[17] *Kroger Profit Margin 2010-2022,* MACROTRENDS, https://www.macrotrends.net/stocks/charts/KR/kroger/profit-margins. *See also,* Tom Ryan, *Can Kroger offset its margin headwinds?* RETAILWIRE (Sept. 13, 2021), https://retailwire.com/discussion/can-kroger-offset-its-margin-headwinds/.

IV. The Merger Will Significantly Enhance Kroger-Albertsons' Buyer Power in Input Supply Markets

The food supply chain has been in the grip of "reactive" consolidation for years.[18] The accretion of market power in various segments has spurred an ongoing cycle of bulking up to gain bargaining leverage over suppliers and customers. This is especially true of, on one hand, suppliers such as protein processors (e.g., beef packers and poultry processors) that exercise market power over retail grocery chains and, on the other hand, retail grocery chains that exercise market power over food manufacturers.[19] These market participants often traffic in *both* buyer and seller market power. Thus, the shifting balance of bargaining power between markets is both the outcome of consolidation at different levels *and* the cause of further consolidation to gain compensating bargaining leverage (e.g., countervailing power).[20]

For example, the market power of food manufacturers and food processors has increased over time. Companies such as PepsiCo, Grupo Bimbo, Danone, Unilever, ConAgra, Kraft, Heinz, MOM Group, Kellogg hold dominant market positions (i.e., in excess of 50%) in major food categories ranging from dairy, to bread, condiments, fruits and vegetables, and prepared meals.[21] Four major beef processors and poultry processors account for about 80% and 67% of the national market, respectively.[22] Both segments exert market power against retail grocers.

In response to the growth in the seller market power held by larger input suppliers, retail grocers have developed methods to counter its effects. For example, grocers charge slotting fees to food manufacturers for favorable shelf-placement and other promotional advantages. This and other practices to counter seller market power can have the detrimental effect of erecting higher barriers to entry for smaller brands. Retail grocers have also vertically integrated to better control imbalances in market power vis-à-vis processors. For example, Walmart, Albertsons, and Kroger, have purchased their own milk-bottling plants and Costco has invested in chicken processing facilities.[23]

The foregoing analysis highlights the dynamics between large retail grocers and large input suppliers. But it does not capture the effects of the Kroger-Albertsons merger on suppliers that *lack* market power. The effects of the merger on smaller suppliers include higher barriers to entry, anticompetitive reductions in inputs, and loss of bargaining power. These effects would be felt by smaller and independent food brands, regional dairy and protein processors, and food wholesalers,

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[18] Letter from the American Antitrust Institute to Assistant Attorney General William Baer Re: Antitrust Review of the Aetna-Humana and Anthem-Cigna Merger (Jan. 11, 2016), at Section 2.A, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Health-Insurance-Ltr_1.11.16.pdf.

[19] *See, e.g.*, Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytical Failures of the U.S. Beef Supply Chain: Issues and Challenges*, Univ. of Wisconsin Legal Studies Research Paper No. 1741 (Mar. 3, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049230.

[20] Laura M. Alexander, Countervailing Power: A Comprehensive Assessment of A Persistent But Troubling Idea, AMERICAN ANTITRUST INSTITUTE (Oct. 15, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/10/AAI_CountervailingPower10-15-20.pdf.

[21] Food & Water Watch, *supra* note 5, Appendix.

[22] *See*, U.S. Department of Agriculture, Agricultural Marketing Service, Packers and Stockyards Division, *Annual Report 2018*, at Table 5, https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2018.pdf. Data are for steers and heifers; U.S. Government Accountability Office, Structure of U.S. Cattle Markets, Report: GAO-18-296 (Apr. 2018), https://www.gao.gov/assets/700/691178.pdf; and *2019 Top 100 Meat & Poultry Processors*, PROVISIONERONLINE.COM, *available at* https://www.provisioneronline.com/2019-top-100-meat-and-poultry-processors.

