BROWN
School of Public Health

AMERICAN ECONOMIC LIBERTIES PROJECT

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

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

January 2, 2025

Hayden Rooke-Ley, JD, Brown University School of Public Health & the American Economic Liberties Project (AELP)

Erin Fuse Brown, JD, MPH, Brown University School of Public Health

Jaime King, JD, PhD, University of Auckland, Faculty of Law, University of California College of the Law, San Francisco

Daniel Arnold, PhD, Brown University School of Public Health

Table of Contents

We respectfully submit this public comment to Oregon state legislators, state health policy leaders, and the Health Care Market Oversight ("HCMO") program regarding the proposed merger between Oregon Health & Science University ("OHSU") and Legacy Health ("Legacy"), pursuant to Oregon Revised Statute 415.500 et seq. and rules implemented thereunder at Oregon Administrative Rules at 409-070-0060(4). As scholars of health care law and policy, our research and advisory work focuses on health care consolidation, antitrust and state transaction review, and health care payment and financing policy. We appreciate the opportunity to present our views as the HCMO program undertakes its comprehensive review of the proposed merger.

I. Executive Summary

OHSU proposes to acquire Legacy Health and consummate the largest hospital merger in Oregon history. The state should block it. Substantial if not overwhelming research indicates that transactions of this sort increase costs without improving quality. This merger is also unlikely to ameliorate—and may well worsen—urgent problems of access and equity for Oregonians, particularly in primary care. And contrary to the parties' assertions, OHSU's proposed acquisition is not the only viable outcome here—and likely not the best. We encourage state legislators and state health policy leaders to vigorously and publicly support HCMO's review of the merger and to pursue legislative alternatives to acquisition, if needed. Our public comment emphasizes the following points:

- The merger is unlikely to satisfy HCMO's criteria for cost and quality. The most consistent finding of in-market hospital mergers is that they drive up prices without improving quality or efficiency, due to increased market concentration. In stark contrast to OHSU's application, we estimate that the merger would significantly increase market concentration and create a presumption of antitrust illegality if the transaction were reviewed in a court of law.

- The transaction is also unlikely to satisfy HCMO's third and fourth criteria for approval: access and equity. Simply put, the math doesn't add up. The parties claim, on the one hand, that Legacy is on the brink of collapse, while promising to deliver more of the services purportedly underlying Legacy's financial distress: low-margin care for Medicaid patients, such as primary care and behavioral health. In addition, putative pro-competitive efficiencies, such as balancing capacity across hospitals systems, do not justify consolidation; courts have thus rejected this defense in analogous mergers.

- The parties are misportraying the merger as a binary, "best-of-bad-options" decision for Oregon: either the state approves the transaction, or a private equity operator takes over Legacy. Not so. Legacy appears to be on stable financial ground, and if it does need capital support, there are numerous viable alternatives that the parties and state leaders can pursue.

- Approval of the transaction by HCMO risks creating an unregulated monopoly. Crucially, this proposed acquisition is immune from review by state and federal antitrust authorities, and recent allegations and reporting at OHSU raise serious questions about its operational competence and commitment to its mission. This leaves HCMO as the sole authority to actively oversee the merged entity and to enforce onerous conditions, which

are essential to any approval. Yet HCMO is also on unstable political terrain: the Oregon hospital industry is suing in court to terminate the program, and the health care industry, more generally, is ratcheting up opposition to HCMO. As has happened too often in the antitrust context, monopolies approved by the state exercise their economic power in the political arena, repealing the entities meant to regulate them.

In light of these concerns, HCMO must rigorously scrutinize the proposal, applying gold-standard methods of review; and state legislators and health policy leaders ought to support HCMO's clear authority to block the merger. Moreover, we encourage legislators to consider reforms that would address systemic issues underlying the financial distress of hospitals across Oregon. Such a legislative package could consider creating zero-interest loan financing for distressed hospitals, increasing Medicaid reimbursement, and strengthening state receivership laws.

II. OHSU's Acquisition of Legacy Is Likely to Increase Costs Without Improving Quality

In June of 2024, OHSU and Legacy announced a definitive agreement to combine. The acquisition would merge two of Portland's three major hospital systems, giving OHSU-Legacy a dominant market position in the Portland region.[1] In September, the parties filed for approval with the state, which triggered the six-month review process by HCMO. HCMO applies a two-step "public interest" standard when reviewing a transaction. When, as here, a transaction is not approved at the preliminary step, the transaction undergoes "comprehensive review."

In comprehensive review, the merger is only approved if HCMO determines, among other criteria, that there is "no substantial likelihood" that the transaction would have "material anticompetitive effects in the region … not outweighed by benefits in increasing or maintaining services to underserved populations."[2] In addition, to be approved, the transaction must benefit the public good by: (a) reducing costs according to Oregon's cost growth target; (b) increasing access to services in medically underserved areas; (c) rectifying historical and contemporary factors contributing to a lack of health equity or access to services; or (d) improving health outcomes for residents of this state.[3]

To apply this standard, HCMO has formulated a four-factor analytic framework, which assesses the likely impact of the merger on *cost*, *quality*, *access*, and *equity*. As discussed in this section, research on horizontal mergers and preliminary evidence specific to this merger suggest that the parties are unlikely to satisfy the cost and quality prongs.

A. Research Suggests the Merger Will Substantially Increase Costs

OHSU is likely to leverage its market power to substantially increase prices for health care services without quality improvements, thereby failing the cost prong of HCMO's

[1] OHSU & LEGACY HEALTH, SYSTEM COMBINATION AGREEMENT (May 30, 2024), https://www.ohsu.edu/sites/default/files/2024-07/System-Combination-Agreement-OHSU-and-Legacy-Health.pdf.
[2] Or. Admin. Code § 409-070-0060(6).
[3] *Id*.

transaction review criteria. HCMO's analytic framework places a heavy emphasis on cost-containment. The cost prong assesses the "current performance and the likely impact" of the transaction on market share, prices, spending, and financial condition. In addition, the transaction cannot be approved if it exceeds the state's 3.4% cost growth target, unless it otherwise improves health care access, equity, or quality.[4] In its application, OHSU concedes that it will not satisfy the state's cost growth target, projecting cost increases of 4.6%. But this cost increase, OHSU asserts, would occur irrespective of the merger.

Substantial evidence undermines OHSU's assertion that costs will not differentially increase as a result of the merger. More than any other type of health care transaction, in-market horizontal hospital system mergers increase costs. The weight of the empirical literature shows that hospital mergers dramatically increase commercial hospital prices.[5] Prices can increase by 20% to 40%, depending on the degree of concentration and market power.[6] As discussed below, an OHSU-Legacy merger will result in a highly concentrated hospital market in the Portland area, which indicates that price increases would fall on the higher end of the scale. Further, even the non-merging hospitals in concentrated markets have prices 12.9% higher than those in more competitive markets.[7] Prices are generally the single largest driver of health care cost growth, increasing premiums and deductibles for Oregonians.[8]

The literature generally shows that price increases occur irrespective of corporate ownership structure, and academic medical centers (AMCs), in particular, often have even higher prices.[9] For AMCs, their brand is a key asset: patients want to go to facilities owned by well-

---

[4] Oregon Health Authority, Health Care Market Oversight Analytic Framework (2023), pp. 9, available at https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.

[5] Karyn Schwartz et al., *What We Know About Provider Consolidation*, *KFF* (Sep. 2, 2020), https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/ (last visited Nov 25, 2024) ; *Jodi L. Liu et al.*, *Environmental Scan on Consolidation Trends and Impacts in Health Care Markets*, (2022), https://www.rand.org/pubs/research_reports/RRA1820-1.html (last visited Nov 25, 2024) ; *Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality*, *Penn LDI* (2023), https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/.

