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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202</td><td rowspan="2">

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<tr><td>STATE OF COLORADO, ex rel. PHILIP J. WEISER, Attorney General,

Plaintiff,

v.

THE KROGER CO.; ALBERTSONS COMPANIES, INC.; and C&S WHOLESALE GROCERS, LLC,

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<tr><td colspan="2" align="center">PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS COUNT I AS MOOT</td></tr>
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Plaintiff, the State of Colorado, by and through its Attorney General, Philip J. Weiser ("Plaintiff" or "Attorney General"), respectfully submits this Response to Defendants' Motion to Dismiss Count I as Moot:

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INTRODUCTION

There were many points of disagreement in this case, but until Defendants' present motion, nobody disagreed that this case presented issues of great public importance. Indeed, few antitrust cases—few cases of any kind—receive the kind of public attention that this case did. And for good reason, as this case presented the potential combination of two of the three largest supermarket operators in Colorado, representing over half of all supermarket sales in the state. Consumers everywhere worried about how this merger would impact their grocery bills and whether their local stores would stay open.

In addition to having a profound impact on the lives of virtually every Colorado resident, this case presented deeply important constitutional questions about the scope of the Attorney General's authority under the Colorado Antitrust Act. Defendants put the Attorney General's authority to bring this case directly at issue from the start of the litigation and repeatedly throughout, including in their post-trial briefing. This case also presented contested questions of statutory interpretation, including the proper approach to market definition, burdens of proof, how to evaluate a divestiture, and the permissible scope of remedies for an unlawful merger. These are all questions of first impression under the Colorado Antitrust Act and they are the types of questions that Colorado courts have repeatedly held to be of great public importance. This Court's decision on those issues will streamline future litigation, assist the Attorney General's evaluation of future mergers, and provide critical guidance to Colorado businesses seeking to merge in the future. Because the case presents issues of great public importance, the Court can and should rule on the Attorney General's First Cause of Action ("Count I").[1]

[1] There is no dispute that the Second Cause of Action is not moot.

Defendants' apparent voluntary cessation of the merger is not grounds for dismissal on mootness either. First, these important issues are capable of repetition yet evading review. Indeed, it is not unusual for parties to abandon a merger before a final decision is reached. As a result, the same questions raised here, if not resolved now, can recur in future merger challenges but evade review. This case presents a perfect opportunity to resolve these issues because there has been a full trial on the merits and completed post-trial briefing, so no additional litigation is required for the Court to reach a decision based on a concrete—not hypothetical—record.

Second, it is unclear whether the merger agreement has, in fact, been validly terminated. The propriety of each party's claimed termination is currently being litigated, as Kroger and Albertsons disagree on whether each other's purported termination was valid. And finally, Defendants bear the heavy and stringent burden to prove that it is absolutely clear that these issues will not recur. Defendants have utterly failed to meet that burden, providing this Court with nothing but attorney argument in support of their claim that the parties do not intend to revive their merger agreement or otherwise merge in the future. That is insufficient to render the merger claim moot.

Accordingly, despite recent events, after a more than three-week long trial and completion of extensive post-trial briefing, the Court is on firm footing to issue a ruling.

BACKGROUND

I. The Oregon and Washington Orders Grant Relief Against Defendants.

On December 10, 2024, the United States District Court for the District of Oregon issued an Opinion and Order granting the FTC's motion for a preliminary injunction. *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 WL 3400098 (D. Or. Dec. 10, 2024) (the "Oregon Order"). The

Oregon Order preliminarily enjoined the Proposed Merger pending a full trial on the merits in the FTC's administrative tribunal, sometimes referred to as "Part 3."

Later that same day, the State of Washington King County Superior Court ruled in favor of the State of Washington. *Washington v. The Kroger Co.*, No. 24-2-00977-9 SEA (Wash. Super. Ct. Dec. 10, 2024) (the "Washington Order"). The Washington Order granted a permanent injunction blocking the Proposed Merger but does "not bar Defendants from negotiating a merger without anticompetitive impacts in Washington." Washington Order at 120.

Both rulings provide highly persuasive support for the Attorney General's claim. For example:

- Both courts found that supermarkets (including supercenters) comprise the relevant product market through which to analyze the Proposed Merger. Oregon Order at 20; Washington Order at 2.
- The Washington court, where Dr. Dua also testified, determined that city areas comprise the relevant geographic markets through which to analyze the Proposed Merger. Washington Order at 25-29.
- Both courts rejected Dr. Israel's analysis, with the Washington court concluding that his modified EGK model was "results-oriented" and led to absurd outcomes. Oregon Order at 26-27, 30, 36; Washington Order at 29-37.
- Both courts held that it is Defendants' burden on rebuttal to show that their divestiture would maintain competition, and found that the divestiture in fact would not maintain competition. Oregon Order at 44; Washington Order at 111.
- Both courts rejected Defendants' efficiency arguments as woefully inadequate. Oregon Order at 39-44; Washington Order at 116-17.

