IN THE

United States Court of Appeals for the Third Circuit

No. 21-2603

FEDERAL TRADE COMMISSION,

Appellee,

vs.

HACKENSACK MERIDIAN HEALTH, INC., and ENGLEWOOD HEALTHCARE FOUNDATION,

Appellants.

On appeal from the preliminary injunction entered on August 4, 2021, by the United States District Court for the District of New Jersey (Vazquez, J.) at No. 20-18140

BRIEF OF ECONOMISTS MICHAEL R. BAYE, KENNETH G. ELZINGA, GREGORY K. LEONARD, JANUSZ A. ORDOVER AND ROBERT D. WILLIG AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICI CURIAE*

The Economist *Amici Curiae* are five economists with expertise in the subjects of antitrust and competition. They have an interest in having courts correctly apply economic and antitrust principles. In this case, they have reviewed the district court's August 5, 2021, opinion and concluded that it includes critical errors regarding the role played by price discrimination in defining geographic markets based on customer location.[1]

Professor Michael R. Baye is the Bert Elwert Professor of Business at Indiana University's Kelley School of Business. He served as the Director of the Bureau of Economics at the U.S. Federal Trade Commission during 2007 and 2008, and in that capacity directed economists working on hospital mergers and other antitrust matters. Professor Baye served as the chairman of the U.S. Consumer Financial Protection Bureau's Academic Research Council during 2019 and 2020. He has published several textbooks and more than 75 academic articles on pricing, mergers, pricing strategies and other areas related to antitrust and consumer protection, including papers in the

[1] No party other than *amici* and their counsel wrote or funded any part of this brief. All parties have consented to the *amici*'s filing this brief. The views expressed in this brief are those of the *amici*, and they do necessarily reflect the views of others at the institutions with which the *amici* are affiliated.

American Economic Review, Econometrica, Journal of Political Economy, Review of Economic Studies, Rand Journal of Economics, and Journal of Law and Economics.

Professor Kenneth G. Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia. Professor Elzinga's major research interest is antitrust economics, especially pricing strategy and market definition. He has testified in several precedent-setting antitrust cases, and was the economic expert for the prevailing parties in three Supreme Court cases: *Matsushita*, *Brooke Group*, and *Leegin*. Professor Elzinga is the author of more than 100 academic publications, including articles in the American Economic Review, the Harvard Law Review and the Journal of Law & Economics.

Dr. Gregory K. Leonard of Charles River Associates specializes in applied microeconomics and econometrics. Dr. Leonard has written extensively in the areas of antitrust, econometrics and intellectual property, with his publications appearing in the RAND Journal of Economics, the Journal of Industrial Economics, the Journal of Econometrics, the International Journal of Industrial Organization and the Antitrust Law Journal, among others. Dr. Leonard is the Vice Chair for Economics of the Editorial Board of the Antitrust Law Journal. He has testified as an economics expert witness in various venues. Dr. Leonard's writings were cited by the United States Court of Appeals for the Federal Circuit in its *Uniloc* decision and his trial testimony was cited by the United States Supreme Court in its decision in *Oracle v. Google*.

Professor Janusz A. Ordover is an Emeritus Professor of Economics and a former Director of the Masters in Economics Program at New York University where he taught since 1976. He served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President George H. W. Bush. While at the Antitrust Division, Professor Ordover served on the White House de-regulation task force, guided economic analyses of antitrust enforcement and acted as a liaison between the Justice Department and various regulatory agencies. At the Division, he was one of the main drafters of the 1992 Horizontal Merger Guidelines. He has published many articles in economics and law journals on various antitrust issues, including predation, access to bottleneck facilities, vertical integration and overlap between intellectual property rights and competition policy. He is a frequent lecturer on antitrust policy in the U.S. and abroad. Professor Ordover has acted as a consultant to the Department of Justice, Federal Trade Commission, State Attorneys General and corporations and law firms in the United States, Australia, New Zealand, South Africa, Poland and Hong Kong. Professor Ordover has been voted "The Economist of the Year, 2010" in the poll organized by the *Global Competition Review*. Additionally, he was named "Competition Economist Individual Expert of the Year" by *Who's Who Legal* in 2015, 2016 and 2017.

