IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, **Plaintiff,** **v.** **ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,** **Defendants.**	**CASE NO. 2:23-cv-01305-LMA-MBN** **c/w 23-cv-1311** **c/w 23-cv-1890** **JUDGE LANCE M. AFRICK SECTION I** **MAGISTRATE JUDGE MICHAEL B. NORTH DIVISION 5** **REF CASE NO. 2:23-cv-01890**

FEDERAL TRADE COMMISSION'S OPPOSITION TO INTERVENOR STATE OF LOUISIANA'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT

The Louisiana Attorney General ("Louisiana AG"), on behalf of the State of Louisiana, has intervened in this action brought by Petitioner Federal Trade Commission ("FTC") to remedy Respondent LCMC Health's ("LCMC") and Respondent HCA Healthcare Inc.'s ("HCA") (together, the "Hospitals") violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). The Louisiana AG has now filed a Motion for Judgment on the Pleadings or Alternatively Motion for Summary Judgment ("LA AG Mot."), Dkt. 74. The Court should deny the Louisiana AG's motion.

On January 1, 2023, LCMC acquired three hospitals owned by HCA. There is no dispute that the transaction met the reporting requirements of the HSR Act, and that the Hospitals did not file notifications under the HSR Act or observe the statutorily required waiting period before closing their transaction. The only issue the Court needs to decide is whether LCMC and HCA

were required to comply with the notification-and-waiting period requirements of the HSR Act before closing their transaction.

Although the FTC brought this action to remedy the Hospitals' failure to comply with the HSR Act, the Louisiana AG's motion ignores the text of the HSR Act entirely. Nowhere does the Louisiana AG argue that the Hospitals qualify for a statutory or regulatory exemption to the HSR Act's notification-and-waiting period requirements. Instead, to the extent it addresses the HSR Act at all, it cites selected excerpts from legislative history and inapposite case law that in no way support the existence of an implied exemption to the HSR Act for claimed state action. Mem. in Support of LA AG Mot. ("LA AG Mem."), Dkt. 74-1, at 10-11, 19-20.

Unable to demonstrate an exemption for state action under the HSR Act, the Louisiana AG points to general principles of constitutional law: the preemption doctrine, the anticommandeering doctrine, and the *Noerr-Pennington* doctrine. LA AG Mem. at 7-9, 20-21. None of those doctrines has any bearing here. In each instance, the Louisiana AG conflates the Hospitals' transaction with the Louisiana Certificate of Public Advantage ("COPA") program. This is an action directed exclusively to the conduct of LCMC and HCA, which are private entities. Neither the HSR Act nor the FTC's enforcement action purports to impose any requirements on the State of Louisiana. And neither the State of Louisiana nor any of its political subdivisions is a party to the Hospitals' transaction. The HSR Act plainly applies to the Hospitals' transaction regardless of the COPA issued by Louisiana. Furthermore, Louisiana has not demonstrated any conflict between the requirements of the HSR Act and Louisiana's COPA program that would require the application of one regime or the other.

The Louisiana AG argues that this action represents a "dramatic shift" from an FTC policy—or at least an awareness among "regulated entities"—that transactions involving COPAs

are not subject to the HSR Act, but not one of its citations supports the existence of such a policy or understanding. LA AG Mem. at 11-14. No such FTC policy exists today, or previously existed; accordingly, there has been no change in policy. The Louisiana AG offers no evidence for the "awareness" it claims among "regulated entities," or the FTC's knowledge of such "awareness." This question of purported FTC policy is not relevant to the current action in any event, but even so, publicly available evidence refutes the Louisiana AG's argument.

The Louisiana AG also seeks a finding that the Hospitals' transaction qualifies for the state action defense. The Court need not decide that question; it is irrelevant to the FTC's claim. At best, the state action question is premature because the Hospitals' notification pursuant to the HSR Act would initiate an investigation of the transaction and any applicable defenses. Regardless, the Court should not decide the issue based on the Louisiana AG's self-serving, redacted, and otherwise incomplete record. Those alleged facts are not material and are not undisputed for purposes of summary judgment.

The FTC respectfully requests that the Court deny the Louisiana AG's motion.

LEGAL STANDARDS[1]

Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." A Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d

[1] The Louisiana AG's memorandum relies on the wrong standard for an injunction in this action, LA AG Mem. at 6, but it does not address the application of that standard. The correct standards, under Sections (g)(2)(A) and (C) of the HSR Act, give this Court broad discretion to formulate relief it determines "necessary or appropriate" for an HSR Act violation, as discussed in further detail in the Part III of the FTC's Opposition to the Hospitals' Motion for Summary Judgment.

305, 312 (5th Cir. 2002) (quoting *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)).

A "court should grant summary judgment when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Davidson v. Fairchild Controls Corp.*, 882 F.3d 180, 184 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). A "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted).

ARGUMENT[2]

I. The Louisiana AG does not and cannot identify an exemption for state action under the HSR Act.

The HSR Act lays out a clear framework for determining which transactions are subject to the Act, and there is no material dispute that the Hospitals' transaction met the financial thresholds identified in the HSR Act and updated through FTC regulations. *See* LA AG Mem. at 2. Rather than address its burden to identify an exemption from the HSR Act's notification-and-waiting period requirements in the text of the HSR Act, the Louisiana AG looks elsewhere for an implied exemption: it cites selected excerpts of the HSR Act's legislative history—which, to the extent relevant, support the *FTC's* position—and an excerpt pulled out of context from case law that does not apply here. Even if it were possible to construe the statute to permit judicially

[2] Although the Louisiana AG has moved for judgment on the pleadings under Rule 12(c) and summary judgment under Rule 56, the FTC's arguments in this Opposition apply to both standards.

created exemptions—which it is not—the sources cited by the Louisiana AG do not support an implied exemption to the HSR Act.

