NOTE

STARVING COMPETITION: HOW THE 2023 MERGER GUIDELINES CAN COMBAT FOOD DESERTS AS AN ANTITRUST FAILURE

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INTRODUCTION

In some American neighborhoods, a resident can walk three blocks in any direction and find a supermarket stocked with fresh produce, specialty items, and organic alternatives; living in such a "food oasis" is defined by abundance, choice, and competition.[1] In others, a resident must travel miles just to buy basic groceries, navigating convenience stores where fresh food is scarce and prices are high.[2] The United States Department of Agriculture defines food deserts[3] as "[l]ow-income census tracts where a significant number (at least 500 people) or share (at least 33 percent) of the population is greater than one-half mile from the nearest supermarket, supercenter, or large grocery store for an urban area or greater than 10 miles for a rural area."[4] Under this measure, around 53.6 million people, or 17.4 percent of the U.S. population, live in food deserts.[5] Such limited access to healthy food correlates to high rates of obesity and chronic, diet-related diseases,[6] and is associated with shorter life expectancies.[7]

With over 6,500 food deserts in the United States,[8] the sheer size highlights that food deserts are not isolated anomalies but

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1 *See* He Jin & Yongmei Lu, *Evaluating Consumer Nutrition Environment in Food Deserts and Food Swamps*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH, Mar. 7, 2021, at 2, https://pmc.ncbi.nlm.nih.gov/articles/PMC7967537/ [https://perma.cc/NAH5-RKNZ].

2 *See id.*

3 In recent years, some scholars and advocates have urged replacing the term "food desert" with "food apartheid" to more accurately capture the historical injustices and structural forces that limit residents' agency within the food system. *See, e.g.*, Jo Walker, *'Food Desert' vs. 'Food Apartheid': Which Term Best Describes Disparities in Food Access?*, UNIV. MICH. NEWS (Nov. 29, 2023), https://seas.umich.edu/news/food-desert-vs-food-apartheid-which-term-best-describes-disparities-food-access [https://perma.cc/E6N2-LWRJ]. While this Note acknowledges the rationale behind this shift, it continues to use the term "food desert" when referring to areas that lack access to affordable and healthy food because it remains the predominant term in colloquial and policy discourse.

4 Alana Rhone, *Food Access Research Atlas – Documentation*, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Jan. 5, 2025), https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation [https://perma.cc/82LU-T4PT].

5 *Id.*

6 PAULA TARNAPOL WHITACRE, PEGGY TSAI & JANET MULLIGAN, THE PUBLIC HEALTH EFFECTS OF FOOD DESERTS: WORKSHOP SUMMARY 2 (2009), https://www.ncbi.nlm.nih.gov/books/NBK208019/pdf/Bookshelf_NBK208019.pdf [https://perma.cc/N9G4-JQCJ].

7 *Living in Food Deserts Is Associated with Shorter Life Expectancy in the US, New Research Shows*, AM. CANCER SOC'Y (June 28, 2023), https://pressroom.cancer.org/releases?item=1237 [https://perma.cc/3H96-MX2G].

8 *Understanding America's Rural and Urban Food Deserts*, BAYER (Aug. 3, 2023), https://www.bayer.com/en/us/news-stories/understanding-americas-rural-and-urban-food-deserts [https://perma.cc/4JSL-VMRN].

part of a broader, persistent pattern that demands closer scrutiny of the structural forces that determine where critical food infrastructure is placed.

In this Note, I will argue that the conditions that give rise to food deserts are not simply remnants of historical segregation and natural economic forces, but a reflection of structural market failure sustained by anticompetitive corporate practices. While discriminatory land-use policies and racialized divestment laid the groundwork for unequal food access,[9] contemporary market dynamics play a central role in maintaining and deepening these disparities. I further argue that modern antitrust enforcement, especially under the 2023 Merger Guidelines issued by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"),[10] offers a viable and underutilized tool to confront the market dynamics that perpetuate food deserts.

This Note proceeds in two parts. In Part I, I trace the historical formation of food deserts and situate them within the framework of antitrust law. This Part examines how historical patterns of segregation intersect with market concentration and firm behavior and reframe limited food access as a form of competitive harm. By reconceptualizing food deserts through this lens, Part I demonstrates that the problem is fundamentally economic in ways that fall within antitrust law's concern for fair competition and efficient market functioning. In Part II, drawing on the 2023 Merger Guidelines and using *Federal Trade Commission v. Kroger Co.*[11] as a case study, I propose that modern enforcement tools provide courts and agencies with a robust analytical framework for intervening in mergers that risk deepening food insecurity. Ultimately, I propose that these tools, if applied consistently and rigorously, can empower courts to prevent mergers whose competitive effects would further entrench food deserts, thereby aligning antitrust enforcement with broader public-interest goals. Given that the issue of food deserts is complex and there is no consensus on their exact cause,[12] this Note focuses on the persistence of food deserts

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9 *See infra* Part I.

10 U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/PEE6-QC5B] [hereinafter 2023 Merger Guidelines].

11 No. 3:24-CV-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024).

12 *See* Michele Ver Ploeg et al., U.S. Dep't of Agric., Econ. Rsch. Serv., AP-036, Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences 119 (2009).

in urban cities—where space is limited, and access to private transportation is not always guaranteed.

I
Understanding Food Deserts as an Antitrust Problem

Food deserts are not the unintended byproducts of economic investment patterns, but the deliberate outcome of discriminatory policies.[13] This Part examines how historical decisions created these inequities and how contemporary corporate practices from supermarket chains continue to reinforce them.

A. Historical Patterns of Racial and Economic Segregation

Between 1910 and 1970 in the United States, about six million Black Americans moved from the South to northern urban areas such as New York, Chicago, Detroit, and Pittsburgh on the east, and Oakland, San Francisco, Portland, and Seattle on the west.[14] As Black people moved north, white urbanites fled to the suburbs. Between 1960 and 1970, the white population of central cities in U.S. metropolitan areas declined by 9.6 percent—that figure was at a higher 16.2 percent in the Northeast during the same period.[15] As relatively wealthy white families moved to the suburbs, cities began to suffer due to depreciating housing stock and declining business districts.[16] At the same time, both federal and local-level governments encouraged this racialized migration.[17] The Federal Housing Administration directed its programs to extend credit and capital to white families who wished to move to the racially homogeneous suburbs, and used federal underwriting requirements—such as labeling Black people as nuisances—to endorse discriminatory zoning.[18] Local boards erected schools

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13 *See id.* (discussing supply- and demand-side factors that contribute to cause of food deserts). *But see* Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 Calif. L. Rev. 1717, 1728 (2022) (noting specific government policies that led to food deserts in specific areas).