Professor Robert D. (Bobby) Willig is the Professor of Economics and Public Affairs Emeritus at Princeton University, where he has been teaching since 1978. Professor Willig's research has focused on industrial organization, government-business relationships, regulation and antitrust. He has published extensively in the leading journals of economics and in many professional books, and he has lectured widely throughout the academic and policy world. Professor Willig served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the US Department of Justice from 1989–91, and there among other responsibilities was a lead drafter of the 1992 Horizontal Merger Guidelines. He has advised state, federal and international agencies on welfare-enhancing competition and regulatory policy. Professor Willig has been an active consultant to businesses and law firms on matters of antitrust, regulation, intellectual property and taxation in most industries, including health care. He was a co-founder of the economic consultancy Compass Lexecon, and now serves as a senior consultant to the firm.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Relying on guidance from economists, courts have held that the proper determinations of the relevant product and geographic markets are critical predicate steps to deciding whether a proposed merger would violate the antitrust laws. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618 (1974); *Federal Trade Commission v. Penn State Hershey Medical Center*, 838 F.3d 327, 338 (3d Cir. 2016); *see also*, Robert D. Willig, "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," 1991 Brookings Papers on Economic Activity: Microeconomics 281, 287-89 ("Willig 1991").[2]

In its August 4, 2021, opinion explaining its preliminary injunction, the district court in this case made certain errors in its economic analysis, most particularly with respect to the role played by evidence of price discrimination in defining geographic markets based on customer location.

After agreeing with the defendants that the Federal Trade Commission (the "FTC") had not offered evidence of actual or potential price dis-

[2] The Economist *Amici Curiae* are attaching copies of all of the articles cited in this brief.

crimination, the district court nonetheless held that "the lack of price discrimination here does not doom Bergen County as the relevant geographic market." *Federal Trade Comm'n v. Hackensack Meridian Health, Inc.*, No. 20-18140 ("Dist. Ct. Op."), at Typeset 37. Although it recognized that the U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (the "Guidelines")—prepared, revised and used by the FTC and the Antitrust Division of the United States Department of Justice (the "DOJ") over a period of decades—provide that the FTC may define geographic markets on the basis of the location of customers "if price discrimination based on customer location is feasible," the district court nonetheless concluded that the Guidelines "are not binding" and that "price discrimination is not required as a matter of law" to establish a geographic market based on customer location. Dist. Ct. Op. at 37.

In this brief, the Economist *Amici Curiae* explain why, as a matter of economics, simple logic and common sense, it is important to demonstrate that there is the potential for price discrimination when defining a relevant antitrust market around a select group of targeted customers. In its opinion, the district court indicated that the FTC did not provide evidence of price discrimination and that the district court did not require it. In doing so, the

Economist *Amici Curiae* believe the district court failed to implement a proper economic analysis.

ARGUMENT

I. Antitrust analysis may define a relevant geographic market on the basis of the location of the supplier or of the customers but, if it focuses on the customers, there must be evidence that price discrimination is possible.

Economic analysis of the anticompetitive effects of mergers typically starts with a proper delineation of the products and geographic area where a merger might adversely affect prices. *See* Kenneth G. Elzinga & Vandy M. Howell, "Geographic Market Definition in the Merger Guidelines: A Retrospective Analysis," Review of Industrial Organization 453, 469 (Sept. 15, 2018) ("Elzinga & Howell") ("Conceptually, the definition of the relevant geographic market is as important as the definition of the relevant product market. To assess whether a merger is likely to cause harm or bring benefits to consumers, or to consider whether a firm or group of firms has geographic market power in general, one must know what market forces currently, or in the future, would thwart any attempt to increase prices (either unilateral or collusive). The answer to this question depends, among other things, on identifying the set of existing and potentially entering firms that would compete with the merging firms (or firms in question). *Geographic market defini-*

tion is the use of economic analysis to identify that set of firms. Which of the competitors that can or do sell the relevant products at issue could or will constrain pricing? Only the one down the street? All firms in the county, in the state or in the country? Getting the answer to these questions right is just as important as getting product market definition right."); *see, also*, Janusz A. Ordover & Robert D. Willig, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment, 71 Cal. L. Rev. (1983) ("Ordover & Willig"). Ordover & Willig note that the "market definition process succeeds in decomposing merger analysis into steps that are each more manageable, that each relate to forensic custom, and that, as a whole, implement many of the lessons of economic theory." *Id*. at 539-40. The law also defines antitrust markets along these two dimensions. *See, e.g., Penn State Hershey Medical Center*, 838 F.3d at 338.

