ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2017
Nos. 17-5024 (lead), 17-5028 (consolidated)

IN THE
United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,
—v.—
ANTHEM, INC. AND CIGNA CORP.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case No. 1:16-cv-1493 (Hon. Amy Berman Jackson)

BRIEF FOR AMICI CURIAE AMERICAN ANTITRUST INSTITUTE, CONSUMERS UNION, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, UNITED STATES PUBLIC INTEREST RESEARCH GROUP, UNIVERSAL HEALTH CARE FOUNDATION OF CONNECTICUT, SERGEANTS BENEVOLENT ASSOCIATION, CONNECTICUT CITIZEN ACTION GROUP, AND CALIFORNIA REINVESTMENT COALITION IN SUPPORT OF PLAINTIFFS-APPELLEES

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March 17, 2017

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INTEREST AND IDENTITY OF AMICI CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http:/www.antitrustinstitute.org. AAI has a long-standing interest in promoting competition in health care markets.

Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its

[1] Pursuant to FRAP 29(c)(5), *amici curiae* state that no party's counsel has authored this brief either in whole or in part; that no party or its counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than amici curiae and their counsel have contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

magazine, website, and other publications. Consumers Union has been active over the years in numerous policy issues affecting consumer rights in the marketplace, including health care policy and competition policy.

The Consumer Federation of America (CFA) is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works at the local and national level to advocate for the consumer's right to safe products and fairly and competitively priced goods and services across many categories including encouraging strong competition in the marketplace.

Consumer Action is a national non-profit organization that has worked to advance consumer literacy and protect consumer rights in many areas for over forty years. The organization achieves its mission through several channels, from direct consumer education to issue-focused advocacy.

U.S. PIRG, the federation of state Public Interest Research Groups ("U.S. PIRG"), works on behalf of American consumers, through public outreach to advocate for affordable health care and prescription drugs. U.S. PIRG's mission is to deliver result-oriented public interest activism that protects consumers, encourages a fair, sustainable economy, and fosters responsive, democratic government.

They are joined by consumer groups Universal Health Care Foundation of

Connecticut, Connecticut Citizen Action Group, and California Reinvestment Coalition, representing millions of consumers across the country, and union Sergeants Benevolent Association that represents approximately 12,000 active and retired sergeants of the New York City Police Department. All of these groups, some of them through the Coalition to Protect Patient Choice, testified before numerous state insurance commissioners, DOJ and state attorneys general in opposition to the Anthem Cigna merger.

The consumer groups and union are concerned that the mergers of Anthem and Cigna would substantially lessen competition in an already concentrated market and harm millions of consumers throughout the United States by raising premiums and fees and reducing choice. Many of the groups raised concerns with the Anthem-Cigna merger before insurance commissioners in eight states and with the Department of Justice, as well as offered testimony in state hearings. The organizations agree with the findings of the district court and support competition in health insurance markets, as elsewhere in the economy, as an effective tool for protecting consumers and workers.

INTRODUCTION AND SUMMARY OF ARGUMENT

As organizations that advocate for consumers and competition, amici submit this brief in support of the district court's ruling blocking the Anthem-Cigna merger. This ruling is soundly based on the evidence demonstrating that the

merger would cause significant harm to competition and consumers, depriving employers and their employees of the benefits of competition—greater meaningful choice, more affordable access, and increased quality.

Anthem's appeal does not challenge the district court's findings that Anthem's merger with Cigna would be anticompetitive (reducing the number of players in the market from four to three), and would likely result in higher premiums and fees for health insurance services paid by national employers based in states where the two companies compete, and by large employers in Richmond, Virginia.[2] Rather, Anthem argues that the district court erred in rejecting Anthem's efficiencies defense—its contention that the merged firm would be able to use its "increased volume" to reduce provider reimbursements, and that those savings would be passed to employers. Anthem claims that while the anticompetitive effects would concededly be in the hundreds of millions of dollars, the medical cost savings would be in the billions of dollars, which, Anthem claims,

[2] The government alleged harm to employers in two relevant markets: (1) "national accounts," i.e., those employers with more than 5000 employees that operate in more than one state and are based in one of the fourteen states where Anthem operates as the Blue Cross Blue Shield licensee, and (2) large group employers of more than 100 employees in 35 separate regions within those states. Op. 1-2. The court did not address the government's case in the local markets except for Richmond, Virginia.

the district court "improperly declined to consider." Anthem Br. 10.[3] But, in fact, the district court's rejection of Anthem's efficiencies defense was well considered, fully supported by the record, and fully in keeping with well-settled antitrust doctrine.