The Louisiana AG then changes tack and invokes several constitutionally derived doctrines—the preemption doctrine, the anticommandeering doctrine, and the *Noerr-Pennington* doctrine—none of which has any bearing on this action. Furthermore, the Louisiana AG falsely asserts that the FTC's action departs from a policy of non-enforcement of the HSR Act in cases involving COPAs. These arguments all lack merit.

A. The Louisiana AG's motion ignores the text of the HSR Act.

As an intervenor in this action moving for summary judgment, Louisiana has the burden of establishing an exemption to the notification-and-waiting period requirements of the HSR Act. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.").

Accordingly, the HSR Act itself is the starting point for evaluating the notification-and-waiting period requirements. Yet the Louisiana AG ignores the text of the HSR Act. Nowhere does the Louisiana AG argue that any exemption applies to the Hospitals' transaction, or that the statute is in any way ambiguous. Absent such a showing, the Court need not consider the Louisiana AG's extra-textual arguments for an implied exemption. *See In re Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996) (explaining that "where the statutory language is plain, the sole function of the court is to enforce it according to its terms" (citation and quotation marks omitted)). In any event, as described below, those arguments fall flat.

B. The Louisiana AG's citations to the HSR Act's legislative history do not establish an implied exemption to the HSR Act for claimed state action.

The Louisiana AG attempts to mine the legislative history of the HSR Act for an implied exemption for a claimed state action defense, but comes up empty handed. And the Louisiana AG's proposed approach presumes that the Court should rely on the legislative history of the HSR Act to create an exemption even though the statute already contains exemptions and is otherwise clear; this approach is wrong as a matter of law.

First, despite the Louisiana AG's argument that "the legislation explicitly *delegates* authority to State attorneys general to enforce the federal antitrust laws," LA AG Mem. at 10 (citing H.R. Rep. No. 94-499, pt. 1, at 5), the word "delegate" appears nowhere in the cited portion of the congressional record. The sentence preceding the cited portion states that "[a]n extremely important benefit which would flow from H.R. 8532 is the promotion of *cooperation* in antitrust enforcement between the States and the federal government[.]" H.R. Rep. No. 94-499, pt. 1, at 5 (emphasis added). Moreover, the cited excerpt appears in legislative history discussing Title III of the HSR Act (parens patriae) rather than Title II (premerger notification). *See Mattox v. FTC*, 752 F.2d 116, 119-20 (5th Cir. 1985) (explaining that the HSR Act has three titles—including the premerger notification requirements under Title II and the parens patriae provisions under Title III—that are "traceable to three distinct bills passed by the House"). The legislative history discussing Title III does not support the Louisiana AG's assertions concerning Title II, and the Louisiana AG does not explain its reasons for suggesting otherwise. LA AG Mem. at 10.

Second, inexplicably, the Louisiana AG cites legislative history concerning the FTC and DOJ's general rulemaking authority—and the requirement of "notice and submission of views" under the Administrative Procedure Act ("APA")—but does not claim that the FTC failed to

comply with the APA or indicate how the APA relates to the FTC's current action. LA AG Mem. at 10-11. Neither does the Louisiana AG explain how those provisions bear on the Hospitals' failure to comply with the HSR Act. *Id.*

Third, the Louisiana AG's assertion that the HSR Act is "silen[t]" on its applicability to states, LA AG Mem. at 11, is wrong. The HSR Act expressly exempts "transfers to or from a Federal agency or a State or political subdivision thereof." 15 U.S.C. § 18a(c)(4). Moreover, as explained in Part I.B. of the FTC's Opposition to the Hospitals' Motion for Summary Judgment, the HSR Act's implementing regulations, 16 C.F.R. § 801.1(a)(1)-(2), expressly define "person" and "entity" to exclude states and their political subdivisions.

To the extent relevant and quoted accurately, the Louisiana AG's cited excerpts of the HSR Act's legislative history support the FTC's position that the legality of a transaction has no bearing on whether a filing is required. In the statement that "[m]any transactions that are literally subject to the reporting requirements are not within the intent of Section 7," LA AG Mem. at 11 (quoting S. Rep. 94-803, pt. 1, at 68), Congress expressly acknowledged that the HSR Act would require reporting of a broader set of transactions than those that may be subject to a substantive challenge under the Clayton Act. The cited excerpt demonstrates Congress's understanding that the HSR Act would exempt certain transactions, and it would provide the FTC with authority to exempt others. *See* S. Rep. No. 94-803, pt. 1, at 67 (stating that the FTC would be "authorized and directed to define the terms used in this section, to prescribe the content and form of reports, [and] to except classes of persons and transactions from the notification requirements thereunder by general regulation"). Accordingly, the legislative history cited by the Louisiana AG does not indicate that Congress intended for courts to invent extra-textual exemptions to the HSR Act.

