No. 21-86

In the Supreme Court of the United States

AXON ENTERPRISE, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and-desist orders.

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INTEREST OF *AMICUS CURIAE*[1]

The American Hospital Association (AHA) represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. Its members are committed to improving the health of the communities that they serve, and to helping ensure that care is available to and affordable for all Americans. The AHA educates its members on healthcare issues and advocates on their behalf, so that their perspectives are considered in formulating health policy. One way in which the AHA promotes its members' interests is by participating as an *amicus curiae* in cases with important and far-ranging consequences for health care.

The AHA's member-hospitals face often face significant costs—and sometimes insurmountable obstacles to efficient consolidation—from unwarranted and constitutionally infirm FTC enforcement proceedings. Hospitals' inability to obtain timely judicial relief can force them to divert resources better spent on providing care or other services, or to forgo consolidation and restructuring that would improve the quality of care while reducing its cost. As a result, the AHA and its members have an acute interest in the question presented in this case. Unless federal courts have jurisdiction to review pre-enforcement challenges, it will be impracticable—if not impossible—for hospitals to obtain timely and impartial judicial relief at all.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus*, its members, or its counsel made a financial contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a hospital is targeted by the FTC, the process that results is costly, protracted, and stacked against the hospital—regardless of the merits of its position. For the AHA and its members, this problem has worsened dramatically in recent years: The healthcare sector is the target of *nearly half* of FTC enforcement actions, and the agency has declared hospitals to be a priority target for the coming decade. This is all the more troubling given recent statements by the FTC's Chair, who has touted recent enforcement actions that "push the envelope." Bryan Koenig, "FTC's Khan More Worried About Inaction Than Blowback," Law360 (April 22, 2022).[2] "Even if FTC enforcement gets struck down as overreach, [the FTC's Chair] said, 'there are huge benefits to still trying.'" *Ibid.*

Hospitals are rightly concerned about such "overreach," and this Court should be too. *Ibid.* The chilling effects of unlawful enforcement actions permit the FTC to win even by losing, which is not how the rule of law is supposed to work. Having been subjected to this one-sided process time and again, hospitals too often conclude that it is best to simply fold, even when the enforcement action is unconstitutional, the merger would be procompetitive, or the community would receive better care at a lower cost. After all, hospitals know that when it comes to FTC enforcement actions, the house always wins.

In fact, the FTC has not lost before its own administrative tribunal *in a quarter century*. This unhappy

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[2] https://www.law360.com/articles/1486611.

state of affairs is all the more frustrating because it is due entirely to an "uncodified, non-public, black-box 'clearance' process" through which hospitals are subject to the FTC's protracted and often unfair proceedings (Pet. Br. 30), while health insurance companies are subject to enforcement by the Justice Department.

Hospitals should not be compelled to endure years of costly and inequitable administrative proceedings before being permitted to challenge the constitutionality of those proceedings in federal court. Nor should other businesses. Timely access to federal courts is necessary to maintain the rule of law in a system under which an administrative agency not only makes, but also enforces and adjudicates, the rules. What's more, Article III courts are far better suited than agency tribunals to decide whether the agency's own structure complies with the Constitution. As this Court has long recognized, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," *Oestereich* v. *Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968); instead, "[t]hat is a judicial function," *Soc. Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 369 (1946); see *ibid.* ("An agency may not finally decide the limits of its statutory power.").

The high stakes of FTC enforcement, and the prohibitive cost of fighting the FTC for long enough to raise constitutional concerns before a neutral Article III court, make the Ninth Circuit's decision deeply problematic for both the rule of law and the quality of health care. As to the rule of law, "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within

th[e] statutory structure.'" *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Board*, 561 U.S. 477, 489 (2010) (citing *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994)). Congress should not be deemed to have stripped courts of the jurisdiction to hear constitutional claims absent indications far clearer than those here. As to the quality of healthcare—a sector comprising almost one-fifth of the U.S. economy—a constitutional, fair process of judicial review is the best way to ensure that hospitals can pursue pro-competitive, efficient structures that give Americans the best care at the best cost. This Court should reverse.

ARGUMENT

I. The FTC's unchecked power is particularly harmful to hospitals.

For the reasons discussed in Axon's brief (at 22-46) and the dissenting opinion below, the Ninth Circuit's decision would be wrong even if it caused little harm. Unfortunately, however, the decision threatens to impose a host of negative consequences, especially in the critical field of American healthcare.

