

Congress of the United States

Washington, DC 20515

December 11, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Dear Chair Khan,

We write to express our continuing concerns with Kroger Company's (Kroger) proposed \$24.6 billion acquisition of Albertsons Companies, Inc. (Albertsons).¹ In September 2023, Kroger and Albertsons released the details of a divestiture plan to sell 413 stores and other assets to C&S Wholesale Grocers (C&S), in an attempt to assuage competition concerns raised by the merger.² However, this divestiture plan will not ameliorate harms to consumers, workers, and the grocery industry as a whole if the merger is allowed. We urge you to oppose this proposed merger, regardless of the proposed divestiture.

The Proposed Merger Will Exacerbate Consolidation, Harm Consumers and Suppliers, and Aggravate Labor Concerns

An October 2022 letter to you outlined both Kroger's and Albertsons' records of profiteering and worker exploitation, and how those conditions stand to worsen if this merger is finalized.³ A Kroger-Albertsons merger would net the five largest food retail companies control of 55 percent of all grocery sales.⁴ The newly merged entity could use its dominant position to further control and ultimately raise consumer prices.⁵ At the regional and local level, mega-grocer domination

¹ The Kroger Company, "Kroger and Albertsons Companies Announce Definitive Merger Agreement," press release, October 14, 2022, <https://www.prnewswire.com/news-releases/kroger-and-albertsons-companies-announce-definitive-merger-agreement-301649531.html>.

² Albertsons Companies, "Kroger and Albertsons Companies Announce Comprehensive Divestiture Plan with C&S Wholesale Grocers, LLC in Connection with Proposed Merger," press release, September 8, 2023, <https://www.albertsonscorporation.com/newsroom/press-releases/news-details/2023/Kroger-and-Albertsons-Companies-Announce-Comprehensive-Divestiture-Plan-with-CS-Wholesale-Grocers-LLC-in-Connection-with-Proposed-Merger/default.aspx>.

³ Letter from Senator Elizabeth Warren to FTC Chair Lina Khan, October 25, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.10.25%20Letter%20to%20FTC%20re%20Kroger-Albertsons%20Merger1.pdf>.

⁴ New York Times, "The Real Reason Your Groceries Are Getting So Expensive," Stacy Mitchell, May 29, 2023, <https://www.nytimes.com/2023/05/29/opinion/inflation-groceries-pricing-walmart.html>.

⁵ Bloomberg, "Kroger Wants to Merge With Albertsons to Create US Grocery Giant," Michelle F. Davis, Ruth David, Ed Hammond, and Crystal Tse, October 14, 2022, <https://www.bloomberg.com/news/articles/2022-10-13/kroger-is-said-to-be-in-talks-to-combine-with-rival-albertsons>.

will be even more pronounced. The merger would result in a duopoly with Walmart, with the two corporations controlling more than 70 percent of the grocery market in over 160 cities across the country.⁶ A grocery megamerger also increases the risk that firms will violate the *Robinson-Patman Act*, a longstanding but under-enforced law that prohibits sellers from engaging in price discrimination among different buyers.⁷ Dominant grocery chains can use their buyer power to pressure food suppliers for preferred pricing and terms, beyond what might be justified by efficiency.⁸ This price discrimination impairs independent and smaller grocers' ability to compete on price and quality.⁹ This merger will also decrease suppliers' buying power and therefore encourage suppliers to themselves consolidate or collude to counterbalance the outsized bargaining power of a merged Kroger-Albertsons.¹⁰

Since October 2022, new economic analyses have illuminated additional harms to workers. The consolidation of grocery store employers will eliminate workers' options for employment, reducing competition for labor and decreasing wages.¹¹ A merger will also decrease the bargaining power of organized labor, as unionized workforces will not be able to play different employers off one another.¹²