The Louisiana AG argues incorrectly that nothing in the text of the HSR Act or its legislative history suggests a distinction between "substantive" and "procedural" requirements of the federal antitrust laws. LA AG Mem. at 11. To the contrary, many of the pages to which the Louisiana AG cites explain that the purpose of the premerger provisions is to provide the FTC and DOJ "advance notification of large mergers." S. Rep. No. 94-803, pt. 1, at 2; *see also id.* at 8 (the legislation "provide[s] for a 30-day notification to the antitrust authorities prior to consummation of very large mergers and acquisitions . . . "); H.R. Rep. No. 94-1373, at 5 ("The purpose of H.R. 14580 is to . . . establish[] premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions."). From this "advance notification of large mergers" the FTC and DOJ were expected to "detect and investigate" mergers that might be illegal. H.R. Rep. No. 94-1373, at 5. As the Louisiana AG notes, LA AG Mem. at 10, the HSR Act did not change "the substantive legal standard of Section 7 [of the Clayton Act]" that prohibits "acquisitions that may substantially lessen competition or tend to create a monopoly." H.R. Rep. No. 94-1373, at 5. Section 7 of the Clayton Act is the lens through which the FTC and DOJ must evaluate reported transactions, not the lens through which transacting parties determine whether notification should be made. Thus, this language clearly indicates that the HSR Act changes nothing *substantive* about the antitrust laws, but merely adds a *procedural* framework for investigations.

C. The Louisiana AG's argument that the state action doctrine precludes "antitrust scrutiny" lacks merit.

The Louisiana AG cites a list of Supreme Court cases for the proposition that the Hospitals' state action defense permits them to evade "antitrust *scrutiny*" altogether. *See* LA AG Mem. at 19 (citing *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013), *Patrick v. Burge*t, 486 U.S. 94, 98 (1988); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 265 (1986), and

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 (1985)) (emphasis in the original). The Louisiana AG overreads the word "scrutiny" in these opinions apparently to include even investigation. The cited cases do not support that proposition; indeed, in two of them—*Phoebe Putney* and *Patrick*—the Supreme Court scrutinized the challenged conduct and concluded the state action defense did not apply. *Phoebe Putney*, 568 U.S. at 236; *Patrick*, 486 U.S. at 105-06.

In *Phoebe Putney*, the FTC sought to preliminarily enjoin a merger based on an alleged substantive antitrust violation. The Supreme Court explained that state action defense is "disfavored," and thus that the doctrine provides a potential defense to liability "only when it is clear that the challenged *anticompetitive conduct* is undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225 (emphasis added and internal quotations omitted). Addressing a claim by a local hospital authority, the Supreme Court held the state action defense did not apply because the standard applicable to substate government entities like the hospital authority—the "clear articulation test"—was not met. 568 U.S. at 219-20. In short, the Supreme Court in *Phoebe Putney* addressed the substantive merits of the FTC's antitrust claim and the hospital authority's state action defense without touching on the procedural requirements of the HSR Act.

In *Patrick*, the Supreme Court evaluated a claim that private physicians on a hospital's peer review committee violated the antitrust laws by initiating and participating in a hospital peer-review proceeding with the intent to reduce competition from a physician in a competing clinic. 486 U.S. at 97-98. On appeal following a jury verdict in favor of the plaintiff, the Supreme Court held that "no state actor in Oregon actively supervises hospital peer-review decisions," and therefore the state action doctrine did not apply. *Id.* at 105. It would be bizarre to

read the word "scrutiny" in *Patrick* so broadly as to preclude *notification* when the Supreme Court's analysis of liability illustrated the fact-intensive nature of the state action defense.[3]

More fundamentally, the Louisiana AG appears to misunderstand the state action doctrine as providing an immunity from suit, akin to Eleventh Amendment immunity, rather than simply protecting from antitrust liability where *Midcal*'s requirements are met. *See* LA AG Mem. at 19 ("COPA . . . shields HCA and LCMC from the Federal Antitrust Laws"). The Fifth Circuit has rejected treating state action protection like Eleventh Amendment immunity. *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (*en banc*). And the Eleventh Circuit has explained that state action protection provides immunity from antitrust liability, but does not protect against litigation altogether. *SmileDirectClub, LLC v. Battle*, 4 F.4th 1274, 1281 (11th Cir. 2021) (*en banc*).

The Hospitals themselves have conceded that the state action doctrine does not exempt them from investigation altogether. Specifically, in prior briefing, the Hospitals conceded that administrative subpoenas issued under the FTC Act are not subject to the state action defense. *See* Opp. FTC's Mot. for Injunction, *FTC v. La. Children's Med. Ctr.*, No. 2:23-cv-1890 (E.D. La. Apr. 26, 2023), Dkt. 23, at 26 ("[A]dministrative subpoenas issued under the FTC Act are not antitrust laws" subject to the state action defense.).

In reaching its holding, this Court should rely on the text of the HSR Act, not a single word—"scrutiny"—selectively pulled out of context from the state action doctrine caselaw.

[3] The Louisiana AG's other cases are even further afield. *See Fisher*, 475 U.S at 270 (holding Sherman Act did not preempt municipal ordinance and therefore evaluation of the state action doctrine was unnecessary); *Hallie*, 471 U.S. at 36, 44 (evaluating state action defense for a substantive antitrust violation by a municipality, not a private party).

Under the HSR Act's text, there is no exemption for claims under the state action doctrine. That is dispositive here.

D. The Louisiana AG's constitutional arguments lack merit.

The Louisiana AG invokes several constitutionally derived doctrines, none of which apply here. The Louisiana AG's argument that the FTC's suit constitutes an "unauthorized attempt" to preempt Louisiana's COPA law, which invokes preemption and anticommandeering principles, LA AG Mem. at 7-9, is misplaced. The FTC's action does not create a conflict between federal and state law, and it does not seek to impose requirements on the State of Louisiana. The Louisiana AG's argument that the *Noerr-Pennington* doctrine exempts the Hospitals from the requirements of the HSR Act, LA AG Mem. at 20-21, is likewise misplaced, as the FTC's action is not premised on the Hospitals' application for a COPA or other government petitioning.

