No. 20-3499

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant, and

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

THOMAS JEFFERSON UNIVERSITY and
ALBERT EINSTEIN HEALTHCARE NETWORK,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
2:20-cv-01113-GJP (Hon. Gerald J. Pappert)

REPLY OF THE FEDERAL TRADE COMMISSION IN SUPPORT OF EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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The hospitals leave two vital points unrebutted; either one establishes a likelihood of success on appeal. First, as we showed in our motion, the district court rejected the results of the hypothetical monopolist test on the ground that the FTC's economic expert did not address health insurers' response to a price increase by a hypothetical monopolist. Op.31. In fact, the expert explained precisely how he addressed that question, an explanation the court ignored. Mot.14-17. The court thus engaged in "incomplete economic analysis," which is a reversible "legal error." *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 336 (3d Cir. 2016). The hospitals offer no response to this point.

Second, the hospitals agree that the district court rejected the FTC's proposed geographic markets on the ground that the Commission had failed to prove that the merger would force insurers to accept a "price increase" rather than turn to "other hospitals besides Jefferson and Einstein." Opp.12. As we explained (Mot.19), whether the merging hospitals themselves could force a price increase pertains to the question of anticompetitive effects; it is not a prerequisite for defining a relevant market. The district court's conflation of market definition and competitive effects violates hornbook principles of antitrust law. In *Hershey*, this Court rejected that very approach. *See* 838 F.3d at 346.

The FTC has raised serious "doubts" about the transaction, *id.*, at 337, providing ample basis to "preserve the status quo and allow the FTC to adjudicate

the anticompetitive effects of the proposed merger in the first instance," *id.* at 352. There is no dispute that the FTC's proposed markets satisfy the hypothetical monopolist test, which is sufficient to define geographic markets. The concentration figures in these markets establish a presumption of illegality.

Because the district court's rejection of the Commission's proposed markets has at least a "reasonable chance, or probability" of being reversed, *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (cleaned up), the merger should be temporarily enjoined pending appellate review. That relief will avert irreparable harm to the public while causing little harm to the hospitals.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY REJECTED THE UNDISPUTED RESULTS OF THE HYPOTHETICAL MONOPOLIST TEST

Under the hypothetical monopolist test, the Commission is "required to show only that payors would accept a price increase rather than excluding *all* of the hospitals" in the proposed market. *Hershey*, 838 F.3d at 346. "If th[e] hypothetical monopolist could profitably raise prices above competitive levels, the region is a relevant geographic market." *FTC v. Advocate Healthcare Network*, 841 F.3d 460, 468 (7th Cir. 2016). Here, the hospitals explicitly conceded that the FTC's three proposed geographic markets "satisfy the hypothetical monopolist test" and "have not been defined too narrowly" under that test. 10/26/20 Hrg. 14:17-15:23. The district court erred when it discarded these undisputed results.

The district court found that the FTC's expert, Dr. Smith, performed the test improperly, a finding the hospitals do not defend here. Specifically, the court claimed that Dr. Smith had failed to address insurers' response to a hypothetical monopolist's price demand. Op.31. That determination flatly ignored Dr. Smith's testimony and report explaining how the aggregate diversion ratios address that very issue. Mot.14-17. The hospitals do not respond to this point, and for good reason: their own economic expert conceded that "Dr. Smith appropriately focuses on stage one price negotiations between hospitals and insurers in conducting his hypothetical monopolist test to define a geographic market." DX8000¶28.[1]

Instead, the hospitals argue that the district court properly rejected the undisputed results of the hypothetical monopolist test because they were inconsistent with the court's own conception of "commercial realities." Opp.8. The court emphasized there are many hospitals in southeastern Pennsylvania aside from Einstein's and Jefferson's. Op.36-37. But courts may not invoke "commercial realities" as an "after-the-fact rationalization for a conclusion that is

[1] We also showed that the district court wrongly ignored Dr. Smith's Willingness-to-Pay (WTP) method of conducting the hypothetical monopolist test. Mot.10, 17. The hospitals have no substantive comeback; they claim only that the FTC waived the issue by failing to mention it in its proposed findings. Opp.14. In fact, the FTC's proposed findings explain that the proposed GAC markets pass the hypothetical monopolist test, citing paragraph 142 of Dr. Smith's report, which discusses the WTP method. *See* ECF 266¶¶24, 27 (citing PX8000¶142).

completely inconsistent with the economic rationale for defining markets." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶565a (4th ed. 2014). Even where there are competitors outside of a proposed geographic market, the "commercial realities" principle—derived from *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)—requires courts to focus on the geographic areas where "the most intense and important competition" occurs. *Id.* at 339.

The aggregate diversion ratios provide that very focus. They show that patients prefer to seek care at hospitals within the proposed geographic markets at *more than double* the rates necessary to lead a rational insurer to accept a small price increase demanded by a hypothetical monopolist rather than risk losing members who prefer treatment in the geographic markets. Mot.9-10, 17. These results account for the commercial reality of both patient demand and insurers' incentives.

