

The Honorable Marshall L. Ferguson  
Noted for Consideration: October 30, 2024  
Without Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO.; ALBERTSON'S  
COMPANIES, INC.; ALBERTSON'S  
COMPANIES SPECIALTY CARE, LLC;  
ALBERTSON'S LLC; ALBERTSON'S  
STORES SUB LLC; and KETTLE MERGER  
SUB, INC.

Defendants.

No. 24-2-00977-9

**NORTHWEST HARVEST,  
UNITED WAY OF KING  
COUNTY, AND THE  
WASHINGTON STATE  
COMMUNITY ACTION  
PARTNERSHIP'S MOTION  
FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF**

**I. INTRODUCTION AND RELIEF REQUESTED**

Northwest Harvest, United Way of King County, and the Washington State Community Action Partnership (collectively, "*Amici*") seek leave to file an *Amicus Curiae* Brief in support of the State of Washington's request for a permanent injunction against Kroger's acquisition of Albertsons. Leave should be granted so that the potential impact of the proposed transaction on *Amici*'s clients and other stakeholders may be considered by this Court. Counsel for *Amici* contacted counsel for The Kroger Co., ("Kroger"), Albertsons Companies, Inc. ("Albertsons"), and the State of Washington ("the State") regarding whether

1 they would oppose granting *Amici* leave to file their *Amicus Curiae* Brief. Kroger opposes  
2 granting leave. The State does not oppose granting leave. Albertsons did not respond.

## 3 II. STATEMENT OF THE ISSUE

4 Whether *Amici* should be granted leave to file their *Amicus Curiae* Brief (the “*Amicus*  
5 Brief”) in support of the State of Washington’s request for a permanent injunction against  
6 Kroger’s proposed acquisition of Albertsons.

## 7 III. EVIDENCE RELIEF UPON

8 *Amici* rely upon the pleadings and other papers on file in this matter.

## 9 IV. ARGUMENT

10 Although no civil rule specifically addresses *amicus curiae* participation in  
11 Washington Superior Courts, this Court enjoys discretion to allow it. See *Parsons v. Dep’t*  
12 *of Soc. & Health Servs.*, 129 Wn. App. 293, 302, 118 P.3d 930, 934 (2005) (upholding trial  
13 court decision to permit *amicus* participation). On October 15, 2024, *Amici*’s counsel notified  
14 counsel for the parties to this litigation of their intention to seek leave to file the *Amicus* Brief,  
15 a copy of which is attached hereto as **Exhibit A**. Kroger opposes granting leave. The State  
16 does not oppose granting leave. Albertsons did not respond.

17 As described in greater detail in the proposed *Amicus* Brief, *Amici* have been working  
18 on food security and related issues in Washington State for decades. For example, Northwest  
19 Harvest provides an average of two million meals each month through its statewide network  
20 of more than 400 food banks, meal programs, schools, and community-based organizations.  
21 Accordingly, *Amici* are well situated to speak to the real-life effects the proposed transaction  
22 will have on Washington’s citizens, particularly the most vulnerable. Courts have recognized  
23 that “assisting in a case of general public interest,” such as this one, is a “classic role” for  
24 *amici*. See, e.g., *Funbus Sys., Inc. v. California Pub. Utils. Comm’n*, 801 F.2d 1120, 1125  
25 (9th Cir. 1986).

*Amici* respectfully submit that their views on the proposed Kroger-Albertsons merger will assist the Court in determining whether to enjoin this transaction.

## V. CONCLUSION

For the foregoing reasons, this Court should grant *Amici* leave to file the *Amicus* Brief attached hereto.

*I certify that this motion contains 432 words, in compliance with the Local Civil Rules.*

DATED: October 17, 2024.

**ARETE LAW GROUP PLLC**

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## CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via electronic mail.

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1 Dated this 17<sup>th</sup> day of October, 2024 in Seattle, Washington.

2 /s/ Kaila Greenberg

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4 Legal Assistant  
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**AMICUS CURIAE BRIEF OF  
NORTHWEST HARVEST,  
UNITED WAY OF KING  
COUNTY, AND THE  
WASHINGTON STATE  
COMMUNITY ACTION  
PARTNERSHIP**

**INTEREST OF *AMICUS CURIAE***

Northwest Harvest, United Way of King County, and the Washington State Community Action Partnership (collectively, "*Amici*") file this *amicus curiae* brief in support of the State of Washington's request that this Court permanently enjoin The Kroger Co.'s ("Kroger") proposed acquisition of Albertsons Companies, Inc. and related companies ("Albertsons").

Founded in 1967, the organization now known as Northwest Harvest works for food justice in Washington State. Reynolds Decl. ¶ 3. In 1970, Northwest Harvest partnered with dozens of other organizations to create Washington's first emergency food bank network. *Id.*

1 By 2010, Northwest Harvest had a statewide presence, after opening food warehouses in  
2 Spokane and Yakima (in addition to its Seattle warehouse). *Id.* Northwest Harvest now  
3 serves every county in the state. *Id.* Working with partners in communities across  
4 Washington to get food where it is needed most, Northwest Harvest provides an average of  
5 two million meals each month through its statewide network of more than 400 food banks,  
6 meal programs, schools, and community-based organizations. *Id.* Centered on the people  
7 and organizations it serves and with whom it partners, Northwest Harvest advocates for  
8 change to inequitable policies, practices, and institutions that perpetuate hunger and poverty.  
9 *Id.* Northwest Harvest’s goal is to ensure that people in communities across Washington  
10 State can access the nutritious food they want and need to thrive. *Id.*

11 Northwest Harvest served on Governor Inslee’s Social Support Advisory Group for  
12 the COVID-19 Pandemic. *Id.* ¶ 4. In 2021, Northwest Harvest was named the “Washington  
13 Organization of the Year” by the Washington State Leadership Board, which under the  
14 authority of state statute has been honoring exceptional individuals and organizations in the  
15 state for nearly fifty years. *Id.* For more than fifteen years, Northwest Harvest has conducted  
16 studies and issued reports regarding food insecurity in Washington. *Id.*

17 United Way of King County (“UWKC”) works to ensure that everyone has access to  
18 resources, quality education, enough food to eat, and a safe place to call home. UWKC works  
19 to combat structural and institutional racism and reduce inequities to build an equitable future.  
20 UWKC also advocates for and helps pass public policies by working side-by-side with  
21 communities to ensure that policies are equitably and effectively implemented in ways that  
22 work for all.

23 The Washington State Community Action Partnership (“WSCAP”) is a poverty  
24 fighting network with 30 Community Action Agencies working to equip low-income  
25 individuals and families in every county in Washington State to exit poverty. WSCAP  
26

1 provides a unified voice for Community Action Agencies in advocacy, policy, programmatic,  
2 and legislative issues affecting families and communities in the State of Washington.

3 Based upon the depth, breadth, and decades of experience *Amici* have in addressing  
4 food security and related issues in the State of Washington, *Amici* are well situated to speak  
5 to the real-life effects the proposed transaction will have on Washington's citizens,  
6 particularly the most vulnerable. *Id.* ¶ 5. *Amici's* food security and related expertise ranges  
7 from the state's largest cities to its most remote rural communities. *Id.* *Amici* welcome the  
8 opportunity to address the food security impacts of the proposed Kroger-Albertsons merger,  
9 and appreciate the Court's consideration of the points below.

### 10 INTRODUCTION AND SUMMARY OF ARGUMENT

11 The cost of groceries has risen precipitously in the United States in recent years.  
12 Against this backdrop, Kroger and Albertsons—two of the largest grocery store chains—  
13 propose to merge, which would form the second largest owner of grocery stores in the United  
14 States, behind only Walmart. When mergers occur in an already concentrated industry, prices  
15 go up. The grocery industry in the United States has concentrated significantly in the past  
16 three decades. Accordingly, it is highly likely that if the Kroger-Albertsons merger is  
17 consummated, grocery prices will increase, impacting all Washington citizens.<sup>1</sup>

18 In a litigation-driven attempt to address the anti-competitive effects of their merger,  
19 Kroger and Albertsons propose divesting a mishmash of nearly 600 grocery stores (about 120  
20 of which are in Washington State) to C&S, a New Hampshire-based food distributor that has  
21 limited experience in retail groceries. As shown by the Albertsons-Safeway merger less than  
22 ten years ago, in which about 150 stores were divested in what turned out to be a colossal  
23 failure, this divestiture is unlikely to work. The result will be reduced competition and closed  
24

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25 <sup>1</sup> *Amici* recognize that in a free market system, acquisitions and divestitures can have pro-  
26 competitive, pro-consumer effects. But the free market needs guardrails, like the antitrust  
and consumer protection laws applicable here. As explained in this brief, and further shown  
at trial, this proposed transaction will decrease competition to the detriment of consumers.

1 stores, hitting Washington consumers with both increased costs and degraded access to  
2 healthy food.

3 This Court should grant the relief the State seeks here, and permanently enjoin the  
4 Kroger-Albertsons merger.

### 5 ARGUMENT

6 As the State has shown at trial, if Kroger's acquisition of Albertsons moves forward,  
7 Washington consumers are likely to experience increased food prices, decreased food access,  
8 and degraded competition. These effects will be felt most strongly by Washington's most  
9 vulnerable citizens.

#### 10 **A. The Proposed Merger is Likely to Lead to Higher Grocery Prices and Reduced** 11 **Access to Food**

12 The United States has one-third fewer grocery stores now than a quarter century ago.  
13 Nina Lakhani *et al.*, *Investigation Shows Scale of Big Food Corporations' Market Dominance*  
14 *and Political Power*, The Guardian (July 14, 2021) (Roller Decl. Ex. A). A 2023 report from  
15 the United States Department of Agriculture showed that in 2019, sales from the 20 largest  
16 food retailers in the United States accounted for 64 percent of all food sales, more than  
17 doubling the share of food sales the 20 largest food retailers enjoyed in 1990. U.S. Dep't. of  
18 Agric., Econ Rsch. Rep. No. (ERR-314), *A Disaggregated View of Market Concentration in*  
19 *the Food Retail Industry* (2023) (Roller Decl. Ex. B) at 1. Indeed, the Department of  
20 Agriculture concluded that the national Herfindahl-Hirschman Index, "one of the most  
21 commonly used and accepted measures of market concentration in the academic literature  
22 and by policymakers," for food sales increased by more than 450% from 1990 to 2019. *Id.*  
23 at 4, 8.

24 If the proposed merger goes forward, Kroger will operate more than 5,000 grocery  
25 stores across the United States, becoming one of the largest supermarket chains in the United  
26 States, second only to Walmart. Press Release, Fed. Trade Comm'n, FTC Challenges  
Kroger's Acquisition of Albertsons (Feb. 26, 2024) (Roller Decl. Ex. C).

1            “[A] trend toward concentration in an industry, whatever its causes” has long been  
2 recognized as “a highly relevant factor in deciding how substantial the anti-competitive effect  
3 of a merger may be.” *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552-53, 86 S. Ct.  
4 1665, 16 L. Ed. 2d 765 (1966). The United States Department of Justice and the Federal  
5 Trade Commission similarly recognize that “[i]f an industry has gone from having many  
6 competitors to becoming concentrated, it may suggest greater risk of harm” from a merger  
7 “for example, because new entry may be less likely to replace or offset the lessening of  
8 competition the merger may cause.” Fed. Trade Comm’n & Dep’t of Just., Merger  
9 Guidelines § 2.7 (2003).

10            *Amici* understand that the State has submitted substantial evidence that the proposed  
11 transaction will have anticompetitive effects, which will enable Kroger to raise prices and  
12 reduce quality. *See, e.g.*, State’s Trial Brief at 23-29. *Amici* won’t rehash this evidence. As  
13 the Center for Science in the Public Interest has observed, “[g]rocery mergers in highly  
14 concentrated markets are associated with higher food prices and affordability is a key barrier  
15 to healthy eating and is associated with food insecurity.” Letter from Peter Lurie and Sara  
16 John, Center for Science in the Public Interest, to Lina Khan, Chair, Fed. Trade Comm’n  
17 (May 15, 2023) (Roller Decl. Ex. D) at 2. Indeed, the authors of a robust study of the price  
18 effects of horizontal mergers in the U.S. grocery market concluded that such mergers  
19 typically lead to higher prices, particularly where the market is already concentrated:

20            By examining a relatively large number of mergers taking place in the same  
21 industry at roughly the same time, we can draw some conclusions about  
22 how changes in market structure caused by mergers affect prices. Despite  
23 the relative ease of entry and expansion in the supermarket industry, we find  
24 evidence that **horizontal mergers can result in significant increases in**  
25 **consumer prices and thereby harm consumers.** The mergers that result  
26 in higher consumer prices are largely those that we would expect, *a priori*,  
to be problematic. When market concentration increases in highly  
concentrated markets as the result of a horizontal merger, we frequently—  
but not always—observe significant increases in prices. Our results are  
consistent with the broader merger retrospective literature: **mergers on the**  
**enforcement margin are, on average, associated with price increases.**

1 Daniel S. Hosken, Luke M. Olson, and Loren K. Smith, *Do retail mergers affect competition?*  
2 *Evidence from grocery retailing*, Journal of Economics & Management Strategy (July 25,  
3 2017) (Roller Decl. Ex. E) at 17 (emphases added).

4 Food insecurity is a significant problem in Washington State. According to the  
5 Washington State Department of Health, for 2014 to 2016, about 12% of Washington  
6 residents were food insecure and 5% had very low food security (formerly called food  
7 insecure with hunger). Washington State Department of Health, Food Insecurity and Hunger,  
8 DOH Pub. No. 160-015 (March 2018) (Roller Decl. Ex. F). “Food insecurity” is the “limited  
9 or uncertain availability of nutritionally adequate and safe foods, or limited or uncertain  
10 ability to acquire acceptable foods in a socially acceptable way.” *Id.* Washington State Food  
11 Security Surveys (WAFOOD Surveys), launched in the summer of 2020 and continuing  
12 through January of 2023 to track impact of the COVID-19 pandemic, have shown that  
13 between 27% and 49% of surveyed households experienced food insecurity.<sup>2</sup> Otten JJ, Spiker  
14 ML, Dai J, Tseng AS, Buszkiewicz JH, Beese S, Collier SM, Ismach A. “Washington State  
15 Food Security Surveys: Cross-sectional findings from survey waves 1-4, 2020-2023” (June  
16 2023) (Roller Decl. Ex. G).

17 Any increase in the costs of groceries will have obvious negative impacts on  
18 Washington’s citizens, at least 12% of whom experience food insecurity, particularly the  
19 most vulnerable. Additionally, to the extent that the proposed transaction results in store  
20 closures, more Washington citizens will lose access to quality, healthy foods at reasonable  
21 prices. In other words, such closures will result in more Washingtonians living in “food  
22 deserts.” For the reasons described below, *Amici* are very skeptical that the litigation-driven  
23 proposed divestiture of more than 100 Kroger and Albertsons grocery stores to C&S will be  
24 effective. *See* Section C, *infra*. Rather, those stores are likely eventually to close. *Id.*

25 \_\_\_\_\_  
26 <sup>2</sup> “The WAFOOD surveys intentionally over-sample households with lower incomes and  
those using food assistance, to provide deeper insights on food insecurity throughout the  
state.” *Id.* at 1.

1            *Amici* are proud to work with their partners, clients, and other stakeholders to reduce  
2 food insecurity in Washington State. But the Kroger-Albertsons merger will make this work  
3 more difficult, and will negatively impact tens of thousands of Washington’s most vulnerable  
4 citizens. This Court should consider the interests of those citizens when determining the  
5 outcome of this litigation.

6            **B. The Proposed Merger and Accompanying Proposed Divestiture is Likely to**  
7            **Degrade Private Sector Support for Nutrition Assistance in Washington State**

8            In Washington State, Albertsons (under both the Albertsons and Safeway banners)  
9 has been a positive force for food access. Reynolds Decl. ¶ 6. Albertsons is recognized as  
10 having a solid product selection that typically aligns with consumer demands and local  
11 preferences. *Id.* Albertsons raises funds each holiday season to provide millions of dollars  
12 in gift cards to support food banks and other food distribution programs across Washington  
13 State. *Id.*

14            Albertsons’ participation in the Washington State Department of Health’s “SNAP  
15 Produce Match” program is an example of Albertsons’ support for food access in Washington  
16 State. *Id.* ¶ 7. Under that program, shoppers who use Supplemental Nutrition Assistance  
17 Program (“SNAP”) benefits can stretch their food budget to buy more nutritious fruits and  
18 vegetables at participating grocery stores. *Id.* Under the “coupon” pathway for the SNAP  
19 Produce Match program, in which Albertsons participates (under the Albertsons, Safeway,  
20 and Haggen Northwest Fresh banners), a SNAP participant who buys at least \$10 of fresh,  
21 frozen, or canned fruits and vegetables using their Electronic Benefits Transfer (“EBT”) card  
22 receives a coupon at the bottom of their shopping receipt. *Id.* The SNAP participant can then  
23 use the coupon for \$10 off their next purchase of fresh, frozen, or canned fruits or vegetables.  
24 *Id.* Other than Fiesta Foods (3 in-state locations), Community Food Co-op, (2 in-state  
25 locations), and Orcas Food Co-op (2 in-state locations), Albertsons, Safeway, and Haggen  
26 Northwest Fresh are the only multi-location physical stores to participate in this program. *Id.*  
With nearly 20 participating Albertsons stores, 15 Haggen Northwest Fresh Stores, and over

1 170 participating Safeway stores in Washington State, Albertsons is by far the most important  
2 grocery provider in this vital food assistance program. *Id.* Indeed, those three Albertsons-  
3 owned banners account for over 90% of all grocery stores that participate in the SNAP  
4 Produce Match program. Neither Kroger nor C&S participate in the SNAP Produce Match  
5 program. *Id.*

6 *Amici* have other reasons to be concerned that Kroger's purchase of Safeway will  
7 degrade private support for food access in Washington State. Because Kroger will be  
8 acquiring Albertsons and intends ultimately to put those grocery stores it retains under the  
9 QFC banner, it appears likely that most of the grocery stores now in Washington's SNAP  
10 Produce Match program will cease to participate, effectively driving up the cost of fruits and  
11 vegetables for Washington individuals and families receiving SNAP benefits. Additionally,  
12 Northwest Harvest has learned that of the Washington stores Kroger plans to divest, in  
13 connection with the divestiture Kroger intends to require those stores to source at least 30%  
14 of their food from local producers. *Id.* ¶ 8. While at first blush this appears to be laudable,  
15 according to Michael Jett, a self-described consulting contractor for Kroger, Kroger has never  
16 before imposed such a requirement. *Id.* In the absence of a proven track record, *Amici* are  
17 concerned that this requirement could hobble the divested grocery stores, which might  
18 contribute to their ultimate closure.

### 19 **C. The Proposed Divestiture to C&S is Likely to Fail**

20 The 30% local sourcing requirement is not *Amici's* only source of unease relating to  
21 the to-be-divested grocery stores. The Albertsons-Safeway merger, which occurred less than  
22 ten years ago, is a cautionary tale. In connection with that 2015 merger, Albertsons and  
23 Safeway agreed to divest approximately 150 stores to Haggen, a small, regional grocery store  
24 chain. The thinking was that Haggen's acquisition of those stores would restore lost  
25 competition. Not so. Within a year, Haggen filed for bankruptcy protection, further reducing  
26

1 competition and disrupting the lives of the consumers who shopped at those divested stores  
2 and the employees who worked there.

3 The Albertsons-Safeway divestiture to Haggen failed because Haggen was not a  
4 suitable buyer and because Haggen's success partially depended on Albertsons' cooperation  
5 with its competitor—Haggen—through a transition period. Haggen's acquisition of the  
6 divested stores caused its store count to increase from 18 to 146. Am. Econ. Liberties  
7 Project., Comment on Fed. Trade Comm'n Draft Merger Guidelines (Sept. 18, 2023) (Roller  
8 Decl. Ex. H) at 12. The divestiture dramatically expanded Haggen's workforce and its  
9 geographic footprint. Haggen was unable to handle these changes, and declared bankruptcy  
10 after less than a year, closing several stores and returning others to Albertsons. Jon Talton,  
11 *Haggen: What Went Wrong?*, Seattle Times (Mar. 15, 2016) (Roller Decl. Ex. I).  
12 Accordingly, the Albertsons-Safeway divestiture to Haggen is now widely regarded as a  
13 complete failure. See, e.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality:  
14 The Antitrust Counterrevolution and Its Discontents*, 11 Harv. L. & Pol'y Rev. 235, 288  
15 (2017) (Roller Decl. Ex. J) (characterizing divestiture remedy in Albertsons-Safeway merger  
16 as a "spectacular failure"); Brent Kendall, *Haggen Struggles After Trying to Digest  
17 Albertsons Stores*, Wall St. J. (Oct. 9, 2015) (Roller Decl. Ex. K) (quoting Professor John  
18 Kwoka as observing that Albertsons-Safeway divestiture to Haggen "failed spectacularly").

19 The very dynamics that caused the Albertsons-Safeway divestiture to fail are  
20 present—and likely stronger—here.

21 First, like Haggen, C&S appears unprepared to operate a large-scale grocery chain.  
22 C&S describes itself as "an industry leader in supply chain solutions and wholesale grocery  
23 supply." See [www.cswg.com](http://www.cswg.com) (visited October 10, 2024). C&S owns and operates scarcely  
24 more than 20 retail grocery stores in four states—New York, Vermont, Pennsylvania, and  
25  
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1 Wisconsin—thousands of miles from Washington.<sup>3</sup> C&S operates only one retail pharmacy  
2 and does not have a data analytics platform or modern customer loyalty program. *See, e.g.,*  
3 *The Friday Checkout: Is C&S Wholesale Grocers Fit to Run Assets Kroger, Albertsons Want*  
4 *to Divest?*, Grocery Dive (Feb. 16, 2024) (Roller Decl. Ex. L). C&S has no retail operation  
5 west of the Mississippi River, yet intends to take the reins of 124 now Kroger and Albertsons  
6 stores in Washington State, in addition to 455 stores in other states, primarily in the American  
7 West. This will be a massive administrative and logistical challenge, undertaken by a distant  
8 company lacking meaningful operational experience. *Amici* note that the State has submitted  
9 additional evidence of C&S’s inexperience, including C&S’s request in an early due  
10 diligence call with Kroger “to discuss what it takes to operate a grocery store.” *See* State’s  
11 Trial Brief at 33.<sup>4</sup>

12 Next, C&S will be building its Washington presence from a disjointed group of  
13 divested stores, without the benefit of a well-known brand. C&S will purchase a grab bag of  
14 Kroger and Albertsons assets, as opposed to a unified existing business line. Courts have  
15 recognized that such divestiture packages are less likely to restore competition than sales of  
16 “turnkey” operations. *See, e.g., United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C.  
17 2017) (recognizing that “[d]ivestiture of an existing business entity might be more likely to  
18 effectively preserve the competition that would have been lost through the merger, because  
19 it would have the personnel, customer lists, information systems, intangible assets, and  
20 management infrastructure necessary to competition”) (internal quotations omitted). The  
21 State has offered significant evidence of C&S’s unsuitability to take over the hodgepodge of  
22 stores that Kroger and Albertsons propose to divest, including challenges in re-branding,

23  
24 <sup>3</sup> Some other grocery stores are operated under the C&S “Piggly Wiggly” banner, but those  
25 are run by franchisees, not C&S.

26 <sup>4</sup> *Amici* have seen only the State’s redacted Trial Brief. The extensive redactions in the  
section of the State’s Trial Brief relating to C&S suggest that there is significant non-public  
evidence of C&S’s poor fit to take over the proposed divested grocery stores.

1 developing an integrated information technology system, replacing the Kroger and  
2 Albertsons private label products, and creating an integrated pricing, promotions, loyalty, and  
3 merchandizing strategy. *See* State’s Trial Brief at 35-40. Suffice to say, transferring a  
4 mishmash of assets to a remote wholesaler with little retail grocery experience is setting the  
5 divestiture up for failure. *See, e.g.,* John Kwoka, *One-and-a-Half Cheers for the New FTC*  
6 *Remedies Study* 6 (Feb. 1, 2017) (Roller Decl. Ex. M) (noting that FTC study showed that  
7 partial-entity divestitures fail almost half the time); Testimony of Andrew Sweeting,  
8 Professor of Econ. at Univ. of Md., *Examining the Competitive Impact of the Proposed*  
9 *Kroger-Albertsons Transaction*, Before the S. Subcomm. On Competition Pol’y, Antitrust &  
10 Consumer Rts. 117th Cong. 5 (Nov. 29, 2022) (Roller Decl. Ex. N) (“One important and  
11 practical finding of the 2017 [FTC] study was that divestitures are more likely to be  
12 successful, in the sense of maintaining the per-merger level of competition, when an entire  
13 on-going business is divested, rather than a more limited set of assets that might lead to  
14 continuing dependence on other firms.”).

15 Finally, C&S has a poor track record with similar acquisitions. For example, when  
16 C&S purchased 170 Grand Union stores more than two decades ago, C&S only initially  
17 retained 30 of them (that number must be lower now, as C&S currently owns and operates  
18 only about 2 dozen grocery stores). Eric Peterson, *Sale of Grand Union Stores Finally*  
19 *Closes*, *Globest* (Mar. 6, 2001) (Roller Decl. Ex. O). While many of the others were sold to  
20 other companies, about four dozen were sold to be converted to non-food retailers. *Id.* As  
21 noted recently, C&S’s purported experience in retail food “(1) is closely connected with the  
22 bankruptcies of grocery store chains (Grand Union, Penn Traffic, A&P); (2) includes buying  
23 and reselling or closing hundreds of grocery stores (Grand Union, Bi-Lo); and (3) appears  
24 opportunistic and in aid of C&S’s primary business, which is distribution and wholesaling.”  
25 Allen Grunes & Rosa Baum, *Why the Kroger-Albertsons Merger Will Harm Labor*, *Am.*  
26 *Prospect* (Feb. 16, 2024) (Roller Decl. Ex. P); *see also* John Springer, *Deep South*,

1 Supermarket News (Nov. 28, 2006) (Roller Decl. Ex. Q) (detailing failure of Southern Family  
2 Markets, a grocery store chain C&S attempted to build from fragments of Bi-Lo and  
3 Bruno's).

4 This Court's evaluation of the proposed divestiture must account for the considerable  
5 uncertainty of success. If past is prologue, this litigation-driven proposed divestiture is likely  
6 to fail, as it failed in the Albertsons-Safeway divestiture to Haggen less than a decade ago.  
7 *Amici's* clients and stakeholders will most acutely suffer from this probable failure, through  
8 lessened competition, increased prices, and reduced access to grocery stores.

### 9 CONCLUSION

10 Based upon the evidence the State has presented at trial and for the reasons set forth  
11 above, this Court should permanently enjoin Kroger's acquisition of Albertsons.

12  
13 *I certify that this motion contains 3,558*  
14 *words, in compliance with the Local Civil*  
15 *Rules.*

16 DATED: October 17, 2024.

**ARETE LAW GROUP PLLC**

17 By: /s/ Jeremy Roller  
18 Jeremy E. Roller, WSBA No. 32021  
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jroller@aretelaw.com

20 *Attorneys for Amici Curiae Northwest*  
21 *Harvest, United Way of King County, and*  
22 *the Washington State Community Action*  
23 *Partnership*

## CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via electronic mail.

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***Intervenor: C&S Wholesale Grocers, LLC***

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41	Caleah N. Whitten	Caleahwhitten@dwt.com

1 Dated this 17<sup>th</sup> day of October, 2024 in Seattle, Washington.

2 /s/ Kaila Greenberg

3 Kaila Greenberg  
4 Legal Assistant

The Honorable Marshall L. Ferguson

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO.; ALBERTSON'S  
COMPANIES, INC.; ALBERTSON'S  
COMPANIES SPECIALTY CARE, LLC;  
ALBERTSON'S LLC; ALBERTSON'S  
STORES SUB LLC; and KETTLE MERGER  
SUB, INC.

Defendants.

No. 24-2-00977-9

**DECLARATION OF THOMAS  
REYNOLDS IN SUPPORT  
AMICUS CURIAE BRIEF**

I, THOMAS REYNOLDS, declare as follows:

1. I am over the age of eighteen and competent to testify to the matters set forth in this declaration. Except as otherwise noted, I make this declaration based on my personal knowledge.

2. I am the Chief Executive Officer of Northwest Harvest, a position I have held since June of 2017. Prior to holding this position, for about fifteen years I worked in multiple positions at CARE, an organization that works around the world to save lives, defeat poverty, and achieve social justice.

1           3.       Founded in 1967, the organization now known as Northwest Harvest works  
2 for food justice in Washington State. In 1970, Northwest Harvest partnered with dozens of  
3 other organizations to create Washington’s first emergency food bank network. By 2010,  
4 Northwest Harvest had a statewide presence, after opening food warehouses in Spokane and  
5 Yakima (in addition to its Seattle warehouse). Northwest Harvest now serves every county  
6 in the state. Working with partners in communities across Washington to get food where it  
7 is needed most, Northwest Harvest provides an average of two million meals each month  
8 through its statewide network of more than 400 food banks, meal programs, schools, and  
9 community-based organizations. Centered on the people and organizations it serves and with  
10 whom it partners, Northwest Harvest advocates for change to inequitable policies, practices,  
11 and institutions that perpetuate hunger and poverty. Northwest Harvest’s goal is to ensure  
12 that people in communities across Washington State can access the nutritious food they want  
13 and need to thrive.

14           4.       Northwest Harvest served on Governor Inslee’s Social Support Advisory  
15 Group for the COVID-19 Pandemic. In 2021, Northwest Harvest was named the  
16 “Washington Organization of the Year” by the Washington State Leadership Board, which  
17 under the authority of state statute has been honoring exceptional individuals and  
18 organizations in the state for nearly fifty years. For more than fifteen years, Northwest  
19 Harvest has conducted studies and issued reports regarding food insecurity in Washington.

20           5.       Based on its nearly six decades of experience and statewide presence,  
21 Northwest Harvest is uniquely situated to speak to the real-life effects the proposed  
22 transaction will have on Washington’s citizens, particularly the most vulnerable. Northwest  
23 Harvest’s food security expertise ranges from the state’s largest cities to its most remote rural  
24 communities.

25           6.       In Washington State, Albertsons (under both the Albertsons and Safeway  
26 banners) has been a positive force for food access. Albertsons is recognized as having a solid

1 product selection that typically aligns with consumer demands and local preferences.  
2 Albertsons raises funds each holiday season to provide millions of dollars in gift cards to  
3 support food banks and other food distribution programs across Washington State.

4 7. Albertsons' participation in the Washington State Department of Health's  
5 "SNAP Produce Match" program is an example of Albertsons' support for food access in the  
6 state. Under that program, shoppers who use Supplemental Nutrition Assistance Program  
7 ("SNAP") benefits can stretch their food budget to buy more nutritious fruits and vegetables  
8 at participating grocery stores. Under the "coupon" pathway for the SNAP Produce Match  
9 program, in which Albertsons participates (under the Albertsons, Safeway, and Haggen  
10 Northwest Fresh banners), a SNAP participant who buys at least \$10 of fresh, frozen, or  
11 canned fruits and vegetables using their Electronic Benefits Transfer ("EBT") card receives  
12 a coupon at the bottom of their shopping receipt. The SNAP participant can then use the  
13 coupon for \$10 off their next purchase of fresh, frozen, or canned fruits or vegetables. Other  
14 than Fiesta Foods (3 in-state locations), Community Food Co-op, (2 in-state locations in  
15 Bellingham), and Orcas Food Co-op (2 in-state locations), Albertsons, Safeway, and Haggen  
16 Northwest Fresh are the only multi-location physical stores to participate in this program.  
17 With nearly 20 participating Albertsons stores, 15 participating Haggen Northwest Fresh  
18 Stores, and over 170 participating Safeway stores in Washington State, Albertsons is by far  
19 the most important grocery provider in this vital food assistance program. Indeed, those three  
20 Albertsons-owned banners account for over 90% of all grocery stores that participate in the  
21 SNAP Produce Match program. Neither Kroger nor C&S participate in the SNAP Produce  
22 Match program.

23 8. On September 19, 2024, I participated in a video conference with Michael Jett,  
24 a consultant for Kroger, specifically on its divestment plans. In that video conference, Mr.  
25 Jett informed me that Kroger intends to require stores it divests in connection with the  
26 Albertsons acquisition to source at least 30% of their food from local producers. While this

1 appears to be a laudable goal, according to Mr. Jett, Kroger has never before imposed such a  
2 requirement.

3  
4 I declare under penalty of perjury under the laws of the State of Washington that the  
5 foregoing is true and correct.

6  
7 DATED: October 17, 2024, at Seattle, Washington

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10 Thomas Reynolds  
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## CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via electronic mail.

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***Intervenor: C&S Wholesale Grocers, LLC***

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41	Caleah N. Whitten	Caleahwhitten@dwt.com

1 Dated this 17<sup>th</sup> day of October, 2024 in Seattle, Washington.

2 /s/ Kaila Greenberg

3 Kaila Greenberg  
4 Legal Assistant  
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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

THE KROGER CO.; ALBERTSON'S  
COMPANIES, INC.; ALBERTSON'S  
COMPANIES SPECIALTY CARE, LLC;  
ALBERTSON'S LLC; ALBERTSON'S  
STORES SUB LLC; and KETTLE MERGER  
SUB, INC.

Defendants.

No. 24-2-00977-9

**DECLARATION OF JEREMY  
ROLLER IN SUPPORT OF  
*AMICUS CURIAE* BRIEF**

I, JEREMY ROLLER, declare as follows:

1. I am over the age of eighteen and competent to testify to the matters set forth in this declaration. Except as otherwise noted, I make this declaration based on my personal knowledge.

2. I am an attorney at Arete Law Group PLLC. I represent the proposed *amici curiae*, Northwest Harvest, United Way of King County ("UWKC"), and the Washington State Community Action Partnership ("WSCAP") (collectively, "the *Amici*") in this matter. I submit this declaration in support of the *Amicus Curiae* Brief of the *Amici*.

3. Attached hereto as **Exhibit A** is a true and correct copy of Nina Lakhani *et al.*, *Investigation Shows Scale of Big Food Corporations' Market Dominance and Political Power*, The Guardian (July 14, 2021), which I downloaded from The Guardian website <https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation> on October 16, 2024.

4. Attached hereto as **Exhibit B** is a true and correct copy of U.S. Dep't. of Agric., Econ Rsch. Rep. No. (ERR-314), *A Disaggregated View of Market Concentration in the Food Retail Industry* (2023), which I downloaded from the United States Department of Agriculture website <https://www.ers.usda.gov/publications/pub-details/?pubid=105557> on October 16, 2024.

5. Attached hereto as **Exhibit C** is a true and correct copy of Press Release, Fed. Trade Comm'n, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), which I downloaded from the Federal Trade Commission website <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons> on October 16, 2024.

6. Attached hereto as **Exhibit D** is a true and correct copy of Letter from Peter Lurie and Sara John, Center for Science in the Public Interest, to Lina Khan, Chair, Fed. Trade Comm'n (May 15, 2023), which I downloaded from the website [https://www.cspinet.org/sites/default/files/2023-05/CSPI\\_KrogerAlbertsonsmerger\\_FTCletter.pdf](https://www.cspinet.org/sites/default/files/2023-05/CSPI_KrogerAlbertsonsmerger_FTCletter.pdf) on October 16, 2024.

7. Attached hereto as **Exhibit E** is a true and correct copy of Daniel S. Hosken, Luke M. Olson, and Loren K. Smith, *Do retail mergers affect competition? Evidence from grocery retailing*, Journal of Economics & Management Strategy (July 25, 2017).

8. Attached hereto as **Exhibit F** is a true and correct copy of Washington State Department of Health, Food Insecurity and Hunger, DOH Pub. No. 160-015 (March 2018), which I downloaded from the Washington State Department of Health website

1 [https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/160-015-](https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/160-015-MCHDataRptFoodInsecHunger.pdf)  
2 [MCHDataRptFoodInsecHunger.pdf](https://doh.wa.gov/sites/default/files/legacy/Documents/Pubs/160-015-MCHDataRptFoodInsecHunger.pdf) on October 16, 2024.

3 9. Attached hereto as **Exhibit G** is a true and correct copy of Otten JJ, Spiker  
4 ML, Dai J, Tseng AS, Buszkiewicz JH, Beese S, Collier SM, Ismach A. “Washington State  
5 Food Security Surveys: Cross-sectional findings from survey waves 1-4, 2020-2023” (June  
6 2023), which I downloaded from the University of Washington website  
7 <https://nutr.uw.edu/cphn/wafood/brief-14> on October 16, 2024.

8 10. Attached hereto as **Exhibit H** is a true and correct copy of Am. Econ. Liberties  
9 Project., Comment on Fed. Trade Comm’n Draft Merger Guidelines at 12 (Sept. 18, 2023),  
10 which I downloaded from the website [www.economicliberties.us/wp-](http://www.economicliberties.us/wp-content/uploads/2023/09/2023-09-18-Merger-Guidelines-Labor-Comment.pdf)  
11 [content/uploads/2023/09/2023-09-18-Merger-Guidelines-Labor-Comment.pdf](http://www.economicliberties.us/wp-content/uploads/2023/09/2023-09-18-Merger-Guidelines-Labor-Comment.pdf) on October  
12 16, 2024.

13 11. Attached hereto as **Exhibit I** is a true and correct copy of Jon Talton, *Haggen:*  
14 *What Went Wrong?*, Seattle Times (Mar. 15, 2016), which I downloaded from the Seattle  
15 Times website <https://www.seattletimes.com/business/economy/haggen-what-went-wrong/>  
16 on October 16, 2024.

17 12. Attached hereto as **Exhibit J** is a true and correct copy of Lina Khan &  
18 Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its*  
19 *Discontents*, 11 Harv. L. & Pol’y Rev. 235 (2017), which I downloaded from Westlaw on  
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25 14. Attached hereto as **Exhibit L** is a true and correct copy of *The Friday*  
26 *Checkout: Is C&S Wholesale Grocers Fit to Run Assets Kroger, Albertsons Want to Divest?*,

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2 [https://www.grocerydive.com/news/cs-wholesale-grocers-kroger-albertsons-divested-](https://www.grocerydive.com/news/cs-wholesale-grocers-kroger-albertsons-divested-stores/707690/)  
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4 15. Attached hereto as **Exhibit M** is a true and correct copy of John Kwoka, *One-*  
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7 16. Attached hereto as **Exhibit N** is a true and correct copy of the Testimony of  
8 Andrew Sweeting, Professor of Econ. at Univ. of Md., *Examining the Competitive Impact of*  
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15 *of Grand Union Stores Finally Closes*, Globest (Mar. 6, 2001), which I downloaded from the  
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24 <https://www.supermarketnews.com/independents-regional-grocers/deep-south> on October  
25 17, 2024.

1 I declare under penalty of perjury under the laws of the State of Washington that the  
2 foregoing is true and correct.

3  
4 DATED: October 17, 2024, at Seattle, Washington

5  
6 /s/ Jeremy Roller  
7 Jeremy Roller  
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## CERTIFICATE OF SERVICE

I hereby certify that on this date I caused true and correct copies of the foregoing document to be served upon the following, at the addresses stated below, via electronic mail.

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Dated this 17<sup>th</sup> day of October, 2024 in Seattle, Washington.

/s/ Kaila Greenberg  
Kaila Greenberg  
Legal Assistant

# **EXHIBIT A**

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**Our unequal earth**

# Revealed: the true extent of America's food monopolies, and who pays the price



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About this content

**Nina Lakhani, Aliya Uteuova and Alvin Chang**

Wed 14 Jul 2021 06.00 EDT

## Investigation shows scale of big food corporations' market dominance and political power

Illustrations by Julia Louise Pereira

A handful of powerful companies control the majority market share of almost 80% of dozens of grocery items bought regularly by ordinary Americans, new analysis reveals.

A joint investigation by the Guardian and Food and Water Watch found that consumer choice is largely an illusion - despite supermarket shelves and fridges brimming with different brands.

In fact, a few powerful transnational companies dominate every link of the food supply chain: from seeds and fertilizers to slaughterhouses and supermarkets to cereals and beers.

The size, power and profits of these mega companies have expanded thanks to political lobbying and weak regulation which enabled a wave of unchecked mergers and acquisitions. This matters because the size and influence of these mega-companies enables them to largely dictate what America's 2 million farmers grow and how much they are paid, as well as what consumers eat and how much our groceries cost.

It also means those who harvest, pack and sell us our food have the least power: at least half of the 10 lowest-paid jobs are in the food industry. Farms and meat processing plants are among the most dangerous and exploitative workplaces in the country.

Overall, only 15 cents of every dollar we spend in the supermarket goes to farmers. The rest goes to processing and marketing our food.

The Guardian and Food and Water Watch investigation into 61 popular grocery items reveals that the top companies control an average of 64%

of sales.

We found that for 85% of the groceries analysed, four firms or fewer controlled more than 40% of market share. It's widely agreed that consumers, farmers, small food companies and the planet lose out if the top four firms control 40% or more of total sales.

Our investigation is based on the analysis of market share data from thousands of supermarkets across the US.

“It's a system designed to funnel money into the hands of corporate shareholders and executives while exploiting farmers and workers and deceiving consumers about choice, abundance and efficiency,” said Amanda Starbuck, policy analyst at Food & Water Watch.

The consolidation runs deep: four firms or fewer controlled at least 50% of the market for 79% of the groceries. For almost a third of shopping items, the top firms controlled at least 75% of the market share.

For instance, PepsiCo controls 88% of the dip market, as it owns five of the most popular brands including Tostitos, Lay's and Fritos. Ninety-three per cent of the sodas we drink are owned by just three companies. The same goes for 73% of the breakfast cereals we eat - despite the shelves stacked with different boxes.



Bloomberg/Getty Images

Grupo Bimbo owns 64% of the bagel and bialy market, which includes several well

## Veggies, fruits and grains

Pasta (dry plain)	78.5%
Bagels/bialys	77.2%
Canned pineapple	<div>Bagels/bialys</div> <div>Grupo Bimbo64.2'</div> <div>Flowers Foods8.6%</div> <div>Franz Family Bakeries2.8%</div> <div>Campbell Soup Company1.7%</div>
Breakfast cereals	
Fresh bread	
Canned green peas	

known brands like Sara Lee and Thomas'.

Tap food items to explore →

Canned potato/sweet potato	59%
Canned tomato	57.5%
Bottled canned green beans	55.7%
Canned corn	55.1%
Fresh cut salad	54.2%
Rice	52.2%
Bottled/canned beans	50.7%
Frozen fruit	21.5%



Scott Olson/Getty Images

A whopping 93% of the sodas Americans drink are owned by just three companies.

[Tap food items to explore →](#)



Lauri Patterson/Getty Images

Conagra owns the huge majority of prepared foods, including sloppy joe sauce and dinner mixes.

**Tap food items to explore →**



Justin Sullivan/Getty Images

PepsiCo owns five of the most popular dip brands for a total of 88% of the market.

[Tap food items to explore →](#)



Richard Levine/Corbis News/Getty Images

85% of the canned tuna we eat is owned by just four companies.

[Tap food items to explore →](#)

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## Big food is getting bigger

For shoppers, it might seem like choices galore at the store, but most of our favorite brands are actually owned by a handful of food giants, including Kraft Heinz, General Mills, Conagra, Unilever and Delmonte.

Kraft Heinz, the result of a [\\$63bn mega-merger](#) in 2015, which was backed by Warren Buffett and a Brazilian private equity firm, appears 12 times in the top 4 firms for groceries, with products ranging from bacon, sour cream and coffee to frozen meat substitutes and fruit juice.

The big firms are helped by so-called category captains who represent leading brands or manufacturers and work with major retailers to decide which products get prominent spots on our supermarket shelves. And then there's the slotting fees - payments by big-brand manufacturers for eye-catching product placement. This makes it very hard for new

independent brands to get a break. And when they do get a tiny foothold, it often doesn't last.



▲ A man in a Los Angeles Whole Foods shopping for tortillas. Photograph: Patrick T. Fallon/Bloomberg via Getty Images

For example, while hipsters and old-school beer enthusiasts have contributed to a boom in local craft beers, the Belgian company Anheuser-Busch InBev acquired 17 formerly independent craft breweries between 2011 and 2020. It might not be clear to consumers from the labels, but the company owns more than 600 brands, including the mainstream favorites Budweiser, Michelob and Beck's.

Another source of confusion is private labels - supermarkets' own brands, of which little is known about the producer - which appeared in the top four of 77% of the groceries we looked at. For frozen fruits like the mixed berries used for smoothies and desserts, private labels

account for 66% of the market share, as well as 56% of refrigerated whole milk and 54% of eggs sales.

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Which of these cereals do you think is owned by one of the four huge companies that dominate this market?

**Scroll down for the answer**

Food giants General Mills, Kellogg and Post own all but one of these brands.

## Millions spent on lobbying politicians

The economic power of the corporations has contributed to their growing political power, which in turn has led to laws that put profits before food and worker safety, consumer rights and sustainability.

During the 2020 election cycle, [the food industry spent \\$175m](#) on political contributions, including lobbying by PACs and individuals and other efforts.

The money came from every part of the food chain, including dairy, eggs, poultry, meat processing, farm bureaus, sugar cane, crop production and supermarkets.

About two-thirds went to Republicans.

The 2020 total compares to just \$29m spent during the 1992 election cycle, which means lobbying by the food industry has increased by sixfold in less than three decades as consolidation across the supply chain has boomed.

## Supermarket chains dominate

Less competition among agribusinesses means higher prices and fewer choices for consumers - including where they can shop for food.

Until the 1990s, most people shopped in local or regional grocery stores. Now, just four companies - Walmart, Costco, Kroger and Ahold Delhaize - control 65% of the retail market.

“Corporate consolidation can drive up food prices and reduce access to food,” said Starbuck. “Supermarket mergers drive out smaller, mom-and-pop grocers and regional chains. We have roughly one-third fewer grocery stores today than we did 25 years ago, according to the US census bureau.”

As countless mom-and-pop stores struggled to stay afloat during the pandemic lockdowns, revenue for Walmart US hit [\\$341bn](#) - almost 3%

higher than the previous year.

Grocery chains and superstores are also the main beneficiaries of government aid for Americans struggling to feed their families. In 2020, 82% of all food stamps were spent in supermarkets and superstores like Krogers, Walmart, Costco and Sam's Club, which means the taxpayer contributed \$64bn to their revenue.

## **The meat market - and sticky commodity prices**

A spate of mega-mergers means that meatpacking plants are now controlled by just a handful of multinationals including Tyson, JBS, Cargill and Smithfield (now owned by the Chinese multinational WH Group). Proponents of capitalism claim mergers and acquisitions generate efficiencies that cut costs for farmers and benefit consumers by keeping prices down. But the tight grip these companies have over the industry means farmers have little choice about whom they sell to and how their animals are raised.



▲ Pigs stand in a pen at a farm in Ayden, North Carolina. Photograph: Callaghan O'Hare/Bloomberg

Consumers pay more while profits for mega meat processors are booming: in 2020, the Brazilian firm [JBS reported \\$51bn in revenue](#) - a 32% rise compared with the previous year. China is driving much of the company's growth, and JBS accounted for 50% of beef exports from the US last year. The proportion of arable land dedicated to producing meat is expanding but this is largely to feed consumers overseas. Per capita meat production flatlined in the US between 2005 and 2020, while the value of exports almost doubled.

Consumers are also hurt by so-called sticky prices. Commodity prices can rise due to shortages caused by unexpected events such as floods or drought that disrupt the supply chain - which happened at the start of the pandemic. When this happens, supermarkets are quick to increase

prices to ensure profit margins remain intact, but when commodities go down, consumer prices are often much slower to decrease.

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Forty years ago, about a third of the beef and pork processing industry was controlled by the top four firms.

After a spate of mega-mergers, more than 80% of beef processing and 70% of pork processing is controlled by four multinational giants.

In 2017, these top firms had a combined annual revenue of \$207bn.

Meanwhile, farmers and consumers lost out.

In the past forty years, these huge corporations have been paying farmers less and less for beef - and selling it to consumers at increasing prices.

These huge companies have also been paying farmers less for pork, while selling it at the same price for the past 30 years.

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## Farmers squeezed ... and desperate

America's farmers have become increasingly dependent on government aid.

Farmers received \$424.4bn in subsidies between 1995 and 2020, of which 49% were for just three crops: corn, wheat and soybeans, according to the [Environmental Working Group](#). Corn subsidies are the largest by a long way - \$116.6bn - accounting for 27% of the total. Very little corn grown in the US is eaten these days. Instead, more than 99% goes into animal feed, additives like corn syrup used in sugary junk food

and, increasingly, ethanol, which produces toxic air pollutants when burned with gasoline.

It's a cruel paradox, according to some campaigners, as subsidies incentivise farmers to grow just a handful of cash crops, a practice that floods the market, depresses prices and keeps them hooked on government aid.



▲ A farmer preparing a field for spring planting in Prairie Grove, Illinois. Photograph: Tannen Maury/EPA

Commodity prices peaked in mid-2012 and plunged by about 50% by the end of 2019.

This is good news for big corporations like meat processors, as it reduces costs, but bad for many farmers: total farm debt has reached levels not seen since the 1980s farm crisis.

Advocates say that a toxic mix of financial woes, climate chaos and trade wars have contributed to a mental health crisis among farmers. At least 450 farmers died by suicide across nine midwestern states between 2014 to 2018, according to the Midwest Center for Investigative Reporting. Calls to a crisis hotline operated by Farm Aid, a non-profit agency trying to help farmers keep their land, almost doubled over the same period. In 2020, 552 [farmers filed for bankruptcy](#) - 7% fewer than the previous year, as commodity prices and government aid [increased during the pandemic](#), but still the third-highest figure over the last decade.

“The economic power of these corporations enables them to wield huge political influence, so we have a system in which farmers are on a treadmill just trying to stay afloat. Basically there’s a handful of individuals in the world, mostly white men, who make money by dictating who farms, what gets farmed and who gets to eat. Consumer choice is an illusion; the transnationals control everything in this extractive agricultural model,” said Joe Maxwell, president of Family Farm Action.

Less than a third of farms - mostly big ones - benefit from USDA subsidies in part because the system has a long history of discrimination against farmers of color and small farms without the time, resources or expertise to dedicate to online applications.

## **Food industry workers: low pay, high hazards**

At least half of the 10 lowest-paid jobs in the US are in the food industry, and they rely disproportionately on federal benefits. Walmart and McDonald's are among the top employers of beneficiaries of food stamps and Medicaid, according to a [2020 study](#) by a non-partisan government watchdog.

Even before the pandemic, farms were among the most dangerous workplaces in the country, where low paid workers have little protection from long hours, repetitive strain injuries, exposures to pesticides, dangerous machinery, extreme heat and animal waste. Between 50% and 75% of the country’s 2.5 million farmworkers are undocumented migrants who have few labor rights and limited access to occupational healthcare.



▲ Workers at a pork processing plant in Missouri trim fat from pork. Photograph: Daniel Acker/Bloomberg

Covid exposed and exacerbated the risks faced by frontline food workers, especially those working in meatpacking plants. As of last week, at least 58,898 meatpacking plant workers had tested positive for Covid, according to data collected by the [Food and Environment Reporting Network \(Fern\)](#), and many of the outbreaks led to community spread in rural areas. This is a massive undercount as the majority of states do not collect or share the data, nor do the big companies.

“The meatpacking industry is much more dangerous now than in the 1990s, and the biggest factors are consolidation and cutting corners of worker safety,” said Debbie Berkowitz, director of the worker health and safety program at the National Employment Law Project.

## Environmental impacts

About half of the planet's land and 70% of freshwater withdrawals are for farming, which is increasingly industrialized.

Industrial agriculture is focussed on extracting maximum profits for minimum costs - an exploitative model with grave consequences for animal welfare, water, land and global heating.

Agriculture is responsible for more than a quarter of global greenhouse gas emissions, making food production a major contributor to the climate crisis. Across the board, the carbon footprint for animal-based foods - beef, lamb, chicken, cheese - is higher than for plant based food, which is mostly due to the consequences of deforestation to create space to grow feed crops, fertilizer used for these crops and methane emissions.

Despite the community, environmental and economic benefits of supporting local sustainable producers, transporting food is a very small contributor to greenhouse gases: it's really what you eat, not where it comes, from that's key to reducing your dietary carbon footprint.

Here in the US, there were 1.6bn animals living on 25,000 factory farms in 2017 - a 14% rise in just five years. Together, these animals produced about 885bn pounds of manure annually - equivalent to the human sewage generated by residents of 30 New York Cities.

Incentivising farmers to grow the same crops has reduced the productivity of some of the country's most fertile lands, as monocropping depletes soil of nutrients and can lead to significant erosion. The practice requires synthetic fertilizers to compensate for the lost nutrients, and pesticides to combat fungi and insect predators that thrive in these conditions. Indigenous and subsistence farmers have always rotated multiple crops because it's the best way of ensuring healthy soil and good yields.

Agricultural runoff is now responsible for 80% of excessive nutrients in our freshwater and oceans, which cause dense growth of plant life like algae that block oxygen from reaching fish and other animals.

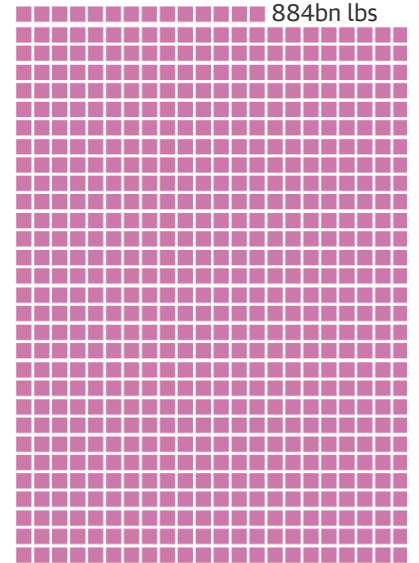
#### Human sewage produced in New York metro area in 2017

27bn lbs



#### Animal waste produced in factory farms in 2017

884bn lbs



Guardian graphic. Source: Food and W

In 2019, agriculture and aquaculture were identified as a threat to 24,000 of the almost 28,000 species threatened with extinction, according to the IUCN Red List.

## What can be done?

In the 1970s, President Richard Nixon's agriculture secretary told farmers to "get big or get out".

This investigation has examined the far-reaching consequences of government support - political and economic - for big corporations that now dominate every part of the food chain.

Last week Joe Biden signed an executive order to tackle the rampant concentration across the US economy - including food and farming. Biden called on government agencies to enforce existing antitrust laws and consider rolling back recent mega-mergers which boosted profits and power for a handful of corporations while hurting the rest of us. The order specifically directs the USDA to take swift action to protect farmers including by making it easier for them to sue meat processors for alleged abuses.

But the problems in the current system run deep.

"From farm to fork, America's food system has been rooted in the exploitation of women, Native Americans and people of color. This is at the heart of capitalist food politics - big corporations taking as much as they can and paying as little as possible for it," said Raj Patel, academic and author of *Stuffed and Starved: Markets, Power and the Hidden Battle for the World's Food System*.

In addition to executive actions, which could be overturned by the next president, such deep-rooted injustices need sweeping reforms by Congress. But bills banning new mega-mergers and factory farms currently lack bipartisan support, despite public opinion supporting them.

It's time to support small-scale regenerative farmers, regional food hubs and grocery coops, according to Starbucks. "Alternatives already exist. We

just need to boost public funding and resources to help sustainable, affordable, more equitable food systems take root.”



*In the US, the [National Suicide Prevention Lifeline](#) is at 800-273-8255 and [online chat is also available](#). You can also text HOME to 741741 to connect with a crisis text line counselor. In the UK and Ireland, [Samaritans](#) can be contacted on 116 123 or email [jo@samaritans.org](mailto:jo@samaritans.org) or [jo@samaritans.ie](mailto:jo@samaritans.ie). In Australia, the crisis support service [Lifeline](#) is 13 11 14. Other international helplines can be found at [www.befrienders.org](http://www.befrienders.org)*

## How we did the research

The Guardian and Food and Water Watch selected a range of grocery categories to reflect everyday products Americans commonly buy.

The sales information comes from retail scanner data compiled by the market research firm IRI, a Chicago-based international company. Data obtained directly from IRI covers the majority of 2020; we also used IRI data published by Mintel Group reports (covering 2019) and the Market Share Reporter (covering 2017).

We calculated the ratio of sales of the top four - or fewer - companies in each food category compared with the rest. This calculation is a common yardstick to measure industry concentration. Brands and subsidiaries (including all mergers/acquisitions completed by June 2021) appear in the market share of their parent companies.

Markets where the top four companies account for more than 40% of sales are generally considered to be consolidated; those exceeding 60% are tight oligopolies or monopolies.

For the meat, beef and poultry processing categories, we used Ibis World's estimate of total revenue in 2021.

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# **EXHIBIT B**



Economic Research Service  
U.S. DEPARTMENT OF AGRICULTURE

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Number 314

January 2023

# A Disaggregated View of Market Concentration in the Food Retail Industry

Eliana Zeballos, Xiao Dong, and Ergys Islamaj





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## Abstract

The U.S. food retail sector has experienced substantial change in market concentration over the last three decades. To understand how the change in concentration might impact consumers, researchers would ideally focus on geographic markets that mimic where consumers actually shop. This report investigates the changes in food retailing market concentration at the national, State, Metropolitan Statistical Area (MSA), and county levels in the United States from 1990 to 2019, using data from the National Establishment Time Series dataset. The research finds that food-retailing market concentration at the county level is much higher than estimates of concentration using national-level data. Food retailing markets in rural and small nonmetro counties are considerably more concentrated than food retailing markets in metro and large nonmetro counties. Further, the study documents a significant rise in food retailing market concentration in the United States over the last three decades, at the national level as well as the State, MSA, and county levels during the period. Finally, the study shows that when excluding the largest food retailer, the concentration in retailing at the national and State level, markets would have been lower, but at the MSA and county level, markets would have been higher for most of the period analyzed.

**Keywords:** food retail industry, grocery stores, warehouse clubs, superstores, supercenters, Herfindahl–Hirschman Index, HHI, National Establishment Time Series, NETS, market concentration.