The court quite reasonably found that the supposed medical cost savings are neither merger-specific nor verified. In part, Anthem planned to lower its medical costs by switching Cigna customers to the Anthem product—with its lower reimbursement rates—but this "rebranding" effort is plainly not a merger-specific efficiency. *See* Op. 106 ("Rebranding is nothing more than marketing the Anthem product to existing Cigna customers and persuading them to buy it, and Cigna customers can do that now.").

Anthem also contended that it would be able to provide the Cigna "value-based product"—which emphasizes collaborative relationships with providers and is designed to improve health outcomes and reduce utilization—at Anthem's lower

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[3] Anthem asserted medical cost savings of $2.4 billion against $900 million in harm in the national accounts market, for a net savings of $1.5 billion. Anthem Br. 47-49. The government points out that Anthem's savings figure is problematic on its face because it involves patients served by non-national accounts. *See* Appellees' Br. at 38. Moreover, more than one quarter of the claimed amount came from fully insured accounts where pass-through is particularly in question. *Id.* at 58. With respect to Richmond, the court found that the likely harm would exceed Anthem's claimed medical cost savings even if such savings were credited in full. Op. 140.

reimbursement rates. Anthem Br. 5. But the court quite reasonably found that this "best of best" scenario is unverified (and implausible) in part because the lower reimbursement would degrade the quality of the Cigna product. Op. at 111 ("[T]he Cigna model depends on collaboration, and . . . takes a higher level of compensation to encourage and enable physicians and hospitals to participate in the arrangements that are aimed at lowering utilization and are central to the value based approach and medical cost trend guarantees that Cigna is selling"). Indeed, the court found that the Cigna model was a spur to pro-consumer innovation, and that this innovation would be harmed by eliminating Cigna as a competitor and further diminished by applying Anthem's rates to Cigna patients. *Id.* at 89-91.

Beyond challenging the court's factual findings, Anthem makes two legal arguments that we address below.

First, we address the argument by Anthem and its amici that the court applied too demanding a burden of proof for the claimed efficiencies. However, where, as here, a merger in a highly concentrated market substantially impairs competition, raises prices, and reduces innovation, the efficiencies defense appropriately requires "proof of extraordinary efficiencies." *Fed. Trade Comm'n*

v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001).[4] There is no basis to alter this appropriately rigorous and well-established standard of proof.

Second, we address Anthem's contention that the court's rejection of its efficiencies defense is not faithful to antitrust's consumer welfare objective. Anthem suggests that the medical cost savings would necessarily benefit consumers (i.e., employers) and thus must be credited. However, medical cost savings that are neither merger-specific nor verifiable do not benefit consumers. Moreover, the prospect that the merged company, through its enhanced bargaining power, may be able to "muscle" doctors and hospitals into reducing the reimbursement rates they would accept, Op. 130, does not advance consumer welfare—even if the savings are passed on to employers—if by doing so they are likely to impair the quality of an innovative health insurance product that keeps

[4] In *Heinz*, the merging parties sought to justify the merger of Heinz and Beech-Nut on a theory akin to Anthem's "best of best" theory. In that case the parties claimed that the merger would enable the merged firm to offer the premium Beech-Nut baby food product at the low Heinz value price. *See H.J. Heinz*, 246 F.3d at 722. The justification was stronger than the one here because the court accepted that there would be some real cost savings by shifting production from Beach-Nut's old, inefficient plant to Heinz's modern one, although it questioned the calculation of the amount. *Id.* at 721-22. Nonetheless the justification foundered on the issue of merger-specificity. The parties had failed to show why Heinz could not develop and offer a premium quality product without the merger. *Id.; see also id.* at 721 n.19. Here, the district court not only found that "there is nothing stopping Anthem from improving its wellness programs, or any other offerings that Cigna now does better, on its own," but that the merger was likely to impair its ability to do so. Op. 6, 111.

health care costs down in other ways, as the district court reasonably found would be the case here. Nor does "muscling" provider rates down help consumers if it involves the exercise of monopsony power, which would have the tendency to reduce the availability and quality of health care services.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE APPROPRIATE STANDARD FOR PROOF OF EFFICIENCIES

The district court's application of the standards for proving an efficiencies defense was fully in accord with the precedents of this Court and other circuits.

