

**In the United States Court of Appeals
for the Third Circuit**

No. 21-2603

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

- v. -

HACKENSACK MERIDIAN HEALTH, INC. AND
ENGLEWOOD HEALTHCARE FOUNDATION,
Defendants-Appellants.

**On Appeal from the United States District Court for the
District of New Jersey, No. 2:20-cv-18140
(Hon. John Michael Vazquez, U.S.D.J.)**

**BRIEF OF NEW JERSEY HOSPITAL ASSOCIATION
AS AMICUS CURIAE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and Third Circuit L.A.R. 26.1, *amicus curiae* New Jersey Hospital Association makes the following disclosure:

Amicus Curiae New Jersey Hospital Association has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

New Jersey Hospital Association is not aware of any publicly held corporation not a party to this appeal that has a financial interest in the outcome of this proceeding.

Dated: September 22, 2021

s/ Richard Hernandez _____

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TABLE OF CONTENTS

STATEMENT OF IDENTIFICATION AND INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. DUE DEFERENCE SHOULD BE AFFORDED TO THE
 THOROUGH REVIEW PROCESSES AND WELL-
 REASONED RECOMMENDATIONS OF NEW JERSEY’S
 DEPARTMENT OF HEALTH AND ATTORNEY
 GENERAL’S OFFICE. 4

 A. Applicable New Jersey Regulatory Framework 5

 B. Attorney General and DOH Review and Assessment 7

 II. THE DISTRICT COURT DID NOT PROPERLY CONSIDER
 THE IMPORTANT PUBLIC POLICY BENEFITS
 SUPPORTING APPROVAL OF THE TYPE OF MERGER
 PROPOSED BY APPELLANTS. 10

 A. Benefits of Scale Should be Taken Into Consideration
 When Evaluating Hospital Mergers. 11

 B. Transactions Similar to Appellants’ Proposed
 Transaction Result in the Expansion of High Quality
 Care to a Larger Population. 13

CONCLUSION..... 15

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Fed. Trade Comm’n v. Hackensack Meridian Health, Inc. et al.</i> , Civil Action No. 2:20-cv-18140-JMV-JBC	10
<i>Hyland v. Kirkman</i> , 157 N.J. Super. 565 (Ch. Div. 1978)	9
<i>IFA Ins. Co. v. New Jersey Dep’t of Ins.</i> , 195 N.J. Super. 200 (App. Div. 1984)	9
 Statutes	
Community Health Care Assets Protection Act, P. L. 2000, c. 143 (N.J.S.A. 26:2H-7.10 et seq.).....	<i>passim</i>
N.J.S.A. 26:2H-7.11(b)	5, 6
N.J.S.A. 26:2H-7.11(l)	6
 Other Authorities	
Federal Rule of Appellate Procedure 32(a)(5).....	2
Federal Rule of Appellate Procedure 32(a)(6).....	2
Federal Rule of Appellate Procedure 32(a)(7)(B)	2
Federal Rule of Appellate Procedure 32(f).....	2
Federal Rules of Appellate Procedure Rule 29(a)	2
Federal Rules of Appellate Procedure Rule 29(a)(4)(E)	2
Local Appellate Rule 31.1(c)	2
Local Appellate Rule 46.1	1
N.J.A.C. 8:33-1.2	6, 7

N.J.A.C. 8:33-4.9(a)(1)7
N.J.A.C. 8:33-4.10(b)(5).....7

STATEMENT OF IDENTIFICATION AND INTEREST

Since 1918, the New Jersey Hospital Association (“NJHA”) has actively worked with its nearly 400 member healthcare organizations, including all 71 New Jersey acute care hospitals, to help them provide accessible, affordable and quality healthcare to New Jersey communities and patients. NJHA accomplishes its mission by providing leadership in policy and data analysis, education, community outreach, and by serving as an advocate to elected officials and tribunals at the state and federal levels on behalf of New Jersey’s acute care hospitals. NJHA also participates in the development of New Jersey policy at the legislative, agency and judicial levels and recommends improvements to enhance the quality, safety, and value of healthcare provided to patients throughout New Jersey.

