

NOTE

How to Minimize the Risk of Collusion in the Wake of the CMS Hospital Price Publication Mandate

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ABSTRACT

In 2019, the Centers for Medicare and Medicaid Services (“CMS”) finalized a rule requiring hospitals to publish their prices for certain goods and services with the goal of encouraging price competition among hospitals and increasing affordability by increasing consumers’ ability to compare prices. Despite the admirable ambitions that led to this rule, competition law has historically disfavored the exchange of prices among firms because it carries the potential danger of increasing firms’ ability to engage in illegal price-fixing arrangements. This is especially true in highly concentrated markets, which most hospitals enjoy. There is currently no legal remedy to offset this new risk because courts generally only view price transparency as meaningfully indicative of price-fixing when firms exchange price information voluntarily and directly. To solve this quandary, this Note proposes a new multistep analysis that courts can use to evaluate circumstantial evidence under section 1 of the Sherman Act. First, this Note recommends that courts classify evidence related to the characteristics of a market as “base factors.” Second, this Note recommends that the existence of significant base factors must enhance the probative value of any existing “plus factors,” here meaning circumstantial evidence of price-fixing that acts to discount alternative explanations for parallel prices. This multistep process would offset the risks posed by the new CMS rule without requiring any statutory or regulatory changes and without putting innocent firms at risk of being punished for the conditions of their markets.

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TABLE OF CONTENTS

INTRODUCTION	702
I. BACKGROUND	704
A. <i>An Overview of Sherman Act Section 1, Price-fixing, and Conscious Parallelism</i>	704
B. <i>An Introduction to Circumstantial Evidence, Plus Factors, and Twombly</i>	705
1. The Role of Circumstantial Evidence	705
2. The Definitional Dilemma	707
C. <i>A Brief History of Price-Exchange Jurisprudence</i>	709
II. PROBLEMS WITH THE STATUS QUO	711
A. <i>How the CMS Rule Altered the Previous Antitrust Paradigm</i>	712
B. <i>How the CMS Rule Provides the Advantages of Price Exchange Without the Adverse Inferences</i>	714
C. <i>How High Concentration Renders Hospital Markets More Susceptible to Collusion</i>	716
III. RECONFIGURING THE SHERMAN ACT SECTION 1 CIRCUMSTANTIAL EVIDENCE REGIME	718
A. <i>The Two-Step Formula</i>	719
B. <i>Operationalizing This Solution Without Codification</i>	723
C. <i>Why This Solution Is Novel</i>	724
IV. REFUTING POTENTIAL OBJECTIONS AND ALTERNATIVES	727
A. <i>Disproportionate Burdens on Certain Industries or Markets</i>	727
B. <i>Punishment for Compliance</i>	728
C. <i>A Stronger Focus on Mergers</i>	730
D. <i>Withdrawal of the CMS Rule</i>	730
CONCLUSION	732

INTRODUCTION

When the Department of Health and Human Services (“HHS”), through the Centers for Medicare and Medicaid Services (“CMS”), finalized the long-awaited Hospital Price Transparency rule in 2019 (“CMS Rule”), it noted that some comments to the proposed rule “cautioned that disclosure of . . . charges would increase, not decrease, healthcare costs in certain markets due to anticompetitive behaviors.”¹

¹ Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524, 65,547 (Nov. 27, 2019) (codified at 45 C.F.R. pt. 180 (2024)).

In response, HHS recognized that “some economists do not believe that healthcare price transparency will prevent rising costs due to the unique characteristics of the healthcare market.”² HHS conceded that “[s]everal studies of mandated price transparency in non-healthcare commodity markets have shown suppliers can use the information to their advantage in maximizing the prices they can charge in [certain] markets.”³ Yet HHS ultimately concluded that concerns about anticompetitive behavior need not interfere with the promulgation of the CMS Rule because “the federal government has laws and processes to investigate and act when entities engage in collusive or other anticompetitive practices.”⁴

This Note examines whether the CMS Rule can facilitate illegal price-fixing agreements and whether such “laws and processes”⁵ truly protect consumers from this risk. Part I of this Note introduces readers to the Sherman Act⁶ and price-fixing arrangements, which are commonly referred to as “cartels”; the phenomenon of conscious parallelism and how this behavior influences what types of circumstantial evidence are considered more probative than others; and the historical jurisprudence that forms the foundation of competition law’s disfavor toward price exchange.⁷ Part II then identifies key problems posed by the new status quo, including how the CMS Rule altered the preexisting antitrust paradigm related to hospital price sharing;⁸ how the CMS Rule provides hospitals the advantages of price exchange without the disadvantageous inferences that would come if hospitals had directly and voluntarily exchanged such information;⁹ and how high market concentration renders hospital markets more susceptible to collusion.¹⁰ Part III of this Note then proposes a solution that could harmonize the incongruities between the background economic principles of federal antitrust law and the CMS Rule while still supporting the goals of consumers, government authorities, and hospitals—a new evidentiary regime under which judges should evaluate circumstantial evidence of price-fixing.¹¹ Finally, Part IV of this Note analyzes and addresses any potential, unintended effects of such a solution.¹²

² *Id.* at 65,548.

³ *Id.*

⁴ *Id.* at 65,550.

⁵ *Id.*

⁶ 15 U.S.C. §§ 1–7.

⁷ See discussion *infra* Part I.

⁸ See discussion *infra* Section II.A.

⁹ See discussion *infra* Section II.B.

¹⁰ See discussion *infra* Section II.C.

¹¹ See discussion *infra* Part III.

¹² See discussion *infra* Part IV.

I. BACKGROUND

A. *An Overview of Sherman Act Section 1, Price-fixing, and Conscious Parallelism*

The Sherman Act, one of the three major statutes that encompass the foundation of federal antitrust law in the United States, operates as the backbone of American antitrust enforcement.¹³ Sherman Act section 1 states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹⁴ A horizontal price-fixing arrangement—often referred to as a price-fixing cartel¹⁵—is an agreement between two or more competitors to set prices.¹⁶ Horizontal price-fixing arrangements are among the contracts, combinations, or conspiracies that are illegal under the Sherman Act.¹⁷ Indeed, under section 1 of the Sherman Act, horizontal price-fixing agreements are not just illegal but are illegal per se,¹⁸ which means that plaintiffs alleging horizontal price-fixing agreements need only prove the existence of an agreement and an injury.¹⁹ Still, proving the existence of an agreement is not always easy.²⁰

Although agreements to engage in horizontal price-fixing are per se illegal, this does not mean that all parallel price setting is necessarily illegal: Inherent in the “contract, combination . . . or conspiracy”²¹ language of the Sherman Act is the necessary element of *agreement*.²²

¹³ See 15 U.S.C. §§ 1–2. The other two main federal statutes are the Clayton Antitrust Act of 1914, *id.* §§ 12–27, and Federal Trade Commission Act of 1914, *id.* §§ 41–58.

¹⁴ *Id.* § 1.

¹⁵ See, e.g., William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 394 (2011).

¹⁶ WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:11 (2023).

¹⁷ *Id.*

¹⁸ See, e.g., Kathleen Guilfoyle, *Uber's Efficiencies: A Modest Proposal for Limiting Use of Antitrust's Per Se Rule*, 91 U. COLO. L. REV. 313, 319 (2020) (“It is a bedrock principle of antitrust law that horizontal price-fixing is per se illegal.”). The per se approach to violations of the Sherman Act involves those violations which have been deemed so unjustifiable that “no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

¹⁹ See Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1585 (2021). Other alleged violations of the Sherman Act require more in-depth analyses. See, e.g., *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (explaining the difference between the judicial analyses necessary for per se versus other violations of Sherman Act section 1).

²⁰ Proving the existence of an antitrust injury is not always easy either, but the complex nature of antitrust standing generally falls outside the scope of this Note.

²¹ 15 U.S.C. § 1.

²² See, e.g., *Vick v. Henry Ford & Son*, 17 F.2d 919, 921 (9th Cir. 1927) (“A contract is an *agreement* . . .” (emphasis added)); *Comput. Identics Corp. v. S. Pac. Co.*, 756 F.2d 200, 205 (1st Cir. 1985)

To demonstrate this idea, imagine that two hospitals—Hospital *A* and Hospital *B*—enter an agreement to set prices together. Under Sherman Act section 1, this conduct is an illegal price-fixing arrangement. Now imagine that Hospitals *A* and *B* never entered into or communicated an agreement to set the same prices but have instead independently chosen to keep their prices at the same level because the hospitals each separately determined that doing so would prevent price competition. Because *A* and *B* made these choices independently, this conduct is not illegal and is instead permissible as “conscious parallelism.”²³ The legality of conscious parallelism poses significant consequences for the type of evidence that courts may consider in price-fixing cases.²⁴

B. An Introduction to Circumstantial Evidence, Plus Factors, and Twombly

1. The Role of Circumstantial Evidence

In Sherman Act section 1 cases, courts generally allow circumstantial evidence to stand in the place of “smoking gun” evidence of an illegal agreement.²⁵ Courts permit such evidence in order to avoid what is referred to as a “type two error,” which occurs in this context “when the law fails to prohibit genuinely harmful conduct.”²⁶ Because the Sherman Act distinguishes between illegal agreements to fix prices and the legal phenomenon of conscious parallelism, however, any such circumstantial evidence must establish that perceived parallel conduct does in fact come from an illegal agreement rather than independent decisions.²⁷ This reduces the risk of a “type one error,” meaning a situation in which firms are punished for price-fixing when they did not do so.²⁸ In the absence of clear evidence of an express agreement

(upholding jury instructions which read, in part, that “a combination is an *agreement*” (emphasis added)); *United States v. Colwell*, 764 F.2d 1070, 1072 (5th Cir. 1985) (“A conspiracy is an *agreement . . .*” (emphasis added)).

²³ See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“[C]onscious parallelism[] describes the process, not in itself unlawful, by which firms . . . set[] their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”).

²⁴ See discussion *infra* Section I.B.

