

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7168

---

---

**In the United States Court of Appeals  
for the District of Columbia Circuit**

DISTRICT OF COLUMBIA;  
THE STATE OF CALIFORNIA; AND  
THE STATE OF ILLINOIS

*v.*

THE KROGER CO. AND  
ALBERTSONS COMPANIES INC.

---

ON EMERGENCY APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA  
(CIV. NO. 1:22-CV-03357, THE HONORABLE CARL J. NICHOLS)

---

**APPELLEE THE KROGER CO.'S SUPPLEMENTAL BRIEF IN  
RESPONSE TO COURT'S JANUARY 18, 2023, BRIEFING ORDER**

---

ROBERT REEVES ANDERSON  
**ARNOLD & PORTER KAYE SCHOLER LLP**  
*1144 15th Street Suite 3100  
Denver, CO 80202  
(303) 863-1000*

MATTHEW M. WOLF  
MICHAEL B. BERNSTEIN  
SONIA K. PFAFFENROTH  
KOLYA D. GLICK  
**ARNOLD & PORTER KAYE SCHOLER LLP**  
*601 Massachusetts Avenue, NW  
Washington, DC 20001  
(202) 942-5000*

MARK A. PERRY  
DREW TULUMELLO  
JEFFREY PERRY  
**WEIL, GOTSHAL & MANGES LLP**  
*2001 M Street NW, Suite 600  
Washington, DC 20036  
(202) 682-7511*

ADAM BANKS  
**WEIL, GOTSHAL & MANGES LLP**  
*767 Fifth Avenue  
New York, NY 10153  
(212) 310-8000*

---

---

Pursuant to this Court's January 18, 2023, Order, Appellee The Kroger Co. submits this supplemental brief to address the effect of the Washington Supreme Court's order, issued on January 17, 2023, in *State of Washington v. Albertsons Companies Inc.*, No. 101530-5 (Wash.), terminating the extension of the temporary restraining order in that case.

On January 20, 2023, Albertsons Company, Inc. ("Albertsons") paid the Pre-Closing Dividend that the Washington Supreme Court had temporarily enjoined it from paying. *See* Albertsons Co., Inc., Preliminary Information Statement (Schedule 14C Information) (filed with SEC Jan. 24, 2023), <https://bit.ly/3XYfSof>. Payment of the Pre-Closing Dividend was the only act that Appellants sought to enjoin in the motion for a preliminary injunction that forms the basis of this appeal. *See* District Ct. Order Denying Prelim. Inj. at 1; Appellants' Emergency Mot. for Inj. Pending Appeal and Immediate Administrative Stay (Dec. 13, 2022).

As a result, this appeal is now moot and should be dismissed.<sup>1</sup> Because Albertsons has paid the Pre-Closing Dividend, there is no case or controversy for this Court to resolve; it "can grant no effective relief to [Appellants]."

---

<sup>1</sup> In the parallel Washington litigation, Plaintiff, the State of Washington, moved to voluntarily dismiss the case. *See* Pl.'s Mot. for Voluntary Dismissal, *State v. Albertsons Co., Inc.*, No. 22-2-18046-3 SEA (Jan. 19, 2023).

*Newby v. Bush*, Nos. 07–5025, 07–5412, 2008 WL 4898962, at \*1 (D.C. Cir. June 24, 2008); *see also id.* (dismissing case on “the court’s own motion” where the event that appellant sought to enjoin had “concluded”). It is well-established that, “if an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed.” *Beethoven.com LLC v. Librarian of Cong.*, 394 F.3d 939, 950 (D.C. Cir. 2005) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 22-23 (D.C. Cir. 2006) (holding that court could not grant effectual relief to a party where the party sought to enjoin action and that action was subsequently “completed”); *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984) (“In general, a case becomes moot where the activities for which an injunction is sought have already occurred and cannot be undone.”).

In the event the Court retains jurisdiction over the appeal, summary affirmance is warranted for the reasons set forth in Kroger’s Rule 8 Cross-Motion for Summary Affirmance and Reply Brief in support thereof. The Washington Supreme Court’s January 17 order reinforces what this Court and two others previously recognized: Appellants’ antitrust theory has no merit.

## CONCLUSION

This Court should dismiss this case as moot or, in the alternative, summarily affirm the district court's order denying Plaintiffs' Motion for a Preliminary Injunction.

Dated: January 25, 2023

Respectfully submitted,

/s/ R. Reeves Anderson

Robert Reeves Anderson  
ARNOLD & PORTER KAYE  
SCHOLER LLP  
1144 15th Street Suite 3100  
Denver, CO 80202  
Phone: (303) 863-1000  
Fax: (303) 863-2301  
Reeves.Anderson@arnoldporter.com

Matthew M. Wolf  
Michael B. Bernstein  
Sonia K. Pfaffenroth  
Kolya D. Glick  
ARNOLD & PORTER KAYE  
SCHOLER LLP  
601 Massachusetts Avenue, NW  
Washington, DC 20001  
Phone: (202) 942-5000  
Fax: (202) 942-5999  
Matthew.Wolf@arnoldporter.com

/s/ Mark Perry

Mark A. Perry

Drew Tulumello  
Jeffrey Perry  
WEIL, GOTSHAL & MANGES LLP  
2001 M Street NW, Suite 600  
Washington, DC 20036  
Phone: (202) 682-7511  
Fax: (202) 857-0940  
E-mail: mark.perry@weil.com

Adam B. Banks  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
Phone: (212) 310-8000  
Fax: (212) 310-8007  
Email: adam.banks@weil.com

*Attorneys for Appellee The Kroger Co.*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit set forth in this Court's January 18, 2023 Briefing Order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 468 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated: January 25, 2023

*/s/ Robert Reeves Anderson*

Robert Reeves Anderson

**CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2023, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

Dated: January 25, 2023

/s/ Robert Reeves Anderson

Robert Reeves Anderson