UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	Docket No. 9348
Phoebe Putney Health System, Inc. a corporation, and	Honorable D. Michael Chappel
Phoebe Putney Memorial Hospital, Inc. a corporation, and	
HCA, Inc. a corporation, and	
Palmyra Park Hospital, Inc. a corporation, and	
Hospital Authority of Albany-Dougherty County	
Respondents.	

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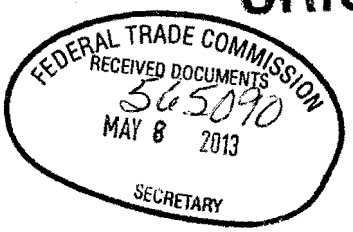

MOTION TO QUASH AND/OR LIMIT SUBPOENA *DUCES TECUM*

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Phoebe Putney Memorial Hospital, Inc. a corporation, and	)	
HCA, Inc. a corporation, and	)	
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MOTION TO QUASH AND/OR LIMIT SUBPOENA *DUCES TECUM*

Pursuant to 16 C.F.R. § 3.34 and Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission, Jack Hughston Memorial Hospital ("Hughston"), a non-party to this proceeding, files the following Motion to Quash and/or Limit Subpoena.

I. INTRODUCTION

On April 29, 2013, Hughston was served with a Subpoena *Duces Tecum* issued April 26, 2013, at the behest of Respondent Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., HCA, Inc., Palmyra Park Hospital, Inc., and Hospital Authority of Albany-Dougherty County ("Phoebe"). The primary parties in this matter are the State of Georgia, the

Georgia Hospital District and the HCA Hospital System, the largest hospital system in the world and owner of Palmyra. The matter regards HCA's proposed sale of Palmyra Park Hospital to the State of Georgia. Hughston moves to quash or limit the Subpoena on five main grounds. First, prior to receiving the Subpoena Hughston has not been a party to the litigation, the negotiations, or the creation of the proposed Protective Order, discussions regarding discovery or any other fact even remotely connected to the litigation. Hughston is a small hospital in Phenix City, Alabama. It is located 93 miles from Phoebe in Albany, Georgia. It has not been involved or related to any of the parties as part of this litigation in or with the State of Georgia, HCA or their defense to the FTC action. The materials, if any, would not likely change or affect the matter being litigated. Second, the Subpoena is overly broad and unduly burdensome on a small non-related hospital as explained below. Third, many of the documents to be produced are confidential and proprietary and/or are considered trade secrets, and therefore should be protected from discovery and disclosure among the parties or to the public. The disclosure of the items to the public or the parties and the national hospital chain of HCA would damage Hughston in its own market. Fourth, assuming even that the scope of the Subpoena was manageable, the responsive documents are not privileged, and that they would in any way support the defense to the FTC position, the timing of the Subpoena and the short time frame for response make compliance impossible under the circumstances. Fifth, the respondent's subpoena request of Hughston is unlikely to yield information that is relevant to the allegations of the complaint, to aid in their proposed relief, or to aid in their defense without unduly harming the unrelated parties they have subpoenaed.

II. ARGUMENT

A. Objections Overview.

First, and importantly, Hughston is not a party to this proceeding, and has no interest in its outcome. Hughston operates 93 miles away in Alabama, outside the State of Georgia and outside the county in question [Albany-Dougherty County]. (A copy of Petition and Reply Brief are attached as Exhibit A). According to the attached briefs, the Georgia authority wishes to acquire Palmyra to aid in its care of the sick for inpatient general acute care services [J.A. 29 (complaint paragraph 1)]. According to the FTC response attached, HCA owns Palmyra and Georgia has "tried to buy it for decades." According to the petitions, "this [acquisition] would allow it [Georgia] to control all hospital beds in the county" (p. 19) [Albany-Dougherty County] and "increase negotiating power with all payors" (J.A. 145). Hughston is a small private hospital with no relevant ties to the State of Georgia's project for acquisition and control of indigent care in the state. Hughston does not have ties to HCA, the world's largest hospital system. Hughston is not and has not been related to any of the other parties in the litigation. Further, the Subpoena as it is so broadly written in its request for all documents would be burdensome even if issued against a party since it goes back over seven years for audited financials and is unlimited in its other requests in time, scope or related entities. Because it is issued against a small, private, out-of-state, non-party, it is unreasonably burdensome to the respondent if not impossible, and should be either quashed in its entirety or dramatically limited for the following reasons. The primary parties in this action are the State of Georgia and HCA Hospital System. The State of Georgia has in its possession any public information submitted by Hughston during this period of time and it is already available to the parties. HCA is the largest hospital system in the world and owns the hospital in question. Surely, it can afford its own discovery and not shift the burden to

small private entities that are unrelated to the matter in question. Further, they have owned the hospital in question and are in possession of the records themselves that are necessary for this litigation. It is conceivable they in fact would have the best cost, access to care, payor and financial data available in the world should they choose to share it in this litigation rather than attempt to pry into unrelated parties businesses for their trade secrets and commercially sensitive pricing information under the guise of responding to the FTC. This prying and access only goes to benefit their sale of Palmyra and their operation of other hospitals in the subpoenaed geographies that would in fact compete with Hughston and other non-party respondents in this action. The same is true for the State of Georgia. If its goal is as the petitioners claim: "to control all hospital beds in the county [Albany-Dougherty County] and increase negotiating power with all payors" (FTC response brief at p. 19) then gaining access to the respondent's financials, payment structures, favored nations provisions and all payor contracts would greatly aid them in that goal and would irrevocably and permanently harm every subpoena respondent in this action since the protective order is clearly insufficient to limit this flow of privileged and commercially sensitive information to the parties and their counsels.

Like a federal court, an Administrative Law Judge in an FTC proceeding should quash or limit any subpoena that is unduly burdensome or requires the disclosure of privileged or confidential and proprietary information, or information rising to the level of trade secrets. 16 C.F.R. §3.31(c)(1)(iii) (use of subpoena and other discovery methods "shall be limited by the Administrative Law Judge" where the "burden and expense of the proposed discovery outweigh its likely benefit"); 16 C.F.R. §3.31(c)(2) (authorizing Administrative Law Judge to "enter a protective order denying or limiting discovery to preserve" a privilege), Fed. R. Civ. P. 45(c)(3) (a court "shall quash or modify the subpoena if it ...requires disclosure of privileged or other

protected matter... [or] subjects a person to undue burden"). Moreover, an Administrative Law Judge has the power to modify the subpoena and limit the scope of permissible discovery. 16 C.F.R. §3.31(d)(1) (authorizing Administrative Law Judge to "deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense"); see also, Fed. R. Civ. P. 26(c) (court may grant a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense). See also, *Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F. 3d 1151, 1163 (10th Cir., 2010) (discovery has "never been a license to engage in an unwieldy, burdensome and speculative fishing expedition.").

Information is not discoverable if it is not relevant. Fed. R. Civ. P. 26(b)(1). Further "discovery in Commission adjudicatory proceedings under Part 3 of the Commission's Rules is limited to matters that are relevant to the allegations of the Commission's complaint, to the relief proposed therein, or to the Respondents' defenses."

Moreover, discovery requests are overbroad, even if some responsive information is conceivably relevant, when only a fraction of the millions of documents requested are relevant. *Nugget Hydroelectric L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9th Cir. 1992). The Subpoena in this case calls for the production of probably tens of thousands of pages of documents, by a non-party, which Phoebe has not shown to be relevant. The Subpoena should be quashed, or at least should be limited in several significant respects.

B. Specific Request Objections to Scope of Subpoena.

Hughston first objects to the scope of the Subpoena. It demands production of documents from 2006 to the present, a period of seven years and it has open-ended requests with no limits in time.

Moreover, as explained below, some of the document requests themselves are unreasonably broad to a point of being incomprehensible. In addition, and again as set forth more fully below, the Subpoena requests production of documents containing privileged or confidential and commercially sensitive information, including competitively sensitive pricing information and Hughston trade secrets, disclosure of which should not be required.

