No. 14-762

IN THE

Supreme Court of the United States

PROMEDICA HEALTH SYSTEM, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY

The court below relied on a deeply flawed framework that injects profound confusion into basic aspects of Clayton Act analysis, while simultaneously handing the FTC virtually unfettered discretion to block mergers. The flaws extend from the court's approach to cluster-market definition (which even one of the FTC Commissioners conceded was unprecedented and allows the FTC to "gerrymander" product markets), to the court's imposition of a market-share-based presumption of harm (in a case where the sole theory of competitive harm relies on substitutability, *not* market share), to the court's doubling down on market share by adopting a per se market-share-based rule to preclude consideration of ProMedica's weakened-competitor defense (a rule the FTC does not even try to defend here).

The confusion on these foundational and frequently recurring issues portends devastating consequences, especially for healthcare markets. The American Hospital Association (AHA) observes that, given the fundamental transformations occurring in those markets due to the Affordable Care Act (ACA) and other recent federal mandates, the FTC's analysis here "leaves the viability of many small and stand-alone hospitals in jeopardy," (AHA Amicus at 2), threatening a "downward spiral to collapse" for struggling hospitals across the country, (*id*. at 10). These hospitals need clarity and certainty regarding the contours of merger law, and they need it urgently. As fully-litigated merger cases remain rare,

this case presents an ideal opportunity to provide that clarity.

The FTC's response only confirms the need for immediate review. It barely addresses the conflict and tension that petitioner and amici identified. Instead, the FTC offers a half-hearted defense of the merits of the decision below, coupled with its real response—that any flaws in the analytical framework do not matter, as the merger here allegedly would not survive under any framework. That response, however, fails for two reasons. First, the above-identified flaws significantly skewed the proceedings below and prevented appropriate consideration of ProMedica's core defenses. Second, as amici explain at length, the confusion and discord resulting from the decision below will profoundly impact not only the merger here, but countless other mergers or potential mergers in healthcare markets across the country.

I. THE DECISION BELOW THREATENS ONGOING AND IMPORTANT CONFUSION IN CLAYTON ACT ANALYSIS.

A. Respondent's Brief Confirms The Need For Clarity On Cluster-Market Definition.

In its petition, ProMedica explained that there are two separate and independent approaches to cluster-market definition. First, separate products *may* be grouped for "administrative convenience" when the competitive conditions for each are the same, such that performing separate analyses for each product would be redundant. Second, separate products *must*

be grouped for analysis when the grouping reflects the commercial realities of marketplace transactions. If consumers treat a collection of products as a group, then the "unit" for antitrust purposes is that group—what the court below referred to as the "package-deal theory." (Pet. App. 16a).

The decision below confuses the interplay between these two theories by improperly limiting the package-deal theory solely to those cases where all producers offer *exactly the same* cluster. That approach is inconsistent with this Court's decision in *Grinnell* and decisions from other courts, which correctly recognize that grouping products may be analytically appropriate when the packages offered are substantially similar, even if not identical. (Pet. at 20-21). Indeed, even one of the Commissioners noted that the FTC's approach to product market definition here "depart[ed] from the case law" and "risk[ed] accusations of 'gerrymandering' the relevant product market," a clear acknowledgment of the confusion and uncertainty that will result from the approach to cluster-market definition below. (Pet. App. 156a).

The opposition does not assuage these concerns. The FTC first claims that limiting clusters to the identical-grouping situation does not create tension with *Grinnell*, but even the FTC concedes that "the real lesson of *Grinnell*," (Opp. at 19), is that clustering is appropriate where it "reflects commercial realities." (*Id.* (quoting *Grinnell*)). Here, all agree the "commercial reality" is that the relevant purchasers—managed care organizations (MCOs)—

"typically bargain for *all* of a hospital's services in a single negotiation," including obstetric (OB) services if a hospital offers them. (Pet. App. 17a (emphasis added)). Under *Grinnell*'s commercial-reality approach, that should have triggered application of the package-deal theory, and OB services should have been included in the general acute care (GAC) cluster.