²⁵ *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (“[E]ven in the absence of direct ‘smoking gun’ evidence, a horizontal price-fixing agreement may be inferred . . .”).

²⁶ THOMAS D. MORGAN & RICHARD J. PIERCE JR., *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 23 (7th ed. 2023).

²⁷ See, e.g., *White v. R.M. Packer Co.*, 635 F.3d 571, 576–77 (1st Cir. 2011) (“A tacit agreement—one in which only the conspirators’ actions, and not any express communications, indicate the existence of an agreement—is distinguish[able] from mere conscious parallelism . . .”).

²⁸ See MORGAN & PIERCE, *supra* note 26, at 23.

to collude, a plaintiff therefore must show both parallel pricing and certain “plus factors” to establish an unlawful agreement to fix prices.²⁹

The precise definition of a plus factor, as explored in the following Section of this Note, carries important implications.³⁰ Broadly speaking, however, a plus factor is circumstantial evidence that can support a plaintiff’s claim that two or more firms’ parallel prices are the result of an illegal price-fixing agreement.³¹ No all-encompassing list of potential plus factors exists, and no defined number of plus factors automatically transforms presumed lawful conscious parallelism into an unlawful agreement.³² Several types of conduct, however, have been consistently recognized as plus factors, including the exchange of price information.³³

Plus factors must be alleged as early as the pleading stage of Sherman Act section 1 litigation, as the Supreme Court established in *Bell Atlantic Corp. v. Twombly*.³⁴ *Twombly* involved a class action lawsuit in which the plaintiffs claimed that the defendant telephone companies had violated Sherman Act section 1 by agreeing to cooperate and participate in activities to prevent new market entrants.³⁵ The facts that the plaintiffs provided in support of this claim were based primarily on the defendants’ “parallel course of conduct” and “market circumstances” — basically, that an agreement could be inferred because defendants were “large firms dominating separate geographical segments of the market” and appeared to have acted in unison.³⁶ The district court dismissed the case for failure to state a claim, concluding that the plaintiffs had not adequately pleaded the existence of an agreement and emphasizing the need for “at least one ‘plus factor.’”³⁷ The United States Court of Appeals for the Second Circuit reversed this holding, determining that “plus factors are not *required* to be pleaded to permit an antitrust claim

²⁹ See Kovacic et al., *supra* note 15, at 395–96; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).

³⁰ See discussion *infra* Section I.B.2.

³¹ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 1433e, Lexis (database updated Sept. 2024) (“The inelegant term ‘plus factors’ refers simply to the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy.”).

³² See *In re Deere & Co. Repair Serv. Antitrust Litig.*, 703 F. Supp. 3d 862, 901 n.36 (N.D. Ill. 2023) (“[N]o exhaustive list [of plus factors] exists.”); Leslie, *supra* note 19, at 1587 (“No court has created a comprehensive list of plus factors . . .”).

³³ See, e.g., *Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522, 525–26 (9th Cir. 1987) (explaining that the “exchange of price information” is among the “series of ‘plus factors’ [that] have been considered”).

³⁴ 550 U.S. 544 (2007).

³⁵ *Id.* at 550–51.

³⁶ *Id.* at 565, 567.

³⁷ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

based on parallel conduct to survive dismissal.”³⁸ The Supreme Court sided with the district court, holding that in order for a plaintiff to adequately plead a section 1 claim, the complaint must contain “plausible grounds to infer an agreement.”³⁹ Allegations of parallel conduct therefore must be accompanied by evidence that indicates there was an actual agreement—not just two or more actors functioning independently.⁴⁰

In the post-*Twombly* world, a plaintiff typically must allege plus factors in the plaintiff’s complaint to survive a motion to dismiss.⁴¹ In other words, a plaintiff alleging a price-fixing conspiracy must somehow gain access to enough circumstantial evidence to survive dismissal before the plaintiff is entitled to engage in the discovery process. Consequently, plaintiffs seeking to ensure enforcement of section 1 of the Sherman Act face significant barriers to bringing a lawsuit.

2. *The Definitional Dilemma*

As alluded to in the previous Section, the dilemma of defining the term plus factor makes these barriers even less surmountable. This dilemma exists because the Supreme Court has never issued an authoritative definition of plus factor.⁴² This issue is perhaps best illustrated by the differences between the scholarship of two prominent antitrust law scholars, Professors Christopher Leslie and William Kovacic.

Professor Leslie’s research categorizes various plus factors based on an understanding of “why certain facts or actions are probative of price fixing” and accordingly encourages courts to assign the appropriate weight to such factors based on this notion.⁴³ The definition upon which Professor Leslie’s typology operates is “circumstantial evidence that indicates that the defendants colluded” or evidence that, “when viewed in conjunction with the parallel acts, can serve to allow a fact finder to infer a conspiracy.”⁴⁴

In comparison, Professor Kovacic’s research, which also emphasizes the importance of distinguishing the probative value of plus factors, defines plus factors more narrowly as “economic actions and outcomes,

³⁸ *Twombly*, 425 F.3d at 114 (emphasis in original).

³⁹ *Twombly*, 550 U.S. at 556.

⁴⁰ *Id.* at 557.

⁴¹ William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 597 n.24 (2017) (“After *Twombly*, most courts require allegations of plus factors on motions to dismiss for failure to state a claim.”).

⁴² See Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CALIF. L. REV. 683, 749–750 (2011) (“[T]here is no readily accepted principle that determines what counts as a sufficient plus factor and what does not”); see also Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1727 (2020) (“Courts . . . have not coalesced on a uniform definition of plus factors.”).

⁴³ Leslie, *supra* note 19, at 1619 (emphasis omitted).

⁴⁴ *Id.* at 1586 & n.14 (quoting *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987)).

above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.”⁴⁵ Professor Kovacic’s definition appears to be more in line with the *Twombly* district court, which defined a plus factor as evidence that “tends to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.”⁴⁶ This definition, although not expressly adopted by the Supreme Court, was quoted in the Court’s analysis on appeal.⁴⁷

The “tends to exclude” language used in *Twombly* was first used by the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁴⁸ and *Monsanto Co. v. Spray-Rite Service Corp.*,⁴⁹ an earlier pair of section 1 cases that involved an alleged predatory pricing conspiracy and an alleged vertical price-fixing conspiracy, respectively.⁵⁰ In *Matsushita*, the Court cited *Monsanto* for the proposition that “conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.”⁵¹ It cited *Monsanto* again for the proposition that “courts should not permit factfinders to infer conspiracies when such inferences are implausible.”⁵² This reasoning underscored the Court’s ultimate determination in *Matsushita*, and later *Twombly*, that evidence presented in a section 1 case “must ‘ten[d] to exclude the possibility’” that the defendants engaged in the alleged conduct for acceptable, legal reasons “rather than to implement an economically senseless conspiracy.”⁵³

Professor Leslie does not ignore *Twombly*’s “tends to exclude” language but rather contends that the phrase has been widely misinterpreted.⁵⁴ In Professor Leslie’s view, courts incorrectly consider whether *individual* pieces of circumstantial evidence exclude the possibility of independent action rather than the alleged circumstantial evidence in its totality.⁵⁵ In essence, the consequence of this definitional dilemma is

⁴⁵ See Kovacic et al., *supra* note 15, at 393.

⁴⁶ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

⁴⁷ *Twombly*, 550 U.S. at 552 (explaining that the lower court “understood that . . . plaintiffs must allege additional facts that ‘ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior’” (alteration in original) (quoting *Twombly*, 313 F. Supp. 2d at 179)).

⁴⁸ 475 U.S. 574 (1986).

⁴⁹ 465 U.S. 752 (1984).

⁵⁰ See *Matsushita*, 475 U.S. at 588; *Monsanto*, 465 U.S. at 755, 764.

⁵¹ *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764).

⁵² *Id.* at 593 (citing *Monsanto*, 465 U.S. at 762–64).

⁵³ *Id.* at 597–98 (alteration in original) (citing *Monsanto*, 465 U.S. at 764).

⁵⁴ See Leslie, *supra* note 19, at 1628–29 (concluding that many courts that have engaged in such analyses have contributed to “a wave of judicial error” because “the *Matsushita* legal standard should not be applied to individual plus factors one at a time”).

⁵⁵ *Id.*

a lack of clarity regarding whether every individual plus factor alleged must discount independent conduct or whether the term “plus factor” merely describes circumstantial evidence that can support a factfinder’s inference of a conspiracy if, in toto, such evidence tends to exclude independent conduct.

C. *A Brief History of Price-Exchange Jurisprudence*

Beginning in 1921, the Supreme Court issued a series of opinions on the issue of price exchange.⁵⁶ Issued prior to the plus-factor standard articulated in *Twombly*, these opinions focused on whether the exchange of prices and other information among competitors could be a violation of section 1 of the Sherman Act.⁵⁷ These cases form the foundation of the rationale behind why price exchange now serves as a plus factor.

The first of these cases is *American Column & Lumber Co. v. United States*.⁵⁸ There, 365 members of the American Hardwood Manufacturers’ Association had been engaged in an “Open Competition Plan” whereby the members shared information with each other about production, market conditions, and prices.⁵⁹ While this plan was in place, the prices of the product sold by the members rose “to an unprecedented extent.”⁶⁰ The Court determined that “[s]uch close cooperation . . . is plainly in theory, as it proved to be in fact, inconsistent with that free and unrestricted trade which [section 1 of the Sherman Act] contemplates shall be maintained.”⁶¹ In so ruling, the Court emphasized that “[g]enuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals.”⁶²

Just four years later, the Supreme Court decided *Maple Flooring Manufacturers Ass’n v. United States*.⁶³ In that case, the Court considered whether twenty-two members of a trade association violated section 1 of the Sherman Act by gathering and disseminating “information as to the quantity and kind of flooring sold and prices received by the reporting members,” among other information.⁶⁴ Despite noting that “[i]t cannot . . . be questioned that [this] data . . . could be made the basis for fixing prices,” the Court determined that there was insufficient

⁵⁶ See discussion *infra* notes 58–80 and accompanying text.

⁵⁷ See discussion *infra* notes 58–80 and accompanying text.