A. Hospital mergers often reduce costs, improve care, and benefit patients.

Hospital mergers provide a range of benefits—especially for small and rural hospitals, which typically operate on razor-thin margins. These benefits were recently catalogued in one of the most comprehensive econometric analyses of contemporary hospital acquisitions. See Sean May, Monica Noether, and Ben Stearns, *Hospital Merger Benefits: An Econometric Analysis Revisited* at 1 (Aug. 2021) ("*Hospital Merger*

Benefits").[3] This research found that hospital acquisitions can generate substantial economic gains and reduce costs, including by increasing hospital scale, standardizing clinical practices, reducing hospitals' cost of capital, and allowing hospitals to avoid duplicative capital expenditures. Mergers can also enable hospitals to improve clinical quality by standardizing clinical protocols, investing to upgrade services at acquired hospitals, and deploying additional staff where needed.

These kinds of merger efficiencies, in turn, have two major benefits for patients. *First*, "[b]y eliminating administrative redundancies operating costs are reduced or shifted towards patient care," which "improves patient outcomes." See Ken Summers, *FTC Crackdowns on Mergers Could Harm Rural Healthcare*, RealClear Markets (Dec. 13, 2021) ("Summers, *FTC Crackdowns*").[4] *Second*, merger efficiencies allow struggling hospitals to pass cost savings on to their patients. Monica Noether, Sean May, and Ben Stearns, *Hospital Merger Benefits: Views from Hospital Leaders and Econometric Analysis–An Update* (Sept. 9, 2019) ("*Views from Hospital Leaders*").[5] Put simply, economic analysis makes clear that hospital mergers allow hospitals to provide patients with better care at lower prices.

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[3] https://www.aha.org/system/files/media/file/2021/08/cra-merger-benefits-revisited-0821.pdf.

[4] https://www.realclearmarkets.com/articles/2021/12/13/ftc_crackdowns_on_mergers_could_harm_rural_healthcare_807469.html.

[5] https://www.aha.org/system/files/media/file/2019/09/cra-report-merger-benefits-2019-f.pdf.

These are not hospital mergers' only benefits. Hospital mergers also increase geographic coverage by bringing needed specialty services and management capabilities to new markets and by expanding them in underserved markets. Kaufman Hall, *Partnerships, Mergers, and Acquisitions Can Provide Benefits to Certain Hospitals and Communities* at 6 (Oct. 12, 2021).[6] For example, one recent study of more than 400 rural hospitals "found a significantly greater reduction in inpatient mortality for several common conditions (*i.e.*, AMI, heart failure, acute stroke, and pneumonia) among patients admitted to rural hospitals that merged or were acquired than among patients admitted to rural hospitals that remained independent." H. Joanna Jiang, et al., *Quality of Care Before and After Mergers and Acquisitions of Rural Hospitals*, 2021 JAMA Network Open 4(9) 7 (Sept. 2021); see also Erwin Wang, Simon Jones, Sonia Arnold, et al.; *Quality and Safety Outcomes of a Hospital Merger Following a Full Integration at a Safety Net Hospital*, JAMA Network Open 5(1) 1 (Jan. 2022) (finding that "a full-integration approach to a hospital merger was associated with an absolute reduction in crude and adjusted mortality rates").

Furthermore, hospital acquisitions can reduce costs by increasing hospital scale, standardizing clinical practices, and reducing the hospitals' cost of capital or allowing hospitals to avoid duplicative capital expenditures. See *Views from Hospital Leaders*; *Hospital Merger Benefits*. For example, merging parties can "consolidate the provision of certain types of care,

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[6] https://www.aha.org/system/files/media/file/2021/10/KH-AHA-Benefitsof-Hospital-Mergers-Acquisitions-2021-10-08.pdf.

such as cardiac surgery, at a single site," which can "improve utilization and efficiency relative to operating two separate cardiac surgery programs, each of which might be underutilized." Norman Armstrong & Subramaniam Ramanarayanan, *Taking Stock of the Efficiencies Defense: Lessons from Recent Health Care Merger Reviews and Challenges*, 82 Antitrust L.J. 579, 581 n.6 (2019). Mergers also can generate substantial savings and better patient outcomes from improved and integrated information technology systems and data analytics, which are increasingly important to delivering high-quality, cost-effective care. See *Views from Hospital Leaders* at 14. And as hospitals face rapidly rising costs and unsustainable financial pressures, these efficiencies can enable some hospitals to avoid bankruptcy and remain open, or even expand. See Testimony of the Am. Hosp. Ass'n for the Subcomm. on Competition Policy, Antitrust, and Consumer Rts. of the Comm. on the Judiciary of the U.S. Senate, *Antitrust Applied: Hospital Consolidation Concerns and Solutions*, at 2 (May 19, 2021).[7]

The benefits that often result from mergers have been particularly pronounced during the pandemic, especially for hospitals in rural areas.

