NO.

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALBERTSONS COMPANIES, INC.;
ALBERTSON S COMPANIES SPECIALTY CARE, LLC;
ALBERTSON'S LLC; ALBERTSON'S STORES SUB LLC;
THE KROGER CO.; KETTLE MERGER SUB, INC.,

*Respondent*s.

EMERGENCY MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3

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I. INTRODUCTION

This Court should promptly enter an injunction preventing Albertsons from irreversibly paying its $4 billion dividend and weakening its ability to compete, causing the State and its residents ongoing actual and substantial injury. Such an order is necessary to allow for appellate review. This action alleges that the $4 billion payment is an unlawful restraint of trade and unfair method of competition, as it would weaken competition between Albertsons and Kroger, two of the largest supermarket companies in Washington. Such weakened competition would have profound immediate and ongoing effects for consumers in Washington.

Unless this Court promptly enters an injunction, the State's pending appeal of the superior court order denying a preliminary injunction will likely be rendered moot. Once the temporary restraining order expires after 4:30 p.m., December 19, 2022, there will be no legal prohibition on Albertsons' payment of its proposed $4 billion dividend. If Albertsons makes

that irreversible payment, it will weaken its competitive position, likely resulting in immediate, irreparable, and ongoing anticompetitive effects that harm consumers and employees in Washington.

Those profound effects warrant this Court's review of the trial court's order. And this Court can meaningfully review the trial court's order only if it first enters an injunction. In light of the trial court's orders, such an injunction is likely effective only if this Court enters it by 4:30 p.m., December 19, 2022. Accordingly, this Court should enter an order by that date.

II. STATEMENT OF RELIEF SOUGHT

By 4:30 p.m. on December 19, 2022, this Court should enter an order that enjoins Albertsons from paying the $4 billion dividend to its shareholders. The order should remain in effect until further order of this Court.

III. ISSUE PRESENTED BY MOTION

Whether this Court should preserve the status quo, and prevent the destruction of the fruits of the appeal, by temporarily

enjoining the irreversible payment of a $4 billion dividend to shareholders.

IV. STATEMENT OF THE CASE

A. Albertsons and Kroger are Grocers that Compete for Consumers and Employees

Albertsons, one of the largest full-service grocers in the United States, operates over 200 stores in Washington under the banners Albertsons, Safeway, and Haggen. App. at 448, 459. Kroger, the largest full-service grocer in the United States, has 114 stores in Washington (App. at 1-2)—with 54 QFCs and 33 Fred Meyer stores in the Puget Sound area alone. App. at 506, 512. Neighborhoods with both Albertsons and Kroger stores are commonplace throughout Washington communities, making them head-to-head competitors. App. at 525-26.

B. Albertsons and Kroger Jointly Announce a $4 Billion Dividend Payout as Part of Their Pending Merger

On October 14, 2022, Albertsons announced that it had "entered into an Agreement" to merge with Kroger. App. at 569. The companies issued a joint press release stating, "As part of the transaction, Albertsons Cos. will pay a special cash dividend

of up to $4 billion to its shareholders." App. at 590. In that same press release, Albertsons announced it would pay the dividend just 23 days later, on November 7, 2022—even though the companies do not expect the deal to close for more than a year. App. at 595. The $4 billion dividend is 57 times more per share than its regular quarterly dividend payment in 2022. App. at 889.

C. Albertsons' History of Divesting and Reacquiring Stores

1. Albertsons' 2006 specialization and spinoff to SuperValu

As early as 2006, in response to struggling in the competitive grocery market as a result of increasing its services and scale, Albertsons spun off its standalone drug business to CVS Corporation. App. at 783. A consortium of private equity companies led by Cerberus Capital Management, L.P. (collectively, "Cerberus"), acquired some Albertsons' stores. *Id.* Albertsons also sold a majority interest in Albertsons' western stores—including its Washington stores—to supermarket chain

SuperValu, while retaining a 35 percent interest. App. at 796, 807-08, 814.

SuperValu touted its purchase of Albertsons' stores as "strengthening" its "'ability to effectively compete in today's challenging grocery industry[ ]'" by "'creat[ing] a very strong competitor with high market penetrations, tremendous brand equities, significant size and scale and sufficient financial flexibility.'" App. at 796-97. SuperValu likewise asserted "the newly formed entity will generate sufficient free cash flow to support its debt service requirements and to improve its overall credit profile." App. at 797.

