

The COPA Problem: A New Approach to The State Action Doctrine

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Over the past few decades, healthcare providers have increasingly consolidated into large conglomerates, leading to negative outcomes such as higher healthcare costs and lower-quality care for patients. In 2021, the Biden Administration appointed Lina Khan to lead the Federal Trade Commission (FTC), the agency responsible for enforcing antitrust laws against corporations engaging in anticompetitive behavior. While the anti-competitive practices of large healthcare providers have attracted scrutiny from antitrust scholars, the FTC faces significant obstacles in prosecuting these providers due to state governments granting them immunity from federal antitrust laws under the state action immunity doctrine. This note examines the state action doctrine and proposes a new three-pronged test for judges to apply when adjudicating challenges involving the doctrine.

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I. INTRODUCTION

Healthcare providers have experienced rapid consolidation over the past three decades,¹ with almost two-thirds of hospitals in the U.S. merging with a large-scale provider.² This trend has led to increased concentration of market participants in the healthcare provider industry, with the 40 largest healthcare systems now owning 2,073 hospitals in the U.S., along with almost a third of emergency healthcare facilities.³ As of 2018, 72% of hospitals and close to 90% of hospital beds were operated by large healthcare provider conglomerates.⁴ The largest healthcare providers own a sixth of all hospitals and have a combined net patient revenue of \$226.7 billion.⁵ With the boom in merger activities in the sector, healthcare merger revenues reached an all-time high of \$45 billion in 2022.⁶ The rapid consolidation of healthcare providers has been detrimental to consumers of their healthcare services.⁷ Analyzing data from 2009 to 2013, researchers at the Harvard University Medical and Business Schools found that mergers among healthcare providers usually result in an increase in prices and a reduction in the quality of care provided.⁸

While healthcare providers are rapidly consolidating, the United States' healthcare system is failing Americans.⁹ High costs for preventative care services deter most Americans from using such services.¹⁰ Instead of utilizing preventative healthcare services, many individuals only seek care when

¹ Barak Richman, *Hospitals Are a Problem. Competition Is the Answer.*, POLITICO (Jan. 19, 2023), <https://www.politico.com/news/magazine/2023/01/19/hospitals-competition-antitrust-00078393> [<https://perma.cc/BPR2-FHZF>]; see also Stefan Rao Kostas, *Hospital Mergers: The Symptoms of Anticompetitive Consolidation & A Routine Checkup on the Horizontal Merger Guidelines*, 31 U. MIAMI BUS. L. REV. 1, 2 (2022).

² *Hospitals & Monopoly*, OPEN MKTS., <https://www.openmarketsinstitute.org/learn/hospitals-monopoly> [<https://perma.cc/DTU2-DV6R>].

³ Robert Pearl, *U.S. Healthcare: A Conglomerate of Monopolies*, FORBES (Jan. 16, 2023), <https://www.forbes.com/sites/robertpearl/2023/01/16/us-healthcare-a-conglomerate-of-monopolies/?sh=4a72570d2e4d>.

⁴ See Kostas, *supra* note 1, at 7.

⁵ Pearl, *supra* note 3.

⁶ Alan Condon and Giles Bruce, *Lina Khan's FTC Has Challenged Health System Mergers—but Not Disruptors*, BECKER'S HOSP. CFO REP. (Mar. 24, 2023), <https://www.beckershospitalreview.com/finance/lina-khans-ftc-has-challenged-health-system-mergers-but-not-disruptors.html>.

⁷ Kostas, *supra* note 1, at 7.

⁸ *Id.*

⁹ Robert H. Shmerling, *Is Our Healthcare System Broken?*, HARV. HEALTH PUBL'G (July 13, 2021), <https://www.health.harvard.edu/blog/is-our-healthcare-system-broken-202107132542> [<https://perma.cc/5SC3-5JKD>]; see also Jamie Ducharme, *More Than 70% of Americans Feel Failed by the Health Care System*, TIME (May 16, 2023), <https://time.com/6279937/us-health-care-system-attitudes> [<https://perma.cc/HBJ9-RTF5>].

¹⁰ See WP BrandStudio, *The Value of Preventative Care*, WASH. POST (Nov. 25, 2019), <https://www.washingtonpost.com/brand-studio/wp/2019/11/25/feature/the-value-of-preventive-care> [<https://perma.cc/47RL-GF97>].

hospitalization is required, which costs immensely more.¹¹ More than 27 million Americans have to pay out-of-pocket for medical expenses due to not being able to afford health insurance premiums.¹² Without health insurance, many Americans undergo medical procedures that they are unable to afford, resulting in medical expenses being the leading cause of bankruptcy filings in the U.S.¹³ The healthcare industry reaps billions in profits annually, while millions of Americans suffer and die because of their inability to afford medical coverage and expenses.¹⁴

The Federal Trade Commission (FTC) has recognized that the consolidation of healthcare providers is one of the biggest factors contributing to the high prices that Americans face when seeking medical care.¹⁵ Under the Biden Administration, the FTC has challenged multiple healthcare provider mergers.¹⁶ Despite pressure from the FTC, courts have allowed healthcare providers to consolidate, believing that they are immune from anti-competitive behavior.¹⁷ One barrier that the FTC faces when prosecuting healthcare mergers is the state action doctrine, which recognizes that states acting in their sovereign capacity are immune from federal antitrust laws.¹⁸ To prevent healthcare mergers from

¹¹ See Karen A. Hacker & Peter A. Briss, *An Ounce of Prevention Is Still Worth a Pound of Cure, Especially in the Time of Covid-19*, 18 PREVENTING CHRONIC DISEASE, Jan. 2021, at 1.

¹² Katja Ridderbusch, *Can America's Healthcare Crisis Be Solved?*, GA. ST. UNIV. RSCH. MAG., <https://news.gsu.edu/research-magazine/can-americas-healthcare-crisis-be-solved> (last visited Jan. 21, 2024).