II. Albertsons Sues Kroger and the Parties Purport to Terminate the Merger Agreement.

The day after the Oregon and Washington rulings, Albertsons announced that it was terminating the Merger Agreement and sued Kroger in Delaware Chancery Court for breach of the Merger Agreement. Defs. Mot.[2] Exs. 3 (Albertsons Dec. 11, 2024, Form 8-K), 5 (Albertsons Press

[2] Citations to "Defs. Mot." or "Motion" refer to Defendants' Motion to Dismiss Count I as Moot, filed on January 8, 2025.

Release: "Albertsons Files Lawsuit Against Kroger for Breach of Merger Agreement"). In a securities filing, Albertsons explained that it was terminating the Merger Agreement under section 8.1(e) (more on that below), and in a concurrent press release, the Albertsons General Counsel stated that "Kroger willfully breached the Merger Agreement in several key ways, including by repeatedly refusing to divest assets necessary for antitrust approval, ignoring regulators' feedback, [and] rejecting stronger divestiture buyers." Defs. Mot. Exs. 3, 5.

Later that day, Kroger announced that Albertsons' purported termination of the Merger Agreement was ineffective, that Kroger instead was terminating the Merger Agreement, and accused Albertsons of breach. Defs. Mot. Ex. 4 (Kroger Dec. 11, 2024, Form 8-K). Kroger remarked that Albertsons committed "repeated intentional material breaches" that Kroger "will prove in court." Ex. 1 (Kroger Press Release: "Kroger Statement Responding to Albertsons' Baseless Lawsuit").[3]

Albertsons' Verified Complaint against Kroger (the "ACI Complaint")[4] is rife with shocking allegations that directly contradict the arguments that all three Defendants made in Court. After fiercely defending the divestiture package, Albertsons now says that Kroger proposed a "plainly indefensible divestiture package" from the start and then refused to modify the package "in response to regulators' predictable and readily addressable feedback." ACI Complaint ¶ 4. Albertsons portrays Kroger as willfully tanking the merger by bumbling through regulatory review of the merger, deliberately selecting a weak divestiture buyer despite interest from much stronger suitors, refusing to sell necessary assets to C&S that could have strengthened the divestiture

[3] Unless otherwise noted, all exhibits are to the Declaration of Arthur Biller, submitted in support of this Response Brief.
[4] The ACI Complaint is submitted as Exhibit 2 to the Biller Declaration.

package, and repeatedly rejecting proposals from Albertsons and C&S on how to put together a stronger package. For example, Albertsons alleges that Kroger turned away divestiture buyers with long track records of success in retail grocery and instead selected C&S. ACI Complaint ¶¶ 5, 146 ("Kroger artificially narrowed the field of potential buyers by insisting on a single buyer for all divested assets.").

According to Albertsons, the selection of C&S was "highly risky" because C&S lacks a large-scale retail business and had previously bought and sold stores, which predictably caused concern that C&S would do so again here. ACI Complaint ¶ 31. Indeed, Albertsons was surprised to learn that C&S has repeatedly stated that its retail grocery operations only exist to support its wholesale business. ACI Complaint ¶¶ 151, 155. In other words, C&S is a grocery distributor and a retail liquidator.

To have any chance of winning approval, Kroger would have had to transfer critical non-store assets, such as lucrative private label brands like Signature and O Organics. ACI Complaint ¶¶ 6(b), 13, 152, 153. Meaning, C&S lacks a retail backbone, and the divestiture package failed to transfer one.

Because of all these flaws, Albertsons believed that the divestiture package would fail in court, and pleaded with Kroger to make changes, even as late as September and October 2024, after the Oregon hearing concluded and in the middle of trial here. ACI Complaint ¶¶ 230, 283.

C&S also disagreed with the contents of the divestiture package and made proposals that Kroger rejected. Those proposals—and their underlying rationale—appear to have been shielded from production by the parties' assertions of common interest privilege, despite the parties' adverse negotiating posture. This includes a term sheet from C&S to Kroger on March 1, 2024.

ACI Complaint ¶¶ 214, 261.

Albertsons also criticizes the economic modeling Kroger used to identify divestiture stores and that Dr. Israel applied to testify at trial, explaining that it "diverged from what the FTC had done for prior mergers and what the FTC had instructed for Kroger to do to calculate diversion ratios."[5] ACI Complaint ¶ 199.

The following day, December 12, 2024, Kroger purported to terminate the divestiture agreement with C&S. Kroger and Albertsons then withdrew their HSR filings effective December 12, 2024. Defs. Mot. Exs. 6-7.

III. Kroger and Albertsons Disagree on Their Termination Rights.

Kroger and Albertsons each claim to have unilaterally terminated the Merger Agreement. However, from their public statements and the termination provisions of the agreement, it appears that the Merger Agreement may not have actually been terminated and may still be operative. At the very least, the validity of the termination will be litigated in the Delaware action.