A. The Law Places a High Burden on the Proof of Efficiencies in a Highly Concentrated Market Where Anticompetitive Effects Are Likely

Anthem does not contest that it had the burden of demonstrating that its claimed efficiencies are merger-specific and verified, do not arise from anticompetitive reductions in output or service, and would offset the likely anticompetitive harm. *See* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 10 (2010) [hereinafter *2010 Merger Guidelines*]. Nonetheless Anthem contends that the district court inappropriately placed a greater burden on Anthem "to establish efficiencies than it required of the Division to prove its case." Anthem Br. 38. Anthem contends that this "asymmetrical" treatment of anticompetitive effects and claimed efficiencies is unsupported by

economics and is inconsistent with *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990). Anthem Br. at 45. Anthem's *amici* make a slightly different argument. They concede the Horizontal Merger Guidelines apply "a more exacting burden" to show efficiencies than anticompetitive effects, but argue that the medical cost savings should be treated not as efficiencies but as a "direct price effect of the merger." Amicus Br. of Antitrust Economists and Business Professors 5 ("Prof. Amicus Br.").

Both arguments are mistaken. In fact, the law appropriately places a high burden on the merging parties to demonstrate that claimed efficiencies will keep likely anticompetitive harm from occurring. As this Court said in *Heinz*, the "court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties" to the merger, and "high market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies." *H.J. Heinz*, 246 F.3d at 720-721.[5] A high burden is particularly warranted where, as here, the government's case does not merely rest on high market concentration, although that might be sufficient.

[5] *See also St. Alphonsus Med. Center-Nampa Inc. v. St. Luke's Health System, Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015) (stating that "defendant must clearly demonstrate that the proposed merger enhances rather than hinders competition because of the increased efficiencies" and that "proof of extraordinary efficiencies is required to offset the anticompetitive concerns in highly concentrated markets") (internal quotation marks omitted); *Fed. Trade Comm'n v. Penn State Hershey Med. Center*, 838 F.3d 327, 347, 349 (3d Cir. 2016) (noting that efficiencies defense requires "demanding scrutiny" and "extraordinary efficiencies").

Rather, the district court specifically found that the merger will likely raise prices and harm innovation, and did so based on a wide range of evidence. *See Promedica Health Sys., Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 571 (6th Cir. 2014) (noting appropriately higher difficulty of rebutting presumption of anticompetitive harm when Commission does not merely rest on market concentration "but instead discussed a wide range of evidence that buttresses" presumption of harm).

The high burden that *Heinz* places on the proof of claimed efficiencies used to justify a merger in a highly concentrated market is entirely consistent with *Baker Hughes*'s burden-shifting or sliding-scale framework, which *Heinz* expressly relied on. *See H.J. Heinz*, 246 F.3d at 715; *id.* at 725 ("As we said in *Baker Hughes*, 'the more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.'" (quoting *Baker Hughes*, 908 F.2d at 991)) (internal brackets omitted); *see also Chicago Bridge & Iron Co., N.V. v. Fed. Trade Comm'n*, 534 F.3d 410, 426 (5th Cir. 2008) (where "the *prima facie* case is very compelling, . . . the respondent's burden of production on rebuttal is also heightened"). *Baker Hughes*—which involved entry, not efficiencies—declined to require the defendants to make a "clear showing" to rebut the government's *prima facie* case where the government relies entirely on market concentration statistics. *Baker Hughes*, 908 F.2d at 992.

Anthem's *amici*'s argument for avoiding the burdens of establishing an efficiencies defense also does not withstand scrutiny. The amici argue that Anthem's claimed medical cost savings should not be treated under the "demanding standard" of the efficiencies rubric because the savings purportedly involve *direct* price reductions, rather than an *indirect* effect on price, like incremental cost reductions. Prof. Amicus Br. 2. Thus, they contend the savings should be treated on a par with the direct price increases alleged by the government. *Id.* at 3. This makes little sense. It posits that all the medical cost savings are going to be passed through to employers, which is something that appropriately must actually be proved under the efficiencies defense, and not simply presumed. Moreover, even if claimed efficiencies were to be passed through, that does not mean that the standards for proving the other important elements, including verifiability and merger-specificity, should be abandoned or lowered, particularly where, as here, any connection between obtaining the savings and preserving or promoting competition is tenuous at best. *See infra* IIB.