## Acknowledgments

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# A Disaggregated View of Market Concentration in the Food Retail Industry

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## What Is the Issue?

The food retail sector has experienced substantial consolidation and structural change over the last three decades. The potential ramifications of these changes on concentration in the food retail sector has led to interest among researchers, policymakers, and consumers. Due to data limitations, most existing studies and reports have focused on providing and analyzing concentration measures of the food retail industry at the national level. While these measures can provide information about national trends, the measures can potentially mask differing trends in localized markets (such as at the Metropolitan Statistical Area (MSA) and county levels)—which are likely more relevant for consumers, food-retail competitors, and policymakers. To understand how the change in concentration might impact consumers, researchers would ideally focus on geographic markets that mimic where consumers actually shop such as at the State, MSA, or county levels. This report investigates the changes in the market concentration—a measure of the extent to which market shares are concentrated between firms of the retail food sector at the national, State, MSA, and county levels in the United States over the 1990–2019 period.



## What Did the Study Find?

The authors report several key results:

- First, the study finds significant increases in food retailing market concentration measured by the Herfindahl–Hirschman Index (HHI) in the United States over the last three decades at the national, State, MSA, and county levels.
- Second, food retailing market concentration at the county level is considerably higher than at the national, State, and MSA levels.

ERS is a primary source of economic research and analysis from the U.S. Department of Agriculture, providing timely information on economic and policy issues related to agriculture, food, the environment, and rural America.

- Although the market was less concentrated at the national level, the food retailing market concentration at the national level increased at a much faster pace than it did at the county level (458 percent, compared to 94 percent) from 1990 to 2019.
- These results are in line with:
  - Entry of large national “nontraditional” food retailers into the food sector (e.g., supercenters).
  - Growth and consolidation of large national food retailers.
- Food retailing markets in rural and small nonmetro counties are considerably more concentrated than food retailing markets in metro and large nonmetro counties.
- Finally, the study shows when excluding the largest nationwide retailer, concentration in food retailing at the national and State level, markets would have been lower, but at the MSA and county level, markets would have been higher for most of the period analyzed.

## How Was the Study Conducted?

To make meaningful comparisons across geographical areas and across time, this report uses a unique dataset, the National Establishment Time Series (NETS), to calculate the market concentration of food retailing from 1990 to 2019. The NETS database provides detailed location, annual sales, and employment information for each retail establishment. This report uses the reestimated annual sales of NETS by Marchesi and Zeballos (2022) that applies a sales per employee ratio, which is calculated using the Economic Census for each North American Industry Classification System (NAICS) code by firm size. The comprehensive retail coverage of NETS allows inclusion of nearly all establishments with a significant portion of food sales that are likely substitutes to each other. The inclusion of nontraditional food retailers (such as warehouse clubs, superstores, and supercenters) is critical, as these types of retailers have seen the most significant growth in the past 30 years. With this uniquely comprehensive and detailed dataset, the report calculates the market share of each food retail firm and the local market food concentration, as measured by the Herfindahl-Hirschman Index at the national, State, MSA, and county levels.

# A Disaggregated View of Market Concentration in the Food Retail Industry

## Introduction

U.S. consumers, businesses, and Government entities spent \$808 billion on food-at-home in 2019 (USDA, ERS, 2022a), an increase of 36.2 percent since 1990 after adjusting for inflation. Food purchases, roughly 13 percent of household expenditures, are the third largest U.S. consumer spending category behind housing and transportation (Chelius and MacLachlan, 2021). In 2019, food sales by the 20 largest food retailers accounted for 64 percent of total food sales. This number is more than double the sales value in 1990 (31 percent). Similarly, the shares of food sales by the top four and eight largest food retailers at the national level have been steadily increasing from 1990 to 2019 (USDA, ERS, 2022b). While national statistics on food retailing can provide a snapshot of the average market concentration in the United States, national averages can mask local heterogeneity and trends (Rossi-Hansberg et al., 2021). More granular information on local market concentration would indicate if local food retail markets are more or less concentrated, which could be useful to policymakers.

This report documents the structure and trend of the food retailing market concentration not only at the national level, but also at the State, Metropolitan Statistical Area (MSA),<sup>1</sup> and county levels in the United States from 1990 to 2019, using data from the National Establishment Time Series dataset. The composition and number of food retailers available for households can differ substantially across localities, which make the local market concentration—for which data are not often available—an important consideration and perhaps a more relevant measurement for policymakers than national market concentration (Richards and Pofahl, 2010; Saitone and Sexton, 2017; Sexton and Xia, 2018).

Two key factors have led to increasing food retail market concentration: (1) the entry and rapid expansion into the food retail sector of large nontraditional food retailers (such as warehouse clubs, superstores, and supercenters) and (2) mergers and acquisitions of existing traditional supermarkets (Ellickson, 2016; Hanner et al., 2015). The share of food retail spending at traditional supermarkets dropped from 80 percent in 1990 to approximately 62 percent in 2012. Most of the change in spending has shifted to nontraditional food retailers, with the share of supercenters increasing from 3 percent to 18 percent during the same period (Volpe et al., 2017). On the other hand, traditional supermarkets have undergone mergers and acquisitions that started in the mid-to-late 1990s (Sexton, 2010). Both the entry of nontraditional food retailers and mergers of traditional food retailers have led to increasing market concentration and to some food retail chains becoming national, which has altered the market structure of food retail at both the local and national levels.

For households, the set of food retailers realistically accessible is confined by spatial distance; the average U.S. household travels roughly 4 miles to its preferred store for the majority of food purchases (Ver Ploeg et al., 2015). Recent studies examining entry of new food retailers also show that competition is highly localized within a 1- to 3-mile radius of a store (Arcidiacono et al., 2020; Ellickson and Grieco, 2013).

While local markets can become more competitive with new entrants, market concentration can further increase if new entrants dominate or drive out local competition. A recent study that focused on food retail

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<sup>1</sup> The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.

markets shows that local concentration increased from 1990 to 2015, with significant differences between rural and urban markets and exits of independent grocery stores (Cakir et al., 2020). Furthermore, the study shows that rural areas have higher food retail concentration. High market concentration might be especially common in the food retail sector, as the high (and endogenous) fixed cost of food retail naturally results in five to six firms in most MSAs (Ellickson, 2007).

Researchers have debated the implications of increased market concentration, which is one measure that can potentially gauge the competitiveness of the market. OCED (2021) further detail how market concentration is one of several possible measurements of competitiveness. An increase in market concentration could signal the potential for food retailers to exercise market power and for possible negative impacts for consumers and producers (Richards and Pofahl, 2010 ; Sexton, 2010; Sexton and Xia, 2018). In particular, food retailers compete through other nonprice attributes, along with price (Bonanno and Lopez, 2009)—offering different services, quality, prices, variety, and amenities (Ellickson, 2016). Thus, differences in local market structures can lead to varying degrees of competition, resulting in different pricing, service quality, and product variety—all factors that consumers care about.

One study found that prices rise with local food retail concentration at the MSA level and that a 5-percent increase in concentration would increase prices by 18 percent and decrease food consumption by 2–5 percent (Hovhannisyan et al., 2019). However, other studies have cast doubt on the link between prices at the product level and local concentration. A study by Ma et al. (2019) shows that supermarkets do not raise prices for USDA Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) products in local markets, or as a function of market concentration or the establishment’s market shares. Further studies (such as DellaVigna and Gentzkow (2019) and Dong (2022)) show that most U.S. food, drugstore, and mass-merchandise chains charge nearly uniform prices across stores and ignore wide variations in consumer demographics, concentration, and competition in local markets. These studies reinforce the idea that food retailers do not necessarily charge prices based on local concentration but instead price at the national level. Other recent work suggests that the market structure of food retailing might resemble monopolistic competition—where each store location is a localized monopoly by being slightly differentiated from its competitors in product offerings, amenities, and distance.

Numerous studies have also examined the impact of large retailer entry into a given market, and the associated decrease in retailer concentration, on local competition in prices, product variety, and quality (Hausman and Leibtag, 2007; Matsa, 2011; Courtemanche and Carden, 2014; Bauner and Wang, 2019). Findings suggest that retailers compete in nonprice dimensions at the local level. Another avenue of research that examines price changes after mergers in areas of differing market concentration finds that food retailer mergers in already highly concentrated markets are frequently associated with price increases, and mergers in less concentrated markets are often associated with price decreases (Hosken et al., 2018). Further, understanding the market structure of food retail can inform discussions on improving access to affordable and healthy food, especially for low-income households (Ellickson, 2016). In particular, information on local food retail market concentration can help shed light on the market structure in areas of low food access (Bitler and Haider, 2010; Bonanno, 2012). As market concentration and competition can influence food retailers’ entry, pricing, and product assortment decisions, local food retail market concentration can provide insights into how high- and low-income households are impacted differently by market concentration. For example, one study found high- and low-income households perceive prices and variety of products offered in local markets differently (Handbury, 2021). The local food retail market concentration can also help shed light on low food access areas with persistent high levels of concentration.

For suppliers, food retailers serve as “midstream” intermediaries between consumers and producers. Thus, increases in market concentration of food retailers can also lead to more monopsony (single-buyer) buying

power from food retailers. In tandem with increasing vertical consolidation and contracts, for example, farmers—and especially smaller farmers—are often left with limited buyers, which can impact their revenues and income (Saitone and Sexton, 2017). However, the full implications of increasing market concentration to farmers, firms, and consumers across the food supply chain is complex (Sexton and Xia, 2018).

These factors highlight the importance of having detailed information on both national and local food retailer concentration trends. However, public information on concentration measures for food retailing in local markets is extremely limited because detailed sales data for food retailers are often proprietary (Saitone and Sexton, 2017). This report attempts to fill this information gap by using a novel dataset to provide comprehensive statistics on the food retail market concentration at the State, MSA, and county levels for the past 30 years across the United States (excluding U.S. territories). The report analyzes the trends of food retail market concentration in terms of the Herfindahl–Hirschman Index (HHI) for food retail sales at the above three levels between 1990 and 2019.

## Data and Methods

### National Establishment Time Series (NETS)

Estimates of food sales can vary across different data sources, as the classification of food stores is not uniform for these sources. To make meaningful comparisons across geographical areas and across time, this report uses one single dataset, the National Establishment Time Series (NETS) database. NETS is a longitudinal database that records the sales, employment figures, growth, and performance of industry peers for specific business locations across time. Dun & Bradstreet and Walls & Associates created NETS by using Dun & Bradstreet’s archival data from surveys of establishments (Walls & Associates, 2013). Each unit of observation in NETS reports the annual sales revenue and the number of employees for an establishment, from 1990 to 2019. Due to the detailed and granular level of the data, NETS has been intensively used in recent studies. As NETS tracks the sales and number of employees for individual-level establishments, NETS provides a rich and unique panel dataset that allows us to examine the change in food sales across different food establishment types in varying geographic locations.

NETS contains information from business establishments from a comprehensive list of industries, and the database categorizes establishments using the North American Industry Classification System (NAICS) and the Standard Industrial Classification (SIC) numeric codes. NETS also reports whether the primary market has changed over time. Retailers are differentiated by the items they sell and the services they provide.

One challenging issue is how to identify the set of food retailers constituting a market to be analyzed as all retailers that sell food—which include supermarkets, drug stores, and convenience stores—are unlikely to be perfect substitutes. Following Hosken et al. (2018), this report limits the analysis to those food retailers more likely to be substitutes—large retailers that sell a sufficient variety of food for consumers to purchase all of their food for a week, often referred to as “one-stop-shopping.” Three food-retailing formats provide consumers with “one-stop-shopping” in the United States: traditional supermarkets, supercenters, and warehouse clubs (Rossi-Hansberg et al., 2021), and this report uses the corresponding two NAICS codes in the analysis:

- 445110 - Supermarkets and Other Grocery (except Convenience) Stores: This industry comprises establishments primarily engaged in retailing a general line of food, such as canned and frozen foods, fresh fruits and vegetables, and fresh and prepared meats, fish, and poultry. In 2019, supermarkets were the

most common retail format offering one-stop shopping—accounting for approximately 92 percent of the roughly 132,600 establishments, 67 percent of food sales, and 57 percent of the employees.

- 452311 - Warehouse Clubs, Supercenters, and Superstores: This industry also comprises establishments primarily engaged in retailing a general line of groceries—including a significant amount and variety of fresh fruits, vegetables, dairy products, meats, and other perishable groceries. These types of stores also offer a general line of new merchandise—such as apparel, furniture, and appliances. In 2019, warehouse clubs, supercenters, and superstores accounted for 8 percent of the food retail establishments studied, 33 percent of food sales, and 43 percent of the employees.

This report does not include certain retail formats—such as limited-assortment stores and discount variety stores—that have undergone growth recently (Cleary et al., 2018; Cleary and Chenarides, 2022), as most of these formats carry limited food products and account for less than 10 percent of household food-at-home expenditures (Volpe et al., 2017).

Recent literature has shown that NETS captures the food environment relatively well compared to the official U.S. Bureau of the Census's Economic Census and the County Business Patterns (CBP) (Cho et al., 2019; Rummo et al., 2015 and Ma et al., 2013). Although the number of establishments and employees reported by NETS have similar aggregate trends compared to the County Business Patterns, aggregate food sales trends in NETS do not align with those observed by the Food Expenditure Series (Zeballos and Merchasi, 2022). This difference is likely due to a significant portion of sales data in NETS being imputed from firm-level employment numbers, in particular, using employment data to estimate the volume of sales (Barnatchez et al., 2017; Crane and Decker, 2019). To more accurately estimate food sales, this report follows the correction methodology developed by Zeballos and Marchesi (2022) of applying a sales per employee ratio, which is calculated using the Economic Census for each NAICS code by firm size. Firm size is measured by the number of employees (i.e., firms with less than five employees, firms with five to nine employees, etc.). The corrected food sales compare well against the aggregate trends observed by the USDA, ERS Food Expenditure Series.<sup>2</sup>

To isolate food spending from total annual sales (as most retailers also sell nonfood products), this report uses product and services codes. The codes were developed by the U.S. Bureau of the Census and detail the percentage of sales by product and by contributing industry. Following the methodology of the USDA, ERS Food Expenditures Series, the PS Codes that are selected are related to food and nonalcoholic beverages sold for off-premise consumption. Using these percentages, the portion of food-at-home sales is calculated for each establishment in NETS, based on the NAICS code.

## Concentration Ratios

A concentration ratio (CR) is the total market share of the largest prespecified number of firms in a given market. For example, a CR-4 is the total market share of the four largest firms in a market. In this report, we present the top 4 (CR4), top 8 (CR8), and top 20 (CR20) food retailers at the national level from 1990 to 2019.

## Herfindahl–Hirschman Index

The Herfindahl–Hirschman Index (HHI) is one of the most commonly used and accepted measures of market concentration in the academic literature and by policymakers. The HHI is calculated by squaring the

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<sup>2</sup> The Food Expenditure Series is a comprehensive dataset that measures the U.S. food system—quantifying the value of food acquired in the United States by type of product, outlet, and purchaser.

market share of each firm competing in a specific market and then summing the resulting numbers, as shown in equation 1. The market share of a firm is calculated by dividing the sales of the firm by the total sales of all firms in the market. One advantage of HHI compared to the concentration ratio is that HHI applies more weight to larger firms. Additionally, the HHI also uses all firms in a market rather than a subset. If no stores exist in the market, the HHI is excluded.

*Equation 1*

$$HHI = (MarketShareFirm_1)^2 + (MarketShareFirm_2)^2 + \dots + (MarketShareFirm_N)^2$$

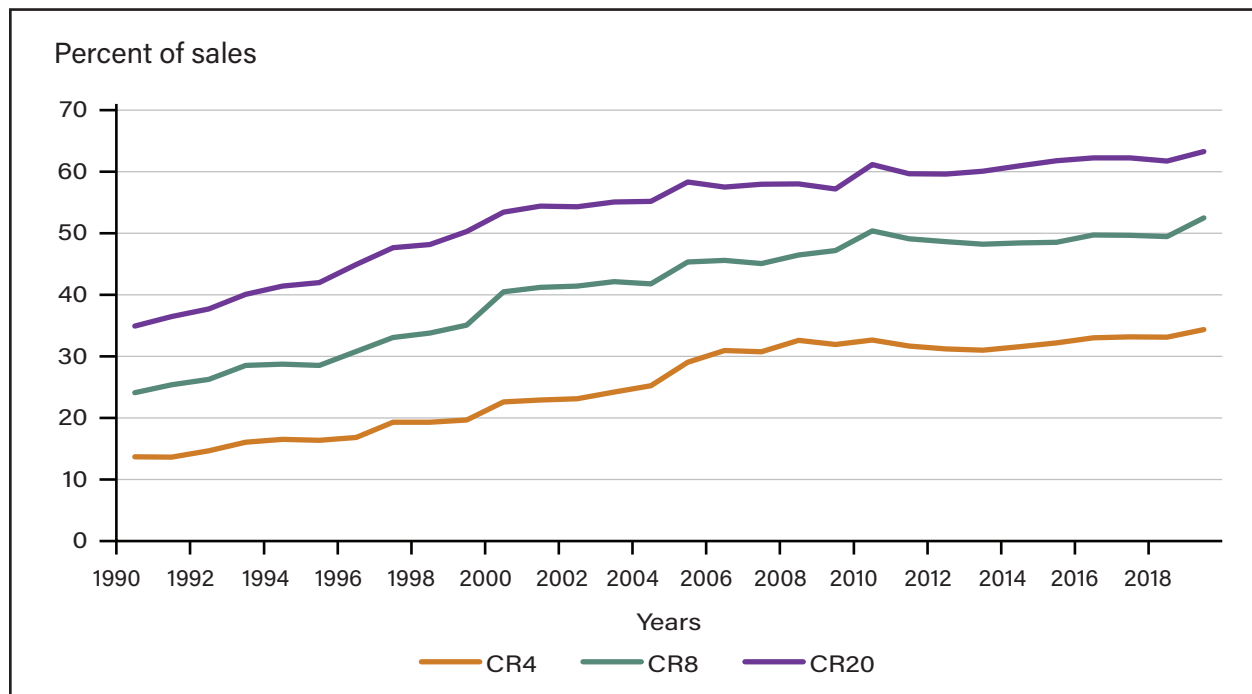
Increasing HHI values indicate higher levels of market concentration, with HHI approaching 0 if a market is occupied by a large number of firms of relatively equal size. The HHI reaches its maximum of 10,000 points when a market is controlled by a single firm. For context, HHI can also provide a measure of the equivalent number of equal-sized competitors in the market. For example, a HHI of 1,500 represents 6.6 equal-sized competitors in the relevant market and a HHI of 2,500 represents 4 equal-sized competitors ( $N = 1/HHI \times 10,000$ ).

## Results

### Concentration in the Food Retail Industry During the Past Three Decades

Figure 1 presents the concentration ratios of the top 4 (CR4), top 8 (CR8), and top 20 (CR20) food retailers—common measurements of concentration for market power—at the national level from 1990 to 2019. Results show that the 20 largest food retailers totaled \$680 billion in 2019, which accounts for 63 percent of food sales in the United States. The CR4, CR8, and CR20 ratios slightly declined in the United States after the 2008–09 Great Recession, which is consistent with Cho and Volpe (2017). However, the longer-term trend of consolidations upturned around 2012–14, with all indicators showing an increase in market concentration between 2012 and 2019. Specifically, the top 4 food retailers (CR4) accounted for 31 percent of food sales in 2012 and grew by 3 percentage points to account for 34 percent of total sales in 2019. Similar trends occurred for CR8 and CR20 (USDA, ERS, 2022B).

Figure 1  
National CR4, CR8, and CR20 ratios for food sales, 1990–2019



Notes: CR4 = top 4; CR8 = top 8; CR20 = top 20. Food sales are estimated based on the sales per employee ratio calculated by the number of employees and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery, except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S Bureau of the Census' Economic Census product lines statistics on the percentage of sales of food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

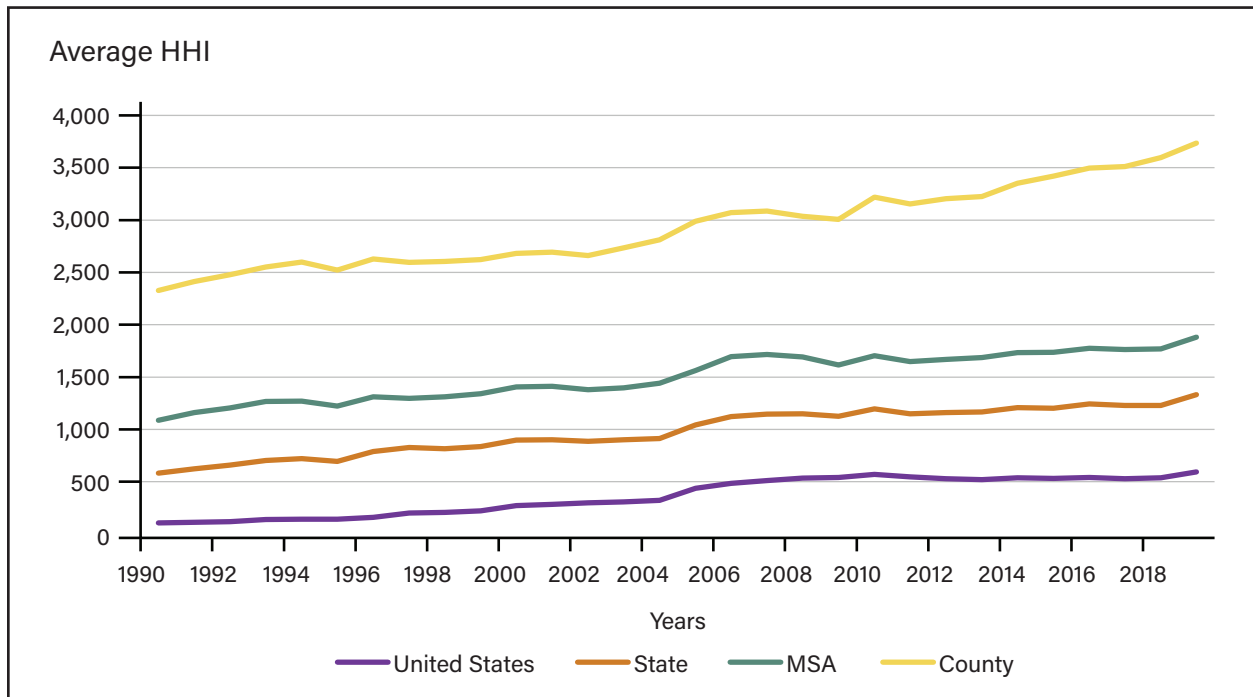
## Concentration in the Food Retail Industry by Geographic Region

We also provide the HHI of food retail markets at the State, MSA, and county levels, which are more disaggregate administrative units than the United States as whole. Figure 2 shows the national-, average State-, average MSA-, and average county-level Herfindahl–Hirschman Index (HHI) of food retail markets from 1990 to 2019. The market concentration of food retailers is the lowest at the national level, at 106 in 1990 and has steadily risen to 593 by 2019, which is equivalent to 94.3 and 16.9 equal sized competitors in the national market, respectively. These numbers are significantly lower than most industries (Grullon et al., 2019). However, as the market areas become more disaggregated, the market concentration in 2019 increases dramatically from 593 (national) to 1,332 (State) to 1,881 (MSA) to 3,737 (county)—equivalent to 16.9 (national), 7.5 (State), 5.3 (MSA), 2.7 (county) equal-sized firms. The variation reflects that grocery and other traditional food retailers are often regional, with independent stores also maintaining a portion of the market (Cho and Volpe, 2017).

Notably, there is a substantial increase in market concentration even between aggregating at the MSA versus county levels. At the MSA level, on average, food retail concentration is higher than at the national level, and concentration is even higher once the market is defined at the county level. The county level may be the more realistic market area, with recent evidence that the average distance from home to food retailers stores visited over the week is between 4 and 10 miles for consumers (Taylor and Villa-Boas, 2016; Ver Ploeg et al., 2015). Across time, HHI measures show that all four levels of aggregation steadily increased from 1990 to 2019.

Figure 2

**The Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019**



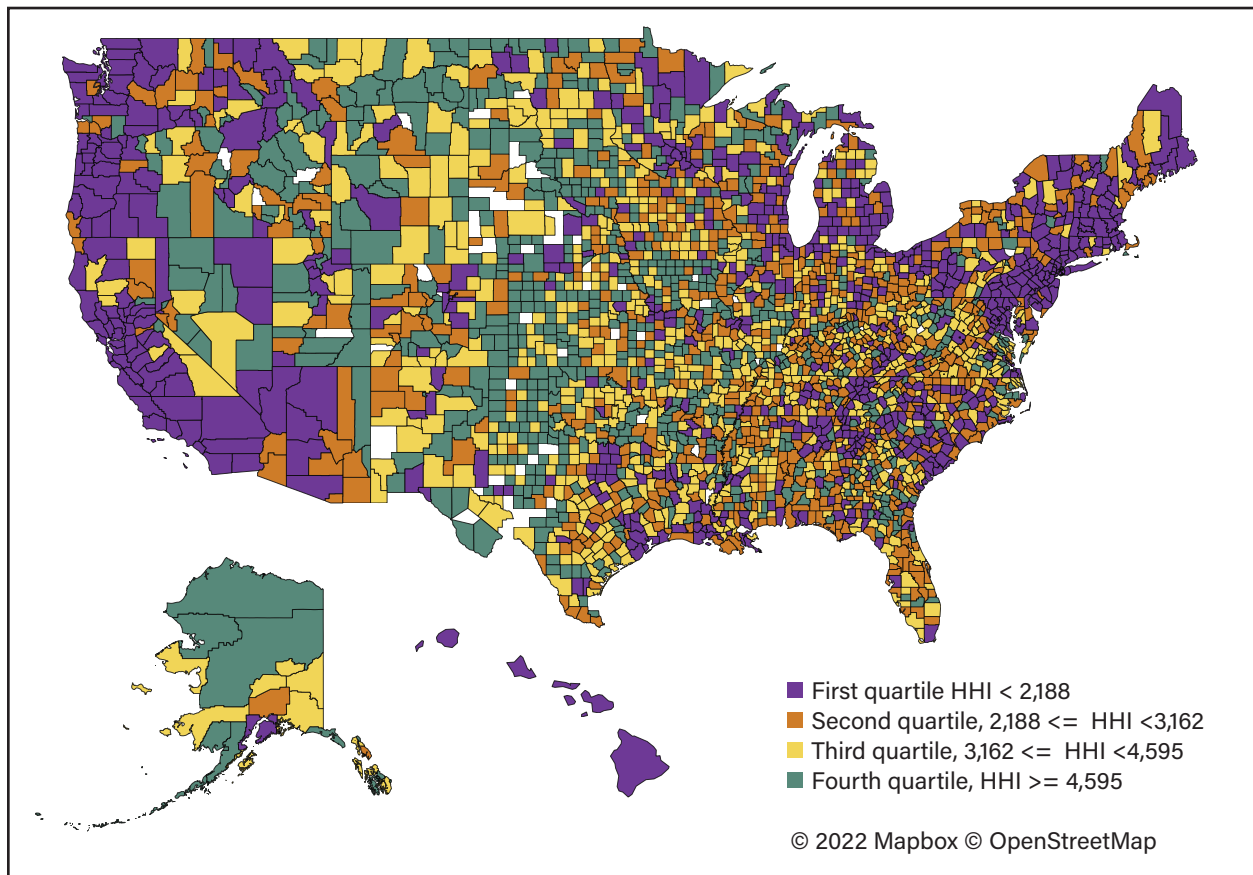
Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

In figure 3, counties are classified by their level of concentration into quartiles. Counties with lower concentration are mostly on the Coasts, while counties in rural areas and other Western counties have higher concentration levels.

Figure 3

**County level Herfindahl-Hirschman Index (HHI) in 2019, by quartile**

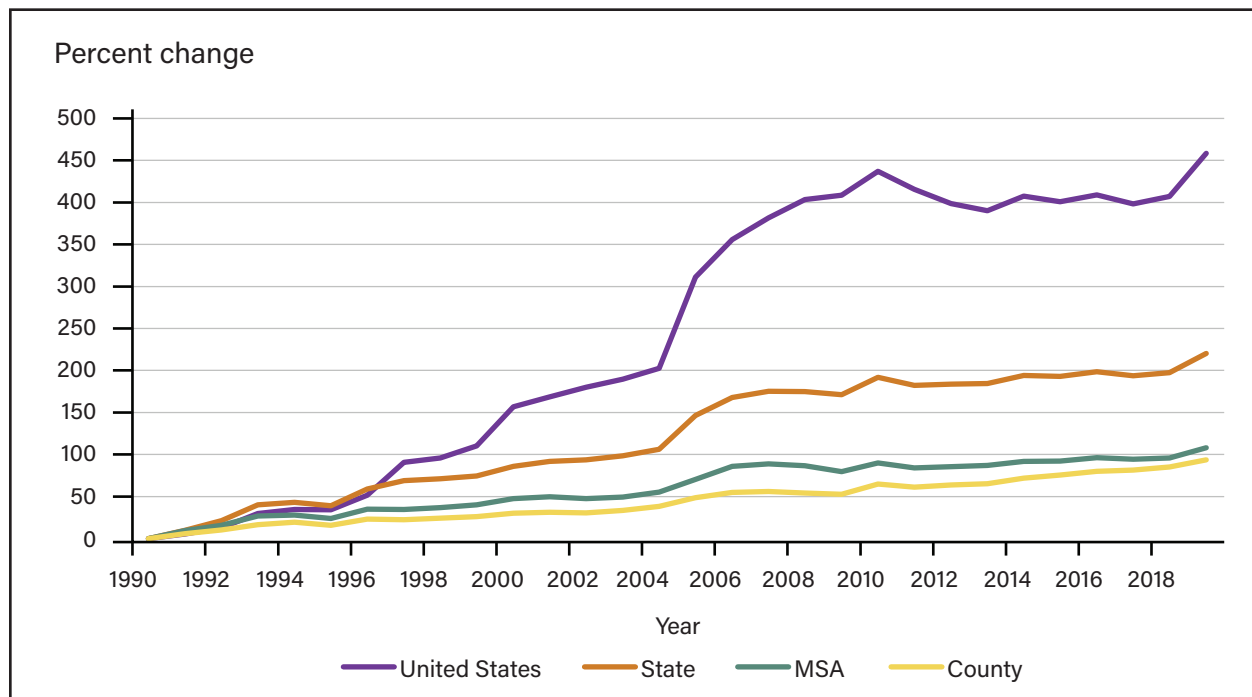


Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

Figure 4 shows the average changes of HHI for every year, measured in percentage terms compared to 1990 for all four geographic levels. National HHI concentration has had the largest increase, up by 458 percent in 2019 compared to 1990. These changes are in line with the recent trends of large national retailers increasingly consolidating to form major retailers. The increase at the local county market level is smaller; the county-level HHI measures have increased 94 percent in the past 30 years.

Figure 4

**Percentage change in Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019**



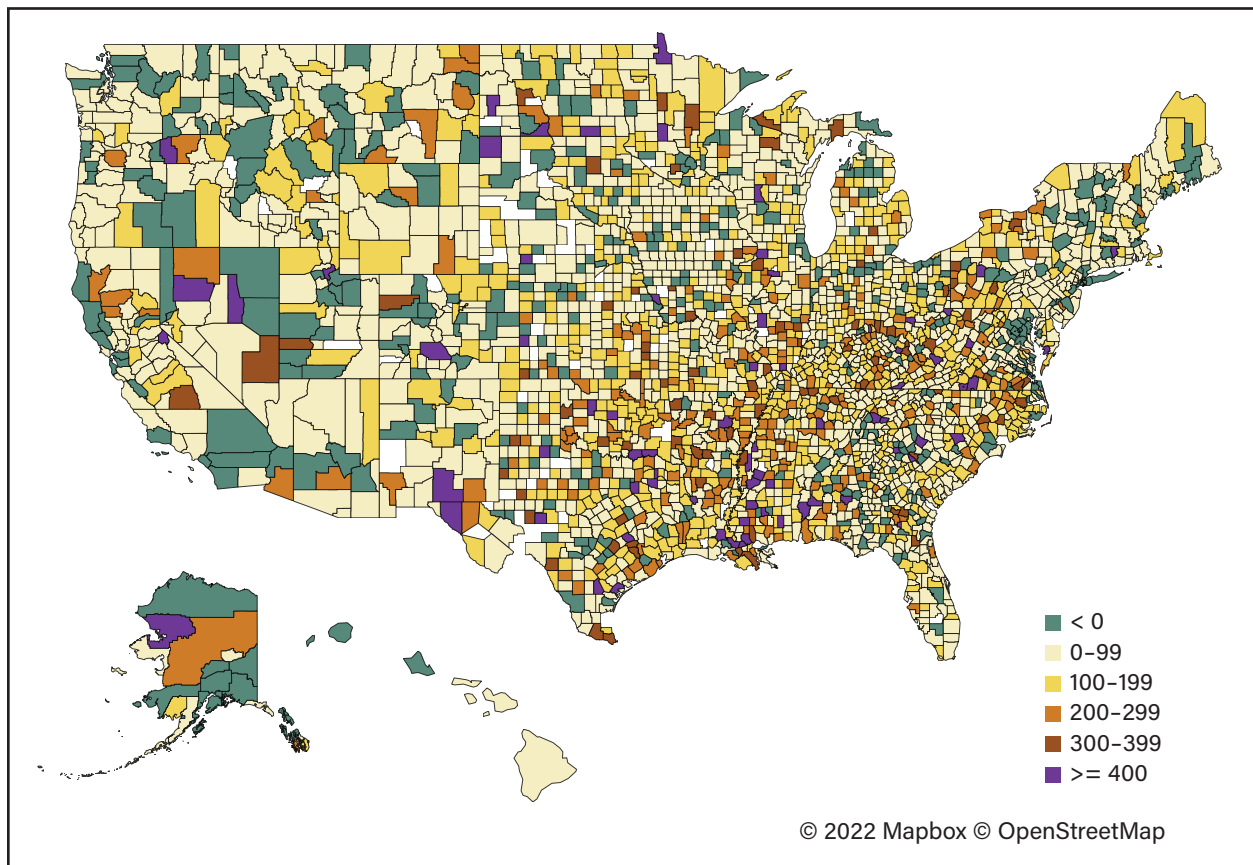
Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

To highlight the change across the United States, figure 5 provides a county-level map categorized by HHI increases from 1990 to 2019. Results show that counties exhibited very heterogeneous changes in HHI between those years. A significant portion of counties experienced decreases in market concentration and are marked in green. However, the majority of counties seem to have undergone slight increases in market concentration (between 0 and 199). A small share of counties experienced more drastic increases, with changes in HHIs of 400 and higher.

Figure 5

**Percentage changes in Herfindahl-Hirschman Index between 1990 and 2019, county level**



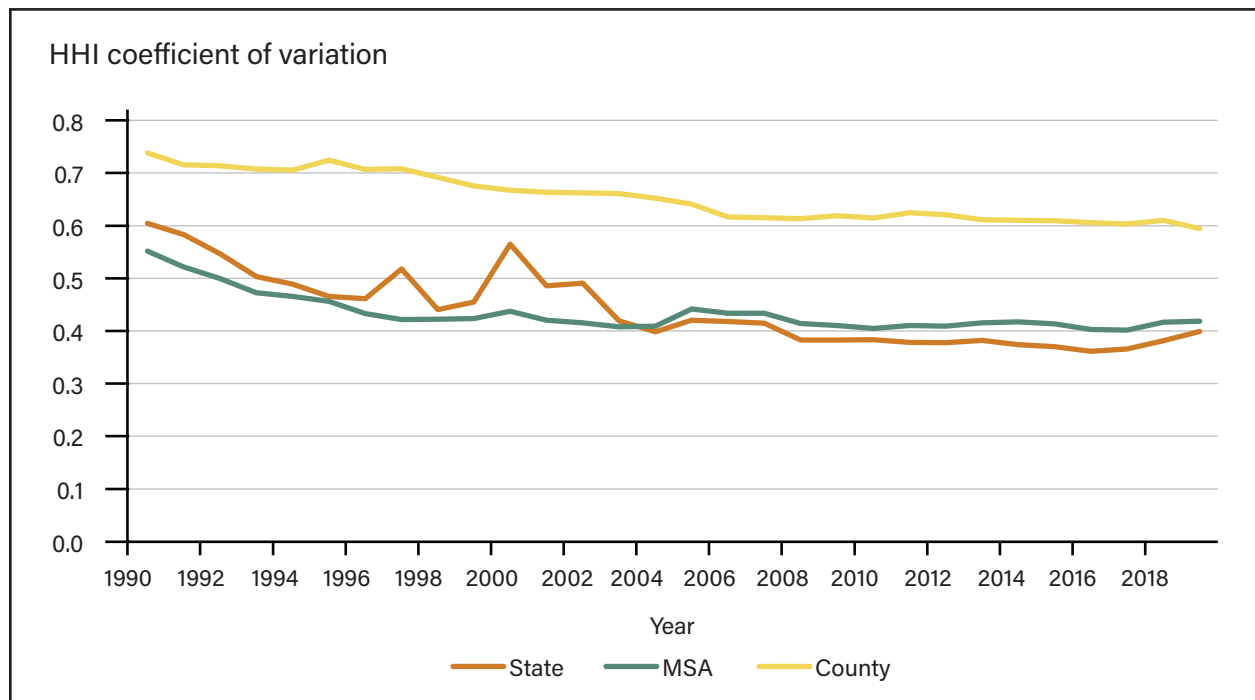
Notes: HHI = Herfindahl-Hirschman Index. Food sales are estimated based on the sales per employee ratio, calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouses, clubs, and supercenters). Food sales are calculated using the U.S. Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

Figure 6 shows the coefficient of variation, which is the standard deviation divided by the mean of HHI measures for State-, MSA-, and county-level markets between 1990 and 2019 to shed some light on the heterogeneity of market concentrations across geography. At the MSA and county levels, the coefficient of variation of HHI decreased from 1990 to 2006 by 16.5 percent and 21.4 percent, respectively. From 2006 to 2019, the coefficient of variation of HHI at the MSA and county levels decreased by less than 4 percent, which indicates the degree of variation in market concentration at the MSA and county levels has not significantly changed since 2006. At the State level, the coefficient of variation of HHI followed similar patterns as at the MSA level, except with more variability from 1996 to 2006.

Figure 6

### Coefficient of variation of Herfindahl-Hirschman Index for State-, MSA-, and county-level markets between 1990 and 2019



Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S. Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

## Concentration in the Food Retail Industry by Rural Versus Nonrural Areas

Recent studies have highlighted the differences in the food retail landscape between rural and nonrural areas (Stevens et al., 2021; Cakir et al., 2020). This report further divides the trends in HHI concentration between metro (metropolitan), large nonmetro, small nonmetro, and rural counties, using the USDA, ERS rural-urban continuum codes.<sup>3</sup> Results show that the market concentrations across all four county types increased over time (figure 7). Metro and large nonmetro counties had less-concentrated markets, with an average HHI of 2,758 and 2,794 in 2019, respectively. Small nonmetro counties had a significantly higher average HHI of 4,053 and rural counties have the highest average HHI at 5,584 in 2019. The results are consistent with those from Stevens et al. (2021) and Cakir et al. (2020) and provide further evidence that rural residents often have limited choices for different food retailers. Moreover, market concentrations across all four regions steadily increased over time.

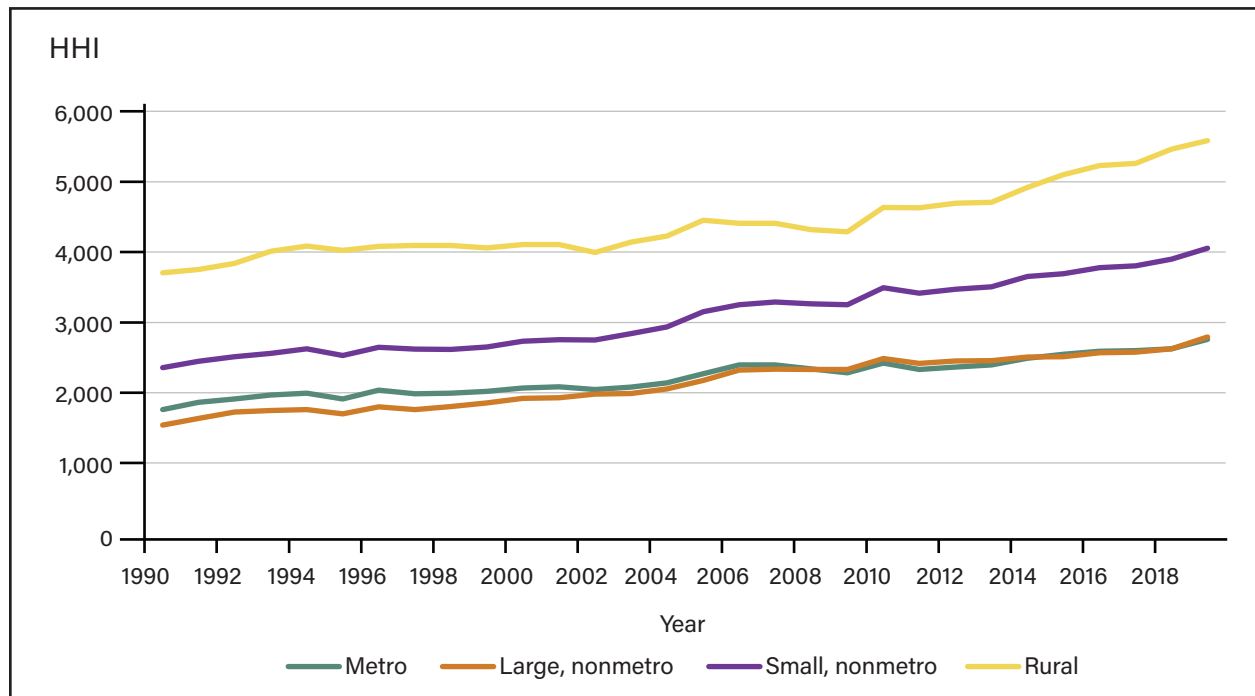
Figure 8 shows the coefficient of variation of HHI measures for metro, large nonmetro, small nonmetro, and rural counties between 1990 and 2019 to shed some light on the heterogeneity of market concentrations across geography. The coefficient of variation decreased the most in rural areas from 1990 to 2019 at 24

<sup>3</sup> Each county is assigned one of 9 codes, and we further classify the codes as follows: metro (code = 1, 2 or 3); large nonmetro area (code = 4 or 5; nonmetro areas with urban population of 20,000 or more, adjacent or not to a metro area); small nonmetro area (code = 6 or 7; nonmetro areas with urban population of 2,500 to 19,999, adjacent or not to a metro area); rural (code = 8 or 9; completely rural).

percent, followed by metro areas at 18 percent, small nonmetro areas at 17 percent, and large nonmetro areas at 12 percent, which was the lowest decrease.

Figure 7

**The Herfindahl-Hirschman Index for metro, large nonmetro, small nonmetro, and small county-level markets between 1990 and 2019**

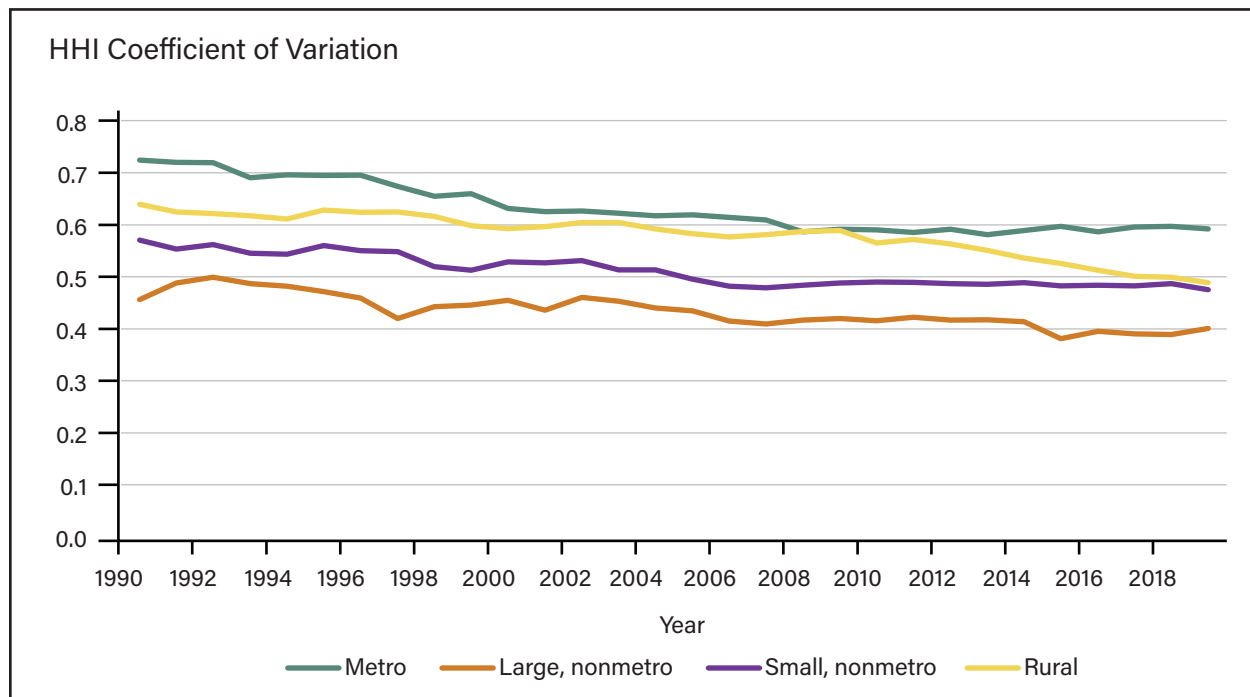


Notes: HHI = Herfindahl-Hirschman Index. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S Bureau of the Census' Economic Census product lines statistics on the percentage of sales of food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

Figure 8

### Coefficient of variation of Herfindahl-Hirschman for metro, large nonmetro, small nonmetro, and small county-level markets between 1990 and 2019



Notes: HHI = Herfindahl-Hirschman Index. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S. Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

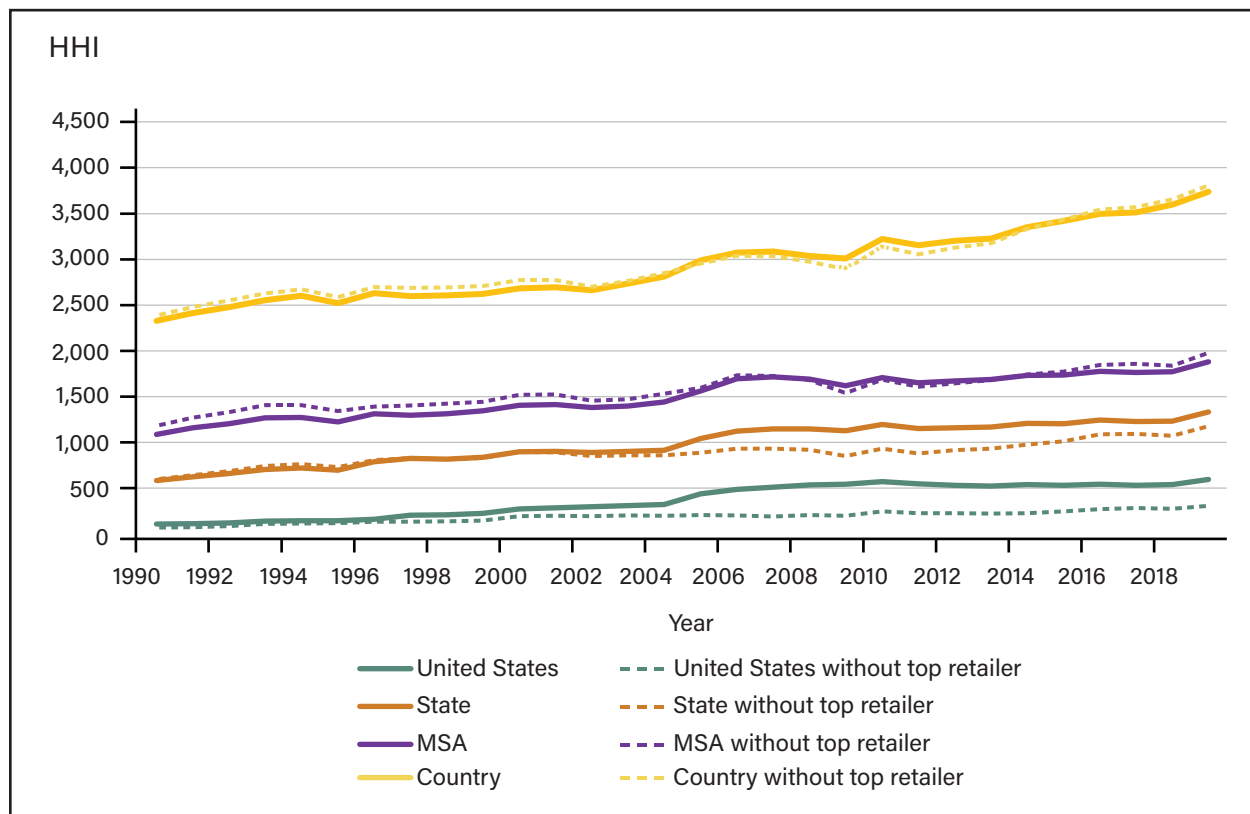
Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

## Concentration in the Food Retail Industry Without the Top Retailer

Following Rossi-Hansberg et al. (2021), this report explores the contribution of the top firm to the market concentration trends in the food retail industry by excluding the top national firm of each year. Figures 9 and 10 present the HHI for different geographic levels and the changes with respect to 1990, excluding the top food retailer. These figures show that excluding the top retailer results in national and State concentration trends that are less pronounced, which is expected. However, trends at the MSA and county level remain similar when the top food retailer is excluded and the trends even present a slightly higher concentration in the first half of the period analyzed. Figure 10, in particular, shows how much the growth in the national market concentration can potentially be attributed to the top food retailer.

Figure 9

**The Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019, excluding the top food retailer**

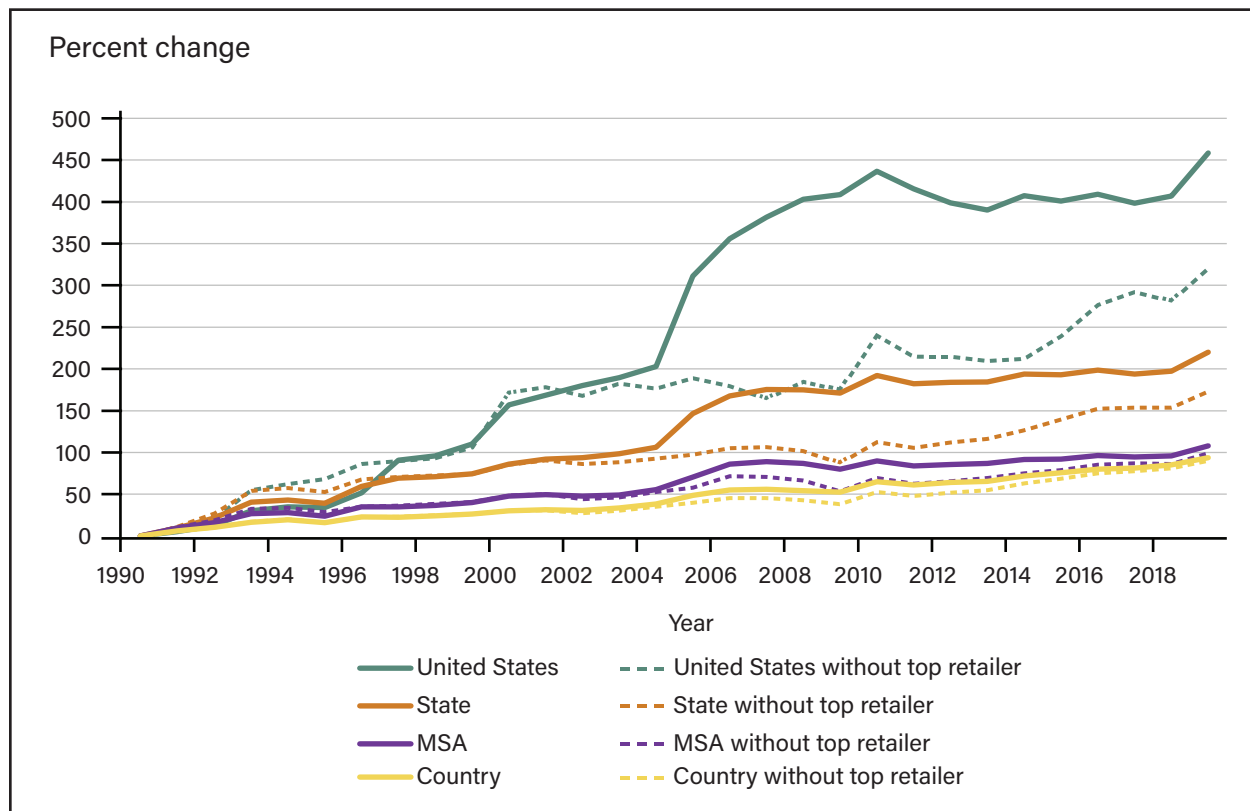


Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S. Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

Figure 10

**Percentage change in Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019, excluding the top food retailer**



Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Food sales are estimated based on the sales per employee ratio calculated by firm size and the North American Industry Classification System (NAICS) code. NAICS included: 445110 (supermarkets and other grocery (except convenience) stores) and 452311 (warehouse clubs and supercenters). Food sales are calculated using the U.S. Bureau of the Census' Economic Census product lines statistics on the percentage of sales on food.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

## Discussion and Implications for Future Research

This report documents the market concentration of the food retail industry in the United States at the national, State, MSA, and county levels between 1990 and 2019 using a novel dataset: the National Establishment Time Series (NETS). The results show increasing market concentration as the geographic area shrinks from the national to county level. Given that consumers shop within a limited region, the county-level findings address a gap in the current literature and public information. In particular, results based on the Herfindahl-Hirschman Index (HHI) measure of market concentration show that food retailer markets had an average HHI of 3,737 (2.7 equal-sized firms) at the county level in 2019. In contrast, the more publicly available measures of HHI at the national level show only an average HHI of 593, masking the higher market concentration at the local level.

Furthermore, results show that market concentration has steadily increased between 1990 and 2019, a finding consistent with the numerous studies highlighting consolidation and mergers across the food retail sector. Most of the growth has been due to the increased market presence of national and regional retailers and results show that the national HHI has increased more than 458 percent compared to 94 percent at the county level. Results also show a large difference in market concentration between metro, smaller nonmetro, and rural counties.

In the past three decades, the food retail sector has been revolutionized by consolidation and industry changes. Two major economic forces may help explain these changes in the brick-and-mortar food retail industry. First, large retailers that have not primarily sold food products have entered the food retail market and are now competing with traditional food retailers. Supercenters and mass merchandisers are examples of “nontraditional” food retailers that have been competing with traditional food retailers due to their substantial offering of food products and have been growing rapidly in new areas. Other new retail formats, such as discount stores and dollar stores, are continuing this trend (Chenarides et al., 2021a; 2021b). The second force is the growth of existing food retailers, which has been greatly accelerated in the past decades by national and large regional retailers, consolidating horizontally through mergers and acquisitions. The potential price and nonprice ramifications of the changing local food retail market concentration can impact consumers, producers, and especially low-income households with food accessibility challenges.

The study has several limitations. Our definition of the market area, even at the county level, relies on administrative boundaries and might not reflect the actual competitive market areas for food retailers (e.g., some consumers might cross county boundaries rather than shopping within a county, and county areas are not uniform; see Ellickson et al., 2020).<sup>4</sup> Furthermore, chains are not identical as they often differentiate themselves in terms of various products, service quality, advertising, and other attributes. As we reestimated food sales, the correction may raise a potential concern. For a robustness check on the correction, the HHI is calculated using employment rather than sales (appendix 1). Finally, this report includes and excludes certain types of food retailers and, therefore, might not reflect the true nature of competition. For example, dollar stores are rapidly expanding into rural areas, which warrants further research (Chenarides et al., 2021a; 2021b).

The trends captured in this report are ex-post, and the future direction of market concentration may change. One growing trend is online food retailing, which could disrupt brick-and-mortar food retailing and dramatically alter competition. However, current data suggest online food shopping only comprises a small market share. The U.S. Bureau of the Census (2019) shows that although online shopping has increased sharply in the past decade, it still represents only 11 percent of the total retail trade and this number is much lower for food stores. Specifically, e-commerce sales in food and beverage stores increased 56 percent from 2016 to 2017 but only represent 0.5 percent of total sales in the food sector. However, the Coronavirus (COVID-19) pandemic has altered the entire food sector and induced a large increase in online food shopping (Ellison et al., 2021). Furthermore, USDA, Food and Nutrition Service has launched pilot programs for online usage of SNAP (Supplemental Nutrition Assistance Program) redemptions, which were traditionally only possible in person. All of these changes might impact the existing trends of market concentration and present important research opportunities.

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<sup>4</sup> Our market concentration measures should not be evaluated for merger considerations (see Hosken and Tenn, 2016) for specific analysis used in horizontal merger analysis in retail markets.