Properly-defined product and geographic markets are essential for computing market shares and other factors that may be relevant for examining the competitive effects of a merger. This brief focuses on the geographic dimension and demonstrates that the FTC's proposed approach to defining a geographic market in the present case—an approach the district court accepted—is not only illogical and inconsistent with accepted economics but has the potential to mislead courts into blocking mergers that do not actually harm consumers.

Economists have determined that geographic markets may be defined by the location of the suppliers of goods or services or by the location of the potential customers depending upon the economic environment and the relevant facts. *See* Elzinga & Howell at 468; Michael R. Baye, "Market Definition and Unilateral Competitive Effects in Online Retail Markets, 4 J. Competition L & Econ. 639, 643-644 (2008) ("Baye"); Guidelines at § 4.2.[3] In this case, the FTC argued for a relevant market based on only some of customers of the proposed, merged healthcare providers—specifically, those in Bergen County, New Jersey. The district court accepted that Bergen County could be an appropriate geographic market.

However, as the Economist *Amici Curiae* demonstrate below, the district court erred because the FTC admittedly failed to offer evidence that price discrimination would be possible with respect to the geographic market it identified, and proof of potential price discrimination is critical to the analysis.

[3] Available at www.ftc.gov/os/2010/08/100819hmg.pdf (last visited Sept. 22, 2021).

A. Customer-defined (or price-discrimination) markets are defined around a customer group that can be targeted for a price increase.

The FTC has defined a relevant market in this case around a *subset* of the merging parties' customers. If this subset of consumers would pay the same price as the merging parties' other customers, whom the FTC excludes from the analysis, there would be no reliable basis to treat the subset as being in a different market than the excluded customers. Any attempt by the merged firm to increase prices (which would apply to all customers under the assumption that all customers pay the same price) would reduce sales—not just in the FTC-defined subset, but also among the customers the FTC excludes. Economic theory and simple logic indicate that the sales reduction by the excluded customers might render the price increase unprofitable for the merged firm. But, by excluding these customers, the FTC's approach fails accurately to assess the merged firm's ability to increase price profitably. Indeed, as a matter of economics and logic, the FTC's approach of defining a geographic market based on a subset of customers would be valid only if the merged parties could engage in price discrimination—that is, targeting price increases only to the putative subset of customers while not raising prices on the remaining customers whose options are not adversely affected by the transaction.

The economic issues and logic involved here are in fact captured in the hypothetical-monopolist test (the "HMT") described in the Guidelines, as well as in the case law. *See Penn State Hershey Medical Center*, 838 F.3d at 338. If a hypothetical monopolist could profitably impose a small but significant, non-transitory increase in price (a "SSNIP") in a proposed market, it might be a properly defined market. *Id*. If the hypothetical monopolist could profitably raise prices to a subset of its customers, that subset could constitute a separate relevant market. If, on the other hand, it would *not* be feasible for the hypothetical monopolist to profitably price discriminate against the subset of customers, the subset does not define a separate relevant market. *See* Elzinga & Howell at 469 ("The presence of price discrimination (or not) always has been an analytical key to determining whether one should begin with supplier location or customer location; these are two very different approaches to geographic market definition."). Thus, in any particular circumstance, the crucial question concerns whether a hypothetical monopolist could profitably price discriminate. *See* Jerry A. Hausman, Gregory K. Leonard, & Christopher A. Vellturo, "Market Definition Under Price Discrimination," 64 Antitrust L.J. 367, 369 (1995-1996) (Hausman, Leonard & Vellturo").

The reason the potential for price discrimination is critical is that only when price discrimination is feasible can the hypothetical monopolist charge different prices to different customers, thus allowing the hypothetical monopolist to profitably target a price increase to some customers while charging low prices to customers who would forgo its product at the higher price. As one respected treatise has explained, "[s]uccessful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 565b (4th ed. 2014); *see also*, Hausman, Leonard & Vellturo at 369 ("If there is price discrimination, even though a hypothetical monopolist may not find it profitable to raise price 5 percent above the competitive level uniformly across all its customers, it may find it profitable to raise price 5 percent to *some* of its customers.") (emphasis added); Jonathan Baker, "Stepping Out in an Old Brown Shoe: In Qualified Praise of Submarkets," 68 Antitrust L.J. 203, 207 ("The term price discrimination market is applied when a hypothetical monopolist of a group of products and location would raise price *profitably* to a class of targeted buyers.") (emphasis added). If such targeted price increases could profitably occur, the targeted customers would comprise a price-discrimination market.