[6] Leemore Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers*, 52 *The Journal of Law and Economics* 523 (2009), https://www.journals.uchicago.edu/doi/10.1086/600079 (last visited Nov 25, 2024); Deborah Haas-Wilson & Christopher Garmon, *Hospital Mergers and Competitive Effects: Two Retrospective Analyses*, 18 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS 17 (2011), http://www.tandfonline.com/doi/abs/10.1080/13571516.2011.542952 Martin Gaynor & Robert J. Town, *Competition in Health Care Markets*, The Centre for Market and Public Organisation, Univ. of Bristol, UK, Working Paper No. 12/282 (2012); March 2020 Report to the Congress: Medicare Payment Policy – MedPAC, https://www.medpac.gov/document/http-www-medpac-gov-docs-default-source-reports-mar20_entirereport_sec-pdf(last visited Nov 25, 2024).

[7] Cooper Z, Craig SV, Gaynor M, Van Reenen J. THE PRICE AIN'T RIGHT? HOSPITAL PRICES AND HEALTH SPENDING ON THE PRIVATELY INSURED. Q J Econ. 2019 Feb;134(1):51-107. doi: 10.1093/qje/qjy020. Epub 2018 Sep 4. PMID: 32981974; PMCID: PMC7517591.

[8] HAYDEN ROOKE-LEY, *Medicare Advantage and Vertical Consolidation in Health Care*, (2024), https://www.economicliberties.us/our-work/medicare-advantage-and-vertical-consolidation-in-health-care/ (last visited Nov 5, 2024).

[9] Brandon W. Yan et al., *Prices for Common Services at Quaternary vs Nonquaternary Hospitals*, 330 JAMA 2211 (2023), https://jamanetwork.com/journals/jama/fullarticle/2812256; Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured**, 134 THE QUARTERLY JOURNAL OF ECONOMICS 51 (2019), https://academic.oup.com/qje/article/134/1/51/5090426; MASSACHUSETTS HEALTH POLICY COMMISSION,

known institutions, such as OHSU. This is true despite the absence of finding that AMCs consistently deliver higher quality care.[10] AMCs' brands increase their leverage when negotiating with payers, heightening the risk of price increases. AMCs also tend to focus on specialty care, so they are particularly keen on controlling broad referral networks.

These consolidation concerns are all salient here. This acquisition facilitates OHSU's strategic reorganization to further focus on tertiary and quaternary care.[11] With greater market dominance in the region—including increased access to the suburban patients and greater control over primary care physicians—OHSU can control specialty referrals and extract higher prices for services. As HCMO's preliminary report demonstrates, OHSU has been aggressively expanding its reach in recent years, highlighted by joint management ventures with Adventist and Tuality, two hospitals already in the region. This acquisition would substantially enlarge OHSU's market share, as detailed in the next section, almost certainly increasing prices across the Portland hospital market.[12]

Moreover, the anticipated price increases from the OHSU-Legacy merger would not be justified by increases in quality of patient care. To evaluate effects on quality, HCMO examines three outcomes: clinical processes, patient outcomes, and patient experience.[13] The empirical evidence suggests that increased hospital prices due to consolidation generally come with no gain, and even decreases, in quality and patient satisfaction.[14] One study found that hospital mergers led to declines in patient satisfaction and no evidence that mergers affected mortality or readmission rates in either positive or negative ways.[15] Another study found that consolidated hospitals showed less improvement in measures of patient experience over time compared with non-consolidated control hospitals.[16] Evidence indicates the quality of care provided in noncompetitive markets is no better, and may be worse in some cases, than in competitive

---

2023 ANNUAL HEALTH CARE COST TRENDS REPORT AND POLICY RECOMMENDATIONS (2023), https://www.mass.gov/files/documents/2023/09/13/2023%20Cost%20Trends%20Report.pdf.

[10] Lawrence W. Vernaglia, *Innovative Revenue Streams for Academic Medical Centers: Reaching Beyond On-Site Patient Care*, FOLEY & LARDNER LLP (2022), https://www.foley.com/insights/publications/2022/02/innovative-revenue-streams-academic-medical/.

[11] OHSU Public Board of Directors Meeting (June 28, 2024), https://www.ohsu.edu/sites/default/files/2024-06/COMBINED_OHSU_PUBLIC_BOD_6-28-24.pdf.

[12] *AFFHP: Health Care Consolidation: Background, Consequences, and Policy Levers*, Alliance for Fair Health Pricing, https://allianceforfairhealthpricing.org/publications/healthcareconsolidationreport/ (last visited Nov 25, 2024).

[13] Oregon Health Authority, Submit a Transaction Notice, https://www.oregon.gov/oha/hpa/hp/pages/hcmo-how-to-submit.aspx.

[14] MEDICARE PAYMENT ADVISORY COMM'N REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 472 (2020), https://www.medpac.gov/wp-content/uploads/import_data/scrape_files/docs/default-source/reports/mar20_medpac_ch15_sec.pdf; Jodi L. Liu et al., *Environmental Scan on Consolidation Trends and Impacts in Health Care Markets*, RAND HEALTH CARE, Sep. 30, 2022, https://www.rand.org/pubs/research_reports/RRA1820-1.html.

[15] Nancy D. Beaulieu et al., *Changes in Quality of Care after Hospital Mergers and Acquisitions*, 382 N ENGL J MED 51 (2020), http://www.nejm.org/doi/10.1056/NEJMsa1901383.

[16] Timothy Attebery et al., *Better Together? An Examination of the Relationship Between Acute Care Hospital Mergers and Patient Experience*, 65 J. OF HEALTHCARE MGMT. 330 (2020), https://journals.lww.com/10.1097/JHM-D-19-00116.

markets.[17] Thus, it is unlikely that the consolidation of OHSU-Legacy hospitals will yield improvements in care quality or patient experience sufficient to justify the anticipated price increases.

In addition to promises of quality improvement, these mergers are often justified with aspirational promises of operational efficiencies and exploitation of scale. Yet here, too, the literature tells a different story. Evidence demonstrating efficiency gains is sparse[18] and, insofar as it exists, tends to reflect reductions in a hospital's operating costs due to closure of an acquired hospital[19] or significant staffing or wage cuts for the workers at the acquired facility.[20] Here, because two large hospital systems are attempting to merge, operational efficiencies have likely already been captured in the respective systems and will not be enhanced by a merger. Moreover, to the extent that a merged OHSU-Legacy health system reduces operating costs, it may be at the expense of closing less profitable services or facilities, staffing cuts, and lower wages for workers.

B. Counter to OHSU's Claims, the Merger Will Significantly Increase Market Concentration and Drive Up Prices

To substantiate its position that costs will not increase post-merger, OHSU asserts that the transaction raises no material anticompetitive concerns.[21] This is an indefensible claim. HCMO's "public interest" standard incorporates many of the standards used in traditional antitrust analysis. To begin, as noted above, there must be no substantial likelihood that the transaction would have "material anticompetitive effects in the region … [that are] not outweighed by benefits in increasing or maintaining services to underserved populations."[22] In the application of the "cost" prong, HCMO assesses the "current performance and the likely impact" of the transaction on market share, prices, spending, and financial condition.

To determine the impact on market share and prices, HCMO adopts numerous tools of analysis directly from antitrust law, including a metric for market concentration known as the Herfindahl-Hirschman Index (HHI).[23] HHI is calculated at the service level, and for hospital mergers, it is most common to use the market for acute care inpatient discharges. HHI is derived by squaring the market share of each hospital in a market and then summing those squared

---

[17] Nancy D. Beaulieu et al., *Organization and Performance of US Health Systems*, 329 JAMA 325 (2023), https://jamanetwork.com/journals/jama/fullarticle/2800656; Liu et al, *Environmental Scan on Consolidation Trends and Impacts in Health Care Markets*, (2022), https://www.rand.org/pubs/research_reports/RRA1820-1.html.

