Congress of the United States
House of Representatives
Washington, DC 20515-4707

November 21, 2022

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We write regarding our concerns with Kroger's proposed $24.6 billion acquisition of Albertsons, and the extent to which this acquisition could harm consumers, workers, and small businesses.[1] We urge the Federal Trade Commission ("FTC" or "the Commission") to closely evaluate the likely competitive effect of this acquisition.

This acquisition threatens to create competition-stifling concentration in markets across the country, hurting consumers, workers and small businesses.[2] Kroger's proposed acquisition of Albertsons presents several anticompetitive concerns. For consumers, the consolidated grocery chain could offer fewer product choices and higher costs for essential goods. For workers, the acquisition could impair bargaining power for fair wages and safe working conditions in local communities. For small- and medium-sized grocers, this acquisition could diminish their already strained resources and drive up supply costs.

While Kroger and Albertsons have proposed divestiture of stores in certain regions to alleviate these concerns, history has proved that divestiture does not always remediate the loss of competition caused by a merger and sometimes can further harm consumers and workers. Albertson's plan to pay a $4 billion cash dividend to shareholders from its operating margins will likely increase the possibility of this harm.[3] We urge the Commission to consider these factors when evaluating the proposed Kroger-Albertsons acquisition.

Market Impact in the United States

If approved, two of the nation's largest grocery chains—Kroger, whose stores include its eponymous chain along with QFC, Harris Teeter, and Fred Meyer; and Albertsons, whose stores

[1] Progressive Grocer, "Why Kroger Is Buying Albertsons," Gina Acosta, October 10, 2022, https://progressivegrocer.com/why-kroger-buying-albertsons.
[2] NBC Chicago, "Kroger and Albertsons, Owners of Grocery Chains Mariano's and Jewel, Have Agreed to Merge," Jewel Osco, October 14, 2022, https://www.nbcchicago.com/news/local/kroger-owner-of-marianos-and-albertsons-owner-of-jewel-osco-have-agreed-to-merge/2967682/
[3] *See* Press Release, AG Ferguson files lawsuit to block Albertsons from paying $4 billion to shareholders before merger can be reviewed (Nov. 1, 2022), Wash. Att'y Gen., https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-block-albertsons-paying-4-billion-shareholders-merger ("Paying out $4 billion before regulators can do their job and review the proposed merger will weaken Albertsons' ability to continue business operations and compete").

include its eponymous chain along with Safeway and Tom Thumb—would be owned by a single company and control around 13 percent of the U.S. grocery market.[4] The concentration would be even more pronounced in many Western states, such as California, Oregon, and Washington.[5] For instance, Albertsons-Safeway is Kroger's biggest competitor in the Seattle-area market, followed by Walmart.[6] This merger would eliminate competition between the top two market competitors.

The grocery conglomerates also overlap in the Southwest. Albertsons and Kroger have 195 stores in North Texas, including 95 Kroger stores, 60 Tom Thumb stores, 31 Albertsons stores and 9 Market Street stores.[7] This transaction would give Kroger-Albertsons the largest market share of any grocery chain in North Texas with 28 percent, overtaking Walmart's 27.6 percent market share.[8]

Impact on Consumers

We are concerned that Kroger's proposed acquisition of Albertsons could result in undue market concentration. As a result, the combined company would be free to raise prices for consumers.

As you know, concerns about consolidation for grocery chains are not new. Almost a decade ago, an FTC report found that concentration in the grocery-retailing industry had resulted in significant increases in consumer prices.[9] The COVID-19 pandemic exacerbated these effects, as products disappeared from shelves or were listed for far higher prices than normal. In particular, customers suffered product shortages and higher prices for meat, fish, dairy, and eggs.[10] At the same time, major U.S. corporations reported record profits while passing on rising supply-chain costs to consumers.[11] In fact, Kroger saw its net earnings for the first two quarters of 2020 jump to more than $2.031 billion compared to $1.069 billion in the same period of 2019.[12]

During the pandemic, dominant grocery chains additionally proved their willingness to take advantage of supply shocks and buyers' limited retail options by hiking up prices for necessities