14 *The Great Migration (1910–1970)*, Nat'l Archives (June 28, 2021), https://www.archives.gov/research/african-americans/migrations/great-migration [https://perma.cc/Q799-SNFJ].

15 Jan Blakeslee, *"White Flight" to the Suburbs: A Demographic Approach*, Focus (Inst. for Rsch. on Poverty Newsl.), Winter 1978–79, at 1, https://www.irp.wisc.edu/publications/focus/pdfs/foc32a.pdf [https://perma.cc/A97P-CLZL].

16 *See* Leslie, *supra* note 13.

17 *Id.*

18 *Id.*

in suburbs, and governments constructed new highways that connected the suburbs to cities' downtown offices.[19] With this, supermarket chains abandoned their inner-city locations and followed white consumers to the suburbs.[20]

However, Black Americans could not partake in suburban expansion due to racial discrimination. Despite the Supreme Court rendering racially restrictive covenants judicially unenforceable,[21] racial covenants continued to be written in new deeds until the Fair Housing Act of 1968 made them illegal.[22] Even after the Act, racial covenants continued to appear in real estate records.[23] Thus, the *de facto* segregation of suburban growth left nonwhite Americans with shut-down supermarkets and insufficient access to fresh and nourishing food.

B. Corporate Conduct that Sustains Food Deserts

Redlining is a historically discriminatory practice that systematically denies predominantly Black neighborhoods essential services such as mortgages, insurance loans, and health care services solely based on their residency, without regard to the individual's qualifications and creditworthiness.[24] Supermarket chains engage in a similar practice when deciding when to open or close a location.[25] Supermarkets are reluctant to invest in urban areas due to perceived "urban obstacles" such as higher costs associated with urban land, labor, and utilities, low profit margins on more perishable goods, and increased theft.[26] However, studies have shown that such perceptions are rooted in stereotypes of the gross income, race, and reputation of the area.[27] In reality, Black neighborhoods continue to have less access to healthy food than equivalent

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19 *Id.* at 1728–29.

20 Kameshwari Pothukuchi, *Attracting Supermarkets to Inner-City Neighborhoods: Economic Development Outside the Box*, 19 ECON. DEV. Q. 232, 232–33 (2005).

21 Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

22 Richard R.W. Brooks & Carol M. Rose, *Racial Covenants and Segregation, Yesterday and Today* 3 (Straus Inst. Working Paper No. 08, 2010), https://www.law.nyu.edu/sites/default/files/siwp/Rose.pdf [https://perma.cc/U5MZ-AJYY].

23 *Id.* at 14.

24 *Redlining*, LEGAL INFO. INST. (Apr. 2022), https://www.law.cornell.edu/wex/redlining [https://perma.cc/29HG-7CHQ].

25 *See generally* Mengyao Zhang & Debarchana Ghosh, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Conn.*, 20 TRANSACTIONS GIS 79 (2015).

26 Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 128 (2001).

27 *Id.*

white neighborhoods even after controlling for income. For example, in Atlanta, residents of affluent Black neighborhoods face travel times to food retailers that are five minutes longer than those of comparably affluent white households.[28] While this may seem insignificant, given that the average household made 4.65 one-way shopping or personal business trips per day in 1995, adding five minutes to each trip would amount to an additional 141.4 hours of travel per year.[29]

Beyond redlining, supermarkets employ additional anticompetitive practices that contribute to food deserts, such as restrictive real estate agreements that inhibit a competitor's ability to establish grocery stores in particular neighborhoods.

1. *The Use of Restrictive Covenants*

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.[30]

In 1980, Davidson, a grocery store chain, closed a supermarket in downtown New Brunswick, New Jersey, and sold the land to D. Katz & Sons, Inc. (Katz), a rug merchant, with a deed that included the above covenant.[31] Given that most inner-city neighborhoods only have a few parcels of land big enough to host a supermarket, such restrictions prevent any new grocery chains from opening in the neighborhood. Subsequently, the New Brunswick Housing Authority acquired the location from Katz to lease to C-Town, another grocery chain, which gave rise to the dispute. Many residents in the area did not own or have ready access to a motor vehicle, and there was no other supermarket within walking distance.[32] The Superior Court of New Jersey found the covenant to be so contrary to public policy that it should not be recognized as a valid, enforceable obligation.[33]

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28 Amy Helling & David S. Sawicki, *Race and Residential Accessibility to Shopping and Services*, 14 HOUS. POL'Y DEBATE 69, 90 n.9 (2003).

29 *Id.* at 90.

30 Davidson Bros., Inc. v. D. Katz & Sons, Inc., 643 A.2d 642, 643 (N.J. Super. Ct. App. Div. 1994).

31 *See id.*

32 *See id.* at 645.

33 *See id.*

However, *Davidson Bros.* is an outlier. In at least twenty-two cases, courts have upheld restrictive covenants,[34] generally enforcing them when the deed's language is "clear and unambiguous" and the restrictions are not "illegal or unconscionable."[35] While such covenants are not impactful when chain stores operate in the area, they become detrimental to neighborhoods when stores close and leave the land empty. As of 2010, 250 Walmart stores across the country sit empty by taking advantage of this anticompetitive practice.[36] In defense of this practice, Walmart claims to "welcome competition in the marketplace, but what we can't be doing is providing infrastructure for our competitors in the same market."[37] When these restrictive covenants expire, grocery stores finally move into the area, revealing long-standing unmet demand, but only after entire generations have already been shaped by years of limited access to healthy food.[38] Restrictive covenants, while legally enforceable under certain conditions, operate as a subtle and calculated instrument of market control and reinforce inequalities in fresh food accessibility.

2. *The Use of Exclusive Clauses*

> No part of the shopping center, other than the demised premises (the supermarket premises), may be used for the conduct of a supermarket business or as a supermarket.[39]

When a supermarket leases space in a shopping center, they often negotiate an exclusive clause that limits the use of the shopping center's other leasable spaces, typically limiting competition for consumers' food dollars by preventing other

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34 *See, e.g.*, Jordan Jackson, Note, *Running (Away) with the Land: A (Super) Market Problem*, 112 GEO. L.J. 413, 421 n.59 (2023) (collecting cases).

