IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, Plaintiff *v.* **MERRICK GARLAND,** in his official capacity as **ATTORNEY GENERAL OF THE UNITED STATES,** **UNITED STATES DEPARTMENT OF JUSTICE,** **FEDERAL TRADE COMMISSION**, and **UNITED STATES OF AMERICA,** Defendants	**CIVIL ACTION NO. 23-1305** **JUDGE AFRICK (I)** **MAGISTRATE JUDGE NORTH (5)**
THIS DOCUMENT RELATES TO *ALL ACTIONS*	

UNITED STATES' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE ALL PROCEEDINGS

The United States respectfully moves this Court to dismiss the case under Fed. R. Civ. P. 12(b)(1), or, in the alternative, to hold this action in abeyance pending resolution of the FTC's

parallel enforcement action, which is also now before this Court, *see FTC v. LCMC*, 2:23-cv-01890 (E.D. La.), R. Doc. No. 38 (Order transferring case). For reasons explained in the attached memorandum, this Court lacks jurisdiction to consider the suit, which is barred on sovereign immunity and ripeness grounds. Even if this Court were able to provide declaratory relief, however, it should decline to do so. Among many reasons, the FTC's suit is the more appropriate vehicle for considering the merits, as the FTC is the natural plaintiff and this Court can more efficiently rule on the key legal question there, rather than, as the Hospitals ask here, determine the validity of an anticipated defense.

Dated: June 20, 2023

Respectfully submitted,

/s/ *Yixi (Cecilia) Cheng*

Yixi (Cecilia) Cheng
Michael Mikawa
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Telephone: (202) 705-8342
Email: yixi.cheng@usdoj.gov
Email: michael.mikawa@usdoj.gov

Attorneys for the United States of America
(U.S. Department of Justice and
the Federal Trade Commission)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, Plaintiff *v.* **MERRICK GARLAND,** in his official capacity as **ATTORNEY GENERAL OF THE UNITED STATES,** **UNITED STATES DEPARTMENT OF JUSTICE,** **FEDERAL TRADE COMMISSION**, and **UNITED STATES OF AMERICA,** Defendants	**CIVIL ACTION NO. 23-1305** **JUDGE AFRICK (I)** **MAGISTRATE JUDGE NORTH (5)**
THIS DOCUMENT RELATES TO *ALL ACTIONS*	

NOTICE OF SUBMISSION

PLEASE TAKE NOTICE that the United States' motion to dismiss for lack of subject-matter jurisdiction or, in the alternative, to hold in abeyance all proceedings is set for submission before United States District Judge Lance M. Africk on August 9, 2023, at 9:00am.

Dated: June 20, 2023

Respectfully submitted,

/s/ *Yixi (Cecilia) Cheng*

Yixi (Cecilia) Cheng
Michael Mikawa
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Telephone: (202) 705-8342
Email: yixi.cheng@usdoj.gov
Email: michael.mikawa@usdoj.gov

Attorneys for the United States of America
(U.S. Department of Justice and
the Federal Trade Commission)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, Plaintiff *v.* **MERRICK GARLAND,** in his official capacity as **ATTORNEY GENERAL OF THE UNITED STATES,** **UNITED STATES DEPARTMENT OF JUSTICE,** **FEDERAL TRADE COMMISSION**, and **UNITED STATES OF AMERICA,** Defendants	**CIVIL ACTION NO. 23-1305** **JUDGE AFRICK (I)** **MAGISTRATE JUDGE NORTH (5)**
THIS DOCUMENT RELATES TO *ALL ACTIONS*	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE ALL PROCEEDINGS

This Court should dismiss this declaratory judgment action—one in which the Hospitals ask the Court to craft a novel state-action exemption to the Hart-Scott-Rodino (HSR) Act—for

want of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Under Fifth Circuit precedent, the declaratory relief the Hospitals seek is barred by sovereign immunity. In particular, although the Hospitals argue Section 702 of the Administrative Procedures Act (APA) waives the agencies' immunity, they have not shown the Department of Justice (DOJ) or the Federal Trade Commission (FTC) took any "agency action" within the meaning of the APA prior to suit. The suit is also unripe for adjudication. Even assuming the Hospitals' declaratory claims were ripe at the start of this action, circuit precedent instructs that they are no longer ripe now, after the FTC filed its enforcement action—now pending before this Court—against the Hospitals. The Hospitals' claim regarding civil penalties also remains unripe, because the DOJ has not made a decision whether to sue for civil penalties and for how much.

Even assuming the Hospitals could overcome these hurdles, this Court should exercise its discretion to decline review. First, this suit is divorced from the purpose of declaratory relief. The Declaratory Judgment Act is intended to allow potential defendants to bring a question to court without waiting in apprehension for the natural plaintiff to do so—but, as noted, the FTC has already brought its parallel enforcement action. That action raises the same legal question at the heart of this case, and the Hospitals will be able to vigorously press any defenses there. Nor is there practical purpose to declaratory relief. Because the Hospitals have already engaged in what FTC contends is the unlawful act—merging without complying with the procedural requirements of the HSR Act—declaratory relief, which is intended to provide guidance to parties on whether to pursue a future course of action, serves limited purpose.

Second, the *Trejo* factors used by courts in this circuit to determine whether declaratory relief is proper counsel toward dismissal. Underlying equity and fairness concerns all indicate the FTC's suit is the more appropriate vehicle for considering the merits, as the FTC's action—

which the Hospitals knew to be imminent when they rushed to file this declaratory case—permits the Court to rule directly on the key legal question at issue rather than, as the Hospitals seek here, determine the validity of an anticipated defense.

Finally, and in the alternative, if this Court is not inclined to dismiss the suit, the United States respectfully requests that all proceedings be held in abeyance pending resolution of the FTC's enforcement action, as its outcome may be fully dispositive of this case.