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[4] Dee-Ann Durbin, *Kroger seeks to create grocery giant in $20B Albertsons bid*, SEATTLE TIMES (Oct. 14, 2022), https://www.seattletimes.com/business/kroger-seeks-to-create-grocery-giant-with-20b-albertsons/.
[5] Paul Roberts, *Why a Kroger-Albertsons-Safeway merger could be 'messy' in Seattle*, SEATTLE TIMES (Oct. 14, 2022), https://www.seattletimes.com/business/why-a-kroger-albertsons-safeway-merger-could-be-messy-in-seattle/
[6] *Id*.
[7] Kyle Arnold, *By the numbers: The Kroger-Albertsons merger*, DALLAS MORNING NEWS (Oct. 14, 2022), https://www.msn.com/en-us/money/companies/by-the-numbers-the-kroger-albertsons-merger/ar-AA12Ypmh
[8] *Id*.
[9] FED. TRADE COMM'N, WORKING PAPER NO.313, DO RETAIL MERGERS AFFECT COMPETITION? (2012), https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf
[10] BUREAU LAB. STAT., ARTICLE, THE IMPACT OF THE COVID-19 PANDEMIC ON FOOD PRICE INDEXES AND DATA COLLECTION (2020), https://www.bls.gov/opub/mlr/2020/article/the-impact-of-the-covid-19-pandemic-on-food-price-indexes-and-data-collection.htm.
[11] Lee Koromvokis & Paul Solman, *Why corporations are reaping record profits with inflation on the rise*, PBS (Apr 12, 2022), https://www.pbs.org/newshour/show/why-corporations-are-reaping-record-profits-with-inflation-on-the-rise.
[12]Susan Selasky, *Food retailers see 'eye-popping profits' during pandemic. But frontline workers get crumbs.*, Chicago Tribune (Dec. 8, 2020), https://www.chicagotribune.com/business/ct-biz-covid-19-frontline-workers-grocery-retail-20201208-nzbobitsl5bqzof3pyt7wptlve-story.html

such as soap, personal protective equipment, and hand sanitizer. [13] In some cases, prices for these items increased by over 1,000 percent.[14] In March 2021, George P. Slover, then the Senior Policy Counsel for Consumer Reports, stated in written testimony before the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust, and Consumer Rights that, "[i]ncreasing concentration and consolidation is leaving consumers with fewer choices and less leverage. Sellers of essential products and services are increasingly able to offer consumers one choice—take it or leave it."[15]

We have seen the evidence: Corporate consolidation in the grocery retail industry leads to higher prices and lower consumer choice. As the largest supermarket chain by revenue and the second-largest general retailer behind Walmart,[16] Kroger, through its acquisition of Albertsons, is poised to leave consumers with far fewer choices, making consumers more vulnerable to price hikes and store closures.

Impact on Workers

As you are aware, for workers, healthy market competition means steady wages and safe working environments. However, the Kroger-Albertsons acquisition could undermine both. This transaction would likely increase Kroger's ability to set wages beneath what a competitive market would deliver.[17] Without adequate employer competition, Kroger and Albertsons would gain wealth while their hardworking employees pay the cost.

Reporting shows that Kroger currently neglects to pay its workers steady, livable incomes. In January 2022, the Economic Roundtable published the results of a survey of more than 10,000 workers at Kroger, conducted at the request of United Food and Commercial Workers (UCFW), which revealed that homelessness and food insecurity were rampant among union grocery store employees.[18] Among the respondents, which included those at Kroger-owned stores in Southern California, Colorado, and Washington State, 14 percent had been homeless in the past year, 36 percent worried about eviction, and more than 75 percent met the U.S. Department of Agriculture's definition of "food insecure," with 34 percent of the respondents skipping or reducing meal size to stay afloat.[19]

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[13] NBC New York, "Brooklyn Company Fined $314K for Price-Gouging NJ Stores for KN95 Masks at 400% Markup," August 9, 2022, https://www.nbcnewyork.com/news/local/crime-and-courts/brooklyn-company-fined-314k-for-price-gouging-nj-stores-for-kn95-masks-at-400-markup/3818090/.

