Submission to Oregon Health Authority Regarding the Proposed Merger Between Oregon Health & Science University and Legacy Health

Pursuant to Oregon Revised Statute 415.500 et seq. and Rules Implemented Thereunder at Oregon Administrative Rules at 409-070-0060 Subpart 4.

April 9, 2025

Martin Gaynor
Lester A. Hamburg University Professor of Economics and Public Policy
Heinz College
Carnegie Mellon University

Barak Richman
Alexander Hamilton Professor of Business Law
George Washington University
Senior Scholar, Clinical Excellence Research Center (CERC)
Stanford University Medical School

We are national experts in health economics and antitrust law and respectfully submit this public comment to the Health Care Market Oversight ("HCMO") program regarding the proposed merger between Oregon Health & Science University ("OHSU") and Legacy Health ("Legacy"). We write to express grave concern about the proposed merger, and we urge the Oregon Health Authority to prevent the completion of the merger. An examination of the merger, informed by economic research into similar hospital mergers that have taken place over the past three decades, reveals that the proposed transaction will not advance Oregon's policy goals of health equity, lower costs, increased access, and better care.

Martin Gaynor is a professor of economics and public policy at Carnegie Mellon University who has studied health care markets and consolidation for over 40 years. He previously served as Director of the Bureau of Economics at the U.S. Federal Trade Commission and as Special Advisor to the Assistant Attorney General at the Antitrust Division, U.S. Department of Justice. His research focuses on competition in health care markets, with a particular emphasis on hospital competition (and the effects of hospital mergers). He has testified before Congress on health care markets and the impacts of consolidation in health care and has served as an expert witness in multiple health care antitrust matters.

Barak Richman is an economist, a licensed attorney, and a professor of law at George Washington University. Prior to 2023, he was on the faculty of Duke Law School and the Fuqua School of Business, where he was on the Health Sector Management faculty. In 2024, he served as a Special Counsel for Competition Policy at the Department of Health and Human Services in the Office of General Counsel. His research focuses on the regulation of health care markets, with a particular emphasis on antitrust law and policy, He has testified before Congress on consolidation in health care markets, its effects on patients and the national economy, and has served as an expert witness in multiple health care antitrust matters.

There has been massive consolidation spanning decades in the U.S. hospital sector, which has resulted in large health systems dominating local markets across the country. This widespread consolidation has provided a great deal of research evidence on the impacts of hospital mergers. The evidence clearly demonstrates that hospital consolidation increases prices without meaningfully improving quality or efficiency, and decreased competition in provider markets can substantially worsen quality of care.[1]

For example, Gaynor and colleagues found that a merger between two nearby hospitals, on average, causes a 6% price increase, with continual price increases for at least two years post-merger.[2] Nonprofit hospitals are no exception. Research also shows that nonprofit hospitals will raise prices and exploit market power as much as for-profit hospitals after a market power

[1] For example, Martin Gaynor and Robert J. Town. *The Impact of Hospital Consolidation – Update*. Policy Brief No. 9, Robert Wood Johnson Foundation, The Synthesis Project, (June 2012). DOI: 10.13140/RG.2.1.4294.0882; Martin Gaynor, Kate Ho and Robert J. Town. *The Industrial Organization of Health-Care Markets*, Journal of Economic Literature, 235 (2015), DOI: 10.1257/jel.53.2.235; Martin Gaynor and Robert J. Town. *Competition in Health Care Markets*, Handbook of Health Economics, Vol. 2, Mark V. Pauly, Thomas G. McGuire, Pedro P. Barros, eds. Chap. 9, pp. 499-637, Amsterdam: Elsevier (2011), https://doi.org/10.1016/B978-0-444-53592-4.00009-8.