C. Specific Objections to Document Request.

Hughston asserts the following specific objections to the categories of documents the Subpoena requires to be produced:

1. **All contracts, including price sheets, between Your Hospital and any health plan that includes Your Hospital, including all amendments, appendices, and related documents reflecting any contract terms.**

This request is overly broad. Not all contracts can possibly be relevant to the matter in question. Insurance pricing information is in the possession of the State of Georgia as the state regulator for all insurance products. HCA, as the largest hospital system in the world surely has sufficient access to this information for the hospital that is the basis of this matter. There also appears to have been over a year of ongoing discovery where these items may already be in the parties' possession from other sources. The other information requested is unrelated to the matter in question and is commercially sensitive to Hughston as privileged and as a trade secret. Costs associated with operations in government programs are reported to the State of Georgia on cost reports and those costs can be obtained from or by the parties already named in the response. If the requested items exist, it is overly burdensome for this respondent to discover or produce them. If they exist and even if it can be produced, the cost of this legal response, the inquiry of

discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and all the costs of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

2. **All documents relating to competition between and among payors in the Geographic Area, including but not limited to, the desirability or necessity of entering into contracts with certain health care facilities.**

This request is overly broad. Not all documents can be relevant, they would likely involve privileged communications, trade secrets, commercially sensitive information, and would unlikely affect this matter for the previously stated reasons. This information is more likely already in the possession of the parties. The great State of Georgia regulates its own insurance market. This information can be obtained by the parties already named in the response. If the requested items exist, it is overly burdensome for

this respondent to discover or produce. If it exists, and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

3. **All documents relating to the Transaction, including but not limited to, all documents sent to or received from the Federal Trade Commission, and all documents relating to communications with the Federal Trade Commission.**

This information can be obtained by the parties already named in the response. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the

requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

4. **All documents relating to competition in the provision of any health care service in the Geographic Area, including but not limited to, market studies, forecasts, and surveys; competitor assessments; SWOT analyses; the supply and demand conditions, including the patient service area for Your Hospital and any other health care facility; and all documents relating to the quality of health care (however defined) provided by any health care facility.**

This information is more likely in the possession of the State of Georgia as the health regulator and insurance regulator for the state. Further, it is overly broad in its request in time, scope, geography, and the matters it attempts to collect. It appears to be more of a fishing expedition across geographies and unrelated providers in markets outside the county [Albany-Dougherty County] of Georgia that is the basis of this matter. This

information can be obtained by the parties already named in the response. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

5. All documents relating to Phoebe or Palmyra.

This information can be obtained by the parties already named in the response. It is likely already in their possession and they are in the best possession to discover it rather than shift the burden and costs to other unrelated parties. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the

items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

6. **Documents sufficient to show Your Hospital's patient draw or origin data, including but not limited to, the zip codes from which 90% of patients come from and the zip codes from which 75% of patients come from.**

Hughston operates 93 miles away from Albany-Dougherty County Georgia in Phenix City, Alabama. This is at a minimum a two-hour drive away from the hospital in question. It is not related to the defense being established by the respondents, the subject of this complaint, or the project to help the indigent in Albany-Dougherty County with the Hospital District and the State of Georgia. The requested information can be obtained by the parties from public information or other sources already named in the response.

The information is unlikely to affect this matter even if it exists. The request appears more like an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter may wish to see but which do not appear germane to the litigation or their defense. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

7. **All documents relating to the categories of health care (including primary, secondary, tertiary, and quaternary) that Your Hospital provides, can provide, or has ceased providing. If your hospital has ceased providing a category of health care, documents sufficient to show why Your Hospital ceased providing that category of health care.**

As previously stated, Hughston operates in Alabama. It is not related to the subject matter or the jurisdiction of this complaint to help the indigent in a limited county in the State of Georgia. This information can be obtained by the parties from public information or other sources already named in the response. The information is unlikely to affect this matter even if it exists. It is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be

quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

8. **All documents relating to the pricing of in-patient and/or out-patient services at Your Hospital, including their comparison to pricing for services at any and all other hospitals in the Geographic Area.**

Hughston operates two hours away in Alabama. It is not related to the subject matter or the jurisdiction of this complaint to help the indigent in a limited county in the State of Georgia. This information can be obtained by the parties from public information or other sources already named in the response. The information is unlikely to affect this matter even if it exists. It is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm the Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*,

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9. **Since 2006, all audited or other financial statements or materials for Your Hospital prepared for either internal use or presented to third parties, (*e.g.*, the Georgia Department of Community Health, the Georgia Hospital Association, potential investors or lenders, investment banks).**

Hughston is a private hospital. To the extent it files cost reports with the state or federal regulators those reports can be obtained by the parties from public information or other sources already named in the response. As the State of Georgia is a party and the named entities above are entities of the State of Georgia, it goes to reason they can supply these items to the court. The documents are easily requested of by the parties under the Freedom of Information act as well. As for private financials used in internal or sensitive commercial transactions this is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear

germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the private and sensitive financial information could irrevocably harm Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

11. All document relating to Your Hospital's utilization or capacity, including all documents relating to the number of licensed versus staffed beds at Your Hospital and the reasons for any difference.

This information can be obtained by the parties from public information like the State of Alabama or other sources already named in the response. It goes to reason the state can supply some of these items to the court as they may be collected and recorded by the state in licensing and accreditation activities. The parties can easily request the documents under the Freedom of Information act as well. In addition, it would interfere with the internal operation of Hughston to produce all documents relating to this request and the reason for the difference. A request for all documents and the reasons for differences could involve privileged communication with counsel or advisors or other sensitive commercial communication or transactions. This is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm the Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the

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12. **All Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") or other periodic reviews performed by any organization that assigned a "quality rating" or "quality-score" to Your Hospital.**

Any public information can be obtained by the parties from Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") or other sources already named in the response. As the State of Georgia is a party, it goes to reason they can request or supply these items to the court when they are the reviewing or licensing regulator for any activity in their state. The documents may be requested by the parties from other less burdensome sources. As for "other periodic reviews" that may used in internal or sensitive commercial transactions this is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do

not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm the Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

13. All documents relating to the effect of the Affordable Care Act on Your Hospital, including but not limited to, the potential decision by the State of Georgia to not accept Federal funds to expand Medicaid.

Any public information can be obtained by the parties from the State of Georgia or other sources already named in the response. As the State of Georgia is a party it goes to reason, they can supply these items to the court. The documents are easily requested of by the parties under the Freedom of Information act as well. The request for "all documents relating to the effect of the Affordable Care Act on Your Hospital, including but not limited to, the potential decision by the State of Georgia to not accept Federal funds to expand Medicaid," is improperly presented to Hughston as they are unlikely to have any relevant information that is germane to the respondents answer or defense to the allegations of the FTC. It is at best an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation coming from Hughston. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. Under In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case,

whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

14. **All documents relating to the compensation received by the CEO (or equivalent), Chief Medical Officer (or equivalent), Chief Financial Officer (or equivalent), Chief Operating Officer (or equivalent), Director of Managed Care Contracting (or equivalent), Head Nurse (or equivalent), and staff physicians of Your hospital, including but not limited to all benchmarking studies relied upon by Your board of directors (or equivalent) to assess or compare the compensation of any hospital employee.**

Hughston operates in Alabama, not Georgia. It is not related to the subject matter or the jurisdiction of this complaint to help the indigent in a limited county in the State of Georgia. To the extent, this information is publicly reported on their Alabama or Georgia cost reports it can be obtained by the parties from public information or other sources already named in the response. However, the information is unlikely to affect this matter, is not relevant and is commercially sensitive. It is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially

sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm the Hughston in its own market at no fault of its own. The request is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are attempting to obtain privileged and sensitive trade information or to pay for information the court deems relevant and must be produced when it exists nowhere else.

15. All documents relating to most-favored-nation agreements between Your Hospital and any payor or health plan.

The request is overly broad, could involve privileged communications or attorney work product and trade secretes or commercially sensitive information the release of which could irrevocably harm Hughston. It is not related to the subject matter or the jurisdiction of this complaint to help the indigent in a limited county in the State of Georgia. This information can be obtained by the parties from public information or other sources already named in the response. The information is unlikely to affect this matter even if it exists. It is an attempt to fish and discover competing information that HCA, Georgia and other parties in the matter wish to see but which do not appear germane to the litigation. It is clearly delving into the commercially sensitive business model of operating a hospital. That trade secret and commercially sensitive information should remain privileged and not accessible to potential or actual competitors of Hughston. The exposure of this information could give an unfair advantage to HCA who operates in all states. The release of the information could irrevocably harm the Hughston in its own market at no fault of its own. If the requested items exist, it is overly burdensome for this respondent to discover or produce. If it exists and if it can be produced, the cost of this legal response, the inquiry of discovery to determine if the items do exists and the action of producing them, if required for this response is overly burdensome and the cost of production should be borne by the requesting parties under Rule 45. In re *Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992) acknowledged, "a clear change from the old Rule 45(b), which gave the district courts discretion to condition the enforcement of subpoenas on the petitioners paying the costs of production." *Id.* at 383. The district court considered three

factors dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance" *Linder*, 180 F.R.D. at 177; *Linder* 183 F.R.D. at 322. Based on equitable factors, the Subpoena should be quashed as the parties have the information in their possession or are in the more likely position to be able to actually produce the information in question or to pay for information the court deems relevant and must be produced when it exists nowhere else.

D. Unreasonable Time Periods.

As noted above, the Subpoena seeks documents generated or received over a seven-year period and some requests are unlimited in time. The amount of effort, time and expense necessary to respond to the Subpoena grows in proportion to the length of time covered by the Subpoena. Hughston requests that if it is required to respond to it, the Subpoena be expressly limited to the last two years.

Moreover, while the time period covered by the Subpoena is too long, the time allotted to Hughston to respond is too short. If compliance is required, Hughston should be granted significantly more time to provide responsive information.