BACKGROUND

I. The HSR Act

Congress enacted the HSR Act "to improve and facilitate" effective enforcement of the antitrust laws. Pub. L. No. 94–435, 90 Stat. 1383 (Sept. 30, 1976), codified at 15 U.S.C. § 18a. To this end, the Act requires merging parties to notify the federal antitrust agencies—the FTC and DOJ—of certain proposed transactions before they are consummated. 15 U.S.C. § 18a(a). The parties must then wait at least 30 days after notification before merging, so that the agencies have an opportunity to review the transaction and request further information. *Id.* §§ 18a(b), (e).

The text of the HSR statute is clear: Regardless whether a planned merger is lawful or unlawful under the antitrust laws, *all* merging parties meeting the statutory requirements must comply with the HSR Act unless they can show the acquisition meets one of twelve statutorily enumerated exemptions listed in subsection (c). *See* 15 U.S.C. § 18a(a) (compliance required "[e]xcept as exempted pursuant to subsection (c)"). The twelve narrow and specific exemptions listed in subsection (c) include acquisitions from or by states or state agencies, *id.* § 18a(c)(4), acquisitions subject to federal statutory exemptions, *id.* § 18a(c)(5), and those prescribed by the FTC with the DOJ's concurrence, *id.* § 18(c)(12). Nowhere does the statute refer to an exemption for "state action"—the exemption the Hospitals claim to the HSR Act.

The exemptions are narrow and specifically enumerated for good reason; the HSR Act is crucial to the government's ability to know when mergers occur and to determine which ones must be scrutinized more closely. When parties ignore notice-and-waiting requirements before merging, the HSR Act empowers the FTC or DOJ to sue to compel compliance, 15 U.S.C. § 18a(g)(2), and the DOJ may seek civil penalties for violations of the Act. *Id.* § 18a(g)(1).

II. The Transaction and the Race to the Courthouse

The Hospitals began planning this merger three years ago and consummated it in January 2023 without notifying the FTC or DOJ. *FTC v. LCMC*, 1:23-cv-01103-ABJ, R. Doc. No. 23-4 at 165 (D.D.C. April 26, 2023).

On March 3, 2023, the FTC contacted Louisiana Children's Medical Center (LCMC) upon learning of the transaction from public sources and asked why LCMC did not file a notification as required by the HSR Act. LCMC counsel responded on March 14, asserting only that the parties had received a Certificate of Public Advantage (COPA) from the Louisiana Attorney General. After the FTC asked for an explanation of how the COPA could exempt the transaction, LCMC counsel replied not by pointing to one of the twelve statutorily enumerated HSR exemptions, but by asserting the COPA established "state action immunity" that exempted the Hospitals from filing. The FTC and Hospitals engaged in further discussions over the next few days, during which the FTC expressed that the Hospitals had not identified any exemptions in the HSR Act applying to the transaction.

On April 19, 2023, FTC staff informed counsel for LCMC that they intended to recommend a lawsuit to address the Hospitals' noncompliance with the HSR Act. Rather than waiting for a suit they knew to be imminent, the Hospitals raced to the courthouse and filed this declaratory judgment action the very same day, seeking a ruling on an anticipated defense. Namely, the Hospitals contend in their complaint that their merger is exempt by virtue of a court-

created doctrine: A state-action defense to antitrust liability, which has never been applied to the procedural requirements of the HSR Act and which is found nowhere in the HSR statute. *See Parker v. Brown*, 317 U.S. 341 (1943) (recognizing "state action" defense to Sherman Act claim); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) (analyzing "state action" defense to substantive Clayton Act challenge to anticompetitive merger).

Just as the Hospitals knew to expect from FTC staff communications, the FTC filed its suit in the D.D.C. the following day, seeking an order under 15 U.S.C. § 18a(g)(2) and 15 U.S.C. § 53(b) for the Hospitals to comply with the HSR's notification requirement, among other forms of relief. *FTC v. LCMC*, 1:23-cv-01103-ABJ, R. Doc. No. 1 (Complaint) (D.D.C. April 20, 2023). The parties completed full rounds of expedited briefing on the merits, personal jurisdiction, and venue by the end of April, and the D.D.C. transferred the suit to this district on May 23, 2023.

Both this case and the FTC's affirmative suit are now pending before this Court. *FTC v. LCMC*, 2:23-cv-01890 (E.D. La.), R. Doc. No. 38 (Order transferring case).

ARGUMENT

I. This Court Lacks Jurisdiction Over This Declaratory Judgment Action.

In this declaratory judgment action, the Hospitals challenge the FTC's and DOJ's view of the HSR Act. But the Hospitals cannot identify any agency action setting forth the position the Hospitals challenge, as is required under Fifth Circuit precedent to overcome the agencies' sovereign immunity. The case is also not ripe for adjudication, further requiring dismissal.

A. The Case is Barred by Sovereign Immunity.

A plaintiff suing a federal agency "must first show that that sovereign has waived its immunity from suit." *Walmart Inc. v. U.S. Dep't of Just.*, 21 F.4th 300, 307 (5th Cir. 2021); *see also Elldakli v. Garland*, 64 F.4th 666, 670 (5th Cir. 2023) ("The Declaratory Judgment Act is

not an independent basis for subject matter jurisdiction."). To meet this burden, a plaintiff must plead the basis of the waiver in the complaint, *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), and that waiver is to be strictly construed, *Lane v. Pena*, 518 U.S. 187, 192 (1996). The Hospitals allege in this case that the agencies "lack sovereign immunity" R. No. 1 (Complaint), ¶ 25, based on three authorities: Section 702 of the APA (5 U.S.C. § 702); *Larson v. Domestic and Foreign Commerce Corp*., 337 U.S. 682, 691, n.11 (1949); and *Dugan v. Rank*, 372 U.S. 609, 621–622 (1963). None of these helps them.

