No. 17-3783

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDERAL TRADE COMMISSION; STATE OF NORTH DAKOTA

Plaintiffs-Appellees.

vs.

SANFORD HEALTH; SANDFORD BISMARCK; MID DAKOTA CLINIC, P.C.,

Defendants-Appellants,

Appeal from the United States District Court for the District of North Dakota
Case no. 1:17-cv-00133-ARS, Hon. Alice R. Senechal

BRIEF OF THE STATES OF MINNESOTA, ALASKA, CALIFORNIA, DELAWARE, HAWAII, IDAHO, IOWA, MASSACHUSETTS, MISSISSIPPI, OREGON, PENNSYLVANIA, PUERTO RICO, AND WYOMING AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES

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STATEMENT OF INTEREST

Pursuant to Fed. R. App. P. 29(a), the Attorney General of the State of Minnesota, respectfully submits this brief, joined by the States of Alaska, California, Delaware, Hawaii, Idaho, Iowa, Massachusetts, Mississippi, Oregon, Pennsylvania, Puerto Rico, and Wyoming ("the States"). The States have a strong interest in ensuring the availability of affordable, quality health care for their citizens. This interest is best served by protecting vibrant competition in local health care markets. Mergers that substantially increase provider market power hinder the ability of States' to control the escalating cost of medical care. The Attorneys General of the States, as the chief law enforcers of their respective states, are thus in a unique position to opine on the appropriate standards under federal Antitrust Law for mergers of health care providers.

SUMMARY OF ARGUMENT

Health care competition is a quintessentially local issue. The States seek to ensure that consumers reap the benefits of competitive health care markets in their local communities. Competitive local markets ensure access to affordable, high-quality health care. The States have witnessed the consequences of acquisitions that substantially lessen competition in local provider markets. The recent wave of provider consolidation has allowed large health care systems to obtain substantial market power. These providers have used that leverage to successfully demand higher reimbursement rates from commercial health plans. Payors must then pass on these rate hikes to patients by increasing prices or reducing access to care.

The harm that consolidation between competing health care providers can cause consumers means that courts should be especially wary of claims that post-merger efficiencies and the presence of powerful buyers justify anticompetitive transactions. Here, the district court determined that the proposed merger, which would result in a combined entity possessing 100% market share of general surgery services, 99% of pediatrician services, 86% of adult primary care services, and 85% of OB/GYN physician services, was likely to adversely affect competition, regardless of the efficiencies the merging parties claimed would result from the transaction. Op. at Findings of Fact ("FOF") ¶¶ 39, 43, 48, 52;

Conclusions of Law ("COL") ¶¶ 31–36.[1] The district court also correctly concluded that the purported leverage of a large health plan was insufficient to serve as a check against the anticompetitive effects of the transaction. *Id*. at COL ¶¶ 37–43.

ARGUMENT

Health care competition is a matter of local concern that falls within the police powers of the States. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); Dep't of Health and Human Serv., *Health Ins. Market Rules*, 78 Fed. Reg. 13406, 13435 (Feb. 27, 2013); Dep't of Health and Human Serv., *Establishment of Exch. and Qualified Health Care Plans, et al*., 77 Fed Reg. 18310, 18413, 18417-19, 18443 (Mar. 27, 2012); *see also* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 679-80 (2003). Given the importance of competition to health care markets, the States frequently review local health care mergers under both federal and state antitrust laws. *See, e.g.*, Consent Decree, *Commonwealth v. Geisinger*, No. 1:13 CV-02647-YK (M.D. Pa. Nov. 1, 2013); Steve Tenn, *The Price Effect of Hospital Mergers: A Case Study of the Sutter Summit Transaction* (Fed. Trade Comm'n, Working Paper No. 293,

[1] "Op." refers to the Memorandum of Decision, Findings of Fact, Conclusions of Law, and Order, No. 1:17-cv-001333-ARS, Doc. No. 140, *Fed. Trade Comm'n and the State of North Dakota v. Sanford Health, et. al.* (D.N.D. Dec. 15, 2017).

