IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN INVESTMENT COUNCIL, and LONGVIEW CHAMBER OF COMMERCE, *Plaintiffs*, *v.* FEDERAL TRADE COMMISSION and ANDREW N. FERGUSON, in his official capacity, *Defendants*.	Case No. 6:25-cv-0009-JDK

BRIEF OF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION AND FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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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 they serve and to helping ensure that care is available and affordable for all Americans.

The Federation of American Hospitals is the national representative of more than 1,000 leading taxpaying hospitals and health systems throughout the United States. Its members provide patients in urban and rural communities with access to high-quality, affordable healthcare. Those members include teaching and non-teaching acute, inpatient-rehabilitation, behavioral-health, and long-term care hospitals. They provide a wide range of acute, post-acute, emergency, children's, cancer-care, and ambulatory services.

Hospitals, including amici's members, currently face severe fiscal challenges and have continued to suffer from the after-effects of the COVID-19 pandemic. Historic inflation and workforce shortages have driven up costs, Medicare reimbursements have lagged behind, and hospitals collectively have lost billions of dollars in the last five years. As a result, numerous hospitals have been forced to close, impeding surrounding communities' access to much-needed care.

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* No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Mergers are a critical tool to address those concerning and destabilizing trends. Often, mergers represent struggling hospitals' only realistic path to survival. Mergers can produce economies of scale, resulting in vital reductions to operating expenses, improvements to the standard of care, and decreases in patient mortality. And they can preserve and even enhance competition by ensuring that multiple healthcare providers in a given geographic area are able to remain in operation and continue serving their communities.

The Federal Trade Commission (FTC), however, has needlessly taken a major step backwards by adopting a misguided and unnecessary overhaul of its premerger-notification process. The FTC's existing notification process had functioned well for decades and earned accolades from many quarters, and the agency itself had lauded its longstanding regime. But in the regulation under review, the FTC abruptly revamped that process in a manner that severely undermines its efficiency without enhancing its efficacy. The FTC's new protocol demands a mountain of additional information at the initial step of its review of a merger—including lengthy and contestable "descriptions" about a merger's impact on competition—while threatening penalties for giving the agency a purportedly "wrong" answer.

The FTC's overhauled regime will significantly increase the complexity and costs of pursuing valuable merger activity in the hospital sector, all while producing little or no benefit to the FTC or the public. Amici and its members have a significant interest in contesting the FTC's de facto tax on merger activity.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly half a century, the FTC and Department of Justice (DOJ) have vigorously exercised their authority under the Hart-Scott-Rodino (HSR) Act to review proposed mergers for compliance with the antitrust laws, including many proposed mergers involving hospitals. Throughout that time, the FTC had struck an effective balance in its premerger-notification process: Parties to a merger had to submit a mandatory notification providing limited but key information about the transaction. The agencies then had 30 days to review that information and determine whether more comprehensive disclosures were needed.

That sensible, streamlined process has been widely lauded by businesses, scholars, and the FTC alike for its efficacy and simplicity. Decades of experience demonstrate that the agencies generally have had no difficulty determining from that initial submission whether additional review is warranted. That has been true of mergers in the hospital sector as well. The agencies' track record and scholarship cited by the FTC itself has confirmed that those agencies have had no trouble under the existing process discerning whether more information and closer review are needed.

Yet in a regulation adopted in the final months of the outgoing Administration, the FTC sabotaged its own success by displacing its longstanding, straightforward framework for premerger notifications with a needlessly onerous new paradigm. Following a "comprehensive redesign of the premerger notification process," *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42,178,

42,180/3 (June 29, 2023), the FTC adopted a new first-step form that requires virtually all companies pursuing a merger to disclose voluminous information to the agency in exacting detail. The FTC's transmogrified form goes far beyond facts that the FTC or DOJ could plausibly need to determine whether further review is warranted—or that the agencies realistically could digest in 30 days. The rewritten premerger-notification form even includes a new requirement to submit "narratives" of legal argument—which the agency later relabeled "description[s]"—about the proposed merger's competitive effects. *Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216, 89,310/1 (Nov. 12, 2024) (Final Rule).