[23] Food & Water Watch, *supra* note 5, at 2-3.

which could see lower prices for their products.[24] Unlike local consumer markets, affected input supply markets could be regional and national, highlighting the broad scope of likely anticompetitive effects of the Kroger-Albertsons merger. Moreover, because the merger will enhance both buyer and seller power, adverse effects in input supply markets are likely to flow to consumer markets, exacerbating the loss of supermarket competition downstream.[25]

Finally, merger-induced increases in Kroger-Albertsons' buyer power in input supply markets are likely to harm independent grocers.[26] Powerful retail grocers already negotiate substantial bulk and bundled discounts with food manufacturers that disadvantage smaller and independent grocers. This "waterbed effect" occurs when non-cost-related "…price reductions are negotiated with suppliers by larger buyers and result in higher prices charged being by suppliers to smaller buyers."[27] The waterbed effect is likely to worsen with Kroger-Albertsons enhanced buyer power post-merger, with adverse effects on the ability of independent grocers to compete in a tighter oligopoly of large grocery chains.

V. Projected Efficiencies Are Unlikely to Meet the Rigorous Standards in the Horizontal Merger Guidelines, or Be Passed On to Consumers

Kroger and Albertsons project $1 billion of "run-rate" synergies, or cost savings from the merger. These include: G&A cost savings and goods not for resale; technology; and sourcing, manufacturing, and supply chain. Cost savings are one type of merger efficiencies. They are typically realized over the shorter term and can result from economies of scale, scope, or elimination of double margins from integrating multiple levels in a supply chain. A second category is consumer benefits, which require more time to realize and are revealed, if successful, in new product innovation or higher quality. Given Kroger-Albertsons' public rationale for their merger, we would expect to see projections of substantial consumer benefits. But the merging parties do not claim such benefits. This affirms that the motivation for the merger has little to do with expanding distribution and more to do with amassing more monopsony and bargaining power by combining with a rival grocer.

The Guidelines look skeptically on efficiencies claims. They explain that "efficiencies will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means."[28]

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[24] Eliminating competition in local markets will also affect workers. *See, e.g.,* Michael Sainato, *We're really worried': US supermarket mega-merger raises mass layoff fears*, THE GUARDIAN (Dec. 12, 2022), https://www.theguardian.com/us-news/2022/dec/12/us-supermarket-merger-kroger-albertsons. In obtaining an injunction in the Penguin-Simon & Schuster merger, court agreed that anticompetitive reductions in output in an input market establishes an antitrust violation. *See, e.g.,* United States v. Bertelsmann SE & Co., Slip Op. at 21 n.13, 77, 79-80, No. 1:21-cv-02886-FYP (Nov. 7, 2022). This is without regard to whether, or how, adverse effects may translate in consumer markets. *See, e.g.,* Comments of the American Antitrust Institute, Public Workshop on Competition in Labor Markets, U.S. DOJ Antitrust Div. (Sept. 23, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/10/AAI-Labor-Workshop-comments-10.23.19.pdf.

[25] See, e.g., Ioana Marinescu and Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA LAW J. (2019), at 1031.

[26] *See, e.g.*, Testimony of Michael Needler, Hearing on Examining the Competitive Impact of the Proposed Kroger-Albertsons Transaction, Senate Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights (Nov. 29, 2022), at 7-8.

[27] Roman Inderst and Tommaso M. Valletti, *Buyer Power and the 'Waterbed Effect,* CEIS Research Paper No. 107 (Feb. 21, 2014, last revised), https://ssrn.com/abstract=1113318.

[28] Guidelines, *supra* note 2, §10.