⁵⁸ 257 U.S. 377 (1921).

⁵⁹ *Id.* at 391–92.

⁶⁰ *Id.* at 409 (“[T]he increases in prices of varieties of oak, range from 33.3% to 296% during the year; of gum, 60% to 343%, and of ash, from 55% to 181%.”).

⁶¹ *Id.*

⁶² *Id.* at 410.

⁶³ 268 U.S. 563 (1925).

⁶⁴ *Id.* at 567.

evidence to find that the members had entered a price-fixing arrangement.⁶⁵ Among other factors, the Court considered that the members' names were anonymized, only past transactions were included, "[t]he statistics gathered by the defendant Association [were] given wide publicity," and the prices of the defendants' products "evidenced no abnormality."⁶⁶

That same day, the Supreme Court issued its opinion in *Cement Manufacturers Protective Ass'n v. United States*.⁶⁷ There, the Court similarly considered whether nineteen members of an association violated section 1 by gathering and disseminating information about credits, past contracts, freight rates, production, and other information.⁶⁸ The Court concluded that this did not violate the Sherman Act because the circumstances required such an exchange in order for the manufacturers to avoid being defrauded by contractors.⁶⁹ The Court also emphasized, among other factors, that there was no evidence that "prices were excessive or unreasonable" and that "[t]he Association's counsel was present at every [Association] meeting to steer the discussions away from illegal subjects."⁷⁰ Still, the Court noted that "it [can] be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price."⁷¹

The Supreme Court did not revisit this issue again until 1969, in *United States v. Container Corp. of America*.⁷² There, the Court considered whether infrequent but direct price exchange among competitors violated section 1 of the Sherman Act; specifically, the conduct involved

a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it.⁷³

Unlike in *Maple Flooring* and *Cement Manufacturers*, the Court determined that this conduct violated the Sherman Act.⁷⁴ It again noted that price sharing "tends toward price uniformity," has "an anticompetitive

⁶⁵ *Id.* at 572.

⁶⁶ *Id.* at 568, 573.

⁶⁷ 268 U.S. 588 (1925); see *Maple Flooring*, 268 U.S. at 563.

⁶⁸ *Cement Mfrs.*, 268 U.S. at 590–92.

⁶⁹ See *id.* at 603–04.

⁷⁰ See *id.* at 592, 601 (quoting the government's brief).

⁷¹ *Id.* at 604.

⁷² 393 U.S. 333 (1969).

⁷³ *Id.* at 335.

⁷⁴ *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 572 (1925); *Cement Mfrs.*, 268 U.S. at 603–04; *Container Corp.*, 393 U.S. at 337.

effect,” and “chill[s] the vigor of price competition.”⁷⁵ Importantly, the Court concluded by stating that “[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.”⁷⁶

Lastly, in 1978, the Court decided *United States v. U.S. Gypsum Co.*⁷⁷ There, several drywall manufacturers had engaged in “interseller price verification—that is, the practice . . . of telephoning a competing producer to determine the price currently being offered . . . to a specific customer.”⁷⁸ The manufacturers derived their defense from *Cement Manufacturers* and *Container Corp.*, arguing that their conduct fell under a “controlling circumstance exception” because they were attempting to comply with a different statute.⁷⁹ The Court disagreed with the manufacturers’ defense, contending that “exchanges of price information—even when putatively for purposes of [statutory] compliance—must remain subject to close scrutiny under the Sherman Act.”⁸⁰

These cases form the foundation—albeit a complex one—for the contention that competition law generally views price exchange among competitors unfavorably. For this reason, some scholars have even argued that price exchange among certain competitors should be treated as per se illegal under Sherman Act section 1.⁸¹ Generally, though, most courts now consider such conduct to be circumstantial evidence of a price-fixing agreement that qualifies as a plus factor.⁸²

II. PROBLEMS WITH THE STATUS QUO

This Part sets forth several major issues that, when combined, illustrate why the CMS Rule creates the perfect storm in which antitrust law fails to prohibit harmful conduct.⁸³ First, the CMS Rule altered the

⁷⁵ *Container Corp.*, 393 U.S. at 337.

⁷⁶ *Id.* at 338.

⁷⁷ 438 U.S. 422 (1978).

⁷⁸ *Id.* at 429.

⁷⁹ *Id.* at 429, 449. The “controlling circumstance” language comes from an explanation of the *Cement Manufacturers* case in *Container Corp.*, whereby the Court stated the attempt to prevent fraud was the “controlling circumstance” in the outcome. *Container Corp.*, 393 U.S. at 335.

⁸⁰ *U.S. Gypsum Co.*, 438 U.S. at 459.

⁸¹ See, e.g., Norman R. Prance, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55, 57–58 (1983).

⁸² See, e.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001) (“[T]he exchange of current price data is suspect . . .”); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (explaining that “whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy” is an important factor in a price-fixing case); *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1148 (8th Cir. 1979) (denying summary judgment because evidence of an exchange of price information contributed to the existence of a genuine issue of material fact as to whether a price-fixing conspiracy existed).

⁸³ In antitrust law, this failure is referred to as a “type two error.” See *supra* note 26 and accompanying text.

previous antitrust paradigm, which governed price exchange among providers since the 1990s and was crafted to harmonize the goals of both health providers and the antitrust authorities.⁸⁴ Second, the CMS Rule provides hospitals with many of the same advantages that would come from direct price exchange without the same adverse evidentiary inferences.⁸⁵ Third, hospitals generally exist in heavily concentrated markets, which better facilitate coordinated collusive behavior, including price-fixing.⁸⁶

A. *How the CMS Rule Altered the Previous Antitrust Paradigm*

On November 27, 2019, HHS, through CMS, finalized the CMS Rule.⁸⁷ The CMS Rule implements a section of the Public Health Service Act,⁸⁸ as amended by the Affordable Care Act (“ACA”),⁸⁹ which requires every United States hospital to create, update, and publicize a list of its “standard charges for items and services.”⁹⁰ CMS claims that more transparent information about the prices hospitals charge “will make it easier for consumers to shop and compare prices across hospitals and estimate the cost of care before going to the hospital.”⁹¹ The principle behind mandatory hospital price transparency is that consumers will be better informed and will then opt for lower-priced care, ultimately forcing hospitals to respond by lowering prices.⁹² A critical inquiry related to this principle is whether price transparency risks increasing coordinated anticompetitive behavior between hospitals.⁹³

⁸⁴ See discussion *infra* Section II.A.

⁸⁵ See discussion *infra* Section II.B.

⁸⁶ See discussion *infra* Section II.C.

⁸⁷ See 45 C.F.R. pt. 180 (2025).

⁸⁸ 42 U.S.C. §§ 201 to 300mm-64.

⁸⁹ Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 & 42 U.S.C.).

⁹⁰ 42 U.S.C. § 300gg-18(e).

⁹¹ *Hospital Price Transparency*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Sept. 10, 2024, 6:18 PM), <https://www.cms.gov/priorities/key-initiatives/hospital-price-transparency> [<https://perma.cc/Q28Z-PP3E>].

⁹² See, e.g., Morgan A. Muir, Stephanie A. Alessi & Jaime S. King, *Clarifying Costs: Can Increased Price Transparency Reduce Healthcare Spending?*, 4 WM. & MARY POL’Y REV. 319, 323 (2013); Lovisa Gustafsson & Shawn Bishop, *Hospital Price Transparency: Making It Useful for Patients*, COMMONWEALTH FUND: TO THE POINT (Feb. 12, 2019), <https://www.commonwealthfund.org/blog/2019/hospital-price-transparency-making-it-useful-patients> [<https://perma.cc/7PUY-F442>].

⁹³ Various other debates between economists, policymakers, and other stakeholders abound as to whether the CMS Rule will actually accomplish these goals. Although much of this economic debate is beyond the scope of this Note, interested readers should see generally Barak Richman, *Shopping for Healthcare: Can We Be Good Consumers?*, HEALTH MGMT., POL’Y & INNOVATION (Apr. 22, 2022), <https://hmpi.org/2022/04/29/shopping-for-healthcare-can-we-be-good-consumers/?pdf=3695> [<https://perma.cc/8ET7-LGJP>].

Prior to the CMS Rule, the exchange of price information among health care providers was governed by guidance issued by the enforcers of federal antitrust law—the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) Antitrust Division—in the “Statements of Antitrust Enforcement Policy in Health Care.”⁹⁴ The Statements, published in 1996, were crafted in part “to ensure that an exchange of price or cost data is not used by competing providers for discussion or coordination of provider prices or costs.”⁹⁵ Among other guidance, the Statements articulated what pricing, wage, and other information the antitrust authorities deemed acceptable for hospitals to share with one another.⁹⁶ In particular, the agencies emphasized the importance of ensuring such data was deidentified, at least three months old, and managed by a third party.⁹⁷ It is likely that this section of the Statements was meticulously crafted and based, in part, on an analysis of the nearly 100 years of caselaw related to price exchange.⁹⁸

In short, the Statements provided a roadmap for increasing price transparency in the health industry while avoiding increasing the risk of coordinated anticompetitive behavior.⁹⁹ Notably, such information was not so wide sweeping as that information now required to be published under the CMS Rule.¹⁰⁰ In 2023, after a brief window of time in which the CMS Rule and the Statements existed seemingly in conflict with one another, the FTC and DOJ withdrew the Statements—signaling the quiet but monumental shift ushered in by the CMS Rule.¹⁰¹

⁹⁴ U.S. DEP’T OF JUST. & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 43–52 (1996).

⁹⁵ *Id.* at 45.

⁹⁶ *Id.* at 49–51. As interpretive rules that did not go through the notice-and-comment rulemaking process that substantive or legislative rules do, the Statements were nonbinding. *See, e.g.,* *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (explaining that interpretive rules “do not have the force and effect of law” (quoting *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995))). Still, the Statements previously served as important references for courts and were a helpful signal of how the antitrust authorities, as the primary prosecutors or plaintiffs in antitrust cases, would exercise their enforcement discretion. *See, e.g.,* *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 630 (E.D. Mich. 2012) (finding it notable, if not dispositive, that defendants’ exchange of sensitive wage data failed to fall within the safety zones identified in the DOJ and FTC Statements).

