IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Petitioner,** **v.** **LOUISIANA CHILDREN'S MEDICAL CENTER,** **and** **HCA HEALTHCARE, INC.,** **Respondents.**	Case No. 1:23-cv-01103-ABJ

RESPONDENTS' OPPOSITION TO PETITION FOR INJUNCTIVE RELIEF PURSUANT TO SECTION 7A(g)(2) OF THE CLAYTON ACT AND SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

For the first time in its history, the Federal Trade Commission seeks to enforce Section 7A of the Clayton Antitrust Act against a merger exempt from "the federal antitrust laws" under the state action doctrine. *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985). The Supreme Court has long held that the "federal antitrust laws are subject to supersession by state regulatory programs." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632–33 (1992). The "federal antitrust laws" do "not apply to anticompetitive restraints imposed by the States." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991). This extends to "nonstate actors carrying out the State's regulatory program." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). That is the case here.

The State of Louisiana enacted a regulatory program to authorize healthcare mergers and place them under State "supervision and control." La. Stat. § 40:2254.1. The Louisiana Attorney General may authorize a merger only after finding it in the public interest of the State and issuing a "certificate[] of public advantage" (COPA). *Id.* For those mergers, the Louisiana Legislature expressly intends to "substitute state regulation … for competition," and to "grant[] … state action immunity for actions that might otherwise be considered to violat[e] … federal antitrust laws." *Id.*

Respondents' merger was authorized under this regulatory program. The Attorney General issued a COPA on December 28, 2022. The transaction closed on January 1, 2023, subject to a clear set of terms and conditions for the Attorney General's active supervision.

There is no legitimate dispute that mergers attributable to the State, such as this one, are exempt from Section 7 of the Clayton Antitrust Act, the primary federal statute regulating anticompetitive mergers. The Commission insists, however, that the acquisition is nevertheless subject to Section 7A of the Clayton Antitrust Act, which imposes a waiting period and notice to the Commission before a merger is consummated.

The Commission is wrong. Every reason for exempting state action from "the federal antitrust laws" in general, and Section 7 in particular, applies equally to Section 7A. It is a federal antitrust law that regulates conduct by prohibiting mergers during a waiting period, on pain of liability in the form of daily penalties. Applying 7A to State-controlled mergers would egregiously interfere with "state regulatory programs." *Ticor Title*, 504 U.S. at 632–33. The text of Section 7A contains the same ambiguity regarding the word "person" that the Supreme Court relied on to exclude state action from the Sherman Act and Section 7. And two other provisions in Section 7A confirm that Congress intended to exempt mergers attributable to the State. At bottom, courts may not apply federal antitrust laws to State-controlled mergers absent a clear statement to the contrary, and Section 7A contains no clear statement that Congress intended "to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

No court has ever held that Section 7A applies to State-controlled mergers. Nor has the Commission ever adopted that interpretation in any regulation, or even in any informal guidance before this case. The Commission's brief makes virtually no effort to support its novel request to carve out Section 7A from the state action doctrine. Its only argument is that the "state action defense" is not an immunity from suit, unlike Eleventh Amendment immunity, and therefore it does not "immunize a merging party from being investigated." Gov't Br. 8. Make no mistake: Respondents do not here contend they are immune from suit or from a subpoena in the Eleventh Amendment jurisdictional sense. Respondents agree the state action doctrine means that conduct attributable to the State is "exempt" from the antitrust laws. But Section 7A is indeed one of the federal antitrust laws, and it regulates conduct by imposing a waiting period on mergers. Under the state action doctrine, State-controlled mergers are exempt from the waiting period under Section 7A for the same reasons they are exempt from "the federal antitrust laws" in general.

As for the public interest, the Commission falls far short. The State of Louisiana has determined that Respondents' merger is in the public interest of the people of the State, and the merger is a purely intrastate transaction centered in New Orleans. Before approving the merger, the Attorney General invited comments from the public and held a public hearing, but the Commission declined to participate, even though it has previously submitted comments in other COPA matters. After sitting on its hands during the review process, the Commission waited for three months after the merger was publicly consummated. The Commission now asks this Court, sitting in Washington, to reach into Louisiana and enjoin a New Orleans merger that the State has determined is in the best interest of its citizens. That extraordinary request should be denied.

This Court, in fact, should not even rule on the Commission's petition. For the reasons stated in Respondents' pending motion to transfer, and in Respondent LCMC's motion to dismiss for lack of personal jurisdiction, this matter should be resolved in the Eastern District of Louisiana, where the transaction occurred. LCMC does not consent to personal jurisdiction in this Court, and files this brief only because ordered by the Court, and subject to its pending motion to dismiss.

The petition fails on the merits and the equities, and it does not even belong in this Court.

BACKGROUND

A. Louisiana's COPA Statute Provides A Comprehensive Regulatory Program For Health Care Mergers That Displaces Federal Antitrust Law

Pursuant to the States' authority to supersede federal antitrust laws, Louisiana is one of 19 States that have enacted COPA statutes regulating domestic mergers, acquisitions, and other cooperative agreements.[1]

[1] For details about each of these State COPA statutes, see Amy Y. Gu, *Updated: States with Certificate of Public Advantage (COPA) Laws*, Source on Healthcare Price & Competition (Aug. 10, 2021), https://sourceonhealthcare.org/updated-states-with-certificate-of-public-advantage-copa-laws/.

Enacted in 1997, Louisiana's statute creates a regulatory program to authorize healthcare mergers and place them under State "supervision and control." La. Stat. § 40:2254.1. The statute expressly dictates "the intent of the legislature" to "substitute state regulation of [healthcare] facilities for competition between facilities." *Id.* And it states "the intent of the legislature" "that this regulation have the effect of granting the parties to the … mergers … state action immunity for actions that might otherwise be considered to be in violation of … federal antitrust laws." *Id.*

The State Attorney General is tasked with administering and enforcing the statute. Parties to a proposed merger agreement may apply to the State Department of Justice for a "certificate of public advantage" (COPA). *Id.* § 40:2254.4. The Department has up to 180 days to review the application, provide notice to the public, and hold a public hearing. *Id.* After review, the Department may grant a COPA only if it "finds that the agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." *Id.* The Department is authorized to issue a COPA "subject to terms and conditions" to ensure compliance with state policy. *Id.*

After approval, the Attorney General must conduct "active supervision" of the merger. *Id.* § 40:2254.9(3). The Department has authority to promulgate supervision regulations, *id.*, and to impose supervisory terms and conditions on COPA approval, *id.* § 40:2254.4. The Attorney General always retains ultimate control—power to "revoke a certificate" if the merger is no longer consistent with state health care policy. *Id.* § 40:2254.6(A).