It does not salvage the district court's analysis that many hospitals compete across southeastern Pennsylvania. As we explained (Mot.17-18), the district court did not find that insurers could successfully thwart a price increase by turning to out-of-market hospitals, and the hospitals cite no such finding. The court determined only that the qualitative evidence was "equivocal" in light of other hospital systems' presence in the broader region. *See* Op.33; Opp.3-4. But a geographic market "does not need to include all of the firm's competitors."

Advocate, 841 F.3d at 469. Even in hospital-dense metropolitan areas, "there are often only a few hospitals in a geographic market" for antitrust purposes. *Id.* at 470.

In this case, some patients who live near Abington Hospital may go to Penn in West Philadelphia. But Dr. Smith showed that patients prefer to seek care within the geographic markets at rates high enough that an insurer could not defeat a hypothetical monopolist's demands for a price increase by turning to hospitals outside those markets. By rejecting this analysis, the district court ran afoul of the principle that markets should be defined "in the smallest relevant [area] satisfying the hypothetical monopolist test." FTC & DOJ, *Horizontal Merger Guidelines* §4.1.1 (2010); *accord FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 201-02 (D.D.C. 2018).

II. THE DISTRICT COURT REJECTED THE FTC'S EVIDENTIARY SHOWING UNDER IMPROPERLY ONEROUS STANDARDS OF PROOF

In rejecting the FTC's proposed markets, the court held the FTC to standards of proof far higher than the law requires.

First, as we showed (Mot.18-19), when the district court discounted the results of the hypothetical monopolist test due to "equivocal" witness testimony, it contravened the standards for preliminarily enjoining a merger, which only require the FTC to establish "doubts" about the transaction. The FTC's unrebutted

economic analysis amply furnished such doubts, and the district court did not determine that the testimony *disproved* the economic evidence.

The district court also applied the wrong legal standards when it rejected the FTC's qualitative evidence. As the hospitals acknowledge, the district court found that the FTC had failed to (1) prove that insurers would be unable to "defeat a price increase" by "turn[ing] to other hospitals besides Jefferson and Einstein," or (2) provide actual "past examples" or "natural experiment[s]" showing insurers succumbing to higher prices. Opp.12, 15; *see also id.* at 10, 16.

But requiring the FTC to provide such evidence contravenes precedent. As we showed (Mot.19), this Court held in *Hershey* that to prove a geographic market, "the Government was not required to show that payors would accept a price increase rather than excluding the merged [hospitals] from their networks." 838 F.3d at 346. It follows that the Commission was not also required to furnish past examples of insurers accepting such increases.

This Court rejected such requirements for good reason. The geographic market definition turns on whether a merger of *all hospitals in the proposed market* could force an increase. The question whether the specific merging parties will be able to force a post-merger price increase pertains to whether the merger will have anticompetitive effects. Here, the district court conflated those issues, improperly requiring the FTC to furnish direct proof of anticompetitive effects in order to

define a geographic market. That ruling, as shown below, contradicts basic tenets of antitrust law.

Once the FTC establishes a geographic market, it may *then* make a prima facie case "that the merger will probably lead to anticompetitive effects in that market." *Id.* At that point, however, the FTC enjoys a presumption of anticompetitive effects "simply by showing," as it did here, "a high market concentration based on HHI [Herfindahl-Hirschman Index] numbers." *Id.* at 347. The presumption that follows from market concentration would mean little if the FTC had to prove direct price effects in order to establish a geographic market. For that matter, "[d]irect evidence" of "increased prices" is not required to prove anticompetitive effects at all. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2016). Indeed, direct price effects is not an element of *any* antitrust claim brought by the FTC.

In *Hershey*, the FTC's evidence that the proposed merger would cause price increases served to *verify* the results of the hypothetical monopolist test. *See* 838 F.3d at 345-46. As the *Guidelines* (at §4) explain, "[e]vidence of competitive effects can inform market definition" and thereby "reduc[e] the role of inferences from market definition and market shares." But the converse is not true: a court may not *reject* the FTC's undisputed proof that its geographic markets satisfy the

hypothetical monopolist test just because there is no direct proof of a price increase or other anticompetitive effects.

The hospitals claim that the district court correctly rejected the FTC's proposed markets due to a lack of evidence that market participants regarded them as "distinct" economic markets. Opp.10-11. But "[r]elevant antitrust markets defined according to the hypothetical monopolist test … may not align with how industry members use the term 'market.'" *Guidelines* §4. It suffices that the hospitals regarded themselves as direct competitors in the areas surrounding the three Einstein facilities at issue. Mot.5-6; *see also* 9/30/20 Hrg. 118:24-119:2, 121:3-12.

The hospitals also challenge the FTC's market definitions based on an IBC document that contemplated terminating the Jefferson system in favor of hospitals outside the FTC's proposed markets. Opp.16. But that IBC document did not address the effects of terminating Einstein at the same time, or the specific effects of terminating Jefferson's Abington Hospital, which is Einstein's main rival in both proposed GAC markets here. 9/14/20 Hrg. 126-3-128:24. More importantly, the IBC document does not answer the relevant question, which is whether an insurer would accept a price increase rather than terminating *all* hospitals in the proposed geographic markets. The undisputed results of the hypothetical monopolist test prove the answer is no.