Kroger and Albertsons' Proposed Divestiture Will Not Resolve Antitrust Concerns

When massive mergers like this one are proposed, merging parties sometimes offer behavioral or structural remedies to preemptively "cure" their anticompetitive effects.¹³ Structural remedies, such as a divestiture of a number of assets, often fail to address harms to competition – in part because companies have an incentive to ensure the failure of spun-off companies,¹⁴ and do not mitigate price increases and other negative effects on consumers.¹⁵

⁶ Institute for Local Self-Reliance, "'Americans Don't Need Another Mega-Grocer.' Stacy Mitchell Responds to Kroger's Bid to Buy Albertsons," press release, October 14, 2022, <https://ilsr.org/statement-kroger-albertsons-merger/>.

⁷ National Grocers Association, "Enforce the Robinson-Patman Act," <https://www.nationalgrocers.org/antitrust/>.

⁸ National Grocers Association, "Modernize and Enforce the Robinson-Patman Act," December, 2022, https://www.nationalgrocers.org/wp-content/uploads/2022/12/NGA_Issue-Brief_Antitrust.pdf.

⁹ *Id.*

¹⁰ American Economic Liberties Project, "Supermarket Squeeze: The Real Costs of the Kroger and Albertsons Deal," Krista Brown, November 2023, http://www.economicliberties.us/wp-content/uploads/2023/11/20231109-AELP-Supermarket-Brief_v3.pdf.

¹¹ University of Utah, "Evaluating the Competitive Effect of the Proposed Kroger-Albertsons Merger in Labor Markets," Marshall Steinbaum, November 11, 2023, p. 6, https://marshallsteinbaum.org/assets/kroger_albertsons_labor.pdf.

¹² *Id.* at 7-8.

¹³ American Antitrust Institute, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," John E. Kwoka & Diana L. Moss, November 2011, https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf.

¹⁴ Institute for Local Self-Reliance, "ILSR Calls for New Merger Standards to Halt Concentration, Revive Local Economies," Stacy Mitchell and Ron Knox, April 21, 2022, <https://ilsr.org/ilsr-calls-for-new-merger-standards-to-halt-concentration-revive-local-economies/>.

¹⁵ Economist John Kwoka has found that mergers subject to divestiture resulted in price increases of about 7.7 percent, while mergers cleared by the antitrust agencies without conditions resulted in price increases of 7.4 percent. See Antitrust Law Journal, "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," John E. Kwoka, Jr., April 4, 2012, p. 640, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954849.

On September 8, 2023, Kroger and Albertsons proposed a structural remedy in which 413 stores, eight distribution centers, and two offices would be acquired by C&S Wholesale Grocers.¹⁶

As Members of Congress have previously raised,¹⁷ structural and behavioral remedies are difficult to administer and enforce and cease to be binding once the term of the agreement ends, and they often fail to maintain competitive conditions because, as stated previously, companies have an incentive to ensure that the businesses they spin off do not succeed.¹⁸ Furthermore, they encourage companies to “litigate the fix” by proposing remedies during ongoing litigation in order to distract a judge’s focus from the original antitrust violations of the merger.¹⁹

But in addition to these general concerns, past experience with Albertsons’ structural remedies indicates that the new proposal will not cure the anticompetitive harms of the deal.

When Albertsons acquired Safeway, Inc. in 2015, the companies agreed to sell 168 of their stores to four buyers as part of a settlement with the FTC.²⁰ The FTC at the time claimed that “this settlement will ensure that consumers in those communities continue to benefit from competition among their local supermarkets.”²¹ However, this effort to preserve competition through structural remedies was an unmitigated failure.