E. The Existing Protective Order Does Not Adequately Protect Hughston.

As set forth above, many of the documents requested by the Subpoena contain sensitive and confidential information. A Protective Order was issued in this proceeding on April 21, 2011. Hughston was not invited to participate in the drafting of that Order. While the Protective Order places some restrictions on certain categories of documents, the Order does not adequately protect Hughston. Hughston would be competitively disadvantaged if such information were disclosed to Hughston's competitors, other respondents, Phoebe Putney Health System, Inc.,

Phoebe Putney Memorial Hospital, Inc., HCA, Inc., Palmyra Park Hospital, Inc., and Hospital Authority of Albany-Dougherty County or their customers. If such information is to be disclosed, it should be subject to a protective order more narrowly tailored than the one already in effect. Any materials that are private, commercially sensitive, that are trade secrets, privileged or appear irrelevant or unlikely to affect the matters within the litigation we request to be subject to an in-camera review to determine any material relevancy that would outweigh the harm it may cause to Hughston in having to discover or to disclose them. We request an in-camera review of all private and commercially sensitive documents that are deemed relevant prior to them being provided to other respondents in this matter since those respondents do business as themselves and as other entities in the health care market place and such release of information could irrevocable harm Hughston.

F. Phoebe Should Reimburse Non-Party Hughston for Its Expenses.

In the event Hughston is required to produce information responsive to the Subpoena, even if its scope is narrowed considerably, the cost of production will be substantial, requiring the work of numerous employees reviewing, organizing, and copying thousands and thousands of documents. Further, Hughston has incurred and will continue to incur legal expenses contesting the scope of the Subpoena. Under Fed. R. Civ. P. 45, the issue is whether the subpoena imposes expenses on a non-party, and if so, whether those expenses are significant. If they are, the court must protect the non-party by requiring the party seeking discovery to bear at least enough of the expense to render the remainder "non-significant." *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001). At a minimum, Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., HCA, Inc., Palmyra Park Hospital, Inc.,

and Hospital Authority of Albany-Dougherty County must be required to bear the expense of the cost to respond to the Subpoena and any production deemed necessary and relevant by the court.

III. CONCLUSION

For the foregoing reasons, non-party Hughston respectfully requests that the Administrative Law Judge quash, modify, or limit the Subpoena. If the Subpoena is not quashed in its entirety (1) Hughston should not be required to produce documents over an unlimited period or a seven-year period; (2) the overly broad document requests should be narrowed considerably; (3) Hughston should not be required to produce confidential information, but if required to do so, only after an in-camera review is done to determine any relevancy that could materially affect the matters at issue and then only under a narrowly-drawn protective order limiting the respondents access and use of the information by and among themselves and all of their affiliates, as well as limiting the public's access to the information for at least 10 years; and (4) Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., HCA, Inc., Palmyra Park Hospital, Inc., and Hospital Authority of Albany-Dougherty County based on the equity of the parties should reimburse Hughston's all of its expenses related to responding to the Subpoena. This seems fair, reasonable, and evident given the relation of the respondent parties in the matter and their size, interest in the litigation, their ability to pay and their public interest as opposed to Hughston's small non-party status.

IV. CERTIFICATE OF CONFERENCE

Brian Flood, counsel for non-party Hughston, had a teleconference with John Fedele, and Brian Rafkin counsel for Phoebe, at approximately 2:15 pm CST on May 6, 2013, in an attempt to resolve any disputes concerning the Subpoena that is the subject of the foregoing motion. Counsels have sent written and verbal suggestions for reductions to their request to this

respondent and the Georgia Hospital Association as a whole. However, after consultation with our client Brian Flood, counsel for non-party Hughston, then emailed on or about 4:05 pm CST on May 7, 2013, a draft of this motion seeking concurrence or resolution of same. As of the time this motion is filed, the issues in dispute have not been fully resolved.

WHEREFORE, PREMISES CONSIDERED AND TIME IS OF THE ESSENCE, Hughston respectfully requests (1) the Subpoena *Duces Tecum* be quashed, (2) that any documents produced should be done so after the subpoena has conformed with 16 C.F.R. §3.31(f)(1)(i)(ii)(iii), (3) any material subject to the subpoena should be only produced in-camera and under a more tailored Protective Order and (4) that Hughston be awarded all of its reasonable attorney's fees and costs, as well as such other relief, both legal and equitable, to which it may show itself to be justly entitled as a non-related party responding to this action.

Dated: May 7, 2013

Respectfully submitted,

Brown McCarroll, L.L.P.

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CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* has been prepared by me or under my personal supervision from the records of Jack Hughston Memorial Hospital and is complete and correct to the best of my knowledge and belief.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If Respondents use such copies in any court or administrative proceeding, Jack Hughston Memorial Hospital will not object based upon Respondents not offering the original document.

(Signature of Official)	(Title/Company)
(Typed Name of Above Official)	(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of May, 2013 a true and correct copy of the foregoing Motion to Quash and/or Limit Subpoena *Duces Tecum* was filed via Federal Express with:

Donald S. Clark
Secretary
Federal Trade Commission
Room H-113
600 Pennsylvania Avenue, NW
Washington, DC 20580
dclark@ftc.gov

I also certify that I delivered via Federal Express and Electronic Mail a copy of the foregoing document to:

Honorable D. Michael Chappell
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Dated: May 7, 2013

Respectfully submitted,

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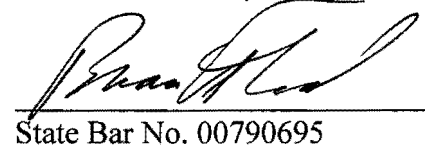

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I declare that the above statements are true to the best of my information, knowledge, and belief.

Dated: May 7, 2013

Respectfully submitted,

Brown McCarroll, L.L.P.

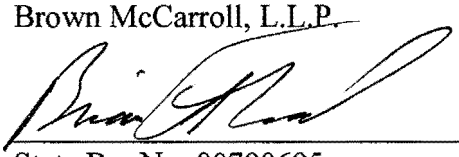

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EXHIBIT A

No. 11-1160

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a Georgia public hospital authority's acquisition of another hospital in its local service area, resulting in increased market concentration, is an act of state "officers or agents" that is not subject to scrutiny under the federal antitrust laws as this Court has construed them since *Parker* v. *Brown*, 317 U.S. 341, 350 (1943).

2. Whether the Federal Trade Commission may maintain an action to prevent acquisition of a hospital by a public hospital authority on an "active supervision" theory when the case involves no private, unsupervised anticompetitive conduct.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

In framing the federal antitrust laws, Congress did not seek "to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Because of the many ways in which a State may act, this boundary to the intended reach of federal law can raise questions concerning whether a particular challenged action is, for this purpose, "the State's own." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). Here, that question focuses on the decision by a local public hospital authority that the best way to continue pursuing its governmental mission was to address the capacity constraints it faced by acquiring another hospital in the local area that state law directs the Authority to serve.

In its previous "state action" cases, this Court has held that acts of sub-state governmental entities are fairly attributable to the State—and thus not subject to federal antitrust scrutiny—if any alleged anticompetitive effect is a "'foreseeable result' of what [a state] statute authorizes.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). That is, a local government or special-purpose public authority has an "adequate state mandate" for its actions, even if they might otherwise be challenged as anticompetitive under federal law, "when it is found from the authority given a governmental entity to operate in a particular area, that the [state] legislature contemplated the kind of action complained of." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion). This standard properly shields decisions made by local public officials from federal challenge so long as they fall within the range of operational or policy discretion in a particular field that has been delegated to those officials by the State.

The FTC asks the Court to replace this reasonable and respectful standard with a clear-statement rule that would subject local officials and public entities to federal antitrust oversight unless the state legislature has expressly conferred immunity, or a particular decision challenged as anticompetitive can be shown to be a "necessary" or "inherent" result of state legislative action. *See, e.g.*, Pet. Br. 17, 41. Previously, however, this Court has consistently rejected any such requirement of express authorization, compulsion, or inherency. *See, e.g., Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 n.21 (1985) ("Therefore, we hold that state action immunity is *not* dependent on

a finding that an exemption from the federal antitrust laws is 'necessary.'" (Emphasis added.)). The Court has recognized that any such requirement would entail precisely "the 'kind of interference with state sovereignty ... that ... *Parker* was intended to prevent.'" *Id.* That approach remains correct, and the Court should not abandon it.

Under established standards, the acquisition decision made by the Hospital Authority in this case is not subject to challenge under the federal antitrust laws. Contrary to the FTC's insistent contention (*e.g.*, Br. 29-33), this is not a situation in which the State did nothing more than endow a sub-state entity with "general corporate powers." Georgia's Hospital Authorities Law authorizes the creation of local hospital authorities at the discretion of local governments; defines limited geographic areas in which each authority may operate; charges authorities with the specific public mission of ensuring access to hospital care for local residents, even when they cannot pay; imposes statutory pricing restrictions; and grants each authority the express power to acquire existing facilities already operating in its defined geographic area. It does all this in large part to address the particular public policy challenge of providing care for the uninsured, under-insured, and publicly-insured—a challenge the FTC does not address. And it operates against a backdrop of other state law that strictly controls, through direct public regulation, entry into or expansion in local markets for hospital services.