¹³ Ed Woods, *Health Care Costs Number One Cause of Bankruptcy for American Families*, AM. BANKR. INST., <https://www.abi.org/feed-item/health-care-costs-number-one-cause-of-bankruptcy-for-american-families> [<https://perma.cc/BU3V-MGGR>].

¹⁴ BERNIE SANDERS, OUR REVOLUTION 319 (Liz Seramur ed., 2016); see also Kostas, *supra* note 1 (“The financial condition of the American healthcare industry continues to grow wealthier yet contemporaneously reduces the quality of care that millions receive.”).

¹⁵ Harris Meyer, *Biden's FTC Has Blocked 4 Hospital Mergers and Is Poised to Thwart More Consolidation Attempts*, KFF HEALTH NEWS (July 18, 2022), <https://kffhealthnews.org/news/article/biden-ftc-block-hospital-mergers-antitrust> [<https://perma.cc/66KN-4V4D>]; see also Pearl, *supra* note 3 (“[T]he Federal Trade Commission and the Antitrust Division of the DOJ are charged with enforcing antitrust laws in healthcare markets and preventing anticompetitive conduct . . .”).

¹⁶ See Tracy Alloway & Joe Weisenthal, *Lina Khan Has a Warning for the World of Private Equity*, BLOOMBERG (Nov. 16, 2023), <https://www.bloomberg.com/news/articles/2023-11-16/lina-khan-ftc-chair-takes-antitrust-fight-to-private-equity>.

¹⁷ Hoag Levins, *Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality*, PENN LEONARD DAVIS INST. OF HEALTH ECONS. (Jan. 19, 2023), <https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality> [<https://perma.cc/MF3E-AM3H>].

¹⁸ Zachary E. Sproull, *Collaboration Versus Competition in Health Care: The Role of State Action Antitrust Immunity in New York's Medicaid Reform Initiative*, 45 FORDHAM URB. L.J., 875, 885 (2018). (The state action doctrine is sometimes referred to as “Parker immunity” when it comes to antitrust law). See HERBERT J. HOVENKAMP, ANTITRUST’S STATE ACTION DOCTRINE AND THE ORDINARY POWERS OF CORPORATIONS 1 (2012), https://scholarship.law.upenn.edu/faculty_scholarship/1904 [<https://perma.cc/3TSX-4NQ9>].

being scrutinized by antitrust regulators, states have been granting mergers Certificates of Public Advantage, otherwise known as COPAs, which allow healthcare mergers to proceed under the state's supervision as part of the state action doctrine.¹⁹

This Note explores the social and economic arguments against state legislatures having the authority to immunize healthcare providers from federal antitrust scrutiny. To better understand the rise in COPAs, Part II will focus on the motives for issuing COPAs, while Part III will focus on the issues that COPAs have caused in the healthcare provider industry. Lastly, Part IV will call for exempting healthcare providers from the state action doctrine under a new framework that courts should implement when analyzing challenges to state actions. Part V will conclude this Note.

II. THE IMPLEMENTATION AND JUSTIFICATION FOR COPAS

In sparsely populated areas, healthcare systems are grappling with a crisis.²⁰ Under the fee-based system, hospitals in rural areas could operate comfortably, with multiple providers serving the same market.²¹ However, as the healthcare industry shifts to a value-based system, many of these hospitals are encountering financial challenges, finding that their market is not large enough to be economically viable.²² To sustain profitability, the hospitals in

(“[A]ntitrust law’s ‘state action’ doctrine permits the states to regulate and even to ‘authorize’ anticompetitive conduct, provided that they state their intention to so clearly and that they also actively supervise any private conduct that results from the regulatory scheme.”).

¹⁹ Marc G. Schildkraut, Carl W. Hittinger & Tyson Y. Herrold, *Hospital Mergers: The Future of COPA Immunity*, BAKERHOSTETLER (Oct. 26, 2022), <https://www.antitrustadvocate.com/blogs/hospital-mergers-future-copa-immunity> [<https://perma.cc/FX4L-CREQ>].

²⁰ See PYA, OVERCOMING ANTITRUST OBSTACLES TO MERGERS BY COMMITTING TO POPULATION HEALTH IMPROVEMENT 2–3 (2018), <https://www.pyapc.com/wp-content/uploads/2018/08/Overcoming-Antitrust-Obstacles-to-Mergers-by-Committing-to-Population-Health-Improvement-White-Paper-PYA.pdf> [<https://perma.cc/NQZ8-XXYD>].

²¹ *Id.*; see also Sproull, *supra* note 18, at 883 (“Under the fee-for-service model, providers billed on an individual basis for each test and procedure provided and every resource expended, the costs of which were generally passed on to insurance companies. This motivated providers to extend hospitalizations and exercise less cost discretion in their treatment.”).

²² PYA, *supra* note 20, at 3 (“Healthcare, especially in rural communities, is at a crossroads. Previous federal policies and economic prosperity led to dramatic growth in hospital construction and often resulted in two or more serving the same community. Now, as reimbursement declines and economic conditions worsen, many hospitals face significant challenges in maintaining their operations in an economically tenable manner.”); see also *What Are the Value-Based Programs?*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/medicare/quality/value-based-programs> (Sep. 10, 2024) [<https://perma.cc/2XAP-GQAF>] (“Value-based programs reward health care providers with incentive

those areas merge to gain access to the full market without competing against each other.²³ However, these hospitals are concerned that their merger could attract antitrust scrutiny from federal regulators. As a result, they negotiate with state governments to issue them Certificates of Public Advantage (COPAs) to be immune from federal prosecution.²⁴

So far, nineteen states have enacted COPA-related legislation.²⁵ COPAs are implemented by state legislatures with the aim of reducing competition among healthcare providers.²⁶ When a state grants a COPA to a healthcare provider, it allows a hospital merger that would likely violate federal antitrust law in exchange for subjecting the resulting merger to state oversight, typically focusing on factors such as prices, quality of care, and other metrics.²⁷ States issue COPAs if they determine that the benefits of allowing such a merger outweigh the costs of reduced competition.²⁸

States have justified the use of COPAs in several ways. First, they argue that COPAs could lead to improvements in the quality of care provided.²⁹ Similar to the rationale behind the 2010 Affordable Care Act, state legislatures believe that vertical integration among healthcare providers would enable closer coordination among providers, reducing duplicative and unnecessary

payments for the quality of care they give to people. . . . [P]aying providers based on the quality, rather than the quantity of care they give patients.”)