B. There is No Basis in Antitrust Legal Policy or Economics to Disturb Existing Standards for Proof of Efficiencies

The standards that courts impose for establishing the efficiencies defense are appropriate and fully supported by antitrust economics and policy. The good and very practical reasons are well explained in the Merger Guidelines. First,

"[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms." *2010 Merger Guidelines* § 10; *see generally* Thomas Greaney, *Efficiencies in Merger Analysis: Alchemy in the Age of Empiricism?*, *in* ECONOMIC THEORY AND COMPETITION LAW 191, 205 (Josef Drexl et al. eds., 2009) (noting "the multiple levels of uncertainty" involved in predicting efficiencies). Second, "efficiencies projected reasonably and in good faith by the merging firms may not be realized." *2010 Merger Guidelines* § 10. Indeed, numerous "studies have shown that merging firms often fail to obtain the efficiencies that they anticipate." American Antitrust Institute, *Mergers, Market Power, and the Need for More Vigorous Enforcement* at 14 (Preview of Am. Antitrust Inst. Merger Chapter of 2016 Presidential Transition Rep., posted Mar. 25, 2016) [hereinafter AAI, *Mergers*], http://www.antitrustinstitute.org/sites/default/files/mergerfinal.pdf (citing studies); *see also* Peter C. Carstensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L. J. 219, 256-57 (2015) (discussing studies that show that mergers between major firms tend to result in net losses for the buyer and its investors). These problems are compounded by the fact that companies can underestimate the costs of integrating, and that integration can lead to inefficiencies. *See* Diana L. Moss, *Delivering the*

Benefits? Efficiencies and Airline Mergers (November 21, 2013), *available at* https://ssrn.com/abstract=2547673).[6]

Easing the standards for proving an efficiencies defense would be particularly ill-advised in light of the *under*-enforcement of Section 7 of the Clayton Act against problematic mergers. As Professor Hovenkamp recently explained, "[r]ecent empirical literature suggests that merger policy today is under deterrent. That is, current enforcement policy is more likely to permit an anticompetitive merger than to prohibit a harmless one." Herbert Hovenkamp, *Appraising Merger Efficiencies*, GEO. MASON L. REV. (forthcoming 2017) (manuscript at 3), *available at* https://ssrn.com/abstract=2664266; *see also* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 155-56 (2015); AAI, *Mergers* at 25-29.

A permissive efficiencies defense would be especially harmful in today's concentrated health insurance industry, where studies of past mergers show a significant problem of under-enforcement leading to consumer harm. Two separate, retrospective economic studies on health insurance mergers found

[6] Indeed, in this case the district court found Anthem's claimed medical cost savings to be unverified partly because of numerous problems that it would likely encounter in achieving them, including resistance from providers to its plan to reduce their reimbursements, as well as the rift between the two companies. *See* Op. 8-10.

significant premium increases for consumers post-merger. One study found that the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States. Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,* 102 AM. ECON. REV. 1161, 1178 (2012). Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada. José R Guardado *et al.*, *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra,* 1(3) HEALTH MGMT., POL'Y & INNOV. 16, 24 (2013).

Economic evidence also shows that a dominant insurer can increase premium rates 75 percent higher than smaller insurers competing in the same state. Eugene Wang & Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), http://techscience.org/a/2015081104. There are also studies showing that, conversely, increasing competition does lead to lower premiums. *E.g.,* Steven Sheingold *et al.*, *Competition and Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums* (2015), https://aspe.hhs.gov/basic-report/competition-and-choice-health-insurance-marketplaces-2014-2015-impact-premiums.

II. THE DISTRICT COURT DID NOT REJECT A CONSUMER-WELFARE STANDARD

Anthem's claim that the district court improperly rejected a consumer-welfare standard is wrong. The claim is based on the fact that the court, having found the supposed medical cost savings to be neither merger-specific nor verified, also questioned whether the supposed cost savings are properly characterized as efficiencies at all. Anthem apparently and incorrectly views any medical cost savings, no matter how they are achieved, as a consumer benefit that must be credited against the merger's anticompetitive effects.