Albertsons claims to have terminated the Merger Agreement on December 10, 2024, under Section 8.1(e) of the agreement, which allows either party to terminate if the outside date has passed and a court order enjoining the merger has been granted. Defs. Mot. Ex. 3. However, termination under Section 8.1(e) is only available if the terminating party itself did not materially breach the agreement. Trial Ex. 508.088 (Merger Agreement). According to Kroger, Albertsons's December 10, 2024, termination "is not an effective termination" due to "repeated intentional

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[5] This contradicts Kroger counsel's false assertions at trial that the government demanded that Dr. Israel use the EGK model. *See* TR 10/18/24 AM, 4477:1-4503:15. Albertsons also admits that, contrary to Dr. Israel's testimony and Kroger's arguments at trial, there is no GUPPI "safe harbor." ACI Complaint ¶ 236.

material breaches" by Albertsons, which Kroger "will prove in court" in the Delaware action. Defs. Mot. Ex. 4; Ex. 1.

The validity of Albertsons's termination under Section 8.1(e) is important because that would entitle Albertsons to receive the $600 million "break-up fee" from Kroger. As Albertsons disclosed in its securities filings, Kroger is claiming that Albertsons's "termination notice was not effective and that Kroger had no obligation to pay the $600 million termination fee." Ex. 3 at 6 (Albertsons Jan. 8, 2025, Form 8-K). Termination under any of the other available provisions—such as mutual termination under Section 8.1(a)—would not provide for the $600 million payment to Albertsons.

Because neither Kroger nor Albertsons accepts the validity of the other party's termination, and because they have not mutually agreed to terminate the agreement, the Merger Agreement may still be operative. As discussed below, a viable way for Kroger and Albertsons to resolve their litigation in Delaware would be to move forward again with the Merger Agreement, for example with a modified divestiture plan.

LEGAL STANDARD[6]

A claim is moot only if a ruling would have no practical legal effect. *DePriest v. People*, 2021 CO 40, ¶ 8. It is a question of the Court's subject matter jurisdiction. *See Diehl v. Weiser*,

[6] Defendants state they conferred with the Attorney General "regarding the grounds for and relief requested in this motion." The parties held a brief phone call before the status conference on December 13, 2024. In subsequent emails about a briefing schedule, Defendants informed the Attorney General that they would be filing an information brief, but not a motion to dismiss under C.R.C.P. 12(b)(1), despite the Attorney General's position that such a motion would be the appropriate procedure. Yet Defendants then filed their brief as a motion to dismiss. In the interest of reaching the merits of the mootness issue, the Attorney General does not ask the Court to deny the motion based on a failure to confer, but Defendants' conduct at best fails to comply with the spirit of the conferral requirement.

2019 CO 70, ¶ 9.

A fundamental characteristic of our judicial system is that "federal courts are courts of limited jurisdiction and that the state courts are courts of general jurisdiction. Article III [of the United States Constitution] does not constrain the state courts. Many state courts thus not only have authority to relax their rules on mootness, but they also permit advisory opinions and indeed some State constitutions explicitly provide for them." *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 716 (6th Cir. 2011). As a result, in Colorado Courts, "parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *see also Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003) (collecting cases reflecting broader standing under Colorado law than under federal law). It is black letter law that Colorado courts may exercise their jurisdiction to decide an issue that otherwise would be moot if certain conditions are met. *Nakauchi v. Cowart*, 2022 COA 77, ¶ 25; *Educ. reEnvisioned BOCES v. Colorado Springs Sch. Dist. 11*, 2024 CO 29, ¶ 27. Two of these conditions apply here: public importance and voluntary cessation. The issue of mootness is a legal question that would be reviewed de novo on appeal. *See Nakauchi,* ¶ 34 (quoting *Colo. Mining Ass'n v. Urbina*, 2013 COA 155, ¶ 23).

ARGUMENT

I. The Merger Claim Presents Issues of Great Public Importance that Must Be Decided.

This Court has authority to issue a judgment on the Attorney General's first claim. An exception to the mootness doctrine exists for issues of great public importance. *See Educ. reEnvisioned BOCES*, ¶ 27. Mootness exceptions permit "a court . . . to settle the controversy so as to establish a precedent for future action by trial courts." *Rocky Mountain Ass'n of Credit Mgmt.*

v. Dist. Ct. of City & Cnty. of Denver, in Second Jud. Dist., 565 P.2d 1345, 1346 (Colo. 1977).

Our courts have not adopted a precise definition of "great public importance." But issues that courts have deemed of "great public importance" include those that affect large numbers of people or the public at large, those that implicate a government agency's authority, significant questions of statutory interpretation, and constitutional questions. "Great public importance"— contrary to Defendants' argument— is not exclusively "reserved for cases in which the constitutional rights of the parties or others would be in jeopardy if no ruling is rendered." Defs. Mot. at 14. Colorado courts phrase this mootness exception in the alternative: "A court may hear an otherwise moot case if . . . the case involves an issue of great public importance *or* a recurring constitutional violation." *Educ. reEnvisioned BOCES*, ¶ 27 (emphasis added).