Given NJHA’s mission to safeguard and improve patients’ access to quality and affordable healthcare, the NJHA has an interest in supporting hospital transactions that benefit New Jersey’s patients and communities, as determined by New Jersey’s extensive regulatory evaluation process. These state regulatory processes invite participation from all stakeholders in the New Jersey healthcare market, including the public, and represent a robust and independent evaluation of potential healthcare transactions by those agencies that are in the best position to know. In the instant case, the District Court’s issuance of a preliminary injunction preventing the proposed transaction between Hackensack Meridian Health, Inc. and

Englewood Healthcare Foundation failed to give due weight to these critical state regulatory evaluation processes. Accordingly, *amicus curiae* NJHA respectfully submits this brief by motion pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure in support of Appellants’ position that the District Court’s judgment failed to take into account several critical considerations.¹

SUMMARY OF ARGUMENT

This is an action by the Federal Trade Commission (the “FTC”) seeking to obtain a preliminary injunction blocking a proposed merger between two New Jersey-based nonprofit health systems, Appellants Hackensack Meridian Health, Inc. (“HMH”) and Englewood Healthcare Foundation, d/b/a Englewood Health (“Englewood,” and, collectively, “Appellants”) on antitrust grounds. This amicus brief will focus on two issues, which NJHA respectfully contends were not properly considered by the FTC and the District Court below: (1) New Jersey’s robust regulatory framework for evaluating nonprofit hospital transactions that resulted in approvals of this transaction; and (2) important public policy benefits of hospital mergers that result in strong hospitals and health systems available to provide high

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, no party’s counsel other than the undersigned counsel for the NJHA authored this brief in whole or in part. No party, party’s counsel, or person contributed money to fund the preparation of this brief. McCarter & English LLP has represented Englewood Healthcare Foundation and Hackensack Meridian Health, Inc., but is not counsel to either party in the above-captioned matter.

quality services to New Jersey's patients and communities.

First, this brief will address New Jersey's two regulatory processes applicable to the evaluation of any proposed transaction that would result in the acquisition of a nonprofit acute care hospital by another entity. These processes – which are overseen by the New Jersey Department of Health and the New Jersey Attorney General's Office, the state agencies that are responsible for health care in New Jersey and the protection of New Jersey's charitable assets, respectively -- principally focus on determining whether a particular transaction is in the "public interest." Notwithstanding these agencies' well-supported findings and decisions that this transaction is in the public interest of New Jersey patients and communities, the FTC and the District Court substituted their own judgments based on the incorrect application of the federal antitrust laws² – thereby effectively undermining the purpose of these New Jersey processes and ignoring or disregarding the stakeholders who will benefit from this transaction.

Second, this brief will address the important public policy benefits to New Jersey patients and communities of hospital transactions in the New Jersey

² Based on NJHA's review of the District Court's heavily-redacted opinion, and its understanding of the arguments and facts asserted in Appellants' opening brief, NJHA agrees that fundamental errors were made by the District Court in defining the relevant geographic market, finding that the transaction would be likely to substantially lessen competition, and failing to properly consider the transaction's procompetitive benefits.

healthcare market. The District Court failed to consider benefits such as the development of innovative diagnostic and treatment protocols by integrated health systems which enables them to better respond to the needs of the communities they serve (including in public health emergencies such as the COVID-19 pandemic) and investments in staff, facilities and technology which expand the availability of quality care to a broader patient population. These important public policy considerations should have been considered by the District Court in its analysis of this transaction.

ARGUMENT

I. DUE DEFERENCE SHOULD BE AFFORDED TO THE THOROUGH REVIEW PROCESSES AND WELL-REASONED RECOMMENDATIONS OF NEW JERSEY’S DEPARTMENT OF HEALTH AND ATTORNEY GENERAL’S OFFICE.

New Jersey’s statutory and regulatory framework for reviewing mergers or other changes of ownership of New Jersey’s nonprofit hospitals provides ample safeguards – and its State regulatory agencies, in turn, act as diligent gatekeepers – to protect and police against any deterioration in the accessibility, availability and quality of hospital services in New Jersey. The FTC and the federal courts should accord due deference to the role of the New Jersey State regulatory agencies that are responsible for the health of New Jersey’s citizens, the strength of New Jersey’s hospitals and health systems, and the preservation of New Jersey’s nonprofit hospital assets in their review of these important transactions, rather than disregarding these

extensive regulatory review processes as they have done in the instant action.