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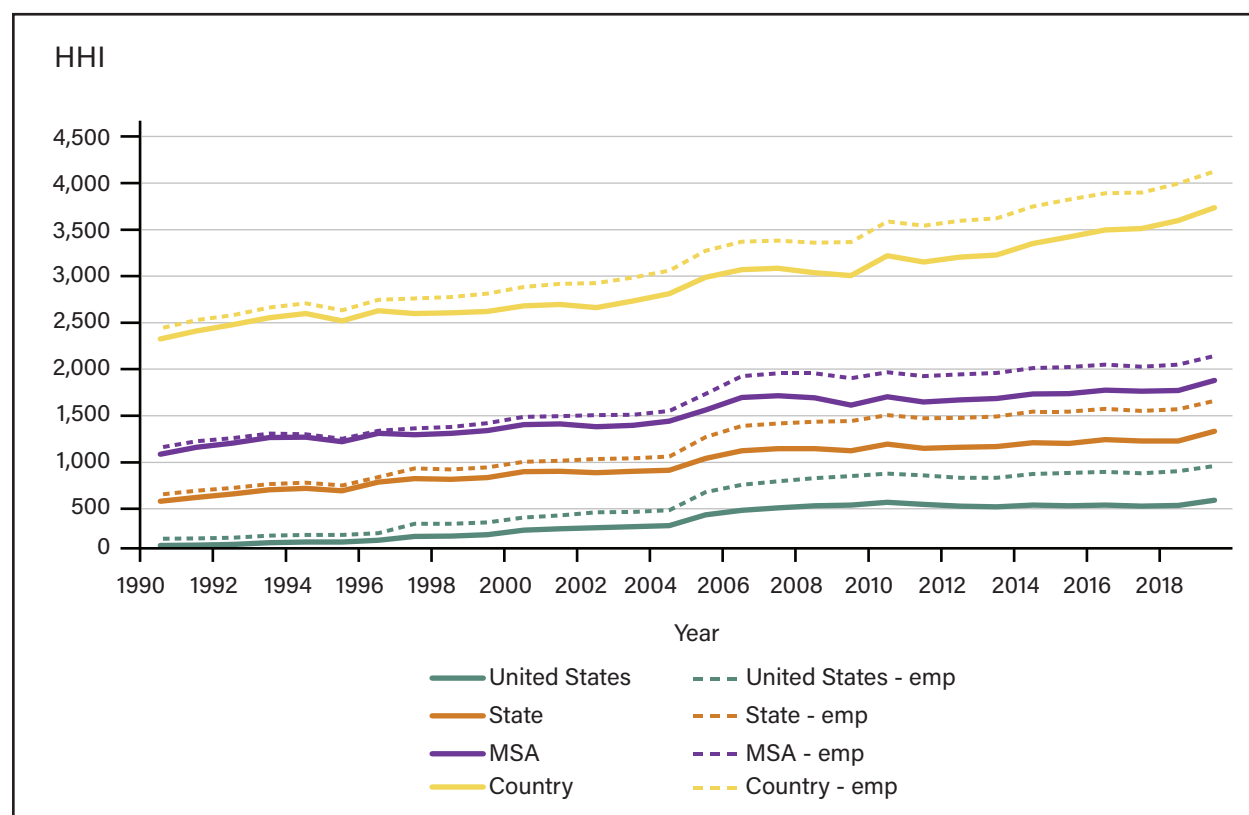
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## Appendix A: Concentration in the Food Retail Industry Using Employment Rather Than Sales Data

As we re-estimated food sales following the correction methodology developed by Zeballos and Marchesi (forthcoming) to ensure aggregated food sales trends align better with trends observed by the Food Expenditure Series, the correction may raise a potential concern. As a robustness check, the HHI is calculated using employment rather than sales, and results show similar trends for each market area level in appendix figures A.1 and A.2.

Figure A.1

**The Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019 using employment data**

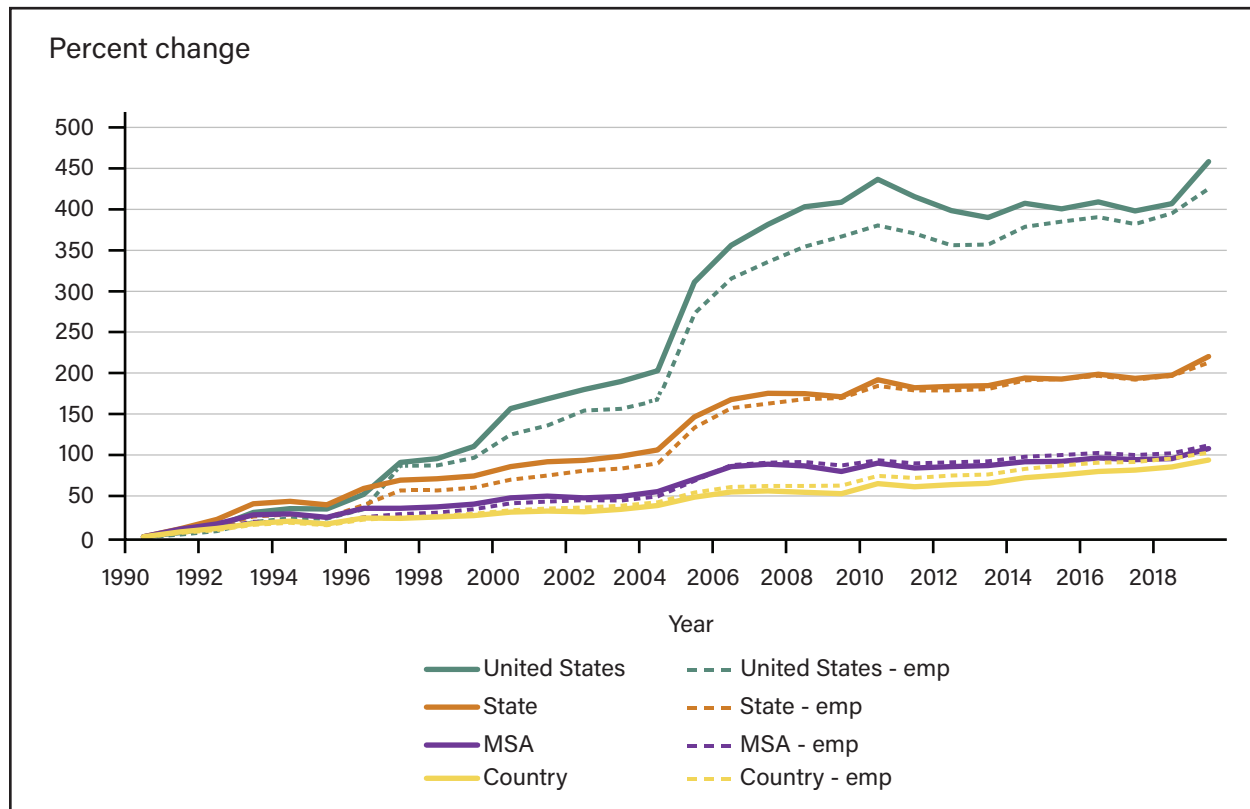


Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Emp = employment.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

Figure A.2

**Percentage Change in Herfindahl-Hirschman Index for national-, State-, MSA-, and county-level markets between 1990 and 2019 using employment data**



Notes: HHI = Herfindahl-Hirschman Index. MSA = Metropolitan Statistical Area. Emp = employment.

Source: USDA, Economic Research Service, using data from the National Establishment Time Series (NETS).

# **EXHIBIT C**



FEDERAL TRADE COMMISSION  
PROTECTING AMERICA'S CONSUMERS

For Release

# FTC Challenges Kroger's Acquisition of Albertsons

Largest supermarket merger in U.S. history will eliminate competition and raise grocery prices for millions of Americans, while harming tens of thousands of workers, FTC alleges

February 26, 2024



**Tags:** [Competition](#) | [Bureau of Competition](#) | [Merger](#) | [Retail](#) | [Grocery/Supermarkets](#)

The Federal Trade Commission today sued to block the largest proposed supermarket merger in U.S. history—Kroger Company's \$24.6 billion acquisition of the Albertsons Companies, Inc.—alleging that the deal is anticompetitive.

The [FTC charges](#) that the proposed deal will eliminate fierce competition between Kroger and Albertsons, leading to higher prices for groceries and other essential household items for millions of Americans. The loss of competition will also lead to lower quality products and services, while also narrowing consumers' choices for where to shop for groceries. For thousands of grocery store workers, Kroger's proposed acquisition of Albertsons would immediately erase aggressive competition for workers, threatening the ability of employees to secure higher wages, better benefits, and improved working conditions.

"This supermarket mega merger comes as American consumers have seen the cost of groceries rise steadily over the past few years. Kroger's acquisition of Albertsons would lead to additional grocery price hikes for everyday goods, further exacerbating the financial strain consumers across the country face today," said Henry Liu, Director of the FTC's Bureau of Competition. "Essential grocery store workers would also suffer under this deal, facing the threat of their wages dwindling, benefits diminishing, and their working conditions deteriorating."

Give Feedback

The FTC issued an administrative complaint and authorized a lawsuit in federal court to block the proposed acquisition pending the Commission's administrative proceedings. A bipartisan group of nine attorneys general is joining the FTC's federal court complaint.

Kroger operates thousands of stores across 36 states, which includes regional banners such as Fred Meyer, Fry's, Harris Teeter, King Soopers, Kroger, and Quality Food Centers (QFC). Albertsons also operates thousands of stores across 35 states under regional names including Albertsons, Haggen, Jewel-Osco, Pavilions, Safeway, and Vons. If the merger were completed, Kroger and Albertsons would operate more than 5,000 stores and approximately 4,000 retail pharmacies and would employ nearly 700,000 employees across 48 states.

Executives for both Kroger and Albertsons have acknowledged that the two supermarkets are direct competitors, forcing each other to aggressively compete for customers by lowering prices and for employees by providing better pay and benefits across the country. Similarly, executives for both supermarket chains have conceded that Kroger's acquisition of Albertsons is anticompetitive, with one executive reacting candidly to the proposed deal: "you are basically creating a monopoly in grocery with the merger."

### **Inadequate Divestiture Offering**

To try to secure antitrust approval of their merger, Kroger and Albertsons have proposed to divest several hundred stores and select other assets to C&S Wholesale Grocers (C&S), which today operates just 23 supermarkets and a single retail pharmacy. The FTC's administrative complaint alleges that Kroger and Albertsons's inadequate divestiture proposal is a hodgepodge of unconnected stores, banners, brands, and other assets that Kroger's antitrust lawyers have cobbled together and falls far short of mitigating the lost competition between Kroger and Albertsons.

The FTC says the proposed divestitures are not a standalone business, and C&S would face significant obstacles stitching together the various parts and pieces from Kroger and Albertsons into a functioning business—let alone a successful competitor against a combined Kroger and Albertsons. The proposal completely ignores many affected regional and local markets where Kroger and Albertsons compete today. In areas where there are divestitures, the proposal fails to include all of the assets, resources, and capabilities that C&S would need to replicate the competitive intensity that exists today between Kroger and Albertsons. Even if C&S were to survive as an operator, Kroger and

Give Feedback

Albertsons's proposed divestitures still do not solve the multitude of competitive issues created by the proposed acquisition, according to the complaint.

### **Harm to Consumers**

In addition to raising grocery prices, the FTC alleges that Kroger's acquisition of Albertsons would also diminish their incentive to compete on quality. Today, Kroger and Albertsons compete to improve their stores in many ways, including offering fresher produce, higher quality products, improved private label offerings, a broader array of in-store services, flexible store and pharmacy hours, and curbside pickup services.

The FTC charges that the deal would eliminate head-to-head price and quality competition, which have driven both supermarkets to lower their prices and improve their product and service offerings. If the merger takes place, grocery prices will increase, and Kroger and Albertsons' incentive to improve product quality and customer service will decrease, further harming customers.

### **Harm to Workers**

Kroger and Albertsons are the two largest employers of union grocery labor in the United States. <sup>1</sup> They actively compete against one another for workers. The two companies also try to poach grocery workers from each other, especially in local markets where they overlap. Currently, most workers at both supermarket chains are members of the United Food and Commercial Workers (UFCW) union.

Today, UFCW and other unions leverage the fact that Kroger and Albertsons are separate and competing companies. Unions push for both supermarket chains to negotiate better employment terms for union grocery workers, especially when negotiating over collective bargaining agreements (CBAs).

A combined Kroger/Albertsons, however, would gain increased leverage over workers and their unions—to the detriment of workers, the FTC alleges. The combined Kroger and Albertsons would have more leverage to impose subpar terms on union grocery workers that slow improvements to wages, worsen benefits, and potentially degrade working conditions. In some regions, such as in Denver, the combined Kroger/Albertsons would be the only employer of union grocery labor. Union grocery workers' ability to leverage the threat of a boycott or strike to negotiate better CBA terms would also be weakened.

Give Feedback

The Offices of the Attorneys General of Arizona, California, the District of Columbia, Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming are joining the Commission's federal lawsuit.

The Commission vote to issue the administrative complaint and authorize staff to seek a temporary restraining order and preliminary injunction in federal district court was 3-0. The federal court complaint and request for preliminary relief will be filed jointly with the state attorneys general in the U.S. District Court for the District of Oregon.

**NOTE:** The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an administrative law judge.

The Federal Trade Commission works to [promote competition](#), and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about [how competition benefits consumers](#) or [file an antitrust complaint](#). For the latest news and resources, [follow the FTC on social media](#), [subscribe to press releases](#) and [re our blog](#).

Give Feedback

## Contact Information

### Media Contact

[Victoria Graham](#)

Office of Public Affairs

[415-848-5121](#)

# **EXHIBIT D**



May 15, 2023

VIA ELECTRONIC FILING

The Honorable Lina M. Khan, Chair  
The Honorable Rebecca Kelly Slaughter, Commissioner  
The Honorable Alvaro Bedoya, Commissioner  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

***Re: Anticompetitive and Consumer Protection Concerns of the Proposed Kroger-Albertsons Merger***

Dear Chair Khan and Commissioners Slaughter and Bedoya,

The Center for Science in the Public Interest (CSPI) respectfully submits these comments in opposition to the proposed acquisition of Albertsons Companies, Inc. (Albertsons) by Kroger Company (Kroger). CSPI is an independent, science-based consumer advocacy organization that has worked for over 50 years to improve the food system to support healthy eating. A merger of Kroger and Albertsons would dramatically decrease competition within an already consolidated food retail market, which would result in fewer grocery stores and higher food prices, negatively impacting food and nutrition security for consumers across the country. Additionally, the proposed merger would substantially increase Kroger-Albertsons' buying power, worsening anticompetitive retailer marketing practices to the detriment of smaller suppliers and consumers.

The Kroger-Albertsons merger would combine the two largest U.S. supermarket chains, resulting in an entity that would control 22% of the food retail market and make it the nation's second largest food retailer.<sup>1</sup> Post-merger, two firms would control over 55% of the national food retail market that includes supermarkets, grocery stores, warehouse clubs, and supercenters (Walmart and Kroger-Albertsons).<sup>2</sup> The proposed merger would continue the trend of concentration in the food retail market; over the past three decades, national market concentration, measured by the Herfindahl-Hirschman Index, has increased by 458 percent and county-level market concentration has increased by 94 percent.<sup>3</sup> The merger would reduce competition in numerous states, increasing anticompetitive concentration in local markets.<sup>4</sup> Kroger and Albertsons acknowledged local market competition concerns by proposing to divest 100–375 stores.<sup>5</sup> However, divestitures as conditions of previous grocery mergers have proven unsuccessful solutions to local market concentration, leading to companies buying back stores and store closures.<sup>6</sup>

Consumer concerns arise from the Kroger-Albertsons merger as the recent consolidation of the grocery market has been associated with fewer grocery stores.<sup>7</sup> Nearly forty million Americans already live in areas that have low incomes and low food access, with evidence that the food access crisis is worsening.<sup>8</sup> Limited geographic access to healthy food is a key contributor to nutrition insecurity and inequality, as limited access to supermarkets, supercenters, grocery stores, or other sources of healthy and affordable food makes it harder for Americans to achieve a healthy diet.<sup>9</sup> Nutrition insecurity is defined by the USDA as lacking “consistent and equitable access to healthy, safe, and affordable foods that promote optimal health and well-being.”<sup>10</sup> Poor nutrition is the leading cause of illness in the United States, leading to 600,000 deaths caused by diet-related disease every year.<sup>11</sup> Importantly, there are health equity concerns as Black and Latine communities have less access to healthy food retailers<sup>12</sup> and are therefore disproportionately impacted by food and nutrition insecurity and diet-related chronic diseases relative to their white counterparts.<sup>13</sup> The proposed merger will worsen the current food access crisis and is likely to have a greater impact in areas where food access is already limited, potentially worsening inequities.

The Kroger-Albertsons merger will also harm consumers by exacerbating current food access issues through higher prices. Grocery mergers in highly concentrated markets are associated with higher food prices<sup>14</sup> and affordability is a key barrier to healthy eating and is associated with food insecurity.<sup>15</sup> Americans are already facing unprecedented high food prices, constraining their budgets and likely leading consumers to choose cheaper, unhealthy foods.<sup>16</sup> The increase in the price of groceries driven by the proposed merger is therefore likely to further exacerbate food and nutrition insecurity.

Finally, smaller suppliers and consumers will be negatively impacted by Kroger-Albertsons’ consolidated buying power. CSPI is committed to promoting a competitive, fair food retail market where Americans have access to affordable, nutritious groceries. In 2021, CSPI submitted a [letter](#) requesting that the FTC investigate under Section 6(b) of the FTC Act food retailer and manufacturer marketing practices of antitrust and consumer protection concern, including trade promotion practices and category captain arrangements. Since then, CSPI filed a [public comment](#) on how supply chain disruptions have further exacerbated the previously identified threats to competition and consumer choice in the food retail marketplace. By increasing consolidation in the food retail market, this merger would further threaten competition and consumer choice. The proposed merger would concentrate powerful cooperative marketing agreements, thus consolidating retailer control of trade promotion practices like exorbitant slotting fees and category captain arrangements where a single brand exerts influence on product placement and pricing across entire categories of foods.<sup>17</sup> Smaller suppliers could face higher barriers to entry, further ceding control to major food manufacturers and processors and their predominantly unhealthy products, and ultimately limiting consumer choice.<sup>18</sup> And while store

closure and food price concerns are manifest in local markets, this buyer power consolidation creates anticompetitive concerns in regional and national markets, underscoring the widespread anticompetitive impacts of the proposed merger.

Kroger and Albertsons claim the merger will benefit consumers,<sup>19</sup> yet there is no evidence the projected efficiencies stemming from the merger will meet Horizontal Merger Guidelines for pass-through of cost savings to consumers.<sup>20</sup> In fact, the proposed merger is likely to harm consumers through an anticompetitive food retail market with fewer stores, higher food prices, and consolidated food manufacturer and processor control, ultimately reducing healthy food access. We urge the FTC to seek to enjoin this merger.

Thank you for the opportunity to share CSPI's perspectives on maintaining a fair and competitive food retail environment that operates in the best interest of America's consumers and their health. We welcome the opportunity to discuss our concerns about the Kroger-Albertsons merger and the negative implications for consumer health with you and the FTC.

Respectfully,

A handwritten signature in dark ink, appearing to read "Peter Lurie". The signature is fluid and cursive, with a horizontal line underneath the name.

Peter Lurie, M.D., M.P.H.  
President and Executive Director  
Center for Science in the Public Interest

A handwritten signature in dark ink, appearing to read "S John". The signature is stylized and cursive, with a horizontal line underneath the name.

Sara John, Ph.D.  
Senior Policy Scientist  
Center for Science in the Public Interest

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<sup>1</sup> Food & Water Watch, The Economic Cost of Food Monopolies: The Grocery Cartels. (Nov. 2021), [https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB\\_2111\\_FoodMonoSeries1-SUPERMARKETS.pdf](https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf)

<sup>2</sup> *Id.*

<sup>3</sup> USDA Economic Research Service, Food retailing market concentration increased more at national level than county level over past three decades. (Jan. 2023) <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=105671>

<sup>4</sup> Kroger, Albertsons Companies, Merger Investor Presentation. (Oct. 2022) [https://s1.q4cdn.com/137099145/files/doc\\_downloads/2022/Kroger-and-Albertsons-Merger-Investor-Presentation-FINAL.pdf](https://s1.q4cdn.com/137099145/files/doc_downloads/2022/Kroger-and-Albertsons-Merger-Investor-Presentation-FINAL.pdf)

<sup>5</sup> *Id.*

<sup>6</sup> Kendall, B. and Brickley, P. Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway, Wall Street Journal (Nov. 24, 2015), <https://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193>.

<sup>7</sup> Food & Water Watch, 2021.

<sup>8</sup> Rhone, A, et al. Low-Income and Low-Supermarket-Access Census Tracts, 2010-2015, USDA ERS Economic Information Bulletin No. (EIB-165) 21 pp (Jan. 2017).

<sup>9</sup> Allcott H, et al. Food Deserts and the Causes of Nutritional Inequality\*. *The Quarterly Journal of Economics*. 2019;134(4):1793-1844.

<sup>10</sup> USDA Food and Nutrition Service, USDA Actions on Nutrition Security, (Accessed May 2023), <https://www.usda.gov/nutrition-security>.

<sup>11</sup> *Id.*

<sup>12</sup> Amin, MD, et al. Predicting access to healthful food retailers with machine learning. *Food Policy*. Feb. 2021;99:101985.

<sup>13</sup> USDA Food and Nutrition Service, May 2023.

<sup>14</sup> Hosken DS, et al. Do retail mergers affect competition? Evidence from grocery retailing. *Journal of Economics & Management Strategy*. 2018;27(1):3-22.

<sup>15</sup> USDA Food and Nutrition Service, Barriers that Constrain the Adequacy of Supplemental Nutrition Assistance Program (SNAP) Allotments: Survey Findings (June, 2021), <https://www.fns.usda.gov/snap/barriers-constrain-adequacy-snap-allotments>.

<sup>16</sup> U.S. Department of Agriculture ERS. Food Price Outlook, 2023. Updated March 24, 2023. Accessed April 19, 2023. <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/>

<sup>17</sup> Rivlin, G, Rigged: Supermarket Shelves for Sale, CSPI (Sep. 2016) <https://www.cspinet.org/resource/rigged>

<sup>18</sup> *Id.*

<sup>19</sup> Kroger, Albertsons Companies, 2022.

<sup>20</sup> U.S. Department of Justice and the Federal Trade Commission, HORIZONTAL MERGER GUIDELINES (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#10>.

# **EXHIBIT E**



# Do retail mergers affect competition? Evidence from grocery retailing

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## Abstract

This study estimates the price effects of horizontal mergers in the U.S. grocery retailing industry. We examine fourteen regions affected by mergers, including mergers in highly concentrated and relatively unconcentrated markets. We identify price effects by comparing markets affected by mergers to unaffected markets using difference-in-difference estimation with three different comparison groups, propensity score weights, and by using the synthetic control method. Our results are robust to the choice of control group and estimation technique. We find that mergers in highly concentrated markets are most frequently associated with price increases, and mergers in less concentrated markets are most often associated with price decreases.

## 1 | INTRODUCTION

Economists long have believed that, all else being equal, mergers resulting in highly concentrated markets reduce competition, increase consumer prices, and reduce consumer welfare. This belief provides the basis for much of the world's antitrust policy. The United States, United Kingdom, and European Union, for example, review horizontal mergers prospectively.<sup>1</sup> The problem for regulators is determining which mergers are likely to result in reduced competition. Unfortunately, there is remarkably little reliable systematic evidence relating measures of market concentration, such as the Herfindahl-Hirschman Index (HHI),<sup>2</sup> to manufacturer markups or consumer prices.

In this paper, we examine how prices change following significant changes in market structure resulting from a relatively large number of mergers in the supermarket industry. By focusing on how changes in market structure induced by mergers affect consumer prices, we can implicitly control for endogenous factors that determined the premerger market structure. We estimate the causal effect of mergers on supermarket prices using two related empirical techniques. We begin by following the extant literature and estimate merger price effects using a difference-in-difference analysis: we compare prices in markets experiencing a merger to those in similar markets not experiencing a major change in market structure. The major criticism of this method is that the decision to merge itself may be related to market participants' expectations about future prices resulting in biased estimates of the merger's effect on price. To address this concern, we first estimate two variants of the difference-in-difference estimator that use the relative *a priori* likelihood of a comparison market experiencing a merger to either limit the comparison group (as suggested by Crump, Joseph Hotz, Imbens, & Mitnik 2009) or by weighting comparison markets by their estimated propensity score (Hirano, Imbens, & Geert 2003; Imbens 2004). Second, we estimate merger price effects using the synthetic control method developed by Abadie, Diamond, and Hainmueller (2010).

We would like to thank Patrick DeGraba, Paul Pautler, David Schmidt, Steve Tenn, Mike Vita, Matt Weinberg, Nathan Wilson, seminar participants at Drexel University, two anonymous referees and the editor for their comments. The views expressed in this paper are those of the authors and do not represent those of the U.S. Federal Trade Commission or any individual Commissioner. Corresponding author: Hosken, U.S. Federal Trade Commission, 6th and Pennsylvania Ave, NW, Washington, DC 20580, dhosken@ftc.gov. Olson: U.S. Federal Trade Commission, 6th and Pennsylvania Ave, NW, Washington, DC 20580, lolson@ftc.gov. Smith: Compass Lexecon, 1101 K Street, NW, Washington, DC 20005, LSmith@CompassLexecon.com.

A strength of our study, in contrast to much of the literature,<sup>3</sup> is that we estimate the price effects of a number of mergers in the same industry affecting different geographic markets with different levels of market concentration at roughly the same time. Our approach follows the suggestion of Carlton (2009) that researchers should examine the price effects of all mergers (those likely and unlikely to result in price increases) to more fully understand how mergers affect the competitive process. Our sample contains eight mergers that took place in highly concentrated markets and six mergers that took place in moderately concentrated or unconcentrated markets. Our results are largely consistent with the presumptions of antitrust regulators as stated in the *Horizontal Merger Guidelines*.<sup>4</sup> We find that five mergers resulted in estimated price increases of more than 2%, and that four of those mergers were in highly concentrated markets. Five mergers resulted in estimated price decreases of more than 2%, and only one of those occurred in a highly concentrated market. The remaining four mergers were associated with relatively little change in price. These findings are robust to the choice of comparison group and estimation technique.

Our paper adds to the literature that evaluates the efficacy of antitrust enforcement by examining how prices change following mergers of competing firms. Roughly 60 published studies have estimated the price effects of mergers, with the majority finding that mergers have resulted in price increases.<sup>5</sup> The ability to draw general conclusions regarding the efficacy of horizontal merger policy from the published literature, however, is limited. Only a tiny fraction of the thousands of mergers filed with the U.S. antitrust agencies have been studied, and among those the majority of studies estimate the price effects of mergers taking place in one of only four industries: banking, airlines, hospitals, and petroleum. Of particular interest to our paper are two recent studies that each estimate the price impact of a single merger in the supermarket industry. Huang and Stiegert (2009) found that the merger of grocery retailers Kohls and Cops in Madison, Wisconsin did not raise prices in the months immediately following the merger, but did increase prices relative to a control market two years after the merger. Allain, Chambolle, Turolla, and Villas-Boas (2013) examined a large merger of French supermarket retailers that affected many cities, and found that prices increased in markets directly affected by the merger relative to a comparison group of unaffected markets.

The remainder of this paper is organized as follows. Section 2 describes our data sources, and Section 3 presents the methodology used to construct our merger and comparison markets. Section 4 describes our estimation strategy and presents the empirical findings of the study. Section 5 concludes.

## 2 | DATA

Our study uses three data sources. The first is A.C. Nielsen's Trade Dimensions retail database. Each year Trade Dimensions creates a census of retail outlets operating in the United States for a number of retailing industries, including supermarkets, club stores, liquor stores, convenience stores, and restaurants. In this study, we focus on the primary formats used for grocery retailing: conventional supermarkets, supercenters, and club stores.<sup>6</sup> Our dataset consists of annual observations, including the location, size, estimated sales, the store's banner (the name the store operates under), and corporate ownership of each supermarket, supercenter, and club store in the United States from 2004 through the fall of 2009. An additional feature of the dataset is that every store location has a unique identification number that allows us to track store ownership over time.

The price data we use consists of the prices used to construct the ACCRA Cost of Living Index, produced by the Council for Community and Economic Research (CCER). The ACCRA price index is designed to compare the cost of living for moderately affluent professional and managerial households in different U.S. metropolitan areas at a point in time.<sup>7</sup> The price data assembled by CCER are collected by the staff of roughly 350 local U.S. Chambers of Commerce.<sup>8</sup> In this study, our primary dataset consists of the prices collected for the 26 grocery products in the ACCRA sample.<sup>9</sup> These prices typically correspond to a distinct food product, such as a pound of T-Bone steak or a 2-liter bottle of Coca-Cola, sold at a specific retail outlet on a given day.

CCER reports its data at the level of the Core Based Statistical Area (CBSA). A CBSA is defined as a set of adjacent counties connected by commuting ties to a common urban core of at least 10,000 residents and is designed to capture the political jurisdictions in a region that are closely connected by commerce.<sup>10</sup> The population of the markets (CBSAs) included in the CCER data varies dramatically from medium sized markets such as Lima, Ohio (106,000) to the largest U.S. CBSA of New York City (19,800,000). Smaller markets in the CCER data tend to have fewer price quotes per item than large markets.<sup>11</sup> Because we observe the retail banner that a price quote corresponds to but not the specific retail location that was visited, we treat the CBSA in which the price was collected as the geographic unit of observation.

The CCER data is particularly well-suited to our study. First, it contains prices on a broad set of supermarket products designed to measure the typical "market basket" of consumers' food purchases. Second, the data covers more geographic regions within the United States than any other publicly accessible pricing dataset of which we are aware. This allows us to study many mergers

and gives us a great deal of flexibility in identifying potential comparison cities to use in both our difference-in-difference analysis and in constructing a synthetic control. Third, we were able to obtain a relatively long panel of price data (5 years).<sup>12</sup>

There are two key weaknesses of the CCER data. The first is that CCER's price collection method is more informal than other organizations such as the U.S. Bureau of Labor Statistics (BLS). Although surveyors are given a detailed set of instructions to follow in collecting prices,<sup>13</sup> CCER does not enforce a formal sampling scheme.<sup>14</sup> The second is that the products contained in the CCER sample are, by construction, composed of frequently purchased supermarket products. As will be discussed in more detail in Section 3, the prices of frequently purchased products are likely to be more strongly affected by changes in competition than a randomly selected grocery product. In spite of these shortcomings, the CCER data is the best publicly accessible data we are aware of for our study because of its broad geographic coverage of a variety of grocery products' prices over time.<sup>15</sup>

Finally, we have also obtained annual data from the Census describing the demographic characteristics of potential customers in the geographic markets in which the firms compete. Demographic variables describing a region's population, income, and racial composition were collected at the county level and then aggregated to the CBSA level to correspond to our pricing data.

### 3 | MARKET AND PRICE CONSTRUCTION

Retailers are differentiated across locations by the types and quality of items they sell and by the level of service they offer consumers. As a result, market definition—identifying the geographic region in which retailers compete and the set of firms (or products) that constitute a market—can be difficult.<sup>16</sup> For instance, although there are a large number of retailers in the United States that sell some food products (e.g., supermarkets, drug stores, and convenience stores), it is unlikely that all retailers selling food are similarly substitutable to one another. We limit our attention to the set of retail formats most likely to affect the pricing of supermarkets—large grocery retailers that sell a sufficient variety of food and other household goods such that consumers can purchase all of their food for a week at the retail outlet, often referred to as “one-stop-shopping.”<sup>17</sup>

There are three grocery retailing formats that provide consumers with “one-stop-shopping” in the United States: traditional supermarkets, supercenters, and club stores. The traditional supermarket is the most common retail format offering one-stop-shopping, accounting for approximately 86% of the roughly 31,000 retail outlets operated in the U.S. by large grocery retailers during our sample period.<sup>18</sup> Hanner, Hosken, Olson, and Smith (2015) categorize supermarket retailers as falling into one of three groups: independents (operating only a single outlet), small chains (with between two and 100 stores), and large chains (with more than 100 stores). Supermarkets operated by independents tend to be small, the majority have less than 12,000 square feet of selling space, and have relatively low revenue, averaging only about \$100,000 in sales per week. By contrast, supermarkets operated by small and large chains are much larger, averaging about 24,000 and 32,000 square feet of selling space, respectively, and have much larger sales volumes, with approximately \$200 and \$290,000 in weekly sales, respectively. Collectively, supermarkets owned by large chain retailers accounted for about 37.8% of U.S. grocery sales, while the aggregate sales of supermarkets owned by small chain and independent supermarkets were 13.5% and 7.4% of U.S. grocery sales.

The other two retail formats we include in the study, supercenters and club stores, are relatively new grocery retail formats.<sup>19</sup> Supercenters are very large stores, often larger than 180,000 square feet that combine both a large supermarket and a large mass-merchandise within the same store, and have much larger revenues than a traditional supermarket with estimated weekly sales of \$925,000 (Hanner et al.). WalMart, the largest supercenter retailer, opened its first supercenter in 1988, and rapidly became the largest U.S. grocery retailer. Club stores use a very different retail format than either traditional supermarkets or supercenters to sell grocery items. Club store retailers typically charge an annual membership fee, and offer consumers a limited selection of a very broad variety of products (roughly 4,000 grocery items compared to the 45,000 offered by a modern traditional supermarket), including meat and produce, at relatively low per-unit prices. Despite its limited product selection, the typical club store generates much higher weekly sales revenues of grocery items than conventional supermarkets, averaging about \$1 million in weekly sales. Collectively, the retail outlets operated by club store retailers accounted for 4% of U.S. stores and approximately 13% of grocery revenues, and the retail outlets operated by supercenters accounted for 10% of U.S. stores and approximately 29% of grocery revenue.<sup>20</sup> Although we account for the presence of club store and supercenter retailers in our analysis, for example, in identifying the markets affected by mergers and in calculating market concentration, all of the mergers we study involve the operators of traditional supermarkets that were owned by either small or large chains.<sup>21</sup>

Identifying the geographic region that contains the competitors that determine the prices at a specific store location in retail markets is complicated because of spatial differentiation. Chain grocery retailers develop common marketing and pricing strategies for the broad geographic markets in which they operate to differentiate themselves from rivals. At the same time, these retailers face an incentive to exploit highly localized market power. Although some retailers do engage in localized pricing (charging different prices at stores using the same retail banner within the same broad geographic market), it is unclear how

important this within market retailer price variation is empirically. Volpe and Li (2012), for instance, found that two large chain retailers charged essentially the same prices at their outlets in many locations throughout the Los Angeles metropolitan area.

Ultimately, because our price data is reported at the CBSA level, we cannot measure how prices change within the local neighborhoods potentially most affected by a given merger. Like previous researchers studying competition in U.S. retail food markets (Basker & Noel, 2009, Hausman & Liebttag, 2007, Huang & Stiegert, 2009), we restrict our empirical analysis to measuring how prices change across the broad geographic markets in which retailers compete.

### 3.1 | Market classification

Major changes in market structure, such as those resulting from entry, exit, or horizontal mergers, frequently cause significant changes in market prices.<sup>22</sup> As a result, prices in these markets are unlikely to provide a reasonable estimate for the counterfactual change in price for the regions experiencing horizontal mergers that are the focus of this study. For this reason, we must both identify those regions that experienced a significant change in market structure as the result of a horizontal merger (treatment markets) and those markets that experienced no significant change in market structure as the result of entry, exit, or horizontal mergers (comparison markets). We define a CBSA as experiencing a significant change in market structure if it experiences a horizontal merger, entry, or exit affecting at least 5% of the retail outlets in the CBSA. We limit our analysis of mergers to those CBSAs that experience only one significant change in market structure as the result of a merger during our sample period.<sup>23</sup>

We define entry as occurring in a CBSA when a new firm begins operations as a grocery retailer with a new retail brand. We do not consider expansion by incumbent firms within the CBSA or the sale of a local retail chain to a firm not previously operating in that CBSA to be entry. We define exit as an event where a retail firm ceases operations in a CBSA and at least one retail brand is removed from that CBSA. Parallel to entry, we do not view the sale (and continued operation) of a retail brand to another corporate entity or the contraction of a retailer's operations within a CBSA to be exit.

In our data, we observe two types of transactions that we define as horizontal mergers. The most common type of merger we observe occurs when one firm sells most (or all) of its existing operations in a CBSA to a current market participant. For example, in exiting the San Francisco, California CBSA in 2007, Albertsons sold its stores to incumbent grocery retailer Save Mart Supermarkets. Save Mart then operated those store locations using a new name, Lucky. The second type of transaction is a traditional merger where an incumbent buys all of the assets of a rival. In this scenario, the acquiring firm may or may not continue to operate the acquired firm's stores under their prior store name. We identify mergers using the Trade Dimensions data by identifying all instances where an incumbent firm begins operating stores that had previously been operated by a rival in a given CBSA. We then searched the trade press and local newspapers to confirm that this observed change in store ownership was the result of either a horizontal merger or acquisition. For all but one of the mergers we study, we have been able to identify at least one press article identifying the merger.<sup>24</sup>

Our dataset contains price data for 357 different geographic regions (CBSAs). However, only 248 of the CBSAs meet our inclusion criterion of having at least 10 quarters of data. Of these 248 CBSAs, 26 experience at least one significant horizontal merger,<sup>25</sup> 42 experience at least one significant entry event, and 64 experience at least one significant exit event. Many of the CBSAs experiencing significant entry, exit, or a merger experience multiple changes in market structure during our sample period, or experience a change in market structure at the beginning or end of our sample period. Given our identification strategy, we cannot estimate the price effects of a merger for CBSAs with either of these characteristics. When we limit attention to those CBSAs that (1) experienced only one significant merger, and (2) experienced mergers in either 2007 or 2008, we are left with our estimation sample of 14 CBSAs experiencing horizontal mergers.<sup>26</sup>

We next define two sets of CBSAs that we use as potential comparison markets. The first consists of CBSAs that experienced *no* change in market structure during the sample period that resulted from entry, exit, or merger of competing firms. We observe 75 CBSAs that meet this criterion. Because all large CBSAs in our data experience some change in market structure (most often the entry or exit of an independent or small chain retailer), there are no large CBSAs in the narrow comparison group. For this reason, we consider a second set of comparison markets that consists of CBSAs that experienced a likely *di minimis* level of entry, exit, or mergers: collectively entry, exit, and horizontal mergers affected fewer than 2% of stores within the CBSA during our sample period. This less strict restriction increases the number of CBSAs to 117 and adds a number of very large CBSAs to the broad comparison group such as Los Angeles, California; Washington, DC; and Dallas, Texas.<sup>27</sup>

### 3.2 | Measuring grocery prices

We measure a retailers' grocery price at a point in time by constructing a price index designed to correspond to the market basket purchased by a consumer during a shopping trip. We use a price index (rather than the price of specific grocery items) as

our preferred measure because it likely corresponds to the “price” consumers consider when choosing which grocery retailer to shop at in a time period. This assumption follows the retailing literature, which typically views consumers as trying to minimize the total costs of shopping (both grocery expenditures and travel costs). In these models, consumers choose an optimal retailer by determining the price of the entire bundle of products they will purchase rather than the price of any single item in the bundle (see, e.g., Bliss 1988).

CCER's grocery sample is constructed to correspond to a typical manager's food consumption bundle. To approximate this bundle, CCER has constructed expenditure weights using data extracted from the 2006 U.S. Consumer Expenditure Survey. We use these weights ( $w_k$ ) to construct a price index for a retailer/market/quarter ( $p_{ijt}$ ) as shown in equation (1) below

$$p_{ijt} = \sum_{k=1}^{26} w_k^* p_{ijk t}, \quad (1)$$

where  $p_{ijk t}$  is the price of product  $k$  sold by retailer  $i$  in market  $j$  in time quarter  $t$ , and  $w_k$  is the expenditure share associated with product  $k$ .

As noted above, one shortcoming of the CCER price data is that they are likely disproportionately composed of items that are especially sensitive to retail competition. Retailers likely offer low prices and have frequent sales on commonly and frequently purchased products (the products about which consumers are most informed) as a cost-effective mechanism to communicate a store's price level to consumers.<sup>28</sup> Ashenfelter, Ashmore, Baker, Gleason, and Hosken (2006), for example, found that the office supply retailer Staples was more likely to change the prices of frequently purchased items, such as copier paper or pens, in response to changes in competition (entry or exit of a close rival) than the prices of less frequently purchased items (staplers). Unfortunately, we do not know how the pricing strategies used by grocery retailers vary across the items included in (and excluded from) the CCER price data. We do, however, suspect that many of the products included in CCER's basket are commonly purchased items (such as 2-liter bottles of Coca Cola) that are likely to be more sensitive to the level of retail competition than the average product. As a result, our price index will likely be more sensitive to changes in retail competition than an index that included all products sold by a grocery retailer (weighted appropriately by a product's relative expenditures). Nonetheless, our price index should estimate correctly the sign and relative magnitude of a merger's effect on market pricing.

Table 1 provides some information describing the individual mergers.<sup>29,30</sup> Table 1 shows that there is significant heterogeneity in the size and estimated market concentration of the markets experiencing mergers. Our sample consists of a number of medium-sized U.S. markets, with less than 100 retail outlets, and some massive markets, including New York, Philadelphia, and Detroit, with hundreds of retail outlets. Over half of our merger sample consists of highly concentrated grocery markets (with estimated HHIs greater than 2,500), although the remaining markets are relatively unconcentrated. New York and Philadelphia, for example, both have HHIs below 1,000. This variability in market concentration provides us with an opportunity to determine if there is a systematic relationship between market concentration and the price effects resulting from consummated mergers.<sup>31</sup>

Table 2 presents average demographic characteristics of the markets affected by horizontal mergers, and the broad and narrow comparison groups. Not surprisingly, because the merger markets include some of the largest and wealthiest U.S. CBSAs, on average, the merger markets tend to be larger and have higher premerger grocery prices than CBSAs in either the broad or narrow comparison group. In addition, as discussed earlier, the average CBSA in the narrow comparison group is much smaller than the average merger market because all large U.S. CBSAs experience some entry, exit, and/or mergers by chain grocery retailers. When we weaken the requirement to include those markets that experience small levels of entry, exit, or horizontal mergers, the average market in the broader comparison group becomes much larger and more similar to the average merger market.

## 4 | EMPIRICAL MODEL AND RESULTS

The major issue faced by any study attempting to measure the effect of a change in market structure on retail prices is to develop a reasonable estimate of the counterfactual change in price. Like most studies that estimate the price effects of mergers, we use a difference-in-difference estimator to control for the counterfactual change in price.<sup>32</sup> For this approach to be valid, the change in price in the comparison markets must closely approximate how prices would have changed in the merger market “but for” the merger. It is not possible to directly test this assumption because the counterfactual price is unobserved. However, because we observe a large number of markets that are unaffected by horizontal mergers or other large changes in market structure, we can

TABLE 1 Description of mergers studied

Market	Merger Year	Merger Description	Acquiring Firm		Acquired Firm		Premerger Firms in Market			Change in HHI
			Stores	Revenue Share	Stores	Revenue Share	Chains	Independents	Stores	
Albuquerque, NM	2007	Albertsons acquires Raley's Supermarkets locations.	10	0.09	8	0.06	7	14	72	110
Detroit-Warren-Livonia, MI	2007	Kroger acquires Farmer Jack Supermarket locations from Great A & P Tea Co.	73	0.15	63	0.14	19	171	409	412
Evansville, IN-KY	2008	Houchens Industries bought Buehler Foods locations.	5	0.07	11	0.13	8	9	47	172
Fort Smith, AR-OK	2007	C V Foodliner acquires locations from CVM Inc.	10	0.08	7	0.06	4	7	42	99
Fort Wayne, IN	2007	Kroger acquires locations from SuperValu Inc.	7	0.10	13	0.15	6	11	40	313
Fresno, CA	2007	Save Mart Super Markets buys stores from Albertsons.	24	0.36	5	0.06	11	34	86	412
Muskogee, OK	2007	Assoc Wholesale Grocers Inc buys store from Albertsons.	3	0.13	1	0.08	5	3	11	226
New Orleans-Metairie-Kenner, LA	2007	Rouse Enterprises buys stores from Great A & P Tea Co.	4	0.02	18	0.12	7	43	109	57
New York-Northern New Jersey-Long Island, NY-NJ-PA	2007	Great A & P Tea Co buys stores from Pathmark.	197	0.13	112	0.09	69	769	1755	222
Oklahoma City, OK	2007	Assoc Wholesale Grocers Inc buys stores from Albertsons	13	0.04	12	0.06	11	24	113	46
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	2007	Great A & P Tea Co buys stores from Pathmark.	38	0.07	26	0.05	33	96	452	72
San Francisco-Oakland-Fremont, CA	2007	Save Mart Super Markets buys stores from Albertsons.	13	0.05	42	0.11	23	73	317	98
San Jose-Sunnyvale-Santa Clara, CA	2007	Save Mart Super Markets buys stores from Albertsons.	8	0.06	19	0.11	21	27	145	134
Topeka, KS	2008	Kroger buys stores from Assoc Wholesale Grocers Inc.	7	0.27	6	0.11	4	11	30	597

**TABLE 2** Market characteristics

Market Characteristics	Market Type		
	Narrow Comparison <sup>a</sup>	Broad Comparison <sup>b</sup>	Merger
Price Index	2.300 (0.241)	2.318 (0.223)	2.578 (0.421)
Total weekly supermarket revenue (\$000)	9,460 (18,254)	30,365 (47,403)	71,700 (111,407)
Market concentration (HHI)	3,208 (1,171)	2,773 (1,136)	2,147 (995)
Store concentration (HHI of store ownership shares)	2,182 (1,008)	1,961 (920)	1,153 (393)
Count of firms with more than 100 establishments	4.197 (2.169)	5.805 (3.234)	6.500 (3.757)
Median household income	40,120 (7,130)	42,877 (7,637)	45,459 (10,272)
Population	308,203 (595,551)	1,019,988 (1,711,163)	2,880,174 (4,916,621)
Population density (persons per square mile)	155.1 (227.0)	282.4 (363.2)	624.8 (787.2)
Percentage of population living in poverty	13.7 (4.7)	13.0 (4.0)	13.3 (3.5)
Percentage of school age population living in poverty	17.0 (6.8)	16.1 (5.8)	16.9 (5.0)
Percentage of population African American	7.6 (10.2)	10.3 (10.6)	12.3 (9.9)
Percentage of population Hispanic	14.1 (20.1)	13.4 (17.6)	14.2 (14.9)
Number of people per household	2.4 (0.2)	2.4 (0.2)	2.4 (0.2)
Income growth (2000–2004)	4.4 (4.0)	4.2 (3.7)	2.8 (4.5)
Poverty growth (2000–2004)	16.9 (11.9)	21.1 (12.9)	18.5 (11.2)
School age poverty growth (2000–2004)	10.2 (13.2)	14.5 (13.8)	15.2 (15.7)
Percentage growth in Hispanic population (2000–2004)	20.1 (11.2)	23.3 (11.4)	17.9 (10.3)
Percentage growth in African American population (2000–2004)	23.2 (34.2)	17.6 (28.2)	3.0 (7.7)
Number of markets in group	75	117	14

The price index corresponds to the premerger time period for merger markets. Prices come from the first year of available data (either 2005 or 2006). All other statistics are calculated using 2004 or the difference between 2004 and 2000. Standard deviations are shown in parentheses.

<sup>a</sup>The narrow comparison group contains markets that do not experience entry, exit, or a horizontal merger during the sample period (2005–2009).

<sup>b</sup>The broad comparison group contains markets that do not experience any one entry, exit, or horizontal merger that affects more than 2% of stores in a market.

test the robustness of our findings to different plausible comparison groups. In addition, given the large number of comparison group markets in our dataset, we can estimate the *a priori* probability that a comparison group market will experience a merger (its propensity score) to either further limit the comparison group (as suggested by Crump et al. 2009) or to weight comparison group markets in estimation. To further evaluate the robustness of our findings, we also estimate merger price effects using the synthetic control estimator (Abadie et al. 2010).<sup>33</sup>

#### 4.1 | Difference-in-difference estimator

We estimate price effects using equation (2) below, where the (log) of retailer  $i$ 's price index in market  $j$  in quarter  $t$  is regressed on a retailer/market specific fixed-effect ( $\gamma_{ij}$ ), a time fixed-effect to control for idiosyncratic factors affecting grocery prices in all markets in a given quarter ( $\delta_t$ ), and an indicator set equal to one in the postmerger period for the market affected by the merger.

$$\log(p_{ijt}) = \gamma_{ij} + \delta_t + \theta(\text{Post-Merger}_{jt}) + e_{ijt}. \quad (2)$$

Because the price impact of mergers may vary, we estimate equation (2) separately for each merger relative to a (potentially different) comparison group. We estimate standard errors by clustering by both the market (CBSA) and quarter using Cameron, Gelbach, and Miller's (2011) multiway clustering procedure.<sup>34</sup>

To estimate equation (2), we must first specify the timing of the event; that is, determine when we think the merger could begin having an effect on grocery pricing. We are somewhat constrained in our ability to determine precisely when mergers took place. Although we can identify the year in which a merger took place in the Trade Dimensions data, we cannot identify precisely the quarter in which all of the mergers occurred.<sup>35</sup> To avoid contamination bias, we have dropped data corresponding to the year in which the event took place, so that the pre-event and postevent periods are clearly defined.<sup>36</sup>

We next describe the various methods we have used to construct comparison groups for each of the markets experiencing a merger. As noted in the previous section, markets that have experienced economically important exit, entry, or horizontal mergers during our sample period are poor candidates for a counterfactual, because prices in those markets may have changed as the result of changes in market structure.<sup>37</sup> We have constructed two groups that limit the changes in market structure of candidate comparison markets. The narrow comparison group consists of 75 relatively small CBSAs that did not experience any change in market structure as the result of entry, exit, or a horizontal merger during our sample period. The broad comparison group includes all CBSAs in the narrow group and 42 additional larger markets that experienced only small changes in market structure as the result of entry, exit, or mergers (affecting fewer than 2% of stores within the CBSA).

The key assumption underlying the validity of the difference-in-difference estimator is that the comparison markets and the merger market experience common trends in pricing "but for" the merger. Although it is not possible to directly test the validity of this assumption postmerger, it is possible to test this assumption using premerger price data. We implement this test by estimating equation (3) using premerger prices for all retailers in each merger market/comparison market combination, and determine if the interaction of the time trend and the merger city indicator ( $\alpha_2$ ) is statistically different than zero.

$$\log(p_{ijt}) = a_{ij} + \alpha_1 t + \alpha_2 t^* \text{MergerCity}_j + e_{ijt}. \quad (3)$$

To ensure that grocery prices in the comparison group CBSAs are likely to track those in the merger market, we limit the estimation sample to those comparison group CBSAs whose premerger price trends are not statistically different from the merger market at the 10% level.

Even after eliminating candidate comparison markets that either experienced significant changes in market structure or statistically different premerger trends in pricing, it is still possible that the remaining candidate comparison markets could differ systematically from the merger markets and thus provide poor forecasts of the counterfactual change in price. In particular, it is possible that a firm's decision to engage in merger activity within a market may be influenced by its expectations about future pricing within that market. For example, mergers may systematically take place in markets with growing (or shrinking) demand for grocery services. To address this concern, we also estimate merger price effects using two alternative difference-in-difference estimators that make use of information on the relative likelihood of a market experiencing a merger.<sup>38</sup>

The first method is a two-step estimator suggested by Crump et al. (2009). The motivation behind this estimator is that comparison markets that are highly unlikely to experience a merger are unlikely to be "similar" to those markets experiencing mergers. Crump et al. propose limiting the comparison markets to those whose probability of experiencing a merger (referred to as the propensity score) is not too extreme. To justify this approach, Imbens (2015) notes that when the observations used in estimation have an estimated propensity score that is either close to one or zero that linear regressions are very sensitive to model specification, and estimates are likely to be biased.<sup>39</sup> In our implementation of the Crump et al. method, we first estimate the propensity score using an algorithm proposed by Imbens (2015) and Imbens and Rubin (2015). This algorithm is a stepwise regression that systematically selects linear and second order functions of market characteristics that could plausibly predict whether a market will experience a merger during our sample period.<sup>40</sup> Once the propensity score has been estimated for each comparison market, we use the method suggested by Crump et al. to select the optimal propensity score cutoffs to trim the sample, keeping comparison markets with estimated propensity scores roughly between 0.081 and 0.919.

We also estimate merger price effects using the estimated propensity score as a weight in the difference-in-difference estimation. The intuition underlying this estimator is that those comparison markets most likely to experience mergers (based on observable characteristics) should receive more importance in the estimation than those relatively less likely to experience a merger. However, instead of dropping markets with very low probabilities of experiencing a merger as in Crump et al., we use a smooth function of the propensity score to weight observations based on their relative likelihood of experiencing a merger. We implement a propensity score estimator proposed in Hirano et al. (2003) and Imbens (2004),<sup>41</sup> where we re-estimate equation (2) where an observation in a market experiencing a merger receives a weight of “1” and an observation from comparison market  $j$  receives a weight equal to the ratio of its propensity score to one minus its propensity score  $(\frac{\text{ProbabilityMerger}_j}{1 - (\text{ProbabilityMerger}_j)})$ .<sup>42</sup> In estimating this model, we use the propensity score generated in the implementation of the Crump et al. technique described above.

## 4.2 | Results

The results from the difference-in-difference estimators are presented in Table 3. Each row in Table 3 corresponds to a distinct region affected by a horizontal merger, and each column corresponds to a different specification of the estimating equation and/or comparison group. Entries in the table correspond to the estimated effect of the merger on grocery prices in the region affected by the merger ( $\theta$  from equation 2). The first column of results corresponds to regressions estimated using the narrow comparison group (markets experiencing no change in market structure as the result of entry, exit, or horizontal mergers) and includes retailer/market fixed-effects and time indicators as controls. The second column differs from the first by using the broad comparison group (including markets experiencing only small changes in market structure). The third column implements the Crump et al. (2009) estimator that eliminates markets from the broad comparison group that have a very high or very low probability of experiencing a merger. Finally, the fourth column contains the results from propensity score weighted difference-in-difference estimator. To facilitate interpretation, we have also included the postmerger HHI corresponding to the CBSA in which the merger took place.

The estimated price effects are robust to both the choice of comparison group and the use of propensity score weights. The estimated sign of the price effect for a merger does not change across specifications for almost any city and, in many cases, the estimated merger price effects vary by less than a percentage point across specifications. The predicted effect of the merger in Philadelphia, for example, varies by less than a percentage point (between  $-4.6\%$  to  $-4.4\%$ ) across specifications (comparing columns 1 to 4 of Table 3). For roughly half of the merger cities the use of propensity score weights results in larger estimated merger price effects (on the order of  $1-3\%$ ) than the other model specifications.

Although the estimated price effects corresponding to any single merger are stable across specifications and comparison groups, there is noteworthy variability across markets in the estimated price effects of a merger. Overall, the results in Table 3 show that five of the markets experienced estimated price increases of more than  $2\%$ , five experienced estimated price decreases of more than  $2\%$ , and the remaining four markets experienced little change in retail markets postmerger. Virtually all of the estimated price changes that we view as economically significant (greater than  $2\%$  in absolute value) are also statistically significant at conventional levels. Moreover, prices tend to increase postmerger most frequently in highly concentrated markets and decrease most frequently in the least concentrated markets.

Some of our estimated price effects are very large in absolute value. As we noted in Section 3, many of the grocery items in our price index are likely to be affected more strongly by changes in the level of retail competition than a randomly selected item. For example, although we estimate that the price of the CCER bundle fell by between  $10\%$  and  $13\%$  in San Francisco and San Jose following the purchase of Albertson's by Save-Mart, we strongly suspect that the reduction in a price index including all grocery items (appropriately weighted) would be considerably smaller. For this reason, we interpret our estimated price effects as being a relative measure of how much the overall price level changed as the result of a change in market structure.

Although the price index is designed to correspond to a consumer's typical consumption bundle, it explicitly places more weight on some grocery items than others. As a result, it is possible that the estimated merger price effects could be sensitive to the index's weighting scheme. To evaluate this possibility, we have also estimated all of the difference-in-difference estimators by changing the unit of observation to a grocery product's price at a retailer in a quarter (implicitly giving all sampled products equal weight). Specifically, we have modified equation (2) as follows:

$$\log(p_{ijkt}) = \gamma_{ijk} + \delta_t + \theta(\text{Post-Merger}_{jt}) + e_{ijk t}, \quad (2')$$

where we now regress the (log) of retailer  $i$ 's price of product  $k$  in market  $j$  in quarter  $t$  on a retailer/market/product specific fixed-effect ( $\gamma_{ijk}$ ), a time fixed-effect to control for idiosyncratic factors affecting grocery prices in all markets in a given quarter ( $\delta_t$ ),

**TABLE 3** Estimated effects of mergers on retailer's price index: Difference-in-difference

Region	Predicted Postmerger HHI	1	2	3	4
New York City, NY-NJ-PA	819	−0.0195*** (0.00438)	−0.0177*** (0.00349)	−0.0155** (0.00531)	0.00333 (0.0196)
Philadelphia, PA-NJ-DE-MD	889	−0.0443*** (0.00402)	−0.0438*** (0.00291)	−0.0459*** (0.00363)	−0.0446*** (0.00539)
Detroit, MI	1,672	−0.0297*** (0.00457)	−0.0274*** (0.00407)	−0.0262*** (0.00769)	−0.00561 (0.0197)
San Jose, CA	1,683	−0.105*** (0.00471)	−0.105*** (0.00370)	−0.105*** (0.00487)	−0.106*** (0.00636)
Fresno, CA	2,117	0.0416*** (0.00645)	0.0441*** (0.00482)	0.0484*** (0.00602)	0.0711** (0.0229)
San Francisco, CA	2,250	−0.136*** (0.00607)	−0.134*** (0.00463)	−0.135*** (0.00717)	−0.133*** (0.00975)
Fort Wayne, IN	3,256	−0.0189** (0.00722)	−0.0156*** (0.00484)	−0.0182 (0.0106)	−0.0163 (0.0135)
Albuquerque, NM	3,361	−0.0536* (0.0243)	−0.0559*** (0.0153)	−0.0651** (0.0241)	−0.0653** (0.0249)
Evansville, IN-KY	3,503	0.0162*** (0.00458)	0.0188*** (0.00323)	0.0227** (0.00799)	0.0488* (0.0235)
New Orleans, LA	3,519	0.0272*** (0.00489)	0.0299*** (0.00402)	0.0335*** (0.00510)	0.0536** (0.0206)
Muskogee, OK	3,601	−0.00326 (0.00450)	−0.000437 (0.00413)	0.000785 (0.00587)	0.0197 (0.0205)
Oklahoma City, OK	4,007	0.0570*** (0.00598)	0.0611*** (0.00518)	0.0671*** (0.00748)	0.0955*** (0.0247)
Topeka, KS	4,169	0.0856*** (0.00498)	0.0870*** (0.00459)	0.0903*** (0.00721)	0.118*** (0.0247)
Fort Smith, AR-OK	5,377	0.0339*** (0.00606)	0.0388*** (0.00475)	0.0432*** (0.00734)	0.0697*** (0.0220)
Specification					
Broad or narrow control group		Narrow	Broad	Broad	Broad
Market/retailer fixed-effects		x	x	x	x
Quarter indicators		x	x	x	x
Propensity score trimmed control group				x	
Propensity Score Weights					x

Dependent variable is the log of a retailer's price index where the unit of observation is a retailer/CBSA/quarter. Each entry in columns 1–4 of the table corresponds to the estimated effect of a merger on market prices in the specified region. Each estimate comes from a separate difference-in-difference regression. All regressions include market/retailer fixed-effects and separate indicator variables for time periods (quarters). Control markets that experience premerger price trends different from the merger markets at the 0.1 level are excluded from the analysis. Column 1 includes as control markets those markets that experienced no merger, entry or exit event during our time period (narrow comparison). Column 2 adds control markets that experienced small events (broad control group). Column 3 further limits the comparison group to stores in markets whose estimated probability of experiencing a merger (propensity score) is within (0.081, 0.919). Column 4 weights observations in the control markets by a function of the propensity score for the market experiencing a merger:  $(PS / (1-PS))$ . Standard errors (in parentheses) are clustered by CBSA/quarter using the method of Cameron, Gelbach, and Miller (2011).