APA § 702 sets forth that:

> "A person suffering legal wrong because of *agency action*, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages *and stating a claim that an agency . . . acted or failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

5 U.S.C. § 702 (emphases added). Beyond a conclusory assertion that "[d]efendants lack sovereign immunity," R. No. 1 (Complaint), ¶ 25, the Hospitals do not attempt to show sovereign immunity is waived with respect to either the DOJ or the FTC. Indeed, there is no allegation in the complaint that the DOJ "acted or failed to act" at all. Nor can the Hospitals so allege; the DOJ did not interact with the Hospitals regarding this merger prior to the lawsuit.

The complaint likewise fails to point to any "agency action" taken by the FTC. As the Fifth Circuit has interpreted APA § 702, a declaratory-judgment plaintiff "must 'identify some "agency action" [within the meaning of the APA] affecting him in a specific way,' and must show that he has suffered legal wrong because of it," before the plaintiff can overcome an agency's sovereign immunity. *Walmart*, 21 F.4th at 308; *see also Louisiana v. United States*, 948 F.3d 317, 321 (5th Cir. 2020). What constitutes "agency action" within the meaning of

Section 702 is, in turn, set forth by 5 U.S.C. § 551(13), which defines the term as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (internal quotation omitted); *Louisiana*, 948 F.3d at 321.

At most, the Hospitals' complaint describes the FTC's intended litigating position during negotiations, *see* R. Doc. No. 1 (Complaint), ¶¶ 6, 13, 64—but the Hospitals cannot show the FTC's contemplated litigating position qualifies as agency action within the meaning of 5 U.S.C. § 551(13). *Alabama-Coushatta Tribe*, 757 F.3d at 489. The closest the Hospitals come is to frame the view of FTC staff during negotiations as an FTC "order," citing a single email from FTC staff expressing disagreement with the Hospitals' analysis of the HSR Act. *See* R. Doc. No. 1 (Complaint), ¶ 64 (referring to an email from FTC staff as "FTC's Order"). But the FTC staff email merely stated: "We disagree with your analysis below. Assuming your transaction met the statutory thresholds, you should have submitted an HSR filing. Please submit your HSR filing as soon as possible." R. Doc. No. 1 (Complaint), Ex. C.

This short email is in no sense a "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). FTC staff has no authority to order any party to take an action; orders must come from the Commission itself, which can act only by majority vote. 16 C.F.R. § 4.14(c) ("Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners"). An email from FTC staff requesting that the Hospitals comply with the HSR

Act thus does not represent even a final intent to sue, much less a final disposition restricting the Hospitals' actions.[1]

Regardless, *Walmart v. DOJ* dooms the Hospitals' claims. There, the DOJ had made "statements of an intent to sue Walmart" during settlement negotiations, "based on DOJ's legal theories interpreting the [Controlled Substances Act]." *Walmart Inc. v. U.S. Dep't of Just.*, 517 F. Supp. 3d 637, 649 (E.D. Tex. Feb. 4, 2021). Walmart then sued the DOJ for declaratory relief, asking the district court to proclaim precise limits on pharmacists' legal obligations under the Controlled Substances Act. The district court dismissed the action as barred by sovereign immunity, because Walmart could point only to DOJ's negotiating positions as potential agency action—but DOJ's litigation positions were not an "order," "rule," or "sanction" within the meaning of the APA. *See id*. at 649 ("legal theories associated with a nebulous 'intent' to sue . . . [does not] constitute 'a final disposition . . . of an agency' and there are not 'orders' under 5 U.S.C. § 551(6)").

The Fifth Circuit affirmed. 21 F.4th 300 (5th Cir. 2021). As did the district court, the Fifth Circuit held DOJ's negotiating positions did not amount to agency action, specifically rejecting the contention that they amounted to a "rule" or a "sanction."[2] As the court explained, "positions allegedly taken by the government in settlement negotiations with Walmart" cannot constitute an agency rule, *id.* at 308; DOJ's negotiating positions represent "mere legal theories

[1] The Hospitals cannot argue that FTC's filing of a lawsuit constitutes final agency action. *See, e.g.*, *Nerium Int'l, LLC v. FTC*, No. 19 C 7189, 2020 WL 5217152, at *4 (N.D. Ill. Aug. 31, 2020) (FTC's "[f]iling an enforcement action" is not final agency action because it "does not determine the rights or obligations of the involved parties."); *Endo Pharm. Inc. v. FTC*, 345 F. Supp. 3d 554, 560 (E.D. Pa. 2018) (same, collecting cases); *Am. Fin. Benefits Ctr. v. FTC,* No. 17-04817, 2018 WL 3203391, at *8 (N.D. Cal. May 29, 2018) (same).

[2] Walmart did not press the argument that an agency's statement of intent to sue is an "order" on appeal.

that would succeed or fail in court based on their own merits," *id.* at 309, and the positions were "expressed behind closed doors" rather than shared to the public. *Id*. at 309. The Fifth Circuit likewise rejected Walmart's contention that "[t]hreats [by the DOJ] designed to compel compliance' qualify as sanctions," *id.* at 310, as the definition of "sanction" under the APA simply "does not extend to [litigation] threats." *Id.* at 310. Because Walmart did not satisfy the Fifth Circuit's requirement that it identify "agency action," then, the suit was barred by sovereign immunity. *Id*. at 310–11.

Because the Hospitals failed to identify any action or failure to act at all by the DOJ and any "agency action" by the FTC prior to suit, APA § 702 does not waive the government's sovereign immunity. *See Alabama-Coushatta Tribe*, 757 F.3d at 489–90 (no subject-matter jurisdiction where a plaintiff "fails to point to any identifiable 'agency action' within the meaning of § 702"); *Louisiana*, 948 F.3d at 322 (same).