B. Respondents' Acquisition Was Authorized And Supervised Under Louisiana's COPA Program

Respondents applied for COPA approval on October 10, 2022. Ex. C. Louisiana Children's Medical Center (LCMC) is a non-profit health system operating as an Organized Health Care Arrangement under Louisiana law. Ex. D, Petition of Intervention ¶ 3; Ex. C at B-3; Dkt.

19-1 ¶ 4. It operates nine hospitals and other facilities in Louisiana and Mississippi. Dkt. 19-1 ¶¶ 4–5. HCA Healthcare, Inc. (HCA) previously owned and operated three hospitals in Louisiana through a joint venture with Tulane University of Louisiana. Ex. C at B-7–8.

Under the transaction (the "Acquisition"), LCMC would acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital from HCA. *Id.* at B-8–9. As the application explained, the Acquisition was designed to increase access to clinical services and high-quality health care in the New Orleans region and create expanded hubs for specialty care, innovation, and academic medicine in the region. *Id.* at B-10–17.

The Attorney General extensively reviewed the application. Ex. D, Petition of Intervention ¶¶ 12, 19–31; Ex. D, Motion to Intervene at 2; Dkt. 19-1 ¶ 12. The application itself contained detailed information regarding the transaction, the facilities, and the likely effects on health care and competition in the state. Ex. C at B-3–73. The State retained expert consultants for an independent review. Ex. D, Petition of Intervention ¶¶ 12; Dkt. 19-1 ¶ 12. The State held a public notice-and-comment period, and held a public hearing on December 8, 2022. Ex. D, Petition of Intervention ¶¶ 12, 14, 20–29; Ex. D, Attachments 1–8; Dkt. 19-1 ¶¶ 12–13.

Based on this review, the Louisiana Department of Justice concluded that the Acquisition "is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." La. Stat. § 40:2254.4; Ex. D, Petition of Intervention ¶¶ 31, 46–49. The Department accordingly approved the Acquisition and granted a COPA on December 28, 2022. Exs. A, B.

The COPA contained a set of "Terms and Conditions of Compliance," providing comprehensive provisions for supervision. Ex. B. Under the "Rate Review" provision, LCMC "may not contract with a third-party payor for a change in rates … without the prior written

approval of the [Louisiana] DOJ." *Id.* at 6. LCMC must also submit quarterly, semi-annual, and annual reports, enabling the Attorney General to determine whether LCMC's activity is consistent with the State's policy goals. *Id.* at 7–10. The Attorney General may at any time impose "a plan to correct any deficiency" upon determining "that an activity of [LCMC] is inconsistent with the policy goals" of the State. *Id.* at 2. Finally, the Attorney General may at any time "revoke the COPA" if "the [department] is not satisfied with any submitted corrective action plan," if LCMC fails to comply with the Terms & Conditions, "or if the [Louisiana] DOJ otherwise determines that the transaction is not resulting in lower health care costs or greater access to or quality of health care." *Id.* at 3.

Relying on this COPA and the Attorney General's active "supervision and control," La. Stat. § 40:2254.1, together with the Legislature's express intent that "this regulation" will grant "state action immunity" from "federal antitrust laws," *id.*, Respondents closed the Acquisition on January 1, 2023, and announced the closing publicly on January 3, 2023. Ex. E.

C. Federal Law Regulates Mergers Under Sections 7 And 7A of the Clayton Antitrust Act.

Federal antitrust law regulates mergers differently, and in a way that conflicts with Louisiana's COPA program. The primary federal statute regulating mergers is Section 7 of the Clayton Antitrust Act. 15 U.S.C. § 18. Under Section 7, "[n]o person shall acquire" ownership or assets of "another person" if "the effect of such acquisition may be substantially to lessen competition." *Id.* As explained below (Part I.A.), the Supreme Court has long held that conduct attributable to States is exempt from the federal antitrust laws, including Section 7, because the word "person" is ambiguous as to States, *Parker v. Brown*, 317 U.S. 341, 351 (1943), and the Court requires a clear statement before concluding that Congress would "intend to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S.at 56.

The Hart-Scott-Rodino Antitrust Improvements Act (HSR) enacted Section 7A of the Clayton Antitrust Act as an enforcement tool for Section 7. Pub. L. No. 94-435, 90 Stat. 1383 (1976). Section 7A prohibits consummation of a merger without notice to the Commission and compliance with a waiting period. 15 U.S.C. § 18a. Parties who consummate mergers without observing the waiting period are subject to liability in the form of daily penalties enforceable by the Department of Justice. *Id.* § 18a(g)(1). The penalty is currently more than $46,000 per day.[2] As with Section 7, Section 7A applies to "persons," providing that "no person shall acquire" ownership or assets without observing the waiting period and submitting to FTC review. *Id.* § 18a.

D. The Commission Makes An Unprecedented Attempt To Impose Section 7A On A COPA-Approved Merger

To Respondents' knowledge, the Commission has never applied Section 7A to COPA-approved mergers. Nor are Respondents aware of any judicial authority or regulatory authority ever holding that Section 7A of the Clayton Antitrust Act—undeniably one of the federal antitrust laws—is carved out from the state action doctrine. For many other COPA mergers, moreover, the Commission has submitted comments and participated in hearings during the COPA review process, at times urging the States to reject the COPA application, including in New York, Tennessee, Virginia, West Virginia, and Texas, without ever claiming that the mergers were subject to Section 7A or that COPA-approved mergers violate the antitrust laws.[3]

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[2] *See* FTC, *FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023* (Jan. 6, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023.

[3] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, at 1 n.2, 11 n.49, 12 n.62 (Aug. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-policy-paper-warns-about-pitfalls-copa-agreements-patient-care-healthcare-workers; FTC, *Certificates of Public Advantage (COPAs)*, https://www.ftc.gov/news-events/features/certificates-public-advantage-copas (last visited Apr. 25, 2023).