The FTC's overhaul of its HSR-disclosure regime is an ersatz solution in search of a problem. Tellingly, the agency has not identified a single specific, problematic merger that slipped through its existing mandatory-disclosure process but that its reimagined form would have flagged for further review. The regulation's massively outsized burdens and lack of any antitrust benefit make the FTC's real aims clear: to impose a tax on mergers and thereby discourage their occurrence.

The FTC attempted to reverse engineer a basis for its economy-wide transformation of the premerger protocol by citing supposed risks from mergers in the hospital industry. But the FTC has matters backwards. Far from supporting a dramatic expansion of premerger notifications, the experience of hospital mergers further confirms that the FTC's new rule is arbitrary and unwarranted. That is so for at least three reasons.

First, in holding out hospital mergers as purported evidence that problematic mergers have gone undetected, the FTC ignored the vital benefits—including preserving and enhancing competition—that hospital mergers foster but that the FTC's de facto merger tax threatens to destroy. Ensuring continued access to healthcare is a paramount concern for hospitals. But unprecedented challenges—including inflation, chronic underpayments by the government, and the lingering effects of the pandemic—have made it harder than ever for hospitals to survive. The recent passage of new legislation will only exacerbate these problems. Mergers help to answer those existential challenges by permitting hospitals to reduce costs and keep their doors open to their communities.

Second, the FTC's hospital-merger claim fails on its own terms. The FTC struggled unsuccessfully to offer a single example of a hospital merger raising antitrust concerns that its longstanding initial disclosures failed to flag but that its new mandated disclosures would catch. The FTC instead tried to backfill with a handful of academic studies, but those studies undermine the FTC's contentions. And the FTC's and DOJ's history of merger review and enforcement in the hospital context belies any FTC claim that its current notification process has resulted in underenforcement.

Third, the FTC's new regime is a misfit for hospital mergers for multiple reasons, and that mismatch vividly illustrates the arbitrariness of the FTC's blunderbuss approach. The FTC's prior, time-tested protocol afforded the agency flexibility to request additional information that is actually relevant to the sector and

transaction at issue. But the FTC's one-size-fits-all rule will reflexively require information from hospitals that—whatever its value for other transactions—is irrelevant to healthcare mergers. The Final Rule's untailored approach thus will impose significant and unwarranted costs on those sectors of the economy that can least bear it for no discernible return. The FTC also ignored various other legal frameworks that look out for potentially anticompetitive conduct in the hospital industry, undercutting the FTC's premise that purportedly problematic hospital mergers support imposing a heavy-handed disclosure regime.

The Court should hold unlawful and set aside the FTC's Final Rule as arbitrary and capricious and permanently enjoin the regulation's enforcement.

ARGUMENT

The FTC invoked supposed experience with the hospital sector to support its Final Rule. Yet the agency ignored the medical profession's prime directive: First, do no harm. The FTC's wholesale rewriting of its premerger-notification form is not merely unnecessary to address any real-world problem in the healthcare industry, but in fact threatens significant harm to hospitals and the communities they serve. The agency's costly cure will prove far worse than the non-existent malady.

I. The FTC Ignored The Vital Role Of Mergers In Helping Hospitals Overcome Severe Economic Difficulties

The FTC flouted the bedrock tenet of administrative law that "an agency cannot simply ignore 'an important aspect of the problem'" it is addressing, *Ohio* v. *EPA*, 603 U.S. 279, 293 (2024) (quoting *Motor Vehicle Manufacturers Ass'n of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)), by

disregarding the critically important role mergers play in the hospital industry. When invoking hospitals in the Final Rule as support for its new, highly burdensome premerger-notification regime, the FTC simply posited that there are "information gaps in the current" disclosure regime and that the agency has an "interest in preventing hospital mergers that may violate the antitrust laws." 89 Fed. Reg. at 89,268/2-3. But the FTC glossed over the crucial fact—which amici and other commenters highlighted—that mergers are highly beneficial, even essential, in enabling the hospital industry to navigate severe economic challenges. And the agency was willfully blind to the negative effects that its new de facto tax on mergers will correspondingly create.

