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 et al.,** Defendants	CIVIL ACTION No. 2:23-cv-1305, c/w 23-cv-1890 JUDGE LANCE M. AFRICK SECTION I MAGISTRATE JUDGE NORTH DIVISION 5 THIS DOCUMENT RELATES TO: Case No. 23-cv-1890

REPLY IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

The Commission does not contest that the Hospitals' Acquisition meets the requirements for state action immunity. The Commission addresses only whether the state action doctrine applies to Section 7A as it does to the other federal antitrust laws, and its arguments are unpersuasive. The Commission purports to interpret Section 7A's text, but it ignores the applicable clear statement rule, and it draws groundless distinctions in an attempt to carve out Section 7A from the scope of the state action doctrine. Finally, the Commission makes virtually no argument on the equitable considerations that must guide the Court's remedial discretion. The Court should accordingly grant the Hospitals' motion for summary judgment and deny the Commission's cross-motion.

ARGUMENT

I. THE ACQUISITION SATISFIES THE REQUIREMENTS FOR STATE ACTION IMMUNITY

The Commission refuses to take a position on whether the Acquisition meets the elements for state action immunity, claiming "it would be a wasteful exercise" for the Court to decide that issue now. Dkt. 77 ("Opp.") at 17, 19. That is wrong. The Court must decide the underlying immunity question. First, because state action immunity applies to Section 7A, the Court cannot

resolve this case without deciding whether that immunity applies to the transaction here. Second, and independently, the Court must decide that question to properly evaluate whether discretionary injunctive relief is appropriate. There is no dispute that injunctive relief under Section 7A is discretionary, and state action immunity is a compelling reason to deny an injunction here. *See infra* pp. 9–10. As Judge Jackson explained in her transfer order, if the Acquisition is exempt from the other federal antitrust laws, including Section 7, then an injunction mandating compliance with Section 7A would simply force the parties through the paces of an "empty exercise." Dkt. 31 at 22. That is not an appropriate use of equitable power.

The immunity issue is also easy to resolve. The Hospitals presented abundant evidence that Louisiana authorized the Acquisition and expressly immunized it from federal antitrust law, actively supervised the Acquisition at closing, and continues to actively supervise it. *See* Dkt. 75-1 at 10–13. In response, the Commission waives the issue by refusing to take a position. It then fails to meaningfully brief it, offering placeholder arguments that are easily refuted. Opp. 19.

For example, the Commission incorrectly suggests (without citation) that the clear-articulation element requires proof of the State's "specific intent to exempt the Hospitals' transaction from the HSR Act." Opp. 20. That is not the standard. *See* Dkt. 75-1 at 9; *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 506–07 (2015) (the "clear articulation requirement is satisfied where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature" (quotation marks omitted)). Regardless, the Legislature expressly stated its intent to immunize the Acquisition from the federal antitrust laws, without exception or equivocation. Dkt. 75-2 ¶¶ 4–7, 18–29. The Commission also insists that "the granting of a COPA does not, in itself, show active supervision" (Opp. 20), but it does not engage with the evidence of Louisiana's active supervision—including a declaration from

the Louisiana Department of Justice detailing the terms and conditions of supervision and the supervision conducted to date. Dkt. 75-2 ¶¶ 30–38; Dkt. 75-14 ¶¶ 12–14, 30–37.

The Commission never says what additional evidence is needed, resorting instead to platitudes about "the fact-specific nature" of active supervision. Opp. 20. These unsubstantiated assertions are not competent summary judgment evidence. *Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887, 896–97 (5th Cir. 2013) (party failing to cite record evidence cannot create a genuine fact dispute). The Commission conspicuously does not seek deferral under Rule 56(d)—perhaps because it knows it cannot identify specific material facts that are lacking, much less show that it has been diligent in attempting to obtain any such facts. *See Dominick v. U.S. DHS*, 52 F.4th 992, 995–96 (5th Cir. 2022); *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 815–16 (5th Cir. 2017).