⁹⁷ U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 94, at 50.

⁹⁸ For example, these factors are in near perfect alignment with those considered by the Supreme Court in *Maple Flooring*. *See supra* note 66 and accompanying text.

⁹⁹ *See* U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 94, at 3.

¹⁰⁰ *See* 45 C.F.R. §§ 180.40–60.

¹⁰¹ Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Health Care Enforcement Policy Statements (July 14, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements> [<https://perma.cc/F336-2MNR>] (explaining that “the statements no longer serve their intended purpose of providing accurate guidance to market participants”); Press Release, U.S. Dept. of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb.

B. How the CMS Rule Provides the Advantages of Price Exchange Without the Adverse Inferences

Plaintiffs can allege price exchange between competitors as a plus factor.¹⁰² This is in large part because price exchange can assist price-fixing cartels with the management or maintenance of their illegal agreement.¹⁰³ For example, imagine that the aforementioned Hospitals *A* and *B* continue to engage in their horizontal price-fixing arrangement. To ensure that neither party is cheating on the arrangement by lowering prices to pick up more consumers, each would want access to the other's prices.¹⁰⁴ In the absence of a transparent environment, they would need to directly exchange such information. This demonstrates why price exchange is often viewed as a plus factor.¹⁰⁵

No caselaw has discussed whether compelled publication of pricing information, without a direct exchange or a corresponding announcement, would be considered meaningful circumstantial evidence of a price-fixing agreement.¹⁰⁶ Of course, there are at least two strong rationales for why a court would refuse to do so. First, recall *Maple Flooring*,¹⁰⁷ wherein the Supreme Court emphasized, as part of its reasoning against finding the defendants guilty of a Sherman Act violation, that “[t]he statistics gathered by the defendant Association [were] given wide publicity.”¹⁰⁸ Although the Court did not plainly explain its logic behind this statement,¹⁰⁹ its reasoning is consistent with basic intuitions about the difference between an exclusive exchange between group members versus a wide publication of pricing information. Specifically, consider what inferences would be reasonable based on evidence that Hospitals

3, 2023), <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements> [<https://perma.cc/DCZ3-8BTL>].

¹⁰² See *supra* notes 33, 82 and accompanying text.

¹⁰³ Leslie, *supra* note 19, at 1597 (“Information exchanges facilitate price coordination and help cartel members monitor each other’s pricing to ensure that nobody is cheating by charging less than the cartel-fixed price. Empirically, firms in price-fixing cartels often share their pricing information with each other.”).

¹⁰⁴ See, e.g., *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993) (“Game theory teaches us that a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great.”).

¹⁰⁵ See *supra* notes 33, 82 and accompanying text.

¹⁰⁶ The act of “price signaling,” meaning to announce a current or future price through press release or another form, can serve as a plus factor, but neither this action nor the principles supporting its classification as a plus factor are sufficiently analogous to the CMS Rule. See, e.g., *In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446–47 (9th Cir. 1990) (holding that price change announcements, when combined with parallel conduct and other circumstances, could be “sufficient to support a reasonable and permissible inference of an agreement . . . to raise or stabilize prices”).

¹⁰⁷ See *supra* notes 64–66 and accompanying text.

¹⁰⁸ *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 573 (1925).

¹⁰⁹ See *id.*

A and B directly exchanged their pricing information versus evidence that the parties have merely complied with the CMS Rule by publishing their prices. Direct exchanges might suggest that the firms have a history of cooperation and an intent to collude,¹¹⁰ while compliance with the CMS Rule might instead suggest that the firms wish to avoid the civil monetary penalties imposed on those who fail to comply.¹¹¹

Second, recall the definitional dilemma surrounding plus factors.¹¹² Given the unsettled definition of plus factor, it is uncertain whether evidence of market characteristics—such as the imposition of a price publication mandate on an industry—would be relevant to a Sherman section 1 case. For example, under the more narrow definition of a plus factor such as the one proffered by Professor Kovacic, despite the fact that “certain industry structures . . . and market environments are conducive to and/or facilitate collusion,” such evidence does not necessarily constitute a plus factor because it is not the “operational criteria” relied upon by all courts “to determine whether a pattern of parallel conduct results from an agreement.”¹¹³ Accordingly, courts adhering to this definition do not ascribe meaningful weight to such evidence.¹¹⁴

Meanwhile, under Professor Leslie’s broader definition, a plus factor *can* encompass market characteristics such as “market concentration, high entry barriers, inelastic demand, an absence of substitutes, and markets with homogenous products.”¹¹⁵ The United States Court of Appeals for the Third Circuit and courts within its jurisdiction, for example, claim to subscribe to this definition.¹¹⁶ These courts consider three categories of plus factors, the first of which includes “evidence that the defendant had a motive to enter into a price fixing conspiracy.”¹¹⁷

¹¹⁰ Recall, for example, the Supreme Court’s skepticism in *American Column* regarding whether “[g]enuine competitors” would voluntarily disclose such information. See *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410 (1921) (emphasis added).

¹¹¹ See *Enforcement Actions*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Feb. 6, 2025, 4:49 PM), <https://www.cms.gov/priorities/key-initiatives/hospital-price-transparency/enforcement-actions> [<https://perma.cc/UC4F-38WD>] (publicizing the civil monetary penalty notices that have been issued for violations of the CMS Rule).

¹¹² See *supra* Section I.B.2.

¹¹³ Kovacic et al., *supra* note 15, at 405.

¹¹⁴ See, e.g., *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1305 (N.D. Ga. 2002), *aff’d sub nom. Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003) (“Plaintiffs’ first four factors . . . are simply statements of the characteristics of an oligopolistic market and, thus, are not plus factors that tend to exclude the likelihood that Defendants were engaged in competitive conduct.”).

¹¹⁵ Leslie, *supra* note 19, at 1590.

¹¹⁶ See, e.g., *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 391–92 (3d Cir. 2015); *In re Ductile Iron Pipe Fittings (“DIPF”) Direct Purchaser Antitrust Litig.*, No. 12-711, 2014 WL 3971620, at *7–8 (D.N.J. Aug. 13, 2014).

¹¹⁷ *Chocolate Confectionary*, 801 F.3d at 398.

Such evidence includes that which demonstrates “that the industry is conducive to oligopolistic price fixing,” such as “the structure of the market.”¹¹⁸ However, even these courts—bound by *Twombly* precedent and cognizant that market-structure evidence does not wholly discount the possibility of conscious parallelism¹¹⁹—have simultaneously emphasized that “non-economic evidence of a conspiracy [is] the most important plus factor.”¹²⁰

By consequence of these two considerations, industry-wide price transparency—particularly when mandated by an agency such as CMS—either would not be classified by courts as a plus factor or would not serve as a particularly meaningful one. Still, mandated price transparency carries nearly the same benefits as direct price exchange; firms still have access to each other’s prices, which can facilitate both coordination and monitoring to ensure cartel members adhere to the terms of the conspiracy.¹²¹ The difference is that conspiring firms no longer need to directly communicate with each other, which eliminates an important evidentiary trail for prosecutors or plaintiffs and the availability of the adverse inferences that direct communication would normally have carried.

C. *How High Concentration Renders Hospital Markets More Susceptible to Collusion*

There is another factor crucial to this Note’s analysis of the potential anticompetitive effects of the CMS Rule: the vast amount of literature from courts and scholars that explains the higher likelihood of cartel success in highly concentrated or oligopolistic markets,¹²² meaning markets “dominated by a few firms.”¹²³ Imagine that Hospitals *A* and *B*

¹¹⁸ See *Flat Glass*, 385 F.3d at 360.

¹¹⁹ See *id.*; *Chocolate Confectionary*, 801 F.3d at 398 (explaining that evidence of the structure of the market is “neither necessary nor sufficient to preclude summary judgment”).

¹²⁰ *Chocolate Confectionary*, 801 F.3d at 398; cf. Jeffrey Manns, *The Case for Preemptive Oligopoly Regulation*, 96 IND. L.J. 751, 762 (2021) (contending that the Third Circuit, among other courts, merely “give[s] lip service to the role of economic factors” while basing rulings on other evidence).

¹²¹ See *supra* note 103 and accompanying text.

¹²² See, e.g., Gabriel Hertzberg, *Antitrust Enforcement in Electronic B2B Marketplaces: An Application of Oligopoly Theory and Modern Evidence Law*, 28 RUTGERS COMPUT. & TECH. L.J. 463, 472 (2002) (“The structure of an industry is recognized in modern economic theory as the central theme in determining probability of price coordination.”); *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (“Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers.”); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 457 (“Especially in oligopolistic industries . . . the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements.”); *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001) (“Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries.”).

¹²³ DONALD RUTHERFORD, *ROUTLEDGE DICTIONARY OF ECONOMICS* 108 (3d ed. 2012) (defining “concentration”).

want to maintain uniform prices for the purpose of avoiding competition and keeping prices high. This scheme would be easily undermined if there was a third firm, Hospital *C*, which refused to participate and kept its prices lower than Hospitals *A* and *B*. To maintain their success, Hospitals *A* and *B* would need to recruit Hospital *C* and keep it in line with their agreement. Now imagine there were twenty-six firms—Hospitals *A* through *Z*—to recruit and monitor: Such a cartel would be far harder to facilitate than one between just Hospitals *A* and *B*. This is an elementary illustration of why highly concentrated markets are viewed as more susceptible to collusion.