Under these circumstances, the Hospital Authority's decision to address longstanding capacity constraints, which were interfering with the discharge of its public mission, by buying an existing private facility in its local area plainly falls within the range of decisions that the Georgia legislature expected local au-

thorities to make. For purposes of the federal antitrust laws, that decision was an act of the State.

STATEMENT

1. Respondent the Hospital Authority of Albany-Dougherty County is a "public body corporate and politic" under Georgia law. Ga. Code Ann. § 31-7-72. It was created by the Dougherty County Commission in 1941, immediately after enactment of a new state Hospital Authorities Law, *id.* §§ 31-7-70 *et seq.*, and in turn promptly acquired Phoebe Putney Memorial Hospital in Albany, Georgia (Putney Memorial). The Authority's nine-member board is appointed by the County Commission, which requires that the board include one Commission member and one member of the hospital medical staff. By law, board members receive no compensation, *id.* § 31-7-74, operate under strict conflict-of-interest rules, *id.* § 31-7-74.1, and may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care facilities in the county," *id.* § 31-7-76. For more than seventy years, the Authority has sought to provide high-quality, reasonably-priced hospital services to local residents. This includes the vast majority of the hospital services provided to those who cannot pay.

The Authority operated Putney Memorial directly until 1990, when it restructured its operations by creating two special-purpose non-profit corporations—respondents Phoebe Putney Health System, Inc. (PPHS), and its subsidiary Phoebe Putney Memorial Hospital, Inc. (PPMH). *See* Pet. App. 4a; J.A. 67-119 (lease). The Authority leased Putney Memorial to PPMH for day-to-day operation. PPHS also signed an agreement to be bound by relevant provisions of the

lease with PPMH (J.A. 114), although it is not itself involved in matters of hospital management. This restructuring was modeled on similar transactions approved by the Georgia Supreme Court as consistent with the Hospital Authorities Law and an authority's governmental mission to promote public health and care of the indigent.[1] Neither PPHS nor PPMH has any equity holder or other private owner. *See* Pet. App. 4a & n.4, 27a n.10, 35a. The Authority holds the ultimate interest in all the assets of both entities, including operating funds and any reserves generated through operations. Those assets would revert to the Authority if the entities were to be dissolved—as would happen automatically if, for example, the lease agreement between the Authority and PPMH either expired in accordance with its terms or was terminated because of a failure by PPMH to discharge the Authority's public duties as prescribed by the lease. *Id.* at 4a n.4; J.A. 90-91, 97, 108 (lease terms); J.A. 110-119 (corporate documents and agreement to be bound).

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[1] *See Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 564-569 (Ga. 1985) (authorizing essentially identical lease terms as consistent with public mission of hospital authorities); *Bradfield* v. *Hospital Auth. of Muscogee County*, 176 S.E.2d 92, 99 (Ga. 1970) (similar). In *Richmond County*, the court explained that the lease structure could put an authority hospital "in a better position to serve the public-health needs of the community" by, for example, "allow[ing] the development of additional health-care facilities without the need to raise all of the capital in the public sector"; permitting the lessees to perform certain services "to raise funds to offset the cost of indigent care"; and structuring operations "so as to maximize the amount of Medicare/Medicaid funds received, thereby lowering the cost of health care to the community." 336 S.E.2d at 569.

Under Georgia law, a hospital authority may not transfer operations to a lessee unless it "first determine[s] that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community." Ga. Code Ann. § 31-7-75(7). The lease itself must impose a duty on the lessee to fulfill the authority's public health and indigent care missions—as the Authority's lease with PPMH does. *See id.*; J.A. 86-87, 88-89, 93 (lease §§ 4.02(g)-(h), 4.03(b), 4.18). The authority must also "retain[] sufficient control ... so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return" from operation of the hospital. Ga. Code Ann. § 31-7-75(7); *see also id.* § 31-7-77 (no hospital authority project may be operated for profit or charge prices greater than necessary to cover costs and create reasonable reserves). Here, the Authority could terminate the lease, cause the dissolution of PPMH and PPHS, and retake control of both entities' assets if PPMH failed to discharge its and the Authority's public obligations. *See* J.A. 102-108 (§§ 9.01-9.07); J.A. 114, 117-119 (corporate documents and agreement to be bound).

In practice, this structure for pursuing the Authority's mission has resulted in an efficient hospital operation that provides high-quality care at comparatively low prices to both paying and non-paying patients in the Authority's service area. With 443 beds, Putney Memorial has over 14,000 inpatient admissions annually; sees over 5,200 Medicaid patients, at state reimbursement rates that cover far less than the actual cost of services; and provides substantial additional charity care, outpatient, and emergency services, while increasing prices at a rate far lower than the rate of increase of the medical consumer price index and receiv-

ing no additional support from county taxpayers. *See* Dkt. 52-13 (Dec. 2010 presentation to Authority regarding acquisition) at 22, 27; *see also* Dkt. 52-8 (report by PricewaterhouseCoopers) at 3 (independent study comparing Putney Memorial favorably to peers in nearly all respects, including indigent care and community benefit); J.A. 237-238 (Dougherty County now provides no indigent care funding, compared with $2 million annually before 1990).

2. Since well before the 1990 restructuring, demand for Putney Memorial's services has exceeded what the hospital could supply. *See, e.g.*, J.A. 238-239. The hospital has often been required to divert patients to other facilities because of a lack of available ICU beds. *See* Dkt. 52-13, at 10; Dkt. 52-18 (May 2011 presentation to Authority regarding acquisition) at 8-9. These constraints interfere with accomplishment of the Hospital Authority's public mission of providing necessary care.

There are two ways to increase capacity: buy it or build it. Of the two, buying existing unused or underused capacity is generally much faster, cheaper, and less disruptive to existing patient care than designing a new facility, securing needed approvals, and completing construction. *See* Dkt. 52-13, at 16-18; *see also* Dkt. 52-18, at 10-18. Accordingly, beginning in 1986—when the Authority was still running Putney Memorial directly, and well before PPMH or PPHS even existed—the Authority periodically sought to acquire the other hospital in Albany, Palmyra Medical Center, from its owner HCA Inc., a large for-profit hospital operator. *See* J.A. 120-121 (1988 Authority Minutes); 122-123 (1989 Minutes), 239-240. In 1989, further negotiations between Joel Wernick, then the Authority's new chief ex-

ecutive officer, and HCA again failed to result in an agreement. *See* J.A. 230, 238-242.

Periodic discussions regarding expansion through acquisition of Palmyra continued in the ensuing twenty years. J.A. 242-245. By 2010, the lease structure for operating Putney Memorial had been in place for many years, and Wernick had moved from working directly for the Authority to being CEO of PPHS and PPMH; but the hospital's capacity problem remained the same or worse, with increasing diversions and additional constraints imposed by the age of some of its facilities. J.A. 245. Meanwhile, Palmyra, despite having more than half as much nominal capacity as Putney Memorial (248 beds), had one-fifth the number of admissions and treated less than one Medicaid patient per bed—less than one-tenth of Putney Memorial's rate of service to the disadvantaged. Dkt. 52-13, at 22. Analysis again showed that, compared to the most reasonable construction plan, purchase of the existing Palmyra facility would provide Putney Memorial with more than three times the number of additional beds at less than half the average cost per bed, and would be less disruptive to existing patient care. *See* Dkt. 52-18, at 13. Those savings would serve the Authority's public mission, including enabling the provision of more services for elderly or indigent patients at the reimbursement rates fixed by Medicare and Medicaid. *See, e.g., id.* at 15, 18.

In September 2010, Wernick learned that HCA might be willing to entertain a new offer for Palmyra. He met with the Chairman and Vice Chairman of the Authority, who agreed that he should pursue the opportunity. J.A. 246. Because HCA—a private, for-profit enterprise—insisted on confidentiality, while formal Authority board meetings must be public, during the negotiations Wernick met only individually with

Authority board members and counsel, briefing them on the proposed transaction and obtaining tentative approval. *See* J.A. 242-245, 248, 249; *see also* J.A. 207-208, 223-224. In November, Wernick reviewed a formal offer with the Authority's Chairman, Vice Chairman, and general counsel, who approved it. J.A. 247. Throughout the negotiations, it was clear to all concerned that any deal would require final Authority approval.[2]

The Authority's board formally considered the final proposed terms of the transaction at a public meeting on December 21, 2010, and voted unanimously to make the acquisition. The money would come from the operating income and reserves held by PPMH and PPHS—which are the Authority's only source of funds apart from potential tax subsidies, just as they would be if the Authority were still operating the hospital directly—but title to all assets would pass solely to the Authority. *See* Dkt. 52-11 (Purchase Agreement) at 7, 16 (defining "Buyer" and outlining terms of transfer). It was contemplated that, after further state-law requirements were met, including notice and a public hearing, Palmyra would be incorporated into the Authority's lease arrangement with PPMH.

After the FTC challenged the Palmyra acquisition and the Authority's approval process, the Authority revisited the issue. On May 5, 2011, "after reviewing the allegations and complaints," the board again voted unanimously to "reaffirm and ratify the previous deci-

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[2] Indeed, HCA expressed concern that the proposed acquisition might become public but then not be approved by the Authority, and demanded a termination fee to compensate it for potential harm to its ongoing business if that were to occur. J.A. 164, 150.

sions ..., it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will further the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolutions) at 2.