The only specific evidence the Commission suggests it needs (at 20–21) is the unredacted COPA application. The Commission does not explain why any redacted information—which largely concerns the Hospitals' finances and details of planned investments—could possibly be material to whether Louisiana reviewed the application, made a decision based on clearly articulated state policy, and actively supervised the transaction. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634–35 (1992) (clear articulation and active supervision serve "not to determine whether the State has met some normative standard, such as efficiency," but to ensure that the State "exercise[s] ultimate control over" the transaction). Nor does the Commission explain why it could not have obtained an unredacted copy by now, or any efforts whatsoever toward that end.[1]

II. THE STATE ACTION DOCTRINE APPLIES TO SECTION 7A OF THE CLAYTON ACT

a. Supreme Court precedent makes clear two points that resolve the statutory interpretation

[1] The Commission opened an investigation of the transaction in early April and could have requested relevant documents at any time. *See* Dkt. 78-1 at 4 ¶ 2; No. 23-cv-1890, Dkt. 5-8 at 1. Further, the Commission has made no effort to proceed with discovery in this case.

question here. First, absent a clear statement to the contrary, a federal antitrust law does not apply to States, *Parker v. Brown*, 317 U.S. 341, 350–51 (1943), or to state-controlled conduct, meaning private-party conduct that satisfies the authorization and supervision requirements, *see Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 105 (1980). *See* Dkt. 75-1 at 15, 17; *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (Congress must be "unmistakably clear in the language of the statute"). When States are exempt from the federal antitrust laws, so are private actors executing the States' regulatory programs; otherwise, "[a] plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56–57 (1985). Second, the word "person" in a federal antitrust law is not a clear statement that the law applies to States or state-controlled conduct. *Parker*, 317 U.S. at 350; *see Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000). Section 7A is a federal antitrust law that applies only to "persons," and it lacks any clear statement that it applies to States or state-controlled mergers. Therefore, Section 7A's requirements do not apply to States' conduct or to private parties' state-controlled mergers.

b. The Commission argues (at 7) that the Hospitals seek to "conjure up ambiguity" in the word "person." This ignores the Supreme Court's repeated holdings that "person" in antitrust statutes is not a clear statement. *Parker*, 317 U.S. at 350 ("person" does not include States); *Stevens*, 529 U.S. at 780 (same); *Midcal*, 445 U.S. at 105 (applying *Parker* to state-controlled conduct). It also ignores and distorts the applicable clear statement rule. To prevail, the Commission must point to a clear statement in Section 7A that the statute applies to States or state-controlled mergers. Dkt. 75-1 at 14–15. It cannot do so.

The Commission remarkably argues (at 7–8) that it can *supply its own* clear statement through regulations that define "person." But the clear statement rule requires *Congress* to speak

clearly on major questions of federalism. This responsibility cannot be delegated to an agency. *See Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022). Indeed, *Sackett* and *West Virginia* confirm that the lack of a statutory clear statement means that the agency lacks statutory authority to regulate on that question. Regardless, the Commission's regulations say nothing about state action immunity in general, or about *Midcal*'s extension of immunity to state-controlled private conduct in particular. The regulations generally define terms like "person" and "entity," without addressing the questions presented in this lawsuit. Presumably, there is no regulation on point because the Commission is pressing a new position it concededly has never before taken in any court or enforcement proceeding.

The Commission also points to the statutory exceptions in Section 7A(c) as evidence that Congress intended Section 7A to apply to state-controlled action (at 5–6, 8–9). This fails for multiple reasons. First, the enumerated exceptions are not clear statements that Section 7A applies to States or state-controlled conduct. The Commission's contrary argument is based on an *implicit* negative inference, which falls far short of a clear statement. *See* Dkt. 78 at 15; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 253–55 (1991) (requiring "clearer evidence" than a negative inference from an exception to rebut presumption against extraterritoriality). Further, it is not enough for the Commission's interpretation to be "plausible" or even "better." *Boechler, P.C. v. CIR*, 142 S. Ct. 1493, 1499 (2022). Where a "clear-statement rule" applies, "better is not enough"—the statutory language "must be … clear." *Id.* Second, like Section 7A, Section 7 contains enumerated exemptions, 15 U.S.C. § 18, yet the Supreme Court did not hesitate to apply state action immunity to Section 7. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224–27 (2013). Third, the exemptions cut in favor of the Hospitals. To the extent Section 7A clearly says anything about States, it confirms that Congress sought to *exempt* States from Section 7A. *See* 15 U.S.C.

