

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580



Office of Policy Planning
Bureau of Competition
Bureau of Economics

June 5, 2023

Representative Larry W. Potts
North Carolina House Health Committee
North Carolina General Assembly
300 N. Salisbury Street
Raleigh, NC 27603

Re: North Carolina Senate Bill 743, Purporting to Give State Action Defense to
UNC Health's Collaborative Activities

Dear Representative Potts and Members of the House Health Committee:

The staff of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics (collectively, "FTC staff")¹ respectfully submits this letter regarding the impact of North Carolina Senate Bill 743 ("S-743")² on competition for healthcare services. The proposed bill purportedly would provide the University of North Carolina Health Care System ("UNC Health"), as well as the public or private entities with which it collaborates, with a defense from antitrust enforcement action for any otherwise unlawful merger or coordinated activity. The collaborative activities that the proposed bill authorizes could include the kinds of acquisitions, market allocation, information sharing, and joint contract negotiations that reduce competition among healthcare providers and lead to patient harm in the form of higher healthcare costs, lower quality, reduced innovation, and reduced access to care, as well as depressed wages for hospital employees. For the reasons described below, FTC staff urges the North Carolina General Assembly to reconsider whether UNC Health needs state action protection to engage in beneficial collaborative activities. We are aware that a North Carolina Senate Budget Proposal also included purported state action protection for East Carolina University, and FTC staff would have similar concerns about those types of provisions as it does for the provision regarding UNC Health..³

FTC staff recognizes that not all collaboration among healthcare providers substantially lessens competition or otherwise violates the antitrust laws. We also recognize there are bona fide regulatory approaches that may be appropriate for implementing a variety of important public policy goals. We are concerned, however, that the proposed legislation is based on inaccurate premises regarding the scope of the

antitrust laws, the need for exemptions from those laws, and the value of competition among healthcare providers. The FTC has raised concerns about similar legislation in other states that purport to confer broad antitrust defenses to public health entities.⁴ In addition, the FTC has advocated against the use of the state action doctrine to shield specific hospital mergers from antitrust enforcement liability,⁵ as well as federal and state legislative proposals that seek to create antitrust exemptions for collective negotiations by healthcare providers.⁶

Antitrust carve-outs are unnecessary for UNC Health to engage in appropriate collaborative activities. The antitrust laws are not a barrier to the formation of healthcare collaborations that benefit patients and employers without raising competitive concerns, as explained in guidance issued by the Federal Trade Commission.⁷ Because such collaborations already are permissible under the antitrust laws, the main effect of S-743 would be to shield mergers and conduct that *would* violate the antitrust laws by depriving patients and workers of the benefits of competition without efficiencies or quality improvements. Therefore S-743 would likely lead to increased healthcare costs – in the form of higher premiums, co-pays, deductibles, and other out-of-pocket expenses – and reduced quality and access to healthcare services for North Carolina patients. It could also result in reduced wages and benefits for healthcare workers.

I. FTC’s Interest and Experience

The FTC’s mission includes promoting fair competition in healthcare markets that benefits patients, hospital employees, and the public at large. To carry out this mission, Congress has charged the FTC with enforcing the Clayton Act, which prohibits mergers and acquisitions whose effect may be substantially to lessen competition or tend to create a monopoly.⁸ In addition, the FTC enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁹ Pursuant to its statutory mandate, the FTC investigates mergers and acquisitions, business practices, and other activities that may violate the Clayton Act or the FTC Act and, where there is reason to believe those laws have been violated, brings enforcement actions to stop and remedy such violations.

Vigorous competition among healthcare providers in an open marketplace provides patients with the benefits of lower prices, higher quality, greater access, innovation for goods and services, and improved wages and benefits for employees.¹⁰ Anticompetitive mergers and conduct in healthcare markets have long been a focus of FTC law enforcement, research, and advocacy.¹¹ The FTC also has significant experience with evaluating the effects of efforts by state and local governments to shield certain market participants from antitrust liability, including in healthcare markets.