These confident predictions proved false. Suffering under $3.2 billion in debt, SuperValu sold all of its Albertsons assets back to an affiliate of Cerberus just seven years later. App. at 852. In its related Securities and Exchange Commission (SEC) filing, SuperValu quoted Cerberus' spin on this deal as "creat[ing] stronger, more competitive businesses" even though it was in fact a failed SuperValu acquisition. App. at 854.

2. Albertsons agrees to divest stores to Haggen to address competitive concerns over its acquisition of Safeway

As it turns out, past is prologue. In 2014, Albertsons announced an acquisition of Safeway Inc. App. at 636. But upon review, the Federal Trade Commission (FTC) concluded it would have anticompetitive effects and required Albertsons to divest 26 stores in Washington. App. at 656-58, 681, 684-686.

Haggen, a regional supermarket with only 18 stores, purchased 146 of Albertsons' divested stores, including all 26 Washington stores. *In re HH Liquidation, LLC*, 590 B.R. 211, 219 (Bankr. D.C. Del. 2018). But it was later forced to declare bankruptcy—allegedly due to sabotage by Albertsons in overstocking perishable inventory, understocking stable inventory, removing purchased fixtures, providing inaccurate pricing information, cutting off advertising, lying about the merchandising data system, and misappropriating Haggen's store opening plan. App. at 697-98.

Like Albertsons now, a private equity firm, Comvest, controlled Haggen and drained the company of liquidity necessary to operate by paying itself a $20 million dividend and structuring the divested assets to its own benefit. *In re HH Liquidation*, 590 B.R. at 232. The dividend and new company structure, which placed real estate assets in one subsidiary and the operating company in another, drained Haggen of funds needed to operate the new stores and crippled Haggen's ability to obtain new loans. *Id.* at 237, 231-32. After the divestment, Comvest increased Haggen's rents, further destroying Haggen's liquidity. *Id.* at 234-35.

Within months of divestiture, Haggen filed for bankruptcy and, once again, Albertsons was able to reacquire 14 of its divested stores. App. at 739. Haggen became another Albertsons brand and 15 of the formerly independent Haggen stores became Albertsons-owned stores. App. at 737.

D. Divestitures Would Be Necessary in Washington

In their merger announcement, Kroger and Albertsons announced a proposed fix to address any competitive concerns: "SpinCo," a "newly created standalone public company" that will operate some of the stores the Defendants are required to divest in order for their proposed merger to be approved. App. at 590. While Kroger and Albertsons have not fully disclosed their plans for divestitures in Washington, given that Washington's grocery store markets are already consolidated due to the failed Haggen divestiture, and, given that divestitures were required in the Albertsons-Safeway acquisition, there is a reasonable likelihood of the same occurring in the present matter.

E. Albertsons' Liquidity Needs

Albertsons' most recent quarterly financial filing reports a need for $10 billion in liquidity for the next year—including the $4 billion dividend. App. at 350. Albertsons plans to fund the $4 billion dividend with $2.5 billion of its available liquid assets and $1.5 billion in debt. *Id.* This will reduce the

remaining amount available for it to borrow from $4 billion to $2.5 billion—and leave it with only $500 million in cash. App. at 326.

That filing also reflects Albertsons' expectation that operating cash flows alone will not cover its remaining $6 billion liquidity needs to maintain its current non-investment grade debt ratings and existing operations. App. at 350. Instead, Albertsons may borrow to cover cash flow needs. App. at 350-51. Albertsons further cautions:

> There can be no assurance, however, that our business will continue to generate cash flow at or above current levels or that we will maintain our ability to borrow under our ABL Facility.

App. at 890, 894. Nevertheless, Albertsons will borrow an extra $1.5 billion to pay the dividend at a time when "borrowing costs are set to rise to the highest level in 15 years . . . ." App. at 631.

F. Albertsons' Speculative Credit Rating and Limited Access to Capital

Based on the planned $4 billion dividend, investment analyst Moody's downgraded Albertsons' speculative grade

liquidity rating. App. at 621. Even before the merger, investment analyst Standard & Poor's affirmed its BB non-investment grade long-term credit rating for Albertsons. App. at 625, 628. The BB rating applies to companies facing "major ongoing uncertainties to adverse business, financial and economic conditions[.]" App. at 628. The non-investment grade designation will make it difficult for Albertsons to raise capital during the expected economic downturn. App. at 348.