The Commission has apparently now reversed course. Here, the Commission remained silent and declined to participate in Louisiana's notice-and-comment process and public hearing. Ex. D, Petition of Intervention ¶ 28. The Commission then waited three months after the Acquisition closed. Only then did the Commission inform Respondents of its view that Section 7A applies to COPA-approved mergers. During discussions in March 2023 with counsel for LCMC and April 2023 with counsel for HCA, the Commission insisted that Respondents must make a corrective filing, immediately halt the integration of the merged hospitals, and take no further steps to integrate the hospitals without observing the waiting period. *See* Dkt. 5-8, Dkt. 5-12. When Respondents informed the Commission they would not halt the merger because the Acquisition is exempt, the Commission threatened to impose daily penalties for noncompliance.

Under threat of enforcement, on April 19, 2023, LCMC filed a declaratory judgment complaint in the Eastern District of Louisiana, where the Acquisition occurred. Dkt. 20-5. The complaint seeks a ruling that a COPA-approved merger is exempt from Section 7A of the Clayton Antitrust Act under the state action doctrine. HCA followed with its own complaint, seeking the same relief. Dkt. 20-4. The Attorney General of Louisiana then moved to intervene in support of LCMC and HCA. Ex. D.

After both lawsuits were filed in Louisiana, the Commission filed its petition with this Court on April 20, 2023. Invoking Section 7A of the Clayton Antitrust Act, the petition seeks a "preliminary injunction against [LCMC] to hold separate and maintain" the hospitals acquired from HCA in the COPA-approved Acquisition. Pet. 1–2. The petition asks the Court to order compliance with the filing requirements and waiting period of Section 7A, and to maintain the standstill injunction "until thirty days after the parties have substantially complied" with the

Commission's merger review. *Id.* at 2. As demonstrated below, the Commission's petition should be denied.[4]

LEGAL STANDARD

Insofar as the Commission seeks preliminary injunctive relief, the Commission must demonstrate a "likelihood of success on the merits" and that the "public equities" favor an injunction. *See FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35–36 (D.D.C. 2009). Insofar as it seeks permanent injunctive relief, the Commission must prove its claim on the merits and show that the public interest favors an injunction. *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1348 (2021) (discussing authority to obtain permanent injunctive relief).

As applied here, to obtain preliminary injunctive relief, the Commission must demonstrate a likelihood of success on its claim that Section 7A of the Clayton Antitrust Act applies to Respondent's Acquisition, even where the merger is attributable to the State of Louisiana under the state action doctrine. The Commission must also demonstrate that the public interest favors an injunction from this Court, where the injunction would halt an intrastate Louisiana merger authorized by a Louisiana statute that was enacted expressly to displace federal antitrust law with state healthcare regulation.

Next, to obtain permanent injunctive relief, the Commission must conclusively prove its claim that Section 7A applies to the Acquisition, even where it is attributable to the State under the state action doctrine. The Commission must also show that the public interest favors a permanent injunction.

[4] Respondents have separately moved to transfer the case, and LCMC has moved to dismiss the action for lack of personal jurisdiction. Dkts. 19–20. This response is without prejudice to those two motions, and Respondents respectfully submit that those motions should be decided before this Court considers the Commission's request for a preliminary injunction.

ARGUMENT

The Commission's petition should be denied because its Section 7A claim fails on the merits. First, under a straightforward application of the state action doctrine, mergers attributable to the State are exempt from Section 7A of the Clayton Antitrust Act, just as they are exempt from Section 7 of the Clayton Antitrust Act. Second, the challenged Acquisition is attributable to the State of Louisiana because it was expressly authorized and supervised under Louisiana's COPA statute. That statute expressly and clearly articulates a state policy to displace competition with state regulation, and to immunize COPA-approved mergers federal antitrust laws. The Louisiana Attorney General actively reviewed and approved the Acquisition, and is actively supervising compliance with the COPA. The Commission cannot show a likelihood of success, let alone actual success, on its claim.

The public interest cuts strongly against the Commission as well. The Commission urges this Court to extend into Louisiana and enjoin a purely local merger that the State has determined is in the best interest of its citizens. This would plainly compromise the State's COPA program and its ability to regulate local healthcare facilities, and it would delay or diminish the healthcare access and quality improvements that LCMC committed to provide to the State. If any court should be assessing the public interest, moreover, it should be the Eastern District of Louisiana in New Orleans, as explained in Respondents' pending motion to transfer and motion to dismiss.

I. THE ACQUISITION IS EXEMPT FROM SECTION 7A OF THE CLAYTON ANTITRUST ACT

A. Conduct Attributable To The State Is Exempt From The Federal Antitrust Laws

The Supreme Court has long presumed that Congress—absent a clear statement to the contrary—would "not intend to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56; *Parker*, 317 U.S. at 351 ("an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress").

Accordingly, the Court has consistently interpreted federal antitrust statutes to exempt "state action or official action directed by a state." *Parker*, 317 U.S. at 351. "Relying on principles of federalism and state sovereignty," the state action doctrine provides that "the federal antitrust laws" do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia*, 499 U.S. at 370.

The Court first applied this principle in *Parker*, holding that the phrase "[e]very person" in the Sherman Act was insufficiently clear to include States or "official action directed by a state." 317 U.S. at 351. The Court has since applied the exemption many times, including to merger challenges under Section 7 of the Clayton Act, *Phoebe Putney*, 568 U.S. at 222–25, and has repeatedly confirmed "that federal antitrust laws are subject to supersession by state regulatory programs." *Ticor Title*, 504 U.S. at 632–33; *see Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1263 (3d Cir. 1994) (applying state action immunity to the Sherman Act, Clayton Act, and Robinson-Patman Act); *Hunnicutt v. Tafoya-Lucero*, No. 21-cv-867, 2022 WL 832566, at *4 (D.N.M. Mar. 21, 2022) ("The state action exemption … appl[ies] to all of the federal antitrust laws, including the Clayton Act and the Robinson-Patman Act."). In sum, state action is "exempt from scrutiny under the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219.

Crucially, the exemption extends to "nonstate actors carrying out the State's regulatory program." *Id.* at 225. This is essential, the Court has explained, to avoid "compromis[ing] the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. "If *Parker* immunity were limited to the actions of public officials, … a State would be unable to implement programs that restrain competition among private parties." *Id.* Any "plaintiff could frustrate" the state's regulatory program "merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." *Id.* at 56–57.