A. Applicable New Jersey Regulatory Framework

The State of New Jersey has implemented a robust statutory and regulatory framework for reviewing nonprofit hospital transactions, such as the merger between HMH and Englewood, in the form of the Community Health Care Assets Protection Act (CHAPA), P. L. 2000, c. 143 (N.J.S.A. 26:2H-7.10 et seq.). CHAPA specifically requires the New Jersey Attorney General’s Office, in consultation with the Commissioner of the Department of Health (“DOH”), to evaluate any transaction that would result in the acquisition of a nonprofit hospital by another New Jersey nonprofit corporation or by any for-profit or out-of-state entity, in order to determine if the acquisition is in the public interest. This determination may only be made based upon a finding that “appropriate steps have been taken to safeguard the value of the charitable assets of the hospital and to ensure that any proceeds from the proposed acquisition are irrevocably dedicated for appropriate charitable health care purposes.” *See* N.J.S.A. 26:2H-7.11(b). This process also requires a determination that the proposed transaction is “not likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities.” *Id.* Stated differently, CHAPA is focused on preserving and protecting the health care services available to the communities in which the subject hospitals are located.

CHAPA defines the Attorney General’s role in transactions involving the

transfer of nonprofit hospitals. Specifically, CHAPA authorizes the Attorney General to review a proposed nonprofit hospital transaction, ascertain whether it is in the public interest, and thereafter advise the Superior Court of New Jersey, in an action to approve the transaction, “whether he supports or opposes the proposed acquisition, with or without specific modifications, and the basis for that position.” N.J.S.A. 26:2H-7.11(l); *see also* Am.App.12 (“It is the Attorney General’s duty to analyze the Proposed Transaction to determine its impact on the public interest and to ensure that the process is open to public comment and scrutiny in order to maximize the public’s confidence in the final decision.”).

In addition to the Attorney General’s review, the DOH is also tasked with analyzing the particular transaction to determine that “the proposed transaction is not likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities.” N.J.S.A. 26:2H-7.11(b). The DOH is dedicated to upholding the principle “that access to healthcare services of the highest quality are of vital concern to the public health” by focusing its review of transactions on maintaining quality of care throughout the State. N.J.A.C. 8:33-1.2. To this end, the DOH’s review is intended to guard against transactions that are “harmful to the public interest” and approve those that “protect and promote the health of the inhabitants of the State.” *Id.* The DOH is responsible for the health of New Jersey citizens and evaluates whether proposed transactions are appropriate and

beneficial based on its evaluation of the healthcare needs in the State. This entails consideration of factors such as:

- “The availability of facilities or services which may serve as alternatives or substitutes,” N.J.A.C. 8:33-4.9(a)(1);
- “Availability of similar services at other institutions in or near the service area,” N.J.A.C. 8:33-4.10(b)(5); and
- “Provider’s historical and projected market shares,” N.J.A.C. 8:33-4.10(b)(5).

The DOH requires the submission of a licensure application for any transfer of ownership or membership of a licensed acute care hospital such as the instant transaction. This application requires the parties to provide detailed information about the proposed new owner and its track record of operating healthcare facilities for review by the DOH.³

B. Attorney General and DOH Review and Assessment

Here, after an extensive review of the proposed transaction – during which HMH and Englewood each provided a great deal of information regarding the synergies between their health systems and the anticipated benefits of the merger to the local communities, and a public hearing regarding the transaction in the Englewood service area, the Attorney General, in accordance with CHAPA, issued a well-reasoned 33-page recommendation letter (the “Attorney General’s

³ A copy of the CN-7 application can be found here:

<https://www.nj.gov/health/forms/cn-7.pdf>.

Recommendation Letter”) to the Superior Court of New Jersey, Chancery Division,⁴ categorically supporting the transaction as beneficial to, and in furtherance of, the public interest. *See generally* Am.App.1. The Attorney General’s Recommendation Letter documented the factual and legal bases supporting this determination (Am.App.14 – Am.App.31), including its finding that:

HMH has made a number of commitments to enhance Englewood Hospital’s ability to provide health care services, including funding strategic capital projects enhancing Englewood Hospital’s charitable mission and ability to provide key health care services to the community. Thus, we find that it is manifest under the circumstances of this transaction that the monetary and nonmonetary benefits to be conferred on Englewood Hospital by affiliating with HMH in accordance with the Agreement will be used for appropriate charitable health care purposes and will enhance Englewood Hospital’s ability to provide health care services”

Am.App.31 (emphasis added). The AG’s office also found that, that based on its “examination of the activities of the fiduciaries in negotiating the Agreement, as well as [its] review of the evidence provided of the substantial economic and non-economic benefits to be derived by Englewood from the Proposed Transaction, the Englewood Board was cognizant of the fiscal risks and benefits of the Proposed Transaction in furtherance of their fiduciary duties.” Am.App.29.