Nov. 2008), *available at* https://goo.gl/2zum2k. These merger reviews have allowed the States to develop a nuanced understanding of these markets.

The States write to address three points. First, mergers to monopoly have a dramatic effect on competition and cause substantial harm to consumer welfare. Second, traditional post-transaction efficiencies should never justify mergers to monopoly. Third, the "powerful buyer" argument, which the district court analyzed as an affirmative defense to the prima facie case set forth by the government (Op. at COL ¶ 37–41), is limited in scope, and fails for multiple reasons.

I. MERGERS TO MONOPOLY CAUSE SIGNIFICANT HARM TO COMPETITION.

From the outset, it has been a fundamental principle of Antitrust Law that mergers to monopoly are never justified. The Supreme Court has repeatedly concluded that antitrust law "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Nat'l Soc. of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 689 (1978). "No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized." 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 911a, p. 58 (3d. 2009).

The damage that highly concentrated markets cause to competition is particularly apparent in the health care industry. Independent economists and state agencies frequently review the impact that consolidation between competing providers has on health care costs. *See* Richard Scheffler, et al., *Differing Impacts of Market Concentration on Affordable Care Marketplace Premiums*, 35 J. Health Aff. 880, 881, 883–85, 886 (2016) (finding higher premiums to be associated with market concentration in New York and California state exchange markets for the sale of individual health care policies); Cory Capps, et al., *The Silent Majority Fallacy of the Elzinga-Hogarty Criteria: A Critique and New Approach to Analyzing Hospital Mergers* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 8216, 2001), *available at* http://www.nber.org/papers/w8216. These studies, along with many others, confirm that the greater leverage a provider has, the higher the price the provider charges. *See* Massachusetts Attorney General, *Examination of Health Care Cost Trends and Cost Drivers*, Report for Annual Public Hearing, 2 (May 2010), *available at* http://goo.gl/nwFqxu; Martin Gaynor, Robert Town, *The Impact of Hospital Consolidation – Update*, The Synthesis Project, (June 2012) (finding provider consolidation to be responsible for significant price increases).[2] These price increases are ultimately passed on to consumers, who must then pay more for premiums and deductibles.

[2] *Available at https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/r*
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The harm that mergers to monopoly cause consumer welfare is even more apparent. Those mergers contain "such large competitive risks[,] . . . they ought never to be permitted even for a limited period." Joseph F. Brodley, *Proof of Efficiencies in Mergers and Joint Ventures*, 64 Antitrust L.J. 575, 587–88 (1996); *see also* U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines ("Merger Guidelines") § 6 (2010) (recognizing that such mergers have the "most apparent" unilateral effects on competition). This is particularly true when competing health care providers merge, as commercial health plans have little ability to hold down the costs of health care "when they negotiate prices with monopolistic providers." Diane Archer, *No Competition: The Price of a Highly Concentrated Health Care Market*, Health Affairs Blog (Mar. 6, 2013), available at https://www.healthaffairs.org/do/10.1377/hblog20130306.028873/full/. As a result, monopoly power in the hands of health care providers is "more, not just equally, harmful to both consumers and the general welfare than monopolies of other kinds." Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 Or. L. Rev. 847, 850 (2011); *see also* Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, The Nat'l Bureau of Economic Research Working Paper 21815

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(December 2015), http://www.nber.org/papers/w21815 (concluding that hospital prices in monopoly markets are more than 15 percent higher than in areas where there are at least four hospitals). Mergers between competing health care providers should therefore "be subject to special . . . vigilance by antitrust agencies and courts." Havighurst & Richman, *The Provider Monopoly Problem in Health Care*, *supra*, at 850.

Set against this backdrop, the district court correctly determined the proposed transaction was likely to cause significant harm to competition. Op. at COL ¶ 29. The weight of economic evidence suggests that mergers to monopoly result in considerable harm to consumers. This Court should uphold the district court's order granting a preliminary injunction in this matter.