[18] Jodi L. Liu et al., *Environmental Scan on Consolidation Trends and Impacts in Health Care Markets*, RAND HEALTH CARE, Sep. 30, 2022, https://www.rand.org/pubs/research_reports/RRA1820-1.html.

[19] David M. Cutler & Fiona Scott Morton, Hospitals, Market Share, and Consolidation, 310 JAMA 1964 (2013), http://jama.jamanetwork.com/article.aspx?doi=10.1001/jama.2013.281675.; David Dranove & Richard Lindrooth, *Hospital Consolidation and Costs: Another Look at the Evidence*, 22 J. HEALTH ECON. 983 (2003), https://linkinghub.elsevier.com/retrieve/pii/S016762960300078X.

[20] Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AMERICAN ECONOMIC REVIEW 397 (2021), https://pubs.aeaweb.org/doi/10.1257/aer.20190690.

[21] *Oregon Health Authority: Submit a Transaction Notice: Office of Health Policy: State of Oregon*, https://www.oregon.gov/oha/hpa/hp/pages/hcmo-how-to-submit.aspx (last visited Nov 25, 2024).

[22] Or. Admin. Code § 409-070-0060(6).

[23] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT ANALYTIC FRAMEWORK 21 (2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.

values; a higher HHI indicates a more concentrated market. When applied by enforcers and courts, an HHI greater than 1800 and an increase in HHI of more than 100 is used to determine when the merger will trigger a "structural presumption" of illegality.[24] The merging parties have a high bar to overcome the presumption that the merger is illegal. HCMO expressly adopts the thresholds used by the Department of Justice (DOJ) and Federal Trade Commission (FTC) to determine whether there is a structural presumption. In addition to HHI, HCMO's analytic framework states that it may use a number of more rigorous methods of analysis used in antitrust litigation, including merger simulation, diversion ratios, and willingness to pay.[25] These analyses are employed by economics experts in litigation and directly assess the loss of competition from mergers and predict their price effects.

According to our calculations, the OHSU-Legacy merger would increase HHI levels far in excess of the threshold to make the merger presumptively illegal. Our team includes health economists at the Brown University School of Public Health, who have extensive expertise in health care merger analysis and antitrust standards. We calculated HHI estimates using statistics for acute care inpatient discharges that were submitted to HCMO by OHSU. **Using a geographic market of Portland's metropolitan statistical area (MSA), our analysis found that the OHSU-Legacy merger would result in an HHI of 3548, and an increase in HHI of 1196.** A more conservative estimate that included Kaiser hospitals (further discussion of this method below) generated a post-merger HHI 2837 and change in HHI of 895.[26] Both of these calculations find the OHSU-Legacy merger would result in HHI metrics well above the threshold for creating a presumption of illegality.

The conclusion that the OHSU-Legacy merger would be presumptively illegal is consistent with other indicia of anticompetitive effects. The 2023 merger guidelines from the FTC and DOJ also state that a structural presumption exists where a merger creates a 30% market share and an HHI increase of 100.[27] Here, OHSU's ownership of seven of the 11 hospitals in the tri-county area (64%), coupled with an HHI increase of 1196, exceeds these alternative thresholds for a presumption of illegality. Moreover, HCMO's preliminary report shows that the geographic market for Legacy hospitals is entirely subsumed by that for OHSU, again suggesting concerns of market concentration. The report also confirms that the merger would create a monopoly in the state for pediatric hospitals and Level 1 trauma centers.[28]

Despite this evidence, OHSU claims that it does "not anticipate any material anticompetitive effects resulting from the transaction."[29] OHSU first argues that HCMO should disregard any assessment of competitive effects of the merger because OHSU is a public

---

[24] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023) , https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.
[25] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT ANALYTIC FRAMEWORK 22 (2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.
[26] We would be happy to supply further details of our analysis upon request.
[27] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.
[28] OREGON HEALTH AUTHORITY, OREGON HEALTH SCIENCE UNIVERSITY - LEGACY HEALTH SYSTEM 30-DAY REVIEW REPORT 7 (2024), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-Preliminary-Report.pdf.
[29] *Oregon Health Authority: Submit a Transaction Notice: Office of Health Policy: State of Oregon*, https://www.oregon.gov/oha/hpa/hp/pages/hcmo-how-to-submit.aspx (last visited Nov. 25, 2024).

institution solely operating in the public's interest (which we address in a later section). OHSU then argues that, even if the state were to scrutinize anticompetitive effects, there are none here. OHSU's claim hinges on self-calculated HHI metrics that suffer from three fatal errors.

First, OHSU's HHI calculation is flawed because it excludes two of its hospitals from the calculation of its market share, an error which HCMO correctly identified in its preliminary review.[30] Accurately capturing the number of hospitals affected by the merger is critical to calculating the HHI, which sums the squared market share for each hospital in a market. Strategically excluding affiliated hospitals skews OHSU's market concentration to appear inaccurately low.

Second, OHSU (and HCMO) appeared to underestimate market share by including Kaiser Permanente as a competitor hospital. Yet legal experts generally agree that Kaiser should not be included in the market definition of the proposed merger because it is not actually a competitor to OHSU-Legacy from an antitrust perspective.[31] That is, because Kaiser is a closed-system, fully integrated HMO, it does not contract with insurance companies in the region for network inclusion or negotiate with them on price. Therefore, if OHSU-Legacy or another dominant hospital system in the region were to exercise its market power and attempt to increase prices, insurance companies cannot exercise countervailing bargaining power by contracting with Kaiser hospitals as an alternative.

The third flaw in OHSU's HHI calculation is that it defines its geographic market to be indefensibly broad, with the effect of obscuring its true market share within the Portland area. This third flaw requires a brief discussion of the all-important geographic market definition, which supplies the geographic boundaries within which to calculate HHI market concentration. Generally, the geographic market seeks to capture the boundaries within which patients reasonably seek alternative hospitals, or competitive substitutes. The gold standard for calculating the geographic market is known as the hypothetical monopolist test (HMT),[32] and there are several proxies for calculating the geographic market that can be used at the preliminary stage of review. We used the aforementioned metropolitan statistical area (MSA) for Portland, while other proxies include approximated mileage radii (e.g., 15 miles), drive time (e.g., 30 minutes), county-based markets, or the primary service area (PSA) calculated as the lowest number of contiguous zip codes from which the entities in question draw at least 75% of their patients.

In its filings, OHSU purported to apply a PSA analysis. It determined that the geographic market for acute care inpatient discharges covers nearly the entire state, including numerous hospitals that are at least a five-hour drive from Portland. This geographic designation far exceeds HCMO's calculation of the geographic market in its preliminary report (using the PSA

---

[30] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT ANALYTIC FRAMEWORK 25 (2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.

[31] Maria Dinzeo, *Economists Hopeful About Outcome of Antitrust Trial Against Northern California Hospital Giant*, COURTHOUSE NEWS SERVICE, Mar. 8, 2022, https://www.courthousenews.com/economists-hopeful-about-outcome-of-antitrust-trial-against-northern-california-hospital-giant/.

[32] Martin Gaynor & Kevin W. Pflum, *Hospital Consolidation and Public Policy*, COMPETITION POL'Y INT'L (2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/07/CPI-Gaynor-Pflum.pdf.

methodology) and is well beyond the geographic market that would be derived using the HMT. As a result, OHSU's sprawling, overbroad geographic market dilutes its actual market share and generates HHI metrics that barely register a change in market concentration. OHSU appears to have applied the method incorrectly in order to evade scrutiny of its acquisition of Legacy Health.