For instance, the Supreme Court has applied the "great public importance" exception to consider a statutory issue relating to taxpayer burdens of proof because it could impact "every taxpayer and every taxpaying authority in the state." *Larimer Cnty. Bd. of Equalization v. 1303 Frontage Holdings LLC*, 2023 CO 28, ¶ 67. In *Education reEnvisioned BOCES*, the Colorado Supreme Court reviewed "as a matter of great public importance" whether a board of cooperative education services can locate a school extraterritorially without a nonmember school district's consent under the Boards of Cooperative Services Act of 1965. *Education reEnvisioned BOCES,* ¶ 29; *see also Feigin v. Colorado Nat. Bank, N.A.*, 897 P.2d 814, 817 (Colo. 1995) (a court's authority to direct the Colorado Securities Commissioner to pay a bank for its costs of compliance with a subpoena is an issue of "considerable public significance"); *Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637, 640 (Colo. 1987) (resolution of jurisdictional dispute in water proceedings "should be resolved to assist orderly judicial procedures and is of public importance statewide");

People ex rel. Morgan Cnty. Dep't of Hum. Servs. ex rel. Yeager, 93 P.3d 589, 592 (Colo. App. 2004) (determining as a matter of "great public importance" whether "a county department of human services . . has the authority to seek a [do not resuscitate] order" under a particular statute and whether another statute limits that authority); *Van De Vegt v. Board of Com'rs of Larimer Cnty.*, 55 P.2d 703, 705, 710 (Colo. 1936) (questions about agency's discretion in issuing liquor licenses was a problem "of prime public concern and a continuing one"). Defendants thus vastly misrepresent the law in claiming the public importance exception is limited to constitutional issues.

Defendants are also wrong that this mootness exception applies only to appellate courts. *See* Defs. Mot. at 14 n.4. Mootness can occur at any stage of litigation, and no Colorado case has held that the public interest exception to mootness is limited to appellate courts. As the Colorado Supreme Court recently described: "*A court* may hear an otherwise moot case" if the exception applies. *Educ. reEnvisioned BOCES*, ¶ 27 (emphasis added).

Kroger and Albertsons are two of the top three grocery operators in the state of Colorado. Together these two firms account for over half of all supermarket sales in the state of Colorado. The issues in this case are of great public importance because they affect large numbers of people and the community at large and are crucial to the food supply of most Coloradans.

Moreover, resolution of the issues here will inform all companies contemplating business combinations in Colorado going forward. The Colorado Antitrust Act is applicable to every sector of the economy and to businesses large and small, local and international. The Colorado Antitrust Act allows for both private claims and government enforcement actions. Questions that will shape future antitrust enforcement efforts and guide parties as they contemplate mergers are of significant public importance, and this case involves many such questions. Defendants' tactics with respect

to this merger led to a trial that lasted over three weeks, a complete factual record, and full post-trial briefing. This Court's ruling will not be an advisory opinion, because it is based on a full and complete record. There are no contingencies, and judicial economy and the public interest favors issuing a ruling.

A. Statutory interpretation issues of first impression under the Antitrust Act are of great public importance.

A merger has not yet been tested under the Colorado Antitrust Act. This case therefore raises questions of first impression under the statute. Statutory interpretation questions of first impression are of great public importance. *See In re Marriage of Wiggins*, 2012 CO 44, ¶¶ 14, 17n.4 (the need to provide "a clear directive" on questions "never before considered" cuts against mootness); *People ex rel. Morgan Cnty.*, 93 P.3d at 592 (Colo. App. 2004) (novel questions of statutory interpretation and application are of great public importance). There were several such questions here, including the proper approach to market definition, questions about divestiture analysis, and the available scope of remedies under the Colorado Antitrust Act.

As to market definition, Defendants argued for a purely econometric approach based on Dr. Israel's modified "EGK" model. This was a stark departure from traditional antitrust analysis. *See* Oregon Order at 26-27 (noting Dr. Israel's departure from traditional antitrust analysis); Washington Order at 29-32 ("Neither the EGK model—nor Dr. Israel's modified version of it—has ever been used in antitrust analysis before" and is "simply not helpful to the Court"). The Attorney General, on the other hand, relied on both the *Brown Shoe* factors and expert economic evidence to define the relevant markets, which included a product market and geographic market component, as has always been done and is further supported by the Oregon and Washington Orders. *Compare* Plf. PCOL ¶¶ 940-57, 983-84 *with* Defs. PCOL ¶¶ 332-33, 364. Nevertheless,

the question before this Court now is which approach to adopt pursuant to the Colorado Antitrust Act. The Court's decision on the proper standard to analyze a relevant antitrust market will impact *all* future cases involving market definition under the Colorado Antitrust Act.

There are also critical questions in this case about divestiture analysis. In particular, (i) who bears the burden on divestiture and to what extent; (ii) how should courts handle post-complaint divestiture proposals and attempts to surprise the government with changes to a divestiture at trial; and (iii) what factors should a court consider in evaluating a divestiture. Again, the Attorney General advocated for an approach that is well-rooted in traditional antitrust analysis, while Defendants had different ideas. *Compare* Plf. PCOL ¶¶ 925-29 *with* Defs. PCOL ¶¶ 368-78. But the question of first impression is how the Colorado Antitrust Act will govern these issues.