Importantly, hospital markets have grown highly and increasingly concentrated.¹²⁴ A recent study of data from 2010 through 2016 found that ninety percent of metropolitan statistical areas (“MSAs”) were highly concentrated hospital markets.¹²⁵ The study measured market concentration using the Herfindahl-Hirschman Index (“HHI”),¹²⁶ which antitrust enforcement authorities commonly use.¹²⁷ At the time this study was conducted, when a market’s HHI fell between 1,500 and 2,500, antitrust enforcement authorities deemed it “moderately concentrated.”¹²⁸ If the HHI was in excess of 2,500 points, the enforcement agencies considered that market to be “highly concentrated.”¹²⁹ In this report, ninety percent of MSAs studied in 2016 had a hospital HHI of more than 2,500.¹³⁰ Other reports measuring hospital concentration using the HHI have supported these findings.¹³¹ In sum, a large number

¹²⁴ See, e.g., Brent D. Fulton, *Health Care Market Concentration Trends in the United States: Evidence and Policy Responses*, 36 HEALTH AFFS. 1530, 1534 (2017).

¹²⁵ *Id.* at 1533.

¹²⁶ *Id.*

¹²⁷ U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 2.1 (2023) [hereinafter 2023 MERGER GUIDELINES], <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf> [<https://perma.cc/DL3U-PRD6>] (“The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index (‘HHI’).”); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010) [hereinafter 2010 MERGER GUIDELINES], <http://ftc.gov/os/2010/08/100819hmg.pdf> [<https://perma.cc/9RYK-FN9S>] (“The Agencies often calculate the Herfindahl-Hirschman Index (‘HHI’) of market concentration.”).

¹²⁸ 2010 MERGER GUIDELINES, *supra* note 127, § 5.3. The agencies’ understanding of the HHI levels has since shifted: The 2023 Merger Guidelines now deem a market “highly concentrated” if the HHI is above 1,800. See 2023 MERGER GUIDELINES, *supra* note 127, § 2.1. Under this new understanding, hospital markets are even more concentrated than previously reported.

¹²⁹ 2010 MERGER GUIDELINES, *supra* note 127, § 5.3.

¹³⁰ See Fulton, *supra* note 124, at 1533. Further, this research warned that the reported concentrations “may still be understated” because the definition of hospital may not recognize certain affiliations among hospitals, such as the way some “operate as a system when negotiating with payers.” *Id.*

¹³¹ See, e.g., Tina Reed, *Report: 3 in 4 Hospital Markets Are Now ‘Highly Concentrated,’ FIERCE HEALTHCARE* (Sept. 17, 2019, 12:01 AM), <https://www.fiercehealthcare.com/hospitals-health-systems/report-three-four-hospital-markets-are-now-highly-concentrated> [<https://perma.cc/9RYK-FN9S>].

of hospitals exist in markets that are concentrated enough to present increased risks of coordinated behavior.

Adding fuel to the fire, consideration of whether a market is highly concentrated carries a similar evidentiary problem as price transparency: Highly concentrated markets not only better facilitate the establishment and maintenance of illegal price-fixing, but also better facilitate legal conscious parallelism.¹³² This means that the fact that a market is highly concentrated either does not logically serve as a plus factor or does not serve as a meaningful one¹³³—just as agency-compelled price transparency among competitors either does not qualify as a plus factor or does not serve as a meaningful one.¹³⁴

To summarize, a government mandate to improve access to hospitals' price information makes it easier for hospitals to participate in a price-fixing cartel.¹³⁵ This is particularly true for hospitals in those ninety percent of MSAs deemed concentrated markets.¹³⁶ Moreover, neither evidence of market concentration nor price transparency is a meaningful plus factor.¹³⁷ Ergo, hospitals that wish to engage in a price-fixing cartel would enjoy several advantages in forming and maintaining such an agreement without having to face the same disadvantages as other types of entities because of the limited inferences that may be taken from purely environmental conditions. Taken all together, these circumstances present how hospitals could fix prices and get away with it.

III. RECONFIGURING THE SHERMAN ACT SECTION I CIRCUMSTANTIAL EVIDENCE REGIME

This Note proposes a simple but novel solution: a two-step formula to assess certain kinds of circumstantial evidence relevant to Sherman Act section 1 cases. This new regime would enable courts to better consider whether the characteristics of a given market facilitate price-fixing arrangements, as well as better contextualize other types of evidence. Specifically, this Note proposes that evidence of market structure and other characteristics should be deemed a “base factor,” as defined

cc/39Z7-QPEL] (highlighting the findings of a recent “Healthy Marketplace Index” report by the Health Care Cost Institute).

¹³² Judge Posner, writing for the Seventh Circuit, explained this concept as follows: “[I]f a small number of competitors dominates a market, they will find it safer and easier to fix prices But the other side of this coin is that the fewer the firms, the easier it is for them to engage in [conscious parallelism]” *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 871 (7th Cir. 2015).

¹³³ *Id.* (explaining that, for this reason, the fact that a market contains a “small number of firms . . . could not be thought dispositive”).

¹³⁴ *See supra* notes 113–20 and accompanying text.

¹³⁵ *See supra* Section II.B.

¹³⁶ *See supra* notes 124–31 and accompanying text.

¹³⁷ *See supra* notes 113–20, 132 and accompanying text.

herein.¹³⁸ Such evidence should include, among other potential base factors, the extent to which prices in a given market are transparent—encompassing hospital compliance with the CMS Rule.¹³⁹ Moreover, the finding of sufficient base factors, in the proper circumstances, should allow for the finding of fewer plus factors to at least reach the threshold of plausibility required for a complaint to meet *Twombly*'s pleading requirements, thus allowing antitrust enforcement authorities and other plaintiffs to bring actions against bad actors with relatively more ease.¹⁴⁰ This solution would offset the problems presented by the CMS Rule.¹⁴¹

A. *The Two-Step Formula*

The first step of the proposed solution requires evidence alleged in a Sherman Act section 1 case that relates to market characteristics and structure to be deemed a base factor. The purpose of a base factor would be to explain the ways in which the relevant market in a section 1 case is more susceptible to cartelization than other markets. Courts should view plaintiffs that successfully allege base factors as having demonstrated how a price-fixing arrangement is economically plausible. A key distinction between a plus factor and a base factor under this analysis would be that plus factors must “tend to exclude” the possibility of independent conduct while base factors need not.¹⁴²

The first step of this solution is not without support: Consider Judge Posner's explanation of relevant circumstantial evidence from *In re High Fructose Corn Syrup Antitrust Litigation*.¹⁴³ There, Judge Posner articulated that although market characteristics are separate from evidence that indicates an illegal price-fixing arrangement, such evidence is still relevant for the purpose of determining whether such an arrangement is plausible:

The evidence upon which a plaintiff will rely will usually be . . . of two types—economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types . . . : *evidence that the structure of the market was such as to*

¹³⁸ See discussion *infra* Section III.A.

¹³⁹ See discussion *infra* Section III.A.

¹⁴⁰ See discussion *infra* Section III.A.

¹⁴¹ See discussion *infra* Section III.A.

¹⁴² See *supra* notes 46–47 and accompanying text.

¹⁴³ 295 F.3d 651 (7th Cir. 2002).

*make secret price fixing feasible . . . and evidence that the market behaved in a noncompetitive manner.*¹⁴⁴

Additionally, the principles espoused by the first step of this solution are supported by a different area of antitrust law—merger law. Both the FTC and DOJ Joint Merger Guidelines of 2010 and Merger Guidelines of 2023 detail the ways in which the federal antitrust authorities evaluate proposed mergers for violations of the Clayton Act,¹⁴⁵ a statute which aims to prohibit mergers where the result “may be substantially to lessen competition, or to tend to create a monopoly.”¹⁴⁶ These antitrust policies were largely crafted around the same principles that support inclusion of a base factor analysis¹⁴⁷—and both sets of Merger Guidelines articulate several factors that this Note concludes should be considered base factors.¹⁴⁸ Specifically, section 7 of the 2010 Merger Guidelines focuses on analyzing proposed mergers for “whether a market is vulnerable to coordinated conduct,” meaning the degree to which the proposed merger, once completed, would create an environment in which it is easier for firms to engage in *either* illicit price-fixing arrangements or conscious parallelism.¹⁴⁹ Section 2.3, or “Guideline 3,” of the 2023 Merger Guidelines focuses on “market structures [that are] conducive to . . . coordination.”¹⁵⁰

Notably, price transparency is among the first factors listed in section 7 of the 2010 Merger Guidelines.¹⁵¹ Other factors included

¹⁴⁴ *Id.* at 655 (emphasis added). Notably, Professor Kovacic has praised this opinion for being among the “most sophisticated [analyses] of the probative value of various forms of evidence, direct and circumstantial, offered to establish the existence of concerted action” and contrasted it with other courts that “have failed . . . to establish an analytical framework.” Kovacic et al., *supra* note 15, at 406 & n.63.

¹⁴⁵ 15 U.S.C. §§ 12–27.

¹⁴⁶ See 2010 MERGER GUIDELINES, *supra* note 127, § 1 (quoting the Clayton Act, 15 U.S.C. § 18); accord 2023 MERGER GUIDELINES, *supra* note 127, § 1. This Note references both sets of Merger Guidelines with the understanding that the 2023 Merger Guidelines are newer and somewhat controversial, possessing a staying power about which one can currently only speculate. See, e.g., Robert Freedman, *Merger Guidelines Will Likely Go Away Under Trump*, LEGAL DIVE (Nov. 7, 2024), <https://www.legaldive.com/news/merger-guidelines-go-away-under-trump-second-term-ftc-doj-antitrust-law/732309/> [<https://perma.cc/2CT5-S8B9>].

¹⁴⁷ Courts have emphasized that merger law itself “rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to . . . achieve profits above competitive levels.” *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 77 (D.D.C. 2011) (quoting *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009)).

¹⁴⁸ See 2010 MERGER GUIDELINES, *supra* note 127, § 7; 2023 MERGER GUIDELINES, *supra* note 127, § 2.3.

¹⁴⁹ 2010 MERGER GUIDELINES, *supra* note 127, § 7 (“Coordinated interaction can involve the explicit negotiation of . . . conduct [that] typically would itself violate the antitrust laws [A]lternatively [it] can involve parallel accommodating conduct not pursuant to a prior understanding . . . [and] not otherwise condemned by the antitrust laws.”).