II. EFFICIENCIES SHOULD NEVER JUSTIFY A MERGER TO MONOPOLY.

Courts typically assess claims brought pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, under a burden-shifting framework. *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 337 (citing *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health System*, 778 F.3d 775, 783 (9th Cir. 2015)). The burden first falls to the plaintiff to prove the merger is likely to have an anticompetitive effect in a relevant product and geographic market. *St. Luke's*, 778 F.3d at 783 (9th Cir. 2015). If the plaintiff meets its burden of establishing a prima facie case that the merger is

anticompetitive, then the burden shifts to the merging parties to rebut that case. *Penn State Hershey Medical Center*, 838 F.3d at 337.

For many years, parties have argued that a presumptively anticompetitive merger could be justified by purported pro-competitive effects, or "efficiencies" that would result from the transaction. Several circuits, including this one, have previously recognized that "proof of post-merger efficiencies could rebut a Clayton Act § 7 prima facie case." *St. Luke's*, 778 F.3d at 789 (citing *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 571 (6th Cir. 2014); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054–55 (8th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222–24 (11th Cir. 1991)). Federal antitrust agencies have also indicated, in certain circumstances, that it is appropriate to consider the efficiencies that might result from a transaction. Merger Guidelines § 10.

Though the post-merger efficiencies defense has been analyzed in several jurisdictions, the scope of its application in Section 7 proceedings remains uncertain. *St. Luke's*, 778 F.3d at 789.[3] No court has ever approved an otherwise-anticompetitive merger between competing health care providers because of

[3] *See also Penn State Hershey Medical Center*, 838 F.3d at 347–48 ("We note at the outset that we have never formally adopted the efficiencies defense. Neither has the Supreme Court. Contrary to endorsing such a defense, the Supreme Court has instead, on three occasions, cast doubt on its availability.)."

predicted post-merger efficiencies. *Id*. The States write to urge the Court to conclude that post-merger efficiencies should never be used to justify a merger to monopoly, as would result if the transaction here were not enjoined.

The States' position is based on the unique nature of Section 7 of the Clayton Act, a rare federal statute that requires courts to weigh "probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Section 7 essentially is a forward-looking statute that asks courts to predict whether intervention is necessary to prevent competitive harm. Courts must therefore balance competing interests to determine what is in consumers' best interests. They must weigh the strength of the plaintiff's prima facie case—the likelihood that the transaction will result in anticompetitive harm—versus any evidence the merging parties have that negates those anticompetitive consequences. The anticompetitive effects resulting from mergers to monopoly are so severe and so likely to occur, however, that they cannot be outweighed by evidence of traditional merger efficiencies, which scholars have found time and time again to be uncertain, difficult-to-quantify, and in any event, subject to serious doubt as to whether they are merger-specific and beneficial to consumers. *See infra* pp. 11–12. In cases involving mergers to monopoly, courts should disregard speculative evidence of post-merger efficiencies in favor of protecting consumers from the almost certain harm those transactions will cause.

The States' position here flows from the foundational tenets of antitrust law, including as discussed above, the principle that competition will always promote trade and commerce better than a monopolistic arrangement. *See Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 689. "[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013) (quoting 1 AREEDA & HOVENKAMP, *ANTITRUST LAW* ¶ 100, p. 4 (3d 2006)). It is also consistent with the plain text of the Clayton Act, "which prohibits 'without exception' mergers that 'tend to create a monopoly.'" Thomas A. Piraino, Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. Rev. 785, 815 (2003) (citing 15 U.S.C. § 18). Indeed, the Supreme Court has previously stated that "[p]ossible economies cannot be used as a defense to illegality" because despite being aware that some anticompetitive mergers might result in procompetitive benefits, Congress "struck the balance in favor of protecting competition." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *see also United States v. Anthem, Inc.*, 855 F.3d 345, 355 (D.C. Cir. 2017) ("Congress may not have wanted anything to do with an efficiencies defense asserted by a firm that was already large or low cost within the market and to whom the efficiencies would give an even greater advantage over rivals." (quoting 4A AREEDA & HOVENKAMP, *ANTITRUST LAW* ¶ 950f, p. 42; *id.* ¶ 970c, at 31) (2016)). The

Supreme Court also noted that, in passing the Clayton Act, Congress determined that competition and consumers were best served through "decentralization," even when integration might result in some economic benefit. *Brown Shoe*, 370 U.S. at 344.[4] By eliminating consideration of post-merger efficiencies in transactions that would cause a monopoly to occur, the Court can ensure that Section 7 analysis remains properly focused on consumer welfare and against consolidation.