3. On April 19, 2011, the FTC initiated an administrative proceeding challenging the Authority's acquisition of Palmyra. The next day, it brought this action in the district court seeking a preliminary injunction barring completion of the transaction. *See* Pet. Br. 13; 15 U.S.C. § 53(b).[3]

a. The district court denied the injunction and dismissed the case. Pet. App. 16a-65a. It framed the core issue as whether the acquisition had been made by a political subdivision of the State "pursuant to state statutes authorizing the challenged action," and whether any potential anticompetitive effect was "reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision." Pet. App. 42a; *see id.* at 38a-49a. Analyzing the provisions of Georgia law relevant to hospital services, the court noted in particular that Georgia authorized hospital authorities to operate in limited geographic areas, to acquire one or more hospitals, and to operate networks of providers. *Id.* at 51a-59a. An acquisition like the one here was "reasonably foreseeable," because "the Georgia legislature intended to guarantee that hospital authorities could accomplish their mission of promoting

[3] The FTC observes in passing (Br. 13) that its district court complaint was "joined by the State of Georgia." Notably, the State did not join in the FTC's appeal and is not a party in this Court.

public health notwithstanding [any] anticompetitive results." *Id.* at 55a.

The court reached this conclusion even accepting the FTC's characterization of PPMH and PPHS as "private parties." *See, e.g.*, Pet. App. 57a. It recognized that under Georgia law a hospital authority could use private entities to carry out its public mission so long as it "retain[ed] public control[,] ... which it has done here." *Id.* at 58a. It noted that, under the applicable statutory and lease structure, PPMH and PPHS acted in effect as Authority agents. *Id.* at 61a-64a.

b. The court of appeals affirmed. Pet. App. 1a-15a. It explained that its analysis turned on "whether the state has authorized the Authority's acquisition of Palmyra and, in doing so, clearly articulated a policy to displace competition." *Id.* at 10a (footnotes omitted). That standard "does not require the state legislature to 'expressly state in a statute[] or its legislative history that the legislature intends for the delegated action to have anticompetitive effects,'" *id.* at 9a (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985)), but is satisfied if anticompetitive consequences were a "'foreseeable result'" of the state legislation authorizing the Authority's actions, *id.* (quoting *Hallie*, 471 U.S. at 42).

In applying that standard, the court focused on the power granted to hospital authorities to promote public health by acquiring and operating hospitals within defined local areas, using not only "any power a private corporation could" but also "powers that private corporations do not." Pet. App. 11a. Because many local areas would not be large hospital markets, the legislature "must have anticipated" that acquisitions in some areas

would result in the "displacement of competition." *Id.* at 12a-13a.

The court rejected the FTC's argument that there was an "absence of genuine state action" here because the Authority only "rubber-stamped" the acquisition of Palmyra. Pet. App. 10a n.12. Applying this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the court refused to "look behind governmental actions for perceived conspiracies to restrain trade" or engage in "deconstruction of the governmental process and probing of the official intent." Pet. App. 10a n.12, 14a n.13 (internal quotation marks omitted).

After ruling, the court of appeals dissolved the injunction it had entered pending appeal. Pet. App. 68a. The Authority then completed its acquisition of Palmyra. *See* Pet. Br. 16. On July 25, 2012, after public hearing and comment and further deliberation, the Authority also approved an amended lease agreement, incorporating the Palmyra facilities—now known as Phoebe North—into the Authority's lease arrangement with PPMH. *See id.*

SUMMARY OF ARGUMENT

I. A. This Court has long recognized that Congress designed the federal antitrust laws to prohibit private restraints on trade, not "to restrain a state or its officers or agents from the activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Where a State acts through officers or agents, it must be determined whether, for these purposes, the act is properly attributable to the State itself. Under the Court's decisions, the act of a sub-state public entity is "state action" if the entity "act[s] pursuant to a clearly

articulated state policy." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 47 (1985). In such cases there is no further requirement of "active supervision." *Id.*

These standards have been developed through a series of cases in which the Court has held that a state policy is clearly articulated if potential displacement of competition is a "foreseeable result" of the State's delegation of authority in a particular field, *see, e.g.*, *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). Displacement is "foreseeable" in this sense when it may reasonably be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (internal quotation marks omitted). In fashioning and applying this standard, the Court has consistently refused to impose any requirement that an intention to insulate public actions from the federal antitrust laws be expressly stated, that anticompetitive effects be compelled by state law or inherent in a state policy regime, or that anticompetitive decisions be necessary to make a state program work.

The FTC asks the Court to revisit these questions and reformulate its state-action standard in just the inflexible manner the Court has previously rejected. As prior cases have made clear, however, any standard requiring that an allegedly anticompetitive action be compelled, "inherent," or "necessary" under state law in order to be shielded from federal antitrust scrutiny would demand an unrealistic degree of specificity from state legislation, deny States appropriate flexibility in delegating specific decisions to local public officials, and perversely encourage States to *require*, rather than merely *permit*, potentially anticompetitive ways of pur-

suing state goals. There is no sound reason for abandoning current law in favor of such a revised standard. Moreover, States have been legislating against the backdrop of *Parker* and *Hallie* for decades, and the FTC has made no showing that would justify departure from standard principles of *stare decisis*.

B. The hospital acquisition challenged in this case was undertaken in the context of Georgia's statutory response to the complex challenges of public health care policy, such as ensuring that hospital services will be available to all state residents, even if they cannot pay. In addition to actively regulating entry into or expansion in local markets for hospital services, Georgia has provided for the creation of local public hospital authorities in each county. These authorities are given significant power to operate in their assigned areas and with respect to hospitals and certain related services; but they are not authorized to operate outside those parameters, and even within them they are subject to significant statutory policy constraints. Certainly, they are not merely created and endowed with what the FTC insistently calls "general corporate powers."

Among other specific powers, authorities are authorized to acquire existing hospitals operating within their geographical jurisdictions. When the Georgia legislature created this statutory framework, it surely contemplated that in making such an acquisition in a relatively small area of a relatively sparsely populated State, a local authority might decide to pursue its public goals by making an acquisition that would reduce local competition or increase market concentration, and thus might be viewed for other purposes as anticompetitive. Under these circumstances, the respondent Authority's decision to address the capacity constraints that were hampering its discharge of its public mission

by acquiring another local hospital, rather than pursuing a more complex and expensive expansion of its existing facilities, fits easily within the holdings and rationale of this Court's prior cases. For purposes of the federal antitrust laws, the acquisition decision was an act of the State.

II. The Authority, as a state-created public entity, is not subject to any "active supervision" requirement. The FTC argues that the Authority's decision to structure the discharge of its public responsibilities using a lease structure and two non-profit entities, PPMH and PPHS, has created a "private monopoly" subject to such supervision. But the only actions relevant to *Parker* immunity here are those of the Authority itself, which made the decisions to acquire Palmyra and to lease it for joint operation with Putney Memorial. In any event, for *Parker* purposes the entities here acted as agents of the Authority, for the purpose of carrying out the Authority's public functions in a manner specifically authorized by state law. Finally, even if "active supervision" were required, that requirement would be satisfied on the facts here.

ARGUMENT

I. THE ACQUISITION OF PALMYRA WAS AN ACT OF "A STATE OR ITS OFFICERS OR AGENTS" FOR PURPOSES OF THE FEDERAL ANTITRUST LAWS

A. The Act Of A Sub-State Entity Is State Action If The State Has Delegated To The Entity The Authority To Make Potentially Anticompetitive Choices In A Specific Field

Since *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has recognized that in enacting the federal antitrust laws Congress had no intention of seeking "to re-

strain a state or its officers or agents from the activities directed by its legislature." *Id.* at 350-351. In 1985, a unanimous Court reaffirmed *Parker*'s "principles of federalism and state sovereignty," emphasizing that "the Sherman Act was intended to prohibit *private* restraints on trade." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *see also, e.g.*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 n.19 (1985) (noting legislative history).

Since *Parker*, the Court has developed different ways for determining what constitutes an action taken, directed, or authorized *by the State*. Where the State acts directly, its actions "*ipso facto* are exempt from the operation of the antitrust laws." *Hoover* v. *Ronwin*, 466 U.S. 558, 567-568 (1984). At the other end of the spectrum, purely private actors who seek immunity from federal scrutiny must demonstrate that their conduct results directly from a regulatory regime that is both "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted); *Southern Motor Carriers*, 471 U.S. at 61. In the middle lies the category relevant to this case, involving action by a sub-state public entity such as a municipality or, as here, a special-purpose authority. In such cases, the Court has held, the public entity must "act pursuant to a clearly articulated state policy." *Hallie*, 471 U.S. at 47. "Once it is clear," however, "that state authorization exists, there is no need to require the State to supervise actively the [public entity's] execution of what is a properly delegated function." *Id.*

In this case, the FTC in effect asks the Court to revisit a question addressed in *Hallie*: "how clearly a

state policy must be articulated for a [sub-state entity] to be able to establish that its [allegedly] anticompetitive activity constitutes state action." 471 U.S. at 40. Part of the Commission's argument—that Georgia's creation of hospital authorities involves nothing more than a grant of "general corporate powers" (*e.g.*, Pet. Br. 17)—is simply incorrect as a characterization of the applicable state law context, as respondents address in Part I.B. Doctrinally, however, the Commission's proposal is more far-reaching. Previously, this Court has held that "it is enough ... if suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (quoting *Hallie*, 471 U.S. at 42). The FTC asks the Court to reformulate that standard to require that anticompetitive effects be a "necessary" or "inherent" result of state law. *E.g.*, Pet. Br. 17. That would be a significant change in the law, unjustified either by first principles or by any factor that could counsel a departure from *stare decisis*.