²³ PYA, *supra* note 20, at 3.

²⁴ See William M. Sage & David A. Hyman, *Antitrust as Disruptive Innovation in Health Care: Can Limiting State Action Immunity Help Save a Trillion Dollars?*, 48 LOY. U. CHI. L.J. 723, 735 (2017).

²⁵ Fred Ashton, *FTC Warns that Monopoly Hospitals Use State COPA Laws to Evade Antitrust Enforcement*, AM. ACTION F. (Sept. 27, 2022), <https://www.americanactionforum.org/insight/ftc-warns-that-monopoly-hospitals-use-state-copa-laws-to-evade-antitrust-enforcement> [<https://perma.cc/D8KE-NLMG>].

²⁶ *Certificates of Public Advantage (COPAs)*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/features/certificates-public-advantage-copas> [<https://perma.cc/SCM9-NDV3>]; see also Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, 34 ANTITRUST 14, 16 (2020).

²⁷ See Judith Garber, *Why Antitrust Laws Aren’t Stopping Some Hospital Mergers*, LOWN INST. (Aug. 19, 2022), <https://lowninstitute.org/why-antitrust-laws-arent-stopping-some-hospital-mergers> [<https://perma.cc/F3W9-YCGW>]; FED. TRADE COMM’N, *FTC POLICY PERSPECTIVE ON CERTIFICATES OF PUBLIC ADVANTAGE 1* (2015), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf [<https://perma.cc/T7LD-FJWP>] (Usually, state departments of health oversee hospitals that have merged using a COPA, but will regularly consult with state attorney generals.).

²⁸ FED. TRADE COMM’N, *supra* note 27; Abdur Rahman Amin, *Certificates Of Public Advantage: A Valuable Tool Or Diminishing Allure?*, 45 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 1, 18 (2024) (States will grant COPAs if they believe it will lead to “increased quality health outcomes, hospitals retaining their existing patients after the merger, cost reductions and increased efficiency in health services rendered, utilization of resources optimized, and duplication of resources avoided.”).

²⁹ PYA, *supra* note 20, at 5.

procedures.³⁰ Second, proponents of COPAs also assert that COPAs allow healthcare providers to experiment with different approaches to improving patient outcomes and generating efficiencies, all while being supervised by state officials.³¹ Additionally, states believe that they can better monitor potential anticompetitive practices of healthcare providers within their own state compared to federal enforcement agencies, due to closer ties with the entities.³²

III. ISSUES WITH COPAS

Research has shown that the anticipated benefits of COPAs have not materialized.³³ A study analyzing hospitals that obtained COPAs found that prices increased by 20% in the early years after obtaining a COPA, and by another 25% several years later.³⁴ The FTC has also found several studies that have analyzed price changes in healthcare markets after the granting of a COPA.³⁵ For example, a study of North Carolina's Mission Health System found that prices increased by 20% more than their peers during their initial COPA period.³⁶ Additionally, North Carolina repealed its COPA law for Mission Health, leaving the healthcare provider unregulated, which allowed them to increase their prices by another 38%.³⁷ The attorney overseeing the Mission Health COPA for almost 20 years expressed regret for the COPA scheme, noting the difficulty in monitoring healthcare providers and their attempts to evade COPA regulations.³⁸ After analyzing the merger, the FTC concluded that North Carolina's COPA laws did not prevent Mission Health from raising prices for its services.³⁹

Montana also experienced negative effects from its COPA laws, leading Governor Steve Bullock to repeal the state's COPA laws.⁴⁰ After the repeal, the

³⁰ *Id.*; see also Erin C. Fuse Brown & Jaime S. King, *The Double-Edged Sword of Health Care Integration: Consolidation and Cost Control*, 92 IND. L.J. 55, 61 (2017); *Hospitals & Monopoly*, *supra* note 2. One of the goals of the Affordable Care Act (ACA) was to encourage healthcare providers to merge, with the statute containing several provisions that aim to promote the merger of healthcare providers. *See id.* In particular, the ACA sought to advance integration among healthcare providers, believing that it would align financial incentives among providers. *Id.* This would reduce duplicative and unnecessary care while allocating services to a centralized entity, therefore promoting efficiency in providing healthcare to patients.

³¹ *See* Brown & King, *supra* note 30, at 62–63, 77.

³² *Id.* at 76–77.

³³ *See* FED. TRADE COMM'N, *supra* note 27, at 1.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.* at 8.

³⁷ *Id.*

³⁸ *Id.*

³⁹ FED. TRADE COMM'N, *supra* note 27, at 8.

⁴⁰ *See* Rebecca Kelly Slaughter, Comm'r, FED. TRADE COMM'N, *Antitrust and Health Care Providers: Policies to Promote Competition and Protect Patients* 10 (May 14, 2019).

Benefis Health System in Montana increased its prices by at least 20% as it was no longer subject to regulatory constraints on price increases.⁴¹

One of the challenges states face when monitoring COPAs is that states may not be adequately equipped to regulate healthcare providers.⁴² Regulating COPAs is a complex task for state agencies, many of which lack the expertise or resources to effectively oversee the healthcare provider sector.⁴³ Issues such as regulatory fatigue, staff turnover, and changes in government funding can further impede state agencies' ability to supervise healthcare providers operating under a COPA.⁴⁴ Healthcare providers under COPAs have strong financial incentives to circumvent state regulations, undermining the intended benefits of COPAs.⁴⁵ Given the significant resources required to comply with the state COPA regulations, healthcare providers often engage in substantial lobbying efforts to reduce the burdens of their COPA or repeal them entirely.⁴⁶ In West Virginia, for example, legislative pressure from healthcare lobbyists led to the elimination of the board of directors responsible for overseeing the state's COPAs and significant staff reductions in the department that regulated hospitals benefiting from COPAs.⁴⁷

When states are pressured to repeal their COPA statutes, the negative effects can worsen.⁴⁸ A study published in the *Journal of Law and Economics* found that when states repealed their COPAs, hospitals that had benefited from federal antitrust immunity increased their prices by up to 51%.⁴⁹ After repealing their COPAs, states not only experienced an increase in healthcare prices, but also a decline in the quality of care provided.⁵⁰ Another consequence of implementing COPA laws is the downward pressure on the wages of employees working at healthcare providers who have obtained a COPA.⁵¹ Essentially, hospitals that had COPAs became "unregulated monopolies" upon repeal.⁵²

⁴¹ FED. TRADE COMM'N, *supra* note 27, at 8.