35 *See* Steve Holt, *How Leaving Stores Closed for Years Helps Grocery Chains and Hurts Communities*, CIV. EATS (Jan. 22, 2018), https://civileats.com/2018/01/22/how-leaving-stores-closed-for-years-helps-grocery-chains-and-hurts-communities/ [https://perma.cc/64JL-UCGQ].

36 Jeremy Bowman, *Where Have All the Inner-City Grocery Stores Gone?*, BUS. INSIDER (Apr. 4, 2012), https://www.businessinsider.com/where-have-all-the-inner-city-grocery-stores-gone-2012-4 [https://perma.cc/XQ3L-NB8D].

37 *Id.*

38 Holt, *supra* note 35 (noting that downtown Vallejo, California, was left without a supermarket for fifteen years as a former Safeway store sat empty and that, when the restrictions ended, a Grocery Outlet moved into the space).

39 Emanuel B. Halper, *Supermarket Use and Exclusive Clauses*, 30 HOFSTRA L. REV. 297, 308 (2001) (providing hypothetical example of an exclusive clause).

supermarkets from opening.[40] Such clauses could be beneficial. For example, they may motivate supermarkets to open in a shopping center that would not otherwise have a supermarket.[41] They can also protect the negotiating supermarket from competition if the shopping center is too small to support two similar stores.[42] Supermarkets in the latter case can also act as an "anchor tenant," encouraging the entry of smaller businesses to the shopping center.[43] Similar to how grocery chains use restrictive covenants as an anticompetitive strategy, grocery stores who lease their premises engage in such anticompetitive practices through the use of such clauses. After a supermarket has successfully negotiated an exclusive clause, they will sometimes abandon the location while keeping the lease and enforcing the clause to prevent other grocery stores from opening.[44]

C. Why Food Deserts Represent a Market Failure

Given that the objective of antitrust laws is to protect competition in the market for the benefit of consumers, food deserts appear to be antitrust failures.[45] A perfectly functioning market, governed by principles of supply and demand, should naturally correct for localized shortages where consumers are willing and able to pay for goods. However, the dynamics within food deserts—high prices, low-quality groceries, and corporate

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40 *See id.* at 299.

41 *See* Leslie, *supra* note 13, at 1738–39 n.142 (citing Goodman v. Acme Mkts., Inc., No. CIV. A. 88-6447, 1989 WL 42484, at *6 (E.D. Pa. Apr. 21, 1989), *aff'd*, 893 F.2d 1329 (3d Cir. 1989), and Optivision, Inc. v. Syracuse Shopping Ctr. Assocs., 472 F. Supp. 665, 676 (N.D.N.Y. 1979)).

42 *See id.* at 1739.

43 *See id.* at 1739 n.144 (citing Child World, Inc. v. S. Towne Ctr., Ltd., 634 F. Supp. 1121, 1129 (S.D. Ohio 1986)).

44 *See id.*; Kate Haworth, The Birchwood Food Desert: A Neighborhood's Fight for Food Justice 18 (Oct. 1, 2019) (B.A. thesis, Western Washington University), https://cedar.wwu.edu/wwu_honors/304 [https://perma.cc/C7S9-AX2G] (noting a noncompete clause prevented any grocer from occupying the vacant Albertsons grocery store's space in the Birchwood, Washington, neighborhood for twenty-five years); *Shame on Safeway and Albertsons!*, Food Empowerment Project, https://foodispower.org/shame-on-safeway-and-albertsons/ [https://perma.cc/YV8L-EUJW] (last visited Mar. 30, 2026) (noting Albertsons closed down their space in Park Manor Shopping Center but left in place a noncompete clause that prohibits a new grocer from moving into anywhere in the shopping center for twenty years).

45 *See Guide to Antitrust Laws*, Fed. Trade Comm'n, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws [https://perma.cc/L77R-6A6M] (last visited Mar. 30, 2026).

avoidance—all demonstrate a severe breakdown of market efficiency. As mentioned above,[46] supermarkets build or close down stores based on stereotypes that inaccurately reflect the purchasing power of residents in an area.[47] In 1999, the U.S. Department of Housing and Urban Development ("HUD") found that inner-city neighborhoods in forty-eight major cities had a combined $8.7 billion in unmet retail demand,[48] demonstrating a substantial divergence between resident purchasing power and available retail options. Assuming roughly fourteen percent of this unmet demand could be captured by supermarkets and other grocery stores, these communities represented about $322 million in potential annual grocery sales—enough to support approximately twenty-eight new supermarkets based on the 1999 average of $11.6 million annual sales per store.[49]

By abandoning these neighborhoods with untapped demand because of discriminatory stereotypes, major grocery chains are not only losing out on sales, but also conceding those sales to non-chain grocers, who can charge higher prices for lower-quality produce because large chains are "not there to price discipline them."[50] Low-income shoppers in food deserts are disproportionately likely to rely on these non-chain stores and bear the brunt of these inflated prices.[51] In 1996, there was a $16.62[52] ($34.96 adjusted for inflation[53]) price gap in market-basket goods[54] between chain and non-chain stores.[55] Additionally, in urban areas, people who must walk to the store—often the same low-income individuals—are further constrained by the limited distance they can travel and

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46 *See supra* subpart I.B.

47 Eisenhauer, *supra* note 26.

48 Pothukuchi, *supra* note 20, at 233.

49 *Id.*

50 Leslie, *supra* note 13, at 1741.

51 Chanjin Chung & Samuel L. Myers, Jr., *Do the Poor Pay More for Food? An Analysis of Grocery Store Availability and Food Price Disparities*, 33 J. CONSUMER AFFS. 276, 293 (1999) ("Results indicated that absence of inner-city chain stores were the major explanation for the price disparity.").

52 *Id.* at 290, 296 n.9 (estimates were based on food prices in 1996).

53 To adjust the figure for inflation, I used Consumer Price Index calculator from The Bureau of Labor Statistics, *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/DKJ3-3ATA] (last visited Apr. 29, 2026), comparing January 1996 with September 2025.