§ 18a(c)(4) (exempting "transfers to or from … a State"); *see also* Dkt. 78 at 14; Dkt. 75-1 at 18.[2]

Crucially, nothing in the list of exemptions, much less the word "person," contains any clear statement that Congress intended to reject *Midcal* and *Southern Motor Carriers*, which hold that to the extent States are exempt from federal antitrust laws, so are private parties carrying out the State's regulatory program under active supervision. 445 U.S. at 105; 471 U.S. at 56–57. There is no clear statement that Congress intended Section 7A to apply to state-controlled mergers. Contrary to the Commission's claims, the Hospitals' reliance on *Midcal* and *Motor Carriers* does not improperly "blur the line between states and private actors." Opp. 9. The Hospitals refer to "state-controlled mergers" to accurately reflect the standard for state action immunity and to accurately reflect state law. *See Ticor*, 504 U.S. at 634–35 (the State must exercise "sufficient independent judgment and control" so that the conduct is attributable to the State as "the State's own"); *see* Dkt. 75-2 ¶ 3 (State law placed the Acquisition under State "supervision and control").

c. Aside from its misguided textual argument, the Commission relies on several unpersuasive arguments about the practical consequences of applying the state action immunity doctrine to Section 7A. It argues (at 11–13) that *Midcal* and *Motor Carriers* should not apply because Section 7A does not interfere with state COPA programs. That is plainly wrong. As both the Hospitals and the State have explained at length, and the Commission cannot credibly refute, compliance with Section 7A will interfere with the COPA program and will impose costs and delays that will deter future COPA applicants. Dkt. 75-1 at 15–16; Dkt. 74-1 at 19–20.

Louisiana's COPA statute and the Commission's premerger review operate on entirely different and conflicting timelines. The State authorized the Acquisition to close immediately on

[2] In light of the clear statement rule, the exceptions in § 18a(c)(4)-(5) can be fairly read to encompass state-controlled mergers like the Acquisition. This would not improperly "stretch" the statutory text (at 6), but would fairly apply the clear statement rule, which the Commission ignores.

December 31, 2022, in conflict with Section 7A. The Commission's claim (at 12) that the Hospitals could have made their Section 7A filing in January 2022 is absurd. There is no evidence that a price or other material terms had even been set at that point (they had not), let alone that the price was above Section 7A's threshold for filing. Plus, analysis of state action immunity—which the Commission claims it alone can evaluate—would have been impossible in January 2022 because the Hospitals' COPA application had not even been submitted yet.

In any event, the issue here is whether Section 7A would interfere with state COPA programs writ large, not on the particulars of this transaction. And writ large, timing is crucial for mergers; there simply are not spare months or years to file and await approval between agreement on all material terms and closing. *See* Dkt. 75-2 ¶¶ 45–50. Section 7A gives the Commission unilateral control over merger timing by deciding whether to make a second request, its scope, and whether parties have substantially complied—a process that typically takes six or seven months. *Id.* ¶ 45. Such delays can kill even a merger that a State determines is in its citizens' best interest, thus interfering with the States' ability to implement and encourage mergers they shape to benefit their citizens. And the costs of complying with both Section 7A and state COPA processes will likewise deter merger parties from giving States the opportunity to shape transactions through COPAs. It is to avoid just that sort of interference that "federal antitrust laws are subject to supersession by state regulatory programs." *Ticor*, 504 U.S. at 632–33.