1. The preemption doctrine has no bearing here.

Contrary to the Louisiana AG's arguments, LA AG Mem. at 7-9, the preemption doctrine has no bearing here. Preemption is a "rule of decision" that arises from the Supremacy Clause of the Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). As the Louisiana AG correctly notes, "[s]tate law must yield to federal law in cases of conflict." LA AG Mem. at 8 (citing *Murphy*, 138 S. Ct. at 1479 (2018)). In this case, however, there is no conflict between the HSR Act and the Louisiana COPA statute or the Louisiana AG's issuance of the COPA. The Louisiana AG's motion attempts to create a conflict where none exists.[4]

[4] To the extent the Louisiana AG is concerned that the FTC's proposed Order to Maintain Assets would conflict with its implementation of the COPA agreement with the Hospitals, it has identified no specific concerns. The proposed Order to Maintain Assets is drafted to ensure that the Hospitals' assets are not irreversibly altered but to allow effective patient care to continue. In

Accordingly, the cases on which the Louisiana AG relies—both those that ruled in favor of preemption and those that ruled against it—have no bearing here. In *New York v. FERC*, 535 U.S. 1, 17-18 (2002), for example, the Supreme Court upheld the exercise of federal authority over the transmission of electricity, ruling that the presumption against preemption did not apply. The Louisiana AG cites *FERC* for the uncontroversial and uncontested proposition that federal agencies have no power to act, or to preempt state law, unless Congress confers such power upon them. LA AG Mem. at 8 (citing *FERC*, 535 U.S. at 18). But these principles are not implicated in this case; there is no conflict between the HSR Act's enforcement provisions and the Louisiana COPA statute, and, beyond one false, conclusory assertion, the Louisiana AG has not attempted to articulate one. *See* LA AG Mem. at 7 (stating that the FTC's suit "plainly seeks to not only interfere with, but effectively undo altogether, a transaction the [Louisiana AG] determined will benefit the health and welfare of the State's citizenry").

If there *were* a conflict between the HSR Act and the Louisiana COPA statute, preemption would require that Louisiana's COPA statute yield to the HSR Act, not the other way around. *See Murphy*, 138 S. Ct. at 1479 (2018) ("[F]ederal law is supreme in case of conflict with state law"); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (holding that, notwithstanding Missouri law to the contrary, under the Federal Employers' Liability Act, the causation standard for employee contributory negligence and the causation standard for railroad negligence should be the same); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (affirming a Florida Supreme Court decision striking down a Florida statute, finding it

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any event, such concern from the Louisiana AG would apply to the remedy, not the applicability of the HSR Act to the Hospitals' transaction or the Louisiana AG's preemption arguments.

conflicted with the balance struck by Congress in the federal patent statute between the encouragement of invention and free competition in unpatented ideas").

The cases rejecting preemption claims likewise have no bearing here. *Xcaliber International Ltd. LLC v. Atty. Gen. State of Louisiana,* 612 F.3d 368 (5th Cir. 2010), involved a private plaintiff's challenge to state legislation adopted to implement a multi-state tobacco settlement. The plaintiff claimed that the Sherman Act preempted the state legislation. Addressing that claim, the court considered whether the legislation mandated or authorized "conduct that necessarily constitutes a violation of the antitrust laws in all cases," or placed "irresistible pressure on a private party to violate the antitrust laws to comply with the statute," holding it did not. *Id.* at 374, 374-75. The court also rejected the arguments that the scheme was really a private price-fixing conspiracy, *id.* at 376-77, and that the private parties success in persuading the legislature to enact the statute defeated the legislature's state action. *Id.* at 377-80. In short, the Fifth Circuit found no conflict between state law and federal law. Likewise, no such conflict exists here between the HSR Act and the Louisiana COPA law.

The same was true in *California v. ARC America Corporation*, 490 U.S. 93, (1989). There, the Supreme Court held that the federal antitrust laws generally do not preempt state antitrust laws. *Id.* at 100-01. Specifically, the Court held that although federal antitrust law does not permit claims by so-called "indirect purchasers," it does not preclude the states from enacting statutes that permit such claims. *Id.* The Court explained that "[s]tate laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *Id.* at 102 (citations

omitted).[5] Again, the current situation is analogous: the HSR Act and the Louisiana COPA law can both apply to the Hospitals and their transaction.

2. The anticommandeering doctrine has no bearing here.

The Louisiana AG's reliance on the anticommandeering doctrine, LA AG Mem. 7-9, is likewise unavailing. Under that doctrine, Congress does not have the "power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. In *Printz v. United States*, 521 U.S. 898, 935 (1997), the Supreme Court held that Congress may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

This action involves no such command. Under the HSR Act, it is the Hospitals, not the State of Louisiana, that must comply with the notification-and-waiting period requirements of the HSR Act. Nothing in the HSR Act prevents or impedes the Louisiana AG from implementing a COPA pursuant to Louisiana state law—let alone orders the Louisiana AG or the State of Louisiana to take any action. The Louisiana AG's motion suggests overreach and conflict where none exists.[6]

[5] The Louisiana AG also cites *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) for the proposition that the federal government may not interfere with the conduct of states except where authorized by the Constitution. LA AG Mem. at 8. The Louisiana AG, however, does not argue that the HSR Act, or the FTC's action pursuant to the Act, *see* 15 U.S.C. § 18a(g)(2), is unconstitutional.

[6] The other cases on which the Louisiana AG relies do not support a claim that the FTC's suit is an unauthorized attempted to preempt the Louisiana COPA law. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632, 646 (1981) (holding in the context of a private antitrust suit for damages, that there is no statutory or common law allowing federal courts to grant a defendant a right to contribution from other participants in the unlawful conspiracy); *Gregory v. Ashcroft*, 501 U.S. 452, 455-56 (1991) (holding the Age Discrimination in Employment Act did not preclude a mandatory retirement provision for state judges under the Missouri Constitution).