The FTC and DOJ's own guidelines—which for decades have embodied "the best available economic learning"[4]—similarly make the point:

> If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

Guidelines at § 4.1.4.[5] Indeed, "DOJ investigations often begin by asking whether there are particular types of customers who are most likely to be harmed by the merger. We often find that some types of customers are more vulnerable than others to adverse competitive effects." Carl Shapiro, The

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[4] Ordover & Willig at 539.

[5] This requirement has been in the Horizontal Merger Guidelines since 1992. *See* 1992 *Horizontal Merger Guidelines* at § 1.2.2.

2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 701, 746 (2010).[6]

B. The Horizontal Merger Guidelines clarify what type of evidence is generally required to show that there is the potential for price discrimination among customers.

The *Horizontal Merger Guidelines* state explicitly that two conditions typically must be met for price discrimination to be feasible: differential pricing and limited arbitrage.[7] Once again, these conditions are consistent with the economic literature.[8]

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[6] The Economist *Amici* focus in this brief on broader economic principles, but they note that this case arises in the specific setting of healthcare providers. That is important because, as this Court held in *Penn State Hershey Medical Center*, the proper analysis must recognize that patients are often insensitive to the price of healthcare because they have insurance to cover those costs and that it is then the insurers that shoulder the impact of any price increases. *Id.* That does not diminish in any way the importance of proof that price discrimination is feasible as a prerequisite for defining a geographic market by customer location; it simply shifts the focus from potential patient response to potential insurer response. *Id.*

[7] As discussed below, *Amici* note that differential pricing and limited arbitrage alone are not sufficient to establish price discrimination. For example, differential pricing among customers may be the result of differential costs of serving the customers. Thus, in some cases it may be necessary to adjust for cost differences before concluding that customers are being treated differently based on their observable characteristics. *See* John R. Lott & Russell D. Roberts. "A guide to the pitfalls of identifying price discrimination." 29.1 Economic Inquiry 14-15 (1991).

[8] *See, e.g.*, Michael R. Baye and Jeffery T. Prince, *Managerial Economics and Business Strategy*, McGraw Hill at 350 (McGraw-Hill, 9th ed. 2017).

First, as noted, there must be evidence that the merged businesses would be able to price their products or services differently to targeted customers than to other customers. Guidelines at § 3. "This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics." *Id.*

Second, there must generally be evidence that those targeted customers are not be able to defeat the price increase at issue through arbitrage—for example, by purchasing the products or services indirectly through other, non-targeted customers. *Id.*

The Economist *Amici Curiae* emphasize that it is not sufficient merely to establish differential prices; the evidence of price discrimination must relate to the specific subset of customers that forms the alleged price-discrimination market. Certain patterns of price discrimination may exist that are inconsistent with the price discrimination necessary to define a market around a specific subset of customers. Among other things, in this case one must establish that the merged entities could charge different prices to customers with the same insurance policy but residing or working in different counties.

There is a final point. It is all the more important to require reliable evidence of potential price discrimination specific to the price-discrimination market alleged when there is no evidence of current price discrimination in the industry at issue. Hausman, Leonard and Vellturo have explained that

> extreme caution is warranted when attempting to define relevant markets based on the possibility of price discrimination. This conclusion applies particularly strongly when no price discrimination is currently occurring in the industry under scrutiny. With no currently existing price discrimination, the assumption that a hypothetical monopolist could price discriminate is all the more speculative.

Hausman, Leonard & Vellturo at 383. Thus, someone seeking to determine if there is the potential for price discrimination so that a market may be defined around a group of customers should be particularly wary of doing so in the absence of evidence of current price discrimination.

II. The district court erred when it accepted the FTC's customer-based geographic market without supporting evidence of price discrimination.

When the defendants offered argument regarding the importance of evidence of price discrimination in the HMT, the district court recognized that the Guidelines require such evidence when the market is to be defined around customer location, but it excused the FTC's failure to provide such evidence: "The Court concludes that the lack of price discrimination here does not doom Bergen County as the relevant geographic market." Dist. Ct. Op. at 37.[9]

The district court erred.

First, the district court asserted that the Guidelines are not binding. Dist. Ct. Op. at 37. While it is true that the Guidelines do not have the force of law, as noted above, the Guidelines are deeply rooted in economic literature. Additionally, the Guidelines are based on the collective expertise of multiple generations and hundreds of Ph.D. economists working for the Bureau of Economics at the FTC and the Economic Analysis Group at the DOJ, numerous academics at prestigious universities and feedback from hearings at universities across the United States, and courts routinely use them as persuasive authority. *See, e.g.*, *Penn State Hershey Medical Center*, 838 F.3d at 338 n.2. Moreover, as demonstrated above, the Guidelines carry significant weight in the economics community in which the Economist *Amici Curiae* work because the Guidelines rest on well-established economics principles and authorities.