In light of those concerns, "anticompetitive acts of private parties are entitled to immunity" if they satisfy two elements designed to ensure that the conduct is attributable to the State. *Phoebe Putney*, 568 U.S. at 225; *see Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (adopting the two-part test). ***First,*** the State must have authorized the challenged anticompetitive conduct—it must be "clearly articulated and affirmatively expressed as state policy." *Phoebe Putney*, 568 U.S. at 225 (quoting *Midcal*, 445 U.S. at 105). The Court has clarified, however, that this requires "no express mention of anticompetitive conduct," let alone an express reference to immunity from federal antitrust law. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41–42 (1985). "It is enough … if suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia*, 499 U.S. at 373 (quoting *Town of Hallie*, 471 U.S. at 42). In other words, "the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 507 (2015); *W. Star Hosp. Auth. Inc. v. City of Richmond*, 986 F.3d 354, 358 (4th Cir. 2021) ("A legislature need not, however, 'expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects'" (quoting *Town of Hallie*, 471 U.S. at 43)).

Second, the challenged anticompetitive conduct must be "actively supervised" by the State. *Phoebe Putney*, 568 U.S. at 225 (quoting *Midcal*, 445 U.S. at 105). Active supervision means "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Dental Exam'rs*, 574 U.S. at 507. Its purpose is "not to determine whether the State has met some normative standard, such as efficiency," *Ticor Title*, 504 U.S. at 634, but to ensure that the State "exercise[s] ultimate control over the challenged anticompetitive conduct," *id.*

Both of these requirements "are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* at 636. To be sure, the Court has applied these two elements with rigor. *Phoebe Putney*, 568 U.S. at 225; *Dental Exam'rs*, 574 U.S. at 507. When doing so, the Court has sometimes stated that "state-action immunity is disfavored," meaning that it applies "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. But when the two elements are satisfied, the exemption is complete. Conduct attributable to the State is wholly "exempt from scrutiny under the federal antitrust laws." *Id.* at 219; *Motor Carriers*, 471 U.S. at 57 (holding that private parties were "shielded from the federal antitrust laws").

B. The Acquisition Is Attributable To The State And Is Exempt From The Federal Antitrust Laws

These elements are easily met here. Indeed, the State's express grant of immunity, along with its "supervision and control" of the merger, far exceeds them. La. Stat. § 40:2254.1.

First, for clear articulation, this is not a case lacking an "express mention of anticompetitive conduct," *Town of Hallie*, 471 U.S. at 41–42. Nor is it a case where the State has merely "foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Dental Exam'rs*, 574 U.S. at 507. To the contrary, the Louisiana Legislature expressly and unequivocally authorized "mergers … and consolidations among health care facilities for which certificates of public advantage are granted." La. Stat. § 40:2254.1. The statute expressly states "the intent of the legislature" to "substitute state regulation of facilities for competition between facilities," and that State "supervision and control" will "grant[] … state action immunity" from "federal antitrust laws." *Id.*

Relying on this express authority, Respondents applied for a COPA from the Louisiana Attorney General. *Supra* pp. 4–5. The voluminous application contains extensive detail regarding the transaction, including its likely effects on health care and competition in the state. *Id.* The Attorney General's office comprehensively reviewed the application, retained expert consultants, provided a public notice-and-comment period, received input from a wide range of stakeholders, and held a public hearing on December 8, 2022. *Id*. Based on this review, the Attorney General concluded that the Acquisition "is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." La. Stat. § 40:2254.4. The Attorney General accordingly approved the Acquisition and granted a COPA on December 28, 2022. *Supra* pp. 5–6. The Louisiana COPA statute plainly satisfies the clear articulation requirement. *See, e.g.*, *W. Star Hosp.*, 986 F.3d at 359 (clear articulation satisfied because statute "expressly authorized the [defendant] to fix prices and control entry into the … market"); *Jackson, Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc.*, 414 F.3d 608, 612 (6th Cir. 2005) (clear articulation satisfied when statute provided that "[hospital] authorities may exercise such powers *regardless of the competitive consequences thereof*") (alteration and emphasis in original).

Second, the Attorney General's "supervision and control" easily satisfies active supervision. La. Stat. § 40:2254.1. The COPA is subject to a set of "Terms and Conditions of Compliance" spelling out comprehensive provisions for supervision. *Supra* pp. 5–6. Under these provisions, the Attorney General specifically controls prices: LCMC "may not contract with a third-party payor for a change in rates … without the prior written approval of the DOJ." Ex. B at 6. The Attorney General also controls the full range of LCMC's ongoing activities. LCMC must submit quarterly, semi-annual, and annual reports, enabling the Attorney General to determine

whether LCMC's activity is consistent with the State's policy goals. *Id.* at 7–10. The Attorney General may at any time impose "a plan to correct any deficiency" if he determines "that an activity of [LCMC] is inconsistent with the policy goals" of the State. *Id.* at 2. Finally, the Attorney General has ultimate control: he may at any time "revoke the COPA" if "the [Louisiana] DOJ is not satisfied with any submitted corrective action plan," if LCMC fails to comply with the terms and conditions of supervision, "or if the [Louisiana] DOJ otherwise determines that the transaction is not resulting in lower health care costs or greater access to or quality of health care." *Id.* at 3.

This level of ongoing supervision is not just sufficient, but far exceeds what is required for supervision of a merger. Indeed, to obtain state action immunity from a merger challenge under Section 7 of the Clayton Act, there is no requirement at all for ongoing, post-merger supervision. It is the merger itself—not the ongoing operations of the merged entity—that must be actively supervised. The supervision requirement applies to the "challenged anticompetitive conduct"—the conduct that violates the antitrust laws—not any downstream effects of that conduct. *Ticor Title*, 504 U.S. at 634; *Dental Exam'rs*, 574 U.S. at 507 (requiring supervision over the "particular anticompetitive acts"). And under Section 7, the "violation [is] the merger itself." *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004). "Unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme." *Id.* That is why "the continuing violations doctrine does not apply to" Section 7 claims. *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 599–600 (6th Cir. 2014). And that is why "price increases in the merger-acquisition context do not extend the statute of limitations"—"price increases following a merger or acquisition are not overt acts" of anticompetitive conduct. *Id.*

Contrast that with price-fixing cases under Section 1 of the Sherman Act, where the "challenged anticompetitive conduct" is an ongoing agreement to fix prices. *Ticor Title*, 504 U.S.

at 634. In that circumstance, the State must supervise and exercise ongoing control over "the details of the rates or prices," *id.*, because "each price increase requires further collusion between multiple parties." *Z Techs.*, 753 F.3d at 599. But here, where the challenged anticompetitive conduct is a merger, it is the merger agreement itself that must be supervised. *See id.*; *Midwestern Mach.*, 392 F.3d at 271. And the Attorney General supervised the transaction through an intensive review of the COPA application, his approval of the COPA, and supervision over consummation of the transaction.