The FTC also seeks to downplay the tension with *Grinnell* by arguing that the package-deal approach does not reflect "how *patients* use hospital services ...." (Opp. at 19 (emphasis added)). But all agree that prices are negotiated between hospitals and *MCOs*. Thus, it is the bundle that MCOs *negotiate for*, not the bundle that patients *use*, that sets the "commercial realities" in this market, and here that bundle includes OB services if a given hospital provides them. Or, as the FTC acknowledges elsewhere, grouping is appropriate where "customers use[] the various … services in combination." (Opp. at 18). Here, MCOs use all of the services "in combination," as the MCOs must build networks that offer the entire range of GAC services, including OB services.

The FTC likewise has no meaningful response to *California v. Sutter Health System*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001), and *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), both of which combined the entire group of GAC hospital services into a single cluster for analysis, even though not all providers offered each service. (Pet. at 20-21). The FTC does not address the first case at all. As for

University Health, the FTC does not dispute ProMedica's description of the cluster there, but merely opines that the market definition in that case was not central to the analysis. That does not relieve the tension between the decision below and these prior cases, resulting in ongoing uncertainty about market definition.

The FTC is likewise incorrect to assert that this case is a poor vehicle for addressing cluster-market definition. (Opp. at 20-21). The FTC claims that the cluster-market definition did not matter here, as the combined entity's market share was sufficiently high to trigger a presumption of illegality even if OB services were included into a single GAC cluster. That argument, however, ignores that the court below relied on the merged entity's particularly high market share *in a separately defined OB-services market* to avoid carefully considering the appropriateness of using a market-share-based presumption. That is, the court specifically relied on its finding that "ProMedica's share *of the OB market* would top 80%" as the basis for concluding that here market share was a proxy for substitutability, thus making market share relevant to the unilateral-effects analysis. (Pet. App. 23a (emphasis added)). In short, market definition mattered greatly.

B. The Decision Below Creates Confusion Regarding The Role Of Market-Share-Based Presumptions Of Harm In Unilateral-Effects Cases.

Separately, review is urgently needed to address the role of market-share-based presumptions of harm in unilateral-effects cases. Any such presumption is badly misplaced, as the likelihood of unilateral effects turns on *substitutability*, not market share. (Pet. 10-12, 24). Even the court below admitted this argument is "one to be taken seriously," (Pet. App. 22a), and this Court has not yet addressed it.

The role, if any, for such presumptions is vitally important to Clayton Act analysis generally and in the GAC healthcare context in particular. GAC services markets tend to be distinctly local and, as a result, inherently concentrated. Use of market-share-based presumptions provides the FTC unbridled discretion to block virtually any hospital merger in all but the largest cities (where there may be sufficient numbers of hospitals to reduce market concentration statistics below *Merger Guideline* thresholds).

In response, the FTC dissembles. It seeks to change the question from whether a market-share-based *presumption* is warranted, to instead whether market share is *relevant* to the competitive-effects analysis. (*See* Opp. at 23). There is a gap, however, between relevance and application of an actual presumption, and the FTC offers nothing to bridge that gap. In other words, the FTC's arguments that

"market concentration remains important," (*id.*), or "can be a useful and informative metric[]," (*id.*), do not remotely justify a *presumption* of harm.

The FTC's assertion that another recent decision adopts this same misplaced presumption only further underscores the need for immediate review. (Opp. at 24 (citing *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015))). Widespread adoption of the presumption will have an unwarranted chilling effect on mergers, and *Saint Alphonsus* is merely another step down that flawed path.