⁴ Upon completion of the AG’s Office’s review and receipt of its recommendations, CHAPA authorizes the New Jersey Superior Court, Chancery Division to review and approve transactions involving nonprofit hospitals in accordance with the Chancery Division’s general supervisory jurisdiction over nonprofit corporations.

The Commissioner of DOH likewise issued a letter (“DOH Commissioner’s Letter”) noting its review of the proposed transaction and its participation in the public hearing, and confirming that it “*does not believe the proposed transaction will result in the deterioration of the quality, availability or accessibility of health care in the impacted communities.*” See Am.App.35 (emphasis added).

The Superior Court of Bergen County approved the proposed transaction in a judgment dated December 23, 2020, thereby adopting the findings of the Attorney General’s Office and the Commissioner of DOH. Critically, neither the Attorney General’s Recommendation Letter nor the DOH Commissioner’s Letter nor the Superior Court’s decision expressed any concerns regarding the consolidation of these two health systems or the resulting impact of such consolidation on the quality, availability or accessibility of health care services in the affected communities.

NJHA respectfully submits that disregarding or discounting New Jersey’s extensive processes and the well-supported conclusions of its trusted State agencies must be discouraged. Given the roles of the DOH and AG’s Office as guardians of the public interest, their findings and conclusions should be respected and afforded substantial deference both by the FTC and our Courts. See, e.g., *Hyland v. Kirkman*, 157 N.J. Super. 565, 577 (Ch. Div. 1978); *IFA Ins. Co. v. New Jersey Dep’t of Ins.*, 195 N.J. Super. 200, 208 (App. Div. 1984). Indeed, with all due respect given, the DOH and the Attorney General’s Office are closer to, and more informed about,

New Jersey's health care system and needs than the FTC. The DOH Commissioner and Attorney General are qualified to review and evaluate whether a proposed hospital merger is (or is not) beneficial to patients, communities and other stakeholders in New Jersey, and whether, from a practical perspective, a given transaction will improve (or lead to deterioration in) the quality, availability and accessibility of healthcare services. In the instant transaction, these agencies and the New Jersey Superior Court determined that this transaction was in the public interest.⁵

NJHA respectfully submits that these New Jersey agencies and their rigorous processes for evaluating transactions such as the proposed HMH-Englewood merger, must be afforded substantial deference and respect, and that the FTC should be dissuaded from substituting the judgment of these responsible and diligent State agencies with its own.

II. THE DISTRICT COURT DID NOT PROPERLY CONSIDER THE IMPORTANT PUBLIC POLICY BENEFITS SUPPORTING APPROVAL OF THE TYPE OF MERGER PROPOSED BY APPELLANTS.

In recent years, nonprofit community hospitals have faced increasing

⁵ Moreover, the District Court ignored the Attorney General's explicit finding that HMH "has made a number of commitments to enhance Englewood Hospital's ability to provide health care services," opting instead to dismiss these commitments as largely inconsequential. *See, e.g., Fed. Trade Comm'n v. Hackensack Meridian Health, Inc. et al.*, Civil Action No. 2:20-cv-18140-JMV-JBC, at ECF No. 368, pp. 23-24, 57-58.

challenges in providing high quality services to their communities, including, among others, reductions in payments from governmental programs, increased regulation, and the cost of information technology systems and sophisticated medical equipment. These challenges have caused many New Jersey nonprofit hospitals to pursue affiliations with larger New Jersey health systems to help them address operational and financial challenges and provide clinical and financial resources to improve quality of care and accessibility and position them to be able to provide services to their communities for years to come.

Patients have experienced improvements in the quality of, and access to, care as a result of New Jersey's hospital mergers. Benefits of scale, an expanded capability to pursue innovative diagnostic and treatment models, and the ability to provide higher quality care to a larger patient population are all benefits New Jersey patients experience when hospital mergers that are beneficial to the community are permitted to proceed. The District Court's decision did not give appropriate weight to these factors, which, as discussed above, were evaluated by the DOH and the AG's Office as part of their review of the proposed transaction.