The Commission also attempts (at 12 n.5) to sidestep Section 7A's monetary penalties, but this lawsuit will affect whether penalties are potentially available for the Acquisition. The penalties also underscore that the statute is one of "the federal antitrust laws," *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991), and imposes antitrust liability. Imposing antitrust penalties on a COPA-approved merger interferes with State regulatory programs.

Next, the Commission repackages its argument that all state action immunity precedent is wholly inapplicable to Section 7A because Section 7A is procedural. Abandoning the word "procedural," the Commission now argues that immunity applies only to "anticompetitive conduct," and it "has alleged no anticompetitive conduct." Opp. 13–14. That argument is baseless. State action immunity applies to conduct challenged under "the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219. The conduct is immune whether it is ultimately anticompetitive or merely potentially anticompetitive. Here, the challenged conduct is the closing of the Acquisition. The Commission contends that conduct violates Section 7A, a federal antitrust law designed to identify and prevent anticompetitive mergers. Under the state action doctrine, the Acquisition is exempt from "the federal antitrust laws," including Section 7A. *Id.*[3]

Finally, the Commission contends (at 18–19) that state action immunity is unlike any of the enumerated exceptions to Section 7A, all of which involve unilateral determinations about whether to make an HSR filing. *See* Dkt. 78-1 at 4 ¶ 4. Contrary to the Commission's claims, other exceptions are "fact-intensive," such as whether an entity is an arm of the state under § 18a(c)(4). *See, e.g.*, *Smith v. Bd. of Comm'rs*, 372 F. Supp. 3d 431, 440 (E.D. La. 2019) ("determining whether an entity is an arm of the state 'requires a fact intensive inquiry'"). COPA approval and active supervision are "*characteristics* of transactions," so that distinction fails, too. Opp. 18. And the Commission wrongly claims (at 18) that no exception requires assessment of whether a transaction ultimately violates the antitrust laws, even though one exception expressly asks whether the transaction is "exempted from the antitrust laws." § 18a(c)(5).

[3] The Commission's argument that state action immunity is "disfavored" is not a justification for declining to apply the doctrine to any particular antitrust statute, but instead an explanation for insisting on compliance with the authorization and supervision requirements. *See Phoebe Putney*, 568 U.S. at 225.

III. THE PUBLIC INTEREST STRONGLY FAVORS RESPONDENTS AND THE STATE

Finally, and independently, the Court should grant the Hospitals' motion because the Hospitals have shown that equitable relief is inappropriate, and the Commission has failed to meaningfully oppose that showing. Injunctions under Section 7A are discretionary. 15 U.S.C. § 18a(g)(2)(A), (C) ("may order compliance"; "may grant such other equitable relief as the court in its discretion determines necessary or appropriate"). The Acquisition is (at minimum) exempt from Section 7—meaning there will never be a reason to undo the Acquisition—so imposing review under Section 7A would be an unjustified "empty exercise," Dkt. 31 at 22, which serves no valid purpose and harms Louisiana's public interest. *See* Dkt. 75-1 at 24; Dkt. 78 at 21–23.

The Commission contends (at 22) that it is automatically entitled to an injunction if there has been a statutory violation, and expresses consternation at the idea that an injunction could ever be unwarranted where Section 7A applies to a transaction. But Congress's grant of remedial discretion to the courts in Section 7A(g) necessarily means that injunctive relief is not warranted in every case. Indeed, the Supreme Court has "explicitly reject[ed] the notion that an injunction follows as a matter of course upon a finding of statutory violation," even if that statute authorizes injunctive relief and a government entity is the plaintiff. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358 (5th Cir. 1996); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12, 320 (1982); *see also Sec. Indus. Ass'n v. Bd. of Governors of Fed. Rsrv. Sys.*, 628 F. Supp. 1438, 1443 (D.D.C. 1986) (discussing *Weinberger*). Here, the harm to the public interest as assessed by the State and demonstrated by the evidence, and the lack of harm to the Commission absent an injunction, compel the conclusion that equitable relief is unwarranted. That is true whether the equitable considerations flow from the traditional injunction standard; from the public equities

inquiry the Commission previously endorsed when it filed this case, No. 23-cv-1890, Dkt. 4 at 9–10; or from the "appropriate[ness]" inquiry the Commission now advances, Opp. 23–24.[4]