G. Procedural History

On November 1, 2022, the State filed its Complaint and Motion for TRO. App. at 1, 25. Albertsons' Response confirms that Respondents negotiated the timing and the amount of the dividend. App. at 301, 305. On November 3, a King County Superior Court commissioner granted the TRO. App. at 333-40. On December 9, the trial court entered an Order Denying Motion for Preliminary Injunction. The trial court also declined the State's request to extend the TRO to allow this Court to consider an emergency motion for injunctive relief. The State

immediately filed a notice of appeal in superior court. The State is simultaneously filing an affidavit stating the type of notice given, as required by RAP 17.4(b).

V. GROUNDS FOR RELIEF

Pursuant to RAP 8.3, this Court should enter an order prohibiting Albertsons from paying its $4 billion dividend until this Court has the opportunity to review the trial court's order on the State's request for a preliminary injunction. This situation readily satisfies the three criteria for such relief.

First, the issues presented are more than debatable. There is significant evidence that payment of the dividend is an unreasonable restraint of trade in violation of RCW 19.86.030 and an unfair method of competition in violation of RCW 19.86.020.

Second, injunctive relief is necessary to preserve the fruits of the State's appeal. If, following the expiration of the TRO, Albertsons pays the $4 billion dividend, it will effectively moot the State's appeal of the denial of the preliminary injunction.

Third, the equities strongly favor preserving the status quo pending appellate review. Payment of the $4 billion dividend imperils competition in Washington's supermarkets. This industry uniquely touches the lives of all Washingtonians.

A. This Court Has Authority to Grant Injunctive Relief

RAP 8.3 gives this Court "authority to issue orders, before . . . acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party."[1] The purpose of this rule is "to prevent destruction of the fruits of a successful appeal." *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). Under RAP 8.3, injunctive relief is available if (1) "the moving party can demonstrate that debatable issues are presented on appeal," (2) "the stay is necessary to preserve the fruits of the appeal for the movant," and (3) relief is justified "after considering the equities of the situation." *Confederated Tribes of*

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[1] While "[t]he appellate court will ordinarily condition the order on furnishing a bond or other security," RAP 8.3, no bond is required for the State. RCW 4.92.080.

the Chehalis Rsrv. v. Johnson, 135 Wn.2d 734, 759, 958 P.2d 260 (1998). The moving party need only demonstrate that the issue is a debatable one to prevail on appeal. *See Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956).

B. The Issues on Appeal Are More than Debatable

It is more than debatable that the superior court erred in denying preliminary injunctive relief. A court may exercise its broad discretion to fashion injunctive relief when the party seeking the preliminary injunction shows: (1) "a clear legal or equitable right"; (2) "a well-grounded fear of immediate invasion of that right"; and (3) "that the acts complained of have or will result in actual and substantial injury." *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (quoting *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)); *see also* RCW 7.40.020. A court must also balance the relative interests of the parties and of the public. *Id.*

"At a preliminary injunction hearing, the plaintiff need not prove" the ultimate merits of its claims. *Nw. Gas Ass'n v. Wash.*

Utils. & Transp. Comm'n, 141 Wn. App. 98, 116, 168 P.3d 98 (2007). Instead, "the trial court considers only the *likelihood* that the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear legal or equitable right, that he reasonably fears will be invaded by the requested disclosure, resulting in substantial harm." *Id.*

1. The State has a clear legal or equitable right

The State has a clear legal right to investigate and enforce the Washington Consumer Protection Act (CPA). RCW 19.86.080. The Washington CPA prohibits "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce." RCW 19.86.030. This prohibition is also enshrined in article XII, section 22 of the Washington Constitution.

The State brings two causes of action: that the agreement between Kroger and Albertsons by which Albertsons pays the dividend constitutes (1) an unreasonable restraint of trade in violation of RCW 19.86.030; and (2) an unfair method of

competition in violation of RCW 19.86.020. The State is likely to succeed on the merits of both claims.

a. The $4 billion dividend is the product of an agreement that unreasonably restrains trade

Respondents' actions constitute an unreasonable restraint of trade in violation of RCW 19.86.030. Under RCW 19.86.030, Plaintiff must allege: (1) an agreement, conspiracy, or combination between two or more entities, and (2) the agreement is an unreasonable restraint of trade. *See Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996) (stating elements of claim under section one of the Sherman Act); *see also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 55, 738 P.3d 665 (1987).

(1) Albertsons and Kroger agreed to the $4 billion dividend

There is significant evidence that Respondents jointly agreed to issue the $4 billion dividend, satisfying the first element of a claim under RCW 19.86.030.