OHSU's erroneous HHI submission magnifies the importance that HCMO applies proper methods of analysis when assessing market-share impacts. This begins with an appropriate assessment of the geographic market for acute care inpatient services, as well as any other relevant service lines, to establish correct HHI metrics. Now that the merger is in comprehensive review, it is also essential that HCMO employs one or more of the more rigorous assessments of loss of competition and price effects.

III. The OHSU-Legacy Merger Is Unlikely to Increase Access and Equity

In addition to cost and quality, HCMO reviews transactions for their impacts on patient access and equity. HCMO evaluates the likely impact of the transaction on the availability of services and potential changes in the payer mix and patient demographics. HCMO's assessment of equity impacts cover four outcomes: equitable access, equitable quality, community engagement, and equity-enhancing services. Here, too, the literature suggests that consolidation often adversely impacts access and equity, and there is little in OHSU's application that suggests otherwise.

A. Consolidation Often Leads to Closures and Workforce Shortages, Decreasing Access for Low-Income Patients

The merging parties assert that a central aim of the merger is to increase health care access for low-income populations. OHSU lists as part of its "primary goals and objectives of the transaction" to "maintain and improve health care access to underserved, vulnerable populations in urban, suburban, and rural locations, thus improving health equity and the diversity of the combined system's patient population."[33] Yet the literature suggests that hospital consolidation often reduces access to care, particularly for marginalized populations.

Acquiring hospitals often discontinue less lucrative service lines at the acquired hospitals, such as labor and delivery, intensive care, and psychiatric care.[34] The merged hospitals, in an attempt to become more profitable, often find ways to improve the "payer mix" by seeing fewer Medicaid patients.[35] Preliminary data from our colleagues at Brown point to collateral effects:

---

[33] OHSU, HEALTH CARE MARKET OVERSIGHT PROGRAM HCMO-1: NOTICE OF MATERIAL CHANGE TRANSACTION 9 (2024), https://www.ohsu.edu/sites/default/files/2024-09/HCMO-Filing-Notice.pdf.

[34] *Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality*, Penn LDI (2023), https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/.

[35] Maria Monroe, *The Impacts of Increasing U.S. Hospital Consolidation on Medicaid Recipients*, Equitable Growth (Jan. 25, 2024), https://equitablegrowth.org/the-impacts-of-increasing-u-s-hospital-consolidation-on-medicaid-recipients/ (last visited Nov. 25, 2024) ; Sunita M. Desai et al., *Hospital Concentration and Low-Income Populations: Evidence from New York State Medicaid*, 90 J. HEALTH ECON. 102770 (2023); Ashvin Gandhi, *Picking Your Patients: Selective Admissions in the Nursing Home Industry*, SSRN(2023), https://papers.ssrn.com/abstract=3613950.

unaffiliated hospitals in the same geographic market see more Medicaid patients post-consolidation, as the merging hospitals decrease access for these less profitable patients.[36] Here, because Legacy sees a disproportionate share of Medicaid patients, these patients are at risk of experiencing a loss of or decrease in access post-merger.

Hospital consolidation also often negatively impacts the health care workforce. With the shuttering of services comes layoffs to clinicians and other staff. Already, apparently in preparation for the merger, OHSU has recently laid off 500 employees.[37] Though the merger application touts OHSU's collaboration with labor unions, the agreement appears only to forestall layoffs: OHSU has committed not to make layoffs for the first six months after acquisition, and a year for frontline workers who are in the bargaining units of numerous unions. UFCW, which represents workers at Legacy and was not part of the labor agreement, is opposing the merger. Beyond layoffs, the creation of monopsony power (market power as a buyer or employer) allows merging hospitals to depress clinician wages.[38] Evidence suggests that hospital consolidation particularly depresses wage growth for the skilled clinical workforce, including nurses.[39] More troubling is emerging research that price increases from hospital consolidation lead to job losses and wage reductions at employers across the affected region—not just at the health system itself—due to how these price increases are passed on to employer-sponsored health plans.[40] Thus, we expect that the OHSU-Legacy merger would reduce jobs and wages for health care workers and non-health care workers by increasing health care costs for employers throughout the Portland area.

A merger between OHSU and Legacy Health is likely to adversely affect the physician market. Currently, physicians at OHSU report a lack of support services, driving more burnout for clinicians and voluntary decrease in clinical hours, which in turn make hiring full-time clinicians more difficult due to workload concerns. These conditions further threaten access to care.[41] There are also concerns about physician autonomy in the wake of increased market concentration. In a more consolidated employer market for physicians, independent groups may be forced to become employed. For example, Legacy currently contracts with the independent Oregon Anesthesiology Group, whereas OHSU anesthesiologists are employed. When hospitals vertically consolidate, research shows that costs tend to increase but physician reimbursement declines.[42]

---

[36] Arnold DR, Radhakrishnan N, and Whaley CM. "Foisted: The Spillover Effects of Hospital Mergers on Costs and Utilization." Forthcoming working paper.

[37] Christian Wihtol, *Years of Losses Would Follow OHSU's Absorption of Legacy Health*, LUND REPORT, Oct. 1, 2024, https://www.thelundreport.org/content/years-losses-would-follow-ohsus-absorption-legacy-health.

[38] Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AMERICAN ECONOMIC REVIEW 397 (2021), https://www.aeaweb.org/articles?id=10.1257/aer.20190690.

[39] Sylvia A. Allegretto et al., *Hospital Consolidation and Labor Market Outcomes* (Inst. for New Econ. Thinking, Working Paper No. 197, 2023), https://www.ineteconomics.org/uploads/papers/WP_197-Allegretto-HospCons.pdf.

[40] Zarek Brot-Goldberg et al., *Who Pays for Rising Health Care Prices? Evidence from Hospital Mergers* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32614, 2024), https://www.nber.org/papers/w32613.

[41] Anonymous faculty physician at OHSU, Personal Interview (Dec. 20, 2024).

[42] Christopher M. Whaley et al., *Physician Compensation in Physician-Owned and Hospital-Owned Practices: Study Examines Physician Compensation in Physician-Owned and Hospital-Owned Practices*, 40 *Health Aff.* 1865 (2021).

All of these predicted effects of hospital consolidation—a shrinking clinical workforce, disappearing jobs and insurance coverage, and depressed wages—suggest that the OHSU-Legacy merger would reduce access to health care, particularly for low-income Oregonians.

B. Expanding Primary Care Access and Equity Conflicts with OHSU's Principal Defense of the Merger and Its Stated Strategic Priorities

Though the parties claim that the merger will address the state's primary care and behavioral health crises, these promises do not square with the parties' principal defense of the merger, nor with OHSU's plan to further prioritize tertiary and quaternary care. OHSU and Legacy's main case for the merger is that Legacy is on the brink of collapse and OHSU is best positioned to rectify its financial position. Legacy's financial woes, addressed in greater depth below, appear to be largely related to the COVID-19 pandemic. Poorly performing financial investments, increasing labor costs, post-acute capacity constraints, and the slow-down in lucrative elective surgeries produced negative margins during the pandemic. The hospital was already operating on thin margins in part because it treats a high proportion of Medicaid and low-income patients.

Insofar as Legacy is financially distressed, the parties' promised expansion of primary care and access for Medicaid patients will not help. As documented above, consolidation often is lucrative for acquirers because they can increase the prices of services and cut less profitable services, especially for Medicaid patients. The latter strategy, of course, would be directly at odds with access and equity, and it would point to the need for a structural legislative solution (such as increasing Medicaid reimbursement and primary care investment), rather than industry consolidation. As such, if the central justification for the merger is that Legacy is on the brink of collapse, it is incompatible for the merged entity to both serve more Medicaid patients and turn Legacy's financial situation around.