\*Statistically significant at the 10% level,

\*\*Statistically significant at the 5% level,

\*\*\*Statistically significant at the 1% level.

and an indicator set equal to one in the postmerger period for the market affected by the merger. The coefficient on the postmerger indicator ( $\theta$ ) should now be interpreted as the proportional change in price of all grocery items sold in market  $j$  caused by the merger.

The results of estimating this variant of the estimating equation (shown in Table 4) are qualitatively similar to those shown in Table 3. Although the absolute value of the estimated price impact of the mergers changes in some cases, the estimated merger price effects do not systematically increase or decrease. For six mergers the absolute value of the estimated price changes increased, for five mergers the absolute value of the estimated price change decreased, and in three cases the estimates essentially were unchanged.<sup>43</sup> The most significant change associated with the change in the measure of retailers' prices is that fewer of the estimates are "small" in absolute value. For example, fewer of the estimated merger price effects in Table 4 are less than 2% in absolute value than in Table 3. Importantly, the change in price measure does not result in any economically significant changes in the sign of the price impact of a merger. That is, a merger estimated to significantly increase (decrease) price when using the price index was also estimated to increase (decrease) price when using an item's price as the unit of observation. From this analysis, we conclude that the choice of price measure does not appear to have an important impact on our ability to identify which mergers increased or decreased consumer prices.

### 4.3 | Synthetic control groups

We now further assess the robustness of the study's findings to the choice of comparison group by using the synthetic control group estimator developed by Abadie et al. (2010). The synthetic control method was developed to identify treatment effects in studies like ours that use macro (market level) data where identification of the treatment effect comes from comparing a region that experienced treatment to regions that did not. Like the difference-in-difference estimator, the goal of the synthetic control method is to build a forecast of how the variable of interest (grocery prices) would have evolved but for treatment (a merger) using information on how the variable of interest (grocery prices) evolved in markets unaffected by treatment. However, rather than compare prices in the merger market to all markets unaffected by mergers, the technique determines which regions unaffected by mergers (the control group) are most similar to the merger market, and only uses prices from this subset of regions to forecast how prices would have evolved but for the merger. The counterfactual price (synthetic control) is a weighted average of this subset of the comparison group's prices. The weights are determined using an algorithm that minimizes the distance between premerger market characteristics including markets' price levels, of the merger market and the synthetic control market.<sup>44</sup> The estimated price effect of a merger is calculated by computing the average difference in the observed postmerger price of the merger city and the average postmerger price of the "synthetic control." The details of how we implement the synthetic control estimator are provided in the online appendix.

We use the Stata code developed by Abadie et al. (2010) to estimate the synthetic control model.<sup>45</sup> Abadie et al.'s program requires that there be a single time series for the treatment group being analyzed. Thus, we need to aggregate the data to the level of a market/quarter from a market/retailer/quarter. However, we cannot simply construct a simple average of the retailers' prices in a market, because not all retailers are observed in a market in every time period; that is, the composition of retailers observed in a market varies over time. Instead, we construct a price index that controls for retailer/market effects. Specifically, we regress retailer  $i$ 's (log) price in market  $j$  at time  $t$  on a retailer/market fixed-effect ( $\alpha_{ij}$ ) and a series of time indicators. We estimate these regressions at the retailer/market level.

$$\log(p_{ijt}) = \alpha_{ij} + \sum_t \delta_{jt} + e_{ijt}. \quad (4)$$

The time indicator ( $\delta_{jt}$ ) from equation (4) estimates market  $j$ 's average price at time  $t$ , holding retailer effects constant. We use the estimated  $\delta_{jt}$  as prices in the synthetic control group estimator.<sup>46</sup> Abadie et al.'s Stata programs also require a balanced panel. Hence, for a given merger, we limit the potential set of controls to comparison markets that report prices for each period reported by the merger market.

Abadie et al. suggest testing the validity of the synthetic control estimator by plotting both the prices in the merger (treatment) region and that region's synthetic control. If the synthetic control does not track prices in the merger city well premerger, it is unlikely to provide a good forecast of the counterfactual price. Figure 1 provides a plot of each merger region's observed (log) price index and its corresponding synthetic control price pre- and postmerger.<sup>47</sup> In all but one market (Albuquerque), the synthetic control closely fits the merger market's price in the premerger period. In the postmerger period, the average deviation between the merger market's price and the synthetic control's price provides our estimated merger price effect.

Abadie et al. do not calculate conventional standard errors for the estimated effects of treatment using their estimator. The authors argue that in market level studies like ours, the most important source of uncertainty is not the estimated precision of the

**TABLE 4** Estimated effects of mergers on retailer's prices: Difference in difference

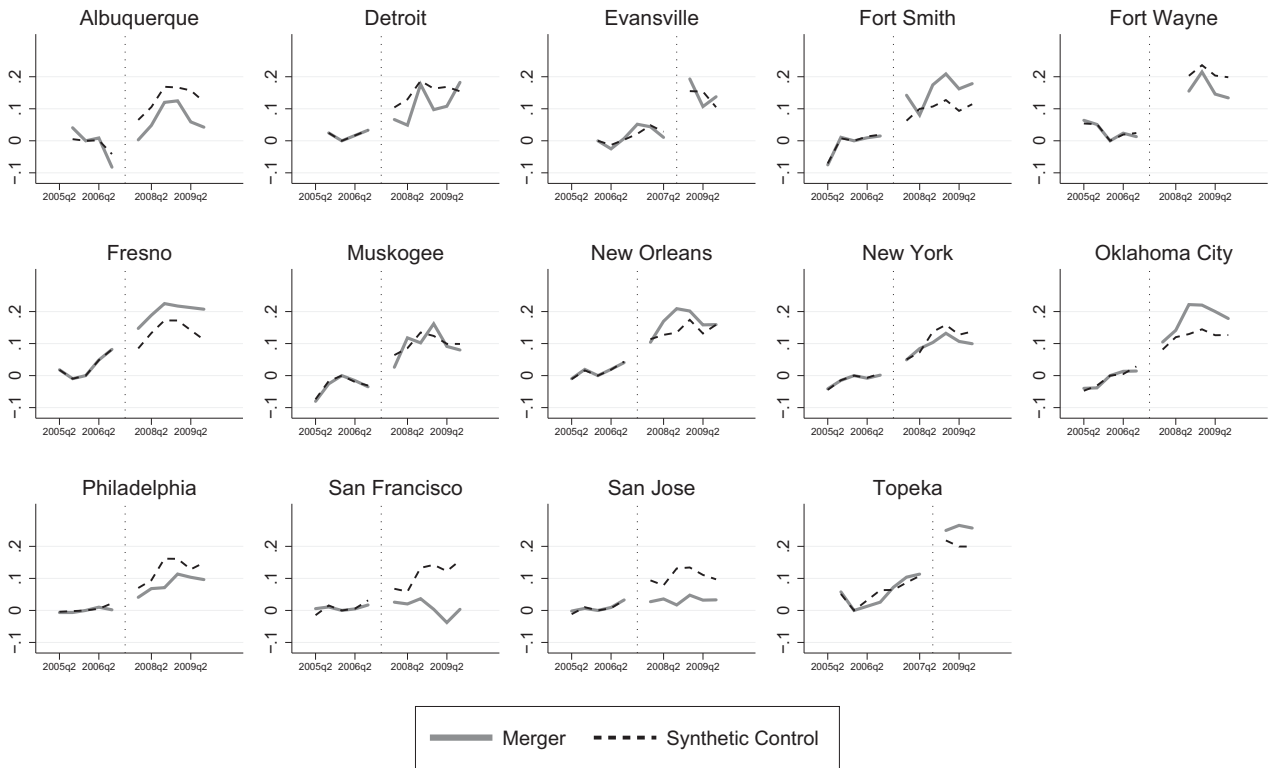
Region	Predicted Postmerger HHI	1	2	3	4
New York-Northern New Jersey-Long Island, NY-NJ-PA	819	−0.0313*** (0.00551)	−0.0247*** (0.00475)	−0.0157* (0.00742)	0.00480 (0.0205)
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	889	−0.0357*** (0.00408)	−0.0317*** (0.00318)	−0.0287*** (0.00444)	−0.0262*** (0.00684)
Detroit-Warren-Livonia, MI	1,672	−0.0613*** (0.00447)	−0.0559*** (0.00395)	−0.0484*** (0.00637)	−0.0271 (0.0199)
San Jose-Sunnyvale-Santa Clara, CA	1,863	−0.125*** (0.00451)	−0.121*** (0.00359)	−0.115*** (0.00493)	−0.115*** (0.00647)
Fresno, CA	2,117	0.0134* (0.00645)	0.0192*** (0.00532)	0.0292*** (0.00660)	0.0541** (0.0234)
San Francisco-Oakland-Fremont, CA	2,250	−0.173*** (0.00704)	−0.169*** (0.00529)	−0.165*** (0.00814)	−0.162*** (0.0116)
Fort Wayne, IN	3,256	−0.0261** (0.00996)	−0.0206** (0.00679)	−0.0199 (0.0112)	−0.0174 (0.0149)
Albuquerque, NM	3,361	−0.0746*** (0.0192)	−0.0768*** (0.0126)	−0.0806*** (0.0179)	−0.0828*** (0.0206)
Evansville, IN-KY	3,503	0.0342*** (0.00476)	0.0402*** (0.00367)	0.0460*** (0.00763)	0.0723** (0.0232)
New Orleans-Metairie-Kenner, LA	3,519	0.0104** (0.00381)	0.0172*** (0.00317)	0.0260*** (0.00422)	0.0480** (0.0196)
Muskogee, OK	3,601	0.00806 (0.00566)	0.0142** (0.00488)	0.0206** (0.00655)	0.0404* (0.0202)
Oklahoma City, OK	4,007	0.0532*** (0.00558)	0.0613*** (0.00488)	0.0743*** (0.00759)	0.103*** (0.0236)
Topeka, KS	4,169	0.0445*** (0.00553)	0.0503*** (0.00545)	0.0560*** (0.00819)	0.0844*** (0.0248)
Fort Smith, AR-OK	5,377	0.0265** (0.00930)	0.0347*** (0.00717)	0.0469*** (0.0110)	0.0740*** (0.0224)
Specification					
Broad or narrow control group		Narrow	Broad	Broad	Broad
Retailer/market/product fixed-effects		x	x	x	x
Quarter indicators		x	x	x	x
Propensity score trimmed control group				x	
Propensity score weights					x

Dependent variable is the log of a retailer's product's price where the unit of observation is a retailer/CBSA/product/quarter. Each entry in columns 1–4 of the table corresponds to the estimated effect of a merger on market prices in the specified region. Each estimate comes from a separate difference-in-difference regression. All regressions include market/retailer/product fixed-effects and separate indicator variables for time periods (quarters). Control markets that experience premerger price trends different from the merger markets at the 0.1 level are excluded from the analysis. Column 1 includes as control markets those markets that experienced no merger, entry or exit event during our time period (narrow comparison). Column 2 adds control markets that experienced small events (broad control group). Column 3 further limits the comparison group to stores in markets whose estimated probability of experiencing a merger (propensity score) is within (0.081, 0.919). Column 4 weights observations in the control markets by a function of the propensity score for the market experiencing a merger:  $(PS/(1-PS))$ . Standard errors (in parentheses) are clustered by census division/quarter using the method of Cameron et al. (2011).

\*Statistically significant at the 10% level,

\*\*Statistically significant at the 5% level,

\*\*\*Statistically significant at the 1% level.



For the Merger Markets, we plot  $\delta_{jt}$  from equation 4, where  $\delta_{j, 2006q1}$  is set to zero. Data from the merger year + 2007 or 2008 – is excluded from the graph.

**FIGURE 1** Time series plot of scaled log price in the merger market and the synthetic control market

price change within the affected region (which is typically estimated with a high degree of precision) but in the uncertainty of the methodology itself. To understand the importance of this uncertainty, the authors suggest that researchers conduct placebo studies; that is, compare the magnitude of the estimated merger effect for a market that experienced a merger to the estimated price impact of “placebo mergers.” A placebo merger price effect is constructed by treating a comparison market as if it experienced a merger in the same year as the (true) merger market, and then using the synthetic control algorithm to construct a “placebo” price effect.<sup>48</sup> We implement our placebo tests as follows. For every merger/comparison group combination, we treat each comparison region as if it experienced a merger and then calculate the estimated merger price effect using the synthetic control estimator. This generates a distribution of up to 116 placebo treatment effects (one effect corresponding to each member of the comparison group).<sup>49</sup> We then rank these effects from smallest to largest and report the percentile corresponding to the (true) estimated merger price effect. Table 5 presents the synthetic control estimates of the price effect of the merger and the percentiles of the counterfactual pricing distribution generated by the placebo study in columns 3 and 4, respectively. For example, the estimated price effect of the supermarket merger in Oklahoma City is 5.6%. This price effect falls in the 99th percentile of the counterfactual pricing distribution. One can interpret this percentile as analogous to a p value; that is, using this method, 99% of the markets not experiencing a merger were predicted to experience price increases less than Oklahoma City, and 1% of markets not experiencing mergers were predicted to experience price increases larger than Oklahoma City.

To facilitate comparison of the synthetic control estimates to the difference-in-difference estimates, we have re-estimated the difference-in-difference model using the same data used in the synthetic control analysis (the market-level prices generated by equation (4)). We also generate an analogous measure of where the difference-in-difference estimate falls in the counterfactual distribution. Specifically, for each year in which a merger event can take place (2007 or 2008), we estimate how much the price changed following that year for each comparison market and the market that experienced a merger in that year using equation (5) below.

$$\delta_{jt} = \gamma_j + \theta_j(\text{Post-Event}_{jt}) + e_{jt}. \quad (5)$$

We then sort the estimated price effects ( $\theta_j$ ) from smallest to largest for the comparison group and record which percentile a given merger market's estimated price effect corresponds to. Columns 1 and 2 of Table 5 contain the estimated price effect

**TABLE 5** Estimated price effects mergers comparison of difference-in-difference and synthetic control estimates

Merger Market	Predicted Postmerger HHI	Difference-in-Difference		Synthetic Control	
		Coefficient	Percentile Of Counterfactual Distribution	Coefficient	Percentile Of Counterfactual Distribution
New York	819	−0.022	30.2%	−0.018	32.1%
Philadelphia	889	−0.048	10.9%	−0.045	9.9%
Detroit	1,672	−0.030	18.1%	−0.038	12.3%
San Jose	1,863	−0.107	2.6%	−0.075	3.7%
Fresno	2,117	0.042	89.7%	0.062	98.8%
San Francisco	2,250	−0.129	1.7%	−0.105	1.2%
Fort Wayne	3,256	−0.016	50.9%	−0.048	9.9%
Albuquerque	3,361	−0.050	7.8%	−0.065	3.7%
Evansville	3,503	0.013	54.8%	0.008	70.3%
New Orleans	3,519	0.023	75.9%	0.027	91.4%
Muskogee	3,601	−0.002	44.8%	−0.005	51.9%
Oklahoma City	4,007	0.058	94.0%	0.056	98.8%
Topeka	4,169	0.077	96.5%	0.052	98.9%
Fort Smith	5,377	0.036	85.3%	0.057	98.8%

The dependent variable is the log of a region's price index in a CBSA/quarter. Each entry in the columns labeled "Coefficient" corresponds to the estimated effect of a merger on prices in that market. The difference-in-difference models include time indicators and market fixed-effects. Each estimate comes from a separate difference-in-difference regression or synthetic control estimation. Each entry in the columns labeled "Percentile of Counterfactual Distribution" corresponds to the percentile of the counterfactual distribution in which the merger coefficient is located.

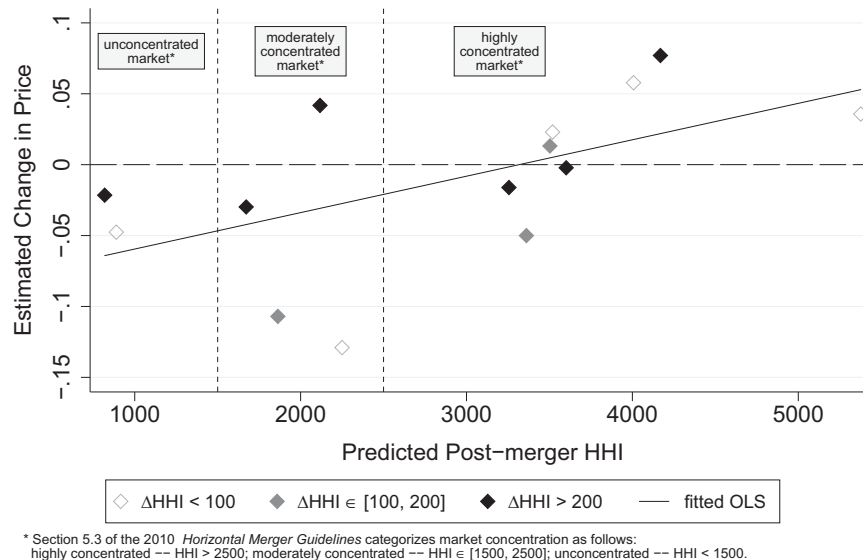
and the percentile of the counterfactual pricing distribution to which a price effect corresponds. For example, the difference-in-difference model estimates the price effect of the merger in Oklahoma City increased price by 5.8%. That price effect was larger than 94% of the price changes taking place in the comparison group for Oklahoma City following the merger.

The difference-in-difference estimates in Table 5 are very similar to those estimated with retailer/market level data (Table 3) suggesting that the data aggregation used in equation (5) does not result in a meaningful change in our estimated price effects. Although the difference-in-difference and synthetic control model estimates are not identical, they are very similar both qualitatively and quantitatively. The robustness of the estimated merger price effects to both model specification and choice of control group suggests that mergers are likely exogenous to the time path of prices within the market affected by the merger.

#### 4.4 | Discussion

Horizontal mergers are more likely to be competitively harmful if the merging firms produce highly substitutable products, and if there are relatively few firms that produce similar products. Quantifying the level of competition between two firms that propose to merge, however, is a resource intensive process and antitrust agencies have limited resources. Antitrust agencies have developed a number of tools that are relatively easy to implement to identify those proposed transactions that should be subject to an extensive review. For example, Section 5.3 of the DOJ's and FTC's 2010 *Horizontal Merger Guidelines* states that, "they [market share thresholds] provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased competition."

We provide empirical evidence on the value of one such tool, the use of market concentration thresholds, specifically the level (HHI) and change in market concentration ( $\Delta$  HHI) to identify competitively suspect mergers. We examine how well these measures predict merger price effects by plotting the predicted postmerger level of market concentration in the CBSA against the estimated price effects of each of the mergers examined in the study (using the estimates from column 1 in Table 5).<sup>50</sup> Each point in Figure 2 is depicted by a marker, which indicates the magnitude of the change in market concentration ( $\Delta$  HHI < 100,  $100 < \Delta$  HHI < 200,  $\Delta$  HHI > 200), where the ranges correspond to those discussed in the *Horizontal Merger Guidelines*. For example, the merger in Topeka resulted in a predicted postmerger HHI of about 4,200, and change in HHI of about 600, and a change in price of about 7.7%. We have also added vertical lines classifying the level of market concentration following the *Horizontal Merger Guidelines*: markets with a postmerger HHI of less than 1,500 are defined as unconcentrated, and between



**FIGURE 2** Relationship between postmerger market concentration, change in concentration, and estimated change in price

1,500 and 2,500 as moderately concentrated, and greater than 2,500 as highly concentrated. Finally, the figure includes the regression line from the simple linear regression of the change in price caused by the merger on the predicted postmerger HHI.

Although not all mergers in highly concentrated (unconcentrated) markets resulted in price increases (decreases), Figure 2 shows that, on average, most of the economically significant price increases occurred following mergers in highly concentrated markets. Similarly, although there was one significant price decrease resulting from a merger in a highly concentrated market, most mergers resulting in price decreases were in either moderately concentrated or unconcentrated markets. The relationship between the change in market concentration and the change in price resulting from a merger appears to be less closely related (although positively correlated). In particular, three of the mergers resulting in economically significant price increases also resulted in relatively small changes in market concentration ( $\Delta \text{HHI} < 100$ ) in highly concentrated markets.<sup>51</sup> For the mergers studied here, the level of postmerger concentration appears to provide a better screening role in identifying mergers likely to increase price than the change in market concentration.<sup>52</sup>

Figure 2 shows that neither the level of market concentration nor the change in the level of market concentration alone predicts which mergers will result in price increases. This finding, however, should not be surprising. Other factors also play an important role in determining how mergers affect competition. Unilateral effects theories, for example, predict that mergers of firms producing highly substitutable products are more likely to result in price increases than those of firms producing more distant substitutes. Because food retailers are differentiated in terms of the types of products they carry, store locations, and the types of consumers they target, the impact of a merger on prices will likely also depend on the similarities of the merging firms.<sup>53</sup> Thus, although we find that market share thresholds do not identify all problematic mergers, they can provide a useful screening role in helping antitrust agencies determine which proposed mergers to subject to an extensive premerger review.<sup>54</sup>

## 5 | CONCLUSION

Antitrust enforcement agencies must determine if the loss of competition in a merger is sufficient to lead to a price increase. The answer to this question depends not only on market concentration, but also on market specific supply and demand factors such as the degree of product differentiation, ease of entry and expansion, and the model of competition that best fits the industry. By examining a relatively large number of mergers taking place in the same industry at roughly the same time, we can draw some conclusions about how changes in market structure caused by mergers affect prices. Despite the relative ease of entry and expansion in the supermarket industry, we find evidence that horizontal mergers can result in significant increases in consumer prices and thereby harm consumers. The mergers that result in higher consumer prices are largely those that we would expect, *a priori*, to be problematic. When market concentration increases in highly concentrated markets as the result of a horizontal merger, we frequently—but not always—observe significant increases in prices. Our results are consistent with the broader merger retrospective literature: mergers on the enforcement margin are, on average, associated with price increases.

Because the *ex post* merger evaluation literature has focused on estimating the price effects of mergers on the enforcement margin, there is little empirical evidence describing how presumably benign mergers affect consumer prices. Our study helps fill this gap. We find that mergers in unconcentrated or moderately concentrated markets are often associated with reductions in consumer prices. This result supports the presumption that competitively benign mergers can confer significant efficiencies that are passed on to consumers in the form of lower prices. Overall, our study's findings support the use of market concentration as a screen (as employed by the *Horizontal Merger Guidelines*) to aid antitrust agencies in efficiently deploying scarce enforcement resources.

## NOTES

- <sup>1</sup> See Section 1 of the 2010 U.S. Department of Justice (DOJ)/Federal Trade Commission (FTC) *Horizontal Merger Guidelines* for a clear description of the economic logic underlying U.S. horizontal merger policy.
- <sup>2</sup> The Herfindahl-Hirschman Index is defined as the sum of the squared market shares of market participants, where firm's market shares are typically measured as percentage points.
- <sup>3</sup> Prager and Hannan's (1998) study of banking mergers, Kim and Singal's (1993) study of airline mergers, and Dafny's (2009) study of hospital mergers are notable exceptions.
- <sup>4</sup> The 2010 *Horizontal Merger Guidelines* predict that mergers in highly concentrated markets (mergers in markets with an HHI greater than 2,500 and an increase in HHI of more than 200) will likely enhance market power, while mergers in unconcentrated markets (with an HHI of less than 1,500) resulting in a small change in market concentration are unlikely to be anticompetitive.
- <sup>5</sup> See Kwoka (2013) and Ashenfelter et al. (2014) for recent surveys.
- <sup>6</sup> We exclude other retail formats in the Trade Dimensions Grocery dataset—limited assortment, natural/gourmet food, warehouse, and military commissary—because they are so differentiated from traditional supermarkets.
- <sup>7</sup> See the Council's web page for more details <http://www.coli.org/>
- <sup>8</sup> In the first, second, and third quarter of each year, staff of participating Chambers of Commerce collect price quotes for 60 distinct products corresponding to broad categories of consumer expenditures, including housing, energy, food, transportation, and health care.
- <sup>9</sup> The online appendix contains a list of the CCER grocery products.
- <sup>10</sup> The U.S. Office of Management and Budget has devised the methodology used to construct CBSAs. For a detailed discussion of this methodology see, <http://www.whitehouse.gov/sites/default/files/omb/fedreg/metroareas122700.pdf>
- <sup>11</sup> We observe markets with as few as one retailer surveyed within a quarter and others with more than 30 in our data. In the median market/quarter, five retail outlets and four retailers are surveyed; that is, in the median market prices in two outlets of a single retailer have been recorded.
- <sup>12</sup> We observe prices from two quarters in 2005, and three quarters in 2006–2009. Thus, a given price quote (retailer/CBSA/product) can contain up to 14 quarterly observations.
- <sup>13</sup> The instruction manual given to participants can be found at: <http://www.coli.org/surveyforms/colimanual.pdf> (last visited 7/17/2012).
- <sup>14</sup> Although it is our understanding from discussions with CCER staff that surveyors are supposed to track the prices of identical grocery items over time, in some cases, a number of grocery items could be selected to represent a CCER product category, for example, the price of vacuum-packed coffee could be for an 11.5 ounce package of Maxwell House, Hill's Brothers, or Folgers coffee. If the sampled item corresponding to a product category at a retail outlet changed over time, price changes might reflect changes in sample composition rather than a true price change. To address this possibility, we have compared the CCER price data to prices from the IRI Marketing Dataset (Bronnenberg et al. (2008)) for the eight product categories common to both datasets, and find that the observed price variation within a price series is very similar in the two datasets (see the discussion in the online appendix for details). For this reason, we do not think this form of measurement error is significant in the CCER data.
- <sup>15</sup> Datasets with more detailed price data have much more limited geographic coverage. For example, the IRI Marketing Dataset, only provides data for 47 relatively large geographic markets (Bronnenberg et al. 2008).
- <sup>16</sup> We do not formally define the antitrust markets in which retailers compete (see, e.g., the discussion of market definition (Section 4) of the 2010 *Horizontal Merger Guidelines*). Instead, our goal is to identify the geographic region and set of competitors most likely affected by a horizontal merger of supermarket retailers.
- <sup>17</sup> Recent empirical work shows that supermarkets change their prices in response to competition from supercenters and possibly club retailers suggesting that these retail formats compete with one another, see, for example, Hausman and Liebttag (2007), Basker, and Noel (2009), and Courtemanche and Carden (2014). We are unaware of empirical work that directly measures substitution between supermarkets, supercenters, club stores, and other types of food retailers such as drug stores or convenience stores.
- <sup>18</sup> Our description of supermarket, club, and supercenter retailers is drawn from Hanner et al. (2015) which describes market dynamics in the U.S. supermarket industry during our sample period.
- <sup>19</sup> See Ellickson (2016) for an excellent description of the evolution of the U.S. food retailing industry including the recent entry and expansion by club and supercenter retailers.

- <sup>20</sup> Authors tabulations using the information in Hanner et al. (2015) and Tables 1 and 3.
- <sup>21</sup> Of the 11 supermarket chains involved in the mergers we study, five were operated large chain supermarkets (Albertsons, A&P, Kroger, Pathmark, and SuperValu) and six were operated small chains (Associated Wholesale Grocers, Buehler Foods, CV Food Liner, CVM Inc., Houchens, and Rouse Enterprises).
- <sup>22</sup> The large literature cited in the introduction has shown that significant horizontal mergers can increase consumer prices. Market entry in food markets typically causes prices to fall. Moreover, the amount by which prices fall depends on the magnitude of market entry as well as how the entrant's product compares to those offered by incumbent retailers. Basker and Noel (2009), Hausman and Leibtag (2007), and Hosken, Olson, and Smith (2016), for example, find that the estimated price decline following entry varies from roughly 1% to as much as 7%. Hosken, Olson, and Smith (2016) also show that exit can affect the market price for food retailers.
- <sup>23</sup> Most medium-sized and all large CBSAs experience some entry and exit during our sample period. As a result, the large markets affected by mergers in our study also experience some entry and exit. However, as shown in Hanner et al. (2015), the aggregate effect of this entry and exit activity is much smaller (representing less than 1% of market sales) than the changes in market structure caused by the mergers in the large markets studied here.
- <sup>24</sup> We have been unable to find an article documenting the merger which took place in Fort Smith, Arkansas.
- <sup>25</sup> None of the significant mergers observed during the sample period involved either club store or supercenter retailers.
- <sup>26</sup> We did not estimate the price effects of 12 horizontal mergers that took place during our time window. It was impossible to estimate price effects for five of these mergers because the mergers took place in either 2005 or 2009; that is, there was no data describing prices either pre- or postmerger. We restricted our analysis to mergers occurring in 2007 or 2008 such that we would have at least 1 year pre- and postmerger to estimate how mergers changed prices. Because our price data only contains data for part of 2005 (the first quarter is missing), we dropped the six mergers that took place in 2006. In addition, three of the markets that experienced mergers in 2006 also experienced other large changes in market structure (one experienced entry, another exit, and the third entry, exit, and multiple mergers. Finally, one merger took place in 2007, however, that market also experienced entry and exit in the sample period.
- <sup>27</sup> A list of the comparison group CBSAs used in the study is available in the online appendix.
- <sup>28</sup> Lal and Matutes (1994) describe how offering low prices on a subset of popular items can be a profitable pricing strategy and MacDonald (2000), Chevalier et al. (2003), Hosken and Reiffen (2004) provide empirical evidence showing that when grocery items become more popular (experience a seasonal demand spike) retail prices fall.
- <sup>29</sup> We use the estimated grocery revenues of all club, supercenter, and supermarket retailers within the broad geographic regions (CBSAs) affected by mergers in calculating market concentration (HHI) shown in Table 1.
- <sup>30</sup> Appendix Table 4 provides information describing the mergers we could not study using our methodology (the analogue to Table 1). A comparison of Tables 1 and Appendix Table 4 shows two major differences between the mergers we were able to examine and those that we excluded. First, overall, the excluded mergers took place in smaller markets. For instance, three of the 12 excluded mergers took place in very small markets (with fewer than 10 stores), and only one merger took place in a large market (Supervalu's purchases of the Jewel/Osco chain in Chicago). Second, in part because the excluded mergers took place in smaller markets, these markets tended to be more concentrated premerger. For example, Table 1 shows that three of the studied mergers studied took place in unconcentrated markets (with an HHI <1,500), while only one of the omitted mergers took place in an unconcentrated market.
- <sup>31</sup> To provide the reader with a sense of how the mergers affected market concentration in the regions located close to the merging firms' stores, we have also calculated the level and change of the HHI in the region immediately surrounding each of the merging firms' stores (defined as a 6-mile circle centered at the location of a store owned by one of the two merging firms). By construction, this technique generates as many "local markets" as there are stores owned by the merging firms. The online Appendix Table 4 presents descriptive statistics of the empirical distributions of the level and change in market concentration corresponding to each of the 14 studied mergers. Qualitatively, market concentration measured at the CBSA level and within the region immediately surrounding the affected stores were quite similar (with a correlation coefficient of 0.92). The level of market concentration (HHI) in the smaller regions tends to be larger than in the CBSA because (in most cases) fewer independent firms operate within subregions of a CBSA.
- <sup>32</sup> Most studies that exploit geographic variation in how mergers affect pricing using an identification strategy similar to ours. Examples include studies of mergers in the airline industry (Borenstein, 1990; Kim & Singal 1993), banking (Prager & Hannan, 1998; Focarelli & Panetta, 2003), gasoline refining and distribution (Taylor & Hosken 2007; Simpson & Taylor 2008), and hospitals (Haas-Wilson & Garmon 2011; Tenn 2011).
- <sup>33</sup> To our knowledge, the synthetic control estimator has not been used to estimate the price impact of mergers.
- <sup>34</sup> We use the Stata code developed by Sergio Correia (reghdfe.ado) available at <https://ideas.repec.org/c/boc/bocode/s457874.html> (last visited September 23, 2016).
- <sup>35</sup> For the larger mergers we have been able to identify the dates the transactions closed, for example, A&P's merger with Pathmark. For smaller mergers, such as the transfer of ownership of a handful of stores in a small CBSA, we have not been able to identify the precise date the merger became effective.
- <sup>36</sup> Two of the mergers (in Evansville and Topeka) were consummated in the first half of 2008. For these transactions, we assume the effects of the merger are felt within 6 months. That is, pricing observed in 2009 represents how prices changed as the result of the merger.

- <sup>37</sup> Within market expansion or contraction by incumbent retailers has been shown to affect market prices in previous research, see, for example, Basker and Noel (2009). We have estimated a model that includes variables that measured within-market expansion or contraction by incumbent supermarket and supercenter retailers as controls for within-market changes in retail competition. The inclusion of these variables, however, did not have a meaningful impact on the estimated merger price effects (see online Appendix Table 5).
- <sup>38</sup> For both of these estimators, we use the broad comparison group.
- <sup>39</sup> In our data, this is a potentially important concern. Although no market in our data is predicted to have a probability of experiencing an economically significant merger near 1 (the largest estimated propensity score in our data is 0.767), we observe many markets with very low estimated probabilities of experiencing mergers.
- <sup>40</sup> Candidate variables included in this analysis are the levels of demographic variables from the first time period of our data (2004), including population, population density, number of households, income, school age population, average people per household, percent of population in poverty, percent of school age population in poverty, percent Hispanic, percent black; and percentage changes (from 2000 to 2004) in population growth, median income, the poverty rate, the school age poverty rate, black population, Hispanic population, and premerger market characteristics (measured in 2004) including the price level, HHI, grocery sales, presence of supercenters, presence of club stores, and market concentration. We implement this estimator using a logit model. Results from this estimation are available in the online Appendix Table 7.
- <sup>41</sup> Our implementation uses the Stata code from Nichols (2007, 2008).
- <sup>42</sup> Allain et al. (2013) use this propensity score estimator in estimating the effect of a major merger of French food retailers on consumer prices.
- <sup>43</sup> The absolute value of the estimated price change increased in Detroit, San Jose, San Francisco, Albuquerque, Evansville and Muskogee, decreased in New York, Philadelphia, Fresno, New Orleans, and Topeka, and was largely unchanged in Fort Wayne, Oklahoma City, and Fort Smith.
- <sup>44</sup> For example, the algorithm predicts that the best comparison price (synthetic control) for Oklahoma City, is the sum of 0.20 times the price index of Providence, RI; 0.19 times the price index of Tampa, FL; 0.16 times the price index of Paducah, KY; 0.12 times the price index of Cedar City, UT; 0.10 times the price index of Tuscaloosa, AL; and smaller proportions of 10 additional CSAs.
- <sup>45</sup> The Stata programs implementing the synthetic treatment estimator are available at: <http://web.stanford.edu/~jhain/synthpage.html>, (last visited October 6, 2015).
- <sup>46</sup> Prices are all normalized relative to the first quarter of 2006 ( $\delta_{j,Q1,2006} = 0$  for all regions  $j$ ). All included treatment and comparison markets report a price in the first quarter of 2006.
- <sup>47</sup> Recall that to avoid contamination bias, the year the merger occurred was excluded from the empirical analyses (and is also removed from Figure 1).
- <sup>48</sup> In implementing the synthetic control group estimator, we have used all regions in the broad comparison group.
- <sup>49</sup> As noted above, if a comparison market does not have data for the same time periods as the treatment market, it is dropped from the synthetic control model.
- <sup>50</sup> The postmerger HHI is equal to the sum of the premerger HHI and the change in HHI shown in Table 1.
- <sup>51</sup> This can be more clearly seen in the figure in the appendix that plots the change in market concentration and the change in price (the analogue to Figure 2).
- <sup>52</sup> We have also examined the relationship between the postmerger level of concentration or change in concentration using alternative measures of market concentration, (e.g., market concentration measured within either 3 or 6 miles of a store owned by the merging firms). In all cases, we find qualitatively similar results to those shown in Figure 2: both the level of postmerger concentration and the change in concentration are positively correlated with the change in postmerger prices. However, only the level of postmerger concentration is statistically related to postmerger prices (at either the 5 % or 10% significance level). The results from this analysis are shown in online Appendix Table 7.
- <sup>53</sup> Antitrust economists have developed a number of techniques to measure the intensity of competition between competing retailers beyond market concentration to help identify which retailing mergers are most likely to be problematic (see Hosken & Tenn [2016] for a recent survey).
- <sup>54</sup> In related work, Hosken, Olson, and Smith (2016) examine the efficacy of using market entry and exit studies to forecast the likely competitive impact of horizontal mergers. Implicitly, this methodological approach assumes that the price impact of entry (exit) is the reverse of (the same as) a horizontal merger. That is, the estimated reduction in market prices following entry would be roughly the same magnitude (but opposite in sign) as a horizontal merger of similar size. Hosken, Olson, and Smith evaluate this methodological approach by estimating the price impact of market entry and exit in the supermarket industry. They conclude that studies of market exit are unlikely to inform merger analysis (more often than not market exit is associated with reductions in market price). Their findings for entry studies are more promising. Although the authors find evidence that the price impact of entry is biased down (in absolute value), overall, significant market entry appears to lower market prices. Moreover, when the authors compare the estimated price impact of entry to the estimated price effects of mergers found in this study, they note that they are of a similar magnitude. For this reason, Hosken, Olson, and Smith conclude that well-executed entry studies can provide useful information to aid antitrust enforcers in identifying potentially anticompetitive mergers.

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## SUPPORTING INFORMATION

Additional Supporting Information may be found online in the supporting information tab for this article.

**How to cite this article:** Hosken DS, Olson LM, Smith LK. Do retail mergers affect competition? Evidence from grocery retailing. *J Econ Manage Strat*. 2018;27:3–22. <https://doi.org/10.1111/jems.12218>

# **EXHIBIT F**

# Food Insecurity and Hunger

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## Key Findings:

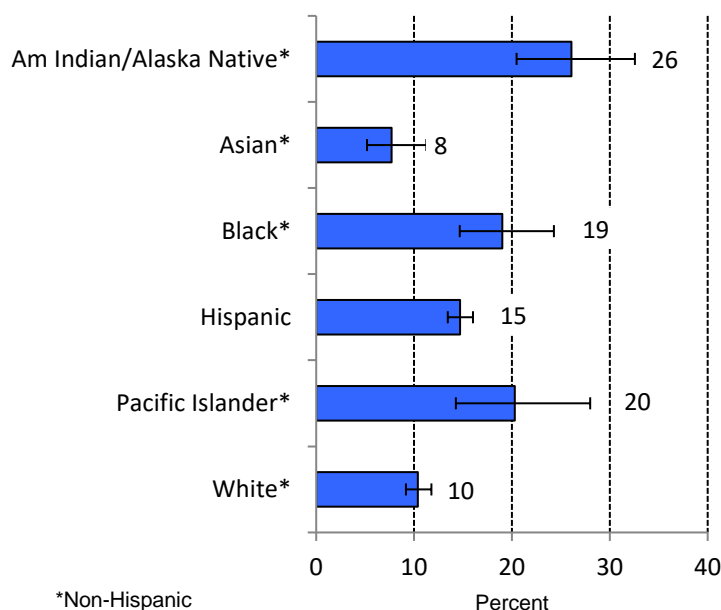
- For 2014-2016 about 12 percent of Washington residents were food insecure and 5 percent had very low food security (formerly called food insecure with hunger) compared to 13 percent and 5 percent for the U.S.<sup>1,a</sup>
- Based on 2011 survey data from the Behavioral Risk Factor Surveillance System (BRFSS), among Washington women ages 18-44, about 16 percent reported that in the 12 months before the survey their household cut the size of meals or skipped meals because there was not enough money to buy food. Of those women, about 31 percent reported this happened almost every month. (Data not shown)<sup>2</sup>
- In the 2016 Washington Healthy Youth Survey (HYS), about 11 percent of 8<sup>th</sup> grade students, 12 percent of 10<sup>th</sup> grade students and 16 percent of 12<sup>th</sup> grade students reported that their family had reduced or skipped meals in the last 12 months because there was not enough money to buy food. These figures are similar to the 2014 HYS results.<sup>3,b</sup>

**Definition:** Food insecurity is the limited or uncertain availability of nutritionally adequate and safe foods, or limited or uncertain ability to acquire acceptable foods in a socially acceptable way.

- Among 10<sup>th</sup> graders, Black, Hispanic, and Native Hawaiian and Pacific Island students were more likely than White students to report that their family skipped meals or reduced meal size in the past year due to lack of money. There were no differences by sex.<sup>3,b,c,d</sup>
- In state fiscal year 2015, about 582,000 people participated in Washington's Basic Food Program each month. The proportion of the state's population that received Basic Food declined from 15.8% in fiscal year 2014 to 15.0% in fiscal year 2015. About 37 percent of those receiving Basic Food were children.<sup>4</sup>
- Health effects of hunger and food insecurity in children are associated with more psychosocial problems; more frequent colds, ear infections, anemia, asthma, and headaches; impaired cognitive functions; and poorer academic achievement.<sup>5,6</sup>
- The Healthy People 2020 objective is to reduce food insecurity to 6 percent among US households. Washington has not yet met this objective.<sup>7</sup>

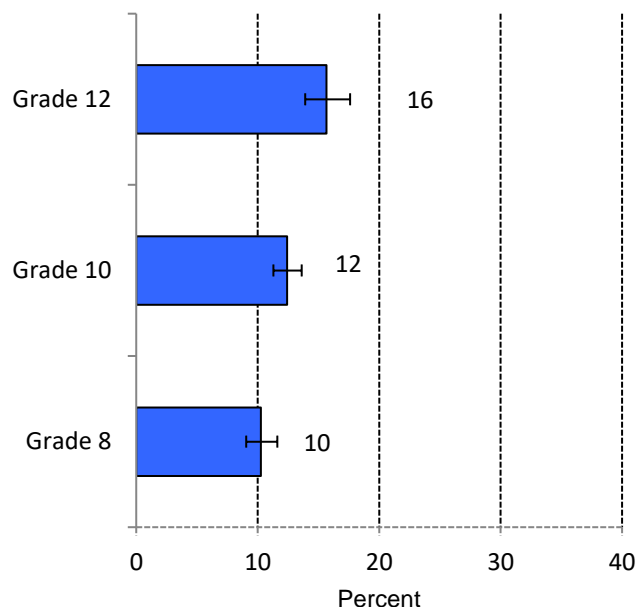
## Race and Ethnicity<sup>3,b</sup>

**Family Reduced or Skipped Meals in Last Year  
Because Not Enough Money to Buy Food, By Race,  
Grade 10, WA HYS 2016**



## Grade<sup>3,b</sup>

**Family Reduced or Skipped Meals in Last  
Year Because Not Enough Money to Buy  
Food By Grade, WA HYS 2016**



### Data Sources

1. Coleman-Jensen A., Nord, M., Andrews M., and Carlson S. Table: Prevalence of household-level food insecurity and very low food security by State, average 2014-2016. In *Household Food Insecurity in the United States in 2014-2016*. ERR-141, U.S. Department of Agriculture, Economic Research Service. Retrieved January 2018, from [www.ers.usda.gov/media/9463/mapdata2016.xls](http://www.ers.usda.gov/media/9463/mapdata2016.xls)
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7. Healthy People 2020, US Department of Health and Human Services, Accessed online at: <http://www.healthypeople.gov/2020/default.aspx>

### Endnotes

- a. Very low food security: In these food-insecure households, normal eating patterns of one or more household members were disrupted and food intake was reduced at times during the year because they had insufficient money or other resources for food. In previous reports, these households were described as "food insecure with hunger." Retrieved January 2018, [www.ers.usda.gov/media/9463/mapdata2016.xls](http://www.ers.usda.gov/media/9463/mapdata2016.xls)
- b. Based on question: "How often in the past 12 months did you or your family have to cut meal size or skip meals because there wasn't enough money for food? [Almost every month; Some months but not every month; Only 1-2 months; Did not have to skip or cut the size of meals.]"
- c. Significance from the Healthy Youth Survey is based on chi-square testing with significance level at  $p < 0.05$ .
- d. Hispanic is treated as a separate racial category. American Indian/Alaska native, Asian, Black, NHOPI and White are all non-Hispanic.

For persons with disabilities, this document is available on request in other formats. To submit a request, please call 1-800-525-0127 (TDD/TTY 1-800-833-6388).

# **EXHIBIT G**

## Washington State Food Security Surveys: Cross-sectional findings from survey waves 1-4, 2020-2023

### Research Brief 14

#### About the WAFOOD Surveys

The Washington State (WA) Food Security Surveys (WAFOOD) first launched as an effort to track impacts of the COVID-19 pandemic on the health, economic well-being, and food needs of Washingtonians. To date, four survey waves have been conducted:

- Wave 1: June - July 2020
- Wave 2: Dec 2020 - Jan 2021
- Wave 3: July - Aug 2021
- Wave 4: Dec 2022 - Jan 2023

The WAFOOD surveys intentionally oversample households with lower incomes and those using food assistance, to provide deeper insights on food insecurity throughout the state. This research brief presents **cross-sectional** findings from WAFOOD Waves 1-4, with data from the full sample of respondents in each wave (see Table 1 for respondent characteristics). Because the majority of respondents in each wave were new, this brief does not draw conclusions about changes over time. For more information on how to interpret these findings, see page 4 of this brief.

#### Across the Four WAFOOD Waves, Between 27% and 49% of Surveyed Households Experienced Food Insecurity

- Across WAFOOD Waves 1-4, which each captured different samples of respondents, the highest proportion of self-reported food insecurity was in Wave 4, at 49% of the sample (winter 2022-2023) (Figure 1).
- The lowest proportion of food insecurity in the first four WAFOOD surveys, 27% of the sample, was in Wave 2 (winter 2020-2021).

#### Key Findings

1. From four survey waves conducted with different samples of WA residents between June 2020 and January 2023, between 27% and 49% of households experienced food insecurity.
2. Food assistance use was more commonly reported by households experiencing food insecurity.
3. Regardless of food security status, reported food assistance use was more common during all four survey waves than estimates of pre-pandemic usage.<sup>a</sup>
4. During Waves 1 and 2, overall per-person food spending was lower than pre-pandemic estimates, with higher grocery costs and lower eating out costs. In Wave 3, participants reported the lowest food spending of all waves. In Wave 4, food spending exceeded pre-pandemic levels for both groceries and eating out.
5. In most survey waves, more than half of respondents experiencing food insecurity reported feeling depressed, anxious, or stressed.

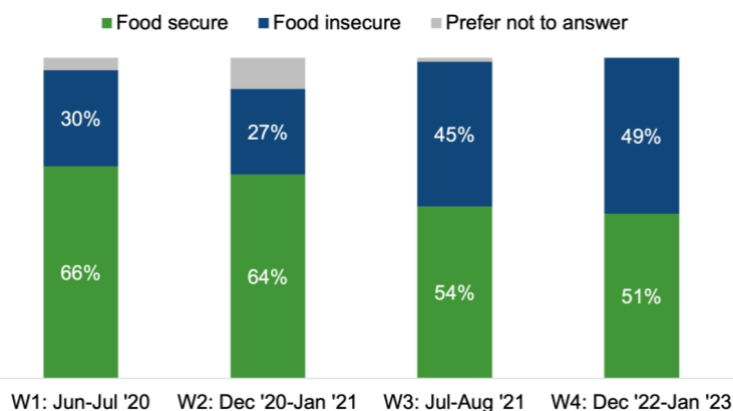


Figure 1. Percentage of WAFOOD4 households classified as food secure or food insecure in each survey wave<sup>b</sup>

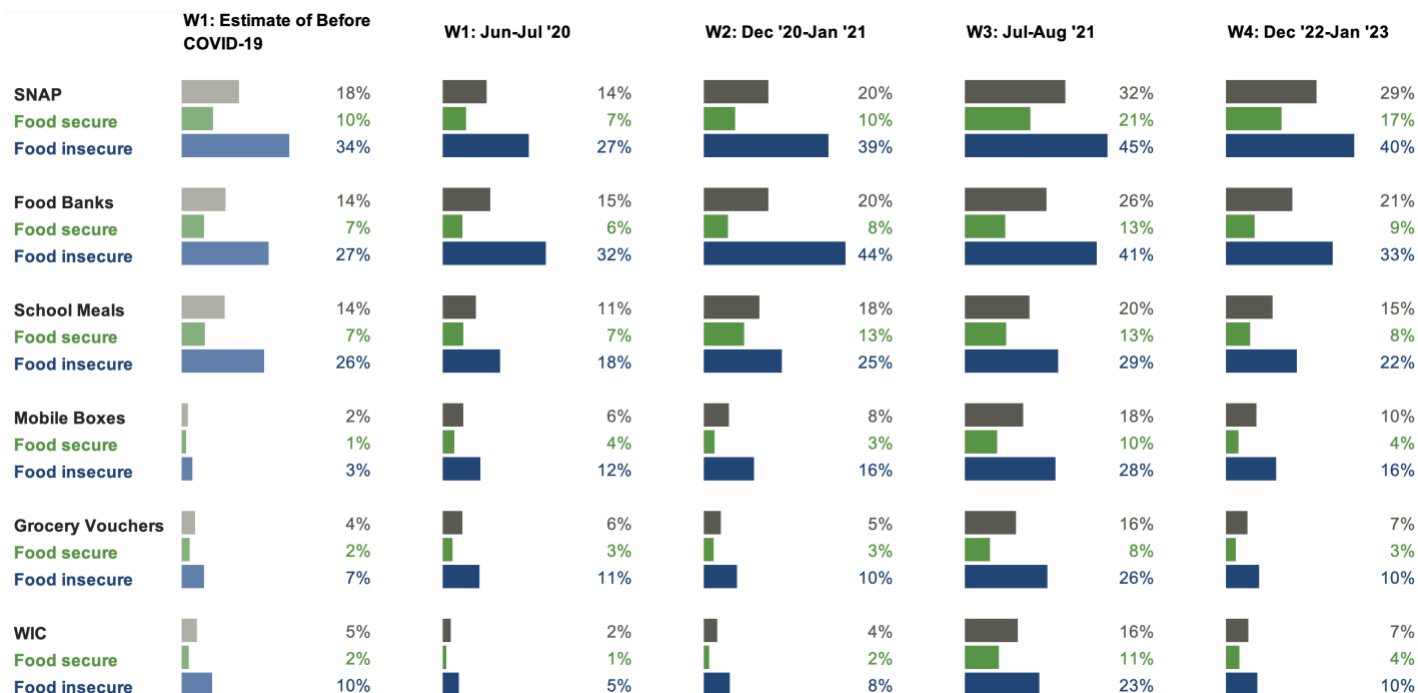


Figure 3. Reported use of food assistance programs in the past 30 days by WAFOOD households (Waves 1-4), by food security status

## In All Survey Waves, Food Insecure Households Were More Likely to Have Used Food Assistance

- Across survey waves, 60-79% of respondents in households experiencing food insecurity reported use of at least one food assistance program in the past 30 days (Figure 2).
- In all survey waves, reported use of any type of food assistance was higher among households experiencing food insecurity.
- Compared to estimates of pre-pandemic usage, reported use of any type of food assistance program was higher during all four survey waves, regardless of food security status.<sup>a</sup>

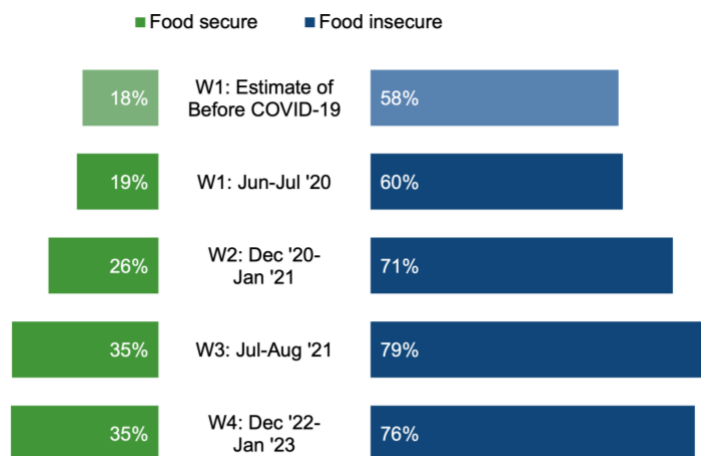


Figure 2. Reported use of at least one type of food assistance in the past 30 days (Waves 1-4), by food security status<sup>a</sup>

## Use Of All Food Assistance Programs Was More Common Among Households Experiencing Food Insecurity, But Varied Over Time by Type

- Among households experiencing food insecurity, food banks were the most commonly reported form of food assistance used during Waves 1 and 2, and SNAP was the most commonly reported form of food assistance used during Waves 3 and 4 (Figure 3).
- Among food secure households, SNAP use was more commonly reported than other food assistance programs (as high as 21% of food secure households in Wave 3).

## Average Food Expenditures Were Lower in Waves 1-3 Compared to Pre-Pandemic Spending, but Exceeded Pre-Pandemic Spending in Wave 4

- During WAFOOD Waves 1 through 3, which took place in 2020 and 2021, total food expenditures (grocery and eating out) averaged lower than respondent-estimated pre-pandemic expenditures on a monthly per-person basis (Figure 4).

- During Waves 1 and 2, although total monthly per-person food expenditures averaged lower than pre-pandemic levels, grocery expenditures were higher and eating out expenditures were lower than pre-pandemic levels.
- During WAFOOD Wave 4 (winter 2022-2023), average per-person food expenditures exceeded pre-pandemic levels for groceries and eating out.<sup>a</sup>
- These data reflect broader trends: according to the USDA, food prices increased by about 10% in 2022 and were estimated to increase by an additional 7% in 2023.<sup>c</sup>

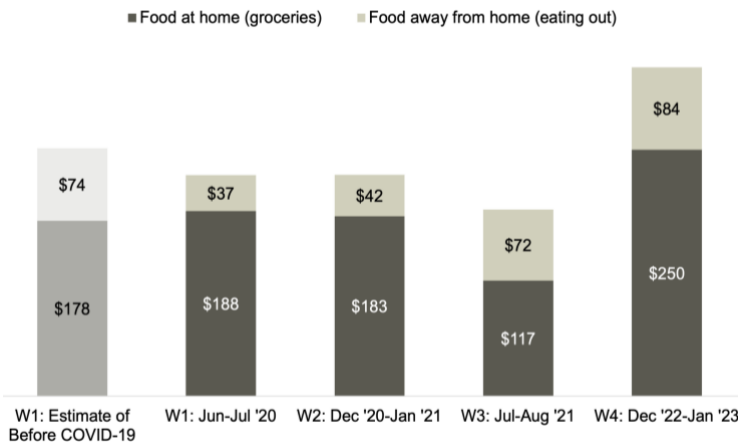


Figure 4. Food expenditures per person in the past month as reported by WAFOOD households (Waves 1-4)

## Anxiety, Depression, and Stress Higher in Households Experiencing Food Insecurity

- Although households experiencing food insecurity had a higher prevalence of depression, anxiety, and stress in Waves 1-4, food secure households also reported these experiences (45-74% in households experiencing food insecurity vs. 22-40% in food secure households) (Figures 5a-c).
- Regardless of food security status, depression, anxiety, and stress were, on average, more common in Wave 2 as compared to Wave 1.
- During Wave 4, households experiencing food insecurity reported higher prevalence of depression, anxiety, and stress compared to Wave 3.