⁴² *Key COPA Facts*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/Key_COPA_Facts.pdf [<https://perma.cc/3Q27-FZGB>].

⁴³ *Id.*; *see also* Garber, *supra* note 27.

⁴⁴ FED. TRADE COMM'N, *supra* note 27, at 4.

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See id.* at 11; Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L.Q. 521, 524 (2005) (James Madison remarked in Federalist No. 10 that the "state political process is prone to abuses, particularly given the lower costs firms face in manipulating state and local, as opposed to federal, politics.").

⁴⁸ Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J.L. & Econ. 465, 482 (2022).

⁴⁹ Garber, *supra* note 27.

⁵⁰ FED. TRADE COMM'N, *supra* note 27, at 7; *see also* Garmon & Bhatt, *supra* note 48.

⁵¹ FED. TRADE COMM'N, *supra* note 27, at 2.

⁵² Wilson & Guniganti, *supra* note 26; *see* Slaughter, *supra* note 40, at 8.

The FTC has determined that COPAs are unnecessary for enabling providers to engage in collaborative activities resembling vertical integration.⁵³ Additionally, the FTC has found that COPAs can “immunize conduct that would not generate efficiencies, and therefore not pass muster under the antitrust laws.”⁵⁴ Edith Ramirez, a former chairwoman of the FTC, has stated that granting antitrust immunity to promote collaboration between healthcare providers “betrays a misunderstanding of the crucial role that competition plays in the healthcare sector.”⁵⁵ Ramirez further asserted that COPAs and grants of antitrust immunity exacerbate anticompetitive behavior rather than alleviate it.⁵⁶

IV. NEW EVALUATION OF THE STATE ACTION DOCTRINE

The negative impact caused by COPAs on consumers must be addressed. The purpose of antitrust laws is to promote free market competition, which leads to lower prices, better products and services, and greater choices for consumers.⁵⁷ When states grant COPAs to healthcare provider mergers, consumers face higher prices, lower quality services, and limited alternative options.⁵⁸ It is essential to empower the FTC to prosecute healthcare mergers backed by COPAs to prevent the detrimental effects they can have on consumers. To achieve this, common law precedent must be reevaluated to allow exemptions for certain industries, such as healthcare, from the state action doctrine.

A. *The Shift from Lochner to Parker*

In the early years of the Sherman Antitrust Act, courts exercised broad discretion in scrutinizing state’s economic policy decisions.⁵⁹ This practice began in 1905 with the Supreme Court’s ruling in *Lochner v. New York*, which declared unconstitutional a New York statute that limited the hours employees

⁵³ See Amin, *supra* note 28, at 24 (“In a 5–0 vote, the FTC concluded, that “[i]n the long run, hospital mergers shielded with COPAs often lead to higher prices and reduced quality from unconstrained provider market power.”).

⁵⁴ Brown & King, *supra* note 30.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

⁵⁸ See *supra* Part III.

⁵⁹ See Daniel A. Crane, *Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses*, 60 WM & MARY L. REV. 1175, 1190 (2019); see also Amin, *supra* note 28, at 7 (The Sherman Act bans “monopolization, attempts to monopolize, and conspiracies to monopolize. Monopolization can be distilled into two elements: (1) possession of monopoly power and (2) the willful acquisition or maintenance of that power. The possession of monopoly power includes the power to control market prices or exclude competition.”).

could work at a bakeshop.⁶⁰ The Court deemed the law an “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual . . . to enter into those contracts in relation to labor” as there was no connection between a bakeshop employee’s health and safety and the hours they worked.⁶¹ Citing the precedent set in *Lochner*, courts invalidated nearly 200 social and economic regulations, hindering the Roosevelt Administration’s New Deal reforms.⁶²

Under pressure from President Franklin D. Roosevelt, who planned to expand the number of Supreme Court justices to secure more favorable rulings, the Court abandoned *Lochner* in 1937 with its decision in *West Coast Hotel v. Parrish*.⁶³ The Court ruled that courts should defer to legislatures on economic and social regulations.⁶⁴ The following year, in *United States v. Carolene Products Company*, the Court implemented “rational basis review” when reviewing state action doctrine controversies, which established that courts would defer to legislatures if a regulation was rationally related to a legitimate state interest.⁶⁵

The Court’s retreat from *Lochner* also affected antitrust enforcement, as seen in *Parker v. Brown*.⁶⁶ In this case, a California raisin farmer sued the state’s director of agriculture for enforcing a statute that required raisin farmers to limit raisin production to artificially raise prices, imposing heavy fines on violators.⁶⁷ The Court ruled that the Sherman Antitrust Act does not apply to

⁶⁰ Crane, *supra* note 59, at 1190. See generally *Lochner v. New York*, 198 U.S. 45 (1905).

⁶¹ *Lochner*, 198 U.S. at 56, 72.

⁶² See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

⁶³ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (upholding state minimum wage law as a valid exercise of state’s police power); see also *Lochner Era*, CORNELL LEGAL INFO. INST. (June 2023), https://www.law.cornell.edu/wex/lochner_era [<https://perma.cc/98PE-73MA>]; Steve Vladeck, *The Switch in Time That Saved Nine*, ONE FIRST (Aug. 28, 2023), <https://stevevladeck.substack.com/p/42-the-switch-in-time-that-saved> [<https://perma.cc/W382-P72U>] (The Court’s decision in *West Coast Hotel* is often referred to as “the switch in time that saved nine” because it is viewed by legal scholars as leading to the demise of President Roosevelt’s plan to pack the Supreme Court.).