A. Benefits of Scale Should be Taken Into Consideration When Evaluating Hospital Mergers.

Integrated health systems and community hospitals are invaluable resources for their communities and patients every day of the year, and are a critical and essential resource during public health emergencies like the ongoing COVID-19

pandemic. During this pandemic, New Jersey's health systems were at the forefront of developing new and more efficient testing, more effective treatment protocols, procuring necessary equipment, and efficiently implementing wide-scale vaccination efforts. These initiatives and responses were possible only because health systems like HMH had the size and resources to execute them. Bergen County hospitals, including HMH's hospitals and Englewood, were at the epicenter of this pandemic in the spring of 2020 and their truly heroic efforts helped and continue to help New Jersey get through the pandemic.⁶

Aside from a public health emergency, New Jersey patients expect and need state-of-the-art health care, and hospitals must be permitted to engage in transactions that permit them to invest in the staff, facilities and technology needed to provide that care. Currently, New Jersey is facing both a nursing and physician shortage. Permitting hospitals to merge allows for the movement of staff to meet the changing needs of the communities they serve in real time.

In addition, transactions like the one proposed by Appellants enable the funding and support of innovation that would not be possible without increased

⁶ See HMH 2020 Annual Report ("2020 Annual Report"), found here: <https://www.hackensackmeridianhealth.org/wp-content/uploads/2021/08/2020-HMH-Annual-Report.pdf?x56982>, at 10-15, discussing HMH's contribution to New Jersey's Covid-19 response.

scale.⁷ Over the past 2-3 years, HMH developed its Center for Discovery and Innovation, which, among other things, developed a rapid COVID test early in the pandemic to address shortfalls in the availability and speed of statewide testing.⁸ HMH also established the first new medical school in New Jersey in decades to help address the significant physician shortage in New Jersey.⁹ This new medical school just graduated its first class, many of whom will stay and practice in New Jersey communities.¹⁰ The benefits of scale and the innovation it enables should be given great weight in evaluating proposed hospital transactions, and the DOH and AG's Office, are best positioned to evaluate a proposed merger's ability to address the healthcare needs of New Jersey's citizens and communities.

B. Transactions Similar to Appellants' Proposed Transaction Result in the Expansion of High Quality Care to a Larger Population.

Allowing properly evaluated hospital transactions to proceed increases the likelihood that smaller hospitals and healthcare systems are able to benefit from the talents, processes, and protocols developed, funded and implemented by New

⁷ See Am.App.49 – Am.App.50 (CHAPA Hr'g Tr.) at 11:25-12:5 (discussing increased access to healthcare and innovation in advanced medical care that would result from the financial component of the Appellants' proposed transaction).

⁸ See 2020 Annual Report at 15.

⁹ See HMH 2018 Annual Report, which can be found here: https://www.hackensackmeridianhealth.org/wp-content/uploads/2019/12/PP3094_HMHAnnualReport_FINAL_LowRes5.pdf?x56982, at 12.

¹⁰ See 2020 Annual Report at 20.

Jersey's larger health systems. One of the other public policy benefits of the scale of large integrated delivery systems such as HMH, is that such systems have the resources to develop and fund necessary tertiary and quaternary hospital services that are needed by New Jersey patients. The development of such services by New Jersey's leading integrated delivery systems permits New Jersey patients to receive those services in-state and closer to their homes.¹¹ The increased scale and resources of an integrated health system such as HMH permits the system to respond to federal governmental initiatives designed to increase the quality and reduce the cost of care, such as value-based payment programs and accountable care organizations. These models require significant investments and staffing, along with the capacity to assume risk, to redesign care that many community hospitals don't have and are barriers to participation. These governmental initiatives and the associated costs of participating in them have been one of the drivers of hospital consolidation in recent years. *See* Certification of Cathleen Bennett, submitted herewith, at ¶ 7. Englewood's Board of Trustees recognized this need and "unanimously agreed that it should seek a merger partner to address [its] competitive weaknesses and improve its quality of care." Appellants' Br. at 11.

¹¹ *See* Am.App.49 – Am.App.50 (CHAPA Hr'g Tr.) at 11:5-12:25 (discussing expanded care Englewood would be able to provide to patients if the transaction is permitted to proceed, including the expansion of tertiary and quaternary health care services offered to New Jersey patients and communities).