1. Development Of The *Hallie* Standard

This Court first squarely addressed *Parker*'s application to a sub-state governmental actor in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978), which involved alleged anticompetitive conduct by city-owned and -operated electric utility systems. A divided majority held that *Parker*'s reasoning did not extend automatically to all government entities within a State. *Id.* at 411 (opinion of Brennan, J.); *id.* at 422-423 (opinion of Burger, C.J.).[4] The plurality

[4] Justices Stewart, White, Blackmun, and Rehnquist would have held that "[t]he petitioners are governmental bodies, not private persons, and their actions are 'act[s] of government' which

opinion instead sought to distinguish sub-state actions that are shielded from federal antitrust scrutiny from those that are not, based on the degree to which a decision to permit the use of potentially anticompetitive measures in pursuit of public goals could fairly be attributed to the State.

The *Lafayette* plurality recognized the importance of municipalities as "instrumentalities of the State for the convenient administration of government within their limits." 435 U.S. at 429. It also noted the dissent's concern that the specter of imposing federal antitrust liability on municipal government actors would "greatly ... impair the ability of a State to delegate governmental power broadly to its municipalities." *Id.* at 438 (Stewart, J., dissenting); *see also id.* at 439-440 (potential liability would "discourage state agencies and subdivisions in their experimentation with innovative social and economic programs"). It expressly rejected the argument "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization" by the State. *Id.* at 415. Rather, it reasoned, "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* (internal quotation marks omitted). Such an inquiry would prevent insulation of "purely parochial" local government decisions, while "preserv[ing] to the States their freedom under our dual system of federalism to use their municipalities to administer

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Parker v. *Brown* held are not subject to the Sherman Act." 435 U.S. at 426 (Stewart, J., dissenting).

state regulatory policies free of the inhibitions of the federal antitrust laws." *Id.* at 415-416.

The Court next considered a municipality's actions under *Parker* in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), where a cable television company challenged a moratorium imposed by the city on the expansion of cable service within city limits. The city's legal authority derived from the Colorado Constitution, which granted it "every power theretofore possessed by the [state] legislature ... in local and municipal affairs." *Id.* at 52. The Court rejected the city's contention that this general "home-rule" provision was adequate evidence of a state policy authorizing local displacement or regulation of competition in the cable market. *Id.* at 54-55. On the contrary, it was clear that, as to cable services, there had been no "affirmative addressing of the subject by the State." *Id.* at 55. In that situation, accepting the argument "that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" would have "wholly eviscerate[d]" the requirement of affirmative authorization at the state level. *Id.* at 56.

The Court returned to the issue in *Town of Hallie* v. *City of Eau Claire*, where it most directly considered "how clearly a state policy must be articulated." 471 U.S. at 40. The case involved allegations that the city of Eau Claire had improperly acquired a monopoly over sewage treatment services in its area and then unlawfully tied the provision of those services to use of the city's sewage collection and transportation services. *Id.* at 36-37. State law authorized cities to build sewage systems and fix the limits of their service areas, and allowed state regulators to order connection to certain "joint" systems by unincorporated areas only if those

areas agreed to be annexed to the operating city. *Id.* at 41. Otherwise state law was silent, and the plaintiff towns argued that "these statutory provisions do not evidence a state policy to displace competition ... because they make no express mention of anticompetitive conduct." *Id.* at 41-42.

The *Hallie* Court again specifically rejected the position that "a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43. Any such contention, the Court observed, "embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Id.* Where state "statutes authorized the City to provide sewage services and also to determine the areas to be served," *id.* at 42, that was enough to make clear that the State had "delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects," *id.* at 43.

Indeed, the Court reasoned, any more searching inquiry would risk "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," "embroil the federal courts in the unnecessary interpretation of state statutes," and "undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 471 U.S. at 44 & n.7. Accordingly, it was "sufficient to satisfy the 'clear articulation' requirement of the state action test" that Wisconsin's statutory provisions addressing "the area of municipal provision of sewage services ... plainly show that 'the legislature contemplated the kind of action complained

of.'" *Id.* at 44 (quoting *Lafayette*, 435 U.S. at 415; other internal quotation marks omitted).

Decided the same day as *Hallie*, *Southern Motor Carriers Rate Conference, Inc.* v. *United States* involved state statutes under which private carriers were "authorized, but not compelled" to submit collective rate proposals for review by state commissions. Again, the Court held that potentially anticompetitive decisions by sub-state entities need not be "compelled" by state law in order to be made pursuant to a "clearly articulated" state policy. *See* 471 U.S. at 50, 59, 61. Noting that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," *id.* at 56, the Court observed that any "compulsion" requirement would disserve *both* state autonomy *and* the goals of the federal antitrust laws, *id.* at 61. Any such requirement would "reduce[] the range of regulatory alternatives available to the State." *Id.*[5] At the same time, it could lead, perversely, to "*greater* restraints on trade," by "encourag[ing] States to require, rather than merely permit, anti-competitive conduct." *Id.*

Similarly, *Southern Motor Carriers* once again made clear that "state action immunity is *not* dependent on a finding that an exemption from the federal antitrust laws is 'necessary.'" 471 U.S. at 57 n.21 (empha-

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[5] "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Southern Motor Carriers*, 471 U.S. at 64.

sis added). The Court squarely rejected (*id.*) the argument advanced by the dissent—and again by the FTC in this case (*see, e.g.*, Pet. Br. 17, 27)—"that a state regulatory program is entitled to *Parker* immunity only if an antitrust exemption is 'necessary ... to make the [program] work.'" 471 U.S. at 57 n.21.

The Court next applied *Parker* in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where the plaintiffs alleged a conspiracy between private parties and public officials to use a city's zoning powers to protect a billboard owner from competition. South Carolina law gave cities broad power to enact land use regulations, *see id.* at 370-371 & n.3, and Columbia used that power to restrict the erection of new billboards, hindering entry into a market in which the incumbent had a 95% market share, *id.* at 367-368. In deciding whether this was properly characterized as "state action," the Court relied on *Hallie*: "It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *Id.* at 373. Noting that "[t]he very purpose of zoning regulation is to displace unfettered business freedom," the Court readily found that test satisfied on the facts of the case. *Id.* at 373-374.[6]

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[6] Drawing on language in *Omni*, amicus the National Federation of Independent Business argues for a "market participant" exception to *Parker*'s principle that the federal antitrust laws do not reach state action. *See, e.g.*, NFIB Amicus Br. 28-29. That argument is not presented in the FTC's petition or its brief and is not properly before the Court. *See, e.g., United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60, n.2 (1981); *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994). In any event, the public provision of hospital services at issue here is no different from the public provi-

Finally, in *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 628-629 (1992), the Court considered claims of antitrust immunity by private title companies that were authorized under state law to fix uniform prices. The FTC conceded that this made state policy clear, but because the underlying conduct was private there was also a need to show "active supervision" by public officers. *Id.* at 631. On that point, while state law provided a "theoretical mechanism" for regulatory review of the privately-agreed prices, *id.* at 629, detailed factual findings, *see id.*, persuaded the Court that "active state supervision did not occur," *id.* at 638. Observing that its "decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision," *id.* at 639, the Court held that *Parker* did not shield "private price-fixing arrangements" without "active [public] supervision in fact," *id.* at 638. Even in those circumstances, however, the Court was careful to disclaim any intention of setting federal courts to inquiring "whether the State has met some normative standard, such as efficiency, in its regulatory practices." *Id.* at 634. "The question is not," the Court explained, "how well state regulation works," but only whether decisions challenged as anticompetitive under federal law and defended as "state action" were in fact "the State's own." *Id.* at 635.

In these cases, the Court has developed a practical standard for determining when the acts of a sub-state public entity are those of state "officers or agents." *Parker*, 317 U.S at 350. The entity must act pursuant

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sion of electricity in *Lafayette* or the public provision of sewage services in *Hallie.*

to a state policy that is "clearly articulated"; but that does *not* mean that the State must have directly expressed an intention to authorize anticompetitive actions, or that such acts must be "compelled" by the State or "necessary" for a state program to succeed. It suffices, instead, if potential displacement of competition is a "foreseeable result" of the State's delegation of authority in a particular area; and such displacement is "foreseeable," in this sense, when it may reasonably be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette*, 435 U.S. at 415 (internal quotation marks omitted); *see Hallie*, 471 U.S. at 44. This standard fully accommodates the federal government's interest in enforcing its antitrust laws against non-state conduct, while respecting both the wide variety of state legislative and regulatory structures and Congress's fundamental decision not to seek to regulate potentially anticompetitive policy choices by the States.