The Hospitals also cite *Larson*, 337 U.S. at n.11, and *Dugan*, 372 U.S. at 621–622, to show the agencies "lack sovereign immunity." R. Doc. No. 1 (Complaint), ¶ 25. But invoking the *Larson-Dugan* doctrine avails them nothing. That doctrine, to the extent it survived the 1976 amendments to the APA at all, provides a limited exception to sovereign immunity where a "statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional" or where the official's challenged actions are so beyond the scope of their authority that the action may be said to be *ultra vires*. *Danos v. Jones*, 652 F.3d 577 (5th Cir. 2011). Here, where there is no claim of an unconstitutional grant of authority and where there has been no identifiable "agency action" at all, the doctrine is inapplicable. Nor can the Hospitals' claim on the merits come close to falling within the extraordinary realm of *ultra vires* official conduct. *See Danos*, 652 F.3d at 583 (a plaintiff can invoke the *ultra vires*

exception to sovereign immunity only where the complaint "allege[s] facts sufficient to establish that the officer was acting 'without any authority whatever,' or without any 'colorable basis for the exercise of authority.'") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)); *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999) ("[T]he exception allowing review of an 'agency action allegedly "in excess of authority" must not simply involve a dispute over statutory interpretation . . . . [T]he agency's challenged action [must be] so contrary to the terms of the relevant statute that it necessitates judicial review independent of the review provisions of the relevant statute.'" (quoting *Kirby Corp. v. Pena*, 109 F.3d 258, 269 (5th Cir. 1997)); *cf. Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 722 (D.C. Cir. 2022) (an *ultra vires* claim is "essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds.") (quoting *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.)).

The agencies therefore retain sovereign immunity in this declaratory judgment action, and this Court lacks jurisdiction to consider it.

B. The Case Is Not Ripe for Adjudication.

Even if the Hospitals could point to "agency action" within the meaning of § 702, they would still need to show "the existence of a case or controversy that was ripe for adjudication." *Walmart*, 21 F.4th at 311. The ripeness inquiry is twofold, requiring a court to evaluate (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Id*. (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Neither supports declaratory relief.

First, the case is not fit for judicial decision, because the FTC has already brought its enforcement action against the Hospitals for the conduct at issue—merging without complying

with HSR Act procedural requirements—which means there is no impending threat of *future* litigation from the FTC.

Walmart v. DOJ is again dispositive. As did the Hospitals here, Walmart filed its declaratory action before the agency filed an enforcement suit. By the time the case reached the Fifth Circuit, however, the DOJ had brought an enforcement action against Walmart in district court. The Fifth Circuit explained that, although the DOJ's enforcement action may show that, "when this [declaratory] case was filed, enforcement was indeed impending," the case was no longer ripe after an enforcement suit was in fact brought: "When considered from the standpoint of the present, . . . the [DOJ] suit's existence also suggests that *future* enforcement is unlikely." 21 F.4th at 313. The existence of an ongoing enforcement litigation thus demonstrates that the declaratory judgment action "is not fit for judicial decision." *Id.* at 311.

So too here. The FTC has already brought an enforcement action under 15 U.S.C. § 18a(g)(2), so the agency "has made its move," and "it would be unusual for it to bring a second action against the same defendant on similar theories until after the current case is decided." *Id.*

The Hospitals' claims are unripe in another aspect. Insofar as the Hospitals ask the court to declare any rights of the parties concerning a potential DOJ suit for civil penalties, the mere theoretical possibility of such a suit also does not create a ripe controversy. *See, e.g.*, *Dahl v. Vill. of Surfside Beach, Texas*, 2022 WL 17729411, at *3 (5th Cir. Dec. 16, 2022) (internal quotation omitted) (declaratory judgment case not ripe because the defendant to the action "never made any decision, let alone a final decision, regarding a building permit"); *In re Jillian Morrison, L.L.C.*, 482 F. App'x 872, 875–76 (5th Cir. 2012) (same where the feared suit "has not yet happened"); *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895–98 (5th Cir. 2000) (same where a party invokes "[f]uture claims" that "could never be filed at all"). The FTC's

enforcement action is brought under 15 U.S.C. § 18a(g)(2); the DOJ's authority to bring an action for civil penalties is separately provided for by 15 U.S.C. § 18a(g)(1)—an authority the DOJ has not yet decided to invoke. To be sure, whether civil penalties may be sought depends on the predicate legal issue presented in the FTC's enforcement action, i.e., whether the Hospitals must make an HSR filing—but even after resolution of that question in the enforcement action, civil penalties are not automatic. FTC staff must first determine whether to recommend penalties to the FTC Commissioners, the Commission must make a decision based on that recommendation, and then the DOJ would decide, in consultation with the FTC, whether to seek penalties and the precise amount.

With respect to the second part of the ripeness inquiry, there is no hardship to the Hospitals from abstention. As the Fifth Circuit held in *Walmart*, the existence of a parallel agency enforcement suit "eliminates, or at least greatly reduces," *id.* at 312, any hardship a declaratory plaintiff might suffer from dismissal, because the plaintiff can press any arguments in the other action. *Id.* at 313. Indeed, the Hospitals already raised their arguments in the enforcement action before that suit was transferred. *FTC v. LCMC*, 1:23-cv-01103-ABJ, R. Doc. No. 23 (Opposition to Petition for Injunctive Relief) (D.D.C. April 26, 2023).

II. This Court Should Not Exercise its Discretionary Jurisdiction Under the Declaratory Judgment Act.

Even if this Court concludes that there is a basis to entertain the Hospitals' declaratory claims, the Court should decline to exercise its jurisdiction. The Declaratory Judgment Act provides that a court "'*may* declare the rights and other legal relations of any interested party,' . . . not that it *must* do so." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). *See*

also Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995) (conferring upon federal courts "unique and substantial" discretion in deciding whether to entertain a suit for declaratory relief).

As described below, exercising discretion in this case does not vindicate any purpose underlying the Declaratory Judgment Act, and declaratory relief is inappropriate based on the seven non-exhaustive factors—the *Trejo* factors—identified in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994). Efficiency and fairness are better served by dismissing the case.