[14] Letter, Society for Healthcare Org. Procurement Prof. http://cdn.cnn.com/cnn/2020/images/04/16/shopp.covid.ppd.costs.analysis_.pdf.

[15] *Competition Policy for The Twenty-First Century: The Case For Antitrust Reform before the S. Subcomm. on Competition Policy, Antitrust, And Consumer Rights*, 117 Cong. (2021) (Statement of George P. Solver), https://www.judiciary.senate.gov/download/george-slover-testimony.

[16] Yahoo News, "Kroger and Albertsons plan to merge into the nation's largest supermarket chain," Theara Coleman, October 14, 2022, https://news.yahoo.com/kroger-albertsons-plan-merge-nations-194408012.html.

[17] Washington Center for Equitable Growth, "Wage and employment implications of U.S. labor market monopsony and possible policy solutions," February 18, 2020, https://equitablegrowth.org/wage-and-employment-implications-of-u-s-labor-market-monopsony-and-possible-policy-solutions/.

[18] Patrick Burns, Aaron Danielson, Peter Dreier, & Daniel Flaming, *Hungry at the Table: White Paper on Grocery Workers at the Kroger Company*, Economic Roundtable (Jan. 11, 2022) https://economicrt.org/publication/hungry-at-the-table/ [hereinafter Burns].

[19] *Id*.

Also in January 2022, More Perfect Union uncovered similar findings in a 2018 internal Kroger document that reportedly warned Kroger executives that "hundreds of thousands of [Kroger] employees live in poverty and rely on food stamps and other public aid as a result of the company's low pay."[20] By comparison, More Perfect Union noted, "CEO Rodney McMullen made $22 million in 2020, more than 900 times as much as the median worker."[21]

Reports demonstrate that Kroger has also strained its workforce through unsafe and unstable working environments. The UCFW survey revealed that Kroger management's cost-cutting practices had compromised personal health and food safety in stores.[22] Workers reported depression and anxiety due to low pay, understaffing, and unpredictable scheduling.[23] Given these overwhelming obstacles, labor turnover at Kroger is high. The number of workers leaving Kroger quadrupled since the onset of COVID-19 due to workers' safety concerns and desire for better opportunities, including better working conditions.[24]

This acquisition could subject more workers, both union and non-union, to poor conditions. With this transaction, Kroger would acquire one of its main competitors in the Western region, eliminating any incentive to improve upon its employees' poor working conditions or wages. Kathy Finn, UFCW 770 Acting President, stated: "The proposed merger of these two grocery giants is devastating for workers and customers alike and must be stopped."[25]

Impact on Small Businesses

The Kroger-Albertsons acquisition will negatively impact the longevity of small- and medium-sized grocers. As you know, when just a few corporations dominate a downstream market, those companies have enormous bargaining leverage with their upstream suppliers. They often dictate prices and terms to their suppliers, who have no meaningful choice but to cede to their demands, at the expense of smaller businesses.

Already, big businesses dominate food and goods supplier contracts, and small businesses lack the volume demand necessary to make them viable competitors for the suppliers. As a result, small businesses end up paying higher prices and waiting longer for goods and services. A March 2022 survey found that 65 percent of small businesses consider big competitors, who strong-arm suppliers and receive special discounts from them, a top challenge to their sustainability. [26] As a result of concentration throughout the supply chain, small- and medium-sized businesses are increasingly subject to discriminatory terms and conditions, including less