II. North Carolina Senate Bill 743

North Carolina Senate Bill 743 was introduced on April 6, 2023, and an amended second edition unanimously passed in the North Carolina Senate on May 1, 2023.¹² S-743 is now being considered in the North Carolina House. The stated purposes of S-743 include

“clarifying the authority of [UNC Health] to conduct operations in the best interests of the state for the purpose of creating a statewide health system of high quality” and “expanding [UNC Health’s] operating authorities and personnel flexibilities.”¹³

S-743 describes UNC Health as “a State agency and political subdivision governed and administered as an affiliated enterprise of The University of North Carolina” in accordance with a newly proposed General Statutes framework titled Chapter 116, Article 37.¹⁴ S-743 describes the governance structure and authority of the Board of Directors of UNC Health, which would be able to authorize UNC Health to enter into contracts and formal agreements.¹⁵ The Board’s general powers and duties, as explicitly stated in S-743, include a broad range of contractual, operational, and financial activities that it deems necessary “to carry out the patient care, education, research, and public service mission” of UNC Health – most notably the authority to acquire or enter into any arrangement with other public or private hospital and healthcare facilities.¹⁶

Included in S-743 is a provision that purports to extend state action “immunity” from antitrust liability to UNC Health, as well as any private and public entities with which it collaborates.¹⁷ This purported immunity would cover “cooperative agreements with any other entity for the provision of health care, including the acquisition, allocation, sharing, or joint operation of hospitals or any other health care facilities or health care provider, without regard to their effect on market competition.”¹⁸ FTC staff takes no position at this time on whether UNC Health legally qualifies as an arm of the state or whether S-743 satisfies the requirements of the state action doctrine. Both are fact-intensive inquiries that would require further investigation.¹⁹

III. State Action Is Unnecessary Because the Antitrust Laws Already Permit Beneficial Health Care Collaborations that Are Competitively Benign

The state action provision of S-743 appears to be based on two fundamentally flawed premises: that beneficial collaborations among otherwise independent healthcare providers are prohibited under the antitrust laws, and that the state action defense is necessary to enable such collaborations. The antitrust laws are not an impediment to competitively neutral collaborations, including certain joint ventures or other types of care coordination, among healthcare providers that may reduce costs and benefit patients. The federal antitrust agencies also recognize that the acquisition of a failing firm, which cannot meet its financial obligations and would exit the market without the acquisition, is not likely to cause competitive harm.²⁰

FTC staff is concerned that S-743 may encourage UNC Health to engage in the kinds of acquisitions and collaborations that would harm patients, employers, and workers. Indeed, there is a significant and growing body of empirical economic research showing that increased consolidation and certain kinds of coordination among healthcare providers increase the risk of higher prices without any improvements in quality.²¹ The benefits of competition also apply in rural areas facing economic challenges. Indeed, the North Carolina General Assembly has recognized the value of healthcare competition through

other proposed legislation.²² Furthermore, recent studies show that consolidation among health systems results in lower wages and reduced benefits for employees.²³

IV. Antitrust Exemptions That Attempt to Shield Otherwise Anticompetitive Conduct Pose a Substantial Risk of Harm and Are Disfavored

Because the antitrust laws already permit competitively neutral collaborations among healthcare providers that benefit patients, no special “exemption” or “immunity” from antitrust liability is necessary to ensure that such collaborations occur. The U.S. Supreme Court has reiterated its long-standing position that “the antitrust laws’ values of free enterprise and economic competition” make such special exemptions or immunities “disfavored.”²⁴ There is no reason to treat the healthcare industry differently with regard to application of the antitrust laws. Indeed, in the healthcare industry, just like in other industries, consumers and workers benefit from fair and vigorous competition and are harmed by anticompetitive conduct and transactions.²⁵

Healthcare providers increasingly seek exemptions from the antitrust laws that would extend to mergers and various forms of joint conduct. Experience has taught us that antitrust exemptions threaten broad harm to many while benefitting only a select few. FTC staff is concerned that S-743 would encourage precisely the types of agreements among competitors that likely would *not* pass muster under the antitrust laws – mergers and conduct that would reduce competition, create or entrench monopolies, raise prices, reduce quality, and provide few or no benefits to patients, employers, or workers. Any effort to shield such harmful mergers and conduct from antitrust enforcement is likely to harm North Carolina citizens.

To evaluate the potential consequences of S-743, consider the results of North Carolina’s last attempt to shield a healthcare provider from antitrust liability. In 1995, Memorial Mission Hospital and St. Joseph’s Hospital entered into a cooperative agreement under North Carolina’s certificate of public advantage (“COPA”) statute, which allowed them to engage in certain collaborative activities and eventually merge to form Mission Health System without facing an antitrust enforcement challenge. For nearly 20 years, Mission Health System operated under the state’s COPA regulatory oversight, which was intended to mitigate the anticompetitive effects resulting from a loss of competition. However, recent empirical studies found substantial increases in commercial inpatient prices during the period in which the COPA was in effect, and even greater price increases after the COPA was repealed.²⁶ Other stakeholders suggest that HCA Healthcare, which acquired Mission Health System in 2019, has been able to exercise its market power to the detriment of North Carolina healthcare patients and workers.²⁷