2. The FTC's Proposed "Necessary" Or "Inherent" Standard

The FTC reviews many of these same cases (Br. 2-7, 21-27), and eventually grapples with this Court's articulation of a "foreseeability" standard (Br. 37-44). In effect, however, it asks the Court to revisit that standard and reformulate it in a manner that past decisions have repeatedly rejected. The FTC would prefer a world in which federal antitrust law reaches the acts of any sub-state entity or official unless anticompetitive action is the compelled, "inherent," or "necessary" result of a state-enacted regulatory regime. *E.g.*, Pet. Br. 17. But these terms, as the Commission uses them, are little more than a different guise for the type of "ex-

press authorization" standard that this Court has never been willing to embrace. The Court has consistently said "foreseeable" or "contemplated," not "inevitable"; and it has made clear that a State may endow its officers and agents not only with power but also with flexibility and discretion. In short, the Court has insisted on assessing antitrust allegations against sub-state public actors in a manner that both respects the state policymaking process and reflects a practical understanding of the many ways in which that process may proceed. That approach is correct, and the Court should not change it.

In *Hallie*, the United States argued (as an amicus) that "[i]f the authority granted by [a state] statute indicates that the legislature *contemplated* the type of anticompetitive conduct at issue, then it can be presumed that the legislature has considered the reasonably foreseeable consequences of the conduct and has determined that such an exercise of the *agency's discretion* will further the interests of the state as a whole." *Hallie*, U.S. Amicus Br. 18 (emphasis added). Thus, it was not "necessary ... to require the State to compel the city's action in order for it to be immune from the Sherman Act." *Id.* A number of States likewise argued that the appropriate question was whether "anticompetitive consequences of the authorized conduct [were] a reasonably foreseeable consequence of the state's authorization." *Hallie*, Virginia et al. Amicus Br. 2; *see also Hallie*, Illinois et al. Br. 6 ("the challenged conduct was contemplated or intended by the state legislature"). Such a foreseeability test, they contended, would "provide[] a principled means for accommodating the federalism rationale of *Parker* with the operational needs of local government," rather than requiring States "to transform units of local government into au-

tomatons in order to afford them reasonable protection from the antitrust laws." Virginia et al. Amicus Br. 11-12.

This Court agreed, holding that because state law "clearly contemplate[d] that a city *may* engage in anti-competitive conduct," such conduct was "a foreseeable result of *empowering* the City to refuse to serve unannexed areas." 471 U.S. at 42 (emphasis added). Thus, the Court's holding in *Hallie* was specifically designed to accommodate *delegation* of authority on the part of the State, and *discretionary exercise* of that authority by sub-state public officials in "contemplated" or "foreseeable" ways. The "inherent" or "necessary" test now proposed by the FTC and a number of States would be a sharp departure from that position.

There is ample reason for maintaining the more flexible approach. In many cases, States choose to set up a general structure for regulation of a particular field and then delegate considerable implementing discretion to public officers or agents, often operating at the municipal or public-authority level. Often, the State may determine that it should not—or even cannot—fix policy through statewide legislation without losing sensitivity to local conditions and the flexibility to innovate, experiment, or adapt. That is one reason *Hallie* made clear, for example, that standards for determining the reach of the federal antitrust laws should not interfere with "municipalities' local autonomy and authority to govern themselves." 471 U.S. at 44. And it is one reason the Court held in *Southern Motor Carriers* that making "state action immunity ... dependent on a finding that an exemption from the federal antitrust laws is 'necessary'" to make a state program operate correctly was unacceptable, because it "would prompt the 'kind of interference with state sovereignty

... that ... *Parker* was intended to prevent.'" *Id.* at 57 n.21. Yet, the FTC advocates an indistinguishable standard of "necessity" here. *See, e.g.*, Pet. Br. 17, 27.

The Court should continue to reject any such rule for the same reasons it always has. Any "necessity" or "inherency" test would chill state flexibility to delegate regulatory authority to sub-state entities; subject such entities and their public officers to an undue threat of federal litigation; and replace a limited inquiry into what state legislators would reasonably have contemplated in enacting a state regulatory or policy regime with an unseemly analysis by federal courts into whether a state program could still "function properly and achieve its intended purposes" (Pet. Br. 17) if operated in some way more to the liking of federal antitrust plaintiffs or the FTC. That is not the way to "preserve[] to the States their freedom under our dual system of federalism to use their [sub-state public entities] to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415.

Finally, even if the question were more evenly balanced as an original matter, what constitutes state action for purposes of the federal antitrust laws is ultimately a matter of statutory interpretation and application, as to which considerations of reliance and congressional acquiescence weigh heavily in favor of adhering to basic principles of *stare decisis*. *See, e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). States have legislated against the backdrop of *Hallie* for nearly three decades, and in light of *Parker* since 1943. Congress has not, during the same periods, ever seen fit to revisit this Court's respectfully limited constructions of federal law. Nor is this a case in which economic understanding has evolved over time, or a series of

later cases has undermined an original rationale, or an established framework has proven to be unworkable or unwise in application. *Cf., e.g., Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899-907 (2007).[7] Under these circumstances, there is no sound basis for revising the Court's previous decisions in a way that would "dislodge settled rights and expectations [and] require an extensive legislative response" by affected States. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Court should instead reaffirm and apply existing law.

B. The Hospital Authority Is A State Actor When It Makes Decisions About How Best To Ensure The Provision Of Hospital Care In The Limited Service Area Assigned To It By State Law

The FTC argues that the respondent Hospital Authority here should be treated the same as any private commercial actor for purposes of the federal antitrust laws. Its primary refrain is that the State of Georgia has done nothing more than create a sub-state entity with "general corporate powers" (*see* Pet. Br. I, 2, 17, 18, 19, 28, 33, 40), and anticompetitive action by such an entity is not "necessary" or "inherent" to a state regulatory scheme and thus not fairly attributable to the State (*e.g., id.* at 17). As a legal matter, that argument

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[7] As respondents explained at the petition stage (Br. in Opp. 24-26), the lower courts have applied the *Hallie/Omni* analytical framework faithfully and without undue difficulty, evaluating what state law as a whole reveals about a given State's policy toward a particular market and particular challenged acts by sub-state actors and reaching appropriately different results on different sets of facts.

is misconceived for the reasons just discussed. Factually, it rests on an unsustainable characterization of the state-law context of the Authority's actions.

1. Georgia Created Local Hospital Authorities To Carry Out A Public Mission In A Specific Field, In Ways Adapted To Particular Local Conditions

a. The provision of health care poses many regulatory challenges to state governments. One fundamental problem is that health care is expensive and the private market, left to its own devices, will leave many individuals who lack sufficient ability to pay either without care or with a level of care below what our society is prepared to tolerate. *See, e.g.*, U.S. Br. 7-8, *HHS* v. *Florida*, No. 11-398; *see also id.* at 33-36, 39-40. Similarly, the population in some areas of a State may be too sparse for the free market to support an adequate level of doctors or hospital services. To address such issues, state governments undertake a variety of interventions in the health care field. Many directly subsidize care to poor or underserved populations. Some regulate the provision of health insurance with a view to expanding care. Others regulate what services may or must be provided by particular providers, under particular circumstances, or in particular areas. Some create systems of public hospitals to provide services directly, often under the management or oversight of state agencies, local governments, or special-purpose public entities. Whatever methods a State may adopt, its choices are policy decisions aimed at addressing the critical challenge of ensuring that all state residents have access to adequate health and hospital care.

How a State intervenes in the health care market will likely depend on specific geographic, demographic,

and economic conditions prevailing in the State or in particular local areas. One critical consideration is the role that federal involvement already plays in a State's health care market, through the Medicare and Medicaid programs. These and other federal programs significantly affect the market for health care services, and a State must take account of them in implementing its own policy goals. A State must further determine to what extent its policies should be dictated at the statewide level or committed to implementation in different parts of the State through discretionary decisions made by agencies or local authorities. In that regard, the federal government has at least sometimes recognized the need for States to retain considerable flexibility in implementing health care policy.[8] This flexibility "allows states and local governments to move quickly to address varying needs, to innovate, and to set geographically sensitive priorities locally[.]" Jennings & Hayes, *Health Insurance Reform and the Tensions of Federalism*, 362 New Eng. J. Med. 2244, 2244 (2010).