B. The FTC subjects hospital mergers to disproportionate scrutiny.

Despite their generally pro-competitive and pro-patient benefits, hospital mergers face disproportionate regulatory scrutiny from the FTC. As a 2019 analysis explains, "of the 154 merger enforcement actions

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[7] https://www.aha.org/testimony/2021-05-19-aha-testimony-antitrust-applied-hospital-consolidation-concerns-and-solutions.

that the FTC brought from the 2000 fiscal year through the 2018 fiscal year, 75 pertained to parts of the health care sector. The agency brought still more non-merger actions." Nathan E. Wilson, *Editor's Note: Some Clarity and More Questions in Health Care Antitrust*, 82 Antitrust L.J. 435 (2019). Likewise, 46% of the FTC's enforcement actions in 2020 were in the healthcare sector.[8]

In prepared remarks, an FTC Commissioner noted the 2019 study, then added that "a significant portion of [those actions] focused on healthcare providers generally and hospitals in particular." Rebecca Kelly Slaughter, *Antitrust and Health Care Providers: Policies to Promote Competition and Protect Patients*, Address to the Center for American Progress (May 14, 2019).[9] Less than a year later, the FTC threatened to *increase* its targeting of hospitals. Rich Daly, *Increased FTC scrutiny of hospital deals coming, commissioner says*, Healthcare Fin. Mgmt. Assoc. (Jan. 20, 2020).[10] Then, in July 2021, the FTC declared "hospitals" were a "[p]riority target." FTC, *FTC Authorizes Investigations into Key Enforcement Priorities* (July 1,

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[8] FTC, *Stats & Data 2020* (Apr. 2021), https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020.

[9] https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf.

[10] https://www.hfma.org/topics/news/2020/01/increased-ftc-scrutiny-of-hospital-deals-coming-commissioner-says.html.

2021).[11] Days later, President Biden issued an executive order urging the FTC to enforce the antitrust laws "vigorously" with a focus on a few key markets, including "hospitals." Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).

C. The FTC's disproportionate scrutiny deters pro-competitive hospital mergers.

That the FTC targets hospital mergers does not mean that its enforcement actions are justified. For instance, from 1994 to 1999, the FTC lost four consecutive hospital merger cases in the federal courts. See *FTC* v. *Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC* v. *Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC* v. *Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC* v. *Hosp. Bd. of Directors of Lee Cty.*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla.), *aff'd*, 38 F.3d 1184 (11th Cir. 1994). Even when such wrongful enforcement actions are defeated, however, they take a toll—both in terms of the costs of defense and in terms of deterring pro-competitive mergers.

Unfortunately, the very hospitals that are most likely to need to consolidate are most *unlikely* to have the resources to sustain a prolonged struggle with the FTC. Even before the pandemic, "about one in five hospital partnership transactions involved a financially distressed hospital, many at risk of imminent closure." Kenneth Kaufman, *Industry Voices—In a time of need, hospitals must be able to transform*,

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[11] https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities.

Fierce Healthcare (May 27, 2021).[12] The pressure on rural and smaller hospitals "has only accelerated" with COVID: "in 2020 alone, 21 rural hospitals closed their doors and more than three dozen entered bankruptcy." See Summers, *FTC Crackdowns*.

Although small and rural hospitals often need to merge into large healthcare systems to survive, they cannot afford to resist an FTC enforcement action to the point of obtaining review and relief in federal court. Responding to FTC investigations and enforcement actions is often prohibitively expensive. In this case, Axon spent more on FTC proceedings than it did in the challenged acquisition. See Pet. 10-11. Given the thin margins for many hospitals—about 2.5% in 2021, Kaufman Hall, *National Hospital Flash Report*, (Jan. 2022)[13]—the cost of a defense alone can chill or kill a pro-competitive, pro-patient transaction.

The prospect of having to defend transactions on multiple fronts and at great cost has deterred many hospitals and health systems from pursuing lawful, pro-competitive transactions that would benefit the communities and consumers that they serve. And it is not only small hospitals that are chilled. Larger healthcare providers—like Inova Health System

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[12] https://www.fiercehealthcare.com/hospitals/industry-voices-a-time-need-hospitals-must-be-able-to-transform.