54 Chung & Myers, *supra* note 51, at 283 (a market basket of goods refers to "a food basket that meets minimum federal dietary standards").

55 *Id.* at 290.

the amount they can carry on each trip, making proximity to affordable and high-quality food essential.[56] However, the absence of chain grocers leaves them with no choice but to shop at non-chain grocery stores nearby frequently.

A breakdown in antitrust enforcement helps explain the emergence of food deserts as well. In 1936, Congress passed the Robinson-Patman Act,[57] which banned price discrimination by making it illegal for suppliers to offer preferential deals, or for retailers to demand them.[58] The law was enacted in response to A&P's growing market dominance and its ability to pressure suppliers into giving them better deals than smaller retailers.[59] Still, the Act allowed businesses to pass along legitimate savings.[60] For several decades, the Act worked largely as intended. "A 1965 federal study that tracked grocery prices across multiple cities . . . found that large independent grocers were less than 1 percent more expensive than the big chains."[61] However, in the 1980s, the Reagan Administration stopped enforcing the law, arguing that strong antitrust oversight hindered American businesses and dismissing the Act as an "economically illiterate handout to inefficient small businesses."[62]

This shift transformed the supermarket landscape. By the 1990s, major grocery chains began a wave of mergers. Within just four years, Safeway acquired multiple grocery chains,[63] while Fred Meyer absorbed Ralphs, Smith's, and Quality Food

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56 *Id.* at 292.

57 15 U.S.C. § 13.

58 *See Price Discrimination: Robinson-Patman Violations*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations [https://perma.cc/X6PW-2KHB] (last visited Mar. 30, 2026); Stacy Mitchell, *The Great Grocery Squeeze*, THE ATLANTIC (Dec. 1, 2024), https://www.theatlantic.com/ideas/archive/2024/12/food-deserts-robinson-patman/680765/ [https://perma.cc/5NAS-LVLP].

59 Mitchell, *supra* note 58.

60 For example, "[i]f it truly costs less to sell a product by the truckload rather than by the case, for example, then suppliers can adjust their prices accordingly—just so long as every retailer who buys by the truckload gets the same discount." *Id.*

61 *Id.*

62 *Id.*

63 *Safeway: A Look Back*, SUPERMARKET NEWS (Dec. 10, 2001), https://www.supermarketnews.com/grocery-operations/safeway-a-look-back [https://perma.cc/SWS5-Z9E3] (stating that in 1997, Safeway acquired Vons; in 1998, Safeway acquired Dominick's Supermarkets; in 1999, Safeway acquired Randall's Food Markets and Carr-Gottstein Foods Co.; in 2001, Safeway acquired Genuardi's Family Markets, and eleven Abco stores).

Centers all in one year.[64] As these chains grew, suppliers, pressured to offer them deep discounts, recouped their losses by raising prices for smaller, independent retailers who lacked the scale to buy in truckload quantities. As a result, many smaller grocers were forced to close—between 1982 and 2017, "the market share of independent retailers shrank from 53 percent to 22 percent."[65] The surviving large chains had little incentive to serve the communities left behind. In rural areas, many residents must drive long distances to Walmart supercenters in larger towns, and independent grocers cannot compete on price because Walmart's immense purchasing power allows it to demand far better terms from suppliers.[66] The result is widespread food deserts where local grocery chains have disappeared.

D. Limitations of Judicial Interventions

Enacted in 1890, the Sherman Act[67] was a legislative response to the rise of monopoly power that threatened competition across major industries. Under Sections 1 and 2 of the Act, courts apply two principal standards to evaluate whether agreements unreasonably restrain trade or constitute monopolization or attempted monopolization.[68] The first is the *per se* rule, which deems certain categories of conduct, such as horizontal price-fixing agreements among competitors, to be "necessarily illegal," and holds the defendant liable without inquiry into market power or actual competitive effects.[69] The second is the "rule of reason," under which factfinders evaluate the totality of circumstances to determine whether a challenged restraint produces anticompetitive effects that outweigh any procompetitive justifications.[70]

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64 Dana Canedy, *Grocery Giant to be Created in $2 Billion, 3-Chain Merger*, N.Y. TIMES (Nov. 8, 1997), https://www.nytimes.com/1997/11/08/business/grocery-giant-to-be-created-in-2-billion-3-chain-merger.html [https://perma.cc/YR9S-E8HM] (in May 1997, Fred Meyer acquired Smith's Food and Drug Centers Inc.; by December, Fred Meyer announced its intent to acquire Quality Food Centers Inc. and the Ralphs Grocery Company).

65 Mitchell, *supra* note 58.

66 *Id.*

67 15 U.S.C. § 1.

68 *See Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act [https://perma.cc/FC2E-9CGP] (last visited Mar. 30, 2026).

69 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

70 *See id.* at 885 (citing Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

Courts are generally reluctant to apply the *per se* rule because it does not account for circumstantial evidence or market context, and the competitive impact of some ostensibly anticompetitive practices may vary depending on economic conditions and industry structure.[71] As a result, under the modern consumer-welfare framework, the vast majority of Section 1 claims are adjudicated under the rule of reason.[72] Yet even under this more exacting analysis, defendants "virtually always win."[73] Under this standard, courts compare consumer outcomes in a restrained market to those in a hypothetical competitive market, but this inquiry operates against a strong presumption that most business arrangements are procompetitive.[74] So long as defendants can articulate a plausible procompetitive justification for the challenged restraint, liability is rarely imposed.[75]

This deference has intensified in recent years as the Supreme Court has increasingly reclassified conduct formerly treated as *per se* unlawful into the rule-of-reason framework.[76] This shift not only reflects a judicial retreat from robust antitrust enforcement but also risks emboldening firms to engage in anticompetitive conduct with diminished fear of liability.

This general trend is reflected in courts' treatment of restrictive covenants imposed by grocery chains. While case law in the area is sparse, as previously mentioned, in at least twenty-two instances courts have upheld restrictive covenants for defendant grocers.[77] However, this judicial restraint is misguided. Unlike exclusive clauses, under which an "anchor tenant" supermarket chain may attract additional businesses to a shopping center and thus offer a plausible procompetitive justification, restrictive covenants ensure that no grocery

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71 *See id.* at 887 (citing White Motor Co. v. United States, 372 U.S. 253, 263 (1963) and describing it as "refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule"); *Cont'l T. V.*, 433 U.S. at 58–59 (*per se* standard must be based on demonstrable economic effect).