A. Declaratory Relief Does Not Vindicate Any Purpose Underlying the Declaratory Judgment Act.

First and fundamentally, resolving this declaratory action would run counter to the purpose of the Declaratory Judgment Act, which allows a potential defendant to bring concerns to court without waiting in apprehension of a lawsuit from the natural plaintiff. But the natural plaintiff has already provided a solution here—that is, the FTC has already brought the key legal question to court in its enforcement action. There is therefore no equitable value to this suit.

There is also no practical value. Declaratory relief was created to provide parties with legal clarity *before* they pursue a course of action, but the Hospitals do not seek any guidance about a future act here; instead, they request an advisory opinion about an action they took in the past—i.e., merging without complying with HSR Act requirements. This Court should therefore abstain from resolving through declaratory relief what is more appropriately handled through the FTC's enforcement suit or the agencies' administrative process.

i. Declaratory Relief is Unavailable Where the Litigant Has Already Been Brought to Court.

Declaratory judgments are intended to be an "extraordinary" form of relief, *AmSouth Bank v. Dale*, 386 F.3d 763, 787–88 (6th Cir. 2004), and the purpose of the Act is to "relieve potential defendants from the Damoclean threat of impending litigation which a harassing

adversary might brandish, while initiating suit at his leisure or never." *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966). The relief provided by the Declaratory Judgment Act is thus to allow a potential defendant to bring concerns to court without waiting—potentially for a long time—to be sued. *See Sherwin-Williams Co. v. Holmes Co.,* 343 F.3d 383, 397 (5th Cir. 2003) (core purpose of Declaratory Judgment Act is to "allow potential defendants to resolve a dispute without waiting to be sued"); *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1336 n.2 (Fed. Cir. 2007).

But the FTC has already resolved the Damoclean threat by bringing the Hospitals to court in its own enforcement action. There is no longer any need for the Hospitals to clear the air by suing for a declaratory judgment themselves, because there will soon be clarity regardless. Where the Hospitals already have an "avenue to test [their] theories," *Walmart*, 21 F.4th at 313—indeed, before this very Court—there is no reason to consider separate declaratory relief.

ii. Declaratory Relief is Unavailable Where It Does Not Guide Future Conduct and Where Civil Penalties Have Already Attached.

Declaratory relief in this case also serves no purpose as a practical matter. The remedy was created to allow a litigant to determine whether it can pursue a course of conduct in the future without waiting for the natural plaintiff to bring it to court. *See, e.g.*, *Hanes Corp. v. Millard*, 531 F.2d 585, 592–93 (D.C. Cir. 1976) (superseded on other grounds) ("The purpose of granting declaratory relief . . . is to allow [a litigant] to know in advance whether he may legally pursue a particular course of conduct.").

For this reason, courts differentiate between declaratory relief regarding planned future conduct (where declaratory relief can sometimes be appropriate) and past conduct (where declaratory relief is improper). As the Fifth Circuit has put it, "[a] claim for declaratory judgment seeks to define the legal rights and obligations of the parties in anticipation of some

future conduct, not to proclaim liability for a past act." *Haggard v. Bank of the Ozarks, Inc.*, 547 F. App'x 616, 620 (5th Cir. 2013) (citing *Bauer v. Texas,* 341 F.3d 352, 358 (5th Cir. 2003)). *See also Matthew v. Hous. Auth. of New Orleans*, No. CIV.A. 15-1770, 2015 WL 4716059, at *1 (E.D. La. Aug. 7, 2015) ("The purpose of a declaratory judgment is to declare future rights of a party and not to remedy past harms.") (internal quotation omitted); *MH Sub 1, LLC v. FPK Servs., LLC*, No. 1:18-CV-834-RP, 2019 WL 13138139, at *5 (W.D. Tex. June 21, 2019) ("'[T]he purpose of the Declaratory Judgment act is not the declaration of non-liability for past conduct,'" but to help a "party who is uncertain of their rights" avoid damages or minimize damages that might increase as a result of "waiting for an adverse party to commence suit."); *Merino v. EMC Mortg. Corp*., No. CIV.A 1:09-CV-1121, 2010 WL 1039842, at *4 (E.D. Va. Mar. 19, 2010) (same); *cf. Hardware Mut. Cas. Co. v. Schantz*, 178 F.2d 779, 780 (5th Cir. 1949) ("The purpose of the Declaratory Judgment Act is to settle 'actual controversies' before they ripen into violations of law or a breach of some contractual duty.").

Here, the Hospitals have already pursued conduct the FTC contends is unlawful—namely, merging without complying with HSR Act requirements—and the natural plaintiff has already brought the Hospitals to court. Because "there is no indication that a declaratory judgment is necessary to . . . 'guide the parties' conduct in the future,'" *Metra Indus., Inc. v. Rivanna Water & Sewer Auth.*, No. 3:12CV00049, 2014 WL 652253, at *2–*3 (W.D. Va. Feb. 19, 2014), declaratory relief is inappropriate. *Id.* ("courts have repeatedly recognized that '[a] declaratory judgment serves no "useful purpose" when it seeks only to adjudicate an already-existing breach of contract claim'") (collecting cases); *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 494 (E.D. Va. 2002) (declaratory remedy "only appropriate" where it "would serve a useful purpose in clarifying and settling the legal relations

in issue to guide the parties in the future") (internal quotation marks omitted); *Tower Prod. Inc. v. Laird Enterprises Inc.*, No. 1:19-CV-1038, 2020 WL 3453552, at *3 (N.D.N.Y. June 24, 2020) (improper to grant declaratory relief "with regard to conduct that occurred in the past, rather than . . . conduct that may occur in the future."); *Nat'l Union Fire Ins. Co. v. Int'l Wire Group, Inc*., No. 02-CV-10338, 2003 WL 21277114, at *5 (S.D.N.Y. June 2, 2003) (because "declaratory relief is intended to operate prospectively," there is "no basis for [such] relief where only past acts are involved").[3] Where the Hospitals have already merged without complying with the HSR Act, and especially where the FTC has already filed an enforcement action encompassing the key legal issue, declaratory relief serves no purpose.[4]

B. The *Trejo* Factors Counsel in Favor of Dismissal.

The suit not only fails to vindicate the purpose of the Declaratory Judgment Act, but it also fails the Fifth Circuit's test for exercising discretionary jurisdiction. In this circuit, whether

[3] To the extent the Hospitals seek declaratory relief merely for certainty, the uncertainty is of their own doing. The Hospitals began planning the merger three years ago, and they never once sought advice from the FTC regarding HSR obligations prior to merger.