3. The *Noerr-Pennington* doctrine has no bearing here.

The Louisiana AG's invocation of the *Noerr-Pennington* doctrine, *see* LA AG Mem. at 21-22 (citing *E. Railroad Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991)), is misplaced. The *Noerr-Pennington* doctrine makes clear that the antitrust laws do not impose liability for petitioning government entities or for attempts to influence the passage or enforcement of laws, in order to protect individuals' rights to take public positions and governments' rights to hear from their citizens. *See Noerr*, 365 U.S. at 135, 139-40; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669 (1965); *Omni*, 449 U.S. at 380.

Neither the HSR Act generally nor the FTC's current action infringe on the rights the *Noerr-Pennington* doctrine protects. As elsewhere, the Louisiana AG conflates the Hospitals' *transaction* with the Hospitals' *COPA application*, and in particular, the Hospitals' actions in petitioning the Louisiana AG for the COPA. LA AG Mem. at 21. The FTC's action does not attempt to impose liability on the Hospitals for applying for a COPA under Louisiana law, for attempts to influence public officials, for attempts to influence the passage or enforcement of laws, or for any other form of government petitioning. As with the Louisiana AG's other constitutionally derived arguments, the Louisiana AG's attempt to insert the *Noerr-Pennington* framework into this litigation introduces a conflict that does not exist.

E. There is no FTC policy exempting COPA-approved mergers from HSR Act reporting.

The Louisiana AG appears to argue that a purported change in FTC policy precludes the FTC's enforcement action in this instance. LA AG Mem. at 11-14. This is flatly incorrect. There has never been an FTC policy exempting COPA-approved transactions from the filing requirements of the HSR Act, nor has there been any policy change on that front. Furthermore,

even if such a policy change had occurred, the Louisiana AG fails to describe how that would preclude the FTC's action in this case.

The Louisiana AG provides no evidence that shows any such policy or policy change. The Louisiana AG also provides no evidence that supports its claim that there is a "belief amongst regulated parties that the state action immunity doctrine provided [an HSR Act] exemption" to transactions subject to a COPA, let alone a belief of which "the agencies have long been aware." *Id.* at 7.

As evidence of the FTC's supposed policy concerning COPA transactions, *see id.* at 12-14, the Louisiana AG relies on 13 publicly-available letters and other materials available on the FTC's website. *See* Donahue Decl., Dkt. 74-4, Exs. 1-13. Not one of the exhibits on which the Louisiana AG relies sets forth an FTC policy concerning its enforcement of the HSR Act. Indeed, not one of these even mentions the HSR Act. *See id.* The exhibits discuss the legislation or the specific transaction or conduct at issue, and in some cases, the application of the state action defense to substantive antitrust concerns from the agencies—not the applicability of the HSR Act. For example, Exhibit 1 is a letter from FTC staff to the Assistant Attorney General of North Dakota, dated March 8, 1993—more than 30 years ago—concerning pending state legislation. *Id.* at Ex. 1. Nowhere does the letter even mention the HSR Act. *Id.*

The only document cited by the Louisiana AG that actually discusses the HSR Act is a brief filed by the FTC in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, an action in which the FTC argued—and the Supreme Court ultimately agreed—that a local hospital authority was not entitled to protection under the state action doctrine. *See* Br. for Pet. at 17-19, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013), No. 11-1160, 2012 WL 3613363. *Phoebe Putney* involved an allegedly anticompetitive merger undertaken by the Dougherty

County Hospital Authority—"a substate governmental entity," *Phoebe Putney*, 568 U.S. at 225, which implicated the HSR Act exemption in 15 U.S.C. § 18a(c)(4) (exempting "transfers to or from a Federal agency or a State or political subdivision thereof"). Here, neither the State of Louisiana, nor any political subdivision, is a transacting party. Further, *Phoebe Putney* illustrates the lack of nexus between the HSR Act exemptions and a state action defense; despite the HSR Act exemption under Section 18a(c)(4), the Supreme Court ruled unanimously that the state action defense did not apply. Far from illustrating an FTC "shift in position," LA AG Mem. at 14, *Phoebe Putney* illustrates that the HSR Act filing requirements and the availability of a state action defense to the merits of a Clayton Act enforcement action are distinct and apply independently. There are mergers subject to the HSR Act that do not violate the antitrust laws, and there are mergers that are not subject to the HSR Act that violate the antitrust laws.

Furthermore, it is not possible for the Louisiana AG to have meaningful insight into whether other merging companies that have received a COPA have not filed HSR Act notifications with the federal government. The HSR Act premerger notification reports are non-public and "no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding." 15 U.S.C. § 18a(h). While HSR filings are non-public, there is a public record of HSR "early terminations." That record reveals at least one COPA-approved transaction that was filed under the HSR Act and received "early termination."[7] In short, the Louisiana AG's evidence of a dramatic policy change and awareness

[7] *Compare* Fed. Trade Comm'n, FTC Policy Perspectives on Certificates of Public Advantage, at 8 (August 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf (identifying COPA approved transaction between Memorial Mission Hospital and St. Joseph's), *with* Fed. Trade Comm'n, *Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules*, 63 FR 67884-01, at *67884 (1998), 1998 WL 846002 (providing notice of early termination of the HSR Act waiting period on October 28th, 1998, in transaction between Memorial Mission and St. Joseph's Hospital).

among regulated parties concerning the application of the HSR Act to COPA-approved transactions is baseless.