72 *See* Gregory Day, *The Necessity in Antitrust Law*, 78 WASH. & LEE L. REV. 1289, 1309 (2021).

73 *Id.* at 1293.

74 *See id.* at 1310–12 ("The theory is that firms would struggle to innovate, resolve litigation, create efficiencies, or achieve other legitimate goals without excluding some competition." (footnotes omitted)). There is also concern that antitrust overenforcement may deter beneficial competition if firms feared antitrust liability, and the presumption that consumers and firms can navigate around monopolies, so the market can be corrected without antitrust enforcement. *Id.* at 1312.

75 *See id.* at 1311.

76 *See id.* at 1313.

77 *See* Jackson, *supra* note 34, at 421.

stores may operate on the affected property for the duration of the covenant, which may span for decades.[78] Moreover, when a supermarket abandons a location while retaining the lease solely to enforce the restriction, any procompetitive rationale evaporates—their presence no longer incentivizes commercial development and instead functions solely to exclude potential competitors from entering the market.[79]

II
The New Era of Merger Scrutiny: The 2023 Guidelines and *FTC v. Kroger*

While the most direct solution to the anticompetitive harm that arises out of such restrictive covenants is to invalidate them, courts have been hesitant to take this approach. As a result, alternative avenues must be explored to bring the problem of food deserts before the judiciary. One such avenue is strengthened merger enforcement.

Insufficient antitrust enforcement contributes to the persistence of food deserts; conversely, strengthened enforcement can play a meaningful role in alleviating existing food deserts and preventing the formation of new ones. Within this enforcement landscape, the DOJ and the FTC periodically issue Merger Guidelines outlining the analytical framework and enforcement principles that the agencies most frequently apply when evaluating whether a merger violates antitrust laws.[80] Although the Guidelines are not legally binding, courts have long treated them as highly persuasive authority in assessing a merger's potential competitive effects.[81] In 2023,[82] the antitrust

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78 *See* Leslie, *supra* note 13, at 1745.

79 *See id.*

80 *Guide to Antitrust Laws*, supra note 45.

81 *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 716 n.9 (D.C. Cir. 2001); Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 434 n.13 (5th Cir. 2008); St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015); FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 167 n.3 (3d Cir. 2022).

82 Despite speculation that the Trump Administration might substantially revise or rescind the 2023 Guidelines, current FTC and DOJ Antitrust Division leadership has confirmed that the Guidelines will remain in effect as the governing framework for the merger review process. Memorandum from Chairman Andrew N. Ferguson to FTC Staff Regarding Merger Guidelines (Feb. 18, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf [https://perma.cc/ZM7T-H6UB]; Memorandum from Acting Assistant Attorney General Omeed Assefi to DOJ Antitrust Division Staff Regarding Use of the 2023 Merger Guidelines (Feb. 18, 2025), https://www.justice.gov/atr/media/1389861/dl?inline [https://perma.cc/492Y-QYQ6]. This confirmation is

agencies released updated Merger Guidelines intended to "reflect modern market realities, advances in economics and law, and the lived experiences of a diverse array of market participants."[83] While the earlier editions of the Guidelines focus on market power, the 2023 Merger Guidelines adopt a different normative benchmark by focusing on harms to the "competitive process" rather than economic welfare.[84] With this departure, the Guidelines have become a focal point in contemporary antitrust discourse.[85]

The FTC's challenge to the proposed Kroger-Albertsons merger illustrates the judicial application of these principles. On October 14, 2022, Kroger and Albertsons announced their intent to merge through Kroger's acquisition of Albertsons for approximately $24.6 billion, asserting that the transaction would create a grocer with "national coverage" capable of competing with mass retailers such as Walmart, Amazon, and Costco.[86] If completed, Kroger and Albertsons would operate more than 5,000 stores and employ nearly 700,000 employees across forty-eight states.[87] Following a civil investigation, the FTC initiated an administrative proceeding and filed a complaint seeking to enjoin the proposed merger pending the outcome of the proceedings.[88] Relying on the 2023 Merger Guidelines, the court concluded that the merger was presumptively unlawful due to the likelihood of unilateral anticompetitive effects and ultimately

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significant, as it provides courts and merging parties with regulatory clarity and a stable analytical lens through which merger-related competitive harms will be evaluated.

83 Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Release 2023 Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines [https://perma.cc/5LEH-94TG].

84 JAY B. SYKES, THE 2023 MERGER GUIDELINES: ANALYSIS AND ISSUES FOR CONGRESS, CONG. RSCH. SERV. 2 (Mar. 28, 2024), https://www.congress.gov/crs-product/LSB11138 [https://perma.cc/GL4D-YK9F].

85 *See, e.g.*, Alexander Raskovich, *Conflict or Continuity? An Analysis of the 2023 Merger Guidelines*, 31 GEO. MASON L. REV. 1043, 1044–46 (2024); D.W. Carlton, *The 2023 Merger Guidelines: A Critical Assessment*, 65 REV. INDUS. ORG. 129, 129–30 (2024), https://link.springer.com/article/10.1007/s11151-024-09962-0 [https://perma.cc/E4F3-RNUW].

86 *See generally* FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *4 (D. Or. Dec. 10, 2024).

87 Press Release, Fed. Trade Comm'n, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons [https://perma.cc/M8YA-U9YL].

88 *See Kroger*, 2024 WL 5053016, at *5.

granted the plaintiff's motion for a preliminary injunction.[89] The day after the court decision, Albertsons announced that they had terminated the merger agreement with Kroger.[90]

This Part examines how the 2023 Merger Guidelines can assist courts in challenging mergers that permit large grocery chains to further consolidate market share, a trend that has historically exacerbated food deserts by reducing competition and leaving low-income communities without adequate access to grocery options. The recent *FTC v. Kroger* litigation will serve as a case study illustrating how courts may adopt the analytical framework set forth in the 2023 Merger Guidelines when evaluating consolidation in the grocery sector.