Regardless, the COPA provides for ongoing supervision. The COPA's terms and conditions provide for blanket ongoing supervision, including pre-approval for any price increases, plenary reporting and monitoring, power to impose a corrective action plan, and ultimate power to revoke the COPA at any time. *Supra* pp. 5–6; *see* Ex. D, Petition of Intervention ¶¶ 29, 32–33, 35, 49. It is beyond dispute that this is sufficient on its face to satisfy active supervision. *Cf. Yeager's Fuel*, 22 F.3d at 1271 (active supervision satisfied because the State's "approval of [the] rate has amounted to more than mere examination for mathematical accuracy"); *Uetricht v. Chi. Parking Meters, LLC*, No. 22-1166, 2023 WL 2818008, at *12 (7th Cir. Apr. 7 2023) (active supervision satisfied); *Cap. Tel. Co. v. N.Y. Tel. Co.*, 750 F.2d 1154, 1163 (2d Cir. 1984) (active supervision satisfied because state official had "general supervision" over the regulatory program, including power to examine books and records, investigate conduct, and "determine reasonable rates").

Nor is there any basis for the Commission to suggest that the Attorney General will not carry out the supervisory duties. The Attorney General has expressly committed to doing so. Ex. D, Petition of Intervention ¶¶ 29, 32–33, 35, 49. Regardless, even if the Attorney General or Respondents somehow failed to comply with their mutual obligations, that would be at most a

reason for a future as-applied challenge, assuming that ongoing supervision is even required. *See, e.g.*, *Ticor Title*, 504 U.S. at 629–31, 638–40 (reviewing an as-applied challenge to supervision of a price fixing regulation). The dispositive point here is that the Acquisition was actively supervised on January 3, 2023, which is the date when the Commission claims Respondents violated Section 7A by consummating a merger without complying with notice and the waiting period.

C. The State Action Doctrine Applies To Section 7A Of The Clayton Antitrust Act

The only question, then, is whether the state action exemption applies to Section 7A of the Clayton Antitrust Act, just as it applies to Section 7 of the Clayton Antitrust Act. It does.

The reasons are straightforward. Mergers attributable to the State are "exempt" from "the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219. Section 7A is a federal antitrust law that imposes a merger waiting period. Section 7A contains the same ambiguity in the word "person" that the Court relied on in *Parker* to exclude state action from the Sherman Act. The principles of federalism apply just as much to Section 7A as Section 7. Other provisions in Section 7A confirm that Congress intended to exclude state action. 15 U.S.C. § 18a(c)(4)–(5). And, at minimum, the statute contains no clear statement that Congress intended to enact Section 7A "to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

Despite repeated holdings that state action immunity applies to "the federal antitrust laws," the Commission now argues that Section 7A should be carved out. That novel theory should be rejected. It cannot be squared with Supreme Court precedent, fails to read the text in view of the applicable clear statement rule, and sharply undercuts federalism by impeding States' efforts to implement mergers under state regulatory programs. Vividly illustrated by the facts of this case, the Commission's view would "compromise the States' ability to regulate their domestic commerce" through state-directed mergers. *Id.*

1. To begin, Section 7A of the Clayton Antitrust Act is indisputably a federal antitrust law. Section 7A is an enforcement tool for Section 7, the primary federal antitrust statute prohibiting anticompetitive mergers. And Section 7A is not just a notice statute—it substantively prohibits mergers pending a waiting period. 15 U.S.C. § 18a(a). It then imposes steep penalties for merging without observing the waiting period, enforceable "in a civil action brought by the United States." *Id.* § 18a(g)(1). These penalties arise not merely for failure to give notice, but for *merging* too soon.

Because Section 7A fits hand-in-glove with Section 7 and is a "federal antitrust law[]," *Phoebe Putney*, 568 U.S. at 219, mergers attributable to the State are "exempt" from Section 7A, just as they are exempt from Section 7. *Id.* Stated differently, they are "exempt from antitrust liability," *City of Columbia*, 499 U.S. at 378, and "antitrust liability" includes liability for merging in violation of Section 7A, just as it includes liability for merging in violation of Section 7. *See, e.g.*, *United States v. Blavatnik*, 168 F. Supp. 3d 36, 41 (D.D.C. 2016) ("there can be no reasonable dispute that an HSR Act civil penalty action arises 'under the antitrust laws'").

2. Next, the operative provisions of Section 7A, Section 7, and the Sherman Act all use the word "person" in the same way. *See* 15 U.S.C. § 18a ("no person shall acquire"); *id.* § 18 ("No person … shall acquire"); *id.* §§ 1–2 ("Every person who shall make any contract or engage in any combination or conspiracy").

This should be dispositive. Under the clear statement rule adopted in *Parker*, the phrase "[e]very person" in the Sherman Act was insufficiently clear to include States or "action directed by a state." *Parker*, 317 U.S. at 351; *see Uetricht*, 2023 WL 2818008, at *5 (recounting the Court's reliance on "persons" as insufficiently clear). This same textual rationale applies both to Section 7 of the Clayton Act, *see Phoebe Putney*, 568 U.S. at 222–24, and to Section 7A. Likewise, just

as the Sherman Act's legislative history contained "no suggestion of a purpose to restrain state action," *Parker*, 317 U.S. at 351, so too the legislative history of HSR contains no hint of a purpose to restrain state action. *See* H.R. Rep. No. 94-1373 (1976).