A. Hospitals Face Acute Economic Challenges

Hospitals today face unprecedented economic difficulties. As AHA warned in its comment letter, "[t]he FTC's proposed amendments could not come at a worse time for hospitals and health systems." AHA Cmt. 9. Historic inflation has caused the cost of medical supplies and equipment to soar, and workforce shortages have further increased hospitals' costs. See AHA, *America's Hospitals & Health Systems Continue To Face Escalating Operational Costs & Economic Pressures as They Care for Patients & Communities* 1 (Apr. 2024) (*Costs of Caring*), https://tinyurl.com/p3c54b5p. Between 2021 and 2023, for example, hospitals' labor expenses increased by more than $42.5 billion. *Id.* at 7. And hospitals were forced "to turn to expensive contract labor to fill gaps," resulting in $51.1 billion expended on contract staff in 2023 alone. *Ibid.*

Such dramatic labor-cost surges are particularly problematic for hospitals because labor on average accounts for "nearly 60% of the average hospital's expenses." *Ibid.*

Instead of keeping pace with cost increases, however, hospitals' funding increasingly has lagged behind. Overall inflation jumped 12.4% from 2021 to 2023, but Medicare reimbursements rose only 5.2%. *Costs of Caring* 1. Those underpayments resulted in a revenue "shortfall of almost $100 billion" in 2022 alone. *Id.* at 2. And that troubling trend continued into 2023, when the industry suffered another $27.5 billion shortfall in underpayments from the Medicaid program. See AHA, *Fact Sheet: Medicaid Hospital Payment Basics* (Feb. 2025), https://tinyurl.com/3tp83d5d. Hospitals also are still suffering from the after-effects of the COVID-19 pandemic. During the first four months of the pandemic alone, U.S. hospitals lost over $200 billion in revenue. See AHA, *Hospitals & Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, at 1 (May 2020), https://tinyurl.com/54a862uh.

These unprecedented challenges have had predictable and enduring adverse effects on hospitals. Over *half* of U.S. hospitals ended 2022 operating at a loss, and 19 rural hospitals closed in 2020 alone. *Costs of Caring* 1. Continuing financial difficulties have only exacerbated that trend: At least 39 other hospitals closed throughout 2023 and 2024, and 2025 has already witnessed 10 additional closures. See Madeline Ashley, *10 hospital closures already in 2025 – what's going on?*, Becker's Hospital Review (Mar. 21, 2025), https://tinyurl.com/yckfhyhu. Credit-rating agencies have also "issu[ed] rating downgrades," compounding hospitals' difficulties by making it harder to borrow money and "make needed capital investments." *Costs of Caring* 2.

The recent enactment of the One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025), will worsen this already-difficult financial situation. Although individual hospitals across the country are still assessing exactly how the law will affect their own finances, "[a]ll providers will be affected"—and "[f]or some, the magnitude of change could threaten their ability to sustainably serve their local population."[1] Just one part of that law, a portion related to state-directed payments and provider taxes, is estimated to cut Medicaid spending by $340 billion.[2] That sharp

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[1] *The more things change: Navigating the next healthcare crisis under the One Big Beautiful Bill*, Kaufman Hall (July 17, 2025), https://tinyurl.com/32rs688e; see also PWC, *The One Big Beautiful Bill Act (OBBBA): A trillion-dollar turn in US health policy* (July 10, 2025), https://tinyurl.com/5n8dcjdj ("Hospitals, especially rural providers, will face growing financial pressure[.] With more uninsured patients and fewer Medicaid dollars, providers may see increases in uncompensated care, with rural hospitals being particularly vulnerable despite a $50 billion funding provision. * * * Healthcare providers, especially hospitals and health systems, may experience significant pressures as federal Medicaid funding shrinks, and the number of uninsured patients grows."); Gabriella Cruz Martínez, *What to Know About New Medicaid Cuts: Is Your Local Hospital Closing Soon?*, Kiplinger, https://tinyurl.com/5aa4uea6 (last accessed Aug. 8, 2025) ("Some experts predict that cuts to Medicaid will impact nearly every state, with most expected to see more than 25% of their hospitals shut down. In 11 states, the risk is even higher, with 50% or more of hospitals at risk."); Travis Jackson et. al, *One Big Beautiful Bill Act Has Many Impacts for Nonprofit Health Systems*, McDermott Will & Schulte (May 29, 2025), https://tinyurl.com/8267xtrm (observing that "the Act would threaten already thin operating margins at nonprofit hospitals and health systems" and that "[a]ny increase in operating expenses or decrease in reimbursement that results from the Act may push many nonprofit hospitals across the thin line that separates profitability from financial distress").