Efficiencies must be "merger-specific," or achievable only through the merger.[29] Kroger-Albertsons' claimed cost efficiencies are unlikely to meet these requirements, for a number of reasons. First, the agencies will likely dismiss several categories of claimed costs savings, such as fixed cost reductions (e.g., administrative costs) as non-merger-specific. This is also true of some technology and procurement cost savings, which could be achieved by alternative means such as more efficient contracting. Moreover, to the extent that some claimed cost savings are deemed to be cognizable, the Guidelines are clear that they must demonstrably reduce marginal costs.[30]

Second, cost savings around sourcing, manufacturing, and supply chain are likely to result from Kroger-Albertsons' enhanced, post-merger monopsony and bargaining power. The Guidelines make clear that efficiencies derived from anticompetitive reductions in output or service will not be considered. The same is true of cost savings Kroger-Albertsons' may attempt to claim around labor, including reduced employee compensation from layoffs and store closures that are shown to be related to anticompetitive reductions in labor inputs.

Third, in a litigated merger challenge, the government bears the burden under the Baker-Hughes framework to show how the merger is likely to substantially lessen competition. The burden then shifts to the merging parties to show how pro-competitive benefits countervail adverse effects.[31] However, the Guidelines explain that "The greater the potential adverse competitive effect of a merger, *the greater must be the cognizable efficiencies*...for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market."[32] Thus, the more concentrative a horizontal merger, as is the case in Kroger-Albertsons, the greater is the burden on the parties to show countervailing efficiencies. This guidance has been adopted by numerous courts.[33] Once the parties' claimed cost savings are whittled down to those that are merger-specific and cognizable, reduce marginal costs, and do not result from anticompetitive reductions in output in any relevant market, there is likely to be little, if anything, left over to ameliorate the significant harm that is likely to result from the merger.

Finally, in a litigated merger challenge, the defendant's burden to show countervailing merger efficiencies includes that they will be passed through to consumers. The Guidelines state, for example, that "The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, *and the more they must be passed through to customers*..."[34] Kroger-Albertsons commit to reinvesting $500M of $1 billion cost savings to lower prices to consumers.[35] This 50% pass-through is unrealistic, for two reasons. First, the post-merger market will be a tighter oligopoly of retail grocers, which already contains rivals with significant buyer power. Post-merger, the degree of buyer power in input supply markets will increase. In oligopolized input markets, where all firms share artificially reduced costs from bidding down input prices, such savings are less likely to be passed on to retail consumers.[36]

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[29] Guidelines, *supra* note 2, §10.
[30] *Id.*
[31] U.S. v. Baker Hughes, Inc., 908 F.2d 981.
[32] Guidelines, *supra* note 2, §10.
[33] *See, e.g.,* Heinz, 246 F.3d, at 720.
[34] Guidelines, *supra* note 2, §10.
[35] Investor Presentation, *supra* note 3, at 5.
[36] Adriaan Ten Kate And Gunnar Niels, *To What Extent are Cost Savings Passed on to Consumers? An Oligopoly Approach, 20* EUR. J. OF LAW & ECON. (2005), at 324.

A second reason why the pass-through of legitimate cost savings from the Kroger-Albertsons merger is unlikely is slim retail grocery margins. Retail grocery margins range from 1-3% and are among the lowest of any business.[37] This means that Kroger-Albertsons would need to make up reduced revenue on any price reductions resulting from cost savings by significantly expanding demand.[38] But incremental increases in demand post-merger may be difficult. Inflation, supply chain disruptions, and recessionary pressure all affect food prices for in-store shopping and delivery services, will put downward pressure on demand.[39] Moreover, incrementally increasing demand for Kroger-Albertsons' products post-merger hinges on successfully building out omnichannel distribution, which we have already established is not the real goal of the merger.

VI. There is a High Burden on a Remedy to Reinject Competition Lost by the Kroger-Albertsons Merger and the Costs of Failure Would Be Borne by Consumers

Kroger and Albertsons have attempted to head off antitrust concerns about large increases in concentration in local "supermarket" relevant markets with an up-front fix. The merger agreement contemplates between 100-375 store divestitures, accomplished by creating a new subsidiary of Albertsons, to be spun off to Albertson's shareholders just prior to the close of the deal. The spin-off would, the parties' claim, operate independently as a "new, agile competitor with quality stores, experienced management, operational flexibility…."[40] This proposal is problematic in light of the highly concentrative nature of the merger and growing evidence of failed divestiture remedies. And it does not address the buyer power that is the major impetus for the merger. Indeed, because relevant input supply markets could be regional and national in scope, local supermarket store divestitures do nothing at all to address buyer power concerns.