[20] Jordan Zakarin, *Exclusive: Leaked Memo Reveals Kroger Executives Knew for Years that Most Workers Live in Poverty*, MORE PERFECT UNION (Jan. 13, 2022), https://perfectunion.us/exclusive-kroger-memo-workers-poverty/,
[21] *Id*.
[22] Burns, *supra* note 16.
[23] Jacobin, "A Horrifying Report Shows the Miserable Working Conditions at Kroger," Alex n. Press, January 12, 2022, https://jacobin.com/2022/01/report-survey-kroger-wages-grocery-store-workers-covid-working-conditions.
[24] *Id*.
[25] *See* Press Release, United Food & Com. Workers Int'l Union, Joint Statement in Response to Proposed Kroger/Albertsons Merger (Oct. 13, 2022), https://www.ufcw21.org/news/2022/10/13/essential-grocery-store-workers-unions-issue-joint-statement-in-response-to-proposed-krogeralbertsons-merger.
[26] "2022 Independent Business Survey: Top Challenges and Policy Priorities," Institute for Local Self Reliance, March 30, 2022, https://ilsr.org/2022-survey-businesses/.

favorable pricing and price terms, less favorable supply, less favorable retail packaging, and sometimes an inability to access products in short supply that are available to the big chains. The COVID-19 pandemic exacerbated this problem as well. With supply chains experiencing shortages on essential goods, there was simply not enough product to go around. Suppliers are inclined to serve their bigger contracts first, while small- and medium-sized vendors fight for the remaining scraps.

In addition, as you are aware, dominant corporations have the power to drive out smaller businesses by lowering consumer prices below cost, with the expectation that they will be able to raise those prices to supracompetitive levels once the smaller competitors have gone out of business. Accordingly, mom-and-pop stores tend to disappear when a mega-conglomerate store enters the market. For example, a 44-year-old local grocery store in Oriental, North Carolina, closed its doors less than two years after a Wal-Mart opened nearby.[27] But the harm did not end there. After the local grocer closed, the retail giant, seeing little profit, abandoned the community and left it without a grocery store or pharmacy.[28] The merger of Kroger and Albertsons, who have touted this acquisition as allowing them to better compete with dominant firms like Wal-Mart,[29] threatens to do the same in markets across the country.

The Kroger-Albertsons acquisition risks driving out smaller competitors that serve rural and urban areas in need. What is worse, if the combined mega-chain determines that a community does not generate enough profit, it could simply shutter the store, creating a food desert. Simply put, mega-chains lack the community ties that are at the core of small businesses. They are quick to leave when they don't realize sufficient profits. When corporate giants run out, small businesses and communities suffer. The transaction threatens just that result.

Divestiture's Damaging History

In anticipation of the need for divestiture to win federal approval, Kroger and Albertsons announced their intention to divest up to 375 Albertsons stores in markets where the companies overlap.[30] However, the potential divestiture of those stores does not assuage concerns on the potential negative impact of the merger on local communities. From poor labor protections to store closures, divestiture may negatively impact consumers and workers.

Mass divestiture from a previously approved merger for Albertsons-Safeway had a disastrous effect on workers and consumers. In 2015, Safeway and Albertsons spun off 168 stores to win approval of their own merger from the Commission.[31] But the divestiture was unsuccessful. The

[27] Shannon Pettypiece, *Wal-Mart: It Came, It Conquered, Now It's Packing Up and Leaving*, BLOOMBERG (Jan. 25, 2016), https://www.bloomberg.com/news/articles/2016-01-25/wal-mart-it-came-it-conquered-now-it-s-packing-up-and-leaving#xj4y7vzkg.
[28] *Id.*
[29] Siddarth Cavale & Arriana McLymore, *Analysis: Kroger looks to fight both inflation and Walmart with new merger*, Reuters (Oct. 14, 2022), https://www.reuters.com/markets/deals/kroger-looks-fight-both-inflation-walmart-with-new-merger-2022-10-14/.
[30] Dan Papscun, *Kroger-Albertsons Divestiture Bid Aims to Head Off Challenge*, Bloomberg Law (Oct. 14, 2022) https://news.bloomberglaw.com/antitrust/kroger-albertsons-divestiture-plan-is-bid-to-deflect-regulators.
[31] *See* Press Release, Fed. Trade Comm'n, Agency's Largest Supermarket Divestiture Order to Date Requires Sales to Four Buyers (Jan. 27, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger.

grocery chain, Haggen, which purchased most of the divested stores, failed to effectively serve local workers and consumers—and ultimately filed for bankruptcy. Haggen raised prices and lost customer business.[32] It then cut employee hours and laid off workers. The UFCW filed grievances for Haggen's violation of a collective bargaining agreement.[33] In less than a year, Haggen filed for bankruptcy protection, closing several stores and selling 29 of its central locations back to Albertsons.[34] Given the bankruptcy filing, local workers were unable to get relief from Haggen and consumers were left with fewer market options.