3. *Parker*'s federalism rationale also applies forcefully to Section 7A. A key reason for the state action doctrine is "respect for ongoing regulation by the State," *Ticor Title*, 504 U.S. at 633. To that end, the Court has consistently invoked a clear statement rule when interpreting antitrust statutes to avoid "compromis[ing] the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56; *see also Bond v. United States*, 572 U.S. 844, 858 (2014) (applying "the well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). As a result, "the federal antitrust laws are subject to supersession by state regulatory programs." *Ticor Title*, 504 U.S. at 632–33.

"[R]espect for ongoing regulation by the State" is also the reason for extending immunity to private parties. *Id.* at 633. "If *Parker* immunity were limited to the actions of public officials, … a State would be unable to implement programs that restrain competition among private parties." *Motor Carriers*, 471 U.S. at 56. Any "plaintiff could frustrate" the State's regulatory program "merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." *Id.* at 56–57. This would "reduce *Parker*'s holding to a formalism." *Id.* at 57.

Applying Section 7A to mergers authorized under COPA statutes would flatly conflict with that reasoning. It would frustrate the State's regulatory program and reduce *Parker*'s holding to a formalism. Ex. D, Petition of Intervention ¶¶ 30, 37, 41, 51. The Louisiana Legislature has

expressed the policy of the state to "substitute state regulation … for competition" among health care facilities. La. Stat. § 40:2254.1. The Attorney General has spent countless hours in the approval process. The State has held public hearings and approved the merger as a matter of state regulation. And the State has entered into a regulatory arrangement for ongoing active supervision of the merger. *Supra* pp. 5–6. Forcing a federal waiting period on this merger—under threat of ruinous daily penalties—would egregiously interfere with Louisiana's COPA program and would undeniably "compromise the States' ability to regulate [its] domestic commerce." *Motor Carriers*, 471 U.S. at 56.

After all, the waiting period would inevitably delay the merger—which is the entire point. And timing is crucial: "Delays imposed on proposed transactions result[ing] from … lengthy review periods … may prove fatal to a transaction." Int'l Competition Policy Advisory Committee to the Attorney General, Final Report 93 (2000). The COPA statute itself sets time limits for the Attorney General's review and approval of the merger. La. Stat. § 40:2254.4(C). The State's approval can also be contingent on terms and conditions that depend on immediate integration of the facilities. Respondents, for example, made a series of specific commitments to the State that would improve healthcare in the New Orleans region, such as modernizing hospital assets, making capital investments, recruiting providers, and relocating services to increase patient access. Dkt. 19-1 ¶¶ 22–23. Many of those commitments would have been hindered or impossible if the Acquisition had been delayed by the waiting period under Section 7A. *Id.* In many instances, including the merger at issue here, compliance with Section 7A could effectively destroy the State's COPA program.

At bottom, applying Section 7A to a COPA-approved merger is in direct conflict with the State's regulatory approval process. Far from "respect for ongoing regulation by the State," *Ticor*

Title, 504 U.S. at 633, it is an *affront* to ongoing regulation by the State. The Commission's out-of-touch view of Section 7A cannot be squared with the Supreme Court's cautious approach to Section 7 or the Sherman Act, where the Court has repeatedly emphasized that antitrust statutes must be interpreted to avoid "compromis[ing] the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. This includes exempting private parties, or else any "plaintiff could frustrate" the state's regulatory program "merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." *Id.* at 56–57.

4. Although they are unnecessary to hold that state action immunity applies to Section 7A for the reasons stated above, two other provisions in that statute lend further support for concluding that state action is exempt. The statute lists 12 categories of mergers that are exempt, and two of these exemptions embrace an exclusion for mergers covered by state action immunity, particularly when read in light of the clear statement rule that must be applied to antitrust statutes.

a. First are "transactions specifically exempted from the antitrust laws by Federal statute." 15 U.S.C. § 18a(c)(5). This is sufficiently broad to include mergers that qualify for state action immunity. State action is indisputably "exempt" from "the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219. And state action is exempted *by federal statutes*. *Parker* holds that the Sherman Act—a federal statute—exempts state action when read in light of principles of federalism. 317 U.S. at 351 (interpreting Sections 1 and 2 of the Sherman Act). *Phoebe Putney* applies that same principle to Section 7 of the Clayton Act. 568 U.S. at 222 (Section 7 of the Clayton Act). State action is therefore exempted by those federal statutes.

State action is also "specifically" exempted by those statutes, as interpreted under *Parker* and the state action cases. The category of conduct that is immune under the state action doctrine is highly "specific"—only conduct of the state itself or that is directly attributable to the state is

exempt from the antitrust laws. "Specifically" exempted does not mean "expressly" exempted. State action is specific, even if not express. Further, even if there is more than one plausible reading of "specifically exempted," 15 U.S.C. § 18a(c)(5), the statute should be read to exempt state action out of "respect for ongoing regulation by the State," *Ticor Title*, 504 U.S. at 633, and to avoid "compromis[ing] the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

b. Section 7A also exempts "transfers to or from … a State." 15 U.S.C. § 18a(c)(4). This, too, is sufficiently broad to include mergers that satisfy the elements for state action. After all, such mergers are by definition "properly attributable to a state." Gov't Br. 7. To qualify, the State must have "exercised sufficient independent judgment and control" to make the transaction "a product of deliberate state intervention," and not simply an "agreement among private parties." *Ticor Title*, 504 U.S. at 634–35. As a result, the merger is deemed "the State's own" conduct. *Id.* at 635. In that light, the exemption for transactions "to or from … a State" comfortably applies to all mergers that qualify as state action. All of those mergers are attributable to the State. All of those mergers are "the State's own." *Id.*

c. But it would make no difference even if those two exemptions did not apply. For all the reasons explained above, the required presumption is that Section 7A is a "federal antitrust law" to which the state action doctrine applies. That means a clear statement would be needed to carve out Section 7A from the state action doctrine.

Section 7A lacks any clear statement that comes close to rebutting that presumption. The statute nowhere says that it applies to state action. At the threshold, it applies only to "persons," a key textual element cutting in favor of state action immunity. The only other argument the Commission can rely on is an *implicit* negative inference drawn from the list of 12 exemptions.