[2] Zack Cooper, Stuart V. Craig, Martin Gaynor and John Van Reenen. *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, Quarterly Journal of Economics, 134 (2019), DOI: 10.1093/qje/qjy020.

enhancing merger.[3] While some might think that nonprofit hospitals with market power use the resulting profits to benefit their community, the evidence actually shows the opposite: such hospitals do not provide more charity care or unprofitable services.[4]

Hospital mergers may also enhance monopsony power in labor markets, which can depress wages, distort hiring decisions, and harm incentives for investment in human capital.[5] They also inflict broader harms on the local economy, increase joblessness, depress wages in non-healthcare labor markets, and exacerbate economic inequality.[6] Moreover, evidence shows that too few hospital mergers have been blocked - many harmful hospital mergers have occurred – which means that more aggressive antitrust policy would have prevented this damage to patients and to the broader economy.[7]

Taken together, this literature casts considerable doubt on OHSU's assertions that the merger will lower costs and improve quality, access, and equity. It especially casts pointed doubt on their assertion that they will not raise prices as an entity that is not for-profit. These are promises that merging hospitals have made many times before, and the empirical literature and real-world experience demonstrably show that the opposite is far more likely.

Analysis of the expected market impacts of this merger underscores these concerns. Market concentration and increases in market concentration are strongly associated with persistent price increases post-merger. By all accounts, this merger represents an alarming level of market concentration in the Portland market. We support HCMO's use of the Herfindahl-Hirschman Index (HHI) in its analytic framework, as well as its adoption of the federal merger guidelines to establish presumptively illegal mergers.[8,9]

The very first guideline in the federal merger guidelines is Guideline 1 "Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly

---

[3] See, e.g., Robert Town and Gregory Vistnes. *Hospital Competition in HMO Networks*, Journal of Health Economics, 733 (2001). DOI: 10.1016/S0167-6296(01)00096-0. Martin Gaynor and William B. Vogt. *Competition Among Hospitals*, RAND Journal of Economics 34, no. 4 (2003): 764–85. https://doi.org/10.2307/1593787.

[4] Cory S. Capps, Dennis W. Carlton and Guy David, ANTITRUST TREATMENT OF NONPROFITS: SHOULD HOSPITALS RECEIVE SPECIAL CARE? Economic Inquiry, (2020), 58: 1183-1199. https://doi.org/10.1111/ecin.12881 Christopher Garmon, *Hospital Competition and Charity Care*. Frontiers in Health Policy Research, (2009), 12(1), Article 2. https://www.degruyter.com/document/doi/10.2202/1558-9544.1130/pdf

[5] Elena Prager and Matthew Schmitt, *Employer consolidation and wages: Evidence from hospitals*. American Economic Review (2021). 111(2):397–427, DOI: 10.1257/aer.20190690.

[6] Zarek Brot-Goldberg, Zack Cooper, Stuart V. Craig, Lev R. Klarnet, Ithai Lurie and Corbin L. Miller. "Who Pays for Rising Health Care Prices? Evidence from Hospital Mergers." Working Paper No. 32613, National Bureau of Economic Research, (2024) https://www.nber.org/papers/w32613.

[7] Brot, Zarek, Zack Cooper, Stuart V. Craig, and Lev Klarnet. I*s There Too Little Antitrust Enforcement in the US Hospital Sector?* American Economic Review: Insights, (2024), 6 (4): 526–42. DOI: 10.1257/aeri.20230340.

[8] Oregon Health Authority, *Health Care Market Oversight Analytic Framework*, Health Care Market Oversight Program Sub-regulatory Guidance, (October 2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf

[9] U.S. Department of Justice and the Federal Trade Commission, *Merger Guidelines*, (December 18, 2023), https://www.justice.gov/atr/2023-merger-guidelines.

Concentrated Market."[10] Guideline 1 states that "Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase. *A merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly.*" (emphasis added). Thus, a merger that results in a market HHI greater than 1,800 and a change in the HHI of greater than 100 will be presumed to be anticompetitive and therefore illegal.