First, in a joint press release announcing the merger, Respondents confirmed that "*[a]s part of the transaction*,

Albertsons Cos. will pay a special cash dividend of up to $4 billion to shareholders." App. at 590 (emphasis added).

Second, Respondents' merger agreement demonstrates that they jointly negotiated the timing and amount of the dividend. App. at 573, 577. Further, "all contracts are formed at a single point in time and are based on the information available at that moment." *Jewel Cos., Inc. v. Pay Less Drug Stores Nw., Inc.*, 741 F.2d 1555, 1564 (9th Cir. 1984). When the parties signed the merger agreement, they both knew that Albertsons' board approved the dividend, and thus the agreement was based on that information.

Third, Respondents admit they discussed the size, method of financing, and timing of the dividend. Albertsons admits that Kroger "sought to confirm the dividend would be (i) appropriately sized." App. at 305. Respondents discussed that the $4 billion special dividend would be financed via $1.5 billion debt and $2.5 billion cash and that the ordinary dividend would remain at $0.48 per year. App. at 379, 385, 387.

Fourth, Albertsons carefully asserts that it decided a year ago, independent of the merger, to return capital to shareholders. But, last year, Albertsons' advisors recommended a return of capital in the form of a stock buyback, which is also known as a tender offer. App. at 759. A tender offer is not a dividend. In June, Albertsons considered a merger with Kroger as an *alternative* to a tender offer. App. at 765. This contradicts Albertsons' claim that it intended to issue the dividend regardless of the merger.

Respondents offer a host of unconvincing explanations for why a merger agreement that incorporates a dividend is somehow not an agreement. For example, Respondents claim there is no agreement because Kroger did not request the dividend. But Kroger signed the merger agreement knowing Albertsons had already voted to issue and would pay the dividend within weeks of signing. App. at 573. Further, Respondents put out a joint press release the next day stating the dividend was "a part of the transaction." App. at 590.

Similarly, Respondents claim that there is no agreement because the dividend is simply a means to determine the purchase price for Albertsons. But (1) Respondents negotiated over the size and timing of the dividend; (2) the merger agreement expressly defines the dividend and caps its maximum amount (App. at 577); and (3) a critical term, the acquisition price, is defined with reference to the dividend. App. at 576.

Respondents' post hoc, self-serving reframing of their negotiations does not change that the two competitors agreed to the dividend.

(2) Respondents' agreement is an unreasonable restraint of trade

Respondents' collaboration and agreement on the $4 billion dividend constitutes an unreasonable restraint of trade. Courts use a continuum of analyses to determine whether concerted action unreasonably restrains trade: (1) *per se*, (2) rule of reason, or (3) quick look analysis. *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013).

Regardless of the standard that the trial court may deem appropriate when assessing the ultimate merits of the State's claims, the State has established a prima facie showing that it is anticompetitive for two competitors—Kroger and Albertsons—to drain one competitor's cash reserves. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005). To the extent that the trial court deems something other than a *per se* analysis appropriate, the burden would shift to Respondents to come forward with plausible and legally cognizable competitive justifications for their conduct. *Id.* Respondents' burden is heavy.

Were Respondents to discharge their burden, the State would still prevail because it can show that anticompetitive effects are likely. Parallel prior acts are direct evidence of anticompetitive effects. *See Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986) ("[P]roof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a

surrogate for detrimental effects." (Citation and internal quotation marks omitted)).

The history of the failed divestitures in the Albertsons-Safeway merger provides an in-market demonstration of the anticompetitive effects on Washington when a grocery company has insufficient liquidity. The controlling private equity shareholder of Haggen drained its liquidity necessary to operate by paying itself a large dividend. Haggen's ability to obtain new funds through loans was crippled. Combined with Albertsons purportedly sabotaging the stores prior to transfer, Haggen went bankrupt within months. *In re HH Liquidation*, 590 B.R. at 219. Ultimately, Albertsons regained 14 stores plus Haggen in the deal. App. at 737-40. Respondents seek to use the same playbook to weaken Albertsons, and potential divestitures, and thwart ongoing competition.

b. The merger agreement is an unfair method of competition under RCW 19.86.020

The State is likely to succeed on the merits of its claim that Respondents engaged in unfair methods of competition. RCW 19.86.020 prohibits "[u]nfair methods of competition . . . in the conduct of any trade or commerce." Conduct that violates the letter of the antitrust laws, such as an agreement in restraint of trade, also constitutes an unfair method of competition. *State v. Black*, 100 Wn.2d 793, 800, 676 P.2d 963 (1984). This Court held that "conduct which threatens an *incipient* violation of" RCW 19.86.030 constitutes a violation of RCW 19.86.020. *Id.* And conduct which violates the *spirit* of the antitrust laws may also constitute an unfair method of competition even though it does not actually threaten to violate the law. *Id.*