### Depression



Figure 5a

### Anxiety

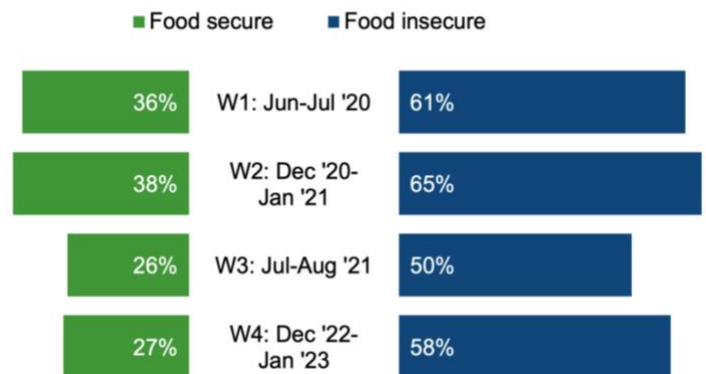


Figure 5b

### Stress

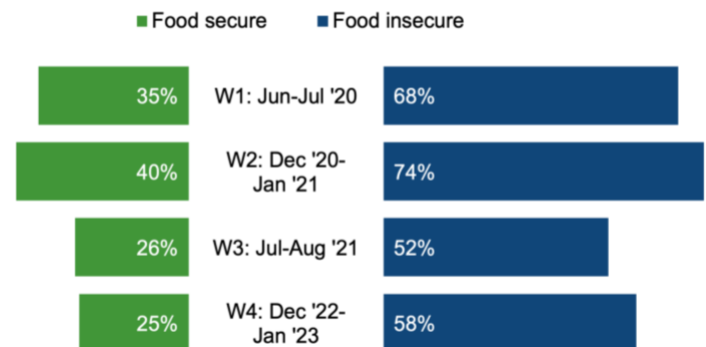


Figure 5c

Figures 5a-c. Reported depression (5a), anxiety (5b), or stress (5c) in the past month by WAFOOD households (Waves 1-4), by food security status<sup>d</sup>

Table 1: Characteristics of respondents in WAFOOD Survey Waves 1-4 compared to overall demographics of Washington State<sup>†</sup>

	WAFOOD1 Respondents Jun - Jul 2020 2,615	WAFOOD2 Respondents Dec 2020 - Jan 2021 3,501	WAFOOD3 Respondents Jul - Aug 2021 3,074	WAFOOD4 Respondents Dec 2022 - Jan 2023 5,052	Washington State Jun - Jul 2020 7,614,893
<b>Dates data were collected:</b>					
<b>Total number of individuals:</b>					
<b>Age (years)</b>					
18 to 34	24%	21%	30%	24%	31%
35 to 54	43%	44%	41%	41%	33%
55 and older	32%	34%	28%	34%	36%
<b>Gender identity</b>					
Woman	81%	83%	72%	77%	50%
Man	15%	13%	23%	19%	50%
Transgender, nonbinary, or self-described	3%	3%	4%	3%	--
<b>Race and/or ethnicity</b>					
Non-Hispanic White	73%	75%	58%	70%	67%
Non-Hispanic Black	4%	3%	4%	5%	4%
Hispanic or Latinx	8%	8%	25%	12%	13%
Non-Hispanic Asian	6%	5%	5%	4%	9%
AI/AN, NH/OPI, or self-described <sup>‡</sup>	5%	5%	6%	5%	11%
<b>Bachelor's degree or higher</b>					
Some college or less	43%	49%	50%	56%	63%
Bachelor's degree or higher	54%	50%	49%	43%	37%
<b>Annual household income</b>					
<\$35,000	30%	32%	41%	40%	20%
\$35,000 to \$74,999	27%	29%	24%	30%	27%
\$75,000+	33%	29%	25%	24%	52%
<b>Married</b>	49%	48%	52%	54%	50%
<b>Children in household</b>					
One or more children	42%	44%	53%	46%	30%
No children	56%	56%	46%	54%	70%

<sup>†</sup>US Census Bureau 2019 American Community Survey 1-year estimates.<sup>‡</sup>AI/AN=American Indian or Alaskan Native, NH/OPI=Native Hawai'ian or Other Pacific Islander.

## How to Interpret These Findings

The WAFOOD surveys intentionally oversampled households with lower incomes and those using food assistance, in order to provide deeper insights on food insecurity throughout the state. All survey waves used a mix of convenience and recontact sampling. For the convenience sample, the research team, together with a diverse network of partner organizations across WA, recruited new respondents via social media, email, and text. For the recontact sample, the research team asked individuals who completed prior surveys and agreed to be recontacted to participate in newer waves directly via email. All four WAFOOD surveys were conducted online.

The limitations of convenience sampling and an online format mean that some groups of Washingtonians could have been overrepresented, underrepresented, or in some cases—such as those without access to computers, tablets, smart phones, or the internet—missed entirely. In interpreting these findings, it is important to remember that WAFOOD data reflect those who responded to the surveys, but do not necessarily represent WA's population as a whole; Table 1 shows how respondent demographics compared to the state overall. Nevertheless, WAFOOD data enable an important examination of economic and food needs among WA residents.

This research brief presents repeated **cross-sectional data** from respondents of WAFOOD Waves 1-4, respectively, with data from the full sample of respondents in each wave. Table 1 shows the demographic characteristics of Wave 1-4 participants alongside the demographic characteristics of WA overall. Though some respondents participated in multiple survey waves, the samples were not identical across waves. In other words, each WAFOOD survey wave included a different pool of respondents. Because the majority of respondents in each wave were new, this brief does not draw conclusions about changes over time. For longitudinal data on the participants who completed multiple survey waves, see [Research Brief 15](#).

## Recommendations for Future Research

The four waves of the Washington State Food Security Survey (WAFOOD) conducted between June 2020 and January 2023 have been instrumental in identifying trends in the health, economic well-being, and food needs of Washington households during the COVID-19 pandemic. Though the federal public health emergency declaration ended in May 2023, COVID-19 continues to have global impacts, and the financial repercussions of the pandemic are unlikely to be short-lived.

Existing national food security monitoring does not provide the resolution or breadth of data needed to identify trends, disparities, and actionable strategies for state and local stakeholders, particularly as pandemic funding related to food security ends. **To support the needs of Washington households we recommend continued and expanded WAFOOD efforts to advance the following goals:**

1. By continuing to monitor food security, economic needs, and well-being among Washingtonians, we can **track evolving food and assistance needs**, especially following the end of federal pandemic boosts to food assistance in March 2023.
2. By collecting additional WAFOOD data that oversample lower-income households, we can **pick up on important trends among households that are disproportionately vulnerable to continued economic impacts** and identify strategies for assistance and support.
3. By gathering additional WAFOOD data from a demographically representative sample, we can **provide estimates of the prevalence of food insecurity** that better reflect the state's whole population. The addition of alternative survey formats (such as telephone) would help reach more of the state's population.
4. By obtaining additional qualitative data, we can **contextualize survey data with people's stories and experiences**. What critical information is easily missed by survey questions but essential to our understanding of how to better support Washington families?
5. By conducting deeper analyses of existing WAFOOD data—for example, to assess geographic trends or factors linked with transitioning out of food insecurity—we can **better understand the nuances of food insecurity within Washington**.
6. By implementing analyses that link WAFOOD data to external data sources, such as food bank inventory of food assistance enrollment, we can **better understand how food insecurity is linked to other indicators**.

## Technical Notes

- a. In Wave 1, participants were asked to report both their current and their pre-pandemic experiences ("Before COVID-19"), where pre-pandemic was defined as any time before March 15, 2020.
- b. In this brief, *food security* is always presented in aggregate and refers to *high food security* and *marginal food security*. *Food insecurity*, where presented in aggregate, is the sum of *low food security* and *very low food security*. The USDA food security scale categories, based on the USDA 18-item food security scale, are:
  - High food security: no reported indications of food-access problems or limitations.
  - Marginal food security: one or two reported indications—typically of anxiety over food sufficiency or shortage of food in the house. Little or no indication of changes in diets or food intake.
  - Low food security: reports of reduced quality, variety, or desirability of diet. Little or no indication of reduced food intake.
  - Very low food security: reports of multiple indications of disrupted eating patterns and reduced food intake.
- c. USDA findings on food price increases in 2022 and 2023 can be found here: <https://www.ers.usda.gov/data-products/food-price-outlook/summary-findings/>.
- d. Depression and anxiety were measured using the Patient Health Questionnaire-4 (PHQ-4) subscales.

## Acknowledgements

The WAFOOD team wishes to thank the WA Department of Agriculture for their generous support in funding WAFOOD4 and United Way King County for their support of survey translations. We also thank funders of prior waves, including University of Washington (UW) Population Health Initiative, the UW School of Public Health and Department of Environmental and Occupational Health (DEOHS), the WA Department of Agriculture, the Paul G. Allen Family Foundation, and other private philanthropy. We also thank the numerous community partners and stakeholders who helped shape this project. Among those are: WA Department of Health, WA Department of Agriculture, WA Anti-Hunger & Nutrition Coalition, WA SNAP-Ed, King County Local Food Initiative, Northwest Harvest, WA State University (WSU) Extension, United Way of WA, and numerous food banks, food pantries, charitable organizations, community organizations, county health departments, and local health jurisdictions. The Nutrition and Obesity Policy Research and Evaluation Network (NOPREN) and the ad-hoc COVID-19 Food Security Surveys subgroup shared valuable insights and surveys relevant to this project.

## Abbreviations

SNAP = Supplemental Nutrition Assistance Program  
 USDA = United States Department of Agriculture  
 WA = Washington State  
 WAFOOD = Washington State Food Security Survey  
 WIC = Special Supplemental Nutrition Program for Women, Infants, and Children

## Further Information

For more information and prior WAFOOD briefs:

- The WAFOOD project page <https://nutr.uw.edu/cphn/wafood/>
- The Washington State Food System Assessment [https://nutr.uw.edu/cphn\\_project/washington-state-food-systems-assessment/](https://nutr.uw.edu/cphn_project/washington-state-food-systems-assessment/)

## About the WAFOOD Team

The WAFOOD survey is a joint effort between the University of Washington (UW) and Washington State University (WSU). The WAFOOD4 team comprises **Jennifer J. Otten**, Associate Professor, Nutritional Sciences Program (NSP) and DEOHS at the UW School of Public Health (SPH); **Marie L. Spiker**, Assistant Professor, NSP, Epidemiology, and DEOHS at UWSPH; **Jane Dai**, PhD Student, Health Systems and Population Health at UWSPH; **Ashley S. Tseng**, PhD Candidate, Epidemiology at UWSPH; **James H. Buszkiewicz**, Research Investigator, Epidemiology at University of Michigan SPH; **Shawna Beese**, Assistant Professor of Rural Health Promotion at WSU Health Sciences; **Sarah M. Collier**, Assistant Professor, NSP and DEOHS at UWSPH; and **Alan Ismach**, Research Coordinator, DEOHS at UWSPH.

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## Suggested Citation

Otten JJ, Spiker ML, Dai J, Tseng AS, Buszkiewicz JH, Beese S, Collier SM, Ismach A. "Washington State Food Security Surveys: Cross-sectional findings from survey waves 1-4, 2020-2023" (June 2023). Washington State Food Security Survey. <https://nutr.uw.edu/cphn/wafood/brief-14>

*Funding note: this project was supported by funds awarded by the US Department of the Treasury. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the US Department of the Treasury. Funds are administered by the America Rescue Plan Act, State and Local Fiscal Recovery Funds, Washington State Department of Agriculture.*

# **EXHIBIT H**

**Before the Department of Justice and the Federal Trade Commission  
Response to Draft Merger Guidelines  
Docket ID FTC-2023-0043**

**Written Comments from the American Economic Liberties Project**

**September 18, 2023**

**THE PROPOSED MERGER GUIDELINES TAKE HISTORIC STEPS TO  
CENTER LABOR IMPACTS IN MERGER REVIEW**

**I. Introduction**

We submit this comment in response to the Request for Comment on Draft Merger Guidelines proposed by the Department of Justice Antitrust Division and the Federal Trade Commission (together, “the Agencies”), specifically addressing concerns about labor markets in merger review as covered in Guideline 11. The American Economic Liberties Project (“Economic Liberties”) is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States.<sup>1</sup>

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<sup>1</sup> This comment focuses on the issues of monopsony power and labor markets as they are expounded upon in Guideline 11. Economic Liberties is submitting a separate comment regarding the other proposed guidelines, which discusses structural presumptions, incipency, vertical mergers, common ownership, and serial acquisitions.

The relationship between antitrust and labor has been strained from the beginning. Although the Sherman Act was expressly intended to address the harm that corporate concentration bears on workers,<sup>2</sup> it was also used to quash union organizing. Even after the Clayton Act explicitly exempted the combination of workers from the Sherman Act's ban on restraints of trade,<sup>3</sup> federal antitrust laws continued to be used to prevent worker boycotts and strikes.<sup>4</sup> With passage of the National Labor Relations Act, collective bargaining emerged as a dominant means of countering employer power and abuses. And for good reason. Antitrust enforcers in both the private and public sector showed little concern for the power of employers in labor markets, and antitrust cases based on labor abuses have been infrequent at best.<sup>5</sup> But with increasing recognition that labor markets are more concentrated than previously understood, and better understandings of the nexus between labor market concentration and decades of wage stagnation, it is time for antitrust enforcers and allies across the labor movement to set their sights on the harm to workers stemming from corporate concentration.

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<sup>2</sup> In congressional debates around the Sherman Act, Senator John Sherman himself stated, "The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors.*" 189021 Cong. Rec. 2457 (1890) (emphasis added).

<sup>3</sup> Section 6 states, "The labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17.

<sup>4</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn. of N. Am.*, 274 U.S. 37 (1927)

<sup>5</sup> Suresh Naidu, Eric Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 552 (2018)

The Draft Merger Guidelines take historic steps to address the impact of mergers on workers. No previous iteration of the Guidelines has ever mentioned impacts to labor markets, with only passing reference to buyer-side market power, also called monopsony.<sup>6</sup> The 2010 Merger Guidelines, for instance, downplayed the importance of buyer and employer power, providing that the Agencies “do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer power.”<sup>7</sup> In the context of labor, “reduction in the quantity purchased” refers to post-merger layoffs or pay cuts, which often *are* done because the consolidated company obtained additional power in labor or product markets.. Meanwhile, merging parties have often promised increased employment and improved working conditions, although even a cursory review of past mergers reveals merging parties abandoning labor-related commitments in the aftermath of merger approvals.

With this comment, Economic Liberties lends its support to the Agencies’ efforts to mend an over century-old gap in scrutiny of the impacts of mergers on labor markets, which build on renewed study of those impacts and recent legal developments. We provide historical context for the inclusion of labor market impacts

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<sup>6</sup> The concept of market power among buyers to depress the price paid for a product first appeared in the 1984 Merger Guidelines. The 1992 Merger Guidelines were the first to include reference to “monopsony” power.

<sup>7</sup> U.S. Dep’t of Justice and the Fed. Trade Comm’n, 2010 Merger Guidelines (Aug. 19, 2010), *available at*: <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

in the updated guidelines. Finally, we offer discrete suggestions for improving upon this already-meritorious effort.

## **II. Labor Markets are Highly Concentrated.**

With intermittent variation, corporate mergers have increased in frequency and size since the FTC started consistently tracking mergers in the late 1970s.<sup>8</sup> In 1979, the first full year of premerger reporting, only 861 transactions were reported.<sup>9</sup> That number spiked to 3,087 in 1996,<sup>10</sup> and in 2021, hit a new record with 3,520 reported transactions.<sup>11</sup> Over the course of roughly the same period, accompanying this consolidation of the economy and the increasing scale of corporate mergers, real wages grew by only 0.7 percent.<sup>12</sup> Accompanying this period of wage stagnation was a rapid growth in income inequality.<sup>13</sup> So, not surprisingly, a recent study confirmed

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<sup>8</sup> In 1976, Congress passed the Hart-Scott-Rodino Act, which requires parties to report transactions exceeding certain dollar thresholds (currently any transaction over \$111.4 million) to both the Federal Trade Commission (the “FTC”) and the Department of Justice (the “DOJ”) for antitrust review.

<sup>9</sup> William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, Speech Before The Conference Board (Oct. 31, 1996), *available at*: <https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Dep’t of Justice and Fed. Trade Comm’n, Hart-Scott-Rodino Annual Report (Fiscal Year 2021), *available at*: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p110014fy2021hsrannualreport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf).

<sup>12</sup> Michael R. Strain, *Have Wages Stagnated for Decades in the US?*, AM. ENTER. INST. (June 27, 2022), *available at* <https://www.aei.org/articles/have-wages-stagnated-for-decades-in-the-us/>

<sup>13</sup> Lawrence Mishel, Elise Gould, & Josh Bivens, *Wage Stagnation in 9 Charts*, ECON. POLICY INST. (Jan. 6, 2015), *available at* <https://www.epi.org/publication/charting-wage-stagnation/>

that, “in local markets[,] ... concentration is high, and increasing concentration is associated with lower wages.”<sup>14</sup> Even labor markets with many dispersed employers can exhibit considerable monopsony power, and this is especially true in low-wage segments of the labor market.<sup>15</sup> Another study found a direct link between merger and acquisition activity, increased labor concentration, and lower wages.<sup>16</sup>

Guideline 11 of the Draft Merger Guidelines recognizes the importance of competition in labor markets and describes some of their unique characteristics, namely that labor markets are rarely, if ever, characterized as a competitive marketplace where buyers and sellers can view the different wage rates for different positions and skill sets, easily selecting the best fit based on that information. As noted in the Guidelines, labor markets exhibit high “switching” costs and search frictions. This refers to the fact that, with limited flows of information between workers and employers and the effort required on both sides to find an appropriate match,<sup>17</sup> employees have fewer opportunities to use the competitive value of their

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<sup>14</sup> Jose Azar, Ioanna Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, *J. of Human Resources, Special Issue: Monopsony in the Labor Market (Supplement)*, 57 J. HUMAN RES. 167, 197 (2022), available at: <http://jhr.uwpress.org/content/57/S/S167.full.pdf+html>.

<sup>15</sup> Ihsaan Bassier, Arindrajit Dube, Suresh Naidu, *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policies*, 57 J. HUMAN RES. S50 (2021), available at <https://jhr.uwpress.org/content/wpjhr/early/2021/04/05/jhr.monopsony.0319-10111R1.full.pdf>.

<sup>16</sup> Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUMAN RES. 200 (2022), available at <https://muse.jhu.edu/article/850939>.

<sup>17</sup> *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1207 (N.D. Cal. 2013)

services to negotiate for higher wages.<sup>18</sup> Guideline 11 lists a variety of factors contributing to high switching costs, including the process of finding, applying, interviewing for, and acclimating to a new job; geographic limitations; and the need for the worker and the employer to agree to the match. Even if two occupations or positions seem very similar, it does not mean the cost of switching from one to the other is low.

Despite these unique features that distinguish labor markets from most others, concentration and monopsony power remain harmful for similar reasons as in other markets. In fact, the proximate harms of highly concentrated markets may appear at even lower rates of concentration in labor markets than elsewhere.<sup>19</sup> This is because the monopsonist employer can simply hire someone else if a job applicant demands higher wage.<sup>20</sup>

The historic trend toward increased concentration in labor markets and other buyer-side markets, more generally, is rightly at the center of Guideline 11, as is the notion that direct evidence – like the ability to unilaterally set wages – can support a

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<sup>18</sup> *Id.*

<sup>19</sup> Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell L. Rev. 1343, 1354 (2020)

<sup>20</sup> *Cf.* Robert H. Lande, *Beware Buyer Power*, Legal Times, at 2 (July 12, 2004), available at [https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1712&context=all\\_fac](https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1712&context=all_fac) (arguing that that power buyer can take their business elsewhere if a seller refuses its demand of lower prices for inputs). Conversely, a power buyer that accounts for 20 percent of a manufacturer’s sales is an important part of that seller’s business, and the result is a seller who “may be willing to make this sale at only slightly above average variable cost and to cover their overhead from the profits on sales to their other customers, who end up paying more. *Id.*

finding that the merging firms are dominant. The Agencies propose that, “in light of their characteristics, labor markets are often relatively narrow.” **Guideline 11 can be improved upon by making clear that buyer-side power, not just in labor markets, can exist at lower levels of market concentration than in product markets.**<sup>21</sup> We propose that, similar to the structural presumption of a 30% market share set by the *Philadelphia National Bank* decision, Guideline 11 should set a lower structural presumption of 20%, based on the reality that harms from buyer power tend to manifest at lower market shares.

### **III. Labor Market Impacts Should be Incorporated in All Merger Review.**

Even where a proposed merger is not being scrutinized or challenged based on labor market concerns, interagency analysis of the potential labor market impacts of a current proposed merger are a way to invite workers and labor unions to the table, even as to mergers that are not being challenged for their potential impacts to labor markets. Such review will also enhance merger review on its own, as examining the likely effects of a merger on workers will be an excellent source of information about the merger’s likely impacts on both labor and product markets. Workers directly feel the impacts on labor markets, and workers are often more acutely aware of the anticipated layoffs from mergers – which stem from cuts in output after a firm gains market power in the product market – than antitrust enforcers have historically been.

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<sup>21</sup> *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 937 (7th Cir. 2000) (toy retailer was able to exert substantial buyer power with 20% of the national wholesale market, and a 30% share of the market among large, traditional toy manufacturers).

Both the FTC and DOJ have recently entered into Memoranda of Understanding with the National Labor Relations Board (NLRB) to enhance coordination and information sharing, training, and outreach in the context of antitrust enforcement.<sup>22</sup> In addition, several agencies have independent authority to review and challenge mergers.<sup>23</sup> These interagency partnerships should be expanded upon to facilitate seamless sharing of information across jurisdictions, bring greater resources to bear on merger review, and broaden the scope of that review even beyond the scope of a second request.

To demonstrate the importance of a methodical, concurrent review of labor market impacts even as to proposed mergers being scrutinized for non-labor market impacts, here we review three recent mergers that demonstrate the impacts of mergers on labor markets.

### **US Airways and American Airlines (2013)**

In 2013, the Association of Professional Flight Attendants, Allied Pilots Association, and Transport Workers Union endorsed a merger between US Airways and American Airlines, amid American's declaration of bankruptcy and an

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<sup>22</sup> *Memo. of Understanding Between the U.S. DOJ and the NLRB*, July 26, 2022, available at: <https://www.justice.gov/opa/press-release/file/1522096/download>; *Memo. of Understanding Between the FTC and the NLRB Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, July 19, 2022, available at: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftcnlrb%20mou%2071922.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf).

<sup>23</sup> The Surface Transportation Board has authority to enjoin anticompetitive mergers of common carriers involved with interstate transportation; the Secretary of Transportation to enjoin airline mergers; the FCC to enjoin mergers of telecommunications common carriers; and the Federal Reserve Board to enjoin bank mergers. 15 USC § 21.

accompanying threat to reduce \$1.25 billion in costs by eliminating 13,000 jobs. Labor support came despite statements from both airlines' executives that they did not need the merger to succeed and a pre-merger analysis finding that the merger would lead to a reduction in size of the merged airlines.<sup>24</sup> Despite obvious impacts to the labor market, if only owed to the near-term loss reduction in employment, the basis for challenging the merger was that lessened competition for commercial air travel in local markets would result in passengers paying higher airfares and receiving less service.<sup>25</sup>

Unsupervised by the formal merger proceedings, the labor unions were left to negotiate their own deals as the DOJ wound its own case toward settlement. A year after the signing of an implementation schedule for commitments made during the merger process, all five US Airways unions began raising concerns that they were not seeing the agreed-upon benefits.<sup>26</sup> In a letter to American CEO Doug Parker, leaders of the five unions wrote that they had generally supported the merger, but “now that the merger has taken place, we expect management to move forward immediately to

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<sup>24</sup> Press Release, *Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines*, U.S. Dep't of Justice (Aug. 13, 2013), available at: <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-challenging-proposed-merger-between-us-airways-and>.

<sup>25</sup> *Id.*

<sup>26</sup> Ted Reed, *American Airlines Merger Left US Airways Workers Behind, Five Unions Say*, THE STREET (Apr. 8, 2014), available at: <https://www.thestreet.com/investing/stocks/american-airlines-merger-left-us-airways-workers-behind-five-unions-say-12632498#:~:text=STOCKS-.American%20Airlines%20Merger%20Left%20US%20Airways%20Workers%20Behi nd%2C%20Five%20Unions,Airways%20workers%20have%20been%20delayed>.

keep its commitments to all of its employees.” They continued, “we told you then we would support it, but only if our concerns were addressed. Now months later, many of us are still waiting for critical issues to be addressed and resolved.” Each of the unions cited specific post-merger problems, including stalled contract negotiations, unequal pay and work conditions between the merging parties’ dispatchers and simulator engineers, and additional frictions among customer service agents and pilots. The US Pilots Association filed a string of grievances, complaining that the airlines “keep putting us off.”

The US Airways-American Airlines merger created the largest airline in the world, and executives heralded their success with ambitions of being the most profitable airline, too. From the perspective of the workers whose interests fell outside the scope of the government’s formal merger review, the outcome was less successful.

### **Albertsons and Safeway (2014)**

In March 2014, Safeway, the nation’s second-largest grocery store operator, announced that it would be acquired by private equity firm Cerberus Capital Management. The announcement of the Safeway merger arrived a year after Cerberus’ acquisition of supermarket chain Albertsons for \$3.3 billion. In January 2015, the FTC filed a Complaint challenging the acquisition, listing 130 geographic markets in which Albertsons and Safeway competed vigorously and directly on the bases of price, quality, product variety, and services, and offer consumers the

convenience of one-stop shopping for food and other grocery products.<sup>27</sup> Absent intervention, consumers would face higher prices and lower quality food and other grocery products. Notably, the FTC's Complaint did not allege effects to relevant labor markets.

The FTC allowed the merger to proceed, contingent on a remedy that the merged supermarkets would divest of more than 168 supermarkets (among other concessions) to Haggen, a small grocery chain based in Washington State.<sup>28</sup> Noting “good relationships with both Safeway and Cerberus,” the United Food and Commercial Workers International supported the merger and won commitments that at least some of their member employees would be able to choose between staying at their Haggen's store or transferring to an Albertsons or Vons supermarket with benefits intact. While the FTC had not alleged effects to relevant labor markets in its Complaint, the FTC's final Decision and Order prohibited Albertsons and Safeway from interfering with or impeding the mobility of workers with outstanding or accepted offers of employment at divested supermarkets. The Order further directed Albertsons and Safeway to remove any non-compete or confidentiality provisions of employment that would impede employees from accepting employment with a divested supermarket.

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<sup>27</sup> Press Release, *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger*, Fed. Trade Comm'n (Jan. 27, 2015), available at: <https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>.

<sup>28</sup> Decision and Order, *In the Matter of Cerberus et al.*, Fed. Trade Comm'n, Case No. 141-0108 (July 2, 2015).

Along all relevant metrics, Cerberus' and Albertsons' acquisition of Safeway was an unmitigated disaster for competition in the retail grocery market – and especially for the sector's workers. The tenfold expansion of Haggen's retail store volume, five-fold increase in staff, and expansion across seven new states was far too much for Haggen to handle. By October 2015, at which point the divestiture agreement had already soured, the Wall Street Journal noted, "Haggen's workers may be feeling the most immediate effects of the restructuring." Citing court papers that Haggen had hired 8,000 employees as part of its divestiture agreement, the prevailing assumption was that "many of those jobs [would be] going away."<sup>29</sup> In a matter of months, thousands of union members were watching their jobs disappearing in real time.

Fueled by criticism from employees that their union had isolated them from key information and failed to appear on their behalf, UFCW locals began filing grievances in August 2015 against Haggen, Albertsons, and Vons for the "illegitimate dismissal of senior workers, disabled workers, and prior plans to close a large number of stores shortly after Haggen's acquisition of nearly 150 Albertsons locations."<sup>30</sup> The president of Los Angeles-based UFCW Local 770 stated, "We will not stand idly by as

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<sup>29</sup> Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL STREET JOURNAL (Oct. 9, 2015), available at <https://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394>.

<sup>30</sup> *Union Files Grievance Charges Against Haggen, Vons and Albertsons*, PROGRESSIVE GROCER (Aug. 24, 2015), available at: <https://progressivegrocer.com/union-files-grievance-charges-against-haggen-vons-and-albertsons>.

management tries to pull the wool over their employees' eyes.”<sup>31</sup> State employment departments in Oregon and Washington organized “rapid response” teams in anticipation of 1,000 grocery workers facing imminent layoffs.<sup>32</sup> California lawmakers moved quickly to draft and adopt a bill requiring successor grocery employers to retain eligible grocery workers for a 90-day period. As Haggen rebuilt their operational strategy based around just 37 stores, public agencies (and public coffers) bore the cost of triaging the resulting harm to workers.

The FTC’s scrutiny of the Cerberus-Albertsons-Safeway merger focused disproportionately on the product market harms of the proposed merger, giving relatively little consideration to potential labor harms. In doing so, the FTC seemingly ceded that analysis to the private sector stakeholders. Separate from federal agency shortcomings, the post-merger history of the transaction illustrates the probability of harm to union workers even when isolated labor victories led to labor support for a proposed merger.

### **AT&T and T-Mobile (2011)**

When government agencies undertake more direct and thorough investigation of potential labor market harms, we see different results. The 2011 proposed merger of AT&T and T-Mobile provides the clearest example of the value of concurrent review

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<sup>31</sup> *Id.*

<sup>32</sup> Tom Banse, “*Rapid Response Teams*” Organized For Mass Layoffs At Haggen Grocery Stores, NORTHWEST NEWS NETWORK (Nov. 28, 2015), available at: <https://www.nwnewsnetwork.org/economy-business-finance-and-labor/2015-09-28/rapid-response-teams-organized-for-mass-layoffs-at-haggen-grocery-stores>.

of labor market impacts, even as to a merger that was not being scrutinized for its labor impacts.

In March 2011, AT&T announced its intent to purchase T-Mobile USA for \$39 billion, in a bid to combine two of only four mobile wireless providers with nationwide networks. The DOJ filed a lawsuit to block the acquisition, alleging that it would eliminate actual and potential competition between the merging parties, lead to higher prices, decrease the quality and quantity of services, and reduce innovation and product variety.<sup>33</sup> Nevertheless, the CWA supported it, in part because AT&T was the only wireless company with a unionized workforce and, according to CWA, “a long tradition of non-interference” with employees seeking to organize. Based on representations from the merging parties, CWA argued that the merger would create “as many as 96,000 good, family-supporting jobs” via AT&T’s commitment to increase capital expenditures by “at least \$8 billion over the next seven years.”<sup>34</sup>

A study by the Federal Communications Commission – which included an independent analysis of labor effects of the proposed merger – told a different story, determining that the merger would result in a net *reduction* of direct employees.<sup>35</sup>

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<sup>33</sup> Press Release, *Justice Department Files Antitrust Lawsuit to Block AT&T’s Acquisition of T-Mobile*, U.S. Dep’t of Justice (Aug. 31, 2011), available at: <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile>.

<sup>34</sup> Communications Workers of America, *CWA: The Facts Support AT&T/T-Mobile Merger* (June 20, 2011), available at: [https://cwa-union.org/news/entry/cwa\\_the\\_facts\\_support attt-mobile merger](https://cwa-union.org/news/entry/cwa_the_facts_support_attt-mobile_merger).

<sup>35</sup> Staff Analysis and Findings, Fed. Commun. Comm’n, WT Docket No. 11-65, 108 at ¶263 (Nov. 29, 2011).

While the 2010 Merger Guidelines made a minor caveat for immediate post-merger reductions in purchases, the FCC's study appeared to show the merger would have a direct impact on CWA workers. In a telling footnote, the FCC relied on a letter from CWA's Telecommunications Policy Director, which described how three acquisitions by AT&T Mobility in the past decade had caused direct employment to fall from 70,000 employees in 2002 down to 67,000 a decade later.<sup>36</sup> AT&T announced that it would abandon the deal a month after the FCC's report was released.<sup>37</sup>

The FCC's report on the failed 2011 AT&T-T-Mobile merger provided extensive analysis and support for the DOJ's complaint, pre-litigation scrutiny of public statements made by merging parties in support of the merger, and, critically, an opportunity for the impacted labor union to engage with an analysis of potential labor harms. The FCC faced industry push-back for taking the "unusual step" of making its report public.<sup>38</sup> Establishing an expectation that such reports will be made public would shield agencies from undue interference, both politically and by market participants.

These studies demonstrate a need for merger guidelines that provide a roadmap for how to engage with labor unions and other federal agencies during the

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<sup>36</sup> *Id.*, 108 at ¶262 n.682.

<sup>37</sup> Press Release, *Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc.*, U.S. Dep't of Justice (Dec. 19, 2011).

<sup>38</sup> Jim Puzzanghera, *AT&T fires back at FCC report criticizing T-Mobile deal*, LA TIMES (Dec. 2, 2011), available at <https://www.latimes.com/business/la-xpm-2011-dec-02-la-fi-att-fcc-20111202-story.html>.

review process. Appendix 1 of the Draft Merger Guidelines identifies sources of information that the Agencies draw on during merger review. Among those sources, the Agencies provide that “workers and representatives from labor organizations” are well-suited to provide information regarding wages, job search frictions, and their own industries. **Appendix 1 should be updated to provide a formalized and consistent process by which the Agencies engage with labor unions and unrepresented workers early in the merger process and throughout a merger challenge, irrespective of the basis of the challenge. Appendix 1 should also be updated to set a clear expectation that review of prior conduct by merging parties is part of the merger review process, including interagency sharing of relevant job market information and labor violations. Finally, the expectation should be established that any report flowing from the review of potential impacts to job markets will be subject to public review and consumption.**

#### **IV. CONCLUSION**

We applaud the Agencies for incorporating guidance on how the Agencies intend to review proposed mergers for possible labor market harms, rectifying an over century-long neglect of those harms. We thank you for your consideration of these suggestions and look forward to the swift implementation of the revised guidelines.

# **EXHIBIT I**

## Economy

## The Seattle Times

# Haggen: What went wrong?

Originally published March 15, 2016 at 10:43 am | Updated March 16, 2016 at 8:49 am



Haggen hadn't been a family-owned independent chain since 2011, when a controlling stake was sold to Comvest Partners, a private equity outfit based in Florida. (Dean Rutz / The Seattle Times)

**Who to blame for the crash-and-burn of the beloved independent chain? Some suspects are easy to identify. The causes and effects are worth pondering.**

By **Jon Talton***Columnist*

The saga of **Haggen** ends with the whimper of it [selling the remaining 29 stores](#) to **Albertsons**, [15 of which will retain](#) the Haggen name.

It's a sad finale for Bellingham's hometown grocer, which embarked on an ambitious expansion into Southern California, only to fail after six months and seek protection in bankruptcy court.

Meanwhile, Albertsons, whose acquisition of **Safeway** triggered the forced divestment of 146 stores to Haggen, emerges bigger than ever.

Regulators were not wrong to try — indeed, [they identified specific locations](#) where the mega-merger would hurt competition and attempted to rectify it. One big problem is they were years, if not decades too late.

Major grocers had been acquiring smaller regional chains without any antitrust resistance in the neoliberal era. The giants that emerged could not be stopped by handing a few crumbs to a small grocer from the Northwest. Having slipped the leash, these giants were after commanding market power — over the supply chain, workers, etc. — not something so trifling as the number of stores they operated.

A more creative solution would have been necessary. There might be a lesson for other efforts to address the very mixed effects of industry consolidation and concentration (e.g., cheaper goods but a model for lower wages and less community leadership). At the least, the divestment should have been larger and with a more experienced outfit.

The grocery business, which has famously thin margins, has also changed. According to Supermarket News' 2015 rankings, the largest U.S. and Canadian food retailers and wholesalers are **Wal-Mart, Kroger, Costco, Loblaw (a Canadian chain), Safeway, Publix, Ahold, C&S Wholesale, Albertsons** and **H-E-B**. The [top 75 list](#) includes **Target**, drug stores, dollar stores and **Amazon** (62).

So while most places don't have individual stores or small independent chains that fulfill roles as community stewards and allow for local buying, it's difficult to make the argument that competition is lacking.

Also, Haggen was no longer the family-owned independent chain. In 2011, a controlling stake was sold to **Comvest Partners**, a private equity outfit based in Florida. Some

private equity wants to slash and burn; some is patient. But the end game is typically to reward investors with a sale or public offering. Growing is hard. It's not surprising that Haggen's Northwest executives were gobsmacked by the ruthlessly competitive, complex market in California. More surprising is that the private equity owner seemed to fail in its role of providing expertise and guidance.

The entire truth may never come out. In a \$1 billion lawsuit, [Haggen claimed](#) Albertsons made "coordinated and systematic efforts to eliminate competition and Haggen as a viable competitor in over 130 local grocery markets in five states," and "made false representations to both Haggen and the FTC about Albertsons' commitment to a seamless transformation of the stores into viable competitors under the Haggen banner." The suit was [later settled](#).

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### Today's Econ Haiku:

*Watch out for the cloud*

*Wall Street might want to float it*

*Free of Amazon*

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# **EXHIBIT J**

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Lina Khan <sup>a1</sup> Sandeep Vaheesan <sup>aa1</sup>

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# MARKET POWER AND INEQUALITY: THE ANTITRUST COUNTERREVOLUTION AND ITS DISCONTENTS

## INTRODUCTION

In recent years, economic inequality has become a central topic of public debate in the United States and much of the developed world. The popularity of Thomas Piketty's nearly 700-page tome, *Capital in the Twenty-First Century*, is a testament to this newfound focus on economic disparity.<sup>1</sup> As top intellectuals, politicians, and public figures have come to recognize inequality as a major problem that must be addressed, they have offered a range of potential solutions. Frequently mentioned proposals include reforming the tax system, strengthening organized labor, revising international trade and investment agreements, and reducing the size of the financial sector.<sup>2</sup>

One underexplored theme in this larger debate is the role of monopoly and oligopoly power.<sup>3</sup> Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to \*236 the few belonging to the 1% and 0.1% at the top of the income and wealth distribution. In concrete terms, monopoly pricing on goods and services turns the disposable income of the many into capital gains, dividends, and executive compensation for the few. Evidence across a number of key industries in the United States indicates that excessive market power is a serious problem. Firms in industries ranging from agriculture to airlines collude, merge and exclude rivals, and raise consumer prices above competitive levels, while pushing prices below competitive levels for suppliers. The aggregate wealth transfer effect from pervasive monopoly and oligopoly power is likely, at a minimum, hundreds of billions of dollars per year.

On top of enabling regressive redistribution in the marketplace, market power gives firms tremendous political clout. In a system with few campaign finance constraints and a revolving door between government and industry, large businesses have tremendous power over politics. They can use their power to push legislators and regulators to lock in their existing gains and lobby for policies that further enhance their wealth and power. This article takes as its premise that the degree of economic inequality we confront today is highly problematic. Even bracketing its moral undesirability, extreme economic inequality subverts political equality and threatens American democracy.<sup>4</sup>

The domination of our markets by monopolists and oligopolists was not inevitable. As David Singh Grewal has written, "Capitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law."<sup>5</sup> In accordance with this understanding of capitalism, monopoly and oligopoly are the result of conscious policy and political choices, tracing back to an intellectual movement in the 1960s, advanced by the courts in the late 1970s, implemented systematically by the administration of President Reagan in the 1980s, and followed by subsequent administrations. With the appointment of numerous conservatives to the federal antitrust agencies and judiciary, the Reagan administration ushered in a radical revision of the antitrust laws that previously promoted competitive markets.<sup>6</sup> Antitrust laws historically sought to protect consumers and small suppliers from noncompetitive pricing, preserve open markets to all comers, and disperse economic and political power. The Reagan administration--with no input from Congress--rewrote antitrust to focus on the concept of neoclassical economic efficiency.<sup>7</sup> In dramatically narrowing the goals of antitrust, \*237 executive branch officials and judges held that open-ended standards favorable to businesses with market power, rather than clear rules, should govern most forms of business

conduct. This elastic standard has crippled plaintiffs' attempts to challenge illegal behavior and has permitted large corporations to engage in anticompetitive conduct.

The Reagan administration's overturning of antitrust has had sweeping effects. But antitrust laws can be restored to promote competitive markets once again. Doing so would also produce a more equitable distribution of wealth and power in American society. This requires two things: first, an intellectual shift that embraces the original goals of antitrust and second, the appointment of antitrust officials and federal judges committed to this approach. A determined administration should do a number of things to revive Congress's vision as expressed in 1890 and 1914. First, antitrust laws must be reoriented away from the current efficiency focus toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power. Second, clear rules and presumptions must govern mergers, dominant firm conduct, and vertical restraints and replace the current rule of reason review and other amorphous standards, which heavily tilt the scales in favor of defendants. Third, by using existing legal powers or seeking additional authority from Congress, the agencies should challenge monopoly and oligopoly power that injures the public on account of duration or magnitude of harm. Fourth, strong structural remedies and blocking of anticompetitive mergers are necessary to ensure that competitive markets are restored and maintained. Fifth and finally, antitrust agencies must be subject to strong transparency duties to allow the public to understand the internal decision-making processes and choices over whether to pursue--or not to pursue--a particular case.

A revived antitrust movement could play an important role in reversing the dramatic rise in economic inequality. With public engagement and political will, the antitrust counterrevolution--which has produced monopolistic and oligopolistic markets and contributed to a captured political system--can be undone. To be clear, our argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution. Instead we hold that the failure of antitrust to preserve competitive markets contributes to regressive wealth and income distribution and--similarly--restoring antitrust is likely to have progressive distributive effects.

**\*238** Recent commentary has sought to refute the connection between lax antitrust enforcement and growing income inequality by claiming that exercises of market power has “complex crosscutting effects” and therefore cannot be “robustly generalized” as regressive.<sup>8</sup> To be sure, there may be *some* instances in which the effects of market power are not straightforwardly regressive. But the idea that market power in several major industries-- airlines, electricity, pharmaceuticals, telecommunications--may have progressive or even neutral effects is implausible. Under current economic arrangements, market power, in general, can be expected to transfer wealth from ordinary Americans to affluent executives and shareholders. In other words, market power is likely to have regressive income and wealth effects.

The article proceeds as follows. Part I examines how market power contributes to economic inequality. Part II provides case studies of anticompetitive practices and non-competitive market structures in several key industries. Part III lays out how economic power often translates into political power. Part IV traces the political decision, initiated by the courts in the late 1970s and applied comprehensively by the Reagan administration, to narrow the scope of the antitrust laws--a choice that has permitted large corporations to dominate our markets and politics. Part V presents a vision of the antitrust laws that accords with what Congress intended in enacting these landmark statutes and offers specific policy prescriptions.

## I. HOW MARKET POWER CONTRIBUTES TO ECONOMIC INEQUALITY

Economics identifies two major ways in which firms with market power can harm society: first, by reducing output below the socially optimal level (the efficiency effect),<sup>9</sup> and second, by raising prices (the distributional effect).<sup>10</sup> The dollar amount of the distributional effect is typically several times larger than the dollar amount of the efficiency effect.<sup>11</sup> Moreover, these higher prices typically transfer wealth from consumers to the firms with market power, which can redistribute income and wealth upwards. The reason this redistributive effect tends to be regressive is that the managers and owners of firms with market power are typically wealthier than the consumers of the products the firms sell.<sup>12</sup> To borrow the words of former **\*239** Federal Reserve Chairman Marriner Eccles, pervasive market power in an economy is likely to operate as “a giant suction pump ... draw[ing] into a few hands an increasing portion of currently produced wealth.”<sup>13</sup>

The figure below lays out the short-term economic effects of market power. A market in which suppliers have market power is compared to a market in which perfect competition prevails.<sup>14</sup> Relative to a market with perfect competition, the equilibrium

price is higher and the equilibrium quantity of output is lower when market power exists. As a result: (1) wealth is transferred from consumers to firms (the gray rectangle), and (2) economic efficiency is reduced (the two white triangles labeled “efficiency loss”).

### FIGURE 1: SHORT-TERM ECONOMIC EFFECTS OF MARKET POWER

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Further, in many markets--most notably agriculture--large buyers have the power to drive prices below the competitive level. In this monopsonistic or oligopsonistic scenario, wealth is transferred from suppliers to purchasers.

The wealth transfer from market power is likely to have regressive effects. Economic research has found that the ownership of stocks and other business interests is heavily concentrated among the top 10%, and especially \*240 the top 1% and 0.1% of American families ranked by wealth. Emmanuel Saez and Gabriel Zucman have estimated that in 2012 the top 10% owned 77.2% of total wealth in the United States, with the top 1% and top 0.1% accounting for 41.8% and 22%, respectively.<sup>15</sup> In other words, the richest 160,000 families together owned nearly as much wealth in stocks, bonds, pensions, housing, and other assets as the 144 million families in the bottom 90% did as a whole.<sup>16</sup> The following chart illustrates the concentrated ownership of business assets. Wealth, including business and non-business assets, is heavily concentrated at the very top of the distribution. Around seventy-eight percent of the nation's wealth is concentrated in the top ten percent of the population. And as skewed as the overall wealth distribution is, this figure, in fact, *understates* the concentration of ownership of business assets because it includes housing wealth, which is distributed more broadly than other forms of wealth.<sup>17</sup>

### FIGURE 2: WEALTH CONCENTRATION IN THE UNITED STATES IN 2012<sup>18</sup>

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Focusing on income from productive assets, capital income is heavily concentrated among the top 10% and, in particular, the top 0.1%.<sup>19</sup> In 2012, \*241 the top 0.1% families, as measured by wealth, received approximately thirty-three percent of total capital income excluding capital gains and approximately forty-three percent of total capital income including capital gains.<sup>20</sup> In light of this distribution, a large percentage of market power rents likely flow to a tiny sliver of the American population.

Along with shareholders, top executives also appear to capture a portion of the rents<sup>21</sup> from their firm's market power.<sup>22</sup> In recent decades, executive pay has increased dramatically. The spectacular increases in income for this group--dubbed “super managers” by Thomas Piketty--has been an important driver of rising inequality in the United States.<sup>23</sup> Due to passivity among dispersed shareholders and captive boards of directors, chief executive officers and other top managers have the effective power to set their own pay.<sup>24</sup> A sizable fraction of this increase has come in the form of stock-based compensation.<sup>25</sup> Executives' discretion over their own pay allows them to capture a portion of market power rents.<sup>26</sup> Economist William Lazonick has written that “[e]ven when adjusted for inflation, the compensation of top U.S. executives has doubled or tripled since the first half of the 1990s, when it was already widely viewed as excessive.”<sup>27</sup>

Contemporary corporate law and norms encourage managers to retain market power rents<sup>28</sup> among themselves and shareholders. The “shareholder revolution” of the late 1970s and early 1980s established a tight nexus between the interests of executives and shareholders--in particular short-term shareholders--of corporations based or publicly traded in the United States.<sup>29</sup> Corporate law and norms in the United States today, much more so than in other industrialized nations and even the United States in the mid- \*242 twentieth century, encourage executives to identify with shareholders and pursue short-term profit maximization.<sup>30</sup> Instead of promoting the welfare of workers and communities, for example,<sup>31</sup> executives are socialized to maximize short-term profits and enhance the price of the stock.<sup>32</sup> In effect, managers are conditioned and pressured to run the business to advance the interests of their wealthiest constituents: shareholders.<sup>33</sup> While often taken as a given, the promotion of shareholder interests over those of workers or the public rests on questionable assumptions--and is historically new.<sup>34</sup>

At points in the past, managers may have felt sufficient pressure from other segments of the firm, specifically workers, to share market power rents more equitably. Indeed, in the unionized manufacturing sector in the mid-twentieth century United States, the windfalls from market power appear to have been divided with workers. The paradigmatic example is the “Treaty of Detroit” arrangements that governed the U.S. auto industry (and heavy industry generally) during the decades following World War II.<sup>35</sup> Although the three giant carmakers earned significant oligopoly profits, they shared some of the rents with their unionized workers through annual cost-of-living and productivity raises and pensions negotiated under collective bargaining agreements.<sup>36</sup>

Other sectors also followed this practice of sharing market power rents with organized workers. Evidence from pre-deregulation airline and trucking industries suggests that, in oligopolistic industries with high union density, market power rents were, in part, disbursed to workers through higher compensation.<sup>37</sup> More generally, in concentrated industries characterized by oligopoly power, unionized workers appeared to earn more than their non-unionized counterparts, receiving a portion of the rents obtained by their employers.<sup>38</sup> The effects of unionization extended beyond particular organized firms and industries. The higher density of unions contributed to the establishment norms of equity and to the securing of higher wages in nonunionized sectors as well.<sup>39</sup> On the whole, the power of organized labor blunted the regressive economic effects of market power.

Given that labor today lacks effective countervailing power, market power rents are not likely to be shared with workers in shareholder-centric business sectors. In recent decades, labor's countervailing power has been more notable for its absence than its presence.<sup>40</sup> Labor markets and workplaces have been radically transformed to the detriment of the working class, with a qualitative shift from unionized, full-time jobs in manufacturing to non-unionized, contingent jobs in the service sector.<sup>41</sup> In 2015, only 6.7% of private sector workers belonged to a union,<sup>42</sup> compared to 25% in 1975.<sup>43</sup> On top of the decades-long decline of organized labor,<sup>44</sup> the U.S. labor market has been weak in recent years. Nearly eight years after the financial crisis, the U.S. economy has not returned to full employment,<sup>45</sup> undermining the bargaining power of even those with jobs.<sup>46</sup> In an economy in which workers lack bargaining power and cannot demand higher wages, managers are unlikely to share the spoils from market power with their employees.<sup>47</sup> Wage trends support this hypothesis. Despite rising labor productivity, wages have stagnated for most workers since the mid-1970s.<sup>48</sup>

The trend of increasing consolidation and rising market power coupled with stagnant or declining wages suggests one possible way forward. A revived union movement and realigned CEO incentives could help mitigate the regressive effects of market concentration.<sup>49</sup> With the exception of industries whose network effects or high fixed costs necessitate monopoly, however, market competition is still preferable to market concentration.

In contrast to shareholders and executives at businesses with market power, consumers--the victims of market power--are much more likely to be representative of society at large. While an affluent person is very likely to spend more in absolute dollars on consumption than a person of lesser means, the relationship between income and consumption is not one-to-one. In other words, a person with an income fifty times greater than the median income is unlikely to consume fifty times as much as the person earning the median income. Rather, a person earning fifty thousand dollars per year almost certainly spends a larger fraction of his or her income on consumption than a person earning one million dollars per year.<sup>50</sup> More specifically, a less affluent person is likely to spend a larger portion of his or her income on essential goods--such as energy, food, and health care--than a wealthier person.<sup>51</sup> Monopoly and oligopoly overcharges are the functional equivalent of a sales tax and, in the markets for necessities, are very likely to have regressive effects, as most sales taxes do.<sup>52</sup>

The distributive effects of market power are understudied. In a 1975 study, William Comanor and Robert Smiley found that market power in the U.S. economy had significant regressive wealth effects in the 1960s--a period of much less economic inequality and greater economy-wide competition than the present.<sup>53</sup> Their economic simulations of the U.S. economy in 1963<sup>54</sup> found that monopoly power transferred wealth to the most affluent segment of society. Comparing the real-world economy in which firms in many markets possess monopoly or oligopoly power with a theoretical economy in which all markets are competitive, Comanor and Smiley found that a fully competitive economy would benefit the overwhelming majority of Americans. Specifically, 93.3% of the population that had limited or no business ownership interests would see an improvement in their relative wealth position, thanks to lower prices for goods and services.<sup>55</sup> In contrast, the most affluent 2.4% of the population, which had total assets of greater than one hundred thousand dollars in 1962, would see a decline in wealth of as

much as fifty percent.<sup>56</sup> A recent study that performed an economic simulation of the European Union found comparable progressive distributional effects from curbing market power.<sup>57</sup>

Given managerial norms that prize the interests of the generally affluent shareholder class, the inability of workers to demand a share of market power rents, and the higher fraction of income devoted to consumption by working and middle class Americans, market power in most sectors can be expected to redistribute wealth upwards. Oligopolistic and monopolistic firms, by raising prices, capture wealth from consumers. In the case of oligopsonists and monopsonists, these powerful buyers capture wealth from small producers by depressing purchase prices for their output. The higher prices borne by consumers (the ninety-nine percent as a rough shorthand) translate into larger profits for firms and ultimately larger dividends and capital gains for shareholders and larger salaries and bonuses for executives—two groups that tend to be overwhelmingly affluent (the one percent as shorthand).

**\*246 II. HOW LARGE BUSINESSES COLLUDE, MERGE, AND MONOPOLIZE MARKETS AND EXTRACT INCOME FROM CONSUMERS AND SMALL PRODUCERS**

Trends in several major industries suggest that market power is a pervasive problem and an important contributor to economic inequality in the United States.<sup>58</sup> Businesses use a variety of methods—including collusion, mergers, and exclusion—that are, at best, policed imperfectly, to extract greater wealth from the public than would be possible were they subject to stronger competitive forces.<sup>59</sup> Case studies of anticompetitive behavior in six key sectors of the economy shed light on how market power transfers income and wealth in a generally upward direction. Consumers in a number of markets pay more for everyday goods and services—and small suppliers in some markets may receive less income—because of monopoly and oligopoly power. Given the distribution of capital ownership, power of top-level managers, and powerlessness of workers, these elevated consumer prices and depressed producer prices generally transfer income from the ordinary many to the elite few.

**TABLE 1: ESTIMATES OF SELLER-SIDE MARKET POWER RENTS IN SIX SECTORS OF THE U.S. ECONOMY IN 2014**<sup>60</sup>

		BILLIONS OF DOLLARS OF MARKET POWER RENTS				
		PERCENTAGE OF TOTAL REVENUES ATTRIBUTED TO MARKET POWER RENTS				
INDUSTRY	ANNUAL REVENUE (IN BILLIONS)	5%	10%	15%	20%	25%
Hospitals	\$972	\$49	\$97	\$146	\$194	\$243
Pharmaceuticals	\$377	\$19	\$38	\$57	\$75	\$94

Food <sup>a1</sup>	\$704	\$35	\$70	\$106	\$141	\$176
Telecommunications	\$229	\$11	\$23	\$34	\$46	\$57
Airlines	\$207	\$10	\$21	\$31	\$41	\$52
Electricity <sup>aa1</sup>	\$176	\$9	\$18	\$26	\$35	\$44
Total (in billions)	\$2,664	\$133	\$266	\$400	\$533	\$666

Footnotes

<sup>a1</sup> Retail sales for food consumed at home.

<sup>aa1</sup> Residential electricity sales only.

**\*247** While these case studies do not purport to establish a firm causal relationship between market power and economic inequality, they point to a connection between the two, particularly when viewed together with other developments.<sup>61</sup> For instance, the share of corporate profits as a percentage of gross domestic product has risen alongside the rise in inequality, especially over the past fifteen years.<sup>62</sup> More firms also appear to be earning rates of return on their assets that are above competitive levels.<sup>63</sup> Goldman Sachs has even advised clients to invest in oligopolistic sectors as a means of enjoying higher rates of return.<sup>64</sup> In open, competitive markets, these high rates of return would ordinarily spur business investment from incumbents and new entrants. Rather than chasing these attractive returns, however, many businesses are sitting on large reserves of idle cash.<sup>65</sup>

**\*248 A. Health Care**

Health care is one of the biggest sectors of the U.S. economy, making up 17.5% of national gross domestic product in 2014.<sup>66</sup> Consequently, changes in consumer prices have significant distributive effects. Some have argued that because health care spending is largely mediated through an insurance system, consumers are rarely the direct or even the ultimate payers of health care costs.<sup>67</sup> What this view misses, however, is that insurers frequently pass on higher costs to consumers in the form of higher premiums and higher deductibles. Individuals receiving their health insurance through employer-based plans may experience price hikes in the form of lower wages, assuming employers choose to pass on costs too. Rising concentration in local health insurance markets makes consumers even more likely to bear higher healthcare costs. One study estimated that the increase in local market concentration raised insurance premiums by about thirty-four billion dollars per year, or about two hundred dollars per person with employer-sponsored health insurance, between 1998 and 2007.<sup>68</sup>

**1. Hospitals**

Hospitals comprise one of the leading sub-industries in health care, generating \$923 billion in revenue in 2014.<sup>69</sup> Two successive rounds of consolidation have transformed the hospital industry over the last few decades. The first major merger wave began in the 1980s, when nearly two hundred hospitals merged per year.<sup>70</sup> By the mid-1990s, annual merger volume had increased nine-fold.<sup>71</sup> Market concentration increased accordingly: in 1990, the average Herfindahl-Hirschman Index (HHI, a widely used measure of market concentration) in a metropolitan statistical area was 1,576 (considered “moderately concentrated”); by 2003, that figure had risen to 2,323 (close to the threshold for “highly concentrated”).<sup>72</sup> Over this period, the **\*249** number of competing local hospital systems available to the average American fell from six to four.<sup>73</sup>

This initial round of consolidation has been followed by a more recent wave, particularly in the wake of the Affordable Care Act, which encouraged provider consolidation in the name of greater coordination of health care delivery. Sixty-six mergers occurred in 2010; 488 have taken place since then, with 112 in 2015 alone.<sup>74</sup> Sixty percent of hospitals are now part of larger health systems, an increase of seven percentage points from the early 2000s.<sup>75</sup> Nearly half of all hospital markets in the United States are highly concentrated, one-third are moderately concentrated, and the remaining one-sixth are unconcentrated. Meanwhile, under the HHI, no hospital market is considered highly competitive.<sup>76</sup>

Research indicates that consolidation among hospitals has led to a significant increase in health care prices. Studies assessing the effects of consolidation within the same geographic region in the 1990s found that prices in these areas increased by forty percent or more.<sup>77</sup> More recent work found that the trend continues: price increases following hospital mergers in concentrated markets often exceed twenty percent.<sup>78</sup> A separate summary of existing research cites eight studies that found price increases ranging from ten to forty percent due to mergers.<sup>79</sup>

Hospital consolidation can raise consumer health prices in many ways, including by increasing the bargaining power of hospitals in negotiations with insurers. Having fewer hospital systems makes it costlier for a health insurer to exclude even one system from its network. Given that each system may cover a large part of the market, consumers and employers are less likely to purchase a plan that does not provide patients access to a significant fraction of the local hospital market. With greater leverage, each hospital system can charge insurers a higher price—which insurers pass on to consumers in the form of lower benefits and higher premiums, co-pays, and deductibles.

A recent study of private health care spending analyzed data for thirty percent of individuals with employer-sponsored coverage, encompassing ninety-two billion health insurance claims from eighty-eight million people. The authors found that the prices hospitals negotiate with health insurance firms vary significantly both within and across geographic areas in the **\*250** United States. For example, 2011 hospital prices for certain treatments were twelve times higher in the most expensive region in the country than in the cheapest region, and could vary by up to a factor of nine even *within* a city. Notably, the single primary driver of this difference across markets is competition. Hospitals in monopoly markets, for example, have prices that are fifteen percent higher than those in markets with four or more providers, the study found, even after controlling for differences in cost and clinical quality. Hospitals in duopoly markets, meanwhile, charge prices that are 6.4% higher, and markets with a hospital triopoly are 4.8% more expensive.<sup>80</sup> The authors estimate that the price of an average inpatient stay at a monopoly hospital is almost \$1,900 higher than where there are four or more competitors. “We know that these higher prices end up getting translated into higher premiums that employers pass on to workers,” one of the authors said in an interview.<sup>81</sup>

Strikingly, the correlation between market consolidation and increased prices holds across different forms of ownership. Nonprofit hospitals traditionally argue that mergers between them will not raise prices precisely because they are nonprofits. But data established that “prices are just as high in nonprofit as in for-profit organizations,”<sup>82</sup> even though the government subsidizes nonprofits “to the tune of \$30 billion dollars annually, in the form of tax exemptions.”<sup>83</sup>

## 2. Pharmaceuticals

The pharmaceutical industry raises a number of competition issues. These include well-known debates over the optimal level of patent protection, as well as two specific practices that will be our focus here: (1) exclusion payments by branded drug makers to prospective generic rivals and (2) product hopping by branded drug makers. Both practices delay generic drug **\*251** competition and cost consumers billions of dollars more per year in pharmaceutical expenditures.