The States' position further reflects the practical realities of the economic analysis that courts require for Section 7 cases. Courts must engage in a complicated analysis to determine the impact efficiencies might have on a transaction.[5] They must determine whether the purported efficiencies are verifiable, merger specific (that is, they can only be achieved as a result of the particular transaction), and are likely to be passed through to consumers. *See*

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[4] As the Supreme Court noted in *Nat'l Soc. of Prof'l Eng'rs*, Congress has proven repeatedly that it can act to exempt certain industries or conduct from the *Antitrust Law* s if it determines such exemptions necessary to promote consumer welfare. 435 U.S. at 689–90; *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) ("Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.").

[5] To the extent that efficiencies are considered where the transaction would result in a monopoly, courts have already held that proof of "extraordinary efficiencies" is required to offset the anticompetitive concerns in highly concentrated markets. *H.J. Heinz*, 246 F.3d at 720–22. The States merely propose that, when the merger would result in concentration levels reaching the point of a monopoly, courts disregard all purported efficiencies that might result from the transaction.

United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 89–90 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 74–75 (D.D.C. 2009); *Univ. Health*, 938 F.2d at 1223; Merger Guidelines § 10. Moreover, "[i]t is not enough" for courts to find that the claimed efficiencies would allow the combined entity to better serve its customers. *St. Lukes*, 778 F.3d at 791. Because "[t]he Clayton Act focuses on competition," courts must also consider whether the proposed efficiencies "show that the prediction of anticompetitive effects from the prima facie case is inaccurate." *Id*.

As a result, many scholars have concluded that it is impossible for courts to ever properly evaluate the impact that post-merger efficiencies might have on consumer welfare.[6] *See* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself at 124 (1978) (rejecting the efficiencies defense as "spurious"); Richard A. Posner, *Antitrust Law* 133 (2d ed. 2001) ("It is rarely feasible to determine by the methods of litigation the effect of a merger on the costs of the firm created by the merger."); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 39 (1984) ("[N]either judges nor juries are particularly good at handling complex economic arguments . . . ."). The measurement and verification of claimed efficiencies in Section 7 cases raises such difficult and complex questions

[6] In order to affirm here, however, this Court need only conclude that post-merger efficiencies are properly ignored in merger-to-monopoly situations.

that the attempt should not be made in mergers to monopoly where consumer harm is so demonstrable and obvious. This is particular true in cases involving competing health care providers. *See* Havighurst & Richman, *supra*, at 870 n. 66.

Moreover, to the extent that such analysis exists, scholars have found that efficiencies should never justify a merger to monopoly.[7] *See* Thomas A. Piraino, Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. Rev. 785, 815 (2003) (stating that "[n]o mitigating factors should save such transactions from illegality"); *see also Univ. Health*, 938 F.2d at 1222 n. 29 ("Of course, once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a section 7 challenge.) (emphasis in original). This is because companies in concentrated markets have a tendency to capture savings, rather than pass them on to consumers. 4A AREEDA & HOVENKAMP, *ANTITRUST LAW* ¶ 971f, p. 48 (3d 2009); *see also Anthem*, 855 F.3d , at 366 ("The ability of a firm to obtain lower prices for inputs for its product . . . should, especially in light of the prophylactic nature of the Clayton Act, be viewed skeptically when high market concentrations may have the future effect of

[7] In fact, "current merger policy, if anything, underestimates competitive harm, *exaggerates passed-on efficiencies*, or produces some combination of both." Herbert J. Hovenkamp, *Appraising Merger Efficiencies*, 24 Geo. Mason L. Rev. 703, 741 (2017) (emphasis added).

permitting capture of those savings."). And no market is more concentrated than one dominated by a single-firm monopoly.[8]

In contrast, the evidence discussed above details the overwhelming likelihood that mergers to monopoly will cause considerable harm to competition and consumer welfare. Given the forward-looking nature of the Clayton Act, the near-certainty of this harm and the difficulty of analyzing the purported efficiencies of a transaction, this Court should prohibit the consideration of efficiencies where the transaction would result in a monopoly.