A. Consumer Welfare Is Not Advanced if Claimed "Efficiencies" Are Credited Without Being Both Merger-Specific and Verified

Even if Anthem's claimed medical cost savings would qualify as real efficiencies, the district court's findings that the cost savings are neither merger-specific nor verified means that they would *not* offset the anticompetitive harm, and consumer welfare would still be diminished by the merger. *Cf. Heinz*, 246 F.3d at 722 (to be merger-specific the efficiencies "cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor").

In other words, employers already have the option of obtaining the Anthem product with its low reimbursement rates, and the option of obtaining the Cigna "value" product with its generally higher reimbursement rates. Although Anthem

argued to the contrary, the district court correctly found that the merger in fact would likely not provide new options for consumers. Rather, in addition to finding that the merger would raise premiums and administrative fees, the district court found that the attempt to "muscle" providers into accepting lower reimbursement rates for Cigna customers would further impair consumer welfare by undermining and degrading the Cigna product. Op. 129 ("the merger would harm consumers by reducing or weakening the Cigna value based offerings which aim to reduce medical costs by reducing utilization and by engaging with, rather than simply reducing the fees paid to providers"). Consumers would essentially lose an option that they currently have. *Id.* at 125-26 ("customers and providers are likely to lose the opportunity to choose between contracts that emphasize cost as the number one factor and those that are more focused on the nature of the collaborative offering").

Consumer welfare involves more than just low prices viewed in isolation. *See Nat. Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (antitrust laws "reflect[] a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services"); *2010 Merger Guidelines* § 10 ("purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value"). So even accepting Anthem's premise that medical cost savings are a benefit, it is no bargain

for consumers if they come at the expense of reduced options and quality and the myriad consumer benefits that competition spurs.

B. Cognizable Efficiencies Must Improve Competition and Consumer Welfare in Order to Be Relevant to Evaluating a Merger

The fact that the ultimate goal of Section 7 of the Clayton Act—and of the antitrust laws in general—is to protect consumer welfare does not mean that *any* claimed benefit to consumers is automatically relevant to an anticompetitive merger, or other anticompetitive conduct. As the government aptly states, "Consumer welfare is the object, and preserving competition is the means chosen by Congress to achieve it." Appellees' Br. 26; *see Comcast Cable Communications, LLC v. F.C.C.*, 717 F.3d 982, 992 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[T]he goal of antitrust law . . . is to promote consumer welfare by protecting competition."). Thus, the district court was correct in requiring a connection between the claimed medical cost savings and the enhancement of competition, Op. 127, and doing so hardly constituted a "sweeping broadside against consumer welfare as the fundamental tenet of modern antitrust law," as Anthem asserts. Anthem Br. 11.

Indeed, the Horizontal Merger Guidelines' treatment of claimed efficiencies is premised on the recognition that claimed efficiencies are not independently relevant to the lawfulness of a merger; rather, they are relevant only insofar as they

are shown to enhance the merged firms' ability and incentive to compete, and thereby show that the merger ultimately is not anticompetitive. *See 2010 Merger Guidelines* § 10 (requiring that merging parties show "how each [efficiency] would enhance the merged firm's ability and incentive to compete" and noting that "the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers"). *Heinz* and the case law in other circuits reflect the primacy of promoting competition in evaluating claimed efficiencies.[7]

Anthem argues that the medical cost savings would help it compete, and characterizes the merger as "akin to a joint purchasing arrangement, as the new company can now negotiate with providers for the purchase of healthcare services based on a larger combined volume of members." Anthem Br. 30-31. But the district court found that Anthem's projected medical cost savings do not constitute an efficiency-enhancing volume discount (or a volume discount at all) because

[7] *See Heinz*, 246 F.3d at 720 (defendant "'must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers'" (quoting *Fed. Trade Comm'n v. University Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991)); *see also Penn State Hershey Medical Center*, 838 F.3d at 349 ("Remaining cognizant that the 'language of the Clayton Act must be the linchpin of any efficiencies defense,' and that the Clayton Act speaks in terms of 'competition,' we must emphasize that a 'successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.'" (quoting *St. Alphonsus*, 778 F.3d at 790)).

they are not based on the merged firm delivering any additional volume to providers; rather, they are to be obtained by applying existing discounts to existing patient volumes. Op. 109. Indeed, most providers belong to both networks, *see id*. at 94 n.29, and would be asked to provide "'an incremental discount with no corresponding incremental value (no new members).'" *Id.* at 112 (quoting Anthem official). Moreover, the court found "there was no evidence that further volume will change the per patient cost for any provider." *Id.* at 110.