[4] Nor is the declaratory judgment suit saved merely because the Hospitals seek a declaration about civil penalties. First, whether civil penalties can be sought depends entirely on how the core legal question (the applicability of the state-action doctrine to procedural HSR requirements) is resolved—and that legal question, as described above, should be fully answered in the FTC's enforcement action. Second, the Hospitals' request focuses on a past act: Civil penalties already attached when the Hospitals merged without complying with the HSR Act, *see* 15 U.S.C. § 18a(g)(1), so there is no reason for this Court to issue an opinion now regarding the liability of that past act. *Seaboard Marine Ltd. v. St. Paul Fire & Marine Ins. Co.*, No. CIV. A. 96-2446, 1996 WL 696354, at *2 (E.D. La. Nov. 25, 1996) ("The purpose of the declaratory remedy is to avoid the accrual of avoidable damages to one not certain of his rights"); *Tower Prod. Inc. v. Laird Enterprises Inc.*, 2020 WL 3453552, at *3 (N.D.N.Y. June 24, 2020) (same) (collecting cases); *Tapia v. U.S. Bank, N.A*., 718 F. Supp. 2d 689, 695 (E.D. Va. 2010) (same); *cf. St. Regis Paper Co. v. United States*, 368 U.S. 208, 226–27 (1961) (holding statutory penalties cannot be forgiven "once they legally attach" and noting the petitioner "might have itself sought relief before the § 10 forfeitures *began to accrue* instead of waiting for the Attorney General to sue for their collection") (emphasis added); *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (declaratory relief gives a remedy for those "waiting until his adversary should see fit to begin an action after the damage has accrued.").

a district court should exercise jurisdiction under the Declaratory Judgment Act depends on seven non-exhaustive factors identified in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994). Though all seven *Trejo* factors must be considered, *Am. Bankers Life Assurance Co. of Fl. v. Overton*, 128 F. App'x 399, 402 (5th Cir. 2005), the ones most relevant include "whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant," "whether the plaintiff engaged in forum shopping in bringing the suit," "whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist," and "whether retaining the lawsuit would serve the purposes of judicial economy." *Sherwin-Williams,* 343 F.3d at 388.[5]

The *Trejo* factors address three overarching concerns: (1) the proper allocation of decision-making between state and federal courts, (2) efficiency, and (3) fairness. *Sherwin-Williams*, 343 F.3d at 390–91. Only the latter two concerns are implicated here, and both counsel strongly in favor of dismissal.

i. Declaratory Relief Is Inefficient: The Threshold Legal Question Will be Litigated More Efficiently in the FTC's Suit.

In this action, the Hospitals seek to resolve the same legal question raised in the FTC's enforcement suit: Whether merging parties can be exempted from complying with the HSR Act based on a state-action defense they can raise if the agencies challenged the merger as substantively anticompetitive.

Viewed from any angle, what the Hospitals have invited here is inefficient. The fundamental legal question will be resolved more efficiently in the FTC's affirmative suit, where the Hospitals have already briefed the issue before the action was transferred. *FTC v. LCMC*,

[5] The *Trejo* factors not listed relate to comity given to state courts, which is not implicated here.

1:23-cv-01103-ABJ, R. Doc. No. 23 (Opposition to Petition for Injunctive Relief) (D.D.C. April 26, 2023). The Hospitals no doubt will continue to assert their arguments in that lawsuit now that it has been transferred to this Court. Allowing this extraneous suit to continue would result in duplicative sets of briefing—six briefs rather than three—covering the same issue.

The district court in *Kochava v. FTC* recently faced a similar procedural posture and dismissed the declaratory suit as duplicative and inappropriate. 2:22-cv-349, R. Doc. No. 18 (Order Dismissing Declaratory Judgment Action) (D. Idaho, May 3, 2023). As did the Hospitals here, Kochava filed a declaratory suit "only after learning that the [FTC] planned to file a lawsuit against it" for its sale of consumer data, which the FTC considered a violation of privacy and hence an "unfair . . . act or practice" under the FTC Act. *Id*. at 1. In its race to the courthouse, Kochava sought, among other requested relief, a declaration that its sales of data do not constitute an "unfair . . . act or practice." *Id*. at 2. The FTC brought its suit 17 days later, seeking a permanent injunction barring certain of Kochava's sales of data. The same district-court judge presided over both suits.

The court assessed each case separately and dismissed Kochava's declaratory action, holding the declaratory remedy unwarranted in light of the FTC's pending enforcement action. *Id.* at 3. As the court put it, "race-to-the-courthouse declaratory actions[] are generally disfavored because they often frame defenses as claims and, in doing so, force the parties and courts into an awkward cart-before-the-horse litigation posture." *Id.* at 6. The court chided Kochava for failing to "seek[] any real affirmative declaratory relief," and instead "effectively ask[ing] the Court to predetermine the strength of its defense[] against an anticipated FTC enforcement action." *Id*. at 6–7. The court held that exercising jurisdiction over the preemptive suit "would not serve a useful purpose in resolving the underlying disputes between the parties,"

because "[a]ll arguments Kochava raises as claims in this lawsuit were also offered as defenses in Kochava's motion to dismiss the FTC's enforcement action." *Id.* at 7. Instead, the FTC's enforcement action would more "fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." *Id.* at 8 (quoting *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 697 (D.C. Cir. 2015)).