III. THE PRESENCE OF A SO-CALLED POWERFUL BUYER SHOULD BE OF LITTLE IMPORTANCE TO THE COURT'S ANALYSIS.

Both the Merger Guidelines and case law recognize that, in limited instances, the presence of a buyer with substantial market share might constrain the ability of merging parties to increase prices and thus harm competition. Merger

[8] Though some scholars have acknowledged that there may be exceptional circumstances that may warrant a reversal of a finding of illegality in a merger to monopoly case, none have ever quantified them or explained what they might be. *See* Robert Pitofsky, *Efficiencies in Defense of Mergers: Two Years After*, 7 Geo. Mason L. Rev. 485, 492 (1999) (stating that when the merger of two firms results in the combined entity possessing monopolistic market shares, "'other considerations,' including efficiency claims should not usually reverse a finding of illegality."). The States believe that the existence of such exceptional circumstances can only involve questions of social policy and are better reserved for state and federal governments and not for courts applying antitrust laws. *See generally Fashion Originators' Guild v. FTC*, 312 U.S. 457, 464–68 (1941); *Anthem*¸ 855 F.3d at 354–56.

Guidelines § 8; *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991). In this case, the merging parties argued to the district court that a large health insurance company in the relevant geographic market, Blue Cross and Blue Shield of North Dakota ("BCBSND"), would be immune to post-merger rate increases as a result of its size and bargaining power. Op. at COL ¶ 38. The district court determined that the presence of a powerful buyer defense was not sufficient to remedy the harm the transaction would cause to competition, however, citing to testimony from BCBSND that it would be forced to increase reimbursements post-merger. Op. at COL ¶ 41. The States urge this Court to affirm that decision. For several reasons, the presence of a "powerful buyer" fails to remedy the anticompetitive effects that result from a merger between two health care providers.

First, mergers like these, which result in one entity obtaining a complete monopoly over a service line, greatly reduce bargaining leverage for **all** commercial health plans. Because commercial health plans require the services of the provider with monopoly power in order to offer a viable provider network, they will have little choice but to agree to rate increases the provider demands. *St. Luke's*, 778 F.3d at 785. Such a result would certainly cause the cost of health care to increase.

Second, the presence of a powerful buyer does nothing to combat the loss of competition for smaller health plans. These small health plans may be dwarfed in size by other insurance providers, yet still provide coverage for many state residents. A Kaiser Family Foundation study found, that of the 25 states that had one health plan with at least 60 percent market share in the Large Group Insurance Market, 24 of those had at least one other health plan with 5 percent market share. *See* Kaiser Family Foundation, *2016 Large Group Insurance Market Competition*.[9] The same study found, in the Small Group Insurance Market, that of the 15 states that had at least one health plan with a 60 percent market share, 14 of them also had at least one other plan with at least a 5 percent market share. Kaiser Family Foundation, *2016 Small Group Insurance Market Competition*.[10]

[9] *Available at https://www.kff.org/other/state-indicator/large-group-insurance-market-competition/?currentTimeframe=0&sortModel=%7B%22colId%22:%22* Lo cation%22,%22sort%22:%22asc%22%7D.

[10] *Available at https://www.kff.org/other/state-indicator/small-group-insurance-market-competition/?currentTimeframe=0&sortModel=%7B%22colId%22:%22* Location%22,%22sort%22:%22asc%22%7D.