As previously stated, Albertsons-Safeway is Kroger's biggest competitor in the Seattle-area market, followed by Walmart.[35] The proposed divestiture of up to 375 locations for the Kroger-Albertsons acquisition could harm the grocery store landscape in Seattle and across Washington, where Kroger—which owns QFC and Fred Meyer—and Albertsons collectively have nearly 350 locations. [36] Consumers in the Seattle area are rightfully concerned, given their experience with the unsuccessful Albertsons-Safeway divestiture that resulted in store closures.[37] Given the turbulent history of divested grocers, it is doubtful whether divestiture would reduce any market challenges presented by the Kroger-Albertsons acquisition. Rather, divestiture has the potential to increase them. We cannot repeat mistakes of the past. Consumers and workers cannot afford to suffer for the sake of maximizing corporate reach and profits.

Conclusion

The antitrust laws were designed to protect against anticompetitive economic discrimination and excessive concentration. Congress recognized the benefits of healthy market competition and the threats posed by economic discrimination when it enacted laws like the Robinson-Patman Act, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. Likewise, the Biden-Harris Administration has made corporate consolidation and its impact on workers, consumers, and small businesses a centerpiece of the Administration's economic policy. Close and skeptical investigation of this transaction is consistent with Section 7 of the Clayton Act, which prohibits any acquisition the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" in "*any* line of commerce or in *any* activity affecting commerce."[38] As indicated, this transaction has the potential to lessen competition in consumer, labor, and supply markets. This transaction could raise prices and limit options for essential goods.

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[32] Ángel González, *Haggen's expansion in Southwest fraught with legal problems, layoffs*, SEATTLE TIMES (Jul. 17, 2015), https://www.seattletimes.com/business/retail/haggens-expansion-in-southwest-fraught-with-legal-problems-layoffs/.
[33] Shan Li, Samantha Masunaga &Ivan Penn*, Grocer Haggen files for bankruptcy and replaces executive after failing to win over shoppers*, L.A. TIMES (Sep. 9, 2015), https://www.latimes.com/business/la-fi-haggen-bankruptcy-20150908-story.html.
[34] Ángel González, *Haggen agrees to sell core stores to Albertsons for $106M*, SEATTLE TIMES (Mar. 11, 2016), https://www.seattletimes.com/business/retail/haggen-agrees-to-sell-core-stores-to-albertsons/, *see also* John Talton, *Haggen: What Went Wrong?*, SEATTLE TIMES (Mar. 15, 2016), https://www.seattletimes.com/business/economy/haggen-what-went-wrong/.
[35] Roberts, *supra* note 4.
[36] *Id*.
[37] Paul Roberts, *In Seattle, Kroger-Albertsons merger raises fears of closures, 'grocery deserts*' SEATTLE TIMES (Oct. 19, 2022), https://www.seattletimes.com/business/in-seattle-kroger-albertsons-merger-raises-fears-of-closures-grocery-deserts.
[38] 15 U.S.C. 18 (emphasis added).

We are at a critical moment in our country where we have the evidence and the opportunity to address corporate consolidation not only through a consumer-oriented lens, but also through the lens of labor, equity, upstream supply, and small business. Given these concerns, we urge you to closely evaluate the proposed Kroger- Albertsons acquisition to ensure it does not undermine competition.

Thank you for your attention to this matter.

Sincerely,

Pramila Jayapal
Member of Congress

Jerrold Nadler
Member of Congress

David N. Cicilline
Member of Congress
Chair, Subcommittee on Antitrust, Commercial, and Administrative Law

Adam Smith
Member of Congress