FTC staff is concerned about a similar outcome with UNC Health if S-743 is passed in its current form and the state action provision remains intact. Even when operating as a not-for-profit, like UNC Health, the research shows that hospitals with substantial market power are often able to demand higher rates (i.e., prices), which are then passed on to consumers in the form of higher premiums, copayments, deductibles, and other out-of-

pocket expenses..²⁸ Indeed, there is at least one example of UNC Health appearing to engage in behavior violating the antitrust laws to the detriment of workers..²⁹

V. Conclusion

In summary, FTC staff believes that the state action provision included in S-743 is unnecessary to facilitate beneficial collaborations between UNC Health and other healthcare providers. We recognize the state interest in weighing values other than competition and determining when those values should govern, and we respect the democratic role of state sovereigns in deciding matters of state and local policy. We are nonetheless concerned that S-743 would likely foster anticompetitive conduct to the detriment of North Carolina healthcare patients and workers. FTC staff urges the North Carolina General Assembly to carefully consider whether excepting UNC Health from antitrust liability – especially the broad immunity S-743 purports to grant – would further legitimate public policy goals or, instead, result in higher prices for patients while reducing healthcare quality and access.

The FTC will investigate and challenge transactions that are anticompetitive, including in situations where legal defenses are asserted based on the state action doctrine and where the state fails to meet the necessary requirements.

Respectfully submitted,

/s/ Elizabeth Wilkins, Director
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/s/ Holly Vedova, Director
Bureau of Competition

/s/ Aviv Nevo, Director
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Cc: Senator Ralph Hise, Senate Bill 743 Sponsor
Senator Joyce Krawiec, Senate Bill 743 Sponsor

¹ This letter represents the views of the FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. It does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit this letter.

² General Assembly of North Carolina Session 2023, Senate Bill 743 - Second Edition (adopted Apr. 20, 2023), Enacting New Article 37, General Statutes Chapter 116, pertaining to the University of North Carolina Health Care System, <https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S743v2.pdf>.

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- ³ General Assembly of North Carolina Session 2023, Senate Committee Substitute for House Bill 259, 2023 Appropriations Act, as amended by the Senate Appropriations/Base Budget Committee and the Senate Finance Committee (Fifth Edition Engrossed May 18, 2023), Article 39, East Carolina University Health Care Operations § 116-360.40., <https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v5.pdf>.
- ⁴ See FTC Staff Comment to the Alabama State Senate Regarding HB 241 and SB 243, Which Would Exempt Health Care Collaborations From Federal Antitrust Laws (May 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alabama-state-senate-regarding-alabama-house-bill-241-senate-bill-243/160504commentalabama.pdf; FTC Staff Comment to New York State Senator Ranzenhofer and New York State Assemblyman Abinanti Concerning SB 2647 and AB 2888 Authorizing Certain Agreements for the Creation and Operation of a Health Care Delivery System Network (Jun. 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-york-state-senator-ranzenhofer-new-york-state-assemblyman-abinanti-concerning/150605nypublichealthletter.pdf.
- ⁵ See FED. TRADE COMM’N, *Certificates of Public Advantage (COPAs)*, www.ftc.gov/copa.
- ⁶ See, e.g., FTC Staff Comment to Sen. Chip Shields, Or. State Legislature, Concerning S.B. 231-A, Intended to Exempt Certain Collaborations Among Competing Health Care Providers and Payers Participating in a Primary Care Transformation Initiative (May 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-provide-federal/150519oregonstaffletter.pdf; FTC Staff Comment to Sen. Catherine Osten and Rep. Peter Tercyak, Conn. Gen. Assembly, Concerning H.B. 6431, Intended to Exempt Health Care Collaboratives from the Antitrust Laws (Jun. 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf; FTC Staff Comment to Sen. John J. Bonacic, N.Y. State Senate, Concerning N.Y. Senate Bill S.3186-A, Intended to Permit Collective Negotiations by Health Care Providers (Oct. 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-john-j.bonacic-concerning-new-york-s.b.3186-allow-health-care-providers-negotiate-collectively-health-plans/111024nyhealthcare.pdf; FTC Staff Comment to Sens. Coleman and Kissel and Reps. Fox and Hetherington, Conn. Gen. Assembly, Concerning Connecticut H.B. 6343, Intended to Exempt Members of Certified Cooperative Arrangements from the Antitrust Laws (Jun. 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-senatorscoleman-andkissel-and-representativesfox-and-hetherington-concerning.b.6343intended-toexempt-members-certified-cooperative-arrangements-antitrust-laws/110608chc.pdf; FTC Staff Comment to the Hon. Elliott Naishtat Concerning Tex. S.B. 8 to Exempt Certified Health Care Collaboratives from the Antitrust Laws (May 2011). All advocacies are available at <https://www.ftc.gov/policy/advocacy-filings>.
- ⁷ See, e.g., FTC Healthcare Advisory Opinions (explaining FTC staff’s public analysis of specific healthcare provider collaborations), https://www.ftc.gov/system/files/ftc_gov/pdf/Overview-Advisory-Opinions.pdf; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.
- ⁸ See Clayton Act, 15 U.S.C. § 18; Federal Trade Commission Act, 15 U.S.C. § 45.
- ⁹ *Id.*
- ¹⁰ See Nat’l Soc. of Prof. Eng’rs v. United States, 435 U.S. 679, 695 (1978) (The antitrust laws reflect “a