The proper scope of a remedy to an unlawful merger under the Colorado Antitrust Act is also at issue. *Compare* Plf. PCOL ¶ 1100 *with* Defs. PCOL ¶ 465. Notably, Defendants argue that Colorado state law differs from federal law with respect to whether proving harm in any relevant market suffices to enjoin a merger. Defs. PCOL ¶ 463 ("Even if this were an accurate statement of *federal* law, State law is *narrower* than federal law, and the "just one market" theory does not apply when a *state* seeks to enjoin a national merger under *state* law."). Again, the Attorney General cited to ample federal precedent, and the Court must decide on what the Colorado Antitrust Act demands.

None of these issues are merely academic or esoteric legal questions. These are substantive issues that can be outcome-determinative in merger cases, and therefore can have a profound impact on the economy of our entire state. These issues especially hit home for Colorado residents in this case, but industry participants that consider mergers in the future will also look to this case

for guidance on the scope of the Colorado Antitrust Act.

Defendants counter that the public importance exception is limited to constitutional questions. Defs. Mot. at 14. That is plainly wrong, as the public importance exception has been applied to all sorts of non-constitutional issues, including questions about burdens of proof and the scope of enforcement authority which, as explained above, are at issue here. *See* pp. 9-10*, supra.* The statutory interpretation issues here impact the Attorney General's authority to protect consumers and ensure competition in our state's economy, and unquestionably qualify as matters of great public importance.

Defendants' argument that these issues are "highly fact-specific" likewise fail. This case involves a detailed body of facts, but the questions of public importance are foundational legal questions, the resolution of which will impact most, if not all, future antitrust cases in Colorado. The sole case cited by Defendants to support their claim provides a useful contrast. Both the claims and requested remedies in *W-470 Concerned Citizens v. W-470 Highway Auth.*, turned entirely on whether the specific language used in a set of election brochures was "slanted." 809 P.2d 1041, 1042-44 (Colo. App. 1990). A ruling on that controversy would have therefore carried "no generalized weight as to nor affect future controversies." *Id.* at 1044. That is not the case here; of course this case, and every case, has unique facts, but there are broad legal issues here that are of great public importance and will impact future cases, and are worthy of being resolved.

B. Defendants' constitutionality arguments must be resolved to establish the scope of enforcement authority under the Antitrust Act.

This case also presents constitutional issues of public importance. Defendants claim the Attorney General's ability to bring this case and seek an injunction is unconstitutional on numerous grounds. In their Motion, Defendants try to walk away from their constitutional defenses, but their

post-trial briefing tells a different story. In that briefing Defendants contend that "the Constitution does not permit a single state to block a national merger negotiated and executed outside of its borders" and ask the Court to find that "[e]ven if *some* injunctive relief were proper, the injunction the State seeks would be overbroad and unconstitutional." Defs. PCOL p. 9; ¶¶ 455. They assert that these are questions "that [ultimately] must be determined." *Id.*

Defendants argued that an injunction here would violate the Commerce Clause and Full Faith and Credit Clause of the U.S. Constitution, and principles of comity and federalism. Defs. PCOL ¶¶ 458-462. These theories purport to severely limit the Colorado Antitrust Act as a tool for protecting competition in Colorado and are therefore of great public importance.

Defendants' Commerce Clause argument assumes that enjoining a single interstate transaction between two companies constitutes a burden to interstate commerce. Defs. PCOL ¶ 459 ("the burdens of blocking the merger on out-of-state commerce would be severe"). A finding that such an injunction burdens interstate commerce, absent evidence of discrimination or the restriction of interstate movement of goods, would cast a shadow over any future enforcement action that by necessity has effects across state lines.[7] *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970); *Exxon Corp.*, 437 U.S. at 127-29 (failure to demonstrate a burden on commerce ends the inquiry). A further finding that this burden outweighs the local benefits of protecting competition in Colorado would raise serious barriers to effective enforcement. In short, Defendants' Commerce Clause argument would inject *Pike*'s balancing

[7] Such a finding would also be contrary to existing law, which recognizes that many areas of state regulation necessarily involve regulation of interstate activity, and such regulation does not burden interstate commerce. Plf. PCOL ¶ 1111 (*citing CTS Corp v. Dynamics Corp of America*, 481 U.S. 69, 89-90 (1987); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978)).

test into a vast swathe of disputes that it has not previously reached.

Defendants' Full Faith and Credit argument goes even further. Defendants argue that injunctions under state law violate the Full Faith and Credit Clause any time they restrict an interstate act or practice that another state declines to challenge. Defs. PCOL ¶¶ 460-61. If adopted, this theory would require unanimity among state enforcers before Colorado could enforce its antitrust laws—or any law—against an act or practice that crosses state lines. The public interest requires a Court ruling to reject this dubious proposition.