The failure of store divestitures in the 2015 merger of Safeway-Albertsons has generated widespread concern over the effectiveness of divestiture remedies. It joins a list of growing failed remedies in pharmaceuticals, rental cars, wireless telephony, and live event ticketing.[41] For example, in Safeway-Albertsons a regional grocer that purchased divested stores failed to maintain them, ultimately exiting the market while stores reverted to Albertsons.[42] Failures of past remedies highlight that the burden on a remedy to restore competition increases with a merger's potential for anticompetitive effects. Past grocery and pharmaceutical mergers have reduced the number of rivals in some relevant markets from three to two, or even two to one.[43] In mergers to monopoly, accepting divestitures is

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[37] Barbara Bean-Mellinger, *What Is the Profit Margin for a Supermarket?* CHRON (updated Nov. 14, 2018), https://smallbusiness.chron.com/profit-margin-supermarket-22467.html, https://smallbusiness.chron.com/profit-margin-supermarket-22467.html.
[38] McMullen Testimony, *supra* note 13, at 1 [explaining that "Our business model is built around lowering prices to attract more customers, rather than making higher margins on fewer customers."].
[39] Meaghan Yuen, *Digital grocery will be a $243 billion market in the US by 2025: Here are the stats and trends you need to know*, Insider Intelligence (Jan. 18, 2023), https://www.insiderintelligence.com/insights/digital-grocery-industry/.
[40] Investor Presentation, *supra* note 3, at 6.
[41] *See, e.g.,* Comments of the American Antitrust Institute, U.S. Department of Justice and Federal Trade Commission Request for Information on Merger Enforcement, Docket No. FTC-2022-0003 (Apr. 21, 2022), at 5-6, https://www.antitrustinstitute.org/wp-content/uploads/2022/04/AAI-Merger-Guidelines-Comments_4.21.22.pdf.
[42] Brent Kendall, Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway (Nov. 24, 2015), https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193.
[43] A study of the FTC's divestitures in pharmaceutical mergers found that 60% of relevant markets defined in 67 mergers involved 3-2 and 2-1 reductions in number of rivals. *See*, Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy In The Pharmaceutical Sector,* AMERICAN ANTITRUST INSTITUTE (Sept. 3, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.In Safeway-

akin to "swapping" out a merging party for a new player. In both Safeway-Albertsons and Ahold-Delhaize, almost 40% of relevant markets involved 3-2 or 2-1 reductions in number of competitors. Placing the task of fully restoring competition in highly concentrated markets in the hands of an untested spin-off rival increases the risk of failure, the costs of which would be borne by consumers. In such cases, as are likely to arise in Kroger-Albertsons, the most effective remedy for restoring competition is for the FTC to seek to enjoin it.

In closing, the AAI urges the FTC to consider the foregoing issues relating to the full scope of anticompetitive effects likely to result from the merger of Kroger and Albertsons. We are happy to discuss our analysis and perspective with you or the FTC Staff.

Sincerely,

Diana L. Moss, Ph.D.
President
American Antitrust Institute
1025 Connecticut Ave. NW, Suite 1000
Washington DC 20036
2020-828-1226
www.antitrustinstitute.org

Albertsons, the FTC alleged that the acquisition reduced the number of rivals from two to one in 13 relevant geographic markets and three to two in 42 markets. *See*, Safeway-Albertsons, *supra* note 7, at Section VI, P. 19. In Ahold-Delhaize, the FTC alleged that the merger reduced the number of rivals from two to one in three relevant geographic markets and three to two in 14 markets. *See*, Ahold-Delhaize, *supra* note 7, at Section VI, P. 18.