⁶⁴ *West Coast Hotel Co.*, 300 U.S. at 399–400.

⁶⁵ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); Alexandra L. Klein, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411, 424 (2016); Timothy Sandefur, *Reining in Antitrust Immunity*, CATO INST. (2014), <https://www.cato.org/regulation/fall-2014/reining-antitrust-immunity> [<https://perma.cc/N7CF-ME6R>] (With rational basis review, courts will be “excessively deferential” to states granting immunity, even if contrary to national policy.).

⁶⁶ *Parker v. Brown*, 317 U.S. 341, 352 (1943); see Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 371 (2016).

⁶⁷ *Parker*, 317 U.S. at 348–49; see Gerald L. Posner, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Formula*, 29 HASTINGS L.J. 211, 214–15 (1977); Sandefur, *supra* note 65.

states because the law does not explicitly mention states in its application.⁶⁸ The Court also argued that applying the Sherman Antitrust Act to state actions would infringe on a state's right to promote essential public policies by restricting competition.⁶⁹

The Court's analysis concluded that states, as sovereign entities under the Constitution, sometimes need to restrict competition to further the public interest.⁷⁰ The decision in *Parker* established the "state action doctrine," which recognizes that states are immune from federal antitrust laws if there is a rational basis for promoting anticompetitive behavior.⁷¹

B. *Parker's Inapplicability to the Healthcare Industry*

Legal scholars have found that the Court's decision in *Parker* was based on the assumption that the anticompetitive effects of state legislation were intended by the state electorate, and if citizens were unhappy with the policy, they could demand change through elections.⁷² However, the complexities of healthcare policy may hinder citizens' ability to comprehend the implications of issuing COPAs and to effectively hold their elected officials accountable.⁷³

⁶⁸ *Parker*, 317 U.S. at 350–51 (“[N]othing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officials or agents from activities directed by its legislature.”); see Posner, *supra* note 67, at 216; Schildkraut, Hittinger & Herrold, *supra* note 19.

⁶⁹ *Parker*, 317 U.S. at 352; see Sproull, *supra* note 18, at 886; Gregory Day, *State Power and Anticompetitive Conduct*, 75 Fla. L. Rev. 637, 661 (2023); Jason Kornmehl, *State Action on Appeal: Parker Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1, 19 (2015) (“One possible explanation as to why the Court went out of its way to create the state action doctrine is that the Court recognized the importance of state sovereignty as well as federalism and felt the need to articulate these principles in the context of antitrust law.”).

⁷⁰ *Brown*, 317 U.S. at 352; see Day, *supra* note 69, at 640; Sage & Hyman, *supra* note 24, at 726–27.

⁷¹ Sproull, *supra* note 18, at 885; Sandefur, *supra* note 64; see Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1380 (2006) (Some legal scholars have sharply criticized the state action doctrine, with Professor Charles Black calling it “a conceptual disaster area,” while others have referred to it as “analytically incoherent” and “a miasma.”).

⁷² Day, *supra* note 69, at 637; see William H. Page & John E. Lopatka, *Parker v. Brown, the Eleventh Amendment, and Anticompetitive State Regulation*, 60 WM. & MARY L. REV. 1465, 1477 (2019); John E. Lopatka, *The State of “State Action” Antitrust Immunity: A Progress Report*, 46 LA. L. REV. 941, 959 (1986).

⁷³ See N. Gregory Mankiw, *Why Health Care Policy Is So Hard*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/upshot/why-health-care-policy-is-so-hard.html>; see also Sandefur, *supra* note 65 (“Voters are usually unaware of a state’s anticompetitive laws, especially where they are couched in the vague terms of a ‘permissive policy.’”).

If state legislators grant a COPA to merging hospitals, voters may struggle to determine whether their representative's vote will benefit or harm them.⁷⁴ One reason that legislators can evade political accountability for granting antitrust immunity to healthcare provider mergers is the unique nature of the healthcare sector.⁷⁵ Unlike other industries, consumers in the healthcare industry receive little guidance on the cost of a procedure until they receive their medical bills after treatment.⁷⁶ Consumers are unable to research the prices charged by different healthcare providers for the same services, leaving them unaware of significant price variations.⁷⁷ Furthermore, patients seeking care are often sick and desperate for treatment, lacking knowledge about the medical care they need and typically deferring to their doctor's judgment.⁷⁸ This lack of transparency and consumer knowledge regarding healthcare contributes to the difficulty voters face in assessing the impact of COPAs and holding legislators accountable for their decisions.

Another aspect of the healthcare provider sector is that most patients do not directly pay the full costs of the services they receive.⁷⁹ A majority of individuals are covered by private health insurance providers,⁸⁰ relying on their insurers to pay for a significant portion of their healthcare expenses.⁸¹ This reliance on health insurers to control prices makes policyholders unaware of the pricing mechanisms used by healthcare providers.⁸² These providers often employ arbitrary pricing models focused on maximizing profit margins for each medical treatment, without considering patients' cost restraints.⁸³

⁷⁴ See James D'Angelo & Ronald Nsubuga, *Perverse Accountability*, THE CONG. RSCH. INST. (Mar. 17, 2023), <https://www.congressionalresearch.org/PerverseAccountability.html> [<https://perma.cc/EW7V-5HRY>]; ANDREW HALL, STATE ELECTIONS, POLICY CHOICES, AND ACCOUNTABILITY 1 (2021), <https://siepr.stanford.edu/publications/policy-brief/state-elections-policy-choices-and-accountability> [<https://perma.cc/CES7-VZXE>].

⁷⁵ See *Opportunities and Limitations of a Free Market in Healthcare*, HEALTHCARE VALUE HUB (May 2017), <https://www.healthcarevaluehub.org/advocate-resources/free-market-healthcare> [<https://perma.cc/CP3Z-BZ9U>].