[2] Congressional Budget Office, *Estimated Budgetary Effects of Public Law 119-21, to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14, Relative to CBO's January 2025 Baseline*, at Title VII tab (July 21, 2025), https://tinyurl.com/4mafcv44.

reduction will result in direct decreases in payments to many hospitals. Both before and after this legislation, hospitals have found themselves in desperate need of mechanisms to combat these concerning trends.

B. Mergers Are Crucial To Help Hospitals Survive

Mergers present a key answer to these financial problems and are often vital to hospitals' survival in daunting economic landscapes—a reality that commenters repeatedly made clear during the rulemaking. As one commenter informed the FTC, "[o]ften, a merger is the last hope for keeping a hospital open and continuing access to hospital services in the community." Tex. Hosp. Ass'n Cmt. 2. And "[i]n many of those cases, competition is actually enhanced by the survival of the merged entity through improvements in clinical care and the creation of economies of scale that can ultimately lower costs." *Ibid.* As another commenter observed, there are several "cases in which a hospital would have been closed, gone bankrupt, or severely cut services if it had not merged with another system." Wash. State Hosp. Ass'n Cmt. 1.

Empirical evidence bears out the critically important role that mergers play in mitigating these challenges. As still another commenter explained, one recent study found that "hospital acquisitions are associated with a statistically significant 3.3 percent reduction in annual operating expenses," as well as a "statistically significant reduction in inpatient readmission rates" and patient "mortality." Iowa Hosp. Ass'n Cmt. 2 n.7 (quoting Sean May et al., *Hospital Merger Benefits: An Econometric Analysis Revisited*, AHA (Aug. 2021), https://tinyurl.com/2776pbsf).

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The FTC was amply apprised that mergers can be a lifeline for hospitals and bring about substantial policy benefits. And the agency was put on notice that the costly changes it had proposed to its premerger-notification process would impose serious negative real-world effects on the hospital sector by imposing a de facto tax on mergers and thus discouraging valuable merger activity. Yet despite invoking hospitals' experience to support its overhaul, the FTC ignored warnings about harmful effects on hospitals. And it never attempted to show how a hypothetical increase in enforcement activity that its new form might (or might not) generate would outweigh those here-and-now harms. Nor can the FTC now defend its decision to adopt the Final Rule in the face of those concerns on the ground that it "was aware of the [commenters'] concern[s]." *Ohio*, 603 U.S. at 295. "[A]wareness is not itself an explanation." *Ibid.* The agency's obligation is to confront concerns and explain its position.

II. The Hospital Sector Provides No Support For The FTC's Concerns That Problematic Mergers Had Historically Evaded Agency Review

Even apart from the FTC's failure to address serious, harmful side effects of its Final Rule, the agency's effort to spin the hospital industry's experience as evidence of a problem that its revised premerger-notification regime could solve is unsupported. The FTC broadly asserted that "hospital mergers in particular" pose anticompetitive risks yet had been slipping through the cracks of merger review because of purported "information gaps that now exist with regard to hospital and other healthcare acquisitions." 89 Fed. Reg. at 89,268/2-3. But that assertion is not borne out by the FTC's record of enforcement actions or by its cited studies. To the contrary,

both the agency's track record and its studies cut against its allegations that the existing regime somehow frustrated enforcement activity in the hospital sector.

A. The FTC Offers No Examples Of Problematic Hospital Mergers That Its New Rule Is Needed To Identify

Despite predicating its extensive rulemaking largely on purported issues with hospital mergers, the FTC supplied *no* specific examples of an anticompetitive merger that evaded FTC scrutiny under the former notification regime, but that would have triggered scrutiny under the overhauled regime. See Foley & Lardner Cmt. 2. The agency instead threw up its hands. The FTC asserted that it was "not practical" for the agency to "identify specific illegal transactions that [it] 'missed' during their pre-merger review." 89 Fed. Reg. at 89,219 n.14. But if a federal regulator is unwilling to do the work to identify whether a purported problem with its current rules even *exists*, it cannot rationally press forward with rewriting its regulations to address that hypothetical problem.