¹⁵⁰ 2023 MERGER GUIDELINES, *supra* note 127, § 2.3.

¹⁵¹ 2010 MERGER GUIDELINES, *supra* note 127, § 7.2.

in the 2010 Merger Guidelines as being determinative in a market's vulnerability to coordinated conduct include the relative homogeneity of relevant products, customers' ability to easily switch between suppliers, and elasticity of demand, among others.¹⁵² Similarly, section 2.3.B of the 2023 Merger Guidelines lists "Market Observability" as a potential factor, which "can refer to the ability to observe prices . . . of other firms."¹⁵³ Additional factors listed in the 2023 Merger Guidelines include high market concentration, prior attempts to coordinate, maverick elimination, and aligned incentives, among others.¹⁵⁴ Evidence related to any of these market characteristics should serve as base factors, and antitrust authorities and courts should consider a high degree of price transparency—in the case of hospitals, a high degree of compliance with the CMS Rule—as a base factor.

This new classification would remedy the definitional dilemma surrounding plus factors, under which evidence of market structure is not weighed in a uniform or meaningful way;¹⁵⁵ as explained previously, courts currently classify this evidence in one of two ways—either as the weakest type of plus factor and one that need not even be alleged, or evidence which does not rise to the level of a plus factor at all.¹⁵⁶ In contrast, by proposing a new class of circumstantial evidence that serves a purpose different from but related to plus factors, this Note proposes a middle ground between two of the leading definitions of a plus factor.

Base factors would serve the same helpful purpose identified by Professor Leslie and the Third Circuit and supported by the Merger Guidelines of 2010 and 2023—characterizing markets as conducive to collusion¹⁵⁷—while avoiding the dangerous implication that mere market characteristics represent evidence that tends to exclude independent conduct.¹⁵⁸ As cautioned above, the same base factors that more easily facilitate illegal price-fixing also more easily facilitate conscious parallelism, which is legal.¹⁵⁹ Under this formula therefore, consistent with *Twombly*, no amount of adequately pleaded base factors would allow a plaintiff to meet *Twombly*'s pleading requirements without at least one plus factor.¹⁶⁰

The second step of this Note's two-step formula requires that a sufficient showing of base factors must serve to amplify the effect of any existing, adequately pleaded plus factors—as defined by Professor

¹⁵² *Id.*

¹⁵³ 2023 MERGER GUIDELINES, *supra* note 127, § 2.3.B.

¹⁵⁴ *Id.* § 2.3.A–B.

¹⁵⁵ *See supra* notes 113–20, 132 and accompanying text.

¹⁵⁶ *See supra* notes 113–20, 132 and accompanying text.

¹⁵⁷ *See supra* notes 114–16, 146–47 and accompanying text.

¹⁵⁸ *See supra* notes 142–44 and accompanying text.

¹⁵⁹ *See supra* notes 23, 132, 147 and accompanying text.

¹⁶⁰ *See supra* notes 33–41 and accompanying text.

Kovacic and the *Twombly* district court.¹⁶¹ This step would ensure that base factors do not just recognize economic plausibility but also account for its value. Despite its novelty, Sherman Act jurisprudence supports this second step of the proposed solution. For example, step two accords with the Supreme Court's reasoning in *Matsushita*, which did not just weigh the impracticality of successfully operating a predatory pricing agreement but placed this analysis at the forefront of its determination that the defendants were not liable for a violation of Sherman Act section 1.¹⁶² Additionally, Judge Posner, a leading antitrust authority,¹⁶³ has suggested that the evidentiary burdens in antitrust cases should vary with the plausibility of collusive conduct.¹⁶⁴ According to this approach, when market characteristics make collusive conduct more plausible, plaintiffs need less direct evidence to support their claims.¹⁶⁵ Allowing base factors to enhance the weight of plus factors would bring this notion to fruition.

Overall, this two-step analysis would allow courts to consider evidence of certain market characteristics and structure in a more useful, accurate, and uniform way when analyzing circumstantial evidence of price-fixing. In practice, establishing a price-fixing agreement through circumstantial evidence under this formula would (1) require a plaintiff to demonstrate parallel conduct, (2) require a plaintiff to demonstrate plus factors to negate the possibility of a defendant being held liable for mere conscious parallelism, and (3) allow plaintiffs to enhance the value of plus factors by alleging base factors.¹⁶⁶

Together, the two halves of this solution would correct antitrust law's failure to stop the harmful conduct allowed by the new CMS Rule. Return to imagining the conduct of Hospital *A* and Hospital *B*. Because of the CMS Rule, these entities would no longer need to directly exchange price information to maintain their price-fixing cartel.¹⁶⁷ Still, these hospitals will likely leave behind other clues if the hospitals are actually engaging in price-fixing rather than independently motivated conscious parallelism, such as frequent, private meetings between representatives.¹⁶⁸ Under this Note's proposal, the existence of base factors would bolster these few clues that are left behind, making it

¹⁶¹ See *supra* notes 45–46 and accompanying text.

¹⁶² See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

¹⁶³ See, e.g., C. Scott Hemphill, *Posner on Vertical Restraints*, 86 U. CHI. L. REV. 1057, 1057 (2019) (noting “Posner’s extraordinary influence . . . [on] antitrust law”).

¹⁶⁴ *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002).

¹⁶⁵ See *id.* at 661, 666 (reversing a district court and rejecting a defendant’s motion for summary judgment in a price-fixing case in part because the high fructose corn syrup market was conducive to price-fixing and made the plaintiff’s charges plausible).

¹⁶⁶ These two requirements are derived from the section 1 pleading standard mandated by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

¹⁶⁷ See *supra* Section II.B.

¹⁶⁸ See *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 409–12 (1921).

moderately less difficult to bring a claim against Hospitals *A* and *B*. For example, if Hospitals *A* and *B* have parallel prices, are the only two hospitals in the market, and both currently comply with the CMS Rule, courts would be required to recognize that their frequent, private meetings could be probative of a price-fixing arrangement.

Alternatively, if these same base factors were present yet there were no such meetings or other plus factors, this proposal would allow courts to recognize that the market concentration and price transparency are likely probative of nothing. Further, if Hospitals *A* and *B* had parallel prices but existed in a competitive market, or in a market where few hospitals complied with the CMS Rule, this proposal would require courts to recognize that it is altogether less plausible that meetings between representatives of Hospitals *A* and *B*, regardless of their privacy or frequency, could serve to maintain a successful price-fixing cartel. Put another way, this proposal recognizes that bits of circumstantial evidence are like pieces in a puzzle: It is easier to determine what the puzzle presents when more pieces are snapped into their proper place, even though some pieces independently will not “tend to exclude” the possibility of independent action.¹⁶⁹

B. Operationalizing This Solution Without Codification

As an added benefit, this solution would not require codifying new statutory language to become operational. This solution is purely interpretive, and the unique character of the Sherman Act enables the change in interpretation without codification. As the Supreme Court explained in the 1970s, the Sherman Act is “unlike most traditional criminal statutes [because it] does not, in clear and categorical terms, precisely identify the conduct which it proscribes.”¹⁷⁰ For this reason, the Sherman Act functions like common law.¹⁷¹ Courts’ interpretations of the Sherman Act thus have evolved substantially over the years as courts allow contemporary economic theories to influence antitrust jurisprudence, like the moon’s gravitational pull influences the tides.¹⁷²

¹⁶⁹ See *supra* notes 46–47, 149 and accompanying text.

¹⁷⁰ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

¹⁷¹ Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *YALE L.J.* 175, 180 (2021) (“The widely held conventional wisdom is that the Sherman Act is the paradigmatic ‘common-law statute,’ entailing a delegation of lawmaking power by Congress to the courts that spans the field of antitrust.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 *U. CHI. L. REV.* 533, 544 (1983) (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”).

¹⁷² See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” (alteration in original) (quoting 15 U.S.C. § 1)).

Just as the Supreme Court shifted its interpretation of the Sherman Act from classifying price dissemination as an outright violation of section 1 in *American Column*¹⁷³ to the newer plus-factor test articulated in *Twombly*,¹⁷⁴ the addition of this Note's proposed analysis could be brought into the fold without the requirement of new statutory language.

C. *Why This Solution Is Novel*

No court has attempted the two-step solution proposed in this Note. Courts have indeed tried to classify circumstantial evidence and weigh it accordingly,¹⁷⁵ but none have stratified or weighed such evidence in the way that this Note proposes. As discussed previously,¹⁷⁶ the United States Court of Appeals for the Third Circuit has attempted to sort circumstantial evidence of price-fixing into economic and non-economic subcategories.¹⁷⁷ This attempt included classifying market structure evidence as evidence indicative of a defendant's motive.¹⁷⁸ Still, as explained above,¹⁷⁹ this approach falls short because it continues to prioritize noneconomic evidence, thereby discounting the true value of economic evidence. Instead, this Note's approach gives economic evidence its proper weight by stratifying it into a subcategory that influences the probative value of noneconomic evidence.¹⁸⁰

Consider the Third Circuit's reasoning in *In re Flat Glass Antitrust Litigation*, in which the court emphasized that “[e]vidence that the defendant had a motive to enter into a price fixing conspiracy”—here meaning “evidence that the structure of the market was such as to make secret price fixing feasible”—merely “restate[s] the phenomenon of interdependence.”¹⁸¹ As a result, the court determined that “[t]he most important evidence will generally be non-economic evidence.”¹⁸² Also consider the Third Circuit's reasoning in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.*¹⁸³ Despite noting that “like in all other summary judgment cases . . . evidence must be viewed in the context of all other evidence,” the *Valspar* court stated that “[w]hile normally all [bits of

¹⁷³ See *supra* notes 58–62 and accompanying text.

¹⁷⁴ See *supra* notes 34–41 and accompanying text.

¹⁷⁵ See, e.g., *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361–62 (3d Cir. 2004).

¹⁷⁶ See *supra* notes 116–18 and accompanying text.

¹⁷⁷ *Flat Glass*, 385 F.3d at 361.

¹⁷⁸ *Id.* at 360.