Perhaps recognizing the weak (or non-existent) justification for market-share-based presumptions in unilateral-effects cases, the FTC spends considerable space arguing that even if substitutability, not market share, is (as the FTC's expert concedes, *see* Pet. at 11) the "central variable," there allegedly is abundant evidence of substitutability here. (Opp. at 24-25). That argument misses the point. The use of a market-share-based *presumption* infused every aspect of the analysis below. It put a thumb (or, here, an entire hand) on the scale in favor of the FTC, creating an inappropriate hurdle that ProMedica was forced to clear. Had the analysis proceeded from the outset on substitutability grounds, starting from a blank slate, the lower court's consideration of the substitutability evidence may have been vastly different than it was once that evidence was viewed

through (and colored by) the lens of a market-share-based presumption.[1]

Separately, the FTC argues that this is a poor vehicle for considering the structural presumption issue as, even if such presumptions are not generally warranted in unilateral-effects cases, it is warranted on the facts here. (Opp. at 26). The FTC's efforts to make this a fact-bound issue, however, fall flat. To start, the Commission's administrative decision did not assert that use of the presumption rested on unique facts. Thus, if the Sixth Circuit's decision might be read as restricting the use of structural presumptions in unilateral-effects cases to certain factual settings, this conflict with the administrative decision actually *increases* the uncertainty surrounding such presumptions.

Second, the two "exceptional facts" on which the lower court relied are themselves the product of flawed analyses. The court first referred to the alleged correlation between market share and price here as justification for the presumption, but correlation is not *causation*, and thus even if there is a correlation (which itself is not clear), that does not show that market share *causes* pricing power. Indeed, often pricing power merely reflects higher quality. *See, e.g.*, *Harrison Aire, Inc. v. AeroStar Int'l,*

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[1] That is particularly true in that the MCOs—which, as the price negotiators, are the relevant consumers—all testified that *Mercy Health Partners*, not St. Luke's, was ProMedica's closest substitute. Having adopted a flawed market-share-based presumption, though, the court below failed to address that issue.

Inc., 423 F.3d 374, 381 (3rd Cir. 2005). The only other "exceptional fact" to which the court below alluded was the exceptionally high market-concentration numbers, particularly in the separately defined OB services market. (Pet. App. 23a). But, as noted above, the court erred in treating OB services as a separate market. Thus, relying on concentration in that separate market to overcome concerns about the use of structural presumptions only exacerbates the problems in the decision below and increases the likelihood that the decision will enhance confusion on this fundamental aspect of unilateral-effects analysis.

Nor does the FTC fare better by asserting that the existence of "substantial evidence above and beyond market share" allegedly confirming the likelihood of competitive harm somehow obviates the need for the Court to consider the presumption issue. (Opp. at 27). Again, the existence of the presumption meant that the lower court's consideration of this "substantial evidence" (and the voluminous evidence that ProMedica produced showing no competitive harm) occurred in the shadow of the presumption. How the analysis turns out *without* such a presumption is anyone's guess. And, in any event, as ProMedica explained, if the Court declines to take this case, it may be many years before the Court has another opportunity to address this issue. Merger suits are rarely litigated, and this case allows the Court to consider the structural presumption issue in the context of a fully developed record. The Court should seize that opportunity.

C. The FTC Fails To Address The Confusion The Decision Below Creates Regarding The Weakened-Competitor Defense.

The weakened-competitor defense arises out of this Court's decision in *United States v. General Dynamics Corporation*, 415 U.S. 486 (1974). As both Petitioner and the AHA explained, the Court has not revisited that doctrine in over forty years, and in the intervening time, two distinct approaches have emerged. (Pet. at 31-34; AHA Amicus at 6-9). In its decision below, the Sixth Circuit joined those courts that have relegated the doctrine to little more than an afterthought—strictly limiting its applicability to those rare cases where a merger proponent can prove that absent the merger, the merger target's "financial weakness would cause the firm's market share to reduce to a level that would undermine the government's prima facie [i.e., market-share-based] case." (Pet. App. 28a (citing *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991))). As the Sixth Circuit acknowledged, this approach makes the defense little more than a "Hail Mary." (Pet. App. 28a). Other courts, by contrast, have adopted a broader reading of the defense that correctly allows mergers to go forward where facts show that the merger target's forward-looking prospects for success have changed dramatically, even if the target is not currently teetering on bankruptcy. (Pet. at 33-34; AHA Amicus at 7-8).