Finally, Defendants argue that the requested injunction "contravenes comity and federalism." Defs. PCOL ¶ 462. So this argument, too, threatens to swallow state regulation in many areas where states have traditionally played an active role. *See, e.g., California v. ARC America Corp.,* 490 U.S. 93, 101-102 (1989) (antitrust enforcement is "an area traditionally regulated by the States").

Defendants' arguments about the scope of the Attorney General's authority regarding interstate mergers are likely to be raised again and again. *See, e.g., Colo. Off. of Consumer Counsel v. Mountain State Tel. & Tel. Co.*, 816 P.2d 278, 281 n.5 (Colo. 1991) ("[a]lthough the precise factual circumstances presented . . . are unlikely to recur, the question of the scope of the [agency]'s authority" was a question of public importance); *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1054 (Colo. 1980) (rejecting a mootness claim because "[t]he breadth of the [agency]'s statutory authority . . . may again be drawn in to question").

In ruling on Defendants' Motion to Dismiss, the Court rejected these arguments as a basis for dismissal on the pleadings, Order on Defs. Mot. to Dismiss at 17-23, but Defendants' post-trial briefing seeks to resurrect them. *See* Def. PCOL ¶¶ 458-62. With respect to the dormant

Commerce Clause, the Court specifically stated that the *Pike* test could not be resolved in either side's favor on the pleadings. Order on Defs. Mot. to Dismiss at 21. The Attorney General firmly maintains that the requested injunction presents no issues under the Commerce Clause, but the Court's prior opinion left unsettled whether Defendants could establish a constitutional violation on a full evidentiary record, and that question is now before the Court.

The public has a great interest in effective enforcement of antitrust laws by states, as evidenced by Congress and the General Assembly's repeated moves to endow state enforcers with the tools they need to protect competition. *See, e.g.,* State Antitrust Enforcement Venue Act, Pub. L. 117-328, Div. GG, Title III, § 301, Dec. 29, 2022, 136 Stat. 5970 (amending 28 U.S.C. § 1407); Colorado Antitrust Act of 2023, HB 23-1192 (Co.) (amending C.R.S. § 6-4-101 *et seq*.). Yet Defendants have repeatedly maligned the Attorney General for bringing this lawsuit, and continue to do so in their Motion. The public has a strong interest in resolution of these important issues.

II. Defendants' Voluntary Cessation of the Merger Does Not Obviate the Need for Injunctive Relief.

The Colorado Supreme Court is unequivocal that "[a defendant's] cessation or modification of an unlawful practice does not obviate the need for injunctive relief to prevent future misconduct." *May Dep't Stores Co. v. State*, 863 P.2d 967, 979 n.24 (Colo. 1993); *see also Nakauchi*, ¶ 25 ("a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice") (internal citation and quotation omitted). To the contrary, "[i]f the practice 'has been abandoned in good faith and for all time, an injunction can do the defendant no harm, and it is a protection to which [we] deem the plaintiff entitled." *Old Homestead Bread Co. v. Marx Baking Co.*, 108 Colo. 375, 381 (1941).

Pursuant to the voluntary cessation exception, an otherwise moot claim can be ruled on if,

as here, it presents "important issues capable of repetition yet potentially evading review." *Walton v. People*, 2019 CO 95, ¶ 8. "An issue may be capable of repetition while evading review even though the chance of recurrence is remote." *Johnson v. Griffin*, 240 P.3d 404, 406 (Colo. App. 2009); *see also, e.g.*, *Byrne v. Title Bd.*, 907 P.2d 570, 573 (Colo. 1995) (review of agency action not moot because the issue "might" recur). This exception applies even when the same precise factual circumstances are unlikely to recur—the concern is not whether the same exact fact pattern may recur, but whether the underlying substantive legal issue may recur. *Cloverleaf Kennel Club*, 620 P.2d at 1054 ("although it is equally true that the precise factual circumstances in which this controversy arose are unlikely to recur, the underlying substantive question is one capable of repetition yet evading review") (internal citation and quotation omitted).

Defendants bear a "heavy" and "stringent" burden to show that it is "absolutely clear" that the same controversy will not recur. *See Portley-El v. Colo. Dep't of Corr.*, 2022 COA 86, ¶ 21. Voluntary cessation *may* moot a claim only if (i) there is no reasonable expectation that the alleged violation will recur; *and* (ii) interim relief has completely and irrevocably eradicated the effects of the alleged violation. *Id.* at ¶¶ 20, 21. Defendants have not met their burden here.

A. Defendants have failed to show that their attempt to merge will not recur.

The fact that the parties appear to have abandoned the merger (for now) is insufficient. No matter that the parties are at odds now over the merger break-up fee and are pointing fingers at each other over whose fault it is that the merger failed. Albertsons has made clear that it is still open to a sale, and there is nothing preventing Kroger and Albertsons from resolving their current dispute by, in part, agreeing to try to merge again.