legislative judgment that, ultimately, competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

- ¹¹ See, e.g., FED. TRADE COMM’N, *Competition in the Health Care Marketplace*, <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>; FED. TRADE COMM’N, OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.04.08%20Overview%20Healthcare%20%28final%29.pdf; Joseph Farrell, Paul A. Pautler & Michael G. Vita, FED. TRADE COMM’N, *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. INDUS. ORG. 369 (2009), <http://link.springer.com/content/pdf/10.1007%2Fs11151-009-9231-2.pdf>; FED. TRADE COMM’N, *Examining Health Care Competition* (Mar. 20-21, 2014), <https://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition>; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *Examining Health Care Competition* (Feb. 24-25, 2015), <https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition>; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>.
- ¹² General Assembly of North Carolina Session 2023, Senate Bill 743 - Second Edition (adopted Apr. 20, 2023), Enacting New Article 37, General Statutes Chapter 116, pertaining to the University of North Carolina Health Care System, <https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S743v2.pdf>.
- ¹³ S-743 at 1.
- ¹⁴ S-743 § 116-350.5(a).
- ¹⁵ S-743 § 116-350.15(a)-(b).
- ¹⁶ S-743 § 116-350.15(c).
- ¹⁷ We reference the term state action “immunity” as that is the language used in S-743. However, the state action doctrine is more properly described as a defense to antitrust liability, not an immunity from investigation or lawsuit. See, e.g., *SmileDirectClub v. Battle*, 4 F.4th 1274, 1277, 1280 (11th Cir. 2021) (en banc); *SolarCity Corp. v. Salt River Project Agric. Improvement and Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017); *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 (5th Cir. 2000); *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc).
- ¹⁸ S-743 § 116-350.70.
- ¹⁹ To obtain a defense from antitrust enforcement liability for conduct by private actors that might otherwise violate the federal antitrust laws, the state action doctrine requires both a clear articulation of the state’s intent to displace competition in favor of regulation and that the state provide active supervision over the regulatory scheme or body. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1013 (2013).
- ²⁰ See e.g., FTC Press Release, *Bureau of Competition Director Issues Statement on FTCs Closure of its Investigation of Consummated Hospital Merger in Temple, Texas* (Dec. 23, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/12/bureau-competition-director-issues>

[statement-ftcs-closure-its-investigation-consummated-hospital.](#)