The FTC's one-page response on this issue does not dispute that two disparate approaches have emerged among the lower courts regarding the weakened-competitor defense, nor does it dispute the

concerns that those disparate approaches create for hospital mergers in light of the structural changes that the ACA has caused. (*See* AHA Amicus at 10-23). Rather, the FTC's sole response is to claim that the Sixth Circuit's per se market-share-based rule did not prevent careful consideration of ProMedica's weakened competitor defense. (Opp. at 28). That response fails for two reasons.

First, the per se rule unquestionably mattered here. Having adopted an unwarranted per se rule as a precondition to asserting the defense—a rule that the court below concluded that ProMedica had failed to meet here—the court necessarily failed to provide the same careful analysis of the evidence that it would have undertaken had it concluded that ProMedica was not barred as a matter of law from pursuing the defense. Under the lower court's per se rule, the *only* evidence that mattered was evidence tending to show that St. Luke's future market share would have declined below the threshold for presumptive illegality. ProMedica's qualitative evidence about future weakness was per se irrelevant.

Second, even if this Court were to conclude that ProMedica was unlikely to prevail under the correct understanding of the weakened-competitor defense, that would not change the need for review. As the AHA amicus observes, the flawed approach to this defense evinced in the decision below threatens dramatic consequences for mergers across the country. Clarity regarding this defense—especially in the context of healthcare mergers—is absolutely

vital, and this case is an outstanding vehicle for providing that clarity.

II. THIS CASE PRESENTS RECURRING ISSUES THAT THREATEN DEVASTATING CONSEQUENCES FOR LOCAL HOSPITALS.

Not only does the decision below adopt an unprecedented (and inappropriate) analytical framework, but it is vital that the Court review these issues now, rather than await further percolation. As ProMedica explained, and the FTC does not dispute, fully litigated merger cases are exceedingly rare. Failure to address these issues now could leave potential merger participants without adequate guidance, and subject to unwarranted presumptions, for years to come.

Compounding that problem, the decision below hands the FTC nearly unfettered discretion regarding hospital mergers. Because such mergers occur in distinctly local markets, those markets are inherently concentrated, almost inevitably triggering a market-share-based presumption of harm. Further increasing the FTC's discretion, the flawed cluster-market framework below provides the FTC broad power to single out an individual GAC service for treatment as a separate market, even absent evidence that MCOs separately bargained for that service, or that the service had any impact on price negotiations. Thus, as the FTC concedes, it need identify only one such GAC service to lay claim to a presumption of harm: "a merger that eliminates competition for *a hospital service* might indeed warrant a presumption of anticompetitive harm."

(Opp. at 21 (emphasis added)). That is a breathtaking assertion of regulatory power. Moreover, unwarranted use of the presumption further increases FTC power by interfering with judicial review. Aided by the presumption, the FTC need not provide a careful and detailed analysis of anti-competitive effects, meaning a court would have little basis for reviewing the FTC's decision.

This FTC-centric approach to mergers could not come at a worse time. As the AHA amicus explains in detail, the changes wrought by the ACA and other federal laws will result in potentially devastating consequences for hospitals, especially independent hospitals, which will need to consider mergers if they are to have any hope of remaining viable—a point that the FTC again does not dispute. A rule that hands the FTC broad discretion, while offering no meaningful guideposts, leaves these hospitals in the dark as they contemplate possible merger opportunities, and also leaves those in local communities who are seeking to preserve the viability of their local hospitals subject to the FTC's whims. (*See* Brief of Amici Curiae 55 Business, Professional, Educational, and Governmental Entities, et al.).

Hospitals desperately need clarity regarding the framework that applies to their merger considerations. ProMedica urges the Court to grant certiorari here to provide that guidance.

CONCLUSION

For the above reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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