Indeed, it is not unheard of for parties to explore mergers more than once. For example,

Staples and Office Depot attempted to merge twice. *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 125 (D.D.C. 2016). Sprint and T-Mobile "considered merging on multiple occasions" before finally doing so. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 196 (S.D.N.Y. 2020). In that case, like here, "both parties have highlighted the complementarity of their . . . holdings" as a reason to merge. *Id.*; *see also* McMullen, TR 10/14/24 AM, 3019:2-14 (Kroger CEO testifying that the complementary locations of Albertsons stores was a reason for the merger); Sankaran, TR 10/9/24 AM, 2089:7-2091:8 (Albertsons CEO testifying that Kroger's and Albertsons's businesses are complementary on a national level).

Moreover, Defendants have not provided any evidence disclaiming intent to merge other than attorney argument at the December 13, 2024 status conference or in their brief. This fails to satisfy Defendants' "'formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Portley-El*, ¶ 21 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)); *see also Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012) (noting defendant's "heavy" burden). Although the parties have withdrawn their HSR filings, they do not submit a declaration or document from any of the merging parties even stating, at minimum, that they are not leaving open the option merge again. Nor have Kroger and Albertsons offered anything to resolve the contractual conundrum they find themselves in—each side says the other's termination of the Merger Agreement is ineffective, leaving the status of the Merger Agreement in doubt, and leaving open the possibility that the parties could resolve their litigation by resurrecting the merger.

Indeed, courts have declined to find mootness on evidence more substantial than that presented here. *See, e.g., F.B.I. v. Fikre*, 601 U.S. 234, 242 (2024) ("sparse declaration" stating

that conduct would not recur in the future "based on the currently available information" "falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.") (internal citations omitted); *Upjohn Co. v. American Home Products Corp.,* 598 F. Supp. 550, 555 (S.D.N.Y. 1984) (narrowly drawn affidavits claiming abandonment of allegedly wrongful conduct are insufficient to meet defendant's heavy burden). Attorney argument and representations, without supporting declarations or documents, are not evidence and are insufficient to meet Defendants' heavy burden. *See United States v. W.T. Grant. Co.*, 345 U.S. 629, 633 (1953) (defendants' representation that they had removed unlawful conditions and disclaimer of any intention to revive them deemed insufficient as "such a profession does not suffice to make a case moot"). Defendants' counsel recognized this at the December 13th status conference and promised that they would bring forth stronger evidence—but they have not done so. *See* Status Conf., TR 12/13/24, 19:14-25 (Kroger counsel stating they would provide a filing "to articulate the steps that have been taken"), 20:2-9 (Albertsons counsel stating they could "file papers" to support mootness "as early as today"). In short, nothing in Defendants' Motion forecloses the possibility that the conduct could recur.

Defendants also seem to think that the Oregon and Washington Orders somehow take them out of the voluntary cessation exception. *See* Defs. Mot. at 11-14. That is wrong. The Oregon Order is a preliminary injunction, not permanent. Oregon Order at 71. And the Washington Order by its own terms does not foreclose a re-worked merger that avoids impacting competition in Washington but still has anticompetitive effects in Colorado. Washington Order at 120 ("Enjoining the transaction would not bar Defendants from negotiating a merger without anticompetitive impacts in Washington."). This case is thus distinguishable from *Arcell v. JetBlue Airways Corp.*,

23-1897, 2024 WL 1878171 (1st Cir. Apr. 28, 2024), where a federal court issued an unqualified *permanent* injunction causing the parties to abandon the merger, thus mooting a parallel putative class action challenging the merger. *See* Defs. Mot. at 9.

The record in this case therefore falls far short of what is required. *R.C. Bigelow v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989), is highly persuasive. There, the Second Circuit reviewed a private plaintiff challenge to a proposed merger between Lipton and Celestial Seasonings. While the case was on appeal, the defendants moved to dismiss the appeal as moot because they had abandoned the merger. *Id.* at 105. And not only that, but Celestial Seasonings (the firm to be acquired by Lipton) reached a deal to sell itself to a third party. *Id.* Lipton and Celestial also directly told the court that the proposed merger had been "abandoned." *Id.* Nevertheless, the Second Circuit denied the motion to dismiss the appeal and reached a decision on the merits (in favor of the plaintiff). *Id.* The Second Circuit found Lipton and Celestial's self-serving and "narrowly drawn" disclaimers of intent to merge to be inadequate because that intent could change and there was still a possibility that the parties could try to merge again later. *Id.* at 107. Defendants here have done even less than what was considered inadequate in *Bigelow*.

Defendants' argument that the Second Circuit "cabined" *Bigelow* to cases where abandonment was "a strategic litigation ploy" is wrong. Defs. Mot. at 13. The *Bigelow* court never used the term "strategic litigation ploy," nor did the Second Circuit subsequently limit the voluntary cessation doctrine to such instances. Rather, in *E.I. Dupont de Nemours & Co. v. Invista B.V.*, (hereinafter "*Invista*") the court cited *Bigelow* favorably for the proposition that a defendant bears the "burden to show that there is no 'reasonable expectation' its actions will recommence." 473 F.3d 44, 47 (2d Cir. 2006). The court then distinguished the rather esoteric factual

circumstances of the case before it. The case dealt not with a merger, but with a contractual dispute. The Dupont company had sold its nylon *fiber* business line to Invista, but the purchase agreement restricted Invista from purchasing any company involved in the nylon *resin* business, because Dupont remained engaged in that line of business. *Id.* at 46. Invista subsequently sought to acquire another firm and a dispute ensued over whether that firm was engaged in the nylon resin business, so Dupont sued Invista for breach. *Id.* Invista later abandoned the transaction, and Dupont—the plaintiff—sought to dismiss its own claim as moot. *Id.* Invista, however, asserted that it may still pursue a transaction with that same firm or others, and argued the claim was not moot. *Id.*