The vast majority of the stores were sold to Haggen Holdings, LLC (Haggen), a regional company that had owned eighteen stores throughout Oregon and Washington.²² Upon the announcement of the divestiture, the CEO of Albertsons and Safeway touted Haggen and the other buyers as “strong buyers,” and Haggen publicly committed to hiring back “most, if not all, of the store employees.”²³ However, mere months later, divested stores began to lay off workers. Ultimately, Haggen failed to adequately manage the stores that Albertsons divested and filed for bankruptcy by the end of 2015. In fact, dozens of the locations were sold back to Albertsons, in some cases, for as little as one dollar. And while this is the most egregious example of a failed divestiture, for decades Albertsons and Kroger have habitually reacquired stores that they had

¹⁶ Albertsons Companies, “Kroger and Albertsons Companies Announce Comprehensive Divestiture Plan with C&S Wholesale Grocers, LLC in Connection with Proposed Merger,” press release, September 8, 2023, <https://www.albertsonscorporation.com/newsroom/press-releases/news-details/2023/Kroger-and-Albertsons-Companies-Announce-Comprehensive-Divestiture-Plan-with-CS-Wholesale-Grocers-LLC-in-Connection-with-Proposed-Merger/default.aspx>.

¹⁷ Letter from Senator Elizabeth Warren to FTC Chair Lina Khan, FTC Commissioners Alvaro Bedoya and Rebecca Kelly Slaughter, November 8, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.11.08%20Letter%20to%20FTC%20re%20Amgen%20Horizon%20Merger.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Federal Trade Commission, “FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger,” press release, January 27, 2015, <https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>.

²¹ *Id.*

²² American Economic Liberties Project, “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework For a New, Structuralist Approach,” January 2021, pp. 51-52, <https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn-Final.pdf>.

²³ AB Acquisition LLC, “Albertsons and Safeway Confirm Agreements to Sell 168 Stores in Eight States to Four Buyers,” press release, December 19, 2014, <https://www.sec.gov/Archives/edgar/data/86144/000119312514452874/d842021dex991.htm>.

previously been forced to sell off.²⁴ Thousands of employees lost their jobs as the result of store closings in the Albertsons-Safeway debacle – and the FTC’s efforts failed to preserve competition in local communities. This was not the only example of divestitures failing to preserve competition in the wake of a massive merger. Other examples include:

- Ahold/Delhaize: In 2016, Koninklijke Ahold (owners of Giant Food, Stop & Shop, and Martin’s) and Delhaize (owners of Food Lion and Hannaford) sold 81 stores to a number of smaller buyers. As of today, 16 of those stores have been permanently closed, and two stores were sold back to Ahold Delhaize.²⁵
- Hertz/Dollar Thrifty: In 2013, the car-rental company Hertz acquired Dollar Thrifty Automotive Group (owners of Dollar Rent A Car and Thrifty Car Rental brands). In settling with the FTC, Hertz spun off one of its brands, Advantage Rent-a-Car.²⁶ Unable to maintain its existing locations and expand into new markets, the company went into bankruptcy in 2014 – selling back 10 locations to Hertz.²⁷

Conclusion

This merger will harm consumers, workers, farmers, and other food suppliers across the country, and the proposed divestiture will not resolve the concerns. We ask that the FTC should use its authority under the *Clayton Act*, the *Sherman Act*, and the *Federal Trade Commission Act* to prevent the companies from merging.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator



Mazie K. Hirono
United States Senator

²⁴ American Economic Liberties Project, “Supermarket Squeeze: The Real Costs of the Kroger and Albertsons Deal,” Krista Brown, November 2023, p. 6,

http://www.economicliberties.us/wp-content/uploads/2023/11/20231109-AELP-Supermarket-Brief_v3.pdf.

²⁵ Food & Power, “What Kroger and Albertsons’ Mega-Merger Means for Shoppers, Workers, Regulators,” Claire Kelloway, October 22, 2022, <https://www.foodandpower.net/latest/kroger-albertsons-merger-10-27-2022>.

²⁶ American Economic Liberties Project, “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework For a New, Structuralist Approach,” January 2021, <https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn-Final.pdf>.

²⁷ *Id.*



Bernard Sanders
United States Senator



Cory A. Booker
United States Senator



Summer Lee
Member of Congress



Alexandria Ocasio-Cortez
Member of Congress