The FTC's track record of enforcement under its prior notification regime proves that it has had no trouble identifying hospital or related mergers that the agency deemed cause for concern. Since at least the 1990s, the FTC has "taken a hard line" on hospital mergers. AHA Cmt. 4. Its pattern of enforcement actions has borne out that stance. The FTC filed 17 enforcement actions challenging hospital mergers in the 1990s, and it has filed 15 lawsuits challenging hospital mergers since 2010—including seven suits in the past three years alone. See FTC, *Overview of FTC Actions in Health Care Services & Products* 51-71 (Apr. 2022), https://tinyurl.com/2vj832up; see also Dkt. 1, *FTC* v. *Louisiana Children's Medical Center*, No. 23-cv-01103 (D.D.C. Apr. 20,

2023) (complaint filed). The actual number of contemplated enforcement actions may well be much higher, given that there is no public record of deals that were abandoned after FTC scrutiny. See AHA Cmt. 4 n.14.

In short, if the FTC felt impeded in investigating hospital mergers by inadequate information under its prior premerger-notice regime, the agency's actions show no sign of it. And even if the FTC could show any merger-specific information gap, it would be one of the agency's own making: If its initial review left relevant questions unanswered, the agency could have simply flagged the transaction for a closer look.

B. The FTC's Cited Studies Undermine Its Position

Rather than attempt to show how its prior notification form was frustrating enforcement in the hospital context, the FTC leaned heavily on a handful of studies as putative evidence of anticompetitive merger activity in the hospital sector at large. But that reliance backfires because the studies if anything show that the FTC's existing system was working just fine in the hospital industry as elsewhere.

Most prominently, the FTC invoked a study suggesting that some "hospital mergers" had "caused significant price increases." 89 Fed. Reg. at 89,268 & n.316; see *id.* at 89,221 & nn.24-25 (citing Keith Brand et al., *In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009 to 2019*, 66 J.L. & Econ. 639, 662 (2023) (Brand)); see also *id.* at 89,396 n.19 (statement of Chair Khan, joined by Commissioners Slaughter and Bedoya) (invoking same study as "support[ing]" the FTC's adoption of the Final Rule). But that study—two authors of which worked for the FTC, see Brand 639—affirmatively *disclaims* a link between asserted

anticompetitive behavior and gaps in the FTC's notification regime. The authors note that hospital mergers with the "highest * * * price effects" were *also* those mergers that the FTC had singled out for "a Second Request" under its old notification form. *Id.* at 662. In other words, "the agencies were successful (on average) in identifying in the preliminary phase of the investigation which mergers were most likely to be anticompetitive." *Ibid.* The authors further concluded that the FTC had ultimately permitted those transactions to be completed for reasons having nothing to do with purported deficiencies in the notification regime: "the agencies may not have had sufficient resources to challenge th[ose] mergers"; may have erroneously diagnosed the mergers as "not anticompetitive" despite selecting them for additional scrutiny; may have concluded "that the evidence supporting a challenge was too weak"; or may have concluded "that improvements in quality would offset any price increases." *Id.* at 662-663. Simply modifying the premerger-notification form would change none of that.

So too with another study by public-policy scholars that the FTC selectively cited. See 89 Feg. Reg. at 89,240 n.193 (citing Zarek Brot-Goldberg et al., *Is There Too Little Antitrust Enforcement in the US Hospital Sector?* 12, U. Chi. Becker Friedman Inst. for Econ, Working Paper No. 2024-59 (May 2024) (Brot-Goldberg), https://tinyurl.com/ytjujjy8). The FTC invoked that study for the general proposition that agencies have "limited resources" for "merger enforcement." *Id.* at 89,240/1. But the agency omitted the authors' conclusion: that underenforcement did not stem from resource constraints on *identifying* purportedly problematic mergers, but from

resource constraints on *addressing* those concerns after the FTC had already identified them. In their own words, the authors "view[ed] this 'underenforcement' as coming from choices made by the government (either through low FTC funding or through the FTC being unwilling to take on certain cases), rather than from failures in *ex ante* merger screening methods or the visibility of transactions related to deal size and HSR thresholds." Brot-Goldberg 12.