Two competitors agreeing to blunt competition is a violation of RCW 19.86.030 and an unfair method of competition under RCW 19.86.020. Even if the agreement to weaken Albertsons (to Kroger's benefit) were not a violation of

RCW 19.86.030, it would still violate RCW 19.86.020 because it violates the spirit of Washington's antitrust laws and is an incipient violation of RCW 19.86.030 in that it will immediately deprive Albertsons of its cash on hand, affecting its ability to compete.

2. The State has a well-grounded fear of immediate invasion of its right to protect consumers

The State has a well-grounded fear of immediate invasion of its right to protect consumers. Albertsons stated that it "intends to seek to overturn the restraint as quickly as possible," and will likely immediately pay the dividend unless prohibited by court order. Press Release, Albertsons Companies, Albertsons Companies Issues Statement Regarding the Temporary Restraint of its Special Dividend Payment as a Result of Washington State Court's Temporary Restraining Order (Nov. 3, 2022), https://investor.albertsonscompanies.com/newsroom/press-releases/news-details/2022/Albertsons-Companies-Issues-Statement-Regarding-the-Temporary-Restraint-of-its-Special-Dividend-Payment-as-a-Result-of-Washington-State-Courts-

Temporary-Restraining-Order/default.aspx. If Albertsons pays the dividend, it will be impossible to restore its competitive position. Further, it is no defense to argue that the harm may be "un-done." *See Sierracin*, 108 Wn.2d at 62-63 (holding that "[n]o finding of irreparable harm need be found" in order to support injunction under CR 65(d) and Uniform Trade Secrets Act).

In an effort to rebut the State's well-grounded fear of an immediate invasion of its right, Albertsons claims that it is a "thriving business." App. at 299. But in other contexts, Albertsons has painted a different picture. In its SEC filings, Albertsons calculated that it needs $10 billion to operate in FY2023. App. at 617. In addition to the $4 billion dividend, Albertsons requires $6 billion to cover a variety of needs, including "interest payments and scheduled principal payments of debt." *Id.* Albertsons will deplete much of its available operating cash and credit line by paying the dividend. In fact, Albertsons plans to drain about 40 percent of its available

$3.76 billion available borrowing ability to pay $1.5 billion of the $4 billion dividend.

Troublingly, Moody's and S&P's did not provide Albertsons with an investment grade rating. App. at 355-56. Thus, rating agencies consider Albertsons risky and illiquid. "It is extremely important for firms without investment grade ratings to hold substantial amounts of cash and other liquid securities," because they "tend to be shut out of bond markets altogether during recessions." App. at 348 (emphasis added). With a recession looming, it is even more critical for Albertsons to retain the little liquidity it has to maintain the status quo and market competition. App. at 348, 353.

"Albertsons' reduced liquidity, combined with its reduced access to capital, and limitations imposed by the merger agreement with Kroger on Albertsons' ability to pursue external financing, in the coming months will make it more difficult for Albertsons to make investments necessary to stay competitive in the markets in which it operates." App. at 352-53. If Albertsons

cannot obtain loans, it will reduce its services and investments in its infrastructure and employees, all of which undercut its ability to operate in a highly competitive market over the next year and hurt Washington grocery consumers, employees, and the economy.

Albertsons has gone to great lengths to argue that it is financially stable. But that argument misses the mark. The dispute is not whether Albertsons *has been* a thriving business on the backs of their employees who worked during the pandemic and their consumers who are paying more for less, but whether, following payment of the $4 billion dividend, Albertsons *will be* a thriving business in the future. On that note, Albertsons' argument fails.

The State has a well-grounded fear that the $4 billion dividend is an irrecoverable, anticompetitive agreement amongst competitors that intentionally weakens Albertsons.

3. Albertsons' dividend will cause the State actual and substantial injury

If the Court does not enjoin the dividend payment, Albertsons will irrecoverably distribute $4 billion to shareholders. This would fly in the face of the long-established object of preliminary injunctions: "to preserve the status quo." *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 528, 98 P.2d 680 (1940).

To obtain an injunction, the State must show that "the acts complained of are either resulting in or will result in actual or substantial injury to [the plaintiff]." *Kucera*, 140 Wn.2d at 209. This showing requires that there be inadequate legal remedies. *Id.* There are inadequate legal remedies if "(1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature." *Id.* The State satisfies these requirements.