¹⁷⁹ See *supra* notes 119–20 and accompanying text.

¹⁸⁰ See *supra* Section III.A.

¹⁸¹ *Flat Glass*, 385 F.3d at 360 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)).

¹⁸² *Id.* at 361.

¹⁸³ 873 F.3d 185 (3d Cir. 2017).

circumstantial evidence] are weighed together, in the case of oligopolies [market structure factors] are deemphasized.”¹⁸⁴

The convoluted logic that the *Valspar* court employed nearly grasps the problem exposed by this Note but fails to articulate an effective formula to address it. The solution proposed by this Note would remedy this in a novel way. By more neatly separating market structure characteristics into the category of base factors, as well as insisting that the inferential conclusions drawn from existing plus factors be amplified by the existence of base factors, this Note’s solution bridges the gaps in logical reasoning that cases like *Valspar* exemplify.¹⁸⁵ Were the Third Circuit to apply the solution proposed in this Note, it would take market structure evidence and—rather than qualify such evidence on the grounds that it alone cannot discount the possibility of conscious parallelism—use it to bolster any such “non-economic evidence” or “‘traditional’ conspiracy evidence.”¹⁸⁶

Scholars, too, have previously discussed the importance of categorizing the kinds of circumstantial evidence surveyed in Sherman Act section 1 cases in order to better assess probative weight.¹⁸⁷ The scholarship of Professor Kovacic, for example, encourages “rank[ing] individual plus factors, and groups of plus factors, in terms of their probative value.”¹⁸⁸ Like this Note, Professor Kovacic’s article advocates for the implementation of a more organized and formulaic model of evaluating circumstantial evidence of collusion;¹⁸⁹ the formula explored there also supports this Note’s contention that no bits of circumstantial evidence should be discounted based solely on their individual probative quality.¹⁹⁰

Rather than construct a bipartite categorization of the sort explored here, Professor Kovacic instead envisions using statistics and mathematical probabilities to stratify and weigh circumstantial evidence.¹⁹¹ That scholarship encourages the recognition of “super plus factors,” which are “plus factors, or groups of plus factors, that lead to a *strong* inference of *explicit* collusion.”¹⁹² Indeed, Professor Kovacic explains that what he

¹⁸⁴ *Id.* at 193–94 (citation omitted).

¹⁸⁵ *See supra* Section III.A. It is worth noting that the phrase “base factors” itself has not yet been coined, let alone embraced, in this context.

¹⁸⁶ *Flat Glass*, 385 F.3d at 362.

¹⁸⁷ Kovacic et al., *supra* note 15, at 396 (“Many commentators have catalogued plus factors and discussed the critical mass of circumstances that ought to justify an inference that observed behavior is the product of concerted action.”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 427–34.

¹⁹⁰ *Id.* at 429 (“[T]he proper way to treat multiple diagnostic factors is as a constellation, rather than in isolation.”).

¹⁹¹ *Id.* at 427–34 (specifically discussing the use of Bayes’ Probability Theorem).

¹⁹² *Id.* at 396–97 (emphasis added).

dubs “super plus factors” involve “actions or outcomes that would *almost never* be observed in the absence of collusion.”¹⁹³ This Note forges a separate path, placing those factors that, relatively speaking, tend to supply the *weakest* inferences given that they may be *frequently* observed in the absence of collusion at the forefront of the analysis.

Professor Leslie’s scholarship, as another example, is similar to Professor Kovacic’s in the way that it criticizes courts’ failure to categorize, contextualize, and consider the “interrelationships” between individual pieces of circumstantial evidence.¹⁹⁴ Professor Leslie’s scholarship introduces the phrase “probative synergy,” arguing—much like this Note—that “[t]he probative value of any one [piece of circumstantial evidence] is not fixed but can grow when viewed in the context of a bundle of [others].”¹⁹⁵ Still, that scholarship differs from this Note because it treats every type of circumstantial evidence as a “plus factor”—including market structure characteristics—and then opts to categorize these so-called “plus factors” into eight categories.¹⁹⁶ It then insists that when a plaintiff can “proffer[] evidence of several plus factors across multiple categories, then courts should be extremely hesitant” to dismiss the plaintiff’s complaint.¹⁹⁷ This approach, although it shares similarities with this Note’s proposed solution, differs because it does not focus on the distinct problems that arise when courts evaluate market structure characteristics in particular.¹⁹⁸

Lastly, and perhaps most importantly given the relative recency and ongoing implementation of the CMS Rule, neither courts nor scholars have yet reconciled how the CMS Rule’s price publication mandate affects the analysis of circumstantial evidence of price-fixing agreements—the focal point of this Note.¹⁹⁹ The CMS Rule increases the urgency of adopting a more formulaic approach to the evaluation of circumstantial evidence in a Sherman Act section 1 case.²⁰⁰ Courts may soon have to come to terms, for the very first time,²⁰¹ with how compliance with the CMS Rule should factor into these analyses and how such analyses should be altered as a result.

¹⁹³ *Id.* at 426 (emphasis added).

¹⁹⁴ Leslie, *supra* note 19, at 1581.

¹⁹⁵ *Id.* at 1620.

¹⁹⁶ Leslie, *supra* note 19, at 1588–619.

¹⁹⁷ *Id.* at 1622.

¹⁹⁸ Compare *id.* at 1590 (neatly classifying market concentration, for example, as simply a “plus factor”), with *supra* Section III.A (explaining how market structure characteristics are often dismissed, viewed as lesser-than, or even used to minimize other plus factors in courts’ actual analyses of plus factors), and *supra* notes 181–83 and accompanying text (same).

¹⁹⁹ See *supra* Part II.

²⁰⁰ See *supra* Section II.B.

²⁰¹ See *supra* note 106 and accompanying text.

IV. REFUTING POTENTIAL OBJECTIONS AND ALTERNATIVES

A. *Disproportionate Burdens on Certain Industries or Markets*

Some stakeholders might argue that altering the existing plus-factor paradigm in this way could risk punishing innocent firms for price-fixing and place an unfair burden on hospitals or other firms in certain markets or industries. These stakeholders likely recognize that recent presidential administrations have repeatedly signaled interest in increasing antitrust enforcement against the health care industry, including hospitals.²⁰² Such stakeholders also likely recognize that given the concentration of hospital markets²⁰³ and finalized status of the CMS Rule,²⁰⁴ many hospitals would immediately be operating in a space in which at least two base factors are built into the environment.

It is certainly not the goal of this Note to suggest that certain industries are any more or less culpable than others. Indeed, there is currently no evidence indicating that hospitals are more likely to engage in illegal price-fixing than any other entity. It is thus important to emphasize that this solution should not unfairly increase a hospital's—or any other firm's—odds of falling victim to circumstance. This is why, under this proposal, base factors alone would be insufficient to survive a motion to dismiss.²⁰⁵ This protects innocent firms that exist in environments with multiple base factors, which are generally beyond their control. Given this limitation, this solution would not significantly increase the risk of punishing innocent firms for price-fixing, because a firm still could not be dragged into discovery, much less penalized, based on the existence of base factors alone.²⁰⁶ To contend that base factors alone would result in the conviction of innocent firms would be a significant overstatement of their power. In fact, given that some courts, attorneys, and scholars still label such factors as plus factors,²⁰⁷ this proposal could actually better protect legally upstanding firms: This proposal ensures that price transparency, market concentration, and other base factors are situated in their proper probative context—as factors relating only to market

²⁰² See, e.g., Press Release, Fed. Trade Comm'n, FTC Authorizes Investigations into Key Enforcement Priorities (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities> [https://perma.cc/ASS9-JY8W] (“Priority targets include . . . healthcare businesses such as . . . hospitals.”); Press Release, U.S. Dept. of Just., Assistant Attorney General Jonathan Kanter Announces Task Force on Health Care Monopolies and Collusion (May 9, 2024), <https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-announces-task-force-health-care-monopolies-and> [https://perma.cc/6MK6-RWFL].

²⁰³ See *supra* Section II.C.

²⁰⁴ 45 C.F.R. pt. 180.

²⁰⁵ See *supra* text accompanying note 160.

²⁰⁶ See *supra* Section III.A.

²⁰⁷ See *supra* notes 115–18 and accompanying text.

structure and conditions that increase the feasibility of conspiracy without inherently inferring the existence of the same.

Opponents may still point out that this Note's proposal insists that the existence of base factors should enhance the evidentiary value of any plus factors identified.²⁰⁸ It would not be misguided or result in a bad outcome, however, for firms to be apprehensive of this feature of the proposal. One goal of this proposal is indeed to discourage firms that exist in base factor-laden markets from engaging in conduct that serves as a "true" plus factor.²⁰⁹ If this proposal deterred firms from engaging in conduct associated with conspiracies, this could result in fewer price-fixing conspiracies, which would benefit consumers.²¹⁰

B. *Punishment for Compliance*

Stakeholders might object that this proposal causes hospitals complying with one law—the CMS Rule—to risk penalization under another—the Sherman Act. These stakeholders might fear that such a result would foster contradictory incentives and lead to a no-win situation. First and foremost, however, this concern should not prevent the proposed solution from moving forward for the same reason articulated in Section IV.A—compliance with the CMS Rule, standing alone, would not result in punishment under the Sherman Act.²¹¹

Second, this would not be the first time that the Sherman Act has seemingly interfered with firms' obligations under other statutes or regulatory regimes.²¹² Recall *Gypsum*, in which defendants alleged that their direct price exchanges, or "interseller price verification," only occurred at the behest of another statute:²¹³ antitrust law's own Robinson-Patman Act.²¹⁴ The key provision of the Robinson-Patman Act there amended section 2(b) of the Clayton Act.²¹⁵ Section 2(a) of this statute prohibits certain types of price discrimination,²¹⁶ and section 2(b) sets forth an exception to this prohibition, dubbed the "meeting-competition" defense, in which a defendant can "show[] that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."²¹⁷ The defendants thus attempted to justify their price exchanges on the

²⁰⁸ See *supra* Section III.A.