OHSU's stated commitment to primary care, post-merger, is also at odds with its strategic vision to prioritize tertiary and quaternary care. OHSU's application does not detail how it will increase primary care access in the region—or how that will resurrect Legacy's struggling finances. The implication seems to be that OHSU would expand its offering of primary care services by acquisition, but this wouldn't increase net access; it would simply rebrand existing Legacy clinics as OHSU. And if OHSU's impetus is to control referrals in the region—and capture lucrative commercial patients—the acquisition could undermine equity and access.

It is notable that OHSU's primary care faculty are generally, if not uniformly, skeptical or opposed to the merger. Rather than making long-term commitments to primary care access and training, faculty lament that OHSU has instead decided to outsource primary care provision to corporate providers such as Zoomcare, and was contemplating doing the same with Amazon's primary care provider, One Medical. Faculty fear that this merger will further undermine OHSU's capacity to train high-quality primary care physicians, as OHSU leans further into its tertiary and quaternary complex care (TQCC) strategy. These sentiments are consistent with what we have heard that OHSU representatives have stated privately: that primary care is simply not mission critical for OHSU.[43]

[43] Anonymous faculty physician at OHSU, Personal Interview (Dec. 20, 2024).

C. *OHSU's Arguments of Capital Investment and Capacity Balancing Do Not Warrant Industry Consolidation*

The parties' two procompetitive justifications for the merger, meant to overcome anticompetitive effects, are unpersuasive. The first, as noted above, is that Legacy needs a capital infusion. Upgrades will enable the system to attract more high-income patients for whom it can provide lucrative services. The argument appears to be that OHSU can access bond financing on more favorable terms than Legacy due to its better credit ratings and the backing of the State of Oregon. But if the rationale for this transaction is that the public coffers need to be leveraged to, in effect, bail out Legacy, then state leaders should be addressing this problem on those terms. There are simpler and more direct ways to provide Legacy with short-term financial relief without significant industry consolidation and all its attendant risks. As outlined in the final section, if the state determines that Legacy needs financial relief to survive the wake of the pandemic, it can directly provide low- or zero-interest financing, as other states have done to support hospitals.[44]

The second rationale for the acquisition, which appears repeatedly throughout the application, is one of capacity balancing: OHSU is overburdened with patients, while Legacy has empty beds.[45] However, balancing capacity appears to be a solvable problem short of a merger. If OHSU has excess demand and Legacy has excess capacity, the hospitals can coordinate to send OHSU patients to Legacy. In fact, OHSU received federal funding during the pandemic to undertake this very initiative, in what it named "Mission Control."[46] If there are barriers to using this kind of system to address current capacity imbalances, the state could work with OHSU to enable such coordination.

From an antitrust perspective, courts have been skeptical of this capacity balancing argument. In the FTC's recent successful challenge of a hospital merger in New Jersey, the parties argued that anti-competitive concerns were outweighed by potential benefits of capacity balancing.[47] The federal appellate court rejected this argument and stressed that capacity could be coordinated without a merger. The court further noted that the hospitals' failure to coordinate capacity absent the merger suggested that the parties were not, in fact, acting solely in the public interest; this, the court said, undermined the parties' argument that regulators should be unconcerned about market concentration because the hospitals are not for-profit entities.

And so too here: OHSU's primary defense of its proposed market dominance is that it is a public institution operating entirely independent of the profit motive, yet this claim may be at odds with the decision not to transfer patients to Legacy unless it can acquire Legacy and retain profits from these patients. Though OHSU is entitled to raise merger-specific justifications to

---

[44] Distressed Hospital Loan Program, CAL HEALTH & SAFETY CODE § 129385 (2023)

[45] OHSU, HEALTH CARE MARKET OVERSIGHT PROGRAM HCMO-1: NOTICE OF MATERIAL CHANGE TRANSACTION 7 (2024), https://www.ohsu.edu/sites/default/files/2024-09/HCMO-Filing-Notice.pdf.

[46] Press Release, OHSU, OHSU Mission Control Offers Modern High-Tech Solution to Historic Challenge (Oct. 31, 2019), https://news.ohsu.edu/2019/10/31/ohsu-mission-control-offers-modern-high-tech-solution-to-historic-challenge.

[47] Fed. Trade. Comm'n Proposed Findings of Fact and Conclusions of Law in the Matter of Hackensack Meridian Health and Englewood Healthcare Foundation ¶ 100, Civil Action No. 2:20-cv-18140-JMVJBC (D.N.J. Jun. 4, 2021).

overcome anti-competitive concerns, HCMO must scrutinize both the likelihood of these efficiencies and whether they require a merger.

The parties' two primary arguments—the need for a capital infusion and capacity balancing—are both difficult to square with their access and equity commitments and can be realized without a merger.

IV. The Parties' Portrayal of the Merger—that Either OHSU or Private Equity Will Acquire Legacy—Is a False Choice for Oregon

The parties are presenting the acquisition as a binary choice: either the state approves the OHSU acquisition, or Legacy is sold to an out-of-state, for-profit owner. But the underlying premise that Legacy will close without a buyer is doubtful. Legacy appears to have recovered from the pandemic and to be on sound financial footing; and even if it is not, there is a range of viable alternatives to support Legacy's continued operation short of consolidation with OHSU.

A. Legacy Appears to Be in Stable Financial Condition

The parties' claim that Legacy is on the brink of financial collapse and needs a capital partner. In the opening summary of the transaction application, OHSU writes:

> Simply put, Legacy Health must find a strategic partner to achieve financial sustainability, and OHSU is the best possible partner for Legacy Health. Over the last five years, Legacy Health has absorbed significant and unsustainable operational losses, driven by COVID-related disruptions, declining volumes, and rapidly escalating costs. Legacy Health reported an operating loss of $(41.7) million for the quarter that began on April 4, 2024, after losing $(50) million in the quarter before that. In fact, after removing one-time non-recurring items, Legacy lost $(96) million in the fiscal year ending March 31, 2024.

When discussing the proposal publicly, OHSU goes further, claiming that a for-profit, out-of-state buyer, such as a private equity operator, will own Legacy if the state does not approve the proposed merger. This narrative appears to have taken hold publicly, and state legislators have communicated similar sentiments.[48]

However, it is unclear, at best, whether Legacy is at risk of shuttering. The hospital system, like many others, appears to have suffered significant losses during the pandemic but is on the path to recovery. Though Legacy reported losses in two quarters of 2024, discrete quarterly numbers can be misleading because they do not consider seasonal effects or longitudinal performance. Indeed annual metrics demonstrate that Legacy is actually profitable. As of the fiscal year ending in March 2024, Legacy had a positive operating margin of $16 million, and a total margin of $230 million.[49] Legacy's current days of cash on hand is roughly

[48] Elizabeth Hayes, *OHSU-Legacy Merger: Regulators Explore Antitrust Concerns*, PORTLAND BUS. J., Nov. 6, 2024, https://www.bizjournals.com/portland/news/2024/11/06/ohsu-legacy-merger-market-concentration.html.
[49] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT ANALYTIC FRAMEWORK 4 (2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.

180, which places the hospital system in the "strong" category of Standard & Poor's metrics for assessing the financial health of a hospital.[50]

Other aspects of Legacy's balance sheet undermine claims of imminent financial collapse. Prior to its two years of losses during the pandemic, Legacy turned profits every year from 2017 onward, averaging $57 million per year. Legacy also has considerable assets. Its investment portfolio is worth about $1.3 billion, delivering returns of $436 million between 2019 and 2024.[51] The vast majority of these assets are liquid.[52] Legacy also has an overfunded pension, which is also highly unusual for an insolvent company. Legacy's other assets, including the ambulance and insurance companies it owns, are listed at $400 million and may well be worth substantially more.