Ironically, the Final Rule only exacerbates those resource constraints. Far from easing the burden on the FTC, the rule will only bog down the agency with voluminous additional material that it cannot realistically review in the first phase's 30-day window. The same constraints that the study authors found have impaired enforcement thus will now also frustrate even the premerger-review process.

That the FTC was forced to stretch and quote selectively from its own sources confirms that its hospital-based rationales for the Final Rule are a smokescreen. "[A]n agency rule [is] arbitrary and capricious" if the agency offers "an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. And "there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part." *American Radio Relay League, Inc.* v. *FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). The FTC's explanation—premised on distorting its own ersatz evidence—confirms that the Rule is arbitrary and should be set aside.

III. The Hospital Sector Illustrates Why The Rule's One-Size-Fits-All Approach Is A Misfit For Many Industries And Will Prove Harmful

Beyond the absence of evidence—and the evidence of absence—of any problem the FTC's overhaul of its existing premerger-notification regime was needed to solve,

the Final Rule will needlessly create new problems that its prior, flexible framework avoided. The FTC's revised notification regime imposes a blanket new protocol to search for purported anticompetitive behavior across the entire U.S. economy. That untailored approach will impose new compliance costs on parts of the economy, such as hospitals, where the information now demanded will be irrelevant or unhelpful.

Consider the FTC's new requirement that companies supply an "Overlap Description," which would purportedly help the FTC identify "whether" a merging company "compete[s] with the other merging party." 89 Feg. Reg. at 89,411/1. As part of the Overlap Description, the merging company must:

(1) list all "current or known planned products or services * * * that competes with (or *could* compete with) a current or known planned product or service of the acquiring person";

(2) "[f]or *each* such product or service listed," disclose "[t]he sales (in dollars) for the most recent year";

(3) describe "all categories of customers of the target that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional)"; and

(4) describe "[t]he top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified."

Id. at 89,387 (emphases added). Compliance with this multi-pronged requirement will be unavoidably onerous. Every filing party must analyze every product or service it already offers or *plans* to offer; it then apparently must make subjective, speculative judgments about whether that product competes with or *could* compete with a product or service actually provided or that *could* be provided by the acquiring party. Moreover, the information solicited will be inapposite in many sectors, including

hospitals. The vast majority of hospitals have *patients*—not "broker," "residential," and "distributor" customers. How hospitals should even respond is thus unclear. Such information is conceivably relevant to *other* types of transactions, but the compliance costs in the hospital context will far outstrip the visibility the FTC gains (if any) into the hospital sector from making hospitals jump through these hoops.

Similarly, the FTC's new form demands disclosure of "prior acquisitions of U.S. entities or assets and foreign entities with sales in or into the U.S." in the prior year that "produced a competitive overlap product or service as described in the Overlap Description." 89 Fed. Reg. at 89,376. "For each such overlap," the filer then must "list all acquisitions of entities or assets deriving dollar revenues in an * * * overlapping product or service made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable." *Id.* at 89,377. This new dragnet disclosure mandate will be similarly burdensome. Yet it will serve little if any purpose in certain sectors where the competition concerns it targets are absent. The FTC purported to justify this new disclosure based on "concerns about roll-up strategies," *i.e.*, "serial acquisitions." *Id.* at 89,325/2. Whatever validity that concern might have for other industries, it has no relevance in the context of hospital mergers. Whether a given transaction violates Section 7 of the Clayton Act turns on whether it will harm competition in a specific "geographic market," not on whether one or both of the parties previously acquired healthcare providers in *other* markets. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974); see *FTC* v. *Advocate Health Care Network*, 841 F.3d 460, 464 (7th Cir. 2016) ("To show that the

merger may lessen competition, the [FTC] had to identify a relevant geographic market where anticompetitive effects of the merger would be felt."). Once again, one size does not actually fit all. The FTC's mismatched mandate will thus impose burdens in particular sectors for no demonstrated benefit.