This small plans represent thousands of consumers,[11] but would have little leverage to negotiate against health care providers with newfound market power. Their members should not have to bear the burden of higher reimbursement rates simply because a larger health plan might have the ability to resist post-merger price increases.[12] *See United States v. United Tote*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (holding that the existence of power buyers did not outweigh the damaging effects on numerous smaller customers). If they did, these small health plans would likely cease operating in the affected area because they would be unable to reach a viable agreement with the combined entity or because their members would flock to the powerful buyer, who can offer more affordable rates. *See* Daria Pelech, *Dropped out or pushed out? Insurance market exit and provider market*

[11] *See* Kaiser Family Foundation, *Market Share and Enrollment of Largest Three Insurers – Large Group Market* (Timeframe 2016), *available at* https://www.kff.org/other/state-indicator/market-share-and-enrollment-of-largest-three-insurers-large-group-market/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Largest%20Insurer__Market%20Share%22,%22sort%22:%22desc%22%7D; Kaiser Family Foundation, *Market Share and Enrollment of Largest Three Insurers – Small Group Market* (Timeframe 2016), *available at* https://www.kff.org/other/state-indicator/market-share-and-enrollment-of-largest-three-insurers-small-group-market/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Largest%20Insurer__Market%20Share%22,%22sort%22:%22desc%22%7D.

[12] Even when the buyer is a "sophisticated company with substantial resources," the loss of a competitor from a concentrated market can change the negotiating dynamic. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 221 (D.D.C. 2017).

power in Medicare Advantage, 51 J. Health Economics 98, 110 (2017). Consolidation would only increase further.

Finally, the presence of a powerful buyer does nothing to address the harm the merger would cause to non-price competition. In physician service markets, providers not only compete to be included in health plan networks, they also compete to attract patients. Greg Vistnes, *Hospitals, Mergers, and Two-Stage Competition*, 67(3) Antitrust L.J. 671, 673–75, 681–82 (2000). Patients' out-of-pocket expenses are typically the same regardless of the provider they use in their network. *Id*. at 681–82. As a result, patients usually select their provider based on who offers the best patient experience, rather than the lowest price. *Id*.

Because of this, providers not only compete to offer the best price, they also compete against each other on non-price dimensions, such as quality and access of service. The presence of a powerful buyer does nothing to remedy the harm that anticompetitive mergers cause to this non-price competition. And it is well established that health care provider mergers reduce providers' incentive to offer the highest-quality service. *See, e.g.*, David Balto and Meleah Geertsma, *Why Hospital Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger*, 34 J. Health L. 129, 152 (2011) (finding that hospital merger in Grand Rapids, Michigan resulted in the closure of urgent care centers, reductions in patient convenience, and diminished quality of treatment); *Berkeley's*

only hospital, Alta Bates, to close by 2030, S.F. Chron., July 1, 2016, available at http://goo.gl/YSk96n (discussing the closing of the only hospital in Berkeley following merger); *see also* Martin Gaynor et al., The Industrial Organization of Health Care Markets, 53 J. Econ. Lit., no. 2, 235, 249 (2015) ("[T]he evidence indicates that increases in competition improve hospital quality."). This loss of non-price competition not only happens regardless of whether a powerful buyer exists, it impacts patients with all types of health insurance, not just those covered by commercial plans.

Here, the district court found that the parties competed with one another to improve patient access and convenience and that the benefits of such competition for insurers putting together provider networks and for consumers would be lost post-merger. Op. at FOF ¶¶79–81. This Court should conclude that the powerful buyer argument fails for multiple reasons. Mergers like this one increase the provider's bargaining leverage for all health plans, cause substantial harm to small health plans, who still represent a significant number of consumers, and reduce incentives for providers to compete to offer the best quality of service. The presence of a powerful buyer does nothing to remedy these harms and therefore should not be considered in this Court's analysis.

CONCLUSION

For the foregoing reasons, the States respectfully ask that this Court affirm the district court's opinion granting the requested preliminary injunction in this case.

Dated: March 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,322 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman font.

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CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ Deanna Donnelly
DEANNA DONNELLY

Federal Trade Commission; State of North Dakota vs. Sanford Health; Sanford Bismarck; Mid Dakota, P.C.
Eighth Circuit Court File No. 17-3783

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2018, I electronically submitted the foregoing Document (Brief of the States of Minnesota, Alaska, California, Delaware, Hawaii, Idaho, Iowa, Massachusetts, Mississippi, Oregon, Pennsylvania, Puerto Rico, and Wyoming as Amicus Curiae in Support of the Appellees) with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 12, 2018

Respectfully submitted,

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