A. The Narrowing of the Relevant Market Definition

To block a proposed merger, an antitrust plaintiff must define the relevant market in order to show that the market is concentrated, and the completed merger would have anticompetitive effects.[91] In the context of grocery retailing, a clear and well-defined geographic market is especially important given the localized nature of grocery competition. Yet historically, both the FTC and courts have struggled to define appropriate geographic markets in this industry, often doing so inconsistently and in manners that obscure localized competitive harm.[92] For example, in 2000, when the FTC challenged the Kroger-Winn-Dixie merger, it defined the relevant geographic market narrowly as Fort Worth rather than the entire Dallas-Fort Worth metropolitan area.[93] In contrast, in its challenge to Whole Foods' acquisition of Wild Oats, the FTC defined the market as the area within a three- to six-mile radius—or approximately sixteen minutes of driving time—of competing grocery stores, a definition the district court accepted.[94] Despite the apparent flexibility, courts have generally been reluctant to recognize neighborhoods or sub-city areas as relevant geographic markets, often making assumptions such as that

89 *See id.* at *34, *39.

90 Press Release, Albertsons Cos., Albertsons Terminates Merger Agreement (Dec. 11, 2024), https://www.albertsonscompanies.com/newsroom/press-releases/news-details/2024/Albertsons-Terminates-Merger-Agreement/default.aspx [https://perma.cc/42PV-77UN].

91 *See Kroger*, 2024 WL 5053016, at *6.

92 *See* Leslie, *supra* note 13, at 1749–51.

93 *Id.* at 1749–50.

94 *Id.* at 1750.

consumers readily have access to a car and can travel to farther areas for groceries.[95]

However, approximately 2.3 million households in the continental United States live more than a mile from a supermarket and lack access to a vehicle.[96] When courts define grocery markets too broadly, they risk denying adequate antitrust protection to residents of food deserts. Even if some residents can travel to distant, larger grocery stores, these stores are unable to effectively price discipline smaller stores located within walking distance.[97] As a result, these nearby sellers can continue charging higher prices to consumers without transportation, operating largely outside the competitive influence of distant supermarkets. Broad geographic markets therefore tend to understate concentration and obscure anticompetitive effects where competitive constraints are weakest.

The 2023 Merger Guidelines remedy this by clarifying that:

> A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.[98]

This language represents a shift away from administrability-driven market definitions, such as an entire metropolitan area, and toward an approach grounded in actual consumer behavior, particularly for vulnerable or mobility-constrained populations.

Kroger illustrates how this Guideline can be implemented in practice. In that case, both sides agreed that the distance a customer is willing to travel to a store is a significant factor in

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95 *Id.* at 1749 (citing United States v. Von's Grocery Co., 384 U.S. 270, 277–78; 288–89 (1966) (Stewart, J., dissenting)).

96 Michele Ver Ploeg, *Access to Affordable, Nutritious Food Is Limited in "Food Deserts"*, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (Mar. 1, 2010), https://www.ers.usda.gov/amber-waves/2010/march/access-to-affordable-nutritious-food-is-limited-in-food-deserts [https://perma.cc/W5BD-QJUF].

97 *See* Leslie, *supra* note 13, at 1751.

98 2023 MERGER GUIDELINES § 4.3.D.2. The 2010 Guidelines used similar language in § 4.2. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.2 (2010) [hereinafter 2010 MERGER GUIDELINES] ("The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions.").

defining the relevant geographic market.[99] The FTC expert, Dr. Nicholas Hill, defined the relevant market by first calculating a catchment area for each store, a radius that accounted for seventy-five percent of the store's sales.[100] He then doubled this radius to establish the final geographic market boundary, which included all competing stores within that expanded distance, ensuring all immediate competitors were accounted for.[101] This method resulted in numerous small, localized markets, showing that competition in the grocery industry is highly localized.[102]

Crucially, the district court accepted Dr. Hill's approach. Unlike earlier cases in which courts rejected narrow markets, *Kroger* signals a growing judicial willingness to credit empirically grounded geographic market definitions. By recognizing a narrower geographic market in the antitrust analysis, courts can make merger-induced harms visible where they are most likely to occur and offer greater protection to consumers in food deserts who are otherwise overlooked by broader, metropolitan-level market definitions.

B. The Herfindahl-Hirschman Index (HHI) and the Presumption of Unlawfulness

When assessing whether an industry is competitive, antitrust analysis often examines the level of market concentration.[103] High market concentration suggests that a smaller number of firms account for a larger share of the market, while lower concentration indicates the presence of a greater number of competing firms.[104] Economists and antitrust enforcers commonly measure market concentration using the Herfindahl-Hirschman Index ("HHI").

> The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a

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99 *See* FTC v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *12 (D. Or. Dec. 10, 2024).

100 *Id.*

101 *Id.*

102 *See id.*

103 *See Herfindahl-Hirschman Index*, U.S. DEP'T OF JUST. (Jan. 17, 2024), https://www.justice.gov/atr/herfindahl-hirschman-index/ [https://perma.cc/8XUT-4RTA].

104 *See id.*

> change of more than 100 points is a significant increase. A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly. The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.[105]

The 2023 Merger Guidelines significantly lowered the market concentration thresholds at which horizontal mergers are presumed to harm competition to the point of illegality.[106] In *Kroger*, the defendants argued that these revised thresholds were "unreasonably low" and had not yet been formally adopted by the courts.[107] The district court, however, declined to reject the 2023 Merger Guidelines in favor of the 2010 edition, noting that the updated concentration thresholds trace back to the original HHI standards used in the 1982 Merger Guidelines and observing that other courts had also cited the 2023 Guidelines.[108]

Applying the 2023 framework, Dr. Hill calculated the market concentration by assessing store-level market shares within relevant geographic markets for both supermarkets and large-format stores.[109] For large-format stores, Dr. Hill found that post-merger concentration levels were presumptively unlawful in 1,785 markets.[110] In the supermarket category, he concluded that 1,922 markets would exhibit presumptively anticompetitive concentrations.[111] By comparison, under the 2010 Merger Guidelines, only 911 large-format store markets and 1,574 supermarket markets would have been deemed presumptively unlawful.[112]

Relying on these calculations and the revised thresholds, the court found that the proposed merger would result in undue market concentration across numerous geographic

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105 2023 MERGER GUIDELINES § 2.1 (footnotes omitted).

106 In comparison, the previous Merger Guidelines classified highly concentrated markets as those that have an HHI over 2,500. 2010 MERGER GUIDELINES § 5.3.

107 *See Kroger*, 2024 WL 5053016, at *15.

108 *See id.* at *16.