Third parties appear to agree with this financial assessment. As the Lund Report has highlighted, the bond rating agency S&P Global gives Legacy an A rating, on a scale of D to AAA. An A rating indicates that the hospital has "strong capacity to meet financial commitments but (are) somewhat susceptible to economic conditions and changes in circumstances," according to the firm. Though weaker profits downgraded Legacy from A+ to A in 2023, S&P noted that Legacy had relatively low debt, a large market share, "sound economic fundamentals," and a "relatively stable business position."[53]

Finally, for a merger that is being principally defended on the grounds of financial necessity, it is notable that the parties have not invoked HCMO's emergency exemption. The HCMO statute and rulemaking creates a capacious emergency exemption that has already been successfully invoked in a high-profile physician practice acquisition. More forgiving than the "failing firm" defense in antitrust law, this emergency exemption fully immunizes transactions from review.[54] The parties, however, have consented to full transaction review, further suggesting that Legacy's financial position is not imminently dire.

Taken together, the financial picture at Legacy appears to be far from dire; the hospital system may be able to survive on its own, and at most would seem only to need minimal financial assistance to survive pandemic shocks.

---

[50] Most Nonprofit Hospitals and Health Systems Had "Strong" Days of Cash on Hand in 2022, Though About One-in-10 Were "Vulnerable," KFF (Jan. 9, 2024), https://www.kff.org/health-costs/press-release/most-nonprofit-hospitals-and-health-systems-had-strong-days-of-cash-on-hand-in-2022-though-about-one-in-10-were-vulnerable/.

[51] Larry Kirsch, Opinion, Top Officials Need to Ensure OHSU-Legacy Merger Questions Are Addressed, LUND REPORT, Nov. 19, 2024, https://www.thelundreport.org/content/opinion-top-state-officials-need-ensure-ohsu-legacy-merger-questions-are-addressed

[52] Legacy Health Consolidated Financial Statements and Other Financial Information, Legacy Health for March 31, 2024 and 2023 at 16, https://www.oregon.gov/oha/HPA/ANALYTICS/HospitalDocuments/FY24%20AFS%20Legacy%20Health%20System%20Legacy%20Emanuel%20Med%20Ctr.pdf.

[53] Press Release, S&P Global, Legacy Health, OR Revenue Debt Rating Lowered To 'A' From 'A+' On Weaker Earnings, Lower Days' Cash On Hand (Nov. 1, 2023), https://disclosure.spglobal.com/ratings/pt/regulatory/article/-/view/type/HTML/id/3082090.

[54] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT: EMERGENCY EXCEPTION (2024), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Emergency-Exemption-Guidance.pdf.

B. Because Numerous Alternatives to Consolidation Exist, HCMO Should Not Speculate About Hospital Closure if the Merger Is Not Consummated

With imminent insolvency off the table, HCMO should confine its review to the proposed transaction without engaging in speculative contingencies. Even if Legacy ultimately needs some sort of support to survive—operationally, financially, or otherwise—there are avenues of pursuing this, short of consolidation with an in-market competitor. As we elaborate in the final section, these alternatives take many forms—from zero-interest loan financing from the state to Medicaid reimbursement reform to an alternative buyer. In the event of an alternative proposed buyer, including any attempted acquisition by a private equity investor or a national, for-profit chain, HCMO would similarly review the deal. Other possibilities include some sort of private capital infusion, perhaps from OHSU in exchange for access to its beds. There's even the possibility of Legacy being held in receivership if it is indeed collapsing financially.

For these reasons, it would be highly speculative for HCMO to engage in second- and third-order hypotheticals when reviewing this deal. Rather, HCMO should focus on objectively applying its analytic framework: would the transaction increase costs or reduce quality, access, or equity relative to the status quo?

V. HCMO Should Block the Merger Instead of Relying on Conditional Approval

HCMO may be considering approving the merger with conditions. If it were to do so, the conditions would need to be especially onerous, including caps on price and overall cost increases, maintenance of necessary service lines, rigorous quality metrics, and expansion of access. In addition, conditions are meaningless without rigorous reporting and strict enforcement mechanisms, such as forced divestiture. In effect, conditional approval requires the state to assume active and indefinite oversight of the monopoly and duopoly markets created by the merger.

But we caution heavily against this approach. For one, the Oregon Legislature has immunized OHSU from antitrust laws by invoking the state action immunity doctrine, thereby preventing antitrust enforcement authorities and private plaintiffs from addressing abuses of market power. Two, OHSU's grave mismanagement and profit-seeking orientation in recent years undermine its assertions that it would never abuse its market dominance. And three, HCMO may not be situated to actively oversee monopoly markets indefinitely, a bet that has repeatedly backfired in analogous contexts in other states. Here, the more prudent path is to block the merger outright.

A. Antitrust Immunity Limits Remedial Action if OHSU Abuses Its Market Power

It is essential to recognize that this merger is not subject to state or federal antitrust laws. Because the Supreme Court has held that federal antitrust laws do not expressly preempt state law, states can invoke their authority as sovereigns to immunize transactions from antitrust scrutiny.[55] As it pertains to substate public entities, such as OHSU, state legislatures need only to "clearly articulate" their intent to protect activities of these institutions from antitrust review.[56]

[55] FTC v. Phoebe Putney Health Sys., 568 U.S. 216 (2013).
[56] *Id.*

The Oregon Legislature did so in 1995 when it converted OHSU from a traditional public institution to a "public corporation." As the statute reads, OHSU may exercise the power to pursue a range of acquisitions "notwithstanding that as a consequence of the exercise of such powers, the university engages in activities that might otherwise be deemed anticompetitive within the contemplation of state or federal antitrust laws."[57] This provision also immunizes OHSU from state antitrust review.

The ramifications of this immunity are significant. It means that consummation of the merger does not have to survive antitrust scrutiny from federal authorities. This point bears repetition: if federal authorities do not sue to enjoin the merger, it would be a mistake to conclude that they do not have concerns on the merits—they almost certainly do. Rather, the state's exercise of immunity prohibits federal involvement as a jurisdictional matter. The state Attorney General (AG) is also barred from blocking the transaction applying the state-level antitrust laws, which mirror federal analogues. Though the state AG can review the transaction under the state's charitable trust law, this review only assesses compliance with broad principles of charitable trust law and is unlikely to provide a basis for blocking the merger.

This immunity also means that private plaintiffs, the state AG, and federal authorities may not bring antitrust actions at a later date if OHSU-Legacy were to abuse its market power. Indeed, with such rampant hospital consolidation nationwide, private plaintiffs and government authorities are increasingly challenging anticompetitive conduct, post-merger, by hospital systems. This post-merger oversight, however, would be off the table for OHSU-Legacy.

B. Grave Mismanagement at OHSU Raises Questions About Its Operational Competence and Commitment to Its Mission

Recent mismanagement at OHSU hardly allays concerns about the potential for abuses of market power. OHSU's application appeals repeatedly to its public nature and mission orientation. Because OHSU's board is appointed by the governor, the parties argue, the institution is operating in the public interest. Thus HCMO should not concern itself with questions of market power, or about whether OHSU is committed to quality, access, and equity.[58] Though we agree that OHSU has a greater obligation to serve the public interest than a non-state supported hospital, regulators and state leaders must look beyond platitudes and scrutinize whether OHSU's governance structure and past conduct align with the best interest of the community and supply concrete mechanisms for monopoly regulation. We fear they do not.

First, as we note above, research on hospital mergers bears out irrespective of corporate form. The literature shows that mergers tend to increase prices without commensurate benefits, irrespective of whether the merger parties are for-profit hospitals, non-profits, or AMCs. Second, though the parties underscore that the OHSU Board of Directors is publicly appointed and accountable, it is not structured to regulate the institution as a monopoly. Nothing in the board's duties or authorities compels it to address concerns about prices, costs, or the ill-effects of certain

[57] Or. Rev. Stat. § 353.050 (2024)

[58] OHSU, HEALTH CARE MARKET OVERSIGHT PROGRAM HCMO-1: NOTICE OF MATERIAL CHANGE TRANSACTION (2024), https://www.ohsu.edu/sites/default/files/2024-09/HCMO-Filing-Notice.pdf.

forms of consolidation.[59] Indeed this is the mandate of HCMO. If, for example, OHSU were to raise prices and fail to meet commitments to access and equity, there is no direct mechanism for the board to impose penalties or force a divestiture—and nothing to suggest that the board, which is pursuing this transaction, would self-impose such penalties.