[13] https://www.kaufmanhall.com/sites/default/files/2022-01/National-Hospital-Flash-Report_Jan2022.pdf.

Foundation,[14] OSF Healthcare System,[15] and Reading Health System[16]—also simply abandoned proposed transactions rather than face a lengthy and expensive administrative litigation with the FTC.

Unconstitutional enforcement actions can thus derail efficient mergers that would promote patient care simply because it costs too much to reach the stage at which a neutral federal court can hear constitutional challenges. That may count as a victory for the FTC, but it is not a victory for patients, hospitals, the economy, or the rule of law.

II. FTC enforcement actions raise constitutional concerns that should be promptly addressed by Article III courts, but are not, to the detriment of healthcare providers and patients.

As discussed above, hospitals are particularly vulnerable to the FTC's exercise of its enforcement power. Unfortunately, that power can be exercised in a way that violates fundamental constitutional principles.

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[14] Shannon Henson, *Facing FTC Challenge, Hospitals Drop Merger Plans*, Law360 (June 10, 2008), http://www.law360.com/articles/58795/facing-ftc-challenge-hospitals-drop-merger-plans.

[15] Stewart Bishop, *Ill. Health Systems Ditch Merger Plans After FTC Antitrust Suit*, Law 360 (Apr. 12, 2012), http://www.law360.com/articles/329680/ill-health-systems-ditch-merger-plans-after-ftc-antitrust-suit.

[16] Dan Packel, *Pa. Hospital Merger Killed After FTC Broaches Challenge*, Law360 (Nov. 19, 2012), http://www.law360.com/articles/395215/pa-hospital-merger-killed-after-ftc-broaches-challenge.

A. FTC enforcement raises due process concerns.

The "essential constitutional promise" of due process is the right to a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004). Under the Ninth Circuit's decision, the statutory scheme here fails to deliver on that promise.

The FTC's Commissioners and their staff investigate claims. Like a prosecutor, the Commissioners initiate enforcement proceedings by filing a complaint. 15 U.S.C. § 45(b). The ALJ then adjudicates the complaint. But the Commissioners then circle back and act as the final judges of whether the party has violated any laws—effectively reviewing the validity of their own actions in seeking to impose liability. See 16 C.F.R. §§ 3.51(b), 3.52.

As should come as little surprise, when the Commission serves as both prosecutor and judge, it has found liability *in every case* brought before it in the past 25 years. "In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed." Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* 6 (Feb. 26, 2015).[17]

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[17] https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf.

By ruling in its own favor 100 percent of the time, the FTC has certainly vindicated the *concerns* that led the Framers to establish a constitutional right to due process. But it has not always vindicated due process itself, and hospitals understandably feel that the deck is stacked against them.

Indeed, in one 2008 hospital merger challenge, the FTC took the extraordinary step of appointing a sitting Commissioner to serve as the presiding ALJ. See Jeffrey W. Brennan & Sean P. Pugh, *Inova and the FTC's Revamped Merger Litigation Model*, 23 Antitrust 28 (2008). Commissioner Rosch participated in the FTC's merger investigation, meeting with the FTC's investigatory staff as the FTC weighed whether to challenge the merger. Commissioner Rosch met with the respondents, their lawyers, and their retained economists, who were presenting their case to him in his capacity as a Commissioner. Less than a month later, the FTC announced Rosch's appointment as the presiding ALJ. Remarkably, Commissioner Rosch denied the motion to recuse himself. *Inova Health Sys. Found.*, No. 9326, 2008 WL 2307161, at *1 (F.T.C. May 29, 2008). This was not merely an agency wearing two hats; it was the same *individual* within the agency doing so. Not surprisingly, with the outcome preordained, the respondents abandoned the merger a week later.

B. These due process concerns are underscored by material differences between DOJ and FTC enforcement actions.

The contrast between the Justice Department Antitrust Division's approach to antitrust enforcement and that of the FTC underscores these due process concerns and the questions of fundamental fairness

that they raise. The two agencies have separate portfolios in the healthcare industry, with the DOJ handling health insurance and the FTC handling hospitals. But there are material differences between the Justice Department's merger challenges and those of the FTC. As a result, "the choice of which antitrust enforcement agency is to review a proposed merger is outcome-determinative." See Raymond Z. Ling, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After* Whole Foods, 75 Brook. L. Rev. 935, 938 (2010). Parties haled before the FTC receive less procedural protection, are subject to different substantive standards, and have less opportunity for judicial review. See Compl. ¶ 32. And unfortunately for regulated parties, which procedural protections apply depends "on a black-box system that allocates some cases to the FTC's administrative process and others to the [Justice Department] and federal court without even the felt need to articulate the sorting criteria." Pet. Br. 1. These unjustified—and arbitrary—differences underscore the inadequacies of the FTC's arrangement.