109 *See id.* at *15.

110 *Id.*

111 *Id.*

112 *Id.*

markets.[113] This application of the 2023 Merger Guidelines enabled the FTC to establish its *prima facie* case, thereby shifting the burden to the defendants to demonstrate that the merger would not substantially lessen competition.[114]

A lowered HHI threshold is especially appropriate when evaluating grocery consolidation given that grocery competition is highly localized and consumers often have limited alternatives within a reasonable distance.[115] Even modest increases in concentration can therefore meaningfully diminish competitive pressure, reduce quality, and lead to store closures in vulnerable communities. By capturing anticompetitive effects in markets that would have escaped scrutiny under the 2010 thresholds, the new Guidelines reflect the economic realities of grocery retailing. In *Kroger*, the lowered thresholds allowed the court to recognize additional competitive harm in hundreds of markets, helping to build the case on how this merger would pose substantial harm to consumers.

C. Explicit Consideration of Labor Markets

The absence of supermarkets in many neighborhoods does not merely restrict access to healthy and affordable food; it also deprives communities of the broader economic benefits grocery stores typically generate. Grocery stores create substantial job opportunities and generate local multiplier effects, often leading to additional business development and entrepreneurship.[116] When a community loses, or never gains, such an anchor business, the harm is not only nutritional but also economic. Yet historically, antitrust courts have largely ignored labor markets as a locus of competitive harm, treating the employment

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113 *Id.* at *17.

114 *See id.*

115 In 2024, consumers reported making six grocery store trips or orders per month. Emily Rodgers, *Grocery Store Statistics: Where, When, & How Much People Grocery Shop*, DRIVE RSCH. (Apr. 25, 2024), https://www.driveresearch.com/market-research-company-blog/grocery-store-statistics-where-when-how-much-people-grocery-shop/ [https://perma.cc/FL53-PNC9]. Time, transportation access, and travel costs constrain how far shoppers are willing or able to go. *See* Ver Ploeg, *supra* note 96. In 2015, The median distance to the nearest food store for the overall U.S. population was 0.9 miles, with forty percent of the population living more than one mile away from a food store. Alana Rhone & Michele Ver Ploeg, *U.S. Shoppers' Access to Multiple Food Stores Varies by Region*, U.S. DEP'T OF AGRIC., ECON. RSCH. SERV. (June 3, 2019), https://www.ers.usda.gov/amber-waves/2019/june/u-s-shoppers-access-to-multiple-food-stores-varies-by-region [https://perma.cc/XR7R-AAQP].

116 *See* Pothukuchi, *supra* note 20, at 232.

market as peripheral to the "real" work of antitrust.[117] Only in recent years has labor gained traction in merger analysis.[118] One reason for this is that labor appears to be less obviously related to consumer-welfare, the dominant analytic frame for late-twentieth-century antitrust. Under the consumer-welfare paradigm, lower labor costs are often viewed as a net positive, theoretically enabling firms to pass cost savings to consumers through cheaper prices.[119] This framing obscures the monopsony problem—the possibility that firms may suppress wages or worsen working conditions when they face too little competition for workers.[120] The DOJ and FTC brought this issue to the foreground by rejecting the proposition that downstream benefits in product markets, such as lower consumer prices, can justify mergers that harm competition in labor markets,[121] and expressly incorporating labor market analysis into merger review in the 2023 Merger Guidelines.

> When assessing the degree to which the merging firms compete for labor, evidence that a merger may have any one or more of these effects can demonstrate that substantial competition exists between the merging firms. . . . To assess this dominance in labor markets . . . the Agencies often *examine the merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.*[122]

This detailed labor market framework marks a significant shift. It signals the agencies' intentions to test mergers more aggressively and to expand antitrust beyond the narrow consumer-price paradigm toward a more holistic vision of "market competition." Notably, the *Kroger* court adopted this broader approach. The defendants argued that because the plain text of the Clayton Act[123] states that "[t]he labor of a human being is not a

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117 *See* Day, *supra* note 72, at 1304.

118 *See id.*

119 *See id.*

120 *See* Paulina Restrepo-Echavarría, *Firms' Wage-Setting Power: A New Take on Monopsony in the Labor Market*, Fed. Rsrv. Bank of St. Louis (July 17, 2025), https://www.stlouisfed.org/on-the-economy/2025/jul/firms-wage-setting-power-monopsony-labor-market [https://perma.cc/XWT8-X2KC].

121 Sykes, *supra* note 84.

122 2023 Merger Guidelines § 2.10 (emphasis added).

123 The Clayton Act addresses specific practices such as mergers and interlocking directorates, prohibits mergers and acquisitions that lessen competition or tend to create monopoly, bans certain discriminatory prices, services, and

commodity or article of commerce," the Act should not apply to labor markets.[124] However, the court rejected this argument, noting that the quoted provision went on to state that antitrust law should not be used against labor unions and that other courts have not construed the provision to prohibit the consideration of labor markets in horizontal mergers.[125] Consistent with that interpretation, the *Kroger* court held that labor market effects were cognizable competitive harms worthy of antitrust analysis.[126]

The plaintiffs relied on Dr. Hill's calculation showing that the merger would produce presumptively unlawful concentration in several union grocery labor markets,[127] meaning there would be fewer employers competing for workers.[128] In Colorado, Kroger and Albertsons are the only unionized grocery employers in the relevant collective bargaining areas, making the post-merger firm a monopoly in Colorado.[129] In Southern California, because multiple union locals negotiate a single collective bargaining agreement, the post-merger firm would control approximately seventy-five percent of the labor market.[130] In Oregon and Washington, the merged firm would hold between sixty and seventy-five percent of the union labor market, depending on the locality.[131] Concentration at those levels would give the combined firm outsized leverage in bargaining.[132] Union strikes, for example, would be far less effective where workers have no alternative union grocery employer and customers have no comparable substitute grocery store.[133]

The defendants countered that reduced head-to-head competition would not lead to anticompetitive effects because both

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allowances, and requires companies planning larger mergers or acquisitions to notify the government in advance. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/L2SD-JEUJ] (last visited Mar. 30, 2026).