- ²¹ See, e.g., Zack Cooper, Stuart Craig, Martin Gaynor & John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q.J. ECON. 51 (2019), https://healthcarepricingproject.org/sites/default/files/Updated_the_price_aint_right_qje.pdf; Nancy Beaulieu, Leemore Dafny, Bruce Landon, Jesse Dalton, Ifedayo Kuye & J. Michael McWilliams, *Changes in Quality of Care after Hospital Mergers and Acquisitions*, 382 NEW ENG. J. MED. 51 (Jan. 2, 2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMsa1901383?articleTools=true>; Martin Gaynor, Kate Ho & Robert Town, *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LITERATURE 235 (2015), https://www.researchgate.net/publication/278676719_The_Industrial_Organization_of_Health-Care_Markets; Jeff Goldsmith, Lawton R. Burns, Aditi Sen, & Trevor Goldsmith, *Integrated Delivery Networks: In Search of Benefits and Market Effects*, NAT'L ACAD. OF SOCIAL INSURANCE (Feb. 2015), https://www.nasi.org/sites/default/files/research/Integrated_Delivery_Networks_In_Search_of_Benefits_and_Market_Effects.pdf; Katherine Baicker & Helen Levy, *Coordination versus Competition in Health Care Reform*, 369 NEW ENG. J. MED. 789 (2013), <https://www.nejm.org/doi/full/10.1056/NEJMp1306268>; Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update* (Robert Wood Johnson Found., Synthesis Project Report, June 2012), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261; Paul B. Ginsburg, *Wide Variation in Hospital and Physician Payment Rates Evidence of Provider Market Power*, Center for Studying Health System Change, Research Brief No. 16 (Nov. 2010), <http://www.hschange.com/CONTENT/1162/>; Robert A. Berenson, Paul B. Ginsburg & Nicole Kemper, *Unchecked Provider Clout in California Foreshadows Challenges to Health Reform*, 29 HEALTH AFFAIRS 699 (2010), <http://content.healthaffairs.org/content/29/4/699.full>; Lawton Robert Burns & Ralph W. Muller, *Hospital-Physician Collaboration: Landscape of Economic Integration and Impact on Clinical Integration*, 86 MILBANK Q. 375 (2008), <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0009.2008.00527.x/epdf>; William B. Vogt & Robert Town, *How has hospital consolidation affected the price and quality of hospital care?* (Robert Wood Johnson Found. Synthesis Project Report, Feb. 2006), <http://www.rwjf.org/files/research/no9researchreport.pdf>; Cory Capps & David Dranove, *Hospital Consolidation & Negotiated PPO Prices*, 23 HEALTH AFFAIRS 175 (2004), <http://content.healthaffairs.org/content/23/2/175.full>.
- ²² See, e.g., General Assembly of North Carolina Session 2023, House Bill 737, *Preserving Competition in Health Care*, <https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H737v1.pdf> (establishing a hospital merger notice, review, and monitoring process for the North Carolina Attorney General's office and requiring the Attorney General to consider “[w]hether the proposed transaction complies with all applicable State and federal laws and regulations, including antitrust laws.” 131E-214.32 (a)(5)); General Assembly of North Carolina Session 2023, Senate Bill 48, *Repeal Certificate of Need Laws*, <https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S48v1.pdf>.
- ²³ See, e.g., Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021), <https://www.aeaweb.org/articles?id=10.1257/aer.20190690>; Daniel Arnold & Christopher Whaley, *Who Pays for Health Care Costs? The Effects of Health Care Prices on Wages*, (2021 working paper), <https://www.ehealthecon.org/pdfs/Whaley.pdf>.
- ²⁴ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). See also *North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) (“The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.”).
- ²⁵ *Phoebe Putney*, 133 S. Ct. at 1015 (state legislature's objective of improving access to affordable health care does not logically suggest contemplation of anticompetitive means, and “restrictions [imposed upon

hospital authorities] should be read to suggest more modest aims.”). As the U.S. Court of Appeals for the Fourth Circuit has observed, “[f]orewarned by the [Supreme Court’s] decision in *National Society of Professional Engineers* . . . that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of ‘good medical practice.’” *Va. Acad. of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980).

- ²⁶ See FED. TRADE COMM’N, *FTC Policy Perspectives on Certificates of Public Advantage* at 8 (Aug. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf.
- ²⁷ See, e.g., Letter from North Carolina Attorney General’s office to North Carolina Department of Health and Human Services regarding Mission Health (Jul. 25, 2022), <https://info.ncdhhs.gov/dhsr/coneed/comments/2022/june/Buncombe-Acute-Care-Beds-Project-ID-B-12232-22-Mission-Hospital-Comments-by-AG-Josh-Stein.pdf>; Letter from State Employees Association of North Carolina to North Carolina Department of Health and Human Services (Aug. 1, 2022), <https://www.seanc.org/assets/HCA-NC-CoN-Comment-FINAL.pdf>.
- ²⁸ See, e.g., Erin E. Trish & Bradley J. Herring, *How Do Health Insurer Market Concentration and Bargaining Power With Hospitals Affect Health Insurance Premiums?*, 42 J. HEALTH ECON. 104 (2015), <http://www.sciencedirect.com/science/article/pii/S0167629615000375>; <https://hmpi.org/wp-content/uploads/2017/02/HMPI-Town-Phoebe-Putney.pdf>; Robert Town, *The Economists’ Supreme Court Amicus Brief in the Phoebe Putney Hospital Acquisition Case*, 1 HEALTH MGMT. POL’Y & INNOVATION 60 (2012). These empirical findings hold for both for-profit and not-for-profit hospitals. In other words, non-profit hospitals can and do exercise market power and raise prices, similar to for-profit hospitals.
- ²⁹ See, e.g., U.S. DEPT. OF JUSTICE, *Justice Department Comments on Settlement in Private “No-Poach” Class Action That Allows Government to Enforce Injunction Against Duke University* (Nov. 8, 2019), <https://www.justice.gov/opa/pr/justice-department-comments-settlement-private-no-poach-class-action-allows-government>.