Yet even though these disclosures are a misfit for hospitals and other industries, companies nonetheless have powerful incentives to prepare these materials with great care—and thus incur substantial compliance costs—for fear of facing civil penalties. See, *e.g.*, FTC, *GameStop CEO Ryan Cohen to Pay Nearly $1 Million Penalty to Settle Antitrust Law Violation* (Sept. 18, 2024), https://tinyurl.com/yr9n3txc; FTC, *FTC Fines Biglari Holdings Inc. for Repeatedly Violating Antitrust Laws* (Dec. 22, 2021), https://tinyurl.com/yers4u4s. Indeed, in enforcing compliance with its disclosure process, the FTC gets to play prosecutor, judge, and jury, adjudicating whether companies' subjective "descriptions" suffice and imposing penalties for perceived misstatements. See *Illumina, Inc.* v. *FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023) ("[T]he FTC's structure * * * combines prosecutorial and adjudicative functions."). Regulated entities have little choice but to supply information that serves no purpose.

Finally, the FTC misstated and largely disregarded the significance of complementary enforcement regimes at the State level. As commenters pointed out, see AHA Cmt. 5, hospitals are subject to multiple other regulatory and supervisory frameworks that further diminish concerns that anticompetitive hospital mergers would escape appropriate review. State officials and agencies—including attorneys

general and departments of health—routinely investigate and challenge hospital mergers. Recent challenges have arisen to transactions involving:

- Madera and Trinity (California 2022), see Office of Cal. Att'y Gen., *Letter from Attorney General Rob Bonta to Jean Tom re: Proposed Change in Control and Governance of Madera Community Hospital* (Dec. 15, 2022), https://tinyurl.com/bdn3xasr;

- Fairview and Sanford (Minnesota 2020), see Office of Minn. Att'y Gen., *Attorney General Ellison announces public input on proposed merger of Fairview Health Services and Sanford Health* (Nov. 21, 2022), https://tinyurl.com/3h8crcrx;

- CareGroup, Lahey, Seacoast, and BIDCO (Massachusetts 2018), see FTC, *Statement of Federal Trade Commission Concerning Its Vote to Close the Investigation of a Proposed Transaction Combining Massachusetts Healthcare Providers* (Nov. 29, 2018), https://tinyurl.com/4kb57hpv (closing investigation after state consent decree); and

- Partners and South Shore (Massachusetts 2015), see *Statement of Attorney General Healey on Court's Rejection of Proposed Consent Judgment With Partners HealthCare*, Mass.gov (Jan. 29, 2015), https://tinyurl.com/5n8nm4us.

State regulators also routinely monitor hospital mergers through Certificates of Public Advantage, which are issued to hospitals when regulators deem the benefits of a merger to outweigh potential effects on competition. See, *e.g.*, *Certificate of Public Advantage*, Tex. Dep't of Health & Human Servs., https://tinyurl.com/s3ds7cxj (last accessed Aug. 8, 2025).

To the extent the FTC acknowledged these parallel regimes at all, it simply noted that "several States have enacted premerger notification laws for certain healthcare acquisitions"—a fact the FTC asserted somehow *supports* its own effort to subject hospitals to its costly notification overhaul. 89 Fed. Reg. at 89,268/3. That assertion is upside-down. If state regulators are already scrutinizing hospital

acquisitions through their own notification regimes, then there is *less* need for the FTC to ramp up its own disclosure requirements. That is particularly true because the FTC admitted, *id.* at 89,240/1, and its own studies confirm, see pp. 13-15, *supra*, that the agency's "limited resources" make it less likely that it will even be able to act on the additional information produced.

CONCLUSION

The FTC's one-size-fits-all solution to a "problem" that the agency failed to substantiate is irrational several times over. The FTC ignored the economic harms that its Final Rule will inflict on the hospital sector, relied on studies that demonstrate the opposite of what the agency claimed, and failed to explain how its costly new notification process will even produce actionable information. The Court should hold unlawful and set aside the FTC's Final Rule as arbitrary and capricious, and it should grant Plaintiffs' motion for summary judgment and vacate the rule.

Dated: August 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Eastern District of Texas by using the court's CM/ECF system on August 8, 2025.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: August 8, 2025

/s/ Jonathan C. Bond
Jonathan C. Bond (*pro hac vice*)

Counsel for Amici Curiae American Hospital Association and Federation of American Hospitals