The legal theory underpinning the Louisiana AG's claims concerning a supposed—but unfounded—FTC policy change is unclear, but the Court need not grapple with the precise legal theory at issue.[8] The Louisiana AG offers no evidence that supports a finding there is an FTC policy or change in policy concerning enforcement of the HSR Act.[9]

II. The Louisiana AG's arguments that the state action doctrine applies in this case are irrelevant and unsubstantiated.

The only issue in this case is whether the Hospitals failed to comply with the notification-and-waiting period requirements of the HSR Act. Accordingly, the Court need not assess the merits of the Hospitals' claimed state action defense, including the Louisiana AG's arguments in support of the defense.

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[8] Although no party in this action asserted a claim under the APA, the Louisiana AG relies on *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), a case involving a challenge in violation of the Administrative Procedures Act ("APA"). The Louisiana AG also cites *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), a case addressing the deference accorded to the Board of Veterans' Appeals' interpretation of a "genuinely ambiguous regulation," and *Wyeth v. Levine,* 555 U.S. 555 (2009), a case evaluating whether agency approval preempts state tort law. The FTC's action does not ask the Court to defer to its interpretation of an ambiguous regulation, or to find that an FTC regulation or ruling preempts state law.

[9] The Louisiana AG's Statement of Undisputed Facts states that the FTC "did not participate in the Louisiana COPA approval process for the Acquisition." Dkt. 74-2, ¶ 30. The Louisiana AG does not claim that the FTC had actual or constructive notice of the transaction, or the COPA, before the transaction's consummation. (It did not.) In any event, the Court need not evaluate whether publication in local newspapers and, later, on a state website and in a state building, Declaration of Angelica Freel, Dkt. 74-3, ¶¶ 21-22, provided the FTC with sufficient notice of the Hospitals' transaction. The HSR Act was enacted to place the burden of notification on the transacting parties—here, the Hospitals. Whether the FTC had independent notice of the transaction or the COPA application is legally irrelevant. In addition, the FTC's participation in Louisiana's evaluation of the COPA would have no impact on the reportability of the Hospitals' transaction under the HSR Act.

Any assessment of the application of the state action defense at this stage would be premature. Without a filing pursuant to the HSR Act, the FTC has not been able to properly investigate the Hospitals' transaction or determine whether it may violate the antitrust laws. Only then—if the FTC were to conclude that antitrust liability is possible—does the applicability of the state action defense become relevant. The Court should not decide the issue based on the Louisiana AG's self-serving, redacted, and otherwise incomplete record. Those alleged facts are neither "material" nor beyond dispute for purposes of summary judgment.

Furthermore, as with other arguments, the Louisiana AG's argument that granting a COPA constituted "true state action" conflates the Hospitals' transaction (and failure to file under the HSR Act) with the issuance of a COPA. The argument has no bearing on the FTC's action.

A. The Louisiana AG is not entitled to a ruling that the state action applies to the Hospitals' transaction.

The Hospitals' purported state action defense is not relevant in this proceeding, and the Court need not address it. Any factual dispute about whether the transaction is anticompetitive or subject to a defense is at best premature, as the Hospitals have not provided the FTC with the information required by the HSR Act that is relevant to making that assessment. Accordingly, the FTC has not taken a position on that question. Regardless, for the same reasons stated in Part II.B. of the FTC's Opposition to the Hospitals' Motion for Summary Judgment, which the FTC incorporates here by reference, the Louisiana AG is not entitled to a ruling that the state action doctrine applies to the Hospitals' transaction as a matter of law.

If the FTC were to challenge the transaction and the Hospitals asserted a state action defense, that defense would be subject to the test the Supreme Court articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Under *Midcal*, non-

sovereign actors (such as private hospitals) may invoke the state action defense only if they can show (1) that the anticompetitive conduct was taken in accordance with a "clearly articulated and affirmatively expressed . . . state policy" to displace competition, and (2) that the conduct is "actively supervised by the State itself." *Id.* at 105 (internal citations omitted). In *Midcal*, the Supreme Court explained that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106. As explained in the FTC's Opposition to the Hospitals' Motion for Summary Judgment in Part II.B., the *Midcal* test is highly fact-specific.

Furthermore, the Louisiana AG is not empowered to decide whether a transaction is protected by the state action defense. "[A] State may not confer antitrust immunity on private persons by fiat." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); *see also Midcal*, 445 U.S. at 106 ("As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" (citing *Parker v. Brown*, 317 U.S. 341, 351 (1943))). If ever necessary, determining the availability of the state action defense is a question of federal case law applied to an objective set of actions taken by the state, not the subjective policy desire of a state official. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 515 (2013) (explaining that active supervision "will depend on all the circumstances of the case").

Even if the state action defense question were ripe—which it is not—the Louisiana AG has not shown that the State of Louisiana "clearly articulated" a specific intent to exempt the Hospitals from the HSR Act, and the Court should reject the Louisiana AG's attempt to demonstrate active supervision on a one-sided, incomplete record. The facts alleged by the Louisiana AG related to this issue are neither material in this case, nor undisputed. The record is

incomplete, in large part because the FTC's fact-finding on this issue has been limited *because* the Hospitals failed to comply with the HSR Act.

B. The Louisiana AG's argument that the issuance of a COPA constitutes "true state action" is a red herring.

The Louisiana AG nonetheless argues that the issuance of a COPA constitutes "true state action." LA AG Mem. at 15-17. The apparent conclusion the Louisiana AG invites the Court to draw is that an evaluation of a COPA-approved transaction under the state action doctrine is not subject to the "heightened scrutiny" of the *Midcal* framework. This argument is misplaced for several reasons and, in any event, not relevant to the resolution of this case.