As in *Kochava*, the Hospitals are asking this Court to rule on an anticipated defense. This request is wasteful and should be rejected, especially where the FTC's enforcement suit is already before this Court. *See Hanes*, 531 F.2d at 592–93 (superseded on other grounds) ("The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure.").

The only substantive argument the Hospitals advance in this litigation is also offered as a defense in the FTC's enforcement action—and that suit can fully serve the needs of the parties. This Court should therefore hold, in line with many other courts to have considered the issue, that only the FTC's enforcement action should proceed.[6] *See Endo Pharms. Inc. v. FTC*, 345 F. Supp. 3d 554, 559–565 (E.D. Pa. 2018) (dismissing declaratory judgment claim against the FTC because plaintiffs have not pointed to a final agency action; the action is not ripe; and "'where the parallel cases involve a declaratory judgment action and a mirror-image action seeking coercive relief . . . we ordinarily give priority to the coercive action, regardless of which case was filed first'") (quoting *Honeywell Int'l Inc. v. Int'l Union*, 502 F. App'x 201, 206 (3d Cir.

[6] The Hospitals have previously invoked the first-to-file "rule" as a reason for dismissing the other suit instead of this one. R. Doc. No. 3 at 3. But it is this action, and not the FTC's, which should be dismissed. This declaratory action fits squarely into an exception recognized by the Fifth Circuit: The first-to-file rule is "disregarded under an 'anticipatory filing' exception when 'a party files a declaratory judgment action in anticipation of a suit by its adversary, which can create an opportunity for forum-shopping.'" *Cormeum Lab Servs., LLC v. Coastal Lab'ys, Inc.*, No. CV 20-2196, 2021 WL 5405219, at *3 (E.D. La. Jan. 15, 2021). The Hospitals already received a tactical advantage from filing this case; D.D.C. transferred the FTC's enforcement action to this district in part because the Hospitals filed this declaratory action.

2012)); *FTC v. Am. Vehicle Prot. Corp.*, No. 22-CV-60298-RAR, 2022 WL 14638465, at *4 (S.D. Fla. Oct. 25, 2022) (dismissing declaratory judgment action where the plaintiff could not show final agency action and has an "adequate remedy in a court: defending the FTC's lawsuit"); *Am. Fin. Benefits Ctr. v. FTC*, No. 17-04817, 2018 WL 3203391, at *9 (N.D. Cal. May 29, 2018) (same where plaintiffs could not show final agency action and where plaintiffs "will be able to present all of the defenses and arguments they seek to advance in this action" in the FTC's enforcement suit); *see also AmSouth Bank*, 386 F.3d at 787–88 ("Where a pending coercive action, filed by the natural plaintiff, would encompass all the issues in the declaratory judgment action, the policy reasons underlying the creation of the extraordinary remedy of declaratory judgment are not present, and the use of that remedy is unjustified.").

ii. Declaratory Relief is Improper: The Hospitals Should Not be Rewarded for Procedural Fencing.

Despite waiting four months after consummating the merger and despite discussions with the FTC for seven weeks preceding this suit, the Hospitals filed their complaint only on the day they learned of FTC staff's recommendation to sue to enforce the HSR Act. The implication is unmistakable: The Hospitals filed this suit to secure a tactical advantage. *See Mill Creek Press, Inc. v. The Thomas Kinkade Co.*, No. 3:04-CV-1213, 2004 WL 2607987 (N.D. Tex. Nov. 16, 2004) (Chief Judge Fish) at *7–9 (improper nature of the DJA suit can be deduced from the timing—namely, if the suit is "filed during a period of 'settlement negotiations'").

Courts are suspicious of procedural fencing even where the plaintiff brought the action *weeks*—much less a single day—after learning of threatened litigation. *See, e.g.*, *Offshore Liftboats, L.L.C. v. Bodden*, No. 12-700, 2012 WL 2064496, at *3 (E.D. La. June 7, 2012) (Africk, J.) (declining to exercise jurisdiction under the DJA in part because "it is readily apparent that [plaintiff] initiated the above-captioned matter in anticipation of any lawsuit that

[defendant] may have been considering following his alleged accident" and the plaintiff "filed its complaint less than two weeks after [defendant's] purported injury"); *AmSouth Bank*, 386 F.3d at 787–88 ("Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum"); *Kochava*, 2:22-cv-349, R. Doc. No. 18 (Order Dismissing Declaratory Judgment Action) at 6 (declaratory action is inappropriate where the plaintiff "filed its Complaint less than a month after learning that the FTC planned to file its own lawsuit"); *see also Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 29 (5th Cir. 1989) (declaratory relief may be denied where "the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping."); *Mill Creek Press, Inc. v. The Thomas Kinkade Co.*, No. CIVA.3:04-CV-1213, 2004 WL 2607987 (N.D. Tex. Nov. 16, 2004) (Chief Judge Fish) at *7–9 ("Courts will generally not allow a party to select its preferred forum by filing an action for a declaratory judgment when it has notice that another party intends to file suit involving the same issues in a different forum."); *POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 45 (D.D.C. 2012) (noting "the disfavored appearance that [the plaintiffs] hastily filed . . . to secure tactical leverage from proceedings in this forum").

Exercising jurisdiction over this preemptive suit would thus encourage natural defendants to file more anticipatory suits on the eve of expected litigation against them. After all, every enforcement suit could be recast as one seeking advance judgment on a defense. Especially where the affirmative action has in fact been brought (one which is now pending before this Court), there is no need to consider an anticipatory filing. *Cf. U.S. Bank Nat'l Ass'n as trustee for CSMC Mortg.-Backed Tr. 2007-3 v. Lamell*, No. 21-20326, 2022 WL 1800860, at *5 (5th Cir. June 2, 2022) (expressing concern where "clever litigants [would] anticipate suit, bring a

future defense as a declaratory judgment 'claim,' and thereby preclude the would-be plaintiff from being able to bring her claim for coercive relief" due to claim preclusion).

iii. Resolving This Suit Circumvents Administrative and Statutory Process.