Exclusion payments between branded and generic drug manufacturers have received significant antitrust scrutiny in recent years.<sup>84</sup> Under the regulatory scheme established by the Hatch-Waxman Act, a generic drug maker can enter the market and compete against a patented drug maker with a bioequivalent drug and without performing full clinical trials ordinarily required for a new drug. To qualify for this path to the market, the generic company must show that either the patents covering the branded drug are invalid or the generic drug does not infringe these patents.<sup>85</sup> The incumbent branded drug maker has the opportunity to prevent generic entry by filing a patent infringement suit.<sup>86</sup> The Hatch-Waxman regime offers a faster path to entry for generic drugs and is intended to promote greater competition in the pharmaceutical market.

Over the past two decades, however, branded drug makers have used the system to frustrate generic competition. Soon after a generic company has announced its intention of entering a market under the auspices of Hatch-Waxman, branded drug manufacturers have filed lawsuits alleging patent infringement by the prospective generic entrant.<sup>87</sup> This act alone is not necessarily either anticompetitive or contrary to the purpose of Hatch-Waxman. However, instead of litigating the case or reaching a settlement in which the branded manufacturers receive compensation from the alleged patent infringers, branded drug manufacturers *pay* the generic company on the condition that the generic company postpone its planned market entry.<sup>88</sup> On its face, this conduct is suspicious, as the branded company with a patented product is paying the alleged infringer; the owner of a legal entitlement is paying someone else not to violate it.<sup>89</sup> This conduct appears to be market allocation, with the branded drug company paying the generic rival *not* to compete.<sup>90</sup>

**\*252** These arrangements are lucrative for both the branded and generic drug companies--and costly for consumers. The attraction for the branded drug company is apparent: monopoly profits, even when diminished by the amount of the exclusion payment, remain higher than the competitive profits the branded drug company would otherwise make.<sup>91</sup> A generic drug can sell for as much as ninety percent less than the branded drug.<sup>92</sup> For the generic company, the exclusion payment--a share of the branded drug company's monopoly profits--is almost certainly greater than the profits it would make in a competitive market.<sup>93</sup> In other words, the branded and generic drug companies agree to share monopoly profits instead of competing them away and ending up collectively worse off. These monopoly rents come out of the pockets of consumers who bear the higher prices for essential drugs. In the case of widely used medicines, an exclusion payment can transfer billions of dollars per year from consumers into the pockets of pharmaceutical companies.<sup>94</sup> One scholar estimated that in 2005, settlements that had the appearance of anticompetitive purpose cost consumers approximately fourteen billion dollars.<sup>95</sup>

Another anticompetitive practice, arguably even more costly to consumers than exclusion payments,<sup>96</sup> is "product hopping" by branded drug companies. In a product hopping strategy, branded drug manufacturers make minor tweaks to the existing branded drug to obtain a new patent and extend their monopoly position. Under state generic substitution laws, pharmacists are allowed or required to fill a prescription with an available generic equivalent, unless the doctor or patient expressly requests the branded version in the prescription.<sup>97</sup> Because generic competition can reduce prices substantially,<sup>98</sup> branded drug manufacturers have powerful incentives to take measures to perpetuate patent protection in the years leading up to the expiration of the patent.

Product hopping can foreclose generic entry for a significant period of time. The tweaks made to the existing drug often have negligible clinical benefits for patients and include changing a drug delivery form to a capsule from a pill (or vice-versa), combining two drugs that had been marketed **\*253** separately, and slightly modifying the drug molecule.<sup>99</sup> Once they develop the new formulation or delivery mechanism, pharmaceutical companies heavily market the new version to doctors and seek to persuade them to prescribe it instead of the previous version that is about to go off patent.<sup>100</sup>

Given the large amounts of money branded companies devote to marketing efforts,<sup>101</sup> these efforts at "switching the market" to the new version are likely to be successful.<sup>102</sup> If the branded drug company executes the switch successfully, doctors, who do not bear the price of more expensive drugs,<sup>103</sup> start prescribing the new drug in place of the old.<sup>104</sup> Generic drug makers cannot offer an unbranded version of the new patented drug, which means that state generic substitution laws cannot play their competition-enhancing purpose. The result is that the branded drug company maintains its monopoly.<sup>105</sup> To ensure that the product hop is successful, some branded drug makers have even withdrawn the old version from the market to deprive doctors of the option of comparing the clinical effectiveness of the old and new versions and prescribing the old out of consideration for the patient's out-of-pocket expenses.<sup>106</sup>

This product hopping costs consumers billions of dollars annually. One analysis, using conservative assumptions, estimated that product hopping costs consumers more than twenty billion dollars a year.<sup>107</sup> As an example, insulin, essential for diabetics, appears to be persistently expensive because of a series of product hops by branded manufacturers that have limited generic competition.<sup>108</sup> Even when a product change has non-trivial benefits for patients, this product improvement has to be weighed against the high cost of monopolistic overcharges that third-party payers and ultimately consumers have to bear.<sup>109</sup> And

importantly, in many actual instances of product **\*254** hopping, the new iteration of the drug appears to offer no tangible clinical benefits over the existing version.<sup>110</sup>

### ***B. Agriculture and Food Retail***

After decades of mergers, the food retail and agricultural inputs and processing sectors have become highly concentrated. The industry today is shaped like an hourglass: millions of consumers and farmers on either end, connected through a few large companies. Retail consolidation has enabled firms to squeeze their suppliers for greater margins--spurring consolidation along the supply chain--and led to worse outcomes for consumers. Research suggests this level of consolidation has redistributive effects, transferring wealth from both farmers and consumers to processors, distributors, and retailers in the middle.

In retail, the top four grocers--Walmart, Kroger, Costco, and Safeway-- control more than half of all grocery sales.<sup>111</sup> Concentration can be even higher at the local level: in over twenty-nine metropolitan markets, Walmart captures more than fifty percent of all grocery sales.<sup>112</sup> Meanwhile, consolidation shows no signs of slowing;<sup>113</sup> the last few years have seen major mergers between Kroger and Harris Teeter, Albertsons and Safeway,<sup>114</sup> and Ahold and Delhaize (which operate a suite of East Coast grocers, including Giant, Stop & Shop, and Food Lion).<sup>115</sup>

**\*255** Concentration in the grocery sector is a relatively new phenomenon: through the 1980s, the industry was largely decentralized and most Americans purchased food from a variety of regional and local supermarket chains. A wave of grocery mergers and buyouts in the 1990s, coupled with entry by warehouse clubs and discount general merchandise stores into grocery products, reshaped the landscape. Grocers sought to bulk up in order to compete with the scale of warehouse clubs and large discount stores, fueling further mergers and leading many local grocers to close; there were 385 grocery mergers between 1996 and 1999 alone.<sup>116</sup> The share of groceries sold by the four biggest food retailers more than doubled between 1997 and 2009, from seventeen percent in 1994 to twenty-eight percent in 1999 and thirty-four percent in 2004.<sup>117</sup>

While grocers often tout efficiencies as a benefit of mergers, little evidence suggests that consumers have actually witnessed lower prices. Instead, concentration seems to have resulted in higher prices.<sup>118</sup> Several academic studies have found a link between higher levels of local retail concentration and higher grocery prices.<sup>119</sup> A majority of studies reviewed by the U.S. Department of Agriculture (USDA) in 2003 found that higher concentration in grocery store markets contributes to higher consumer food prices.<sup>120</sup> According to the American Antitrust Institute, concentration across the food supply chain has “undoubtedly contributed to the increased cost of food.”<sup>121</sup>

In addition to raising prices for consumers, consolidation in the food and agriculture sector has facilitated a significant wealth transfer from farmers to food processors and meat packers. A handful of firms today control the processing sector. The top four processors nationally control eighty percent of beef, sixty percent of hog, and fifty percent of poultry.<sup>122</sup> Powerful players in commodities have expanded both horizontally and vertically; ADM, Bunge, Cargill, and Dreyfus--the “big four”--control “as much as 90 per cent of the global grain trade.”<sup>123</sup> On the processor side, firms have **\*256** both horizontally consolidated and vertically integrated, upending the structure of the industry for farmers and rendering them captive to a handful of buyers. As with grocery stores, concentration at the local level can be even more severe; many local markets are monopolized by a single firm, rendering farmers captive to the one entity. Farmers are also squeezed by powerful players when they purchase inputs. In the seed industry, six hundred independent companies in 1996 have whittled down today to six giants,<sup>124</sup> which now control sixty-three percent of the global seed market.<sup>125</sup>

The effects of horizontal consolidation are exacerbated by the fact that the dominant and other leading firms in some of these sectors have also vertically integrated. In the chicken industry, for example, a processing company delivers birds to farmers, who feed and grow them, and the firm then collects them to take to market.<sup>126</sup> The monopsony power held by these processors enables them to require farmers to bear the risks of business--including steep investments in farming equipment--and also to reduce the prices paid for farmers' products.<sup>127</sup>

Academic research has found that the farmer's share of the retail dollar of food has been dramatically decreasing, while consumers pay largely the same or slightly higher prices. What has changed is that the middlemen that dominate these sectors--Cargill, Monsanto, Tyson, JBS--are reaping much higher returns, effecting a wealth transfer from farmers to these firms.

### *C. Telecommunications*

Telecommunication services are central to the lives of most Americans. It is estimated that in 2015 the average U.S. household spent around three thousand dollars accessing services such as mobile voice, mobile data, cable, landline voice, and broadband Internet.<sup>128</sup> Consumers spent approximately forty-one percent of this on mobile service (for voice and data), and over thirty-seven percent of U.S. households have between four and eight connected devices--a number that is expected to rise.<sup>129</sup> In sum, telecommunications services comprise a significant and growing part of the consumer economy.

Historically, the telecom sector--both wireline and wireless service--has been highly concentrated. In 1984, under a court-approved settlement in *\*257* a long-running monopolization suit, AT&T divested its local phone operations and created seven "Baby Bells." The aim was to isolate the monopolistic local phone segment and establish the conditions for competition in the long-distance and equipment markets.

Following the 1996 Telecommunications Act--which lifted ownership caps and deregulated rates--companies across sub-sectors linked up. The old AT&T, meanwhile, had for years been seeking to enter local markets, but exclusionary tactics by the Baby Bells kept the firm out.<sup>130</sup> In 2005, AT&T gave up and merged with SBC, while Verizon bought up MCI.<sup>131</sup> Long-distance and local phone service--which the government had sought to separate in 1984--had once again been coupled, and the United States was left with two major phone companies, AT&T and Verizon. The sector remains highly concentrated today: in mobile subscriptions, the top four firms--AT&T, Verizon, Sprint, and T-Mobile--control roughly ninety-eight percent of the market; the top two alone control around sixty-eight percent.<sup>132</sup>

Over the last few years, evidence has emerged that these firms are not competing to improve service. During AT&T's proposed bid to buy up T-Mobile, the public learned that AT&T was "sitting on large swaths of underutilized spectrum and maintaining legacy networks rather than investing in upgrades that would substantially increase capacity"--signaling that it was not facing competitive pressures.<sup>133</sup>

More generally, these firms have responded to increased demand not by expanding capacity but by hiking prices and degrading service--primarily through introducing data caps and tiered pricing. In 2010, AT&T eliminated its unlimited data plan for new users;<sup>134</sup> Verizon followed shortly after by introducing tiered pricing. Since then, AT&T has gone on to "throttle" customers with existing unlimited coverage, slowing down their service once they hit certain usage amounts, even when there was no congestion.<sup>135</sup> As noted by analysts and reporters, the company has used throttling to coax customers to switch to pricier plans with limited service. AT&T drew a one hundred million dollar fine from the Federal Communications Commission *\*258* and a lawsuit from the Federal Trade Commission for deceptively marketing these plans subject to throttling as "unlimited."<sup>136</sup> Looking at wireless broadly, analysts estimate that between fifty to seventy percent of Americans overpay for their mobile-phone plans, paying double what they would in a more competitive market.<sup>137</sup>

Research suggests that Verizon and AT&T's choice to introduce data caps and tiered pricing is an exercise of market power. Rapid technological advancement over the last few years has led the costs of providing service to decline, even as consumer demand for data has increased. As one study observes:

Though mobile providers may need to utilize some usage limitations on their network given greater capacity constraints as compared to wired broadband, the use of flat monthly caps makes little sense when congestion on the network is likely to be time and geographically limited. Instead, the decision by AT&T Wireless and Verizon Wireless to move users onto tiered plans and the current price levels are largely influenced by Wall Street demands to report ever-growing revenue and profit margins. Rather than effectively managing use of the network, data caps are a strategy for ISPs to increase their revenue per user.<sup>138</sup>

Partly as a result, Americans are allocating a greater share of their monthly budget to pay for wireless service. Consumer spending for mobile service has increased since 2008, even while families have cut back in other sectors--a fact that wireless carriers are using to bet they can hike prices even higher.<sup>139</sup> Profits at wireless firms remain high: AT&T made \$6.7 billion in net income in 2014 and \$13.7 billion in 2015,<sup>140</sup> while Verizon generated \$9.6 billion and \$17.9 billion, respectively.<sup>141</sup> AT&T returned more than \$11 billion to shareholders in 2014,<sup>142</sup> while Verizon returned \$7.8 billion in dividends.<sup>143</sup>

A similar story is true in the cable sector. Two firms--Comcast and Time Warner--control more than two-thirds of the national broadband market. Sixty-one percent of Americans live in markets with no competition, meaning they have access to, at most, one high-speed broadband provider.<sup>144</sup> Despite a substantial decrease in the cost of operating a network and transporting data, consumers have not seen a subsequent decline in the cost of service. Instead, broadband companies have further raised prices and also imposed data caps.<sup>145</sup> Since their reports to investors show sharply declining costs for IP transit as a percentage of revenue, this is leading to higher net profits.<sup>146</sup>

At the same time, quality has not kept up. Studies show that U.S. consumers pay more for slower Internet speeds than consumers in other countries. For example, providers in Seoul, Hong Kong, and Tokyo offer one gigabit per second plans for under forty dollars; in major U.S. cities, the fastest speed available is five hundred Mbps and costs around three hundred dollars a month.<sup>147</sup>

Although regulators managed to block the proposed Comcast-Time Warner deal-- which would have handed a single firm more than half the country's high-speed Internet and one-third of the cable television market<sup>148</sup>--a suite of proposed deals since then show that the oligopolistic providers seek to consolidate further. In July 2015, the Justice Department<sup>149</sup> and Federal Communications Commission<sup>150</sup> permitted AT&T's forty-eight billion dollar acquisition of DirecTV to proceed. Another large merger was recently allowed to proceed: Charter's bid to acquire Time Warner Cable.<sup>151</sup> Shortly after, Time Warner proceeded to raise its Internet and television rates for New York customers.<sup>152</sup>

## ***D. Industries Historically Subject to Price Regulation***

### ***1. Airlines***

Since the deregulation of entry and prices in the airline industry in 1978, the sector has been characterized by boom-and-bust cycles.<sup>153</sup> Airlines collectively lost nearly sixty billion dollars between 1978 and 2009.<sup>154</sup> While this fact might suggest that the restructured industry has been competitive, the sector is, in fact, dominated by firms that wield market power--the result of a wave of mergers and exclusionary practices by dominant hub carriers. Looking both nationwide and at major hub airports, a defining feature of the industry today is extremely high concentration.

Over the past ten years, the number of major carriers has declined from nine to four, with a handful of smaller competitors existing on the fringes.<sup>155</sup> This concentrated market structure is the culmination of merger activity that took off a few years after deregulation in 1978.<sup>156</sup> While vigorous entry has occurred at times over the past forty years, nearly all entrants were either liquidated or absorbed by a rival.<sup>157</sup> Mergers have eliminated previous head-to-head competition on a number of routes.<sup>158</sup> In the latest merger wave, Delta purchased Northwest in 2008, United acquired Continental in 2010, Southwest bought AirTran in 2011, and American combined with US Airways in 2014.<sup>159</sup> Nearly ninety percent of city-pair markets are highly concentrated.<sup>160</sup>

The effects of this concentrated market structure are clear. With just four major players in the market, the incentives to compete have been significantly diminished. A market structure conducive to coordinated pricing appears to have emerged.<sup>161</sup> The big four carriers face each other in a number of markets and have little reason to undercut current fares and sabotage collective profits.<sup>162</sup> Airlines indeed appear to follow each other in imposing new fees on fliers, an indication of tacit collusion.<sup>163</sup> Pricing "discipline" (at the expense of consumers) is now the watchword among airline executives.<sup>164</sup>

Despite the dramatic decline in fuel prices (one of the most important inputs in air travel) over the past two years, airfares have remained largely constant and even increased on some routes.<sup>165</sup> In 2015, the average airfare hit a twelve-year high, accounting for inflation.<sup>166</sup> After a decade of massive losses following the attacks of September 11, 2001, and the subsequent decline in demand for air travel,<sup>167</sup> the industry has posted strong profits over the past two years.<sup>168</sup> American Airlines alone made \$7.6 billion in 2015.<sup>169</sup> Warren Buffett, who previously vowed not to invest in airlines again after losing money in the industry in the 1990s, has acquired stakes in all four major carriers, reflecting a belief that bountiful profits are here to stay.<sup>170</sup>

**\*262** The deregulation of the airline industry also ushered in the development of the hub-and-spoke model--an outcome that some deregulation advocates did not foresee and one that has produced monopolized hub airports.<sup>171</sup> Instead of offering direct point-to-point service, airlines typically route fliers through one of their hubs. Hubs dominated by one airline include Dallas-Fort Worth (American) and Atlanta (Delta).<sup>172</sup> Empirical research has found that higher concentration at an airport is associated with higher fares.<sup>173</sup> These findings suggest that, by establishing a so-called fortress hub that it dominates, an airline can insulate itself from competition and make larger profits than it would at a more competitive airport.

In light of the economic attraction of hubs, dominant airlines have taken a number of measures to impede and exclude new entrants. Dominant hub carriers have resorted to predatory pricing--short periods of below-cost competition--to drive out new entrants that threatened their monopolistic position.<sup>174</sup> Among other carriers, American Airlines at Dallas Fort-Worth and Northwest at its Detroit hub appear to have resorted to deep, but short-lived, price cuts to exclude new rivals and maintain their hub market power.<sup>175</sup> These campaigns have succeeded, in light of the fragile financial positions of many of the new entrants, and perpetuated the hub carriers' dominance.<sup>176</sup> Monopolistic hub carriers also appear to have built large holdings of slots and thereby deprived rivals of the access that they need to serve an airport.<sup>177</sup> Some carriers appear to have exchanged and purchased an excess number of airport slots (the right to take off or land) to shore up hub dominance and deny rivals access to these airports.<sup>178</sup>

## **\*263 2. Electricity**

With the shift away from utility regulation to market-based pricing at the wholesale level, the lack of competition has become a serious and persistent issue in electricity markets. Across the country, the generation sector has been opened up to new entry and competition, even as transmission and distribution remain natural monopolies. Despite the benefits touted by proponents, wholesale markets have proven structurally vulnerable to the exercise of market power by generators.<sup>179</sup> In electricity markets that are not structurally competitive, the logic of withholding capacity is straightforward: because the demand for electricity is inelastic, higher prices are not likely to lower volume of sales. Instead, raising prices can pay off handsomely because "collecting \$120 for 83% of your fleet of electric power plants produces 99% more revenue than getting \$50 for 100% of the fleet."<sup>180</sup>

Four episodes of anticompetitive behavior--one in California, another in New York, and two more recent ones in New England and the Mid-Atlantic-- exemplify the high consumer cost of market power in electricity markets. Given that electricity is essential and that residential electric supply is a nearly \$180 billion dollars per year industry,<sup>181</sup> even the occasional exercise of market power can cost consumers billions of dollars.

Although California's wholesale electricity markets performed competitively during their first two years of operation in 1998 and 1999,<sup>182</sup> a wave of anticompetitive behavior starting in late 2000 showed the shortcoming of how electricity markets have been structured.<sup>183</sup> The manner in which the market had been set up proved to be a critical mistake. Due to reduced hydropower generation in the Pacific Northwest, a major source of electricity for California, the state became heavily reliant on in-state generation in 2000.<sup>184</sup> During the restructuring of the industry, the vertically-integrated, regulated utility companies sold most of their natural gas generation facilities to just five companies.<sup>185</sup> In the absence of adequate import competition, these five generators could unilaterally withhold capacity and raise wholesale market prices above competitive levels.<sup>186</sup> Manipulative trading strategies **\*264** orchestrated by Enron exacerbated the abuse of market power.<sup>187</sup> At the retail level, prices were capped

in much of the state.<sup>188</sup> The combination of high wholesale prices and fixed retail prices meant that utilities serving customers hemorrhaged money, resulting in rolling blackouts and one of the largest utility companies in the state filing for bankruptcy.<sup>189</sup>

This crisis lasted from late 2000 until the summer of 2001 and inflicted massive harm on California residents. The devastating blackouts belied the fact that generators held more than sufficient capacity within the state to meet demand.<sup>190</sup> The crisis was most likely the product of generators acting independently (that is, without colluding with each other) to create artificial shortages that boosted their profits.<sup>191</sup> As a result of rampant anticompetitive behavior by these firms, the public is estimated to have paid close to twenty billion dollars more for electricity during the affected period in 2000 and 2001 than it would have had markets been competitive.<sup>192</sup>

On the East Coast, New York experienced a costly period of anticompetitive behavior from 2006 to 2008. Due to insufficient transmission connections with upstate New York, New York City is dependent on generators within its five boroughs, particularly during periods of peak demand.<sup>193</sup> At the time, generation ownership within New York City was highly concentrated.<sup>194</sup> After potential antitrust obstacles thwarted its attempt to buy a competing generation facility, Keyspan—one of the in-city generators—entered into a financial swap agreement that gave it an economic interest in this rival.<sup>195</sup> With this quasi-equity stake, Keyspan successfully raised prices in the capacity market,<sup>196</sup> where utility companies purchase generation to meet peak demand and maintain adequate reserves.<sup>197</sup> This arrangement is \*265 estimated to have increased capacity market costs by nearly \$160 million dollars in 2006 alone.<sup>198</sup>

Over the past two years, officials have uncovered evidence of manipulation in the Mid-Atlantic and New England capacity markets. In both markets, firms have bought up generation assets and then gone on to dramatically increase capacity market prices. In New England, for example, prices more than doubled over the previous year after a private equity fund bought—and almost immediately shut down—a large coal-fired power plant in Connecticut.<sup>199</sup> This action raised capacity market costs by an estimated \$1.7 billion.<sup>200</sup> In the wholesale market that covers the Mid-Atlantic and parts of the Midwest, Exelon submitted high bids on three nuclear power plants in the capacity market, causing prices to rise and capacity market costs to balloon by \$3.7 billion.<sup>201</sup> This price increase occurred just a few years after Exelon had acquired Constellation, a major Mid-Atlantic power generator.<sup>202</sup>

### III. HOW OLIGOPOLISTS AND MONOPOLISTS ALSO RIG POLITICS AND POLICY IN THEIR FAVOR

As described above, powerful firms in concentrated markets possess greater ability to extract wealth from consumers and producers than they would in competitive markets. Another way in which concentrated market structures can have regressive wealth effects is through the levers of politics and policy. Firms that achieve economic dominance in their sectors also gain political influence, which they can marshal to sway policy in their favor.

The idea that market power has political significance was foundational to the passage of the Sherman Act. At the most basic level, proponents understood that concentration of economic power concentrates political power, posing a threat to democracy akin to monarchy or dictatorship. Responding to the large industrial entities that had developed through the late 1800s, one article denounced the growth of concentrated economic power as a “great, unscrupulous, powerful plutocracy.”<sup>203</sup> Another warned of the “political menace that was resident in these stupendous aggregations of wealth.”<sup>204</sup> The Sherman Act itself was widely understood as following in a tradition that “aimed to control political power through decentralization of economic \*266 power.”<sup>205</sup> Former President and future Supreme Court Justice William Howard Taft sounded a similar theme and argued that antitrust legislation was essential in combating the “plutocracy” of the “great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us.”<sup>206</sup>

Though contemporary antitrust analysis disregards the political ramifications of market power, large corporations have significant power and influence over politics and policy.<sup>207</sup> Concentrated markets, in which few players dominate, aggrandize corporate influence over politics and policy in at least two ways. First, an industry characterized by five hundred firms of varying sizes, with different leadership and business philosophies, will typically share a more heterogeneous set of goals than

an industry controlled by five firms. In an industry with fewer participants, there are less likely to be conflicts and more likely to be an agreed upon set of common interests.<sup>208</sup> And second, a smaller group of concentrated interests will face a lower cost of organizing than the larger groups of dispersed interests. In general, fewer actors will mean that the industry can more easily solve collective action problems, be it through jointly identifying what to demand, sharing costs of lobbying, or producing effective messaging.<sup>209</sup> In some instances, a single large entity may even find it worthwhile to act unilaterally. In short, concentration increases the likelihood that actors will share interests and decreases the costs of organizing to advocate for their agenda.

While empirical research on this subject is mixed, evidence suggests that concentration and industry lobbying activity are related.<sup>210</sup> Research examining industry size, structure, and rent-seeking backs this finding: “a study of six thousand publicly traded firms’ reported lobbying from 1999 to 2006 showed that corporate lobbying is directly related to firm size.”<sup>211</sup> Political \*267 theory, meanwhile, suggests that several factors shape the type of rentseeking that firms choose to undertake; almost all are positively correlated with company size.<sup>212</sup>

Recent observations linking economic concentration to increased political influence have remained largely broad and vague about how firms translate economic dominance into political power.<sup>213</sup> Insofar as observers do detail the connection, they generally point to corporate donations to political campaigns.<sup>214</sup> No doubt, funding of elections is a key lever companies use to exercise political power. However, it is worth identifying the larger set of activities that fall in this toolbox, including lobbying, staffing and recruiting from government, creating information, directing the politics of employees and contractors, and threatening sector failure or collapse.<sup>215</sup>

Finance presents a particularly salient example for understanding how possession of market powers aids or facilitates the exercise of political influence. As Simon Johnson and James Kwak have traced, a wave of mergers in the 1990s transformed the banking sector, yielding banks that were not just bigger but also involved in riskier financial activities. Their goal was to

create ubiquitous financial “supermarkets” that would be indispensable to both retail and corporate customers. A new divide emerged in the industry as a result: a handful of megabanks on the one hand, and a suite of smaller traditional banks on the other. These megabanks--awash in unprecedented amounts of money--became “the new financial oligarchy.”<sup>216</sup>

Since “the basic principle behind any oligarchy is that economic power yields political power,”<sup>217</sup> the megabanks soon concentrated their political efforts, flooding political campaigns with donations, staffing government, and generally propagating the idea that a large and unregulated financial sector would drive widespread prosperity.<sup>218</sup> Politicians duly complied. Leading members of Congress sponsored the Gramm-Leach Bliley Act, which largely repealed the Glass-Steagall separation of commerce and investment banking, and the Commodities Futures Modernization Act, which prohibited federal regulation of over-the-counter derivatives.<sup>219</sup> The sector \*268 continued amassing political influence up until and through the financial crisis. As Senator Richard Durbin remarked in 2009, “[T]he banks--hard to believe in a time when we’re facing a banking crisis that many of the banks created--are still the most powerful lobby on Capitol Hill. And frankly they own the place.”<sup>220</sup>

In addition to drawing on these more traditional mechanisms of political influence, the banking sector leveraged its size and structure to yield favorable terms during the bailout and its aftermath.<sup>221</sup> This is not to say that executives created a “too big to fail” system for the purpose of wielding political power, but that the practical consequences of consolidation, by concentrating risk, did just that. Banking, of course, plays a uniquely central role in our economy; not all highly concentrated markets possess systemic fragility of the sort that firms can exploit in times of instability or uncertainty. Yet, the potential for great political power may span sectors such as commodities and pharmaceuticals.<sup>222</sup>

The fact that companies in concentrated sectors can wield outsized political influence has distributive implications. Business interests frequently lobby against regulations from which workers and consumers stand to gain. To take just one example: in 2009, the Packers and Stockyards Administration within the U.S. Department of Agriculture proposed rules that would have protected independent farmers from abusive practices by powerful processors and packers-- regulations that would have

helped halt the downward pressure on payments these firms make to farmers.<sup>223</sup> Yet a fierce lobbying effort by trade groups representing the biggest firms in this highly concentrated industry ultimately prompted Congress to thwart the administration, stalling the new rules.<sup>224</sup>

#### IV. HOW THE ANTITRUST COUNTERREVOLUTION CREATED UNCOMPETITIVE MARKETS

Highly concentrated markets in the contemporary United States are not the product of impersonal economic forces--rather they are the product of conscious legal and political decisions in the late 1970s and early 1980s. These decisions severely undermined the antitrust laws, crippling what had \*269 been a major congressional safeguard against monopoly and oligopoly.<sup>225</sup> Two policy decisions stand out above others. First, beginning with the Reagan administration, the antitrust agencies and federal courts held that the antitrust laws should protect the neoclassical concept of "efficiency."<sup>226</sup> Congress, in enacting the antitrust laws, had expressed very different aims--protecting consumers and small suppliers from wealth-redistributing monopolies, oligopolies, and cartels; maintaining open markets; and dispersing economic and political power.<sup>227</sup> The conservative conception of antitrust has, at most, acknowledged only the first of these three goals. Second--in a reflection of this new orientation--the antitrust agencies and the Supreme Court went on to abandon simple rules and presumptions, adopting the defendant-friendly rule of reason and other similarly open-ended standards to govern most forms of business conduct.<sup>228</sup>

The Reagan-initiated antitrust counterrevolution--perpetuated by subsequent Republican administrations and never seriously questioned by Democratic ones--has permitted powerful firms across sectors to control markets. Insofar as Democratic and Republican administrations have disagreed, it has been over the application of the efficiency standard--namely, whether a preference for short-term consumer interests should inform antitrust law--and enforcement actions at the margins.<sup>229</sup> In large measure, antitrust specialists in the United States have come to accept this narrow conception of antitrust--marked by a commitment to some variant of efficiency, with disagreements centered on the application of the rule of reason.<sup>230</sup> A once-populist and progressive "law against exploitation has become the law for exploiters" as "[e]fficiency and power win."<sup>231</sup>

##### *A. Efficiency Becomes the Near-Exclusive Goal of Antitrust*

With the inauguration of Ronald Reagan in 1981, the federal antitrust agencies executed a coup against prevailing antitrust thinking. Building on the rightward shift in antitrust jurisprudence in the 1970s,<sup>232</sup> the federal antitrust agencies moved to narrow objectives of antitrust law further. William \*270 Baxter and James Miller, two conservative academics, were appointed to head of the Department of Justice's Antitrust Division and Federal Trade Commission, respectively.<sup>233</sup> Both Baxter and Miller subscribed to Robert Bork's belief, articulated in *The Antitrust Paradox*,<sup>234</sup> that the antitrust laws should only promote the neoclassical construct of efficiency.<sup>235</sup> According to Bork, Congress enacted the Clayton, Federal Trade Commission, and Sherman Acts only to prohibit conduct that reduced efficiency.<sup>236</sup> Under this ahistorical paradigm, conduct that did not impair efficiency should be permitted, regardless of the effects on consumers, producers, competitors, or the political economy at large.<sup>237</sup> A change in personnel followed this ideological overhaul, as economists began to play a much larger role at the antitrust agencies, at the expense of lawyers.<sup>238</sup> This shift in agency composition reflected and reinforced the shift in ideology, from broad political economy to narrow microeconomics.<sup>239</sup>

Baxter, Miller, and numerous federal judges appointed during the Reagan years applied Bork's interpretation of the antitrust laws, overriding the will of Congress. These conservative bureaucrats and judges accepted Bork's historical analysis. But Bork's argument--that Congress established antitrust laws in order to promote efficiency--was made out of whole cloth.

A number of scholars have studied the legislative histories of the antitrust laws and shown Bork's interpretation to be false. The congressmen and senators involved in the debates preceding the passage of the principal antitrust laws voiced a number of concerns, including the protection of consumers and suppliers from firms with market power, the defense of small businesses from the predatory tactics of large rivals, and the preservation of democracy.<sup>240</sup> Efficiency was not on Congress's radar in 1890 or 1914. In fact, the very concept of "efficiency" was not fully formulated by economists \*271 themselves until the 1920s.<sup>241</sup>

In the 1980s, unelected policymakers and judges retrospectively imposed their conservative ideology on Congress's original vision.<sup>242</sup>

In pursuing their ahistorical and anti-democratic elevation of efficiency above Congress's stated goals, the proponents of this vision also adopted a benign view of conduct previously considered anti-competitive, highlighting the purported efficiency benefits. For example, courts had historically treated horizontal mergers in concentrated markets,<sup>243</sup> tying,<sup>244</sup> and vertical restraints<sup>245</sup> as competitively suspect. Along with Baxter, Miller, and other new federal antitrust officials,<sup>246</sup> judges on the federal bench--such as Bork himself, Frank Easterbrook, and Richard Posner--abandoned this traditional approach. They instead claimed that mergers, predatory pricing, tying, and vertical restraints often had beneficial (namely efficient) purposes and effects.<sup>247</sup> And even when the conduct of monopolists and mergers in concentrated markets harmed competition, proponents of the new antitrust paradigm insisted that markets, left to their own devices, would erode oligopoly and monopoly power.<sup>248</sup> With the exception of collusion and mergers in concentrated markets, the harms from anticompetitive conduct were largely assumed away. These beliefs have little, if any, empirical support.<sup>249</sup>

Weak merger enforcement over the past several decades exemplifies this ideological shift. According to Chicago School precepts, mergers typically have a benign effect on competition<sup>250</sup> and often even yield economies of scale and scope.<sup>251</sup> During and since the Reagan years, government merger enforcement has reflected these assumptions philosophically<sup>252</sup> and \*272 in practice.<sup>253</sup>

### ***B. The Rule of Reason Takes Center Stage***

By applying this benign view of many forms of anticompetitive conduct and maintaining a quasi-religious faith in a "self-regulating" marketplace, the antitrust agencies and federal courts have relaxed antitrust rules. Specifically, the agencies and courts have moved away from simple rules and presumptions toward open-ended, fact-intensive legal standards.

The Reagan Department of Justice published merger guidelines that dramatically weakened government enforcement against harmful corporate consolidation.<sup>254</sup> These guidelines raised the concentration thresholds for anticompetitive horizontal mergers and established broad legality for vertical mergers.<sup>255</sup> The new merger guidelines initiated a shift away from clear merger rules toward a standards-based approach, which requires the antitrust agencies to conduct an exhaustive industry study before challenging mergers in even highly concentrated markets.<sup>256</sup> The latest version of the merger guidelines--the 2010 Horizontal Merger Guidelines<sup>257</sup> -- further raised the concentration thresholds for competitively problematic mergers, stressed effects-based analysis, and devalued market shares and market structure.<sup>258</sup>

Federal judges, too, have adopted standards enshrining a permissive view of anticompetitive conduct. Over the past forty years, for example, the Supreme Court has relaxed monopolization doctrine. The Court has ruled that predatory pricing and refusals-to-deal should be subject to more relaxed standards that followed the spirit of the rule of reason--open-ended tests that required plaintiffs to define the relevant market, establish that defendants \*273 possessed market or monopoly power, and show anticompetitive effects. Heavily influenced by Bork's theoretical musings on the topic, the Court has asserted that predatory pricing is "rarely tried, and even more rarely successful."<sup>259</sup> Based on this belief, it has imposed a demanding standard on plaintiffs that requires them not only to prove below-cost pricing at an early stage of litigation but also "establish" future anticompetitive effects from this pricing conduct.<sup>260</sup> In the context of refusals-to-deal, the Court has embraced an effects-based analysis<sup>261</sup> and, in another instance, asserted that "the opportunity to charge monopoly prices--at least for a short period--is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."<sup>262</sup>

Some courts and agency officials have gone even further than the Supreme Court in favoring monopolists. Rather than recognize the exceptional power of monopolists, certain courts of appeals have imposed high burdens on plaintiffs attacking abusive monopolists.<sup>263</sup> For example, the Ninth Circuit has held that plaintiffs must show evidence of below-cost pricing (typically associated with predatory pricing) when challenging anticompetitive product bundling by a monopolist.<sup>264</sup> A former FTC

commissioner joined this promonopoly chorus and wrote that plaintiffs should satisfy a higher “clear evidence” standard (rather than the usual “preponderance of the evidence” standard in civil cases) in monopolization suits.<sup>265</sup>

In rewriting antitrust precedent on vertical restraints in a pro-defendant fashion, the Supreme Court has held that the rule of reason is the default legal standard.<sup>266</sup> The per se rules that applied to vertical price and non-price restraints have been overturned. This process began with the Supreme Court's 1977 decision in *Continental Television, Inc. v. GTE Sylvania, Inc.*, which held that vertical non-price restraints should be evaluated using the rule of reason.<sup>267</sup> This freeing of vertical restraints from antitrust proscriptions culminated in the 2007 decision *Leegin Creative Leather Products, Inc. v. PSKS Inc.*<sup>268</sup> In this landmark ruling, the Court overruled the nearly \*274 century-old per se rule outlawing resale price maintenance.<sup>269</sup> In the series of cases that ended with the ruling in *Leegin*,<sup>270</sup> the Court relied on a theoretical--but empirically unsupported--view of competition in retail markets to assert that the vertical restraints at issue often had beneficial effects.<sup>271</sup>

The shift from per se rules and presumptions to the rule of reason and other standards-based tests has dramatically undercut antitrust enforcement. Outside of cases alleging collusion, plaintiffs have to define relevant antitrust markets, establish that defendants have market power, and show that the suspect practice has likely anticompetitive effects.<sup>272</sup> Antitrust litigation today requires the retention of economic experts and extensive discovery, which makes for costly and interminable litigation.<sup>273</sup> And often times, plaintiffs have to do all this just to survive defendants' motions to dismiss or motions for summary judgment. Not surprisingly, these legal standards have pushed plaintiffs' probability of success in court in the twenty-first century practically down to nil.<sup>274</sup> With good reason, one of the leaders of the intellectual coup in antitrust, Richard Posner, has described the rule of reason in practice as “little more than a euphemism for nonliability.”<sup>275</sup>

These doctrinal changes have dramatically increased the power of businesses to control and steer how markets and industries develop. Large firms in concentrated markets today have broad latitude to acquire and merge with their direct rivals. Recent mergers proposed in oligopolistic markets include combinations between Anheuser-Busch InBev and SABMiller,<sup>276</sup> Dow Chemical and DuPont,<sup>277</sup> Anthem and Cigna, and Aetna and Humana.<sup>278</sup> Regardless of whether these pending mergers are stopped in court or modified \*275 through a consent decree, the fact that they are even being proposed--given their size--reveals the degree to which contemporary merger law has been enfeebled.

Dominant and other powerful firms also have broad freedom to marginalize their rivals and dictate terms to other players. With the current permissive treatment of predatory pricing, refusals-to-deal, and other exclusionary conduct, dominant firms have the ability to smother their smaller rivals and protect their monopoly power. In consumer goods markets, powerful manufacturers and retailers can establish vertical restraints that raise final prices and hamper the entry and growth of smaller competitors.

Even in the main area of antitrust, in which public enforcement remains relatively strong, courts have erected significant obstacles. Collusion is the one form of anticompetitive conduct still subject to strict rules<sup>279</sup> -- and often appears to be the only type of conduct that draws consistent interest from the antitrust agencies.<sup>280</sup> Private plaintiffs, however, face major procedural roadblocks when pursuing these cases. Parties injured by collusive activity now have to present much more evidence in support of their complaints before they have had an opportunity to conduct in-depth factual discovery through the judicial process.<sup>281</sup> Courts have also dramatically expanded the purview of mandatory arbitration, permitting firms accused of collusion to use contractual provisions to bar private class actions.<sup>282</sup>

## V. WHAT CAN BE DONE TO TACKLE THE OLIGOPOLISTIC AND MONOPOLISTIC DOMINATION OF MARKETS AND SOCIETY

The result of this counterrevolution in antitrust--originating as an intellectual movement led by the Chicago School, stamped into policy by the Reagan administration<sup>283</sup> --is that markets across sectors are highly concentrated.<sup>284</sup> Powerful corporate actors that control our markets inflict major damage on the American economy, society, and democracy. But the antitrust status quo can be changed. Just as Reagan's executive and judicial appointees \*276 deposed a century of antitrust thinking, their vision, in turn, can be abandoned. The antitrust agencies and courts can take actions to align the goals of antitrust with the vision of Congress when it passed the Sherman, Clayton, and Federal Trade Commission Acts. Antitrust should protect consumers from

anticompetitive overcharges and small producers from anticompetitive underpayments, preserve open markets, and disperse economic and political power. While this “citizen interest” standard would not adopt redistribution as an explicit goal, applying it would likely help mitigate inequality.

To advance the citizen interest standard, a number of policy reforms are essential. First, antitrust doctrine should be simplified to ease enforcement and avoid interminable and largely fruitless inquiries into market dynamics. Second, antitrust should also address markets characterized by durable monopoly power or otherwise harmful market power and seek to restore competition. Third, if simpler, more competition-friendly doctrine is to be effective, it must be accompanied by strong remedies that promote competitive market structure, rather than attempt to contain market power through complicated conduct remedies. Fourth, while substantive changes are important, process must also change. The federal antitrust agencies must be more transparent and accountable.

The restoration of a progressive-populist antitrust under the citizen interest standard will not be an easy task and will take time. Antitrust officials and judges committed to the current way of thinking are unlikely to realize this goal. A Congress dominated by Republicans and business-friendly Democrats is even less likely to act.

All hope of an antitrust revival is not lost, however. In recent decades, the common law approach to antitrust has largely been used to retrench antitrust.<sup>285</sup> This judicial flexibility, however, has the potential to be used to revive an expansive vision of antitrust. In fact, the Reagan counterrevolution offers a model for those who believe in the untapped potential of the antitrust laws to protect consumers, preserve open markets, and safeguard democracy from concentrated private power. Reagan believed in a pro-corporate ideology and appointed antitrust enforcers and judges who shared his philosophy and had well-developed ideas on scaling back antitrust. A president with a progressive economic outlook, who appoints antitrust enforcers and judges with a commitment to the citizen interest standard, can revive a vital body of law that has been anemic for the past several decades.

***\*277 A. The Goals of Antitrust Should Reflect Congress's Vision in Enacting the Clayton, Federal Trade Commission, and Sherman Acts***

While scholars have spilled much ink debating Congress's vision in enacting the antitrust laws passed in the late nineteenth and early twentieth centuries,<sup>286</sup> there was no real debate until the 1970s. The Supreme Court routinely acknowledged that Congress intended to promote a variety of political and economic aims, and that the task of the judge was to seek to balance them.<sup>287</sup> Only after Bork had declared that the main goal of Congress in passing the Sherman Act was instead to enhance economic efficiency--defined as the sum of consumers' and producers' welfare<sup>288</sup>--did the intent of Congress become a point of contention. Stunningly, Bork's revisionist account has become mainstream, ratified by nearly four decades' worth of Supreme Court jurisprudence.<sup>289</sup>

Many legal scholars have studied the major antitrust statutes and shown that Bork's argument about efficiency is not supported by the legislative history.<sup>290</sup> Centrally, the passage of the Sherman Act was animated by at least three goals: (1) the distribution of political economic power, (2) the prevention of unjust wealth transfers from consumers and small suppliers to large entities, and (3) the preservation of open markets.<sup>291</sup> As scholars have noted, conflicting statements of legislative purpose make it impossible to identify a single, tidy aim. In fact, it is undeniable that a multitude of political, social, and economic concerns animated lawmakers. Leading economists of the late nineteenth and early twentieth centuries had “very little influence” over the passage of the antitrust statutes.<sup>292</sup> And moreover, efficiency is “a concept that economists only defined after the passage of the Federal Trade Commission Act and Clayton Act in 1914.”<sup>293</sup>

**\*278** Since the literature explicating the various non-efficiency based goals is sizable and comprehensive, only a brief review of these animating goals is necessary. First, the legislative history reveals that key lawmakers viewed antitrust through a political lens. When the Sherman Act passed the U.S. Congress in 1890, Senator John Sherman called it “a bill of rights, a charter of liberty,” and stressed its importance in both economic and political terms.<sup>294</sup> Senator Sherman viewed the monopolist as just another form of monarch. On the floor of the Senate in 1890, he declared,

If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.<sup>295</sup>

One way to understand the political valence of antitrust is through an integrated conception of power—namely, the notion that the distribution of economic ownership and control is intimately bound up in, and has deep implications for, the distribution and exercise of political power. There are at least two facets to this. First is the idea that concentration of economic power concentrates political power through, for example, the accrual of wealth, which can be used as a lever of political influence. Second is the belief that the effects of concentrated economic power are, themselves, fundamentally political, given that excessive economic concentration tends to “breed antidemocratic political pressures,” whereas “reducing the range within which private discretion by a few in the economic sphere controls the welfare of all” enhances individual and business freedom.<sup>296</sup> Leading up to the passage of the Clayton Act, for example, Senator George Hoar warned that monopolies were “a menace to republican institutions themselves.”<sup>297</sup>

A second motivating goal was to prevent unjust wealth transfers from consumers to firms with market power.<sup>298</sup> Throughout the debates, lawmakers denounced monopolies for extracting wealth from consumers and turning it into monopoly profits. Senator Sherman, for example, called overcharges by monopolists “extortion which makes the people poor,”<sup>299</sup> while Congressman Richard Coke described them as “robbery.”<sup>300</sup> Representative John Heard declared that trusts had “stolen untold millions from the people,”<sup>301</sup> and Representative Ezra Taylor noted that the beef trust “robs the farmer on the one hand and the consumer on the other.”<sup>302</sup> As Senator \*279 James George observed, “They aggregate to themselves great enormous wealth by extortion which makes the people poor.”<sup>303</sup>

Strikingly, this concern with wealth transfers was not simply economic. As Robert Lande has explained, prior to the passage of the Sherman Act, price levels in the United States were stable or slowly declining.<sup>304</sup> If the primary concern had been steep prices, then Congress could have focused on industries where prices were high. Congress’s choice to denounce unjust redistribution in and of itself suggests that the public was “angered less by the reduction in their wealth than by the way in which the wealth was extracted,” through excesses of market power.<sup>305</sup>

A third distinct goal was the preservation of open markets, to ensure that independent entrepreneurs had an opportunity to enter. A number of Congressmen supported the creation of the Federal Trade Commission Act with the idea that it would help protect small business. Senator Reed stated that Congress passed the law to keep markets open to independent businesses.<sup>306</sup> Predicting what would happen if big business was permitted to expand unchecked, Senator George warned that it would “crush out all small men, all small capitalists, all small enterprises.”<sup>307</sup>

In summary, ample scholarship documents that Congress had multiple political economic goals when enacting the Sherman Act, the Federal Trade Commission Act, and the Clayton Act. None of the central sponsors of these laws spoke of the need to increase allocative efficiency in the terms that Bork would later insist. Insofar as “efficiency” appeared in the debates at all, it was used in the context of arguing that purchasers should receive a “fair share” of these benefits.<sup>308</sup> When interpreting antitrust laws, the antitrust agencies and courts should hew to this expansive intent.

### ***B. Simpler Legal Standards Should Govern Mergers, Monopolization, and Vertical Restraints***

If antitrust law is to be revived and protect consumers and suppliers from powerful sellers and buyers, maintain open markets, and disperse economic and political power, antitrust enforcers and courts must eschew the open-ended rule of reason and adopt simple presumptions for many forms of anticompetitive conduct. Agencies and courts cannot achieve the pluralistic vision Congress had when it enacted the antitrust statutes by applying the rule of reason. For example, it is not possible to balance the cost savings from a merger against the costs of the enhanced long-term economic and political power of the larger corporation. Rules and presumptions would promote the multiple goals that the Congresses of 1890 and 1914 sought to \*280

advance, reduce the complexity and cost of antitrust investigations and litigation, and simplify legal compliance for businesses. Specifically, simple presumptions of illegality, subject to rebuttal through the introduction of credible business justifications, should govern, at a minimum, horizontal mergers in concentrated markets, monopolization, and vertical restraints.

As a basic matter, it is far from clear that the agencies and courts can apply the rule of reason standard effectively *even* when they focus on promoting efficiency. Weighing short-term efficiency gains against price effects, let alone long-term losses in dynamic and productive efficiencies, is a largely speculative undertaking and involves balancing incommensurate and largely unknowable quantities.<sup>309</sup> This infirmity is especially acute in the realm of prospective merger reviews.<sup>310</sup> The merits of current agency practice and court decisions have not been empirically confirmed.<sup>311</sup> The agencies and courts continue to assume, on the basis of very thin evidence, that the complex and interminable inquiries demanded by the rule of reason and other standards produce superior outcomes.<sup>312</sup> But mounting evidence suggests just the opposite: that this approach has neither lowered prices nor led to efficiency gains.<sup>313</sup> In other words, the efficiency-based approach has failed even on its own terms. It appears that the agencies have achieved the worst of all possible worlds by embracing nebulous legal standards that produce neither procedural efficiency nor substantive accuracy.<sup>314</sup>

**\*281** In the realm of merger law, the Supreme Court's presumption in *United States v. Philadelphia National Bank* should be reinvigorated. The Court held that a horizontal merger that produces a firm with a market share of greater than thirty percent is presumptively illegal.<sup>315</sup> While *Philadelphia National Bank* involved a merger in which the two firms had combined shares well above twenty percent,<sup>316</sup> the Court indicated that a merger exceeding this lower threshold could be presumptively illegal as well.<sup>317</sup> The merging parties could rebut this presumption by establishing business justifications for their combination.<sup>318</sup> Although the *Philadelphia National Bank* decision has not been formally overruled, the agencies' shift toward increasingly fact-driven merger standards has weakened the force of this precedent.<sup>319</sup>

An agency and judicial re-embrace of this previous standard<sup>320</sup> would simplify and enhance the transparency of merger law and restore its role as a deterrent. This structural presumption would advance the incipency standard in merger law and prevent harms from mergers before they occur.<sup>321</sup> While agencies would still have to define relevant markets under the *Philadelphia National Bank* rule, the complexity of merger reviews would be greatly diminished. For one, these reviews would be significantly shortened and be much less dependent on competing speculations about the future development of markets. Armed with a simple rule rather than a standard that demands an exhaustive industry study and impossible projections of the future, the antitrust agencies, for example, would not have to spend more than a year investigating mergers in highly concentrated markets--as they routinely do now.<sup>322</sup>

Importantly, firms in highly concentrated markets would be put on clear notice: a merger that created an entity with a share greater than twenty percent **\*282** would have to show credible business justifications to overcome the presumption of illegality.<sup>323</sup> A simple rule that lay observers could understand would prevail. Leading oligopolists would have less confidence pursuing five-to-four or four-to-three mergers and would be less likely to propose them in the first place. Sophisticated corporate counsel would no longer be able to manipulate the amorphous and subjective Horizontal Merger Guidelines to the advantage of large firms in concentrated markets.<sup>324</sup> For example, if *Philadelphia National Bank* were the governing merger test today, it is hard to imagine that two firms with a joint national market share in excess of forty percent would even contemplate merging,<sup>325</sup> let alone propose to merge with high confidence in completing the deal.<sup>326</sup>

In the realm of monopolization, presumptions should replace the current rule of reason and other unstructured inquiries, including in the context of exclusive dealing, predatory pricing, refusals-to-deal, or tying. To an extent, U.S. law already recognizes the logic of this stricter test for monopolists. The courts have stated that monopolists have less freedom of action because "there is no market constraint on the monopolist's behavior."<sup>327</sup> The late Justice Scalia, despite being an ardent critic of antitrust law generally and monopolization claims specifically,<sup>328</sup> stated that "[b]ehavior that might otherwise not be of concern to the antitrust laws--or that might even be viewed as procompetitive--can take on exclusionary connotations when practiced by a monopolist."<sup>329</sup> Moreover, something akin to a presumption of illegality applies in the area of tying (conditioning the purchase of one product on the purchase of another). The Court has held that tying by a firm with market power in the tying product market is *per se* illegal because "anticompetitive forcing is likely."<sup>330</sup>

Applying a presumption of illegality to exclusive dealing, refusals-to-deal, and below-cost pricing by dominant and near-dominant firms would further the goal of protecting consumers and small suppliers and maintaining open markets. For instance, U.S. law should treat pricing below short-term **\*283** cost by dominant or near-dominant firms as illegal in the absence of credible business justifications.<sup>331</sup> Similar presumptions of illegality should apply when a firm possessing dominance or on the cusp of dominance ties up distributors or final customers through exclusive dealing arrangements, refuses to grant access to essential facilities, or ties two distinct products through contractual or technical means. These forms of conduct may be neutral or even beneficial when practiced by a non-dominant firm in a competitive market. However, they take on a radically different complexion when undertaken by a monopolist or near-monopolist and should be permitted only under extraordinary circumstances.<sup>332</sup>

The antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate. The European Union applies a presumption of illegality to conduct practiced by a monopolist that has exclusionary potential.<sup>333</sup> EU law has imposed special obligations on dominant firms that preclude them from erecting artificial market barriers.<sup>334</sup> Competition law in the European Union establishes “a principle of freedom of non-dominant firms to trade without artificial obstacles constructed by dominant firms, and carries an assumption that preserving this freedom is important to the legitimacy of the competition process and is likely to inure to the benefit of all market players, competitors and consumers.”<sup>335</sup> Dominant firms can engage in certain types of conduct only if they have credible business reasons for doing so.<sup>336</sup> Otherwise, they run afoul of the presumption in favor of markets open to all comers. The EU’s focus on protecting both consumers and rivals from powerful businesses is consonant with the objectives expressed by the drafters of U.S. antitrust laws.<sup>337</sup>

Exclusive territories, resale price maintenance, and similar distributional restraints have immediate and longer-term anticompetitive effects and theoretical business justifications of limited real-world relevance. As a practical matter, these distributional restraints give large retailers and manufacturers the power to dictate the development of consumer goods markets.<sup>338</sup> For example, resale price maintenance, under which a manufacturer sets a contractual floor on the retail price of its products, can limit intrabrand competition, **\*284** raise consumer prices, and impede new entry in the retail sector.<sup>339</sup> Used in sectors with dominant retailers that play a gatekeeper function, resale price maintenance can have a pro-competitive effect.<sup>340</sup> But in other instances it can be misused. This is because with protected profits, retailers are likely to put less pressure on wholesalers and manufacturers to cut their prices over the longer term.<sup>341</sup> Furthermore, under a resale price maintenance regime, retailers with a lower cost structure cannot pass their cost advantages through to consumers in the form of lower prices and expand their market share using their most potent sales tool--discounting.<sup>342</sup> This restriction on price competition impedes the emergence of lower-cost retail formats and can preserve non-competitive retail market structures.<sup>343</sup>

Yet, based on a stylized view of retail competition and the purported threat of “free-riding” on point-of-sale services such as product demonstrations at a store, the Supreme Court has held that these restraints on competition should be subject to the rule of reason and has made them de facto legal.<sup>344</sup> For the small fraction of products requiring retail sales support, the promotion of point-of-sale services, such as product demonstrations, can be achieved through other less restrictive means, such as manufacturers granting promotional allowances for full-service retailers.<sup>345</sup> The beneficial uses of distributional restraints, including resale price maintenance, have not been sufficiently documented--or are limited to sufficiently few circumstances--to warrant the permissive standard that currently exists.<sup>346</sup>

Exclusive territories have similar anticompetitive effects. By limiting the geographical proximity of retailers selling the same brand, exclusive territories limit all forms of intrabrand competition--both price and non-price **\*285** competition.<sup>347</sup> Due to the greater distance between rival sellers, retailers have a diminished incentive to compete on both price and non-price dimensions.

Given the likely loss of retail competition from vertical restraints and low likelihood of offsetting consumer benefits, practices such as resale price maintenance and exclusive territories should be subject to a relatively strict legal standard or, at minimum, a structured legal test. For example, the agencies and courts could hold resale price maintenance and exclusive territories to be presumptively illegal. This standard would reflect the high risk of harm from these practices. The European Union applies such a standard to resale price maintenance and to exclusive territories.<sup>348</sup> Unlike the per se standard that governed resale price

maintenance until 2007 and established conclusive illegality,<sup>349</sup> however, a presumption of illegality would allow businesses to rebut the presumption by offering credible business justifications.<sup>350</sup> They could overcome the presumption by showing that the restraint is reasonably necessary to achieve a beneficial end, such as the provision of point-of-sale services.

### *C. Possession of Highly Damaging Monopoly and Oligopoly Power Should Be Challenged*

The antitrust agencies should use their existing legal authorities or seek additional authorities from Congress to challenge the possession of damaging monopoly and oligopoly power by firms. The specific types of monopoly and oligopoly power that should be challenged are those that last for an extended period of time or result in substantial harm, such as in a market for essential goods and services with highly inelastic demand. In contrast to the present law governing dominant firms, this legal power would not require “bad acts” on the part of the firm possessing market power;<sup>351</sup> rather, an uncompetitive market structure that imposes substantial injury on the public would itself be challenged. Under the proposed “no-fault” monopoly and oligopoly doctrine, firms found to possess monopoly or oligopoly power that inflicts substantial injury and cannot be justified on operational grounds, such as economies of scale, would face antitrust liability.

**\*286** Market power that persists for an extended period of time--say, for at least five years--imposes substantial costs on the public in the form of overcharges on consumer prices or depressed payments to producers or workers. Sometimes this monopoly or oligopoly power persists due to a discrete set of bad acts by the monopolists or oligopolists that exclude competitors. Examples of such bad acts include below-cost pricing and preventing rivals from accessing customers or essential distribution channels. In these instances, eliminating these artificial barriers to competition can restore competition to the market. In other cases, monopoly and oligopoly power persist due to no apparent bad practice<sup>352</sup> or myriad bad practices enabled by the firms' underlying power.<sup>353</sup> Under these circumstances, the options under current law are either to do nothing or to initiate lengthy litigation that guarantees little except steady income for lawyers and economists.<sup>354</sup> Because current law is ill-equipped to tackle these particular problems, let alone quickly, the public suffers under the burden of monopoly<sup>355</sup> and oligopoly power that persists.

