

Kroger Files Motion to Enjoin the FTC’s Administrative Merger Challenge

FTC’s in-house tribunal violates Constitutional protections against federal government overreach

Company remains prepared to defend merger with Albertsons in upcoming federal court trial

CINCINNATI, August 19, 2024 – The Kroger Co. (NYSE: KR) today filed a motion for preliminary injunction in the U.S. District Court, Southern District of Ohio, against the Federal Trade Commission’s (FTC) administrative proceeding challenging the company’s merger with Albertson’s Companies, Inc. The company argues that by proceeding in its administrative tribunal, in addition to the separate action in federal court, the FTC is violating Constitutional protections.

The motion details how the FTC’s administrative proceeding against the merger clearly violates the Constitution in two areas:

- First, the FTC violates Article II of the Constitution because the Administrative Law Judge presiding over the administrative proceeding is not removable by the President of the United States. This principle was recognized and applied by the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010).
- Second, the FTC violates Article III of the Constitution by seeking to adjudicate Kroger’s private rights to contract with another private party administratively through the Executive Branch rather than in the independent Judicial Branch. This standard was reinforced this past term by the Supreme Court in *SEC v. Jarkesy* (2024).

Furthermore, the FTC has sought to split its challenge to the merger into two separate tribunals in an inappropriate attempt to receive multiple opportunities to litigate the same issues. Despite forcing Kroger to participate in this unconstitutional administrative proceeding, the FTC has also filed a motion in the federal court proceedings seeking to block the merger for the duration of its administrative proceeding – which will likely take several years to resolve. Evidentiary hearings for the federal court proceeding are set to be on August 26 in the District of Oregon.

“The merger between Kroger and Albertson’s is squarely focused on ensuring we bring customers lower prices starting day one while securing the future of good-paying union jobs,” said Rodney McMullen, Kroger Chairman and CEO. “We stand prepared to defend this merger in the upcoming trial in federal court – the appropriate venue for this matter to be heard – and we are asking the Court to halt what amounts to an unlawful proceeding before the FTC’s own in-house tribunal.”

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About Kroger

At The Kroger Co. (NYSE:KR), we are dedicated to our Purpose: to Feed the Human Spirit™. We are, across our family of companies nearly 420,000 associates who serve over eleven million customers daily through a seamless digital shopping experience and retail food stores under a variety of banner names, serving America through food inspiration and uplift, and creating #ZeroHungerZeroWaste communities.

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