An implicit inference is just that—implicit. It is far from a clear statement that Congress truly meant to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

The only way to adopt the Commission's position is to draw inferences *against the State* at every turn: first in the ambiguous word "person," then in the (c)(5) exception, then in the (c)(4) exception, and then in the statute as a whole. That is directly contrary to the mandate from the Supreme Court to apply a clear statement rule *in favor of States*, and to interpret federal antitrust laws to exempt conduct attributable to a State. There is no doubt that misinterpreting Section 7A in that way would profoundly interfere with state COPA programs.[5]

5. It also makes no sense to apply Section 7A to State-controlled mergers. Section 7A is an enforcement tool for Section 7, designed "to prevent transactions that may violate the antitrust laws." *United States v. Smithfield Foods, Inc.*, 332 F. Supp. 2d 55, 58 (D.D.C. 2004). That purpose serves no function when there is no possibility that the Commission could ultimately enforce Section 7 or other antitrust laws against a particular transaction. That is the case when—as with Respondents' Acquisition—a merger is exempt from the antitrust laws because it is expressly authorized, supervised, and controlled under a state COPA program.

[5] Not surprisingly, the Petition makes no suggestion the Commission is entitled to deference for its view of state action immunity under Section 7A. The Commission has never issued a regulation interpreting Section 7A to apply to State-controlled mergers. To Respondents' knowledge, the Commission has never even issued informal guidance before this case. The Commission has instead participated in COPA proceedings, without ever hinting that a COPA merger must comply with Section 7A. *Supra* p. 7. And even if the Commission had issued a regulation, no deference would be warranted. A clear statement is required before Courts will assume Congress meant to delegate authority over such a major question as whether to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. That explains why the Supreme Court has never deferred to the Commission in its state action precedent.

Nor is there is any practical problem with exempting COPA mergers from Section 7A. For one thing, COPA mergers represent a narrow category of transactions that hardly present a threat to the overall HSR review framework. This is especially obvious because Section 7A exempts a broad array of other transactions, and the Commission has exempted "29 additional categories" by regulation. Gov't Br. 4. Moreover, as this case demonstrates, the COPA approval process not only ensures public notice and an opportunity for the Commission to comment, but it ensures that the merger will be exempt from federal antitrust laws as conduct attributable to the State. There is simply no point, other than to satisfy "official curiosity," *id.* at 7, in subjecting such mergers to a federal waiting period and HSR review. That is not a valid way to approach the State sovereignty interests at stake here.

Finally, the Commission cannot contend that it alone must determine whether any particular COPA-approved merger satisfies the elements for immunity, and is therefore exempt from Section 7A. Merging parties routinely make their own determinations for all 12 enumerated exemptions in Section 7A plus all 29 regulatory exemptions. In every case, parties who believe they qualify for an exemption to Section 7A must make a determination that they are exempt. Those who are confident that they are exempt need not file, while those with less confidence may seek informal guidance from the Commission or make a precautionary filing. All these decisions are, of course, made under the deterring threat of crushing daily penalties.

D. The Commission's Argument Should Be Rejected

1. The Commission spends less than two pages attempting to argue that Section 7A applies to state action. It cites no case—because there is none—ever holding that Section 7A is somehow carved out from the state action doctrine. It cites no regulatory practice of ever enforcing Section 7A against a State's COPA program. It cites no regulation or administrative interpretation of any sort suggesting that Section 7A applies to State-approved mergers. Its sole argument attacks a

strawman and conflates the Commission's investigatory powers with Section 7A's regulation of conduct and imposition of liability.

According to the Commission, Respondents have "misstate[d] the scope of the state action defense" because, unlike Eleventh Amendment immunity, the "state action defense" "does not "immunize a defendant from suit," and it "does not immunize a merging party from being investigated." Gov't Br. 7–8.

This is a canard. Respondents *agree* that the state action doctrine means their conduct of entering into a COPA-approved merger is exempt from the federal antitrust laws. As the Commission correctly states: "Conduct that is properly attributable to a state is not prohibited by the federal antitrust laws." *Id.* at 7. Respondents have never claimed to be immune, in the Eleventh Amendment sense, from suit or from an investigatory subpoena.

The Commission then conflates its investigatory powers under the Federal Trade Commission Act with the regulation of conduct under Section 7A of the Clayton Act. The Commission is simply wrong when it says "the HSR Act … is no different from other investigations that may begin with the issuance of a subpoena or other forms of compulsory process." *Id.* at 8. To the contrary, Section 7A *prohibits conduct* and *imposes liability* for that conduct. Its operative provision imposes a waiting period on mergers. 15 U.S.C. § 18a(a). Parties who consummate acquisitions without observing the waiting period are subject to massive liability in the form of daily penalties enforced by the United States in a civil suit. *Id.* § 18a(g)(1). These provisions impose liability under the antitrust laws for consummating a merger.[6] Of course it is

[6] Indeed, the Commission itself characterizes Section 7A as a federal antitrust law enforced by the Commission. The petition seeks relief for Respondents' failure to comply with Section 7A, and it invokes Section 13(b) of the FTC Act for its enforcement power. Gov't Br. 9. In turn, Section 13(b) provides authority to seek an injunction "upon a showing 'that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the

true that the purpose of the waiting period is to give the Commission time to review the merger, but the waiting period remains a substantive bar on conduct. Again, as the Commission acknowledges, "Conduct that is properly attributable to a state is not prohibited by the federal antitrust laws." Gov't Br. 7. And applying that rule here makes good sense. Section 7A cannot tenably apply to acquisitions attributable to States without eviscerating the state action doctrine. *City of Columbia*, 499 U.S. at 378.[7]

Contrast Section 7A with the Commission's traditional investigatory process under Section 9 of the FTC Act. 15 U.S.C. § 49. There, the Commission may issue administrative subpoenas to investigate a merger, and it may enforce compliance with those subpoenas in the courts. *See FTC v. Texaco, Inc.*, 555 F.2d 862, 871–72 (D.C. Cir. 1977). Respondents do not claim to be immune from those subpoenas in the Eleventh Amendment jurisdictional sense.[8] But administrative subpoenas issued under the FTC Act are not antitrust laws. Quite unlike Section 7A, administrative subpoenas do not impose a waiting period. They do not block conduct or enjoin the merger in any way. A separate enforcement proceeding requiring proof on the merits—and allowing defenses on the merits—is required to enjoin a merger. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1073 (D.C. Cir. 1981). Thus, the Commission's "other investigations that may begin with a subpoena" are materially different from Section 7A.