⁷⁶ Rich Spiker, *Piercing The Healthcare Veil: An Argument For Healthcare Pricing Transparency*, 7 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 1, 1 (2020).

⁷⁷ *Id.* (“A blood test in New Orleans cost \$19 at one provider and \$522 at a different provider a few blocks away.”).

⁷⁸ John T. McLean and Vinay Datar, *Mastering the Chargemaster: Minimizing Price-Gouging and Exposing the Structural Flaws in the Healthcare “Market,”* 9 PITT. J. ENV'T. PUB. HEALTH L. 1, 1, 8–9 (2014) (“Rare is the patient who receives an array of possible remedies, each with an identified probability of success and an actual price.”).

⁷⁹ Sproull, *supra* note 18, at 883.

⁸⁰ KATHERINE KEISLER-STARKEY, LISA N. BUNCH, & RACHEL A. LINDSTROM, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2022, REPORT NO. P60-281, at 3 (2023), <https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-281.pdf> [<https://perma.cc/E8GA-NK82>].

⁸¹ McLean & Datar, *supra* note 78, at 10.

⁸² Spiker, *supra* note 76, at 7.

⁸³ See McLean & Datar, *supra* note 78, at 9.

Additionally, health insurers have little incentive to control costs for their policyholders.⁸⁴ When healthcare providers raise prices for procedures, insurers pass these on to their insured, aiming to maintain costs at a 20% profit margin, the maximum amount allowed by law.⁸⁵ Health insurers that attempt to negotiate lower prices face challenges due to the significant bargaining power held by healthcare providers in the consolidated industry, as there are often limited alternative providers.⁸⁶

The lack of price transparency and the significant bargaining power that healthcare providers wield make it challenging for voters to understand the socioeconomic consequences of granting healthcare providers immunity from antitrust enforcement.⁸⁷ This undermines the rationale behind the state action doctrine, which emphasizes that the threat of elections should incentivize state legislators to suppress competition only when the public would benefit.⁸⁸

There is substantial evidence that COPAs are detrimental to the public interest, resulting in rising costs for medical treatments and a deterioration in the quality of care provided.⁸⁹ To protect citizens from experiencing the negative effects of COPAs, courts should reexamine the *Parker* decision and its applicability to the healthcare provider sector.

C. The “Critical Industry Test”

To uphold the principles established in the *Parker* decision, courts should adopt a framework that plaintiffs must satisfy for courts to depart from rational basis review in challenges to the state action immunity doctrine. This framework, termed “the critical industry test,” consists of three prongs that the plaintiff must meet by a preponderance of evidence. In most instances, the plaintiff would be the FTC, who would be obligated to satisfy this test in order to establish that the state action doctrine should not apply. Once this test has been met, the burden would be on the defendant to rebut the presumption that the state action doctrine should not apply.

The first prong of critical industry analysis requires the plaintiff to demonstrate that the industry the state seeks to immunize from antitrust enforcement has a high degree of price transparency. The plaintiff must also

⁸⁴ See *id.* at 10.

⁸⁵ *Id.*

⁸⁶ *Will Transparent Pricing Make America’s Health Care Cheaper?*, THE ECONOMIST (June 29, 2019), https://www.economist.com/united-states/2019/06/29/will-transparent-pricing-make-americas-health-care-cheaper?ppccampaignID=&ppcadID=&ppcgclid=&utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gad_source=1&gclid=Cj0KCQjw-r-vBhC-ARIsAGgUO2ASHh23OOFIEPZ_G2paxD_uxss1NdEn1q1QmBuyFZi94wGcF6iHVnkaAofkEALw_wcB&gclsrc=aw.ds [https://perma.cc/7TYT-BZG6].

⁸⁷ See Sandefur, *supra* note 65.

⁸⁸ See Day, *supra* note 69, at 637.

⁸⁹ See *supra* Part III.

show that there is a lack of accessible information for consumers to educate themselves about the prices of goods and services in that industry. This prong is crucial because price transparency benefits consumers by enabling them to make informed decisions about the goods and services they wish to purchase.⁹⁰

Courts should consider the availability of price information to consumers concerning the state action immunity doctrine because it would enable consumers to assess the impact of anticompetitive practices on the prices they pay. If consumers find that anticompetitive practices endorsed by the state negatively affect the prices they pay, they will possess the knowledge needed to pressure their elected officials to pursue changes to the anticompetitive policy.

For the second prong, the state must demonstrate that the industry in question is essential to the well-being of individuals. The baseline for determining what is essential should be basic needs that are “fundamentally connected to an individual’s physical and mental well-being.”⁹¹ This includes food, drinking water, sanitation, healthcare, housing, education, electricity, telecommunications, and access to information.⁹² It is crucial for judges to have the authority to broaden the definition of what industries are considered essential, especially because essential goods and services can vary between geographic areas.

For example, judges in southern states might consider air conditioning essential to the health of citizens, while judges in northern states might consider heating essential. The determination of what is essential ultimately rests on judicial interpretation, and it is the responsibility of plaintiffs to convince judges that the industry in question provides essential services to residents. This “essentiality” prong is critical because antitrust enforcers need the ability to prevent monopolistic behavior that could prevent individuals from acquiring goods and services necessary for their well-being.

The third prong of the critical industry framework requires the plaintiff to provide evidence demonstrating that the industry is not a natural monopoly. A natural monopoly is an industry in which one participant exists because high barriers to entry prevent potential competitors from entering the market.⁹³ In a natural monopoly, competition would drive revenues down to a level where only one firm could remain, as competitive pricing would not generate enough

⁹⁰ *Price Transparency*, SNIFFIE, <https://www.sniffie.io/pricing-vocabulary/price-transparency> [<https://perma.cc/NC3H-KPF3>].

⁹¹ Abby Watkins, *What Are People’s Basic Needs? Six Things You Really Can’t Live Without*, POPULATION EDUC. (July 10, 2019), <https://populationeducation.org/what-are-peoples-basic-needs-six-things-you-really-cant-live-without> [<https://perma.cc/E3VN-U5YF>].