Finally, in bringing this suit, the Hospitals attempt to subvert the typical administrative and statutory process. The HSR Act statute provides that the FTC or DOJ—not merging parties—is the natural plaintiff to seek judicial review for violations of the HSR Act. 15 U.S.C. § 18a(g)(2) (a district court is empowered to order compliance, extend the waiting period, or grant other equitable relief due to violations of the HSR Act "upon application of the Federal Trade Commission or the Assistant Attorney General [of the Antitrust Division of the DOJ]"). The posture in this case, however, presents the opposite situation: The merging parties are suing the government for a declaration on whether they violated the HSR Act.

The consequences of ignoring Congress' framework are stark when considering how the case should proceed. If this Court finds in the Hospitals' favor—that is, it finds the state-action doctrine can exempt the Hospitals from HSR Act procedural requirements—the factual question regarding whether Louisiana's COPA confers state-action exemption remains open. The FTC and DOJ do not currently have a position on whether the COPA confers state action to the Hospitals, as the FTC was not able to investigate the matter via the typical process—i.e., an investigative process undertaken after the agencies receive an HSR filing. Indeed, the purpose of the HSR Act is to allow the agencies to investigate mergers to determine whether they likely violate the antitrust laws, which includes determining whether merging parties might have valid antitrust defenses, such as the state-action doctrine. *Cf. FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (rejecting state-action defense to subpoena-enforcement proceeding; "[a]n agency's investigations should not be bogged down by premature challenges to its regulatory

jurisdiction"). The declaratory judgment action therefore improperly would force the agencies to investigate through discovery in district court what it would typically investigate through internal processes. This circumvention of administrative process is inefficient, costly, and counter to congressional intent—precisely the kind against which the Fifth Circuit has warned. *Agri-Trans Corp. v. Gladders Barge Line, Inc*., 721 F.2d 1005, 1011 (5th Cir. 1983) ("A declaratory judgment action should not be used to circumvent the usual progression of administrative determination and judicial review"); *Texas Med. Ass'n v. Aetna Life Ins. Co.*, 80 F.3d 153, 159 (5th Cir. 1996) ("Appellants cannot circumvent the procedure provided by [statute] by characterizing their request . . . as a request for a declaration of their contract rights"); *Groos Nat. Bank v. Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir. 1978) (upholding dismissal of a declaratory judgment claim where the statute already provides a "detailed framework for regulatory enforcement and for orderly review of the various stages of enforcement"); *see also Cost Control Mktg. & Mgmt., Inc. v. Pierce*, 848 F.2d 47, 49 (3d Cir. 1988) ("Where Congress has provided a specific statutory administrative procedure, we are reluctant to provide an alternative judicial avenue to a party seeking review of an administrative finding"); *Parke, Davis & Co. v. Califano*, 564 F.2d 1200, 1206 (6th Cir. 1977) ("[I]t was an abuse of discretion to enjoin the [agency] in the circumstances of this case where pending enforcement actions" provided an "adequate remedy"); *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) ("You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court . . . ; the specific statutory method, if adequate, is exclusive."); *Endo Pharms*, 345 F. Supp. 3d at 562–63 (dismissing declaratory action in part because "Congress has [] provided means to obtain judicial review" through Section 13(b) of the FTC Act, and it was inappropriate for plaintiffs to seek an

"'alternative judicial avenue' for review" which "circumvent[s]" this process) (quoting *Cost Control Mktg.*, 848 F.2d at 49); *Am. Vehicle Prot. Corp.*, No. 22-CV-60298-RAR, 2022 WL 14638465, at *5–6 ("[A]ppellate courts have upheld dismissals of suits where parties attempt to bypass APA requirements by bringing DJA claims against an agency.") (citing cases). The relevant *Trejo* factors therefore all counsel towards dismissal.

III. To Prevent Duplication, All Proceedings Should be Held in Abeyance Until the FTC's Enforcement Action Is Resolved.

If this Court is not inclined to dismiss the case, the United States respectfully requests that all proceedings, including briefing, be held in abeyance pending the outcome of the FTC's enforcement action. The FTC's case is potentially dispositive of this one, and it is the more efficient way to resolve the threshold legal issue. Holding this action in abeyance would hence simplify resolution of this matter and preserve judicial economy. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *Stone v. INS*, 514 U.S. 386, 392 (1995) (holding appeal in abeyance where there is the "possibility that the order complained of will be modified in a way which renders judicial review unnecessary"); *Veazie v. S. Greyhound Lines, Div. of Greyhound Lines, Inc*., 374 F. Supp. 811, 816 (E.D. La. 1974) (holding abeyance determination on class relief "in the interest of justice and judicial efficiency").

CONCLUSION

The United States respectfully urges this Court to dismiss the Hospitals' complaint under Fed. R. Civ. P. 12(b)(1). This Court lacks subject-matter jurisdiction, as the case is barred on sovereign immunity and ripeness grounds. The Hospitals are also not entitled to declaratory relief, because the FTC's enforcement suit is the more appropriate vehicle for considering the

merits and that suit can fully resolve the dispute. In the alternative, this Court should hold all proceedings in abeyance until the FTC's enforcement action is resolved.

Dated: June 20, 2023

Respectfully submitted,

/s/ *Yixi (Cecilia) Cheng*

Yixi (Cecilia) Cheng
Michael Mikawa
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Telephone: (202) 705-8342
Email: yixi.cheng@usdoj.gov
Email: michael.mikawa@usdoj.gov

Attorneys for the United States of America
(U.S. Department of Justice and
the Federal Trade Commission)