C. Consumer Welfare Is Not Advanced If Cost Savings Result From the Exercise of Market Power

The district court concluded: "[S]ince the [proffered] efficiencies defense is based not on any economies of scale, reduced transaction costs, or production efficiencies that will be achieved by either the carriers or the providers due to the combination of the two enterprises, but rather on Anthem's ability to exercise the muscle it has already obtained by virtue of its size, with no corresponding increase in value or output, the scenario seems better characterized as an application of market power rather than a cognizable beneficial effect of the merger." Op. 130. The court was correct.

It is well settled that the exercise of market power to keep input prices down can be anticompetitive even if in the process it also results in lower output prices.[8] This is reflected in the fact that a buyer cartel that reduces input prices is illegal *per se*. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). And this is true even if the cartel passes along the benefits of the lower input prices to the buying public. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("The fallacy of this argument [that lowering prices should always be exculpatory] becomes clear when we recall that the central purpose of the antitrust laws . . . is to preserve competition.").

Moreover, "cost-cutting by itself is not a procompetitive justification" for a horizontal restraint in an input market. *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) (holding that NCAA rule restricting coaches' salaries violates rule of reason). As the Tenth Circuit explained,

> While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as

[8] In fact, under standard monopsony theory, output prices do *not* decrease if, as is often the case, the monopsonist also has market power in the output market; then input prices will decline, but so will output, and output prices will *increase*. *See, e.g.*, EINER ELHAUGE, UNITED STATES ANTITRUST LAW & ECONOMICS 653-54 (2d ed. 2011). Moreover, the exercise of monopsony power may be harmful to consumers even if output prices do decline. *Id.* Accordingly, a merger of buyers that enables them to reduce input prices because of the enhancement of monopsony power violates Section 7 independently of any possible impact on buyers downstream. *2010 Merger Guidelines* § 12.

> justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws.

Id. at 1023.

Given the absence of any real efficiency explanation, the district court was fully justified in concluding that Anthem's "volume-based" medical cost savings arise from the exercise of market power. *See* Op. at 130 & n. 57. Anthem does not seriously contest this conclusion. Rather, it contends that obtaining lower prices "cannot be monopsonistic because prices are being moved towards, not away from, the competitive level." Anthem Br. at 51. The district court correctly dispensed with this notion, finding that Anthem had failed "to supply the evidentiary basis needed to determine whether *any*, much less all, of the providers are operating so far above their costs that Anthem's hard bargaining can be viewed as a public service." Op. 129 (emphasis added).[9]

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[9] The district court aptly noted that Anthem was asking the court to make a policy judgment "about the appropriate allocation of healthcare dollars" between the insurers and their providers. Op. 128. Likewise, Anthem asks the court to choose whether lower provider reimbursement rates are always better for employers and their employees than higher rates that may result in lower, more thoughtful utilization and also better health outcomes. As the court suggested, these types of judgments are not appropriately decided by the courts in the guise of an efficiencies defense; rather they are best left to a competitive marketplace and to the considered judgments of the other branches of government. *Id.* at 128-29.

Anthem contends that it was up to the government to prove the exercise of monopsony power. Anthem Br. at 52. But whatever the merits of that argument might be with respect to the government's "buy side" case alleging that the merger is independently unlawful because it would lessen competition in the market for the purchase of healthcare services, *see* Op. 16, it has no bearing on this appeal. For purposes of the decision on appeal, Anthem had the burden of establishing the efficiencies defense, including that its claimed cost savings do not "arise from anticompetitive reductions in output or service," *Merger Guidelines* § 10, i.e., from the exercise of market power. It failed to do so.

CONCLUSION

For the foregoing reasons, and those stated in the government's brief, the district court's ruling should be affirmed. This merger would significantly harm competition and consumers, as the court concluded based on the strong evidence presented.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,063 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: March 17, 2017

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CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that a separate amicus brief was necessary because of the expedited schedule associated with this appeal and because of the need to present the unique perspective of consumers.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on March 17, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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