More generally, OHSU's leadership decisions in recent years raise significant questions about both its competence and commitment to its public mission.[60] There have been numerous scandals with employees and top executives, resulting most recently in the resignation of the president and ensuing chaos in appointing a replacement, as well as the resignation of star scientist and CEO of the Knight Cancer Center, Brian Druker.[61] In 2023, 26 out of 27 department chairs at the School of Medicine responded "no" when asked whether the president should be reappointed in 2024; that same group—which represents 2,900 faculty members, or 86% of all faculty on campus—took a "no confidence" vote earlier in the year by a 21-to-six margin.[62] The board nonetheless voted to renew the president's contract. OHSU recently released its employee engagement survey: 42% of respondents stated that they have no confidence in senior management's leadership, placing OHSU in the bottom one percent of health systems, nationally.[63]

In his resignation letter, Druker said his goals of improving patient care and advancing cancer research at OHSU are no longer achievable: "We have lost sight of what is crucial and forgotten our mission."[64] In an interview with the Lund Report, he criticized the strategic decisions by leadership and the large, bureaucratic nature of OHSU, which will increase if the merger is finalized. Druker also lamented that OHSU's obsession with driving profits undermined patient care and the research mission. Similar sentiments were recently expressed by another high-ranking physician faculty member: "I think we have gone from being a university institution that is supposed to be a public good for the state of Oregon to being a for-profit health

---

[59] Memorandum from the Oregon Health and Science University Board of Directors to the Oregon State Senate (Jan. 21, 2022), https://olis.oregonlegislature.gov/liz/2022r1/Downloads/CommitteeMeetingDocument/253453.

[60] Kristine de Leon, *OHSU President Resigns, Citing 'Personal Reasons'; Board Poised to Name Replacement*, OREGONIAN, Oct. 25, 2024, https://www.oregonlive.com/health/2024/10/ohsu-president-resigns-citing-personal-reasons-with-board-poised-to-name-replacement.html; Noelle Crombie, *Former Med School Dean Sues OHSU for $6.2M Over Photo Scandal*, OREGONIAN, Oct. 24, 2024, https://www.oregonlive.com/portland/2024/10/former-med-school-dean-sues-ohsu-for-62-million.html; Anthony Effinger, *Misgivings About Leadership Plague OHSU as It Pursues Takeover of Legacy Health*, WILLAMETTE WEEK, Sep. 13, 2023, https://www.wweek.com/news/2023/09/13/misgivings-about-leadership-plague-ohsu-as-it-pursues-takeover-of-legacy-health/; Elliot Njus, *OHSU Names Interim Leader, Punting on Previously Announced Replacement for Departing President*, OREGONIAN, Nov. 2, 2024, https://www.oregonlive.com/business/2024/11/ohsu-names-interim-leader-punting-on-previously-announced-replacement-for-departing-president.html.

[61] Nigel Jaquiss & Anthony Effinger, *Dr. Brian Druker Resigns as Head of OHSU's Knight Cancer Institute*, WILLAMETTE WEEK, Dec. 3, 2024, https://www.wweek.com/news/2024/12/03/dr-brian-druker-resigns-as-head-of-ohsus-knight-cancer-institute/.

[62] Elizabeth Hayes, *OHSU-Legacy Merger: Regulators Explore Antitrust Concerns*, PORTLAND BUS. J., Nov. 6, 2024, https://www.bizjournals.com/portland/news/2024/11/06/ohsu-legacy-merger-market-concentration.html.

[63] Lucas Manfield, *OHSU Ranks Among Worst in Country in Employees' Confidence in Leadership*, WILLAMETTE WEEK, Nov. 25, 2024, https://www.wweek.com/news/health/2024/11/25/ohsu-ranks-among-worst-in-country-in-employees-confidence-in-leadership/.

[64] Nigel Jaquiss & Anthony Effinger, *Dr. Brian Druker Resigns as Head of OHSU's Knight Cancer Institute*, WILLAMETTE WEEK, Dec. 3, 2024, https://www.wweek.com/news/2024/12/03/dr-brian-druker-resigns-as-head-of-ohsus-knight-cancer-institute/.

system with all decisions made based on financial profitability or financial break even without thoughts about education and service."[65] Together, these facts on the ground cast doubt on OHSU's claim that regulators should disregard anticompetitive concerns because OHSU is publicly accountable with a public mission.

C. HCMO Has Unambiguous Authority to Block the Merger, but It May Not Be Equipped to Regulate a Monopoly in Perpetuity

Antitrust immunity and management woes at OHSU heighten the necessity that HCMO actively and indefinitely regulate the OHSU-Legacy entity, if the merger is approved. But HCMO, though on strong legal ground to block the merger, faces an uncertain political future that may undermine its ability to regulate the transaction in perpetuity.

Taking effect in 2022, the HCMO program is Oregon's novel state transaction review law that has garnered national attention for its scope and potential to oversee corporate consolidation in health care. The statute empowers HCMO to block, conditionally approve, or outright approve all "material" health care transactions in the state.[66] As discussed above, the state applies a two-step "public interest" standard, assessing whether the transaction may "lead to significant adverse effects in any of the domains of cost, access, equity, or quality."[67] If the transaction is denied, the parties can appeal the decision to a state court. HCMO's legal authority has already been upheld in the federal District of Oregon.[68] In May 2024, Judge Simon ruled at the preliminary stage of litigation that the HCMO program did not plausibly violate the 14th Amendment Due Process clause.

Yet the practical impact and sustainability of HCMO is less clear. Since its inception, the program has reviewed 33 transactions and has yet to reject one (it has, however, conditioned seven transactions,[69] and it appeared to *de facto* block SCAN's attempted acquisition of CareOregon, which was rescinded midway through the review process[70]). Further, the program remains under legal attack. The Hospital Association of Oregon, of which OHSU and Legacy are active members, brought the initial legal challenge, and it has appealed the district court's decision to the Ninth Circuit, where the lawsuit is pending as the state reviews numerous hospital transactions.[71] In addition, OHSU has apparently stated that it intends to lobby for HCMO repeal or reform in upcoming legislative sessions. And the health care industry, more generally, appears

---

[65] Anonymous faculty physician at OHSU, Personal Interview (Dec. 20, 2024).
[66] Or. Rev. Stat. § 415.500 (2024).
[67] OREGON HEALTH AUTHORITY, HEALTH CARE MARKET OVERSIGHT ANALYTIC FRAMEWORK 3 (2022), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/OHA-HCMO-Analytic-Framework-FINAL.pdf.
[68] Emily Schneider & Ranganathan Sheela, *Federal Court Rejects Challenge To Oregon's Health Care Transaction Review Law*, HEALTH AFFAIRS FOREFRONT, https://www.healthaffairs.org/content/forefront/federal-court-rejects-challenge-oregon-s-health-care-transaction-review-law.
[69] Oregon Health Authority, *HCMO Transactions and Reviews*, https://www.oregon.gov/oha/HPA/HP/Pages/HCMO-transaction-notices-and-reviews.aspx.
[70] Susanna Vogel, *SCAN Group, CareOregon Abandon Merger Plans*, HEALTHCARE DIVE, Feb. 15, 2024, https://www.healthcaredive.com/news/scan-group-careoregon-abandon-merger-plans/707640/.
[71] Press Release, Hospital Ass'n of Oregon, Hospital Association of Oregon Appeals Court Decision in Health Care Market Oversight Program Case (June 18, 2024), https://oregonhospitals.org/publication/hospital-association-of-oregon-appeals-u-s-district-court-ruling/.

keen on repealing or paring back the law. There is a sense in the legislature that legislative attempts to refine or bolster HCMO would risk repeal.