In a submission to the Oregon Health Authority regarding the proposed merger between Oregon Health and Science University and Legacy Health, researchers affiliated with Brown University and the American Economic Liberties Project (hereinafter the Brown Researcher Comment) calculate that the merger between OHSU and Legacy would lead to an HHI of 3,548 in the Portland metro area, with an increase of 1,196.[11] These are very large numbers. They are far above the thresholds set out by the Merger Guidelines for a presumption of anticompetitive harm and illegality, and thus substantially exceed the threshold for the "highest level of concern" in the federal merger guidelines. If (one of) the federal enforcement agencies were to sue to enjoin the merger, they would be highly likely to establish a presumption of illegality. Were OHSU not immunized from federal antitrust scrutiny, it is very likely that the federal government would successfully sue to block the merger.

Moreover, while these numbers are far above the threshold for a presumption of illegality under the antitrust laws, they very likely are conservative estimates - the actual HHI numbers are probably even bigger. While the geographic area used by the Brown Researcher Comment seems reasonable, the actual geographic market in which OHSU and Legacy compete is likely smaller. The majority of people do not travel far for hospital care - most patients go to hospitals within a few miles of their homes.[12] As a consequence, hospital markets are typically smaller than an entire metro area,[13] so there likely are fewer hospitals competing with OHSU and Legacy than are contained in the metro area. Consequently, OHSU and Legacy probably have even larger market shares in the actual geographic market than the Brown Research Comment suggests, which means that the HHI analysis required under the Merger Guidelines would create an even stronger presumption against the merger.

The merging parties have attempted to defend the transaction by painting Legacy as financially vulnerable. If the entities do not merge, they argue, Legacy will instead be acquired by an out-of-

---

[10] U.S. Department of Justice and the Federal Trade Commission, op cit., Section 2.1, p. 5.

[11] Hayden Rooke-Ley, Erin Fuse Brown, Jaime S. King, and Daniel Arnold, researchers affiliated with Brown University and American Economic Liberties Project, *Submission to the Oregon Health Authority Regarding the Proposed Merger Between Oregon Health & Science University and Legacy Health,* (January 2, 2025).

[12] Weiss AJ, Pickens G, Roemer M. *Methods for Calculating Patient Travel Distance to Hospital in HCUP Data.* (2021), HCUP Methods Series Report # 2021-02, U.S. Agency for Healthcare Research and Quality, www.hcup-us.ahrq.gov/reports/methods/methods.jsp.

[13] Martin Gaynor, Samuel Kleiner, and William B. Vogt, *A Structural Approach to Market Definition: An Application to the Hospital Industry,* Journal of Industrial Economics, (2013), 61, 2, 243–289. ; Martin Gaynor and Kevin Pflum, *Getting Market Definition Right: Hospital Merger Cases and Beyond*, (July 2017), CPI Antitrust Chronicle, 1-9, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/07/CPI-Gaynor-Pflum.pdf.

state, for-profit entity. This is a misleading notion. While Legacy encountered some transient losses during the pandemic, it has remained profitable over the longer term and maintains a positive annual operating margin with substantial cash on hand. Even if Legacy were genuinely struggling financially, alternative pathways can sustain Legacy without resorting to its acquisition and the harms that would bring. We refer readers to the Brown Researcher Comment on this point.

We are also skeptical of OHSU's argument that, despite the overwhelming evidence that similar mergers have caused significant economic harm without generating benefits, OHSU will defy the odds. The parties' this-time-is-different argument seems to rest on the notion that OHSU is a quasi-public institution and therefore will not abuse its market power. But there is overwhelming evidence that consolidation reduces competition and increases costs - whether or not the consolidating parties are for-profit or not. And OHSU is not the first hospital to claim that it is different, that it deserves the public's trust. Many acquiring hospitals have made that promise, yet the economic record of such mergers remains overwhelmingly costly.

This merger will likely increase cost for Oregonians without improving quality, access, or equity. Moreover, the merger is not necessary for Legacy's survival. We encourage HCMO to consider these risks and block the merger.