III. THE DISTRICT COURT IMPROPERLY DETERMINED THAT NO GEOGRAPHIC MARKET COULD EXIST FOR ACUTE REHABILITATION SERVICES

The hospitals offer no authority to defend the district court's ruling that the FTC cannot establish a geographic market for acute rehabilitation services even though it undisputedly satisfies the hypothetical monopolist test. Opp.16-18. A showing of undue concentration in this market alone would justify a preliminary injunction against the merger.

The hospitals contend that their domination of the market would pose no possible antitrust problem because acute rehabilitation services are "not a focus of contracting negotiations" with insurers. Opp.17 (citing Op.55-56). They adopt the district court's view that a medical service "represent[ing] a small overall percentage of provider care" can serve as the basis for a market only if the plaintiff proves the service is "so significant to members and a geographic area that insurers would pay higher reimbursement rates to keep them in their networks." *Id*. (citing Op.59 n.16).

That restricted understanding of market definition has no legal or economic foundation and has never to our knowledge been embraced by a court, the Commission, or any expert in the field of healthcare economics. For starters, it does not matter that acute rehabilitation services represent a "small percentage" of overall healthcare services. When conducting the hypothetical monopolist test,

"the terms of sale of products outside the candidate market are held constant." *Guidelines* §4.1.1. For example, in *ProMedica Health System, Inc.*, FTC No. 9346, 2012 WL 2450574 (Jun. 25, 2012), the Commission defined a separate market for obstetrical services because it "satisfies the hypothetical monopolist test" and because those services were "offered under different competitive conditions than those applicable to the other services" rendered by hospitals. *Id.* at *40. The same applies here.

Furthermore, the district court's ruling defies basic economic principles, which recognize that insurers compete by offering coverage for a "comprehensive range of services." Mot.22 (citing *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 562 (6th Cir. 2014)). The whole point of insurance is that it will cover unforeseen problems. Few people expect to need brain surgery or an organ transplant, but members (or their employers) select health plans in part on the breadth of coverage for all services, including those used by relatively few people. Acute rehabilitation care is one of those critical, but infrequent needs, and the district court erred by concluding that these services are so economically irrelevant that hospital systems may freely monopolize them.

IV. AN INJUNCTION PENDING APPEAL WILL PREVENT IRREPARABLE HARM TO THE PUBLIC WHILE CAUSING MINIMAL HARM TO THE HOSPITALS

This Court has recognized that unwinding a hospital merger is "extraordinarily difficult"; after consummation, it may simply be "too late" to restore competition. *Hershey*, 838 F.3d at 352-53 (quotation omitted). Indeed, in *Evanston Northwestern Healthcare Corp.*, FTC No. 9315, 2007 WL 2286195 (Aug. 6, 2007), the Commission found a consummated hospital merger unlawful, but declined to order a divestiture remedy because the systems were too entangled to pry apart without endangering patient care. *Id.* at *77-79. For such reasons, this Court granted an injunction pending appeal in *Hershey*. *See* No. 16-2365, Order of May 24, 2016.

As we showed (Mot.23), Jefferson's president testified that the company is planning to "shutter" Einstein's Elkins Park GAC hospital and emergency room, along with IRFs at its Abington and Frankford hospitals. 9/29/20 Hrg. 91:4-92:3. The hospitals respond that they will "shift and rationalize" those facilities (Opp.19), but the record belies such doublespeak. And while the hospitals proclaim that Jefferson's CEO has committed to "maintaining Einstein's facilities," Opp.19, he only made assurances about "Einstein North Philadelphia," 9/29/20 Hrg. 34:14-20, and said nothing about the facilities that Jefferson's president testified it plans to "shutter," *id.* at 91:4-92:3.

The hospitals fail to show that an injunction will seriously harm them, since their merger agreement expires 60 days after a final decision in this case. They claim that Einstein is in a precarious condition (Opp.20), but its own projections show that it can operate for several more years without cutting services. Mot.23-24. The district court likewise found that Einstein is "going to continue to be a viable entity for the next three or four years." 10/26/20 Hrg. 280:7-16; *see id.* at 99:1-12. The hospitals have disclaimed any contention that Einstein is a "failing firm." *Id*. at 99:17-19.

The hospitals surely prefer to merge now, but such "private equities" deserve "little weight" and "cannot outweigh effective enforcement of the antitrust laws." *Hershey*, 838 F.3d at 352.

CONCLUSION

This Court should grant an injunction pending appeal.

December 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing reply complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 2,577 words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

December 17, 2020

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CERTIFICATE OF SERVICE

I certify that on December 17, 2020, I filed the foregoing with the Court's appellate CM/ECF system. Counsel for defendants-appellees will be served by the CM/ECF system.

Dated: December 17, 2020

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