[9] The Economist *Amici Curiae* have not themselves conducted a review of the evidence provided to the district court but have based the statements in the text, above, on the district court's description of the evidence.

Second, the district court focused on the Guidelines' use of the word "may" when they provide that, if price discrimination is feasible, the FTC and DOJ "may define geographic markets based on the location of customers." Dist. Ct. Op. at 37 (quoting Guidelines at § 4.2). The Economist *Amici Curiae* do not understand the use of that word in context the same way the district court did, and the district court's interpretation would make the Guidelines internally inconsistent and at odds with other authorities that emphasize the importance of evidence of price discrimination. As the economics authorities discussed above explain, relevant geographic markets may be defined around supplier location or customer location. However, if the market is to be defined around customer location, there must be evidence of the potential for price discrimination. Thus, from an economics perspective, Section 4.2 is best understood to say that the FTC *may* choose to define the relevant geographic market by supplier location or customer location, but if it chooses customer location it has the obligation to prove that price discrimination is feasible. That interpretation best comports with economics principles, while the district court's interpretation is at odds with those principles.

As a matter of economic principle, the district court should have required the FTC to support its proposed customer-based geographic market with evidence of actual or potential price discrimination.

III. By accepting the FTC's incorrectly defined geographic market, the district court reached unreliable conclusions regarding the likely competitive impact of the proposed merger.

The district court's market-definition error has ripple effects through to its competitive-effects analysis because, as the Guidelines explain, whether price discrimination is possible will affect not only market definition but also how market shares should be measured and how potential competitive effects should be assessed:

> When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, *e.g.*, by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

Guidelines § 3.

Simply stated, the theory of competitive harm is different if the market is not a price-discrimination market. Without price discrimination, the market would be defined by the location of suppliers, not of patients, and the analysis of competitive impact would be analyzed by identifying the set of hospitals that compete against each other and evaluating whether the other hospitals in the market would discipline an attempt by the merging parties to raise prices. That competitive-effects analysis would assess whether the merging parties could profitably raise prices to *all* patients, not just patients who live in Bergen County. This follows because, if price discrimination is not possible, the merged entities would have to charge the same price to customers both inside and outside the targeted customer group and would be, therefore, constrained by companies—hospitals in this case—serving customers outside of the target group. *See* Gregory J. Werden, "A Closer Analysis of Antitrust Markets," 62 Wash. U. L. Rev. 647, 649 (1985) ("If price discrimination among buyers is not possible, then all buyers of a firm's product will be 'affected buyers.'"). Expressed differently, a finding that the merged parties would have enough market power to raise prices to Bergen County patients would be irrelevant if in fact the merged parties could not actually charge separate prices to patients in Bergen County.

There is, then, a mismatch in the district court's analysis. The district court relied on a theory of harm focused on Bergen County, but its failure to require proof that price discrimination would be feasible means that the relevant market is not just Bergen County but *all* customers of the merging healthcare providers.

CONCLUSION

The court was wrong to accept the FTC's argument that a hypothetical monopolist or the merged parties could profitably raise prices to customers in Bergen County. Absent evidence of price discrimination (*e.g.*, the ability to target price increases solely to customers in Bergen County), raising prices may be unprofitable due to lost sales to customers outside of Bergen County The Economist *Amici Curiae* respectfully urge the Court to vacate the district court's injunction as it rests on a flawed economic analysis.

Respectfully submitted,

September 22, 2021

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that the attached brief as provided to the Court in electronic form includes the same text as the "hard copies" of the brief filed by overnight courier with the Court. I also certify that this electronic file has been scanned with Symantec Anti-Virus software.

/s/ David R. Fine

CERTIFICATION OF WORD COUNT

I certify that this brief includes 4,333 words as calculated with the word-counting feature of Microsoft Word and including the parts of the brief specified in Federal Rule of Appellate Procedure 32.

/s/ David R. Fine

CERTIFICATE OF SERVICE

I certify that, on September 22, 2021, I filed the attached brief with the Court's CM/ECF system such that all counsel will receive service automatically and that I served two copies on counsel for each party by U.S. Mail, postage-prepaid:

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