The CHAPA process reviewed Appellants' proposed initiatives aimed at improving the quality of patient care in Appellants' patient pool – including Appellants' proposed effort to develop or enhance various service lines in the Englewood service area, develop certain clinical programs, and institute charity care policies that provide similar or greater benefit to the community as those that currently exist – and determined it was appropriate to support the transaction as proposed without modification. *See Am.App.4.*

CONCLUSION

For the foregoing reasons, the District Court should have given greater weight to the analysis and conclusions of the New Jersey governmental agencies tasked with evaluating nonprofit hospital mergers. The New Jersey Attorney General's Office and the Department of Health carefully considered and reviewed the Appellants' proposed transaction and determined it met New Jersey's statutory and regulatory requirements, maintained a competitive healthcare market, and would be a positive development for the patients and communities served by the Appellants' hospitals. The District Court also failed to properly consider the important healthcare public policy reasons that support permitting hospital transactions that deliver benefits to the New Jersey patients and communities they serve.

Respectfully Submitted,

s/ Richard Hernandez _____

Richard Hernandez

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Richard Hernandez certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. Ashley Turner is also a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: September 22, 2021

By: /s/ Richard Hernandez
Richard Hernandez
Counsel for *Amicus Curiae*

COMBINED CERTIFICATIONS

I certify that this brief complies with the type-volume limitation excluding the parts of the brief pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,442 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of this electronic brief is identical to the text of the paper copies and that I have scanned the PDF version of this brief using McAfee VirusScan Enterprise version 8.8 and no virus was found.

Date: September 22, 2021

s/ Richard Hernandez

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CERTIFICATE OF SERVICE

I certify that on September 22, 2021, I caused the foregoing brief to be electronically filed through the ECF system of the United States Court of Appeals for the Third Circuit, which caused counsel of record to be served by ECF.

Date: September 22, 2021

s/ Richard Hernandez _____

Richard Hernandez

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**On Appeal from the United States District Court for the
District of New Jersey, No. 2:20-cv-18140
(Hon. John Michael Vazquez, U.S.D.J.)**

CERTIFICATION OF CATHLEEN D. BENNETT

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I, CATHLEEN D. BENNETT, of full age, certify:

1. I am the President and Chief Executive Officer for the New Jersey Hospital Association (“NJHA”), a not-for-profit trade association organized under the laws of the State of New Jersey, which is located at 760 Alexander Road, Princeton, New Jersey 08534. I am personally familiar with the facts set forth herein. I submit this certification in support of NJHA’s motion for leave to appear and participate in the above-captioned matter as *amicus curiae*.

2. NJHA is a not-for-profit trade association established in 1918 and comprised of hospitals and other healthcare organizations throughout the State of New Jersey.

3. NJHA’s membership consists of nearly 400 member hospitals, health systems, nursing homes, home health agencies, hospice providers and other healthcare related businesses and education institutions statewide, including all of New Jersey’s acute care hospitals.

4. NJHA provides leadership in policy and data analysis, education, community outreach, and by serving as an advocate to elected officials and tribunals at the state and federal levels on behalf of New Jersey’s acute care hospitals.

5. NJHA also participates in the development of New Jersey policy at the legislative, agency and judicial levels and recommends improvements to enhance

the quality, safety, and value of healthcare provided to patients throughout New Jersey.

6. Given NJHA's mission to safeguard and improve patients' access to quality and affordable healthcare, NJHA has an interest in supporting hospital transactions that benefit New Jersey's patients and communities, as determined by New Jersey's extensive regulatory evaluation process.

7. The increased scale and resources of an integrated health system permits the system to respond to federal governmental initiatives designed to increase the quality and reduce the cost of care, such as value-based payment programs and accountable care organizations. These models require significant investments and staffing, along with the capacity to assume risk, to redesign care that many community hospitals don't have and are barriers to participation. These governmental initiatives and the associated costs of participating in them have been one of the drivers of hospital consolidation in recent years.

8. Because of the importance of this issue and the likelihood of its impact on New Jersey's healthcare industry, NJHA respectfully requests to participate and be heard as *amicus curiae*.

9. NJHA believes that its participation will not unduly prejudice any party to this litigation nor delay the progression of this case.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Dated: September 22, 2021

Cathleen D. Bennett