These atmospherics heighten the stakes of the OHSU-Legacy transaction for HCMO. Even today, it is uncertain whether it has the resources and capacity to assume ongoing monopoly regulation with rigorous scrutiny. And it is unclear where the program will be in a few years–much less a decade or two. Analogous dynamics in the antitrust context offer a cautionary tale. States often use the state action doctrine to immunize a merger from federal antitrust review, but with outsized political power, the state-created monopoly can lobby the legislature to repeal the mechanisms for active monitoring that justified the immunity in the first place.[72] With HCMO in its nascency and OHSU immune from antitrust laws, these risks deserve careful consideration. By contrast, HCMO is well-positioned to block this transaction and defend its decision on appeal in court. Such action will signal HCMO's intent to exercise its full legal authority when reviewing material health care transactions moving forward.

VI. State Legislators and State Health Policy Leaders Should Support HCMO and Pursue Alternative Solutions

In light of these concerns, we respectfully make two recommendations moving forward. First, HCMO must apply appropriate methods of analysis in reviewing the proposed acquisition, receiving the backing from state leaders to exercise its full authority to block the deal. Second, we urge legislators and other state health policy leaders to be prepared for HCMO to deny the merger and thus to contemplate the range of alternatives solutions, outlined below.

A. State Leaders Must Support HCMO's Comprehensive Review

Above we have laid out key concerns about the merger and the necessary elements of review. To summarize, HCMO must critically scrutinize the financial position of Legacy to understand the degree and nature of its financial distress. Insofar as this information can be made public, it will assist state leaders in devising alternative courses of action. And as HCMO applies its analytic framework, we urge that the analysis remain confined to the transaction at hand, without engaging speculative hypotheticals.

With respect to HCMO's assessment of the likely impact of the acquisition on prices and market share, HCMO should engage industry experts to properly define both the product and geographic market(s) of analysis, and to conduct a merger simulation, a diversion analysis, and / or a willingness-to-pay analysis. It is also essential that HCMO and the public understand how, specifically, OHSU's commitments to cost containment and expanded access and equity square with efficiency justifications (to attract more commercial patients) and its strategic priority to become a highly specialized tertiary and quaternary care center.

As important, state legislators and other policy leaders must provide the political support that HCMO needs to block the merger. As documented above, HCMO continues to be sued by

[72] Erin Fuse Brown, *To Oversee or Not to Oversee? Lessons from the Repeal of North Carolina's Certificate of Public Advantage Law*, MILBANK MEM'L FUND (2019), https://www.milbank.org/wp-content/uploads/2019/01/MMF-North-Carolina-COPA-Repeal-Issue-Brief-FINAL.pdf.

the Hospital Association of Oregon as it undertakes this review and generally appears to be in a defensive political position. Public support, as well as pursuit of alternatives to merger laid out below, will put HCMO on strong footing to render the correct decision.

B. State Leaders Should Contemplate Alternatives to Acquisition

As HCMO reviews the merger, we encourage policymakers to consider alternatives to acquisition. Notably, shortly after HCMO rendered its decision on preliminary review, it announced that it would review another proposed hospital merger—this between Samaritan and Santiam hospitals in the Salem region. There are also reports that Bay Area Hospital in Coos Bay is planning to sell to a private-equity operator, suggesting that Oregon may be on the cusp of a post-COVID hospital merger wave. Rather than opting for further consolidation, state leaders ought to proactively assess the nature of these markets and pursue options accordingly. Though not exhaustive, we propose potential solutions in three categories: short-term financial relief, change in ownership and governance, and structural financing reform.

- **Capital financing**: The legislature could provide a capital infusion to Legacy and similarly situated hospitals in Oregon, if financial distress is demonstrated. In California, the legislature recently set aside funding specifically for public and non-profit community hospitals that were expected to experience financial distress in the wake of the pandemic.[73] The state is now dispensing $300 million annually in zero-interest loans to preserve community hospitals. The Washington Legislature acted similarly, though it has set aside grant funding, rather than loans.[74] With the long legislative session forthcoming, the state could assemble similar financing models for Oregon's distressed hospitals.

- **Financing reform**: Legacy's "payer-mix" problem—that it treats a high proportion of low-income patients—won't be solved by industry consolidation. But it can and should be solved through public policy. Oregon, like many states, has a two-tiered system: low reimbursement for Medicaid patients systematically disadvantages providers like Legacy and incentivizes capital investment in affluent areas. Meanwhile, prices for commercial patients are unregulated and fuel out-of-control premiums and cost-sharing for Oregonians with commercial insurance. Rates are likely to increase well into the double-digits next year, far exceeding cost growth targets and further burdening pocketbooks. The legislature can address these problems with a package that significantly increases Medicaid reimbursement while capping prices on the commercial market. Rep. Rob Nosse (D-Portland) is currently drafting legislation that follows this framework. We urge the legislature to pursue it.

- **Alternative restructuring**: State leaders ought to contemplate the range of plausible contracting and ownership arrangements at Legacy. Instead of consolidation, perhaps OHSU and Legacy could enter into a shorter-term arrangement that is mutually

[73] Distressed Hospital Loan Program, CAL. DEP'T OF HEALTH CARE ACCESS & INFORMATION, https://hcai.ca.gov/facilities/health-facility-financing/distressed-hospital-loan-program/.
[74] Press Release, Wash. State Hospital Ass'n, Distressed Hospital Grant Applications Are Now Open, http://www.wsha.org/articles/distressed-hospital-grant-applications-are-now-open/.

beneficial, as has been done with other proposed mergers that were denied.[75] For example, if OHSU is indeed in need of capacity, it could enter into a lease agreement to use the beds at Legacy, in exchange for the capital infusion that Legacy needs. Alternatively, if Legacy ultimately needs a new owner, then state leaders must consider other buyers—including other non-profits, health and hospital districts, the county, or the state. A different non-profit, one that is not a main competitor in the region, would pose far fewer concerns about market share. If there are no private options, the legislature could examine regulation around receivership to ensure that Legacy's vital service lines are not closed and that any change in ownership is done in the public interest (though, to reiterate, Legacy seems far from this level of financial distress). Other states dealing with consolidation and closures are pursuing these options.[76]

VII. Conclusion

The state should deny the proposed transaction because the parties have failed to demonstrate that it meets HCMO's public interest standard of review. Though the parties portray the merger as a necessity, Legacy appears to be on stable financial footing. Indeed, the risks of approval outweigh those of denial: costs are likely to increase without improvements in quality or access, and approval risks creating an unregulated monopoly in the region. For these reasons, we encourage state leaders to publicly support HCMO in its comprehensive review and to consider legislative reforms that would address systemic issues underlying the financial distress of hospitals across Oregon.

We thank you for the opportunity to present our views on this proposed transaction. We would be happy to provide any additional expertise and information to HCMO and state health policy leaders if it would be helpful. Please direct all questions regarding this submission to Hayden Rooke-Ley, Brown University School of Public Health, 541-514-0223, hayden_rooke-ley@brown.edu.

[75] Letter from Crouse Health (Feb. 16, 2023), https://www.crouse.org/wp-content/uploads/2023/02/PS-InternalCEO-FEB14-2023-KB-31pm-SL-edit.pdf.

[76] Patrick Lohmann, *Activist group seeks state takeover of troubled Gallup hospital*, SOURCE NEW MEXICO, Sep. 19, 2022, https://sourcenm.com/briefs/activist-group-seeks-state-takeover-of-troubled-gallup-hospital/.