In other instances, monopoly or oligopoly power may arise intermittently or only temporarily but inflict tremendous harm. A classic example is market power in restructured electricity markets. Due to the highly inelastic nature of demand for electricity, generators with market power can unilaterally raise market prices. During the California electricity crisis in 2000 and 2001, generators created artificial shortages of electricity to drive up its price--without any indication of collusion.<sup>356</sup> Similar unilateral withholding could occur in markets for essential medicines.<sup>357</sup> The dramatic increase in the price of the EpiPen, for example, appears to be the product of monopoly power.<sup>358</sup> Although, as currently interpreted, the antitrust laws require evidence of collusion or other bad act before condemning this type of withholding behavior,<sup>359</sup> the harm to the public is real and often severe. The electricity price spikes and rolling blackouts that hit California fifteen years **\*287** ago,<sup>360</sup> and the monopolistic pricing of the EpiPen, illustrate the consumer costs of market power.<sup>361</sup>

The focus on durable monopoly and oligopoly would also shift the focus of current dominant firm law away from bad acts and toward market structure. The antitrust agencies should only challenge the market power of firms that impose substantial injury on the public, due either to persistent market power over a prolonged period of time or to large magnitude of harm in a short period of time. And even firms found to possess this type of market power would be allowed to show that asset divestitures and other restructurings would result in the loss of operational efficiencies.<sup>362</sup> Given these demanding legal standards for when firms could be found liable, the risk that no-fault monopoly and oligopoly cases would diminish the competitive zeal of businesses--most of which are unlikely ever to possess anything even approaching injurious monopoly or oligopoly power--appears remote.<sup>363</sup>

### *D. Merger and Monopoly Remedies Should Focus on Maintaining and Restoring Competitive Market Structures*

Stronger antitrust rules must be paired with effective remedies in public enforcement actions if markets are to be competitive. Even very strong restrictions on conduct are unlikely to be effective if the subsequent remedies are weak. Legal victories are certain to be pyrrhic when “liability is found; but ineffective remedies are imposed and competitive outcomes are not altered

very much.”<sup>364</sup> For example, even under a stricter merger enforcement regime, companies may pursue anticompetitive mergers if they need to make only minor concessions to get through the nominally tough merger review process. To promote competitive markets and the citizen interest standard, the antitrust agencies must seek to maintain and restore competitive market structures. In the merger context, an effective approach would mean enjoining mergers in their entirety rather than accepting divestitures or conduct remedies. In monopolization matters, structural remedies must be favored over complex, quasi-regulatory behavioral solutions.

While the agencies wisely prefer divestitures to conduct remedies in the case of horizontal mergers, the defects of this approach--even from an efficiency perspective--are apparent. Retrospective studies suggest that structural remedies often fail to maintain competition.<sup>365</sup> A landmark FTC study in 1999 found that, in a quarter of reviewed divestitures, “the buyers [were] \*288 not operating viably in the relevant market”<sup>366</sup> and so competition was not preserved following a merger.<sup>367</sup>

While FTC divestiture remedies may have improved following the study, two spectacular failures in recent years raise continued doubts about their efficacy. In the mergers between Hertz and Dollar Thrifty in 2012<sup>368</sup> and Albertsons and Safeway in 2015,<sup>369</sup> the FTC required the merging entities to divest assets to address competition concerns in local markets. In both instances, the acquiring entities proved to be incapable of replacing the lost competition and filed for bankruptcy less than a year after the FTC blessed the divestitures. And in the cruelest of ironies and a stinging rebuke to the FTC, in both instances the merging firms ended up buying back some of the entities originally divested.<sup>370</sup>

Importantly, neither remedy's failure came as a surprise to observers. In Hertz/Dollar Thrifty, the entity that Hertz divested--Advantage Rent a Car--did not appear to be viable from the beginning. Advantage was stripped of cars and the support of being under the Hertz umbrella.<sup>371</sup> A rental car consultant described the divestiture as akin to “taking a two-year old and saying ‘OK, now you've got to go to kindergarten and play Little League.’”<sup>372</sup> On top of inadequate financial and logistical capabilities, Advantage's new management and ownership appeared to lack the knowhow to run a successful car rental business.<sup>373</sup> In the meantime, as Advantage floundered, the Big Three in the car rental market raised prices at the highest \*289 rate since the start of the Great Recession.<sup>374</sup> Perversely, Hertz went on to reacquire some of the Advantage locations it had divested.<sup>375</sup>

The remedy in the Albertsons/Safeway case is arguably even harder to fathom. To allay the FTC's concerns, the merging entities sold 146 Albertsons stores in towns and cities in the Western United States, where they competed with a Safeway, to a small supermarket chain called Haggen.<sup>376</sup> Following this acquisition, the number of Haggen stores increased from 18 to 164.<sup>377</sup> Even a casual observer could have predicted that Haggen would have great difficulty expanding its storefronts nearly ten-fold in a very short period of time. The skeptics have been proven right. Haggen struggled to integrate the new stores and, despite its reorganization efforts in bankruptcy, may be forced to liquidate.<sup>378</sup> Underscoring how the remedy backfired, Albertsons has reacquired a number of the stores it sold through the bankruptcy process.<sup>379</sup>

Even if divestitures could be perfectly tailored and if they preserved competition in narrow markets in every instance, they would fail to advance the citizen interest standard. As they have in recent decades, large companies would still grow larger through consolidation, notwithstanding minor modifications to address the antitrust agencies' efficiency concerns. Businesses could use their greater size to coordinate with rivals across a number of markets and also to engage in exclusionary conduct to preserve their market power. In addition, their greater size would give them more power over our general political economy--an outcome that the congressmen and senators debating and drafting the antitrust statutes sought to forestall.<sup>380</sup>

To promote Congress's broad vision of protecting consumers and suppliers, maintaining open markets, and dispersing private power, the antitrust agencies should establish a strong presumption in favor of enjoining mergers in concentrated industries. This remedy would be more effective in ensuring that competition does not wane. As a practical matter, it is not apparent that the antitrust agencies are capable of crafting good remedies--especially given that as the economy becomes more and more concentrated, the number of credible buyers of divested assets steadily diminishes.<sup>381</sup> If, for example, Haggen was indeed the most qualified buyer of Albertsons supermarkets \*290 in Western cities for the sake of maintaining competition, it would raise serious doubts about the general pool of capable supermarket operators that are not already oligopolists in their own right. More importantly, the current focus on horizontal market overlaps reflects an unduly narrow conception of competitive harms. Stopping mergers would help maintain market structures that are not only more conducive to protecting consumers, producers,

and workers from market power, but would also preserve open markets and prevent excessive concentration of private power in the economy and society.

In addressing monopolization of markets, structural solutions should be favored.<sup>382</sup> They allow for a one-time fix and create or restore a market in which multiple firms exist and competition can develop. Conduct remedies, in contrast, may treat only the symptoms of the problematic monopoly,<sup>383</sup> and are prone to being incomplete, ambiguous, and vulnerable to evasion.<sup>384</sup> Companies subject to these ongoing remedies have a powerful motive to sidestep them, including through the exercise of overt and subtle power over regulators,<sup>385</sup> as a means of perpetuating their profitable dominance.<sup>386</sup> While the challenges are not necessarily insurmountable, the antitrust agencies and courts are not institutionally well-suited to monitor and enforce complex conduct remedies.<sup>387</sup> This task, insofar as it is feasible, is more appropriate for industry regulators and public utility commissions.<sup>388</sup>

The conduct remedies in the Microsoft litigation in both the United States and Europe exemplify this quasi-regulatory approach. Mandatory interoperability and licensing agreements appear to have fostered greater competition in the desktop operating system and applications markets.<sup>389</sup> Yet, major questions remain on whether the complex regulatory undertaking was worth all the effort.<sup>390</sup>

**\*291** In cases in which the monopolist's power gives it a host of options to exclude competitors, enforcers and courts must address the root of the problem--the monopolist's very existence. Rather than undertake a game of "whack-a-mole" that is often beyond their institutional capabilities, they should restructure the monopolist's business operations. Structural remedies include dividing a monopolist into multiple horizontal competitors, as some commentators proposed in the United States' case against Microsoft.<sup>391</sup> Another option is to separate a monopolist in vertically related lines of business into separate entities.<sup>392</sup> Structural remedies typically do require some supervision to ensure compliance. This oversight would involve bright lines--meaning, for example, that the monopolist could not re-enter a certain market following a divestiture--and would not be nearly as complicated and intrusive as regulating terms of interconnection or licensing terms over an extended timeframe.

The vertical separation approach is embodied in the settlement in the monopolization case against AT&T, in which the phone giant agreed to separate its local phone monopoly from its long-distance and equipment operations.<sup>393</sup> The purpose of this remedy was to prevent AT&T from leveraging its then-natural monopoly in local phone service into the potentially competitive long-distance and equipment markets.<sup>394</sup> For twelve years--from 1984 until the passage of the Telecommunications Act of 1996--Judge Harold Greene monitored the local phone companies' compliance with line-of-business restrictions that prevented them from expanding into the long-distance and equipment markets.<sup>395</sup> Judge Greene appears to have performed his duties well and ensured the continued effectiveness of the original structural remedy.<sup>396</sup>

### *E. The Antitrust Agencies Must Be Subject to Greater Transparency Duties*

Increasing agency accountability is vital for ensuring that greater agency resources and stronger legal standards will lead to more vigorous enforcement. Improvements in substantive law are likely to be toothless if **\*292** the antitrust agencies can continue to operate behind a veil of secrecy. Antitrust watchers and other members of the public must be allowed to determine whether the agencies are acting in accordance with substantive law. At present, the antitrust agencies remain some of the least accountable in government. Officials are not required to explain to the public why they did not challenge a particular merger, or reckon with cases in which a merger that they did not challenge led to predicted harms.<sup>397</sup> Nor do agencies have to explain why they ended extensive investigations with no action. A prominent antitrust attorney has remarked that "[t]here are few government functions outside the CIA that are so secretive as the merger review process."<sup>398</sup>

Two recent matters illustrate the opacity surrounding antitrust investigations. In 2012, for example, the Justice Department quietly closed a three-year investigation into Monsanto, whose anti-competitive activities had been documented by journalists and described by state officials as egregious.<sup>399</sup> Upon shutting down its inquiry, the DOJ made no public announcement; only a short press release from Monsanto conveyed the news.<sup>400</sup> In the matter involving Google's search practices, the FTC terminated its investigation with some voluntary agreements, effectively clearing the company of all antitrust wrongdoing.<sup>401</sup>

Only through an inadvertent Freedom of Information Act (FOIA) leak did the public later learn that the FTC's antitrust lawyers had concluded that Google likely violated antitrust laws on three counts, and had recommended bringing a suit.<sup>402</sup>

One way to make agencies more accountable would be by requiring them to conduct publicly available retrospective reviews, assessing how their merger predictions actually played out. The President could create antitrust inspector general units within the DOJ and FTC, whose job would involve evaluating how specific mergers had affected factors like choice, quality, profit margins, and conduct with suppliers. This would be especially \*293 useful for identifying errors in judgment when designing merger remedies, a particular site of recent failure. In two instances discussed earlier--the Hertz/Dollar Thrifty and Albertsons/Safeway mergers--divestiture remedies that the FTC predicted would sufficiently preserve competition proved totally ineffective. In each case, not only did the firm acquiring the divested assets bleed money as a result of the acquisition--weakening it as a competitor--but also the *divesting* firm ended up re-acquiring some of the original assets.<sup>403</sup> For this magnitude of failure to go entirely unexamined--both within and outside the agency--is a recipe for weak and repeatedly feckless antitrust policy.

Another way to enhance agency transparency is to pass comprehensive FOIA reform--as Congress attempted through the FOIA Oversight and Implementation Act of 2014. If adopted, the legislation would have codified the mandate for government agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA and to usher in a new era of open Government."<sup>404</sup> Congress's reform agenda included a focus on Exemption 5, which protects from mandatory disclosure inter-agency and intra-agency documents that would be privileged from discovery in litigation.<sup>405</sup> In practice, the FTC and other agencies liberally use Exemption 5 to keep documents privileged or highly redacted.<sup>406</sup>

Calls to make the antitrust agencies more transparent and accountable to the public are not new.<sup>407</sup> Instituting as routine mechanisms by which the public can track the agencies' actions and document the long-term results of action or inaction would help both identify and recognize the public payoffs of successful enforcement and let public interest groups, advocacy organizations, and journalists both celebrate victories and hold the agencies accountable.

## \*294 CONCLUSION

Amid discussions exploring the factors contributing to the extreme economic inequality we face today, the role of monopoly and oligopoly power is underappreciated. It is as if the disregard of distributional consideration in current antitrust analysis has blinded scholars and policymakers to the connection altogether. Our argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution. Instead we hold that the failure of antitrust to preserve competitive markets contributes to regressive wealth and income distribution and--similarly--that restoring antitrust is likely to have progressive distributive effects. As we have sketched out, oligopolistic market structures and anticompetitive practices in a host of key industries may be transferring billions of dollars upwards--a politically, socially, and economically troubling outcome.

It is important to trace contemporary antitrust enforcement and the philosophy underpinning it to the Chicago School intellectual revolution of the 1970s and 1980s, codified into policy by President Reagan. By collapsing a multitude of goals into the pursuit of narrow "economic efficiency," both scholars and practitioners ushered in standards and analyses that have heavily tilted the field in favor of defendants. Critically, though, this counterrevolution can be undone. Executive and judicial action can revive antitrust policy to promote competitive markets--by protecting consumers and small suppliers from wealth-redistributing monopolies, oligopolies, and cartels; maintaining open markets; and dispersing economic and political power.

Over the last year, politicians and policy elites have started to recognize the fact that current antitrust policy has failed, yielding high concentration and low competition across sectors.<sup>408</sup> In June 2016, Senator Elizabeth Warren urged Americans to revive an antitrust movement, a return to our foundational belief "that concentrated power anywhere was a threat to liberty everywhere."<sup>409</sup> Even the top antitrust official at the Justice Department recently made comments distancing herself from the consumer welfare standard in favor of something closer to the "citizen interest" standard we outline.<sup>410</sup> Antitrust reform carries the potential to elicit bipartisan support.<sup>411</sup> Adopting the approach we detail would not only keep with Congress's original intent, but also advance the economic, political, and social interests of the vast majority of Americans.

## Footnotes

- a1 Fellow, Open Markets Program, New America; Yale Law School, J.D., expected 2017; Williams College, B.A., 2010.
- aa1 Regulations Counsel, Consumer Financial Protection Bureau. This article reflects the views of the authors alone and not necessarily those of New America, the Consumer Financial Protection Bureau, or the United States. For thoughtful feedback on earlier drafts of the article, we are deeply grateful to Ken Davidson, Ben Douglas, Bert Foer, Barry C. Lynn, Michael Oswalt, Frank Pasquale, and Marshall Steinbaum.
- 1 THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013). Piketty and his publisher expected that twenty thousand copies of his book would be sold--instead more than two million copies were sold around the world. *See* J. Bradford DeLong, *The Melting Away of North Atlantic Social Democracy*, TALKING POINTS MEMO (Feb. 21, 2016), <http://talkingpointsmemo.com/features/marchtoinequality/fourmeltingsocialdemocracy/> [<https://perma.cc/MSV5-DWK7>].
- 2 *See generally* ANTHONY B. ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* (2015).
- 3 A few commentators have drawn attention to this connection. *See, e.g.*, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 10-13 (2015); David Dayen, *The Most Important 2016 Issue You Don't Know About*, NEW REPUBLIC (Mar. 11, 2016), <https://newrepublic.com/article/131412/important-2016-issue-dont-know> [<https://perma.cc/DN43-E3FK>]; Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES (Apr. 18, 2016), [http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html?\\_r=0](http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html?_r=0) [<https://perma.cc/AMU4-Y9UT>]. More recently, a series of reports from the White House have also acknowledged the potential connection between a decline in competitive markets and a rise in economic inequality. *See, e.g.*, THE WHITE HOUSE, COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES (2016). Additionally, Senator Elizabeth Warren has observed that rising consolidation contributes to inequality. Elizabeth Warren, Senator of Massachusetts, Keynote Remarks at New America's Open Market Program Event: Reigniting Competition in the American Economy (June 29, 2016) ("Concentration is not the only reason for rising economic insecurity, but it is one of them.") (transcript available at <http://washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/> [<https://perma.cc/TAW8-F2PQ>]).
- 4 *See* Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); *cf.* Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016) (arguing that constitutional theories fail to adequately account for, and suggesting a conceptual framework for mitigating "elite economic domination").
- 5 David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 628, 652 (2014).
- 6 This revision of antitrust was part of the larger global project of freeing capital from the social democratic fetters of the mid-twentieth century and strengthening its position, vis-à-vis other segments of society. *See generally* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).
- 7 This concept of efficiency (sometimes called "consumer welfare" in the antitrust community) focuses on *short-term* maximization of economic output and the prevention of inefficiency that arises from "deadweight loss" (mutually beneficial transactions that are not made due to some market impediment). *See* John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 265-67 (1988). This concept of efficiency is tautological in that it assumes that "if individuals choose to

act in a certain way, that this must *de jure* be the rational utility-maximizing choice.” William Davies, *Economics and the “Nonsense” of Law: The Case of the Chicago Antitrust Revolution*, 39 ECON. & SOC’Y 64, 70 (2010).

- 8 Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1176, 1207 (2016).
- 9 Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 250 (1987).
- 10 *Id.* at 251.
- 11 John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 461 (2012) (estimating based on a number of studies that wealth transfer effect of cartels is five to thirty-three times larger than efficiency loss).
- 12 The short-term efficiency and distribution effects are only part of the story and do not account for the other ills from market power. Non-competitive markets can also subvert long-term innovation and damage a nation’s political economy more broadly. BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 216-55 (2010).
- 13 MARRINER S. ECCLES, BECKONING FRONTIERS: PUBLIC AND PERSONAL RECOLLECTIONS 76 (1951).
- 14 Perfect competition is, of course, a textbook ideal that is almost never seen in the real world. Nonetheless, it provides a baseline for comparison and serves to illustrate how market power transfers wealth from consumers to firms.
- 15 Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 47 (NBER Working Paper No. 20625, 2014), <http://gabriel-zucman.eu/files/SaezZucman2014.pdf> [<https://perma.cc/HY5K-FVAY>].
- 16 *Id.*
- 17 *Id.* at 58.
- 18 Figure is based on data from Saez & Zucman, *see id.* at 49.
- 19 PIKETTY, *supra* note 1, at 302.
- 20 Saez & Zucman, *supra* note 15, at 53.
- 21 Per a standard economic definition, “rents” refers to profits earned above the amount that would be earned in a competitive market.
- 22 Jason Furman & Peter Orszag, Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 14 (Oct. 16, 2015), [https://www.whitehouse.gov/sites/default/files/page/files/20151016\\_firm\\_level\\_perspective\\_on\\_role\\_of\\_rents\\_in\\_inequality.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf) [<https://perma.cc/LSY8-SMMG>]; *see also* Gustavo Grullon & Roni Michaely, *Corporate Payout Policy and Product Market Competition* 19-20, Am. Fin. Ass’n New Orleans Meetings Paper (Mar. 15, 2007), <http://portal.idc.ac.il/en/main/research/caesareacenter/annualsummit/documents/08-8.pdf> [<https://perma.cc/8T6U-TJ2W>] (finding that corporations

operating in less competitive markets pay out a smaller fraction of earnings to shareholders than corporations in more competitive markets).

23 PIKETTY, *supra* note 1, at 302-03.

24 Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL'Y 283, 300-02 (2005); Marc van Essen et al., *Assessing Managerial Power Theory: A Meta-Analytic Approach to Understanding the Determinants of CEO Compensation*, 41 J. MGMT. 164, 187 (2015).

25 Bebchuk & Grinstein, *supra* note 24, at 289-90

26 As Bebchuk and Grinstein write, "The aggregate compensation paid by public firms to their top-five executives was 9.8 per cent of the aggregate earnings of these firms during 2001-3, up from 5 per cent during 1993-5." *Id.* at 284.

27 William Lazonick, *Profits Without Prosperity*, 92 HARV. BUS. REV. 46, 48 (2014).

28 "Market power rents" refers to profits that a company earns by virtue of its market power and that--absent this market power--it would not earn.

29 Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PENN. L. REV. 2003, 2008-10 (2013).

30 See generally Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PENN. L. REV. 2063 (2001).

31 See MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORP. IMPACT 38-39 (2003).

32 *Id.*

33 Perhaps the most revealing--and troubling--illustration of this shareholder wealth maximization norm is the stock buyback phenomenon. In recent years, many companies have, instead of investing in their productive capacities, used surplus cash to buy back their stocks, raise their stock prices, and enrich equity holders--including the executives who have received stock options--in the process. In stark terms, this buyback epidemic means that many executives sacrifice the long-term profitability and viability of the company to promote the short-term interests of shareholders. See Karen Brettell et al., *The Cannibalized Company*, REUTERS (Nov. 16, 2015, 2:30 PM), <http://www.reuters.com/investigates/special-report/usa-buybacks-cannibalized/> [<https://perma.cc/C8JY-CGS2>].

34 See WILLIAM LAZONICK, STOCK BUYBACKS: FROM RETAIN-AND-REINVEST TO DOWNSIZE-AND-DISTRIBUTE, BROOKINGS, CTR. FOR EFFECTIVE PUB. MGMT. 12-14 (Apr. 2015) (explaining that workers and the government often make sizable and uncertain investments in firms, contrary to the assumption that only shareholders do, and that shareholders typically do not fund the productive investments of a firm).

35 Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 20-21 (NBER Working Paper No. 13106, May 2007), <http://www.nber.org/papers/w13106.pdf> [<https://perma.cc/PK3H-MENM>].

36 *Id.* at 23-24.

- 37 See generally Nancy L. Rose, *Labor Rent-Sharing and Regulation: Evidence from the Trucking Industry*, 95 J. POL. ECON. 1146 (1987); David Card, *Deregulation and Labor Earnings in the Airline Industry* (NBER Working Paper No. 5687, July 1996).
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- 39 See generally Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513 (2011).
- 40 See Quoc Trung Bui, *50 Years of Shrinking Union Membership, In One Map*, NAT'L PUBLIC RADIO (Feb. 23, 2015, 11:04 AM), <http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> [<https://perma.cc/3TQE-HUWY>] ("Fifty years ago, nearly a third of U.S. workers belonged to a union. Today, it's one in 10.").
- 41 See generally GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).
- 42 Press Release, Bureau of Labor Statistics, *Union Members--2015* (Jan. 28, 2016), <http://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/C5HR-C5LY>].
- 43 Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors* 27 (Princeton Univ., Working Paper No. 503, Sept. 2005), <https://core.ac.uk/download/pdf/6894934.pdf> [<https://perma.cc/PW7V-6YUC>].
- 44 Another labor market development, the growth of independent contracting and franchising, has created a "fissured workplace" in which those who work together on a daily basis may not be employed by the same entity or may have very different economic relationships with the same employer. This fissuring of workplaces appears to have further eroded notions of intra-firm wage equity and fairness and contributed to lower wages at the bottom of the pay scale. WEIL, *supra* note 41, at 83-87.
- 45 Chico Harlan, *An Unfruitful Jobs Recovery Rewrites the Definition of Full Employment*, WASH. POST (July 2, 2015), [https://www.washingtonpost.com/business/economy/an-unfruitful-jobs-recovery-rewrites-the-definition-of-full-employment/2015/07/02/1006e5c0-20ff-11e5-84d5-eb37ee8eaa61\\_story.html](https://www.washingtonpost.com/business/economy/an-unfruitful-jobs-recovery-rewrites-the-definition-of-full-employment/2015/07/02/1006e5c0-20ff-11e5-84d5-eb37ee8eaa61_story.html) [<https://perma.cc/5M3J-KY2S>].
- 46 Paul Krugman, *The Populist Imperative*, N.Y. TIMES (Jan. 23, 2014), <http://www.ny-times.com/2014/01/24/opinion/krugman-the-populist-imperative.html> [<https://perma.cc/X27S-5G58>].
- 47 Even in unionized sectors defined by producer market power, corporations have been reluctant to share the proceeds with workers. Verizon, whose unionized workers went on strike in 2016, illustrates how the surplus of a corporation is disbursed today. The telecom undertook a \$5 billion stock buyback last year to boost its stock price, on top of an already generous dividend. If that money had instead been divided among 180,000 workers, it would have come to \$28,000 per person--showing that there's plenty of profit to be shared across the company. Or, if it costs \$500 to install FiOS in one household, that money could have been used to help 10 million households cross the digital divide.

Mike Konczal, *How the Rise of Finance Has Warped Our Values*, WASH. POST (Apr. 22, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/04/22/how-the-rise-of-finance-has-warped-our-values/?utm\\_term=.674021859bc7](https://www.washingtonpost.com/news/in-theory/wp/2016/04/22/how-the-rise-of-finance-has-warped-our-values/?utm_term=.674021859bc7) [<https://perma.cc/7MCH-HYXF>].

- 48 See Josh Bivens & Lawrence Mishel, *Understanding the Historic Divergence Between Productivity and a Typical Worker's Pay: Why It Matters and Why It's Real* 3 (EPI, Briefing Paper No. 406, Sept. 2015), <http://www.epi.org/files/2015/understanding-productivity-pay-divergence-final.pdf> [<https://perma.cc/72KG-VKSL>] (“Net productivity grew 1.33 percent *each year* between 1973 and 2014, faster than the meager 0.20 percent annual rise in median hourly compensation. In essence, about fifteen percent of productivity growth between 1973 and 2014 translated into higher hourly wages and benefits for the typical American worker.”).
- 49 For a more comprehensive analysis of how a new labor law could help achieve greater economic and political equality, see Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1 (2016).
- 50 Saez & Zucman, *supra* note 15, at 30; Atif R. Mian et al., *Household Balance Sheets, Consumption, and the Economic Slump* 26 (Chi. Booth, Research Paper No. 13-32, June 2013), [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=1961211](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1961211) [<https://perma.cc/RE9Z-LJKD>].
- 51 See, e.g., PHILLIP R. KAUFMAN ET AL., U.S. DEPT' OF AGRIC., ECON. REPORT NO. 759, DO THE POOR PAY MORE FOR FOOD? ITEM SELECTION AND PRICE DIFFERENCES AFFECT LOW-INCOME HOUSEHOLD FOOD COSTS iii (1997), [https://www.ers.usda.gov/webdocs/publications/aer759/32372\\_aer759.pdf](https://www.ers.usda.gov/webdocs/publications/aer759/32372_aer759.pdf) [<https://perma.cc/44BF-PLST>] (“[P]oor households spend a higher proportion of their income on food than wealthier households which confirms a fundamental principle of economics--the percentage of income spent on necessities falls as income rises.”).
- 52 See, e.g., Sean Higgins et al., *Comparing the Incidence of Taxes and Social Spending in Brazil and the United States*, 61 REV. INCOME & WEALTH (forthcoming 2016).
- 53 PIKETTY, *supra* note 1, at 24.
- 54 William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q.J. ECON. 177, 187 (1975).
- 55 *Id.* at 191.
- 56 *Id.*
- 57 Fabienne Ilzkovitz & Adriaan Dierx, *Competition Policy and Inclusive Growth*, VOXEU (June 19, 2016), <http://voxeu.org/article/competition-policy-and-inclusive-growth> [<https://perma.cc/9REP-E7MN>].
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- 59 In fact, market power may be even more severe and pervasive than some statistics suggest. Cross-ownership by financial institutions in competing firms means that conventional measures of concentration understate market power in many markets. José Azar et al., *Anti-Competitive Effects of Common Ownership* 37-38 (Ross Sch. of Bus., Paper No. 1235, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2427345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345) [<https://perma.cc/CC9C-MS69>].

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Connor and Lande reviewed 1,157 estimates of cartel overcharges and found the median overcharge to be 23.3% and the mean overcharge to be 49%. Connor & Lande, *supra* note 11, at 456. On the whole, monopolies and oligopolies face fewer coordination challenges than cartels and thus exercise market power more ruthlessly. Even accounting for reduced sales volume from higher prices, assuming market power rents in oligopolistic or monopolistic markets to be 15 to 25% of revenues appears quite defensible. In more competitive segments of an industry, market power rents (as a percentage of revenues) are likely to be lower. Market power rents (as a percentage of total revenues) for an entire industry depend on, among other things, the fraction of revenues derived from competitive rather than oligopolistic or monopolistic segments.

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Cooper et al., *supra* note 80; Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-for-Profit Hospital Mergers: A Case Study*, FED. TRADE COMM'N 31, <https://www.ftc.gov/sites/default/files/documents/reports/competitive-effects-not-profit-hospital-mergers-case-study/hospitals.pdf> [<https://perma.cc/NHH2-27DF>] (“These price increases--and in particular, the price increase at Watsonville hospital, a locally-sponsored and administered community hospital--suggest strongly that mergers involving not-for-profit hospitals are a legitimate focus of antitrust concern.”).

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- 207 See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 565 (2014) (“The central point that emerges from our research is that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”).
- 208 See, e.g., Adam Levitin, *Glass-Steagall Is Campaign Finance Reform*, CREDIT SLIPS (Nov. 29, 2015), <http://www.creditslips.org/creditslips/2015/11/glass-steagall-is-campaign-finance-reform.html> [<https://perma.cc/V4NA-CZ96>] (“By splitting up the financial services industry into squabbling factions, the result will be a substantial reduction in the influence of any particular section of the industry. Divide et impera.”).
- 209 See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THEORY OF GROUPS (1965).
- 210 See generally Jeffrey Drope & Wendy Hansen, *New Evidence for the Theory of Groups: Trade Association Lobbying in Washington, D.C.*, 62 POL. RES. Q. 303 (2009).
- 211 Zephyr Teachout, *Corporate Rules as Political Rules: Antitrust as Campaign Finance Reform* 34 (Fordham Law Legal Studies, Research Paper No. 238418, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2384182](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384182) [<https://perma.cc/6JVT-FSUN>].

perma.cc/W8DC-RQVH] (citing Matthew D. Hill, G. Wayne Kelly, G. Brandon Lockhart & Robert A. Van Ness, *Determinants and Effects of Corporate Lobbying*, FIN. MGMT. 931, 944-55 (2013)).

212 *See id.*

213 *See, e.g.*, Robert Reich, *The Political Roots of Widening Inequality*, THE AMERICAN PROSPECT (Apr. 28, 2015), <http://prospect.org/article/political-roots-widening-inequality> [<https://perma.cc/RFP4-G6GG>] (“I’ve come to believe [the standard explanation] overlooks a critically important phenomenon: the increasing concentration of political power in a corporate and financial elite that has been able to influence the rules by which the economy runs.”).

214 *See, e.g.*, ROBERT REICH, *SAVING CAPITALISM: FOR THE MANY, NOT THE FEW* 168 (2015).

215 *See* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 42-53 (2014).

216 JAMES KWAK & SIMON JOHNSON, *13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* 10 (2010).

217 *Id.* at 74.

218 *Id.* at 5-10.

219 *Id.* at 89-95.

220 *Id.* at 92.

221 *See generally* SHEILA BAIR, *BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF* (2012); NEIL BAROFSKY, *BAILOUT: HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET* (2012).

222 Indeed, consolidation trends among commodity traders prompted one European think tank to suggest that these trading houses--which underpin global trade in raw materials--may have “systemic” implications. *See* Neil Hume, *Are Commodities Traders “Too Big to Fail”?*, FIN. TIMES (Dec. 6, 2013), <https://www.ft.com/content/86b94d18-5ce6-11e3-81bd-00144feabdc0> [<https://perma.cc/E7BQ-QHL3>].

223 *See* CHRISTOPHER LEONARD, *THE MEAT RACKET* 284 (2014); Khan, *supra* note 126.

224 Khan, *supra* note 126.

225 The Supreme Court once described the Sherman Act as “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

226 Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 438-39 (1988).

- 227 Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 560-62 (2012); *see also* John J. Flynn, *supra* note 7, at 260-61.
- 228 *See* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).
- 229 *See, e.g.,* Baker & Salop, *supra* note 3, at 15-18.
- 230 Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211-13 (2008).
- 231 Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust--Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 963 (1987) (describing the critical legal studies movement's view of antitrust law as such).
- 232 *See, e.g.,* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (holding that rule of reason applies to territorial restraints imposed by manufacturers on distributors); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 510-11 (1974) (rejecting government challenge to merger in coal industry because it failed to show prospective anticompetitive effects).
- 233 William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 49-50 (1991).
- 234 *See generally* ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).
- 235 Eleanor M. Fox, *Chairman Miller; the Federal Trade Commission, Economics, and "Rashomon,"* LAW & CONTEMP. PROBS. 33, 37 (1987); Fox & Sullivan, *supra* note 227, at 945-46.
- 236 BORK, *supra* note 234, at 61-66.
- 237 *See* Fox & Sullivan, *supra* note 229, at 945 ("It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done. In their intellectual universe, antitrust is embodied in a reductionist paradigm: antitrust concerns the functioning of markets; microeconomics is the study of the functioning of markets; therefore, antitrust is microeconomics. The potential and desired effect of markets is the efficient allocation of resources; therefore, the sole purpose of antitrust is to prevent inefficient allocation of resources. Private firms can in theory, under certain limited circumstances, misallocate resources by obtaining or enhancing market power and artificially restraining output without offsetting cost reductions; therefore, output reduction without offsetting cost savings is the only possible antitrust harm.").
- 238 Davies, *supra* note 7, at 77.
- 239 *Id.* at 79.
- 240 *See, e.g.,* 51 CONG. REC. 8850 (1914); 51 CONG. REC. 13, 231 (1914); 21 CONG. REC. 2598 (1890); 21 CONG. REC. 2570 (1890); 21 CONG. REC. 2461 (1890).
- 241 Peter C. Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. DAVIS L. REV. 487, 487-88 n.1 (1983).

- 242 See, e.g., KENNETH M. DAVIDSON, *REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY* 83-84 (2011); James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 280 (1991).
- 243 See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963).
- 244 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 2 (1958) (finding that, in a tying arrangement, the purchase of one product is conditioned on the purchase of a second product).
- 245 See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960) (noting that vertical restraints impose limits on what, where, and at what price retailers can sell products purchased from upstream distributors and manufacturers).
- 246 Fox, *supra* note 235, at 49-50.
- 247 See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L. REV. 925 (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); BORK, *supra* note 234.
- 248 Easterbrook, *supra* note 247, at 32.
- 249 Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 921-26 (2014).
- 250 Posner, *supra* note 247, at 928.
- 251 Easterbrook, *supra* note 247, at 3.
- 252 See U.S. DEPT OF JUSTICE, 1982 MERGER GUIDELINES § 1, <http://www.justice.gov/archives/atr/1982-merger-guidelines> [<https://perma.cc/7PQU-LD5N>] (last updated Aug. 4, 2015) (“Although they sometimes harm competition, mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets.”) [hereinafter 1982 GUIDELINES]; U.S. DEPT OF JUSTICE & FED. TRADE COMM’N, 2010 HORIZONTAL MERGER GUIDELINES § 10, <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/JT2F-H989>] (“[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.”).
- 253 The number of merger cases filed annually by the Department of Justice has remained fairly constant since the early 1980s. See U.S. DEPT OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS: FY 1980-1989 5, <https://www.justice.gov/sites/default/files/atr/legacy/2011/09/13/215423.pdf> [<https://perma.cc/TZD4-6DVR>] (between 1981 and 1989, the number of merger cases filed in a year never exceeded eight); U.S. DEPT OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS: FY 2006-2015 6, <https://www.justice.gov/atr/file/788426/download> [<https://perma.cc/S4RN-PJKU>] (from 2006 to 2015 and across the Bush and Obama Administrations, the number of merger cases filed annually remained about the same and ranged from a low of four in 2007 to a high of fifteen in 2008).
- 254 1982 GUIDELINES, *supra* note 252.

- 255 See Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 221 (2005) (noting that five FTC challenges to vertical mergers with exclusionary potential between 1993 and 2005 could not have been brought if the FTC had followed the vertical merger guidelines).
- 256 Thomas E. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CAL. L. REV. 497, 518-19 (1983).
- 257 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 252.
- 258 Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707-08, 721 (2010).
- 259 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).
- 260 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).
- 261 See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) ("The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.").
- 262 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).
- 263 See, e.g., *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1079 (10th Cir. 2012) (holding that plaintiffs alleging anticompetitive refusal-to-deal by a monopolist must show that the monopolist sacrificed short-term profits by not dealing with a rival).
- 264 See *Cascade Health Sols. v. PeaceHealth*, 502 F.3d 895, 913-14 (9th Cir. 2007).
- 265 In re *McWane, Inc.*, 2014 FTC LEXIS 28, \*143 (2014) (Wright, Comm'r, dissenting).
- 266 See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason[.]'").
- 267 433 U.S. 36, 58 (1977).
- 268 551 U.S. 877, 907 (2007).
- 269 *Id.*
- 270 See also, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727-28 (1988).
- 271 See Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 196, 210 (Robert Pitofsky ed., 2008).

- 272 See *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (per curiam) (articulating rule of reason framework as series of five steps).
- 273 Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1460-65 (2009).
- 274 See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009) (“[Courts] dispose of 97% of rule of reason cases on the grounds that the plaintiff cannot show an anticompetitive effect.”) [hereinafter Carrier III].
- 275 Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).
- 276 David Ingold, *Will the Justice Department Put the AB InBev Deal on Ice?*, BLOOMBERG (Oct. 8, 2015), <http://www.bloomberg.com/graphics/2015-anheuser-busch-inbev-sabmiller-largest-beer-takeover/> [https://perma.cc/4YND-9DP3].
- 277 Drew Harwell, *Dow and DuPont, Two of America's Oldest Giants, to Merge in Jaw-Dropping Megadeal*, WASH. POST (Dec. 11, 2015), <https://www.washingtonpost.com/news/business/wp/2015/12/11/dow-and-dupont-two-of-americas-oldest-giants-to-merge-in-job-dropping-megadeal/> [https://perma.cc/5KH2-P2VV].
- 278 The Justice Department has sued to enjoin these mergers. Leslie Picker & Reed Abelson, *U.S. Sues to Block Anthem-Cigna and Aetna-Humana Mergers*, N.Y. TIMES DEALBOOK (July 21, 2016), <http://www.nytimes.com/2016/07/22/business/dealbook/us-sues-to-block-an-them-cigna-and-aetna-humana-mergers.html> [https://perma.cc/WLD3-VPG7].
- 279 *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004) (describing collusion as “the supreme evil of antitrust”); Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2569 (2013) (“[The antitrust] system fell into disrepair as most practices, except hardcore cartel behavior, became subject to some form of the rule of reason.”).
- 280 See, e.g., U.S. DEPT OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS: FY 2006-2015, *supra* note 253, at 5-6 (indicating that the Antitrust Division filed forty-five criminal collusion or bid-rigging cases versus eight civil--zero Section 1, zero Section 2 cases, seven Section 7, and one other-- cases in 2014).
- 281 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
- 282 See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (holding that the Federal Arbitration Act requires the enforcement of arbitration clauses that include class action waivers even when individual litigation would be economically infeasible).
- 283 DAVIDSON, *supra* note 242, at 66-73.
- 284 *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), <http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing> [https://perma.cc/FV6K-797F].
- 285 See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[S]tare decisis is not an inexorable command. In the area of antitrust law, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should

be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.”).

- 286 Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 FORDHAM L. REV. 2151, 2152 (2013).
- 287 See, e.g., Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051, 1053, 1056, 1070 (1979).
- 288 See BORK, *supra* note 234, at 405; Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 44 (1966).
- 289 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008) (“The conventional wisdom in the antitrust community is that the antitrust laws were passed to promote economic efficiency.”). As the authors note, Bork was not alone in promoting a vision of antitrust that privileges efficiency. What was unique about Bork's efforts is that he seeded his efficiency argument in the legislative history of the Sherman Act, ensuring that “he would win the argument not just while the Chicago School was in power, but for all time.” *Id.* at 193 n.4.
- 290 See, e.g., Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 80-104 (1982); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1235 (1988).
- 291 See Fox, *supra* note 290, at 1182; *id.* at 1146 (citing 51 CONG. REC. 9265 (1914) (remarks of Rep. Morgan)).
- 292 See Lande, *supra* note 290, at 88-89.
- 293 See Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 406 (2014).
- 294 21 CONG. REC. 2461 (1890).
- 295 *Id.* 2455, 2457 (1890).
- 296 Pitofsky, *supra* note 287, at 1051.
- 297 51 CONG. REC. 8850 (1914).
- 298 Lande, *supra* note 290, at 92-96.
- 299 21 CONG. REC. 2461 (1890).
- 300 *Id.* 2614.
- 301 *Id.* 4101.

- 302 *Id.* 4098.
- 303 *Id.* 1768.
- 304 Lande, *supra* note 290, at 96-97.
- 305 *Id.* at 98.
- 306 51 CONG. REC. 13,231 (1914).
- 307 21 CONG. REC. 2598 (1890).
- 308 Lande, *supra* note 290, at 93.
- 309 Stucke, *supra* note 273, at 1442.
- 310 See Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T-Mobile Transaction*, 64 FED. COMM. L.J. 47, 56 (2011); Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 4 (2016) (“Antitrust law often must trade off one kind of competition for another, or one salutary effect of competition (such as price, quality or innovation) for another. And in so doing, antitrust courts must make judgments between different and incommensurate values.”).
- 311 See Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 277 n.7 (1990) (“The triumph of the Chicago school was not related to empirical evidence. The Chicago school, in fact, declared a variety of empirical tests irrelevant and argued that its position was closer to the heart of the microeconomic price theory. The Chicago school victory was a political victory not an empirical one.”) (citation omitted).
- 312 Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH. L. REV. 159, 163-69 (describing the profound challenges and uncertainties of current merger review practice).
- 313 See JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 155 (2015) (“Of all mergers that resulted in price increases, the agencies acted in only 38 percent of cases, suggesting substantial under-enforcement. Incorrectly cleared mergers on average resulted in price increases in excess of 10 percent.”); Bruce A. Blonigen & Justice R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2016-082, 2016) (“We find that evidence for increased average markups from [mergers and acquisitions] activity [in the manufacturing sector] is significant and robust across a variety of specifications and strategies for constructing control groups that mitigate endogeneity concerns. In contrast, we find little evidence for plant- or firm-level productivity effects from M&A activity on average, nor for other efficiency gains often cited as possible from M&A activity, including reallocation of activity across plants or scale efficiencies in non-productive units of the firm.”).
- 314 See Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of “Per Se Rules vs. Rule of Reason,”* 2 J. COMPETITION L. & ECON. 215, 241 (2006) (“The highest benefits can be reaped by finding simple and robust rules, which are able to solve most of the competition problems without causing high regulation costs.”).

- 315 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963); see also John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?* 48 (Ne. Univ. Dep't of Econ., Working Paper, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2782152](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782152) (finding that structural presumptions of illegality are highly accurate in identifying anticompetitive mergers under the efficiency standard).
- 316 *Philadelphia Nat'l Bank*, 374 U.S. at 364.
- 317 *Id.* at 364 n.41.
- 318 *Id.* at 363.
- 319 See Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L. J. 269, 276 (2015).
- 320 The agencies and courts, on occasion, still rely on the *Philadelphia National Bank* structural presumption. See, e.g., *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1216 (11th Cir. 2012).
- 321 See U.S. DEPT OF JUSTICE & FED. TRADE COMM'N, *supra* note 252, at § 1 (“[C]ongressional intent that merger enforcement should interdict competitive problems in their incipency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.”).
- 322 See, e.g., Emily Steel, *Under Regulators' Scrutiny, Comcast and Time Warner Cable End Deal*, N.Y. TIMES (Apr. 24, 2015), <http://www.nytimes.com/2015/04/25/business/media/comcast-time-warner-cable-deal.html> [https://perma.cc/2WEF-FVRQ].
- 323 See Salop, *supra* note 319, at 273-74.
- 324 See Frankel, *supra* note 312, at 166; Stucke, *supra* note 273, at 1454-56.
- 325 Grunes & Stucke, *supra* note 310, at 54.
- 326 Cf. Vipal Monga, *AT&T Is Paying the Biggest Breakup Fee Ever*, WALL ST. J. (Dec. 19, 2011), <http://blogs.wsj.com/deals/2011/12/19/att-is-paying-the-biggest-breakup-fee-ever/>.
- 327 *LePage's, Inc. v. 3M*, 324 F.3d 141, 152 (3d Cir. 2003) (en banc) (citation omitted).
- 328 See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (describing antitrust as “sometimes [having] considerable disadvantages”); *id.* at 407 (describing monopoly power as “an important element of the free-market system”).
- 329 *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (citation omitted).
- 330 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), *abrogated in part by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); see also *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 271-72 (6th Cir. 2015) (“The tie falls foul of antitrust law if the seller has appreciable economic power in the tying product market and the arrangement affects a substantial volume of commerce in the tied market .... A tying arrangement that falls foul of these

criteria and lacks a valid business justification is anticompetitive because it tends to force more efficient competitors out of the tied product market.”) (internal citations omitted).

- 331 See generally Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERK. BUS. L.J. 81 (2015).
- 332 See, e.g., Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 355 (2002) (“At the extreme, an exclusive dealing arrangement can create or maintain a complete monopoly.”).
- 333 See, e.g., Case T-155/06, *Tomra Sys. ASA v. Comm’n*, 2010 E.C.R. II-4361 ¶ 208 (holding that exclusivity rebates by a dominant firm are illegal in the absence of an objective justification); Case 85/76, *Hoffmann-La Roche v. Comm’n*, 1979 E.C.R. 461 ¶¶ 89-90 (same).
- 334 See, e.g., Case T-65/98, *BPB Indus. v. Comm’n*, 1993 E.C.R. II-389 ¶¶ 65-68.
- 335 Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 395 (2002).
- 336 See, e.g., *Hoffmann-La Roche*, 1979 E.C.R. 461 ¶¶ 89-90 (same).
- 337 See *supra* Part V.A.
- 338 See John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1144 (1987).
- 339 See Pamela Jones Harbour, *A Tale of Two Marks, and Other Antitrust Concerns*, 20 LOY. CONSUMER L. REV. 32, 43 (2007).
- 340 One example of such a situation is e-books, where Amazon initially controlled ninety percent of the market. By introducing agency pricing--a form of vertical pricing restraint--publishers were able to make the e-book market more competitive. See Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. (forthcoming 2017).
- 341 See Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407, 441-42 (1997).
- 342 Warren S. Grimes, *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation*, 55 ANTITRUST BULL. 101, 126-27 (2010).
- 343 Marina Lao, *Resale Price Maintenance: The Internet Phenomenon and Free Rider Issues*, 55 ANTITRUST BULL. 473, 509 (2010).
- 344 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 891-92 (2007); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977).

- 345 See Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467, 478 (2008).
- 346 See Alexander MacKay & David Aron Smith, *The Empirical Effects of Minimum Resale Price Maintenance* 3 (2014), <http://home.uchicago.edu/mackay/files/The%20Empirical%CC20Effects%CC20of%20MRPM.pdf> [https://perma.cc/Y4PF-MENT] (“Our results indicate that prices and quantities have indeed changed as a result of *Leegin*. We find that 8.4 percent of products exhibited a statistically significant price increase in our treatment states, with a median increase of 5.3 percent. Additionally, 9.4 percent of products experienced declining quantities. As a result of *Leegin*, products were most likely to see a price increase combined with a quantity decrease. This combination indicates movement along the demand curve and suggests the exercise of market power.”).
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- 350 Lao, *supra* note 343, at 511; *see also Polygram Holding, Inc. v. FTC*, 416 F. 3d 29, 35-36 (D.C. Cir. 2005) (“[T]he Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed ‘inherently suspect’ and, unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, summarily condemned.”).
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- 358 Carolyn Y. Johnson & Catherine Ho, *How Mylan, the Maker of EpiPen, Became a Virtual Monopoly*, WASH. POST (Aug. 25, 2016), [https://www.washingtonpost.com/business/economy/2016/08/25/7f83728a-6aee-11e6-ba32-5a4bf5aad4fa\\_story.html](https://www.washingtonpost.com/business/economy/2016/08/25/7f83728a-6aee-11e6-ba32-5a4bf5aad4fa_story.html) [https://perma.cc/DQ2K-GXQ2].

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- 362 If the defendant cannot be split into competing entities without the loss of important operational efficiencies, policymakers should consider price regulation or public ownership as a means of controlling the persistent market power.
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- 374 *Id.*
- 375 McLaughlin, *supra* note 370.
- 376 Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015), <http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394>.
- 377 *Id.*
- 378 *Id.*
- 379 David Dayen, *Antitrust Incompetence from the FTC, as Albertson's/Safeway Divestiture Goes Awry*, NAKED CAPITALISM (Nov. 17, 2015), <http://www.nakedcapitalism.com/2015/11/antitrust-incompetence-from-the-ftc-as-albertsonssafeway-divestiture-goes-awry.html> [<https://perma.cc/GN5Y-RKFH>].
- 380 See *supra* Part V.A.
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- 396 *Id.* at 1472.
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- 398 *Id.*
- 399 See Christopher Leonard, *Monsanto Seed Biz Role Revealed*, ASSOCIATED PRESS (Dec. 14, 2009); Lina Khan, *How Monsanto Outfoxed the Obama Administration*, SALON (Mar. 15, 2013), [http://www.salon.com/2013/03/15/how\\_did\\_monsanto\\_outfox\\_the\\_obama\\_administration/](http://www.salon.com/2013/03/15/how_did_monsanto_outfox_the_obama_administration/) [<https://perma.cc/KGX5-29PZ>].
- 400 Ian Berry & David Kesmodel, *U.S. Closes Antitrust Investigation into Seed Industry, Monsanto*, WALL ST. J. (Nov. 16, 2012), <http://www.wsj.com/articles/SB10001424127887324735104578123631878019>.
- 401 Press Release, Fed. Trade Comm’n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [<https://perma.cc/G3EQ-CGVY>].

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11 HVLPR 235

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# **EXHIBIT K**

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<http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394>

## BUSINESS

# Haggen Struggles After Trying to Digest Albertsons Stores

Expansion appears more than regional grocer could handle, raising questions about FTC-approved plan

By [Brent Kendall](#) [Follow](#)

Oct. 9, 2015 1:06 pm ET



Haggen hired over 8,000 workers along with the divested stores. PHOTO: MEL MELCON/LOS ANGELES TIMES VIA GETTY IMAGES

When the Federal Trade Commission in January cleared grocery chain Albertsons Cos. to buy rival Safeway Inc., it insisted that the two companies sell 168 of their stores to rivals to preserve competition and protect consumers from higher prices.

The FTC allowed the small Pacific Northwest supermarket operator Haggen Holdings LLC to buy most of the stores, and Haggen quickly ballooned to 164 locations throughout the West from 18 in Washington and Oregon.

Just months later, however, the rapid expansion appears to be more than the company could handle, and the FTC-approved plan looks like a major mistake.

Instead of becoming a regional powerhouse, Haggen is struggling to stay afloat. The company filed for bankruptcy-court protection last month, and began closing 26 of its recently purchased stores. It then announced plans to close 100 more locations and realign its business around 37 “core stores.”

Complicating matters, Haggen alleges Albertsons thwarted its expansion by interfering with its attempts to reopen the acquired stores under the Haggen brand name, something Albertsons denies.

Haggen’s pullback put workers, suppliers and shoppers in a bind. It also highlights the difficulty of orchestrating divestiture deals designed to replace competition that would otherwise disappear after a merger.

“It’s not easy to get these things right,” said John Kwoka, an economics professor at Northeastern University, who studies such efforts. “And it’s a bigger stretch when you’re trying to turn a company into something much larger than it was before. Here it failed spectacularly.”

The FTC defends its approval of the Haggen deal, saying it closely examined the deal and had a good basis for finding the plan sound.

When the Albertsons-Safeway merger was announced, the FTC worried about its impact on places like Carpinteria, Calif. For decades, Carpinteria, a small coastal town, had two major grocery stores.

After the deal became final, Safeway sold its Carpinteria store to Haggen, which is now leaving town—and leaving residents with questions about competition. “It is a concern,” said city manager Dave Durflinger, adding Carpinteria would like another grocery tenant. The store is on a list of locations that could be sold to another grocery proprietor in the bankruptcy proceedings.

Other communities have worries that extend beyond competition. On opposite ends of town, Anthem, Ariz., has a Fry's Food and a Haggen, which shut down last week. An empty store "sends a bad message," said Kristi Northcutt, spokeswoman for the Anthem Community Council. And, logistically, "thirty thousand people going to the one store is going to be difficult," she said.

Haggen's workers may be feeling the most immediate effects of the restructuring. According to court papers, the chain hired more than 8,000 employees along with the divested stores. Many of those jobs are going away.

Last month, at the company's request, the FTC waived a divestiture provision that had kept Albertsons from rehiring workers from ailing Haggen stores. "We're willing to work with parties when it is feasible...to help them deal with this situation," said FTC spokesman Peter Kaplan.

Some industry watchers say that even under ideal circumstances, it would have been tough for Haggen to absorb scores of new locations. "A grocery-store company that small can't grow that fast and be successful. It's never worked," said Craig Rosenblum, a supermarket consultant at Willard Bishop.

Acquiring divested assets has never been a foolproof strategy. When a new owner takes over another company's business, consumers don't always follow.

That's why the FTC scrutinizes potential buyers. Antitrust lawyers say the FTC has evaluated potential divestitures even more vigorously since 2012, when one connected with the merger of car-rental companies Hertz Global Holdings Inc. and Dollar Thrifty failed to go as planned.

The FTC required Hertz to spin off its Advantage Rent a Car brand, but shortly after it became an independent competitor, Advantage filed for bankruptcy protection. The brand continued to operate and was ultimately purchased by a Canadian private-equity firm that has taken steps to bulk up the business.

Before approving the supermarket deal, the FTC took a close look at Haggen's expertise, financing, and business plan, and concluded the chain was an appropriate buyer for the divested stores, Mr. Kaplan said.

To be sure, the FTC has approved many divestiture plans without repercussions, including grocery-related deals, though none quite on this scale. And, the FTC

received few public comments faulting the divestiture proposal.

People familiar with the matter said the FTC is now examining the situation, including Haggen's allegations of wrongdoing by Albertsons.

Haggen, which is majority-owned by private investment firm Comvest Partners, recently sued Albertsons, seeking more than \$1 billion in damages. It alleges Albertsons systematically thwarted Haggen's reopenings of the purchased stores, such as by deliberately understocking them before turning them over.

"Albertson's anticompetitive conduct caused significant damage to Haggen's image, brand and ability to build goodwill during its grand openings to the public," the lawsuit alleges.

An Albertsons spokesman said the allegations "are completely without merit," and that the company will vigorously defend itself in court. Albertsons has filed its own lawsuit against Haggen over allegedly unpaid inventory.

While the bankruptcy and litigation proceed, the ripple effects continue.

Family-owned Top O' The Morn Farms in Tulare, Calif., which sells milk in glass bottles, had agreed to serve 83 new Haggen stores, allowing it to more than double its reach. The farm had ramped up production and added employees—but now it has had to pull its supplies out of the Haggen locations and is looking for other distribution channels.

"There are too many outstanding invoices, with no promises of getting paid," says owner Ron Locke. "Financially, it's a pretty big hit."

— *Peg Brickley and Annie Gasparro contributed to this article.*

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# **EXHIBIT L**



COLUMN

## The Friday Checkout: Is C&S Wholesale Grocers fit to run assets Kroger, Albertsons want to divest?

The lawsuit brought by Colorado's attorney general claims that the wholesaler and retailer doesn't have the experience to run hundreds of stores and several more private brands.

Published Feb. 16, 2024

By Grocery Dive Staff

*C&S would pick up 52 Albertsons stores in Colorado as part of the Kroger-Albertsons divestiture deal. Courtesy of Albertsons*

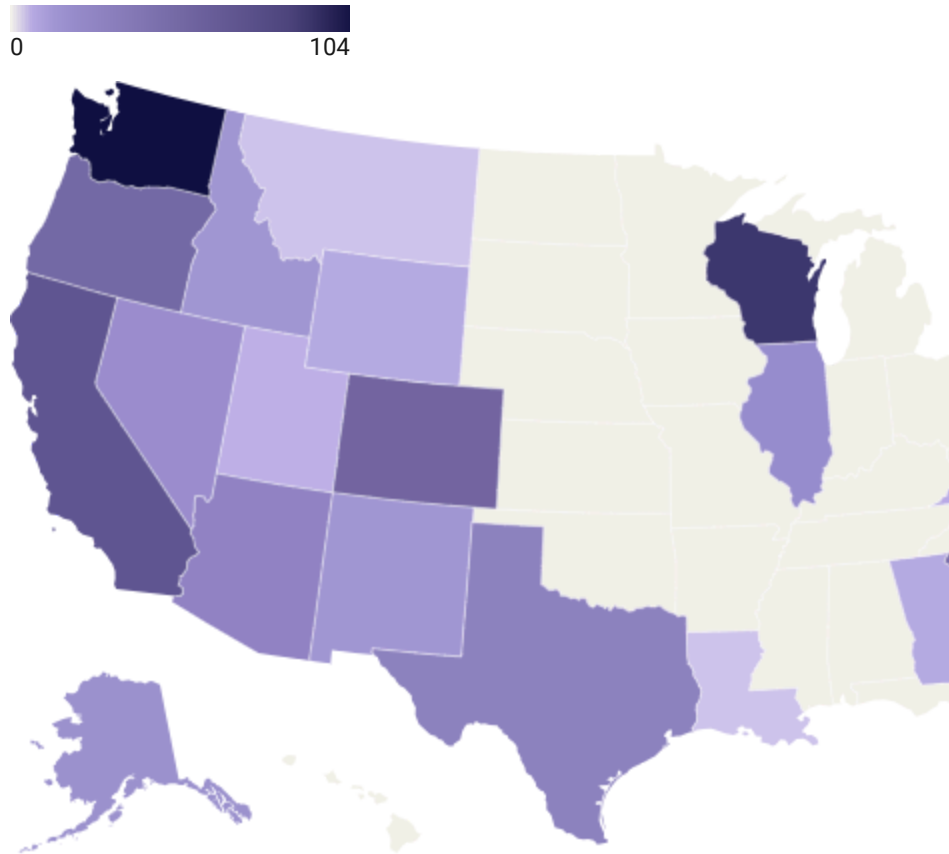
*The Friday Checkout is a weekly column providing more insight on the news, rounding up the announcements you may have missed and sharing what's to come.*

If the Kroger-Albertsons deal closes as it's currently proposed, C&S Wholesale Grocers is slated to acquire at least 413 divested stores across 17 states and Washington, D.C., from the grocery giants, along with five private brands and several distribution centers.