124 FTC v. Kroger Co., 3:24-CV-00347-AN, 2024 WL 5053016, at *31–32 (D. Or. Dec. 10, 2024) (quoting 15 U.S.C. § 17).

125 *See id.*

126 *See id.*

127 *See id.* at *34 ("[T]he Court tentatively finds that the proposed union grocery labor market, including the CBA areas geographic market, is a plausible, relevant market for antitrust purposes. It represents a submarket of the larger pool of retail labor that has industry recognition and offers distinct compensation and benefits based on the CBA negotiated in each store, group of stores, or region.").

128 *See id.*

129 *See id.* at *35.

130 *Id.*

131 *Id.*

132 *See id.* at *36.

133 *See id.*

employers and unions have strong incentives to avoid strikes.[134] They argued that the costs of bargaining failures are mutual and therefore do not inherently disadvantage workers.[135] While the court found aspects of the plaintiff's theory plausible, it ultimately concluded that both sides had offered mostly anecdotal testimony with no economic modeling demonstrating how employee compensation would change as bargaining leverage shifted.[136] Without that evidentiary foundation, the court held that the plaintiff failed to establish a *prima facie* case that the merger would substantially lessen competition for union grocery workers.[137]

Nevertheless, the decision is significant. Even while ruling against the plaintiffs, the court performed a full labor market antitrust analysis relying on the 2023 Merger Guidelines, which explicitly recognize labor as a relevant market and provide a clear framework for defining the labor market and identifying cognizable labor harms. This signals a doctrinal acceptance of labor harms as a legitimate merger law consideration. The court also provided a roadmap for future litigants by clarifying the type of economic evidence necessary to substantiate labor-market claims,[138] marking an important institutional shift: courts are increasingly willing to treat workers, not just consumers, as market participants entitled to the protections of antitrust law.

D. The Efficiencies Defense: A Higher Bar

A common defense that corporations raise when mergers are challenged is that the transaction will achieve greater efficiencies. This argument is strategic, as public opinion tends to tolerate mergers—despite their reduction in the number of competitors in a given market—because of a widespread belief that mergers lead to cost savings or improvements in products, services, or distribution.[139] Traditionally, an efficiencies defense rarely succeeds in justifying a merger once the

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134 *See id.* at *37.

135 *See id.*

136 *See id.*

137 *See id.* at *38.

138 *See id.* at *38 ("There is no economic modeling of how wages, benefits, and other compensation might change as a result of changes in bargaining power, either in absolute terms or relative to non-union grocery wages. Even if those calculations were available, plaintiffs have not explained what they believe would be a 'substantial' reduction in competition.").

139 *See* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017).

government has made out a *prima facie* case of illegality.[140] The 2023 Merger Guidelines narrow the scope of this defense even further. While the language of the 2023 Merger Guidelines did not shift much from the 2010 Merger Guidelines regarding efficiencies, the agencies' more aggressive approach to merger enforcement significantly constrains the circumstances under which efficiencies may rebut a presumption of anticompetitive harm.[141]

Under common law, the critical question raised by an efficiencies defense is "whether the projected savings from the mergers are enough to overcome the evidence that tends to show that possibly greater benefits can be achieved by the public through existing, continued competition."[142] The defendants in *Kroger* projected that the majority of the projected efficiencies post-merger would relate to sourcing, supply chain, manufacturing, and merchandising costs.[143] Additionally, the post-merger firm was projected to make a $1 billion "price investment" that would take the form of price reduction on key grocery items in Albertsons stores over four years—the stated hope was that this investment would bring down Albertsons' prices to be in line with Kroger's lower price scheme.[144] Ultimately, the court held that defendants could not rebut the presumption of anticompetitive effects because the efficiencies were not merger-specific nor verifiable.[145]

The analytical framework of the 2023 Merger Guidelines further diminishes the likelihood that efficiencies defenses will succeed. Narrower market definitions make it easier to demonstrate high concentration and competitive harm, leaving defendants with a substantially heavier burden to show efficiencies sufficient to outweigh the loss of localized competition that is

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140 *See id.* at 705.

141 *Compare* 2023 MERGER GUIDELINES § 3.3 ("To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly."), *with* 2010 MERGER GUIDELINES § 10 ("Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions.").

142 *Kroger*, 2024 WL 5053016, at *21 (quoting FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 63 (D.D.C. 1998)).

143 *Id.* at *22.

144 *Id.* at *24.

145 *See id.*

critical for food access. Second, by lowering the HHI thresholds, it becomes more difficult for firms to use the efficiencies defense, as it becomes easier to establish the presumption of illegality in the merger. Third, because efficiencies are often achieved through labor cost reductions, including the labor market as a consideration frames efficiencies as evidence of harm to the competitive process rather than as consumer benefits.

E. Looking Forward: Modern Merger Enforcement

While strengthened merger enforcement does not directly solve the anticompetitive harm that restrictive covenants and leases create in grocery retailing, by preventing excessive consolidation in already concentrated local grocery markets, modern merger enforcement limits the market power that makes restrictive tactics effective as exclusionary devices. The 2023 Merger Guidelines' emphasis on narrow market definitions and structural competitive effects allows courts and agencies to recognize how lease restrictions foreclose entry by other competitors by locking up scarce, grocery-ready real estate, particularly in urban areas where alternative sites are limited. Additionally, the Guidelines reduce incentives for grocery chains to rationalize store networks in ways that exacerbate food deserts by rejecting speculative efficiencies defenses and incorporating more local labor market effects into merger analysis.

It is also possible for enforcement agencies to expand the scope of scrutiny to explicitly target and require the divestiture or permanent waiver of exclusionary real estate agreements during the review phase. This approach allows regulators to condition merger approval on the elimination of these barriers to entry, thereby facilitating competition and ensuring a vital retail location for new entrants to the grocery retailing industry.

A more robust and expansive merger review process shifts enforcement from a reactive one to one of proactive market structuring, and in turn, focuses on removing structural impediments such as the anticompetitive tactics that grocery chains engage in. Thus, a reinvigorated merger enforcement regime offers courts and agencies a principled means to confront food deserts at their source, ensuring that competition law responds to the lived realities of *all* communities.

Conclusion

Food deserts are not the product of consumer choice or isolated market failure, but the foreseeable outcome of concentrated market power, exclusionary real estate practices, and regulatory gaps that allow private actors to foreclose access to essential goods. This Note has argued that through targeted regulation of restrictive covenants and strengthened merger enforcement, there are viable means to address the issue of food deserts and restore access to essential food markets.