The Commission's citations to dicta and out-of-circuit precedent in support of its proposed "appropriate[ness]" standard (at 22) at most show that the public interest favors an injunction upon a showing of a violation *if the injunction serves the purposes of the statute*, and that the traditional equitable considerations for injunctions acknowledge that government litigants are differently situated from private litigants. *See Weinberger*, 456 U.S. at 311–12, 320; *Sec. Indus. Ass'n*, 628 F. Supp. at 1443. But Section 7A's purpose is not furthered by an injunction mandating an "empty exercise" for an immune transaction. And the presence of sovereigns on both sides of this lawsuit means that the Court cannot simply defer to the Commission's view of the equities (to the extent it even expresses a view). *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38 (1907).[5]

CONCLUSION

For the foregoing reasons, this Court should grant the Hospitals' motion for summary judgment and deny the Commission's cross-motion for summary judgment.

[4] As for which standard applies, the Fifth Circuit and its district courts have repeatedly applied the traditional four-factor injunction test even in cases where the government seeks an injunction. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 746–47 (5th Cir. 2015); *Marine Shale*, 81 F.3d at 1359–60; *Texas v. Becerra*, 575 F. Supp. 3d 701, 711, 724, 727 (N.D. Tex. 2021); *United States v. Texas*, 566 F. Supp. 3d 605, 630–31 (W.D. Tex. 2021). That makes sense because the traditional injunction factors sensibly capture the relevant considerations.

[5] If the Court concludes that injunctive relief is necessary, it should enter only a compliance injunction and not a hold-separate injunction. If the Court concludes that a hold-separate injunction is necessary, it should not enter the Commission's proposed hold-separate injunction without additional briefing or allowing the parties to meet and confer on the appropriate scope of any such injunction. The Court should also stay its order to permit an appeal.

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Respectfully submitted,

/s/ Kenneth W. Field
Kenneth W. Field
Benjamin F. Holt
Sean Marotta
Christopher M. Fitzpatrick
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
benjamin.holt@hoganlovells.com
ken.field@hoganlovells.com
sean.marotta@hoganlovells.com
chris.fitzpatrick@hoganlovells.com

Robert N. Stander
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-7628
rstander@jonesday.com

Sarah E. Welch
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7401
swelch@jonesday.com

/s/ Diana Cole Surprenant
E. Paige Sensenbrenner (#18429) – T.A.
Diana Cole Surprenant (#33399)
ADAMS AND REESE LLP
701 Poydras Street, Suite 4500
New Orleans, LA 70139
(504) 581-3234
paige.sensenbrenner@arlaw.com
diana.surprenant@arlaw.com

Counsel for Louisiana Children's Medical Center

/s/ Sara Y. Razi
Sara Y. Razi
Abram Ellis
Joshua Hazan
SIMPSON THACHER & BARTLETT LLP
900 G Street N.W.
Washington, D.C. 20001
(202) 636-5500
sara.razi@stblaw.com
aellis@stblaw.com
joshua.hazan@stblaw.com

Judy Y. Barrasso (#2814)
Christine M. Calogero (#36818)
Stephen R. Klaffky (#36211)
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER L.L.C.
990 Poydras Street, Suite 2350
New Orleans, LA 70112
(504) 589-9700
jbarrasso@barrassousdin.com
ccalogero@barrassousdin.com
sklaffky@barrassousdin.com

Harry Rosenberg (#11465)
PHELPS DUNBAR, LLP
Canal Place
365 Canal Street, Suite 2000
New Orleans, LA 70130
(504) 584-9219
harry.rosenberg@phelps.com

Counsel for HCA Healthcare, Inc.