Whereas the Justice Department litigates transactions in a full hearing on the merits in federal court before an impartial judge, the FTC's practice is to pursue a preliminary injunction in federal court while at the same time commencing internal administrative proceedings in which the agency has a decided advantage. See Antitrust Modernization Commission, *Report and Recommendations* 130 (Apr. 2007) ("Antitrust Modernization Report") ("The DOJ generally seeks a permanent injunction * * *, resolving the question fully and completely in a single proceeding

before a judge," whereas "the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court" while pursuing "administrative Part III proceedings" that continue even "if it fails to obtain a preliminary injunction"). Moreover, federal judges apply a different—and arguably more deferential—standard of review to a request for a preliminary injunction from the FTC, as compared to the same request from the Justice Department. *Ibid.*; see also *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (holding that the FTC may obtain an injunction under a standard "more lenient" than "the more stringent, traditional 'equity' standard for injunctive relief"). As then-Judge Kavanaugh once observed, the standard is so deferential that the FTC can "just snap its fingers and temporarily block a merger." *Id.* at 1052 (Kavanaugh, J., dissenting). Thus, parties whose proposed transaction is reviewed by the FTC can expect a more burdensome enforcement process, a higher likelihood of having to abandon the transaction, and potentially a different substantive outcome. See Antitrust Modernization Report at 131.

As a primary target of FTC enforcement, hospitals have been harmed by the different process and standard of review applicable to FTC enforcement actions under Section 7 of the Clayton Act. Although hospitals are technically subject to antitrust enforcement by both the FTC and Justice Department, the two agencies have developed a "black box" clearance process through which the agencies consult and decide which will investigate the merger. Pet. App. 35 (Bumatay, J., concurring in the judgment in part and dissenting in part). Although not "codified in any statute, rule, or regulation" (*ibid.*), as a matter of recent historical practice, the FTC reviews all transactions

involving hospitals. Thus, *every* hospital transaction challenged by the FTC is subject to the FTC's unfair and punitive two-track enforcement process, as well as the arguably more lenient standard of review that applies to FTC requests for a preliminary injunction. As Axon argues, "[t]he outcome of this nowhere-codified, black-box clearance process makes a massive difference in terms of the process afforded to regulated parties." Pet. Br. 8-9. And these different processes are often outcome-determinative.

Hospitals have been adversely affected by the FTC's ability to use its own internal administrative process to challenge a transaction. One difference between the Justice Department's approach and that of the FTC is that the FTC can give itself two bites at the apple: it can seek a federal injunction and, as a fallback, simultaneously pursue administrative litigation in its home court.

The FTC's two-track process, as compared to the Justice Department's more streamlined approach, costs transacting parties both more time and more money. For example, when the Justice Department sued to prevent the American Airlines and US Airways merger, a bench trial was scheduled to start within three months of the complaint's filing. The transacting parties could then have appealed a ruling in the Department's favor to a federal court of appeals. In contrast, when ProMedica Health System and St. Luke's Hospital merged, an FTC ALJ took an additional nine months to rule after a federal judge granted the FTC's request for a preliminary injunction. The hospitals then appealed the ALJ's decision to the full FTC, which took an additional three months to uphold the ALJ's decision. Only then—one year after a federal judge granted the FTC's request

for a preliminary injunction—could the hospitals appeal the FTC decision to a federal court of appeals. Not surprisingly, this costly, byzantine process deters a host of pro-competitive mergers.

CONCLUSION

The FTC's role of promoting a healthy economy by preventing anti-competitive mergers is an important one. But to ensure that its aggressive enforcement does not chill important pro-competitive activity, the FTC should have to play that role consistent with due process and basic principles of federal jurisdiction. Because of their inability to seek early judicial review of unconstitutional FTC actions, hospitals have been deterred from pursuing efficient mergers that would promote care for the community and patient wellbeing while reducing costs. If the Ninth Circuit's decision is allowed to stand, that chilling effect will only worsen. Both controlling precedent and sound policy require that the decision below be reversed.

Respectfully submitted,

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