²⁰⁹ See *supra* note 161 and accompanying text.

²¹⁰ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

²¹¹ See *supra* Section IV.A.

²¹² See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 426 (1978).

²¹³ See *id.* at 426, 429.

²¹⁴ 15 U.S.C. §§ 13–13b, 21a.

²¹⁵ *U.S. Gypsum Co.*, 438 U.S. at 450.

²¹⁶ See 15 U.S.C. § 13.

²¹⁷ *Gypsum*, 438 U.S. at 450 (quoting *id.* § 13(b)).

grounds that they intended to comply with the Robinson-Patman Act by directly verifying the prices of their competitors.²¹⁸

In resolving this case, the Court relied on its prior holding in *Automatic Canteen Co. v. FTC*,²¹⁹ wherein it stated “it is our duty to reconcile [the statute], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.”²²⁰ Although the Court in both *Gypsum* and *Automatic Canteen* spoke directly on interpretive conflicts between compliance with the Robinson-Patman and Sherman Acts, the Court’s reasoning applies equally here: Unless Congress has directed the courts not to reconcile a seemingly conflicting statute with the Sherman Act or broader antitrust policies, it is the duty of courts to do so.²²¹ Here, Congress has not directed the courts to avoid reconciling the ACA and Sherman Act; to the contrary, the ACA contains an antitrust-specific savings clause in which Congress emphasized that “[n]othing in this title (or an amendment made by this title) shall be construed to modify, impair, or supersede the operation of any of the antitrust laws.”²²²

Third, the Supreme Court articulated a multipart test in *Credit Suisse Securities (USA) LLC v. Billing*²²³ for determining whether nonantitrust statutory and regulatory schemes should preclude application of federal antitrust law, and the CMS Rule does not qualify under this test.²²⁴ The first part of this test involves determining whether the seemingly conflicting statute is “silent in respect to antitrust.”²²⁵ The CMS Rule does not surpass even this first step because of the aforementioned antitrust-specific savings clause in the ACA.²²⁶ The analysis thus stops here, without application of the remainder of the *Credit Suisse* test, meaning that the Sherman Act is neither preempted by the ACA nor any of its corresponding regulations.²²⁷ This analysis supports that Congress did not intend for the ACA to interfere with the effective enforcement of antitrust law, and it undermines the critique that compliance with the CMS Rule is an improper consideration in Sherman Act section 1 cases.

²¹⁸ *Id.* at 452 (explaining that the Court’s past precedents “have apparently suggested to a number of courts that, at least in certain circumstances, direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2(b) defense”).

²¹⁹ 346 U.S. 61 (1953).

²²⁰ *Id.* at 74; see *U.S. Gypsum Co.*, 438 U.S. at 458.

²²¹ See *Automatic Canteen*, 346 U.S. at 74.

²²² 42 U.S.C. § 18118(a) (footnotes omitted).

²²³ 551 U.S. 264 (2007).

²²⁴ *Id.* at 271.

²²⁵ *Id.*

²²⁶ 42 U.S.C. § 18118(a).

²²⁷ *Credit Suisse*, 551 U.S. at 271.

Lastly, it is not one hospital's act of complying with the CMS Rule that signals the existence of this base factor. Rather, the base factor derives from the prevalence of compliance in the given market. This proposal targets the way in which the CMS Rule's eventual²²⁸ transformation of a whole industry from price opacity to price clarity renders the market more conducive to illegal price-fixing conspiracies.²²⁹ As a result, stakeholders should not fear that this proposal harbors contradictory incentives for individual hospitals.

C. *A Stronger Focus on Mergers*

Penultimately, another potential objection to this proposal is that rather than increase focus on price-fixing arrangements to address the challenges posed by increased hospital price transparency, it would be more effective to focus instead on hospital mergers. Merger law certainly helps address the threats posed by market characteristics that facilitate collusive behavior,²³⁰ and halting anticompetitive mergers before a price-fixing arrangement has the chance to take form can serve as a more preventative prescription. Still, to suggest that merger law could act as a panacea to the problems raised in this Note would ignore reality; the fact that ninety percent of MSAs had highly concentrated hospital markets as of 2016 suggests that merger law has done a poor job regulating competition in the hospital sector.²³¹ Moreover, rewinding a merger is no small feat, much less the countless mergers and acquisitions that have been completed in this sector over the past few decades.²³² In light of the foregoing, although addressing the potential upstream sources of a problem will always be important and merger law can help do so, this proposal focuses on a downstream solution out of necessity.

D. *Withdrawal of the CMS Rule*

There may be some stakeholders who agree so fervently with this Note about the problems presented by the CMS Rule that they would alternatively recommend withdrawing the CMS Rule altogether. But withdrawing the CMS Rule based on anticompetitive concerns would be

²²⁸ See Susanna Vogel, *Hospital Price Transparency Compliance Dips: Report*, HEALTHCARE DIVE (Mar. 4, 2024), <https://www.healthcaredive.com/news/hospital-price-transparency-requirements-patient-rights-advocate> [<https://perma.cc/DQ3W-82FW>] (explaining that hospital compliance with the CMS Rule may be as low as 34.5%).

²²⁹ See *supra* Section II.B.

²³⁰ See *supra* notes 147–49 and accompanying text.

²³¹ See *supra* notes 124–31 and accompanying text.

²³² See, e.g., MORGAN & PIERCE, *supra* note 26, at 837 (“[B]y the time FTC regained its footing and began to succeed in hospital merger cases, 80% of the markets for many types of hospital care had become highly concentrated. FTC can do nothing effective about that problem because it is extremely difficult to unwind a merger.”).

too extreme of a reaction to the risks that the CMS Rule poses.²³³ As a truism, health policy inevitably involves tradeoffs, and this Note disagrees with the notion that there are no benefits to hospital price transparency or that the potential risks to competition outweigh such benefits.

Prior to promulgating the CMS Rule, HHS investigated “[m]any empirical studies . . . [on] the impact of price transparency on markets” in addition to the results of certain state-led transparency initiatives such as one in New Hampshire, which “reveal[ed] that providing insured patients with information about prices can have an impact on the out-of-pocket costs consumers pay for medical imaging procedures,” among other findings.²³⁴ This Note does not seek to challenge such findings. Further, these analyses were upheld when the CMS Rule was challenged in court, with the D.C. Circuit determining that “[t]he [HHS] Secretary weighed the rule’s costs and benefits and made a reasonable judgment.”²³⁵

Further still, despite competition law’s historic disfavor of price exchange,²³⁶ there is antitrust precedent in support of ensuring consumers can engage in comparison shopping.²³⁷ Consider *National Society of Professional Engineers v. United States*,²³⁸ in which the Supreme Court affirmed an injunction against a professional association’s so-called “canon of ethics” that forbade members from “negotiat[ing] or even . . . discuss[ing] the question of fees [with prospective clients] until after a prospective client ha[d] selected the engineer for a particular project.”²³⁹ In determining that this policy betrayed Sherman Act section 1, the Court agreed with the district court’s previous finding that “the ban ‘impede[d] the ordinary give and take of the market place,’ and substantially deprive[d] the customer of ‘the ability to utilize and compare prices in selecting engineering services.’”²⁴⁰ This Note’s solution would help reconcile the jurisprudence that simultaneously encourages comparison shopping but remains wary of price exchange—simply withdrawing the CMS Rule would not.

²³³ See *supra* Part II.

²³⁴ Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524, 65,526–27 (Nov. 27, 2019) (codified at 45 C.F.R. pt. 180 (2024)).

²³⁵ *Am. Hosp. Ass’n v. Azar*, 983 F.3d 528, 539 (D.C. Cir. 2020). Concededly, under the relevant standard the HHS Secretary need only have “examine[d] the relevant data and articulate[d] a . . . ‘rational connection between the facts found and the choice made,’” which is a quite modest requirement. *Id.* at 538 (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

²³⁶ See *supra* Section I.C.

²³⁷ See *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978).

²³⁸ 435 U.S. 679 (1978).

²³⁹ *Id.* at 681–83.

²⁴⁰ *Id.* at 692–93 (quoting *United States v. Nat’l Soc’y of Pro. Eng’rs*, 404 F. Supp. 457, 460 (D.D.C. 1975), *aff’d in part, modified in part*, 555 F.2d 978 (D.C. Cir. 1977), *aff’d*, 435 U.S. 679 (1978)).

CONCLUSION

Was HHS correct in concluding that the government's existing "laws and processes to investigate and act when entities engage in collusive or other anticompetitive practices"²⁴¹ protected consumers from the potential antitrust concerns raised by the CMS Rule? In one sense, the answer is no. Current judicial processes to assess circumstantial evidence of illegal price-fixing arrangements do not currently offset the new risks that the CMS Rule poses. In another sense, the answer is yes. Judicial interpretation of the laws—section 1 of the Sherman Act, specifically—has the flexibility to adjust to this new reality should courts adopt this Note's proposal.

When assessing circumstantial evidence to determine if a price-fixing arrangement in violation of Sherman Act section 1 exists, courts should consider the relevant characteristics of the given market as base factors and, in so doing, properly contextualize any plus factors that have been alleged. The extent to which a given market is characterized by transparent prices—including whether hospitals in the relevant market are complying with the CMS Rule—should serve as one of the base factors contemplated in this analysis. Such base factors would not only shed light on how a price-fixing cartel would operate in the given environment, resulting in a more accurate evaluation of the defendant's activities, but they would also shift the current landscape by more appropriately valuing the notion of plausibility. This proposal would both offset the risks imposed by the new CMS Rule as well as remedy persistent confusion across courts and practitioners regarding the purpose and weight of circumstantial evidence in Sherman Act section 1 cases, particularly in a modern era increasingly characterized by price transparency across many sectors. Under these conditions, hospital price transparency could become what it was always supposed to be: a boon instead of a burden.

²⁴¹ Price Transparency Requirements for Hospitals to Make Standard Charges Public, 84 Fed. Reg. 65,524, 65,550 (Nov. 27, 2019) (codified at 45 C.F.R. pt. 180 (2024)).