Federal Trade Commission.'" *Id.* In the Commission's own view, then, Section 7A is a provision of law enforced by the Commission, not merely an investigatory power of the Commission.

[7] Moreover, the waiting period has no purpose when a merger, such as a COPA-approved merger, is exempt from all other federal antitrust laws, including Section 7.

[8] Respondents of course reserve the right to object to a subpoena on any ground available under the law, including that a subpoena is overbroad, disproportionate, seeks irrelevant information, or is defective in any other way.

Regardless, it would make no difference even if the Commission were right that Section 7A is just a form of compulsory process. The ultimate question is not whether Section 7A is procedural or substantive, or whether the state action doctrine is more like a merits exemption or more like sovereign immunity. The question is whether Section 7A contains a clear statement that Congress truly meant to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. No such clear statement exists. So, just as conduct attributable to the State is exempt from the Sherman Act and from Section 7 of the Clayton Act, it is also exempt from Section 7A.

2. The Commission next asks this Court not to decide whether the Acquisition is exempt from the antitrust laws. Gov't Br. 8. Doing so would supposedly be "premature" because the "FTC is investigating" "whether the state action defense may apply." *Id.* Ruling on the merits may be premature, but only because the case should be transferred to the Eastern District of Louisiana, as requested in Respondents' pending motion to transfer and LCMC's pending motion to dismiss for lack of personal jurisdiction. Dkt. 19, 20.

If this Court rejects those motions, then it must determine whether the Commission is entitled to the injunctive relief it seeks. In turn, the Commission is entitled to relief only if it proves the Acquisition is covered by Section 7A. The Court should resolve that inquiry in two steps. First, the Court should hold that mergers attributable to a State are exempt from Section 7A. Second, because state action is exempt, Respondents are entitled to demonstrate that their merger qualifies as state action. The Court must resolve that issue before it could award any relief to the Commission.

This is perfectly consistent with the Commission's insistence that state action is a "defense." Gov't Br. 7–8. In this sense, state action works the same as any one of the many

exemptions and exclusions from Section 7A—any defendant is entitled to defend against a Section 7A action on the ground that it does not fall within the scope of Section 7A. The Commission must then overcome that argument to obtain relief, either by showing a likelihood of success (for preliminary relief) or actual success (for permanent relief). The Commission cannot make either showing here. As demonstrated above, the clear-articulation and active-supervision elements easily can be decided as a matter of law based on the COPA statute and the COPA Terms and Conditions. *See supra* pp. 13–17. Nothing more is needed.

II. THE PUBLIC INTEREST STRONGLY FAVORS THE STATE AND RESPONDENTS

The Commission's public interest argument fares no better—the public interest leans decidedly against enjoining a State-directed merger. Because states have primary regulatory authority over their own domestic affairs, the state action doctrine establishes that "federal antitrust laws are subject to supersession by state regulatory programs." *Ticor Title*, 504 U.S. at 632–33. The Commission's requested relief purposely undermines that basic principle. The State has expressed its policy choice to "substitute state regulation" of healthcare facilities "for competition between facilities." La. Stat. § 40:2254.1. The Louisiana Legislature and Attorney General have applied that State policy to the Acquisition—a purely intrastate healthcare merger within the core regulatory authority of the State. The State has unequivocally determined that the Acquisition serves the public interest of the people of the State of Louisiana. On this score, the Commission's belated request to enjoin the merger would obviously "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

The Commission, moreover, sat on its hands during the State's COPA review process. The State held a public comment period and a public hearing, which the Commission ignored, despite having previously submitted comments for other COPA reviews. *Supra* p. 7. The Commission has never before suggested that COPA-approved mergers must comply with Section 7A, and it

never informed Respondents of its changed position during the COPA review process here. *See* Dkt. 19-1 ¶ 16. The Commission waited until months after the COPA was publicly approved, and the merger was publicly consummated, before notifying Respondents of its novel position on Section 7A. *Id.* ¶ 17. After all that, the Commission rushed into this Court, seeking emergency relief. The Commission could not even be bothered to file suit in Louisiana, where all of the hospitals are located, and the courts are familiar with local public interests. In light of the Commission's own actions, it is hard to give weight to its insistence that injunctive relief truly serves the public interest of the people of Louisiana.

Indeed, enjoining the integration now will "impair patient care" and cause other affirmative harms to healthcare in Louisiana. *Id.* ¶ 21. The Acquisition was "designed to benefit the people of Louisiana by providing increased access to high quality, affordable health care," *id.* ¶ 15, and the COPA application spelled out the plan to achieve those benefits in great detail. Ex. C at B-3–73. The Attorney General conditioned the COPA on a series of LCMC's commitments to the State aimed at improving access to, and the quality of, healthcare in the New Orleans region, such as modernizing hospital assets, making capital investments, recruiting providers, and relocating services to increase patient access. Dkt. 19-1 ¶¶ 15, 22–23; Ex. C at B-10. Those commitments will be impossible to undertake if further integration is enjoined. Dkt. 19-1 ¶¶ 22–23.

Finally, the Commission needs no HSR filing to see that the Acquisition qualifies as state action and is properly attributable to the State. It is obvious that the Acquisition is exempt from Section 7 and cannot ultimately be enjoined on the merits under federal antitrust law. The Commission knows or should know that the Acquisition is exempt, and yet it refuses to stand down. There is no basis in the public interest to enjoin a merger under Section 7A when that merger is exempt from Section 7.

CONCLUSION

For these reasons, the Court should deny the Commission's request for preliminary and permanent injunctive relief.

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Respectfully submitted,

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APPENDIX OF EXHIBITS

A. Respondents' Certificate of Public Advantage Application Approval (Dec. 28, 2022)

B. Respondents' Certificate of Public Advantage with Terms and Conditions of Compliance (Dec. 28, 2022)

C. Respondents' Public Redacted Application for a Certificate of Public Advantage (Oct. 10, 2022)

D. State of Louisiana's Motion to Intervene, with exhibits, in *Louisiana Children's Medical Center, et al.*, No. 23-1305 (E.D. La.) (April 23, 2023)

E. Louisiana Children's Medical Center Press Release (Jan. 3, 2023)