⁹² *Id.*

⁹³ *Natural Monopoly*, INVESTOPEDIA (June 7, 2023), https://www.investopedia.com/terms/n/natural_monopoly.asp [<https://perma.cc/QK6D-8J5P>].

revenue to cover the high operating costs.⁹⁴ In certain cases, natural monopolies can be beneficial because they prevent wasteful duplication of resources.⁹⁵

It is necessary for plaintiffs to prove that the industry being litigated against does not resemble a natural monopoly because many critical industries would fail the first two prongs of the critical industry test.⁹⁶ Utilities, internet and telecommunication providers, and railroads are industries considered to be natural monopolies.⁹⁷ Since these industries often consist of one private entity providing services to an entire area without competition, it is essential for states to protect them from competition that would make the entire industry unprofitable, thereby depriving citizens of vital services, while also ensuring that firms do not abuse their pricing power.⁹⁸ For example, states often require utility providers to obtain a license from regulators to operate in a particular area and implement pricing controls on the rates they charge customers.⁹⁹ If a plaintiff was not required to prove that the industry is not a natural monopoly, then state policies regulating natural monopolies could be challenged as violating the Sherman Antitrust Act, jeopardizing the efficient allocation of fundamental services to the public.¹⁰⁰

In a hypothetical scenario where a plaintiff sues a state official to prevent the issuance of a COPA to a healthcare provider, they would likely meet the critical industry test. It is well established that there is a lack of transparency in pricing concerning healthcare providers.¹⁰¹ When seeking medical services,

⁹⁴ *Id.*

⁹⁵ See *Natural Monopolies*, ECONOMICS ONLINE (Jan. 20, 2023), https://www.economicsonline.co.uk/business_economics/natural_monopolies.html [<https://perma.cc/34UT-QENS>].

⁹⁶ See Rob Girvan, *Can Price Transparency Improve Customer Satisfaction for Utilities?*, ENERGYCENTRAL (Mar. 27, 2020), <https://energycentral.com/c/cc/can-price-transparency-improve-customer-satisfaction-utilities> [<https://perma.cc/BC2M-ZMPH>]; see also Jon Stojan, *ISP Reports: Elevating Internet Data Transparency in the U.S.*, USA TODAY (Sept. 26, 2023), <https://www.usatoday.com/story/special/contributor-content/2023/09/26/isp-reports-elevating-internet-data-transparency-in-the-u-s/70972426007> [<https://perma.cc/HP9V-484R>]; see also *New Report Finds Rail Customers Paying a Steep Price for Consolidation and Dwindling Competition*, RAIL CUSTOMER COAL. (July 29, 2021), <https://www.freighttrailreform.com/new-report-finds-rail-customers-paying-a-steep-price-for-consolidation-and-dwindling-competition> [<https://perma.cc/3V4B-2SXX>].

⁹⁷ *Natural Monopoly*, *supra* note 93.

⁹⁸ See *id.*

⁹⁹ See Sean Ross, *How Strongly Do Regulations Impact the Utilities Sector?*, INVESTOPEDIA (Sept. 26, 2022), <https://www.investopedia.com/ask/answers/070915/how-strongly-does-government-regulation-impact-utilities-sector.asp> [<https://perma.cc/TGP4-ABRN>].

¹⁰⁰ See Jeffrey D. Schwartz, *The Use of the Antitrust State Action Doctrine in the Deregulated Electric Utility Industry*, 48 AM. U. L. REV. 1449, 1452 (1999).

¹⁰¹ Justin Lo, Gary Claxton, Emma Wager, Cynthia Cox & Krutika Amin, *Ongoing Challenges with Hospital Price Transparency*, KFF (Feb. 10, 2023), <https://www.kff.org/health-costs/issue-brief/ongoing-challenges-with-hospital-price-transparency> [<https://perma.cc/7CJJ-TTS9>].

consumers are unable to access pricing information for various medical treatments and procedures and cannot compare those prices with competing providers.¹⁰² The high costs and lack of transparency in healthcare are common knowledge,¹⁰³ and a plaintiff would be able to meet the first prong with ease.

A plaintiff challenging the issuance of COPAs will also be able to meet the “essentiality” requirement. It would be difficult to argue that healthcare is not essential to one’s well-being, especially when considering that the average life expectancy of Americans is lower than that of other developed countries due to a lack of access to healthcare.¹⁰⁴ Whether one receives healthcare is often the difference between survival and death,¹⁰⁵ which would certainly deem healthcare an essential service to an individual’s well-being.

Plaintiffs would also likely meet the third prong by demonstrating that healthcare providers are not natural monopolies.¹⁰⁶ Healthcare providers can compete with each other in the same area, and smaller providers can operate profitably if the federal government and employer-provided health plans reimburse them at higher rates.¹⁰⁷ Additionally, encouraging greater transparency in pricing among healthcare providers can allow a competitive market to flourish.¹⁰⁸ Competition among healthcare providers is feasible without negatively impacting the quantity and quality of services consumers receive.¹⁰⁹

¹⁰² Spiker, *supra* note 76, at 1.

¹⁰³ See Victoria Bailey, *Healthcare Consumers Want Hospital Price Transparency, Survey Finds*, REVCYCLE INTEL. (Jan. 16, 2024), <https://www.techtarget.com/revcyclemanagement/news/366600241/Healthcare-Consumers-Want-Hospital-Price-Transparency-Survey-Finds> [<https://perma.cc/WL5J-5JAU>].

¹⁰⁴ See Munira Z. Gunja, Evan D. Gumas & Reginald D. Williams II, *U.S Health Care from a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes*, THE COMMONWEALTH FUND (Jan. 31, 2023), <https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022> [<https://perma.cc/6M9B-EAFK>].

¹⁰⁵ Valerie Stone, *The Difference Between Life and Death*, COVERAGE (Apr. 26, 2022), <https://coverage.bluecrossma.com/article/difference-between-life-and-death> [<https://perma.cc/A7W5-6VVJ>]; see also *supra* Part I.