First, money damages will be insufficient to restore competition lost as a result of Albertsons' ongoing weakened condition. Once Albertsons distributes the $4 billion, the State cannot recoup it.

Second, the damages go beyond the $4 billion dividend, and the impact cannot be easily ascertained. If Albertsons disperses the dividend and then enforcers block the merger, Albertsons would be a weakened competitor facing Kroger. If enforcers allow the merger, divested stores—which Albertsons may underfund while waiting for regulatory approval—will lack Kroger's financial backing and will face Kroger's fierce competition. The Haggen debacle proves the point. There was no remedy for consumers when Haggen went bankrupt; rather, its failure allowed Albertsons to reacquire stores and further impair competition. *See* App. at 737-40.

Third, any damages for anticompetitive behavior will be insufficient to restore competitive grocery markets for Washington consumers. Washington has an ongoing

anticompetitive harm from the failed Haggen divestiture. If Kroger and Albertsons are permitted to irreversibly distribute $4 billion, weakening Albertsons and the divested stores, Washington's grocery markets risk further irreversible consolidation.

Past wrongs may appropriately be considered in an injunction proceeding if they are likely to recur. *Fed. Trade Comm'n v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). Washington's experience with Albertsons' 2014 acquisition of Safeway pursuant to a similar proposal serves as a warning against allowing future similar deal structures to proceed. *See supra* at 6 (reflecting deprivation of liquidity and allegations of intentional sabotage of divested stores). The State rightly worries that Kroger and Albertsons are using the playbook from the Haggen debacle and that the $4 billion dividend is an excuse for Albertsons to fail to invest in stores and continue to compete with Kroger in the interim.

Injunctive relief is necessary to protect Washington's consumers and ensure that Albertsons can remain a viable competitor in Washington during the pendency of merger review—and thereafter—if the deal is abandoned or fails to receive regulatory approval.

4. The balance of equities weighs heavily in the State's favor

The balance of equities greatly favors the State. The $4 billion dividend imperils competition in Washington's supermarkets. Washington consumers have a strong interest in maintaining a competitive grocery marketplace. *See* App. at 653-54 (listing the anticompetitive consolidation of Washington markets from Albertsons acquiring Safeway). A competitive grocery market means more choices at lower costs. The financial interests of Albertsons' shareholders do not override the public interest in preventing anticompetitive harm. *Fed. Trade Comm'n v. Weyerhaeuser Co.*, 648 F.2d 739, 741 (D.C. Cir. 1981) (holding that private equities may not "be given conclusive effect at the nearly complete expense of the public

interest also present" and that the companies acted "at their peril" in trying to consummate a transaction in the short gap between a TRO denial and enforcer appeal). And, while Albertsons and Kroger emphasize how Albertsons is poised to face significant legal and financial liability if it is prohibited from paying the dividend, the two competitors agreed to the dividend—and the extremely rushed payout, which appeared timed to preclude regulatory review—at their peril.

The $4 billion dividend would leave Albertsons weakened and poised to underfund divested stores in the interim. Respondents' interest is outweighed by the public interest in vibrant competition between Kroger and Albertsons during the pendency of the merger review.

C. The Equities Support Injunctive Relief Under RAP 8.3

Injunctive relief under RAP 8.3 is justified "after considering the equities of the situation," *Confederated Tribes of the Chehalis Rsrv.*, 135 Wn.2d at 759, for the same reasons that

the balance of the equities support an injunction. *See supra* at 29-30.

D. This Motion Must Be Decided on an Emergency Basis to Preserve the Fruits of the State's Appeal

Unless this Court acts promptly, the fruits of the State's appeal will be lost. Absent an injunction, Albertsons will pay the $4 billion dividend before this Court can fully consider this motion. Payment of the dividend cannot be undone, and it is precisely the action that the State's suit aims to prevent. This Court can grant emergency relief on an interim basis. As in *Washington Federation of State Employees*, this Court can enjoin the challenged action pending consideration by the en banc court. 99 Wn.2d at 882.

VI. CONCLUSION

This Court should promptly enter an order under RAP 8.3 enjoining Albertsons from paying its proposed dividend, pending further order of this Court.

This document contains 4,853 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 9th day of December, 2022.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served all parties, according to the Court's protocols for electronic filing and service.

DATED this 9th day of December, 2022, at Olympia, Washington.

s/ Leena R. Vanderwood
LEENA R. VANDERWOOD
Legal Assistant