First, it conflates the Hospitals' transaction (and failure to file under the HSR Act) with the issuance of a COPA. *See* LA AG Mem. at 17 ("As a result, the [Louisiana AG's] issuance of a COPA renders the transaction between LCMC and HCA 'true action' of the State 'as sovereign' which is '*ipso facto*' exempt from the operation of federal antitrust laws."). The FTC has not challenged the Louisiana AG's conduct, the granting of the COPA, or the Hospitals' participation in the COPA process. For that reason, the Louisiana AG's reliance on *Hoover v. Ronwin*, 466 U.S. 558 (1984), *see* LA AG Mem. at 15, is misplaced. *Hoover* involved a challenge to conduct attributed to the state supreme court itself. 466 U.S. at 572-73. Here, the FTC's enforcement action is directed to the Hospitals' failure to comply with the requirements of the HSR Act. Accordingly, the application of the state action doctrine—including whether officials in the executive branch of a state's government stand in the same position as the state's legislature and supreme court for purposes of the state action doctrine—is not relevant.

Second, even when properly applied, the state action defense does not transform private actors like the Hospitals into a state or political subdivision thereof. *See La. Real Est. Appraisers Bd. v. United States*, 976 F.3d 597, 604 (5th Cir. 2020) (holding that although the Board was

entitled to defend itself under the state action doctrine, it invoked the doctrine only "as a private party," not as a state agency); *see also Acoustic Sys. Inc. v. Wenger Corp.,* 207 F.3d 287, 294 (5th Cir. 2000) (holding that while sovereign immunity concerns underlying the state action doctrine counsel in favor of granting interlocutory review for state entities, "status as a private defendant does not implicate these concerns"). Accordingly, even accepting the Louisiana AG's argument that the state action doctrine extends the definition of "the State" to executive branch officials, the cases on which the Louisiana AG relies—concerning conduct of executive branch agencies or officials (*see* LA AG Mem. at 16 (citing *Deak-Perera Haw., Inc. v. Dep't of Transp.*, 745 F.2d 1281, 1282 (9th Cir. 1984) and *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28–29 (1st Cir. 1999)),[10] and transactions to which executive branch agencies are a party (*see* LA AG Mem. at 16 (citing *VIBO Corp. v. Conway,* 669 F.3d 675, 687 (6th Cir. 2012)))—have no bearing here. Again, the FTC's action does not challenge the Hospitals' transaction as anticompetitive, and thus does not implicate the state action defense—under *Midcal* or otherwise. Nor does it raise the question of whether the Louisiana AG qualifies as "the State" under the federal case law delineating the conduct covered by the state action doctrine.

CONCLUSION

For the reasons stated above, the FTC respectfully requests that the Court deny the Intervenor State of Louisiana's Motion for Judgment on the Pleadings and Motion for Summary Judgment.

[10] To the extent the Louisiana AG's argument is that it can act unilaterally as "the State," *Deak-Perera* and *Neo Gen Screening* are not on point, especially in light of later Supreme Court precedent. *See, e.g.*, *Dental Exam'rs*, 574 U.S. at 505 ("State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.").

Dated: August 9, 2023

Respectfully submitted,

/s/ Mark Seidman

Mark Seidman
Daniel J. Matheson
Adam Pergament
Stephen Rodger
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3296

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, **Plaintiff,** **v.** **ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,** **Defendants.**	**CASE NO. 2:23-cv-01305-LMA-BDN** **c/w 23-cv-1311** **c/w 23-cv-1890** **JUDGE LANCE M. AFRICK SECTION I** **MAGISTRATE JUDGE** **MICHAEL B. NORTH** **DIVISION 5** **REF CASE NO. 2:23-cv-01890**

FEDERAL TRADE COMMISSION'S LR 56.2 RESPONSE TO INTERVENOR STATE OF LOUISIANA'S STATEMENT OF UNDISPUTED MATERIAL FACTS

In accordance with Local Rule 56.2 and in opposition to Intervenor State of Louisiana's Motion for Judgment on the Pleadings or in the Alternative Motion for Summary Judgment, Dkt. 74, brought by and through the Louisiana Attorney General ("Louisiana AG"), the Federal Trade Commission ("FTC") submits the following separate and concise statement of the material facts which it contends present a genuine issue.

PRELIMINARY STATEMENT

The FTC filed this action to remedy Respondent LCMC Health's ("LCMC") and Respondent HCA Healthcare Inc.'s ("HCA") (collectively, the "Hospitals") violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). On January 1, 2023, LCMC acquired three hospitals owned by HCA. By closing their transaction without filing notification forms and observing the statutorily required waiting period, LCMC and HCA violated the HSR Act. There is no dispute that the Hospitals' transaction exceeded the monetary

thresholds for filing notifications under the HSR Act, and there is no dispute that the Hospitals never filed the required notifications. The Louisiana AG claims the issuance of a Certificate of Public Advantage ("COPA") to the Hospitals foreclosed the FTC's suit. More specifically, the Louisiana AG claims that the state action doctrine exempts the Hospitals from complying with the HSR Act's notification-and-waiting period requirements. The dispositive question in this case is whether there is an exemption to the HSR Act's requirements for claimed state action.

In its motion, the Louisiana AG asks this Court to evaluate the fact-intensive question of whether the Hospitals' transaction has satisfied the elements of the state action doctrine. The Court does not need to resolve that question. It is premature at best. Because the Hospitals failed to comply with the HSR Act, the FTC has not been able to fully investigate the transaction or the Hospitals' purported state action defense.