In that context, the Second Circuit distinguished *Bigelow* and stated that the voluntary cessation exception does not apply where "the party that alleged wrongdoing claims the action is moot, and where the cessation by the alleged wrongdoer was not a 'unilateral action taken for the deliberate purpose of evading a possible adverse decision by this court.'" *Id.* at 47 (citing *Bigelow*, 867 F.2d at 106). And although the *Bigelow* court considered the timing of the abandonment of the merger as seemingly "timed to head off an adverse determination on the merits," the "deliberate purpose" language was a summary of the plaintiff-appellant's argument in that case, not the court's own finding. *See Bigelow*, 867 F. 2d at 106 ("*Bigelow responds by arguing* that the claimed abandonment of the Celestial acquisition was a unilateral action taken for the deliberate purpose of evading a possible adverse decision by this court.") (emphasis added).

Furthermore, the *Invista* court went on to clearly explain that Invista was not arguing that its abandoned purchase was a matter capable of repetition yet evading review, contrary to what the plaintiff in *Bigelow* argued and what the Attorney General argues here. *See Invista*, 473 F.3d at 48 n.2 ("The likelihood of a future attempt by Invista to acquire Barnet would bear upon whether this

dispute is capable of repetition yet evading review," but "Invista does not argue that the exception applies.") The *Invista* court therefore did not "cabin" *Bigelow*, and is totally inapposite. In any event, *Bigelow* by its own terms clearly stands for the proposition that voluntary abandonment of a merger does not moot a claim when there is a possibility that the merger could resume. *Bigelow*, 867 F. 2d at 105-07. And the same is true here.

More broadly, Defendants argue that the voluntary cessation doctrine only applies in instances of "gamesmanship." Defs. Mot. at 12. Not so. Courts rightly point out gamesmanship when it may be afoot, but no finding of suspicious intent is required. Indeed, many voluntary cessation cases make no such inquiry and there is no Colorado case that requires a finding of "gamesmanship."[8]

Defendants' citation to *United States v. Mercy Health Servs.*, 107 F.3d 632 (8th Cir. 1997), is likewise unavailing, as it too is distinguishable. The merging parties there won at trial, but the merger was abandoned while on appeal. *Id.* at 634-35. The court was concerned that a ruling would be of no value in evaluating a future attempted merger because it viewed the issues as highly fact-specific and the hospital industry as rapidly changing. *See id.* at 636-37. That is not the case here. *See* Argument § II.A.

B. The legal issues are capable of repetition yet avoiding review.

Even putting aside whether this specific merger could recur, the voluntary cessation exception applies regardless. *Cloverleaf Kennel Club*, 620 P.2d at 1054. The key is that the issues in this case are capable of repetition and avoiding review. Albertsons executives testified at trial

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[8] Even so, having been dealt two adverse rulings, Defendants clearly feared going 0 for 3 and abandoned the merger to try to avoid that outcome.

that they would revisit all strategic options if the Proposed Merger did not go through, including trying again to sell the company. *See, e.g.*, Sankaran, TR 10/9/24 AM, 2101:8-13 (Albertsons CEO testifying that the company would consider another merger). The ACI Complaint states that the proposed merger had a "viable path to antirust approval" and that "obtaining antitrust clearance of mergers between large supermarket companies is well-trodden." ACI Complaint § VII (heading), ¶ 122. It is therefore entirely possible that Albertsons could try to sell its Colorado operations, potentially again to Kroger or someone else. But regardless of who the buyer is, the same questions would be at play about market definition, how to measure anticompetitive harm, and potentially how to evaluate a proposed remedy.

Moreover, the underlying questions about the scope and meaning of the Colorado Antitrust Act with respect to mergers (as detailed above) are themselves capable of repetition yet evading review. Mergers are often abandoned once parties see the writing on the wall, as Kroger and Albertsons did here. As a result, mergers commonly evade court review through voluntary cessation, so it is entirely possible to have future merger challenges under the Colorado Antitrust Act that present the same or similar issues without a court ruling on those issues due to abandonment. This is precisely what the voluntary cessation exception is meant to avoid, and favors applying the exception here to reach a ruling on the merits.

CONCLUSION

The Attorney General respectfully requests that the Court deny Defendants' Motion to Dismiss Count I as Moot and enter judgment in favor of the Attorney General on the First Cause of Action in the Complaint.

Respectfully submitted this 15th day of January 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2025, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS COUNT I AS MOOT** was served on all parties of record via the Colorado Courts E-Filing.

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