The divestiture plan would transform C&S from a regional grocer into a national player. But a lawsuit filed this week by Colorado Attorney General Philip J. Weiser that aims to block the Kroger-Albertsons merger calls into question if C&S has the employees, distribution centers and private label experience to support the divested assets.

## What C&S's store footprint would look like if the divestiture deal gets approved

Washington would have the most C&S stores per state across the company's retail footprint followed by Wisconsin and California.



Map: Catherine Douglas Moran / Grocery Dive • [Get the data](#) • Created with [Datawrapper](#)

The lawsuit points out that C&S only sells a handful of private labels in its stores, does not have a data analytics platform nor a modern loyalty program, and only operates one retail pharmacy. With a footprint of 23 owned and operated stores in New York, Vermont, Pennsylvania and Wisconsin along with its franchised locations under the Piggly Wiggly banner, C&S has a fraction of the retail locations that it would gain with the divested stores.

C&S would pick up 52 Albertsons stores in Colorado — a state where C&S does not currently have any stores — while Kroger and Albertsons plan to retain 201. The lawsuit claims that the

divestiture deal does not give C&S enough stores in Colorado to provide it with adequate scale to effectively compete post-merger. It also flagged quality concerns with the divested stores.

“C&S is not well situated to be a viable competitor because of its complete lack of experience as a national-scale retailer, lack of any experience in Colorado, and its lack of the infrastructure needed to replace the competition lost from [Albertsons] — infrastructure that Kroger plans to keep for itself,” the lawsuit says.

Although Kroger and Albertsons have sought to distance themselves from Haggen’s ill-fated purchase of divested Safeway stores in 2015, Weiser sees a direct connection between that deal and the proposed plan with C&S.

“The competition promised by the Haggen divestiture proved to be a sham,” the lawsuit noted.

### **In case you missed it**

#### *Oxendales Market abruptly shuts store near Mall of America*

The Minneapolis-area grocery chain suddenly closed a location in Bloomington, Minnesota, earlier this month, a setback to the Minneapolis suburb’s drive to encourage the development of a walkable community near the megamall, the Minneapolis Star Tribune reported.

Oxendales did not indicate why it stopped operating the 14,000-square-foot store, which opened in November on the first floor of a newly constructed apartment building, according to the newspaper. “We are actively exploring opportunities to fill the vacant space with a new tenant that will complement the vibrant atmosphere of the neighborhood,” McGough, the company behind

the development where the store was located, told the Star Tribune in a statement.

### *Mercatus unveils online customization tool*

The e-commerce technology company on Tuesday announced that it has launched a system designed to help regional and independent grocers develop personalized experiences for shoppers. The tool, known as AisleOne, is aimed at giving retailers with limited in-house technical resources the ability to use data about customer behavior to individualize their online shopping programs.

### *More people are becoming diet-conscious*

Fifty-two percent of U.S. adults adhere to a specific eating pattern or diet, up from 43% a year ago, the National Grocers Association noted in a Monday blog post about a webinar the trade association recently hosted with experts from SPINS.

NGA also cited data showing that half of shoppers “actively participate” in loyalty programs, with 59% using loyalty points to cut costs and 70% redeeming digital coupons. In addition, over than three-quarters (76%) of consumers are more likely to buy from companies that use personalized outreach programs, according to the association



Meat in a Safeway store in Washington, D.C.

Catherine Douglas Moran/Grocery Dive

## Number of the week: \$500 million

That's the amount Kroger intends to direct toward reducing prices for shoppers if it's able to merge with Albertsons, the grocer announced on Tuesday.

## What's ahead

### *Upcoming earnings*

Walmart plans to share its fiscal year 2024 and fourth-quarter earnings on Tuesday, and Sprouts Farmers Market will report its latest results on Thursday.

## Impulse find

### *A Super Bowl love story*

H-E-B's game day commercial was meant to remind customers that there's something to fall in love with in every store aisle.

The grocer's spot this past Sunday included swoony music and falling rose petals that "flirtatiously showcase[d] an array of popular H-E-B brand products that turn heads," a press release said.

The ad aired during the Super Bowl's third and fourth quarters across a dozen Texas markets and will continue to air through March throughout the state.



# **EXHIBIT M**

## One-and-a-Half Cheers for the New FTC Remedies Study

The Federal Trade Commission has released its study of its remedy orders between 2006 and 2012.<sup>1</sup> Notice of this study was issued in early 2015,<sup>2</sup> so the process has taken two full years to bring to completion. I think the FTC deserves much credit for undertaking this study. Agencies do not often review the effects and effectiveness of their past policies and practices. It takes time and resources from current activities,<sup>3</sup> and then the results may not be favorable to the agency, posing risks of criticism and worse. So it is a sign of good government when an agency does this. Kudos to the FTC.

This is the second such study done by the FTC. The first, in 1999, was widely recognized as a milestone and resulted in a number of significant changes in the Commission's divestiture policy.<sup>4</sup> It has now been replicated in a number of other countries that have also assessed their remedies practices.<sup>5</sup> This new FTC study has a number of notable features. It covers many more remedies than the earlier one, and obviously focuses on more recent experiences. The involvement of the Bureau of Economics undoubtedly strengthened the analytic foundations of the work. It forthrightly reports a less than perfect record for some of its remedies. And it uses its review to identify ways of improving remedy policy going forward. This, too, is all much to the credit of the agency.

That said, I find that this study is ultimately uneven. While in some places its methodology and conclusions represent advances over its earlier study, in many places it does no better than before, and occasionally even worse. This is greatly disappointing. With growing emphasis on remedies, with advances in methods of analyzing policy, and with many comments and suggestions to the FTC in this proceeding, this study was an opportunity to substantially advance our understanding. Instead, it mostly offers some incremental insights.

In the rest of this commentary, I elaborate on my mixed assessment of the FTC Report, first with respect to its methodology and then its conclusions.

### A. Methodology of the FTC Report

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<sup>1</sup> "The FTC's Merger Remedies 2006-2012," FTC, January 2017.

<sup>2</sup> "FTC Proposes to Study Merger Remedies," January 9, 2015. Federal Register, January 16, 2015.

<sup>3</sup> This study lists 115 people as having contributed in some fashion to the study and the report.

<sup>4</sup> "A Study of the Commission's Divestiture Process," FTC, August 1999.

<sup>5</sup> For a listing and review of these other studies, see my book, *Mergers, Merger Control, and Remedies*, MIT Press, 2015, ch. 8. There also were some weaknesses to the 1999 study, which I discuss below.

(1) To begin, the scope of this study was intended to be broader than the 1999 study. The earlier study examined only divestitures, whereas this new study set out to include conduct remedies as well. Even among the 89 orders covering seven years, this study found too few of the latter to draw any conclusions. That is, of course, hardly the agency's fault, but quite unfortunate since conduct remedies are widely believed to be more frequent in the past ten to fifteen years and have become quite controversial. It is not clear how long a period would have been necessary to find a sufficient number of observations, but this is a significant lost opportunity to inform policy about these remedies.

(2) This study inexplicably uses three quite different methodologies for assessing the outcomes of the 89 total orders. For 50 orders (56% of the cases), the procedure involved full blown case studies, similar (but not identical, for reasons below) to the 1999 study. For the other 39 orders, no case studies were done at all, but instead the FTC used only considerably less complete information. Of those 39, 15 orders were assessed based simply on questionnaires to outside parties, while the remaining 24 (27 percent) orders--all in the pharmaceutical industry--were assessed based on nothing more than the FTC's own records of their past actions and monitoring of the markets.

I said this was "inexplicable," but in fact the FTC did offer a rationale for this differential treatment. In the original notice for this study, the FTC declared that, with respect to the questionnaire-based assessments, it had "extensive expertise in crafting remedies for mergers in certain industries,"<sup>6</sup> and that for the records-based assessments in the pharma sector "staff has a great deal of information" on divestitures as well as "close contact with the monitors appointed in the majority of these orders."<sup>7</sup> From this, the FTC concluded that interviews were unnecessary.

It is difficult to be satisfied with the questionnaire procedure, and impossible to be satisfied with the internal records-based assessment procedure. Questionnaires tend to produce formal declarative responses without the subtleties of interviews. They are not well suited to follow-up questions tailored to the circumstances. Records-based assessments are informational closed loops: whatever the agency records and personnel do not know will remain unknown to those who rely on them. Neither of these techniques--certainly not the internal records-based assessments--is a satisfactory basis for the agency's determinations.

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<sup>6</sup> FTC Notice, p. 2424.

<sup>7</sup> Ibid.

When the FTC outlined this tripartite methodology in the original Notice, I submitted comments that pointed out these concerns and urged instead a consistent and thorough methodology for assessing all the orders.<sup>8</sup> I have no doubt that the costs of doing 89 rather than 50 full blown case studies are nontrivial. On the other hand, to undertake this study and fail to do the necessary analysis on nearly half of the orders is unfortunate, to say the least--truly a missed opportunity. Worse yet, by failing to use a consistent methodology, the results are not equally strong and certainly not comparable across all subsets of the cases. As a result, as I said, my view is that this study is very uneven.

(3) In addition to different methodologies, the FTC Report uses different criteria for what it concludes to be a “successful” order across these different categories. For those 50 fully assessed orders, the Report describes the test as whether competition “remained at its premerger level or returned to that level within...two to three years.” By contrast, for the 15 orders assessed using questionnaires, “success” is defined simply as continued production of the divested product, not whether competition was preserved or restored by the remedy. For the remaining 24 orders arising in the pharmaceutical industry, the criteria for “success” vary even further. For orders addressing cases where both merging parties sold the product, “success” is again defined as continued production of the product. But for cases of divestiture of “pipeline products”--those in the development stage--the divestiture was viewed as successful simply if the assets designated for transfer were in fact transferred. This does not even purport to measure survivorship of the assets for any period of time, much less their competitive effects.

A bit of history is useful here. The FTC’s 1999 Divestiture Study assessed remedies strictly by whether the divested assets remained in the industry in the postmerger, post-remedy period. But this criterion--essentially asset viability--is a necessary but not sufficient condition for the preservation or restoration of competition. They certainly should not be viewed interchangeably.<sup>9</sup> So while the FTC improved on its earlier practice and adopted the correct standard for a successful remedy for the 50 case studies, it has persisted in using this incorrect standard (or an even weaker one) to assess the remaining 39 orders. It compounds this error by using this same term--“success”--to describe all of these varied outcomes, even though only one is correct. This certainly improves the apparent “success” rate of its remedies, but equally certainly it invites misinterpretation.

(4) Even with the 50 orders assessed with case studies, the criterion for “success”

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<sup>8</sup> J. Kwoka, “Comment on the Merger Remedies Study Proposed by the Federal Trade Commission,” FTC File No. P143100, March 2015.

<sup>9</sup> Language to that effect can be found in the FTC’s own Statement on Negotiating Merger Remedies (2003), in the DOJ’s Policy Guide to Merger Remedies (2004, 2011), and indeed in this Report (p. 1). This Report calls it a “high bar,” but any lower bar would not be the correct standard. I pointed out these issues in my original comments in this proceeding, and urged the FTC to adopt the correct standard throughout. Kwoka, “Comments.”

deserves comment. Without explanation, a two to three year delay in restoration of competition is viewed as a fully successful remedy, even though much harm may occur in such an interval. Relative to doing nothing, that may seem the better course, but relative to prohibiting the merger altogether, that period represents a true loss of some magnitude.

The Report declares a remedy to be a “qualified success” if competition is restored but it takes more time than two or three years. But if competition returns in more than three years, it could easily be due to exogenous factors or to endogenous responses within the market—neither of which should be credited to the remedy. This is especially true since the criterion of “more than two or three years” can mean any number of years after the remedy is imposed. For this reason, I recommend that the agency report more fully on the time period required for a return of competition to those cases it termed “qualified success.”

And finally, the Report describes some of the factors and evidence that went into its determinations of successful remedies. These are all familiar to an economist’s assessment, but the process is still pretty opaque. While there is no way that all of the evidence could be put on the public record, there is one important action that the FTC still can and should do to improve transparency. For these 50 fully analyzed orders, the FTC should now release its “scorecard” indicating which ones it judged to be successful and which not. This would not violate confidentiality, but it would help make its conclusions more convincing.<sup>10</sup>

#### B. Conclusions of the FTC Report

Some of the conclusions of the FTC Report are bit scattered, so it may be useful to pull them together in summary form. First, for the 50 orders assessed with full case studies and employing the criterion of competition, the FTC reports full “success” in about two-thirds of cases involving horizontal concerns. By adding the cases of “qualified [that is, delayed] success,” the Report states that “with respect to the orders examined [more precisely, of this category of orders], more than 80% of the Commission’s orders maintained or restored competition.”<sup>11</sup> The Report goes on to analyze various details and implications of these 50 case studies in 18 pages.

Oddly, in contrast, the Report devotes a single page to its conclusions with respect to the 15 orders assessed using questionnaires. This may be a reflection of the minimal depth of this method of analysis. Recalling that these were judged “successes” against the lower bar of continued production, the Report states that 39 of a total of 43 products covered by these 15 orders were “successes,” which implies a 91 percent “success” rate. The Report does not address

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<sup>10</sup> Along the same lines, to improve transparency and credibility where an agency conducts a retrospective on its own actions, I have recommended that there be an independent outside monitor who can inspect the data, query the analysis, and ultimately attest that the agency’s conclusions are fundamentally sound.

<sup>11</sup> Report, p. 2.

the fraction that preserved or restored otherwise lost competition.

The conclusions for the remaining 24 orders are also discussed in a single page in the Report. These orders covered 92 cases in pharmaceuticals, divided as follows: Of 60 cases of product overlaps between the merging companies, 18 cases involved contract manufacturing, so that all that was required was re-assignment of the supply agreement. All of these 18 contracts were in fact re-assigned, leading the Report to declare them “successes.” Another 42 product overlap cases involved the need for divesting manufacturing assets. Of these, there were 27 “successful” asset transfers and 15 failures. Finally, all of the 32 cases involving divestiture of product development assets were declared “successes” by virtue of the fact that the transfers in fact occurred, regardless of what ensued. For none of these do we learn anything about the fraction of orders that resulted in the preservation or restoration of competition.

I now offer some observations on these conclusions and additional recommendations.

(1) The report highlights the rate of success for the 50 orders assessed using case studies. Among the 46 horizontal cases, 66 percent were fully successful (69 percent of all cases in this category). Read differently, however, that implies that in one-third of cases, competition was lost for a minimum of two or three years and perhaps indefinitely. One obvious question is whether this is an acceptable failure rate—that is, whether it satisfies the objective of remedies, or whether it signals the need for more outright enforcement actions against such mergers. Views on this will differ, but I do not think that competition denied or significantly postponed in one-third of cases is a basis to conclude that remedy policy is truly doing its job.

(2) I think the FTC can and now should further exploit the data and investigate the roots of success or failure of these 50 remedies. Having judged which were successfully resolved, the next step should be to conduct a statistical analysis of the factors associated with different outcomes.<sup>12</sup> These factors might involve characteristics of the product, the market, the firms, the transaction, and the specific competition problem. That would permit answering such questions as whether the rate of success varies with the size of the firms, or with the heterogeneity of the products, and so forth. A further analysis along these lines could significantly advance understanding of when and where remedies should be used, and when and where they should not, at least not in their present form—important questions that can be examined without the need for much if any new data collection, and certainly not another study.

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<sup>12</sup> There is some discussion of this in various places in the Report, but that does not qualify as statistical analysis.

(3) The FTC Report found a substantially lower rate of success—about 56 percent of orders—where a divestiture remedy transferred less than the entirety of a business unit. As a result, it stated its “preference” for divestitures of entire business units.<sup>13</sup> This finding is no surprise, however, since the 1999 Study found only a 60 percent “success” rate measured against the lower bar of asset viability for these kinds of divestitures. That earlier report also recommended against them for that reason.<sup>14</sup> But having already studied these partial-entity divestitures and determined them often to be failures, the obvious question is why the FTC has not followed its own advice but instead persisted in pursuing a flawed strategy. In this Report the FTC asserts that it resorts to partial-entity divestitures only when necessary, but that would seem to mean “when necessary to use some kind of remedy instead of challenging the merger.” But it is not necessary to use a remedy. Such a high rate of failure—nearly half the time—signals instances in which stricter enforcement is called for. I think the FTC should now face a far heavier burden for resorting to such remedies in the future.

(4) For the other 44 percent of non-case-study orders, the FTC Report simply errs in lowering the standard for “success.” It is only by declaring a remedy “successful” if a contract or project that was required to be transferred was in fact transferred, that the Report arrives at a 100 percent “success” rate for such remedies. In more challenging cases where physical assets needed to be transferred, 64 percent resulted in “successful” transfer, but in each case, the true percent of cases that preserve or restore competition is strictly lower. I have already noted that this low standard is substantively incorrect, and the use of the same terminology invites an exaggerated view of success of remedy policy.

Finally, I commend the FTC for its “Best Practices” section, which is devoted to extracting lessons from its analysis of remedial orders. While I think some stronger conclusions might have been warranted, this is an enormously valuable part of what the FTC has done.

### **My Recommendations**

As I said, the FTC deserves much credit for putting itself under a microscope and acknowledging some instances in which its policies have not worked. But as I also said, and now have detailed, the study is uneven and sometimes flawed in its methodology, and for that reason it ultimately fails to deliver on its considerable promise. There are, however, a number of actions that the FTC can still undertake that will advance understanding about the effects and effectiveness of its remedy policies.

First and foremost, the FTC should complete its job. It should immediately return to the 39 orders where it relied on questionnaires and internal reports and undertake the necessary full case studies. Also for these 39 orders, it should evaluate the success of the remedy by the correct standard of whether it preserved or restored the competition lost due to the merger—and

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<sup>13</sup> Report, pp. 22, 32.

<sup>14</sup> FTC Divestiture Study, pp. 11-12

only use the term “success” for this standard. This further work will take full advantage of what has already been done. It will ask and answer the right question about remedies. And it will not require waiting another 18 years to learn the answers.

Apart from that, there are other ways in which the FTC can exploit the data it already has compiled. In this commentary, I have recommended the following extensions of this FTC study:

- (1) The FTC should report data on the delays it observed in restoring competition for those remedies that did not do so immediately. For those described as “successes,” it would be useful to know how many took fully three years, for example, and for those with greater delays (“qualified successes”), what were the frequencies of long delays (e.g., 5 or more years).
- (2) The FTC should release a scorecard of the 50 orders assessed with case studies, with an indication of those that were full “successes” vs. “qualified [delayed] successes” vs. “failures.”
- (3) The FTC should compile further information on the firm, market, and product characteristics associated with the 50 orders and conduct a statistical analysis of the correlates of success vs. failure. The results of the analysis should be made public.

Furthermore, going forward, I would recommend the following:

- (1) The FTC should not be using divestitures of less than entire business units. The two FTC studies have demonstrated that this approach did not work before and has continued not to work in a large fraction of cases. The lesson needs finally to be learned: if a merger cannot be remedied, it should be challenged.
- (2) The FTC should redouble its efforts to compile data and other information on conduct remedies. While fewer in number than those for the horizontal mergers focused on in this Report, conduct remedies have been used in a variety of antitrust contexts where their effectiveness has been questioned.
- (3) And finally, rather than conducting retrospectives on batches of remedies many years later, as the 1999 study and this study have done, the FTC (and yes, DOJ!) should compile data and conduct assessments of their remedy experiences on an on-going basis. Continuous study and learning will provide further insights as to how policy has been working and can be improved on an on-going basis. And these new studies should henceforth only be evaluated against the correct standard of preservation or restoration of otherwise lost competition.

John Kwoka  
February 22, 2017

# **EXHIBIT N**

**U.S. Senate Committee on the Judiciary Subcommittee on  
Competition Policy, Antitrust, and Consumer Rights**

**Hearing: “Examining the Competitive Impact of the Proposed  
Kroger-Albertsons Transaction”**

**November 29, 2022**

**Statement for the Record**

**Andrew Sweeting, Ph.D.  
Professor of Economics  
University of Maryland, College Park**

Chair Klobuchar, Ranking Member Lee, and distinguished members of this subcommittee, I am honored to testify today and look forward to participating in the discussion.

I am a Professor of Economics at the University of Maryland College Park, and my academic research has addressed a number of antitrust topics, including the effects of horizontal mergers and the tools agencies can use to assess them. I served as Director of the Bureau of Economics at the Federal Trade Commission in 2020. In that position, I oversaw investigations of horizontal and vertical mergers in a number of industries, including retail, and I advised the Commission when it was making enforcement decisions.

Economics provides an analytical framework for assessing mergers, and, in combination with other types of evidence, it plays a critical role in helping to identify how a merger, or a merger remedy, is likely to affect the incentives of market participants, and either benefit or harm consumers. It can also help us to understand how the changing features of an industry, such as the growing importance of home delivery or of data, should be accounted for when analyzing a merger.

However, the methods that agencies use to assess mergers can always be improved by new learning. For this reason, I was also proud to be involved in the revamping of the FTC's Merger Retrospective program.<sup>1</sup> While no two mergers are ever perfectly alike, carefully done retrospectives help to improve today's enforcement decisions by telling us what happened after earlier consummated transactions. Retrospective research by FTC economists (e.g., Hosken et al. (2018) looking at several U.S. mergers) and academics (Allain et al. (2017) looking at a large merger in France, Argentesi et al. (2021) looking at a large merger in the Netherlands) has shown that some grocery chain mergers and acquisitions, especially those in concentrated markets, have raised prices and affected assortment, but that there are also mergers that have been associated with falling prices, suggesting that significant efficiencies are sometimes realized.

The retrospective program, by collecting research from across the globe, also aims to help the U.S. agencies learn about which tools are most helpful in identifying anticompetitive mergers, and to learn from what agencies in other countries are doing. In my comments today, I will draw, in particular, on the UK Competition & Markets Authority's (CMA) 2019 inquiry into a proposed merger between Asda and Sainsbury's, two nationwide supermarket chains with over 2,000 stores.

The FTC staff's assessment of the Kroger/Albertsons transaction will depend on confidential facts and data. As my knowledge of this transaction is limited to what I have read in the press, I cannot say what the FTC will, or should, decide. Instead I want to talk about some issues that appear relevant, where I believe learning from past experience and the practices of other agencies would be especially valuable.

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<sup>1</sup> <https://www.ftc.gov/policy/studies/merger-retrospective-program>.

In-store retail grocery is a classic example of a local, differentiated industry, where both store locations and store formats, including store size, the breadth of assortments and whether retailers use everyday low pricing or discounts, can determine where a consumer chooses to shop.

Economics predicts that, after a horizontal merger, the incentive of the merged firm to raise prices will be positively related to what is called “diversion” between the merging chains. In this setting, suppose that the quality-adjusted price at an Albertsons’s Safeway store was to increase. Some Safeway consumers would switch to other supermarkets, and the relevant diversion would reflect the proportion of these switching consumers who would choose to go to nearby Kroger stores.

The calculation of anticompetitive incentives, and subsequent enforcement decisions, relies on accurate measures of diversion. For example, in the Asda/Sainsbury’s merger, the CMA identified that their estimates of diversion implied that there were 537 local areas where the proposed merger would have caused what the CMA viewed as a “substantial lessening of competition,” and, partly because this number was so large, the CMA blocked the transaction. Estimates of local diversion can also be used to determine which stores may need to be divested.

Accurate estimates of diversion are therefore critical. In some settings, existing market share data can be used to imply likely diversion rates between chains. In grocery, loyalty card data can sometimes be used to determine the other chains that a household visits. Internal firm documents may also contain estimates of the other chains where their customers shop. However, as noted by some respondents to the 2022 FTC and Department of Justice Request for Information on Merger Enforcement (e.g., Conlon and Mortimer (2022)), using these data can sometimes produce misleading estimates of diversion and anticompetitive effects, depending on why people currently use different stores. For example, I often visit both Safeway and Whole Foods, but this does not necessarily mean that I would switch more of my spending to Whole Foods, rather than Kroger, if Safeway prices increased.

One way to try to get a more accurate view of diversion is to use consumer surveys that are designed to elicit the form of diversion that is most relevant for merger analysis. The UK CMA has been a pioneer in its use of surveys, and its Asda/Sainsbury’s inquiry used over 20,000 interviews conducted when shoppers were exiting stores as the basis of its predictions of diversion. These responses were particularly useful in assessing how far consumers were willing to travel to different chains and how many consumers were likely to switch from traditional supermarkets to chains with more limited selection, but typically lower prices, such as Aldi and Lidl.

While surveys need to be carefully designed and carefully interpreted, I believe that the US agencies could usefully expand their use of large scale customer surveys to measure diversion, especially in mergers that involve local retail competition.

While I am obviously not aware of exactly how the FTC staff are assessing diversion in the current transaction, my experience suggests agencies may be reluctant to commission surveys for four reasons: first, surveys can be time-consuming and difficult to complete within the time frame

allowed for the agencies to decide whether to challenge a merger; second, commissioning surveys from independent research firms can be more expensive than working with data released by the parties or third parties; third, agencies are concerned that they currently lack some of the expertise required to interpret survey results in exactly the right way; and fourth, it is unclear how much weight a U.S. court would give to a survey in litigation, and hiring specialized experts who could testify to the quality of any survey used in litigation would be very expensive.

I know that many members of this subcommittee have actively advocated for the agencies to receive additional funding. I believe that additional resources would allow the economics groups within the agencies to develop their expertise in using new tools, such as surveys, to guide better enforcement decisions. Even if courts are skeptical of new tools, enforcement decisions and the design of divestiture packages are often based on modeling that might not play a significant role in litigation, so I do not find this concern to be a compelling reason not to invest.

Additional resources could also put the agencies in a stronger position when deciding what enforcement decisions to take, and what type of divestiture package to require. As noted by a 2019 FTC Office of the Inspector General report, expert witness costs in merger cases can be high, and, in my experience, they may be especially high when, to be able to testify, an expert must have conducted a competitive effects analysis for many local markets. Additional resources would ensure that both the parties and the agencies know that the agencies will be able to go to court, without sacrificing other priorities, if they need to.

While traditional in-store retail is clearly a critical part of this transaction, assessing the effects of the merger on online competition for delivered groceries, and the types of digital advertising opportunities that the online channel offers, will also be important.

Assessment of the online channel will likely raise a distinct set of market definition issues, such as whether there is a clearly distinct market for delivered groceries, and, if so, how competition is affected by firms such as Amazon, and whether chains with stores or distribution centers that are further away from a consumer's home should be counted as effective rivals. These are questions which surveys could also address, and in fact, the CMA used an online survey of over 30,000 consumers to assess competition for delivered groceries in its Asda/Sainsbury's inquiry.

The CMA also suggested that a different type of competitive effect may be present in the online channel. For traditional in-store grocery, there are so many products and prices that one might view chains as being unlikely to coordinate. On the other hand, the CMA took the view that for delivered groceries, delivery charges and the availability of different types of delivery timeslots are highly visible strategic choices, and that coordination on these terms between the chains that offer delivery might have become more likely after the merger that the CMA was evaluating. While economists have only a limited set of tools for quantifying the likelihood of coordinated effects, I expect that FTC staff will be looking carefully at how grocery chains make these types of strategic choices.

The FTC staff will also be looking carefully at whether any efficiencies that might be associated with greater scale in the online channel, whether in the form of physical volumes or greater data, are really merger-specific, in the sense that they can only practically be realized through the proposed merger, or whether they could be achieved through more organic growth. More broadly, the assessment of claimed efficiencies will rely on determining whether they reflect real reductions in resource costs, or whether instead they might reflect some loss of competition in either input or output markets.

This brings me to my final point, which is on the design of any divestiture package. In 2017 the FTC published a report which assessed the remedies it had required in merger cases between 2006 and 2012. One important and practical finding of the 2017 study was that divestitures are more likely to be successful, in the sense of maintaining the pre-merger level of competition, when an entire on-going business is divested, rather than a more limited set of assets that might lead to continuing dependence on other firms.

In the current case, this finding suggests that an appropriate divestiture may not only involve divesting a large number of stores where the merger might reduce local competition, but also distribution centers, trademarks and manufacturing plants for private label products, and a set of digital assets, possibly including data. The evaluation of any divestiture package should also account for the fact that the success of any new business is uncertain, and that the degree of risk to be borne by consumers should be appropriately limited.

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# **EXHIBIT O**

Page Printed from: [globest.com/2001/03/06/sale-of-grand-union-stores-finally-closes/](https://www.globest.com/2001/03/06/sale-of-grand-union-stores-finally-closes/)

## Sale of Grand Union Stores Finally Closes

WAYNE, NJ-The supermarket's name will survive, but the 186-store chain will end up as a 30-store operation in the hands of a Vermont-based wholesaler with the others all being sold off in small blocks to other companies.

By **Eric Peterson** | March 06, 2001 at 01:01 AM

The transaction that just closed was the sale of 170 stores to C&S. The latter, in turn, is selling six of them to Pathmark, 19 to Shaws and 20 to Tops. All will remain as supermarkets, operating in New Jersey and New England. C&S will retain 30 of them, entering the retail side of the business itself. The 30 will continue to bear the Grand Union name.

Over the next three months, meanwhile, 42 stores will be sold to Royal Ahold of the Netherlands, which will convert them to Stop & Shop operations. Hannaford Brothers, based in Maine, will acquire another five stores for its own stable. The remaining 48 of the 170 acquired by C&S will also be sold off, although most of them will be converted to non-food retail operations.

Finally, the 16 stores that Grand Union didn't sell to C&S will be liquidated, although a time frame has not been outlined. Grand Union itself will go out of business once that liquidation is completed, and will remain only as a name on 30 stores owned and operated by C&S.



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# **EXHIBIT P**

## THE AMERICAN PROSPECT

IDEAS, POLITICS &amp; POWER

DNC 2024

THE COLD CIVIL WAR

HOW PRICING REALLY WORKS

MONEY, POLITICS AND POWER

ECONOMIC MODELS

ECONOMIC POLICY

WORKING IN AMERICA +

ENERGY AND THE ENVIRONMENT +

HOUSING AND TRANSPORTATION +

CIVIL RIGHTS IN AMERICA

LAW AND JUSTICE

HEALTH AND SOCIAL POLICY

AMERICA AND THE WORLD

PODCASTS

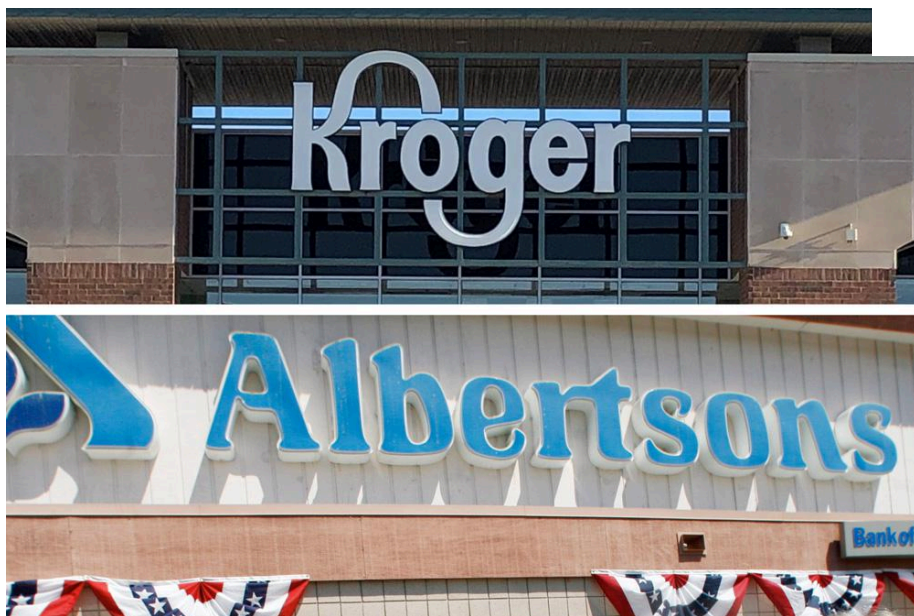
THE PROSPECT ARCHIVE

# Why the Kroger-Albertsons Merger Will Harm Labor

The companies' choice of an anti-union third party for its divestitures reveals why labor needs a seat at the table in merger remedies.

BY ALLEN GRUNES, ROSA BAUM FEBRUARY 16, 2024

347  
Shares



ED PEVOS/ANN ARBOR NEWS; DAMIAN DOVARGANES/AP PHOTO

Kroger and Albertsons are the largest unionized grocery chains in the United States. As both companies have pointed out from the day they announced their proposed merger, this fact distinguishes them from their competitors, one of which is alleging that the National Labor Relations Board is unconstitutional in a bid to stave off a union drive.

In an op-ed in *The Cincinnati Enquirer* (where Kroger is headquartered), the CEOs of Kroger and Albertsons pledged to protect and expand union jobs following the merger: “No frontline workers will be laid off as a result of the merger. The combined company will have one of the largest unionized workforces in the country. We are committed to protecting and expanding opportunities for union jobs.”

More recently, facing possible litigation by the Federal Trade Commission, Kroger doubled down on its pro-union messaging, contrasting itself with the growth of non-union retailers like Walmart and Amazon, which it claims has led to 200,000 union job losses over the past 20 years. “Kroger’s merger with Albertsons will mean workers gain from \$1 billion in higher wages, expanded benefits, long-term job security, and a strong unionized workforce for associates,” a Kroger spokesperson said.

But actions speak louder than words. We represent a labor union in connection with the proposed merger, and we believe that workers, along with customers, will be materially harmed. There is a remedy for this, to protect good-paying jobs in this and all mergers. But it’s not the path Kroger and Albertsons have taken.

## Mix and Match

Kroger and Albertsons own dozens of grocery “banners” (store names), and operate competing stores within three miles of each other in hundreds of local geographic areas. One estimate of store overlap showed that approximately 48 percent of Albertsons stores are within three miles of a Kroger store. In the neighborhood of one of the authors, for example, Harris Teeter (owned by Kroger) is directly across the street from Safeway (owned by Albertsons).

Given the massive number of overlaps, it was obvious from the beginning that there was likely to be a dramatic loss of head-to-head retail competition if the merger took place. Accordingly, in connection with the merger announcement, the companies stated that they planned to divest grocery stores to a third party.

The companies later entered an agreement with C&S Wholesale Grocers, LLC (C&S), a privately held company based in Keene, New Hampshire. Under the agreement, C&S is to acquire 413 stores, eight distribution centers, two offices, and some intellectual property currently owned or operated by either Kroger or Albertsons.

The divestiture plan was presented as a definitive agreement, without the blessing of the Federal Trade Commission. This is a prelitigation move; the intent is to make it harder for the government to win at trial by forcing the government to litigate not only the original merger agreement but also the adequacy of the proposed remedy. In antitrust jargon, the strategy is called “litigating the fix.” Through the agreement with C&S, Kroger and Albertsons are setting the stage for the FTC to “litigate the fix” if the FTC decides to challenge the merger, which at this point appears likely. (Colorado’s attorney general went ahead with a merger challenge just this week. The investigation also uncovered other unlawful activity: “Despite being competitors,” the two

companies allegedly “colluded to suppress the wages and benefits of their workers” during a 2022 strike.)

The history of failed merger remedies highlights the risks to consumers. The FTC’s own study of negotiated consent decrees between 2006 and 2012 found a significant number of failures. The data indicated that there was at least some significant competitive harm in 34 percent of all horizontal merger consent decrees.

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The history of failed merger remedies highlights the risks to consumers.

The selection of some of one party’s assets and some of the other party’s assets—as is the case here—is sometimes called a “mix and match” divestiture package. The antitrust agencies tend to view this with skepticism, chiefly because they assemble assets that have not been operated together by a single owner in the past, which has long been known to result in a greater risk of failure. As John Kwoka points out, the FTC’s study “found a substantially lower rate of success—about 56 percent of orders—where a divestiture remedy transferred less than the entirety of a business unit.”

The failure of grocery store divestitures during the past decade provides an object lesson in what can go wrong. Customer experience and store traffic are critical to grocery store viability—more so than in other businesses. A typical grocery store stocks thousands of items, many of them perishable, and operates on thin margins. Grocery store delivery windows are narrow.

The complaint filed by Haggen against Albertsons in 2015, after the Albertsons-Safeway merger remedy imploded within a year, suggests how many things can

go wrong with divestitures in this business. As alleged by Haggen, these included saddling the buyer with outdated inventory; understocking items resulting in empty shelves; overstocking perishables; failing to do required maintenance; removing inventory, fixtures, and equipment from stores; failing to continue to advertise to existing customers in the weeks before the ownership change; saddling the buyer with inaccurate retail pricing data; and botching the transition of back-office systems. We could add to this list the disappearance of familiar goods, sizes, brands, and private labels when a new owner comes in.

A “mix and match” divestiture strategy only magnifies these risks. It is also likely to be inefficient in this case: We can assume that Kroger and Albertsons have sited, and are operating, their own warehouses to maximize efficiency.

## **An Anti-Union Divestiture Buyer**

The divestiture buyer Kroger and Albertsons settled upon is anything but union-friendly. C&S has a long history, going back more than 20 years, of acquiring unionized distribution centers, closing them down, and moving the work to non-union facilities. A conservative estimate is that C&S has eliminated more than 5,000 Teamster jobs over the last 20 years.

For example, after acquiring three New England warehouses in an asset swap with Supervalu in 2003, C&S announced in 2004 that it was closing all the distribution centers and moving the work to its own non-union facilities. These warehouse closures in Portland, Maine; Andover, Massachusetts; and Cranston, Rhode Island, resulted in the loss of over 500 union jobs.

In April of 2010, C&S took over the dry grocery warehouse of Giant Food (now part of Ahold Delhaize) in Jessup, Maryland. In 2011, C&S announced plans to move the work to its own non-union warehouse in York, Pennsylvania, resulting in the loss of approximately 400 union jobs.

C&S took over Pathmark's Woodbridge, New Jersey, warehouses in the late 1990s, then took over distribution for A&P in 2003. The two companies merged in 2007. The Woodbridge warehouses were closed in February of 2011, and C&S moved the work to its non-union facility in Harrisburg, Pennsylvania. More than 1,000 union members lost their jobs.

In upstate New York, the Tops supermarket chain (then owned by Ahold) sold its 880,000-square-foot distribution center in Lancaster to C&S in 2002 and contracted with C&S to operate it. When Tops repurchased the facility in 2013, C&S structured the transaction to avoid any obligation to pay into the pension plan, claiming that the responsibility lay with Tops. Some 600 union employees at the warehouse saw their pensions frozen; in 2018, the employees received a one-time payment to replace only part of the benefits they would have accumulated.

DAVID ZALUBOWSKI/AP PHOTO

Colorado Attorney General Phil Weiser announces the filing of a lawsuit to block the Kroger-Albertsons merger on the basis of eliminating competition, February 14, 2024, in Denver.

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C&S's track record as a retailer also leads to the conclusion that it is not an acceptable buyer. When the divestiture plan was announced, C&S was touted as having an "extensive background in food retail," but its experience (1) is closely connected with the bankruptcies of grocery store chains (Grand Union, Penn Traffic, A&P); (2) includes buying and reselling or closing hundreds of grocery stores (Grand Union, Bi-Lo); and (3) appears opportunistic and in aid of C&S's primary business, which is distribution and wholesaling.

One may ask how many grocery stores does C&S actually own today? The answer is about two dozen. In short, there are ample reasons to believe that this is not a company that will grow into an effective retail competitor.

It's not like there were zero union-friendly divestiture buyers out there. The choice of an anti-union divestiture

buyer calls into question everything the two companies have claimed about their pro-union stance and alleged unwillingness to put jobs at risk.

And to hear Kroger talk critically about Walmart is pure irony, as C&S's affiliate, Symbotic, is automating all of Walmart's warehouses. Symbotic and C&S overlap in their principal shareholders, officers, and directors, and share a number of services. Symbotic's largest customer, and 10 percent shareholder, is Walmart, which is such an important customer and investor that it has observer status in Symbotic board meetings.

## Labor and Merger Remedies

Historically, the impact of mergers on labor has been a "blind spot" in antitrust enforcement. This blind spot developed notwithstanding the fact that antitrust laws reach two kinds of conduct: conduct that harms *consumers* and conduct that harms suppliers (including workers, who supply labor).

Why this blind spot? Possible reasons include: (1) legal theory has placed more emphasis on product markets; (2) there has been an assumption that labor markets are reasonably competitive; (3) labor laws, which sit "outside" of antitrust, may have seemed sufficient; and (4) litigation focused on labor markets is more challenging than litigation focused on product markets. Moreover, there has been hostility to unions in antitrust. This hostility persists when unions continue to be compared to cartels.

Due to a growing body of empirical work that has examined the impact of mergers on things like wages and employment, this tendency to overlook labor market competition has been changing in recent years in both Republican and Democratic administrations. As

Eric Posner has written: “Recent studies have shown that many labor markets are concentrated, and that wages, as one would predict, are lower in concentrated labor markets than in competitive labor markets. Moreover, concentration is far more serious in labor markets than in product markets; wage suppression is much more significant than price inflation.”

In 2019, former FTC Chair Joseph Simons noted that his agency and the Justice Department’s Antitrust Division “are now devoting more attention to competition in labor markets and how certain conduct, including mergers, may impact competition in those markets.” In 2021, DOJ successfully sued to block Penguin Random House’s proposed acquisition of Simon & Schuster by alleging, among other things, that the acquisition would be likely to depress author pay. Most recently, the agencies released new Merger Guidelines that, for the first time, expressly discuss labor markets.

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Antitrust agencies should start to think about labor neutrality agreements as a merger remedy.

Evaluating workers’ relative bargaining power against employers is not only consistent with antitrust law’s goals of protecting competition in labor markets, but is also aligned with the National Labor Relations Act’s policy of ensuring equal bargaining power between workers and employers, as Hiba Hafiz has written. Perhaps counterintuitively, a merger between two unionized companies may harm labor market competition and lead to a reduction in worker welfare,

as Marshall Steinbaum suggested in a recent economic paper on the Kroger-Albertsons merger.

What remedies are likely to be effective and workable for workers and labor markets? First and most obvious, if divestitures are contemplated, the choice of buyer is critical. The choice of a buyer that has repeatedly eliminated union jobs and avoided responsibilities to its unionized workforce is not a buyer that can be expected to work well with unions in the future.

Second, recognition of existing contracts and successor employer responsibility need to be spelled out. Unions have bargained over recognition and successorship language for years. When parties conceal such language from the impacted unions, this is a red flag. A claim that the proposed buyer intends to “maintain” collective-bargaining agreements and not lay off any “frontline associates” should be treated just as skeptically, and examined just as critically, as the claim that the buyer “will operate as a fierce competitor.” When recognition and successorship are part of a remedy, labor needs to be at the table, not just the employer.

Third, the specific divested assets need to be identified. Lack of transparency in the Kroger-Albertsons context makes a mockery of third-party analysis—including assessing the quality and competitiveness of the divestitures—as it has to be done by guesswork. One of the benefits unions can offer to the agencies is “boots on the ground” experience. At a minimum, this experience can serve as a reality check on claims made by parties about the competitive significance of the assets. Affected employees have a need to know, as their livelihoods are at stake. The specifics should be disclosed up front so that “market testing” becomes a reality in the United States, as it is elsewhere in the world.

Fourth, antitrust agencies should start to think about labor neutrality agreements as a merger remedy. After announcing a series of labor principles, Microsoft entered into a neutrality agreement in connection with its acquisition of Activision Blizzard. The agreement provides for: (1) an explicit employer commitment to remain neutral during the union's organizing drive; (2) a method of determining whether the union has majority status; (3) avenues for union organizers to communicate with employees, such as by allowing organizers on the employer's premises or providing employee contact information similar to what the union would receive under an NLRB election process; and (4) a dispute resolution process to address issues of interpretation and compliance with the agreement. Such agreements are unquestionably legal under the case law.

Finally, in a merger such as Kroger-Albertsons, even if divestiture were a workable and acceptable remedy (a big if), a "mix and match" proposal is unlikely to maintain premerger efficiencies, and should be rejected for that reason. In this instance, distribution efficiencies could only be preserved if all of the grocery stores owned by a party in a local area were divested together with the distribution facility and transportation network that serves those stores. Anything else is courting disaster.

Kroger and Albertsons should have thought harder about these issues earlier. The choice of an anti-union buyer was a slap in the face to labor. Involving the affected unions in recognition and successorship discussions would have given some substance to the promises both companies made to their employees. But it's too late now. The CEOs of both companies pledged they "would never move forward" with the merger if it placed their employees' careers at risk. The time has come for the two companies to abandon the merger.

*The authors represent a labor union in connection with the proposed Kroger-Albertsons merger. We are grateful to Jack Kirkwood for his helpful suggestions. The views expressed here are those of the authors and not necessarily those of any other person or entity.*

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# **EXHIBIT Q**

## INDEPENDENTS / REGIONAL GROCERS

Southern Family Markets is vanishing almost as suddenly as it appeared. Pieced together less than two years ago from fragments of the Bi-Lo and Bruno's chains after they passed from Ahold to a private equity firm, Southern Family was to have provided its owner, C&S Wholesale Grocers, with a retail base to supplement and integrate with the Bi-Lo wholesale account it picked up in a prior, related deal.

**Jon Springer**, Executive Editor

November 27, 2006

13 Min Read

# **sn** SUPERMARKET NEWS

JON SPRINGER

Southern Family Markets is vanishing almost as suddenly as it appeared.

Pieced together less than two years ago from fragments of the Bi-Lo and Bruno's chains after they passed from Ahold to a private equity firm, Southern Family was to have provided its owner, C&S Wholesale Grocers, with a retail base to supplement and integrate with the Bi-Lo wholesale account it picked up in a prior, related deal.

The chain, however, has been rapidly shrinking. What began as 104 stores spun off from Bi-Lo/Bruno's, plus at least seven Winn-Dixie stores picked up as the result of that chain's bankruptcy, Southern Family outlets now number about 57 after waves of closures and store sales. The remaining outlets, according to observers, in most cases haven't successfully addressed the volume, market-share and competitive issues that landed them on the selling block in the first place. For many stores, sources said, the situation has gotten worse.

Moreover, they said, the chain has done little to establish an identity amid increasingly difficult competition in Southern markets where Wal-Mart is a dominant brand.

Whether the brisk pace of openings and closings at Southern Family indicate a brilliant design, a deal gone wrong, or something in between puzzles some observers. C&S isn't saying: Officials did not respond to several interview requests from SN for this article.

## Distribution Driven

Southern Family Markets traces its beginnings to the final act of a long-term recovery strategy spanning two owners and several years at Bi-Lo. The Columbia, S.C.-based retailer and its Birmingham, Ala.-based sister chain Bruno's were put on the auction block by former owner Ahold in 2004.

Ahold at that time was reeling from an accounting scandal and a subsequent need to reduce debt — factors that had slowed the flow of capital toward its Southern U.S. banners to a trickle, Bi-Lo officials said. The increasing need for attention at Bi-Lo sparked its officers to engineer a deal that landed the stores with Texas buyout firm Lone Star Funds, and shortly afterward, its three distribution centers and all replenishment functions with C&S.

Finally last May, in what Bi-Lo called “the last phase of its long-term growth strategy,” it shed 116 stores, paring the chain to a lean 310-store operation consisting only of stores in markets where Bi-Lo was or could be the No. 1 or No. 2 grocer.

C&S made no secrets that the dealings with Bi-Lo were distribution driven, saying that the acquisition of warehouses and the Bi-Lo account would open up new opportunities in the Southern states for C&S. By taking on Bi-Lo's troubled stores, C&S assured it would do business with at least one healthy customer. The question remained whether the sick assets it acquired would soon infect C&S.

"C&S were looking for distribution — that was their main objective," Neil Stern, senior partner at McMillan-Doolittle, Chicago, told SN. "The stores they bought they could operate under their own banner, or they could parcel them out for other independent operators."

Observers at the time were skeptical. One source, who asked not to be identified, predicted C&S was in for trouble when it acquired the stores. "If you have 100 stores and 50 of them are losers, you're going to be a loser," the source told SN last year.

"To lose between 45% and 50% of the store base is really shocking," Burt P. Flickinger III, managing director of Strategic Resource Group, New York, told SN. "It seems to fly in the face of the whole objective of buying those stores to keep the wholesale business. If they lose half a store base, what kind of size and scale can you have for the balance?"

## Troubled Assets

C&S closed on the acquired Bi-Lo and Bruno's stores in a series of transactions over 11 months, the company said. A purchase price was not announced. According to sources, each acquired store was set up as its own limited liability company, which could facilitate the sale of the stores one at a time if necessary.

Mark Gross, the former C&S senior vice president who at the time of the deal was named president of Southern Family Markets, told SN that a retail presence offered C&S "another way for us to interact with the manufacturing community."

And in a speech last year, Ron Wright, co-president and chief operating officer, C&S, described the chain as "an educational tool" that would help C&S learn to deal with independent retail customers — a nascent strength at C&S, which traditionally made its money outsourcing logistics to large chains.

C&S spent much of summer 2005 rebranding the acquired assets — which operated variously under the Bi-Lo, Bruno's, Food World, Food Fair or Foodmax names — with the Southern Family Markets banner. Certain stores in Georgia were rebranded as Piggly Wiggly, which C&S acquired the right to use there as the result of its Fleming acquisition a few years earlier. Shoppers noticed signs changing as early as September a year ago and conversions continued until this spring.

Frank Curci, a former Bi-Lo executive who since ran Ahold's Tops stores in New York, was named chief operating officer of Southern Family. Curci in a press release announcing the reopenings said the stores would be “family focused” offering quality foods at competitive prices and would continue to offer a discount card, as its predecessor had.

Observers told SN they noticed little change, and little to support the new banner. Southern Family, for example, does not operate a website. “It was like they just changed the name of the store one day and assumed everyone would shop there,” said Britt Beamer, chairman of America's Research Group, a consumer behavior firm based in Charleston, S.C.

While a smooth transition has its benefits, the assets acquired by C&S, particularly in the Bruno's division, cried out for change, Stern said. If C&S has encountered difficulty running the former Bruno's stores, it wouldn't be alone in that regard, he added.

“The Bruno's piece alone hasn't worked for any number of people who've run it, going all the way back to KKR,” said Stern, referring to the private equity firm that purchased Bruno's in 1995, only to surrender it to creditors in a 1998 bankruptcy filing. “It's been difficult for anyone to figure out. Under no circumstances was anybody going to buy them and operate them as business as usual, because business as usual was a loss.”

A reorganized Bruno's in the late 1990s achieved something of a renaissance, only to stumble again after Ahold, which purchased it in 2001, encountered its own troubles in 2003, and Wal-Mart Stores continued to gain market share and influence in the South, spelling disaster for any number of retailers.

Beamer recalled visiting a Southern Family Markets store near his vacation home in Clayton, Ga., this summer and being struck by what he called the store's "lack of identity."

"You have to give the consumers a reason to exist today, especially when you're in the eye of the tiger with Wal-Mart supercenters all around you," Beamer told SN. "Southern Family Markets had no identity. It looked to me like a neighborhood grocery store that was going to go out of business."

## Closures and Sales

The Clayton store visited by Beamer in fact closed on Aug. 12 of this year, the same day 12 other stores in Alabama and Georgia shuttered their doors. That announcement was followed in September by word that Southern Family was backing out of North Carolina completely, closing nine stores and selling eight others.

The closing announcements were made by a new chief operating officer, Bill White, who took over for Curci in June. White told the Birmingham News in September that the chain gave the stores several months to "grow the business and change [sales] trends." However, he said, the company determined the closing outlets had "no long-term potential."

Accompanying the closings was a reduction of 66 staff members at Southern Family's Birmingham headquarters, the newspaper added. That left the retailer with approximately 75 head office employees. The smaller staff would require less office space, White added, so the retailer was looking into selling its headquarters building and leasing the necessary space back.

North Carolina stores slated for sale went to a variety of competitors including Harris Teeter, Food Lion and Fresh Market. David Diaz, a member of New York City's Key Food cooperative, purchased and reopened two former Southern Family stores (including a Winn-Dixie Southern Family acquired after the Bi-Lo deal). Key Food may have also purchased a third location.

Key Food's outlets will be supplied by C&S. Jerry Cesaro, senior vice president of Key Food, told SN there was little ailing the purchased locations that a sharp focus on the local market couldn't fix.

Food Lion purchased locations in Greensboro and Mocksville, reopening the former on Sept. 20 and beginning an extensive remodeling in Mocksville. No date has been announced for that store's reopening.

Many other closed stores went unsold. A newspaper article this month detailed a petition effort by residents of Eden, N.C., to entice Lowes Foods to take over a former Southern Family site there. Lowes refused, according to the report in the Eden Daily News.

Rumors of additional sales trail Southern Family in places like Tennessee. On an Internet message board discussion, participants identifying themselves as employees of Southern Family said store staffs and shoppers in Tennessee, formerly loyal to Bi-Lo, were on edge fearing a sale or closure could come at any time.

"We are tired of all the secrecy and the wait-and-see games," one message read in part. "You can't go a day without customers asking you, 'What is going on?' or 'When are you closing?'"

## According to Plan?

There's an argument to be made the Southern Family operation is going more or less as planned. Flush with new capital and free of market laggards dragging down its results, Bi-Lo is aggressively expanding behind large modern stores, providing C&S with additional distribution sales.

C&S in the press release announcing its purchase of the former Bi-Lo/Bruno's stores said it intended to operate "the majority" of the acquired stores. If that remains true it would indicate store closures are at or near an end.

The new COO, White, has a good reputation as an operator. As president of Supervalu's Shoppers Food and Pharmacy division, he helped reposition that chain as a full-service price operator in the Washington-Baltimore region. Curci, by contrast, was more of a financial executive, according to Flickinger.

"Bill White is a superb operator, and getting him was a real coup for C&S, but he's inheriting a lot of problems," Flickinger said. "Frank Curci was more of a financial guy, with less experience at marketing and merchandising."

Grand Union, the Northeast-based retail chain C&S acquired out of bankruptcy court in 2000, faced a similar wind-down. C&S acquired 185 stores, then sold numerous units to competitors, let leases lapse on others, and retained a small core of stores today known as GU Family Markets. That chain today has 36 stores in New York, Vermont, Massachusetts, Connecticut and Pennsylvania and “does reasonably well,” according to Flickinger.

Southern Family stores remaining open have recently phased out the bonus card program for a wall-of-values approach called Power Buys, employees say. Whether that approach can be successful at the stores remains to be seen, but it indicates new strategies are at work.

The majority of its remaining stores have union employees anxious over their futures, according to Elaise Fox, president of United Food and Commercial Workers Local 1657, Birmingham. Local 1657 represents workers at around 29 stores in Alabama who are working on an extension of a contract that was to have expired in September 2004. A plan to extend terms to a future owner in the event of a sale is one of the major issues in ongoing renewal negotiations, Fox told SN.

“Southern Family Markets has given us the indication that some or all of the stores may be for sale, so successorship is important for our members,” Fox told SN. “Employees are getting anxious. They work for a chain that has been sold three times already.”

## Southern Family History

**February 2004:** Ahold announces it would sell its Bi-Lo and Bruno's chains in an attempt to reduce debt. Bi-Lo at the time operates about 287 stores in North Carolina, South Carolina, Georgia and Tennessee; Bruno's operates 168 stores under the Bruno's, Food Fair, Food World and Foodmax names in Alabama, Florida, Georgia and Mississippi.

**December 2004:** Ahold agrees to sell Bi-Lo and Bruno's to Bi-Lo Holdings, an affiliate of Dallas-based private investor Lone Star Funds, for \$560 million — a figure at the low end of analyst estimates. The price could increase to \$660 million pending Ahold's ability to meet certain targets related to disposition of inventories and assets.

**January 2005:** Bi-Lo transfers ownership of its three warehouses and all replenishment functions to C&S Wholesale Grocers. Financial terms are not disclosed. Also, Bi-Lo announces it would combine back-office operations of the chains at its Mauldin, S.C., headquarters.

**March 2005:** Bi-Lo announces it will close 29 stores, nine under the Bi-Lo banner and 20 in the Bruno's division.

**May 2005:** Bi-Lo announces it would sell 104 Bi-Lo and Bruno's stores to Southern Family Markets, an affiliate of C&S, in Georgia, North Carolina, Tennessee, Alabama, Florida and Mississippi. Financial terms are not disclosed.

**June, 2005:** Winn-Dixie announces plans to close or sell 327 stores, completely exiting Virginia, North Carolina, South Carolina and Tennessee, and parts of Georgia, Alabama, Mississippi and Louisiana.

**September 2005:** Southern Family Markets acquires seven former Winn-Dixie stores in bankruptcy actions; Southern Family Markets signs begin appearing on storefronts at former Bi-Lo and Bruno's stores throughout the South, and officials say openings will continue through early 2006; in Georgia, 12 former Foodmax stores are rebranded with the Piggly Wiggly banner by C&S.

**June 2006:** Bill White is named chief operating officer of Southern Family, replacing Frank Curci. Southern Family chain includes 99 stores.

**July 2006:** Southern Family announces it would close 13 stores in three states on Aug. 12. Southern Family chain now down to 75 stores.

**August 2006:** Southern Family announces it would exit North Carolina completely, closing 17 stores. Eight of the stores are sold to new operators. Southern Family chain now totals 58 stores.

**September 2006:** Southern Family cuts 66 headquarters jobs, reflecting store sales and closures, according to reports. Chain includes 57 stores.

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Jon Springer is executive editor of Winsight Grocery Business with responsibility for leading its digital news team. Jon has more than 20 years of experience covering consumer business and retail in New York, including more than 14 years at the Retail/Financial desk at Supermarket News. His previous experience...

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