The Louisiana AG devotes most of its Statement of Undisputed Material Facts to assertions he believes support the elements of a state action defense. Other than paragraphs 12, 13, and 26, none of those assertions is "material" to this action, even if true. Even if those asserted facts were considered "material," they would not "present no genuine issue," pursuant to Local Civil Rule 56.1.

DISPUTED FACTS

1. Immaterial and undisputed.

2. Immaterial and undisputed that the cited statute contains the words "supervision" and "control." The words "supervision" and "control" in the Louisiana statute do not bear on the application of *Midcal*'s "active supervision" prong, which necessarily entails a fact-sensitive inquiry to any particular transaction.

3. Immaterial and undisputed that the statute contains the quoted words (other than

those that are bracketed).

4. Immaterial and undisputed.

5. Immaterial and undisputed.

6. Immaterial and undisputed.

7. Immaterial and undisputed.

8. Immaterial and undisputed as to the requirement of Louisiana law that the Louisiana Department of Justice adopt a rule "[t]o effect the active supervision by the department of agreements between health care facilities." La. Stat. § 40:2254.9(3).

9. Immaterial and undisputed.

10. Immaterial and undisputed.

11. Immaterial and disputed that the record shows that LCMC operates as an Organized Health Care Arrangement under Louisiana law. LCMC is a non-profit corporation incorporated under the laws of Louisiana with its principal place of business at 1100 Poydras Street, New Orleans, LA 70163. FTC Petition for Injunctive Relief Pursuant to Section 7(A)(g)(2) of the Clayton Act and Section 13(b) of the Federal Trade Commission Act (Dkt. 1) ¶ 2; Answer and Affirmative Defenses of Louisiana Children's Medical Center (Dkt. 52) ¶ 2.

12. Undisputed.

13. Undisputed.

14. Immaterial and undisputed as to general claims in the Hospitals' COPA application (to the extent they are not redacted). Disputed as to the Louisiana AG's characterization regarding what the Acquisition was "designed to" do.

15. Immaterial and undisputed as to LCMC's commitments summarized in the COPA application (though LCMC did not include the agreements underlying the Hospitals'

transaction).

16. Immaterial and undisputed.

17. Immaterial and undisputed that counsel for the Louisiana AG has submitted a declaration (Freel Decl. at ¶ 28) claiming the Department reviewed the COPA application and determined that a COPA should be issued in connection with the Acquisition. Otherwise disputed. The record before the Court is not sufficient to evaluate the alleged undisputed fact.

18. Immaterial and undisputed that counsel for the Louisiana AG has submitted a declaration (Freel Decl. at ¶¶ 25, 28) claiming the Department obtained input from expert consultants who reviewed the COPA application. Otherwise disputed. The record before the Court is not sufficient to evaluate the alleged undisputed fact.

19. Immaterial and undisputed that the Department held a notice and comment period, received numerous comments from the public, and held a public hearing. Otherwise disputed. The record before the Court is not sufficient to evaluate the alleged undisputed fact.

20. Immaterial and undisputed.

21. Immaterial and undisputed that the COPA's approval contains "Terms and Conditions." Otherwise disputed. The record before the Court is not sufficient to evaluate the alleged undisputed fact.

22. Immaterial and undisputed as to the quoted content of the "Terms and Conditions."

23. Immaterial and undisputed as to the content of the "Terms and Conditions."

24. Immaterial and undisputed as to the quoted content of the "Terms and Conditions."

25. Immaterial and undisputed as to the quoted content of the "Terms and

Conditions."

26. Undisputed that the Hospitals closed their transaction on January 1, 2023, and publicly announced the closing on January 3, 2023. Otherwise disputed, as the record before the Court is not sufficient to evaluate the alleged undisputed fact.

27. Immaterial and disputed. The FTC Policy Perspectives on Certificates of Public Advantage does not purport to be a comprehensive summary of the FTC's submissions or comments concerning state-led hearings during COPA review processes. HSR Act filings are confidential. Whether the FTC raised the HSR Act (Section 7A) in the context of public hearings does not bear on whether transactions at issue in those hearings were subject to the HSR Act or whether parties to those transactions complied with the notification-and-waiting period requirements of the HSR Act.

28. Immaterial and disputed. The FTC has not determined that any COPA program "succeeded in affording state action immunity." Moreover, the FTC's enforcement decisions are subject to the agencies' prosecutorial discretion such that a decision to enforce or not to enforce in any particular case sheds no light on any supposed agency policy.

29. Immaterial and disputed. There is no evidence in the record that shows a "widespread belief" among the parties that the FTC regulates that the state action doctrine relieves parties of their obligations under the HSR Act, and there is no evidence in the record that shows that the FTC is "aware" of such belief. There has never been an FTC policy exempting COPA-approved transactions from the filing requirements of the HSR Act, nor has there been any policy change on that front.

30. Immaterial and undisputed. The FTC was not aware of LCMC and HCA's transaction, COPA application, or any proceedings concerning the COPA until after LCMC and

HCA consummated the Acquisition.

31. Immaterial and undisputed as to when counsel was first informed of the FTC's view. Disputed to the extent the Commission refers to the FTC Commissioners rather than FTC staff.

32. Immaterial and undisputed that Commission staff advised counsel for the Hospitals that the Commission staff's position was that the Hospitals were required to make an HSR Act filing and to pause integration of the Hospitals in accordance with the HSR Act.

33. Immaterial and undisputed that civil penalties accrue from the date of a violation of the HSR Act. Disputed that any communications about penalties amount to a threat.

Dated: August 9, 2023

Respectfully submitted,

/s/ Mark Seidman

Mark Seidman
Daniel J. Matheson
Adam Pergament
Stephen Rodger
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel: (202) 326-3296