¹⁰⁶ See *Hospitals & Monopoly*, *supra* note 2 (“Courts have ruled, for instance, that a local hospital monopoly is not actually a monopoly because at least some patients traveled to that hospital from areas where other hospitals were located.”).

¹⁰⁷ See *How to Prevent Rural Hospital Closures*, SAVING RURAL HOSPITALS, <https://ruralhospitals.chqpr.org/Solutions.html> [<https://perma.cc/3FBL-XT6W>].

¹⁰⁸ *Why Healthcare Price Transparency is Essential to a Competitive Market*, NOMI HEALTH (May 15, 2023), <https://www.nomihealth.com/blog/why-healthcare-price-transparency-is-essential-to-a-competitive-market> [<https://perma.cc/QK32-CUY9>].

¹⁰⁹ See James F. Blumstein, *The Application of Antitrust Doctrine to the Healthcare Industry: The Interweaving of Empirical and Normative Issues*, 31 IND. L. REV. 91, 106–07 (1998).

D. Consequences of the “Critical Industry Test”

Allowing courts to make economic judgments might concern many legal scholars who fear a return to the *Lochner* era.¹¹⁰ However, permitting the consolidation of healthcare providers that would increase costs for consumers in need of medical care is ethically questionable, justifying exemptions for the state action immunity doctrine. With the critical industry test, courts can identify industries where promoting anticompetitive conduct is against the public interest. States will still have the freedom to enact anti-competitive policies they deem necessary for a robust local economy.

For instance, many states regulate alcohol distributors to reduce competition and output compared to what would exist in a competitive market.¹¹¹ States typically designate an agency to oversee alcohol distribution and set minimum prices to promote public health and safety by reducing alcohol consumption.¹¹² A plaintiff could argue that the agency is engaging in anticompetitive conduct and sue the official overseeing the agency. However, such a lawsuit would likely fail to satisfy the critical industry test. First, transparency in alcohol prices allows consumers to shop around at different competitors and recognize that state regulations contribute to the higher prices they pay for alcohol. Second, alcohol is not considered essential to well-being, as many people abstain from it.¹¹³

Issuing occupational licenses is another area where states could continue to promote anti-competitive policies. States issue these licenses in various professional areas to protect workers and consumers by establishing minimum professional standards.¹¹⁴ Critics of occupational licensing may argue that it protects incumbent professionals and restricts the market against new entrants.¹¹⁵ However, the critical industry test would prevent antitrust challenges from bypassing the state action doctrine. Consumers can research

¹¹⁰ Rossi, *supra* note 47, at 557.

¹¹¹ Crane, *supra* note 59, at 1206.

¹¹² *What Are Alcohol Control States*, PARK ST. (May 23, 2022), <https://www.parkstreet.com/what-are-control-states> [<https://perma.cc/BKF2-VS59>]; see *Preventing Excessive Alcohol Use with Proven Strategies*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 15, 2024), <https://www.cdc.gov/alcohol/prevention/proven-strategies.html> [<https://perma.cc/NKT2-47TS>].

¹¹³ Laura Bailey, *More Young Adults Are Abstaining from Alcohol*, MICH. NEWS (Oct. 12, 2020), <https://news.umich.edu/more-young-adults-are-abstaining-from-alcohol> [<https://perma.cc/4K57-G7BT>]; Julian Baggini, *Want the Truth About Alcohol? You Won't Hear It from the Government*, GUARDIAN (Aug. 3, 2018), <https://www.theguardian.com/commentisfree/2018/aug/03/alcohol-health-government-advice-drug-benefits-morality> [<https://perma.cc/NGB6-FUCD>].

¹¹⁴ Daniel A. Hanley, *More States Should Take Advantage of an Antitrust Doctrine to Make Our Economy Fairer and More Democratic*, SLING (Oct 20, 2023), <https://www.thesling.org/more-states-should-take-advantage-of-an-antitrust-doctrine-to-make-our-economy-fairer-and-more-democratic> [<https://perma.cc/Z59N-TKMN>].

¹¹⁵ *Id.*

and compare the costs of services that require occupational licensing, such as legal services and cosmetic treatments. Therefore, challenges would fail the critical industry test and state licensing would be protected under the state action doctrine.

Overall, the critical industry test is a suitable framework for courts to implement because it helps them identify anti-competitive policies in industries where citizens would have difficulty holding their political leaders accountable, thus strengthening the rationale set forth by *Parker*.¹¹⁶ Additionally, the precedent set by *Parker* remains intact, allowing states to continue exercising significant control over their local economies.

V. CONCLUSION

With states continuing to allow healthcare provider monopolies,¹¹⁷ judges need to examine the negative impacts that a consolidated market of healthcare providers can have on consumers, ranging from higher prices to lower quality of care provided. Although courts are pressured to follow precedent based on *stare decisis*,¹¹⁸ allowing anticompetitive mergers between healthcare providers that would increase healthcare costs for the public would be an unjust outcome, providing a basis for courts to reconsider the *Parker* decision. However, the critical industry framework proposed in this test would supplement *Parker* by preventing states from being immune from antitrust enforcement when the anti-competitive behaviors being promoted are not condemned by the public. The critical industry test allows judges to be confident that the anti-competitive policies are the will of the populace. Under a critical industry test system, healthcare mergers will receive stricter judicial scrutiny that will prevent their unlawful anti-competitive behavior from continuing. This will allow the FTC and other parties to better enforce our nation's antitrust laws, ensuring a fair and competitive market in the healthcare industry.

¹¹⁶ Day, *supra* note 69.

¹¹⁷ See, e.g., Mike Scarcella, *US Judge Blocks FTC Bid to Review Louisiana Hospital Deal*, REUTERS (Sept. 27, 2023), <https://www.reuters.com/legal/government/us-judge-blocks-ftc-bid-review-louisiana-hospital-deal-2023-09-27/>.

¹¹⁸ *Understanding Stare Decisis*, A.B.A. (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/.