Georgia has chosen various forms of intervention in the health care market. Among other things, it carefully restricts entry into or expansion in particular markets by existing or potential providers. Any party wishing to establish or substantially expand a hospital,

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[8] *See, e.g., Preparing for Innovation: Proposed Process for States to Adopt Innovative Strategies to Meet the Goals of the Affordable Care Act*, HealthCare.gov (Mar. 10, 2011), at http://www.healthcare.gov/news/factsheets/stateinnovation03102011a.html (describing proposed regulations implementing the Affordable Care Act, "[b]uilding on President Obama's commitment to give states the flexibility to innovate and implement health care solutions that work best for them").

for example, must first secure a "certificate of need" from state regulators. *See* Ga. Code Ann. §§ 31-6-40 *et seq.* This requirement embodies a state policy "to ensure that health care services and facilities are developed in an orderly and economical manner," which in the State's view makes it "essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided ... in a manner that avoids unnecessary duplication of services." *Id.* § 31-6-1; *see Phoebe Putney Mem. Hosp., Inc.* v. *Roach*, 480 S.E.2d 595, 597 (Ga. 1997) (certificate of need law necessary to "the orderly implementation of [the State's] health plan," specifically that health-care facilities and services are "made available to all citizens and that only those health-care services found to be in the public interest shall be provided in this state"). The Georgia Supreme Court has observed that such certificate-of-need laws are paradigmatic examples of "regulated monopoly in this state"—confirming that "the General Assembly is free to restrict competition among public utilities where, in the judgment of the legislature or its duly authorized delegate, such competition may be injurious to existing public services." *City of Calhoun* v. *North Ga. Electric Membership Corp.*, 213 S.E.2d 596, 603 (Ga. 1975); *see also, e.g., New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state scheme preventing free entry was "designed to displace unfettered business freedom" and embodied state action for federal antitrust purposes).

The FTC takes a dim view of certificate-of-need laws, complaining that they "create barriers to entry and expansion to the detriment of health care competition and consumers." Joint Statement of the Antitrust Division of the U.S. Dep't of Justice and the FTC,

Competition in Health Care and Certificates of Need 1-2 (Sept. 15, 2008). Georgia, however, has reached the opposite conclusion; it has "kept its CON program active and has one of the most extensively regulated healthcare industries in the country." *2008 Legislative Review: Health*, 25 Ga. St. U. L. Rev. 219, 223 (2008). This is precisely the type of policy choice that *Parker* reserves to each State.

These features of the health services or hospital market in general, and of Georgia law in particular, provide the context for this case. Georgia has made the policy decision to authorize the creation of local public hospital authorities to provide needed services in many areas of the State. These authorities are not free-floating creations, endowed with "general corporate powers" and left to do as they like. They are an integral part of the State's approach to the public policy challenge of ensuring the availability of adequate health care to all state residents—including those in smaller or rural communities and those who are uninsured, underinsured, or publicly insured and cannot afford to pay in full for care.

b. As the FTC explains (Br. 7-9), in 1941 Georgia amended its constitution to enable its political subdivisions to offer health care services, delegating to counties and municipalities "the duty which the State owed to its indigent sick." *DeJarnette* v. *Hospital Auth. of Albany*, 23 S.E.2d 716, 723 (Ga. 1942). The state legislature then enacted the Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, authorizing "counties and municipalities to create an organization which could carry out and make more workable" their assumption of that duty. *DeJarnette*, 23 S.E.2d at 723. The powers granted to such authorities went "beyond anything heretofore attempted in this State," deploying "new

weapons ... to combat ancient evils." *Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 564 (Ga. 1985) (quoting *Williamson* v. *Housing Auth. of Augusta*, 199 S.E. 43, 56 (Ga. 1938)).

The Hospital Authorities Law provides that each authority is to serve the health needs of a limited geographic area. Ga. Code Ann. § 31-7-71(1). In carrying out their delegated mission, hospital authorities are "deemed to exercise public and essential governmental functions" and are given "all the powers necessary or convenient to carry out and effectuate" *that mission. Id.* § 31-7-75. These include the power "[t]o make plans for unmet needs of [authorities'] respective communities," *id.* § 31-7-75(22), and "[t]o establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10). The law also specifically confers the powers (i) to acquire existing hospitals or other "projects," *id.* § 31-7-75(4), as well as to "construct, reconstruct, improve, alter, and repair" them, *id.* § 31-7-75(5); and (ii) to lease hospitals or other facilities for operation by others, provided that the authority "shall have first determined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community," *id.* § 31-7-75(7).[9]

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[9] Authorities are in all respects public entities, and accountable as such under state law. *See, e.g., Bradfield*, 176 S.E.2d at 99 ("[T]he Hospital Authorities Law is replete with safeguards and controls on the operation of the hospital to insure that the public interest in the hospital, including the care of indigents, is protected[.]"). Each authority is overseen by a multi-member board appointed by the relevant municipality or county government. Ga. Code Ann. §§ 31-7-74, -74.1. State statutes prescribe the duties of

Indeed, authorities are specifically authorized to acquire property, if necessary, by eminent domain. Ga. Code Ann. § 31-7-75(12). The FTC dismisses this provision as having "no bearing on this case" (Br. 30), but that is not so. A State that authorizes a local authority to pursue its public purposes by acquiring property, if necessary, *without the consent of the seller* has surely contemplated that the authority may need to pursue its public mission using a "specific power" (*id.* at 39) that is "inherently inconsistent with pure free-market competition" (*id.*).[10] Grant of this power clearly demonstrates the State's intention that hospital authorities would exercise judgment about the needs of their local communities and take the steps they deemed necessary to meet those needs.

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board members, who may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care facilities in the county." *Id.* § 31-7-76. Members are "public officers, and as such are further restrained by the provisions of Art. I, Sec. II, Par. I, Constitution of Georgia of 1983, which provides: 'Public officers are the trustees and servants of the people and are at all times amenable to them.'" *Richmond County Hosp. Auth.*, 336 S.E.2d at 567, 569. And whatever may have been the case in 1995 (*see* Pet. Br. 45-46), at all times relevant here both the Authority and PPMH (as the entity leasing Putney Memorial from the Authority and operating it on the Authority's behalf) have been subject to the Georgia Sunshine Laws, Ga. Code Ann. §§ 50-18-70 *et seq.*; *id.* §§ 50-14-1 *et seq.*

[10] *Cf. Pennsylvania* v. *Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472, 479 (M.D. Pa. 2006) ("That anticompetitive effects are a foreseeable result of an authority's power to take property by eminent domain is obvious. It cannot reasonably be disputed that the exercise of this power may result in the displacement of competitive facilities.").

At the same time, the Hospital Authorities Law imposes substantial constraints on authorities, limiting use of their powers to the pursuit of the goal that led the State to authorize their creation and making clear that that goal is the provision of services to the public, not the fostering of free markets. *See Department of Human Res.* v. *Northeast Ga. Primary Care, Inc.*, 491 S.E.2d 201, 204 (Ga. Ct. App. 1997) ("A hospital authority does have certain competitive advantages, such as the ability to issue tax-free debt instruments, eligibility for a certain amount of public funding, a governmental exemption from taxation, and grant of the power of eminent domain. But it also has one major competitive disadvantage, *i.e.*, the obligation to provide indigent medical care."). In the case of eminent domain, for example, an authority's power is limited to the acquisition of property "essential to the purposes of the authority," Ga. Code Ann. § 31-7-75(12)—presumably including, for example, a hospital or other health care facility, but not any other business that an authority might simply decide to buy and run.

Another important constraint is the statutory limitation on pricing and earnings. Authority projects may not be operated for profit, and their prices must not exceed the amount necessary to cover costs and create reasonable reserves. *Id.* §§ 31-7-75(7), -77. This does not mean that an authority or lessee categorically could not or would not engage in conduct that could be viewed as anticompetitive, or that this case turns on any claim of "non-profit immunity." *Cf.* Pet. Br. 35-36; Economists' Amicus Br. 3-6. It does mean that the respondent Authority and its non-profit operating lessee—which is bound by the same statutory duties and restrictions—have goals and incentives quite different from those of private, profit-maximizing actors. As the

FTC's amici economists explain, for example, a non-profit actor with pricing power may place a high value on additional output of its services, leading it to "set a lower price than would an otherwise similar for-profit entity in order to deliver a greater quantity of services." Economists' Amicus Br. 8 & n.13. Restraining prices and increasing the output of services—especially services for those who cannot afford to pay—is a defining purpose of Georgia's Hospital Authorities Law, clearly reflected in the statutory mandate that they operate on a not-for-profit basis.[11]

Other mandates in the Law likewise focus on the provision of care, not the maximization of either efficiency or profit. *Id.* §§ 31-7-75(7), -76, -77. For example, authorities are given the power to enter into agreements with other parties, but only if doing so constrains health care costs and otherwise serves public goals. *Id.* § 31-7-75(7). And public accountability provisions include a process for state-court removal of authority members who have defaulted on their statutory duties, *id.* § 31-7-76, and immediate sanctions for conduct that might lead to pecuniary gain for individual board members, *id.* § 31-7-74.1. In short, authorities are simultaneously empowered and constrained to serve a single governmental goal—providing hospital

[11] The amici ecnomists question (Br. 13-14) whether the merger at issue here will allow Putney Memorial to provide more uncompensated care. That is precisely the sort of empirical and policy question that *Parker* allows States to make without interference from the federal antitrust laws, and that Georgia in turn has entrusted to its local hospital authorities.

services to the public in the local areas assigned to them by state law.[12]

Twenty-first on the list of twenty-seven powers granted to Georgia hospital authorities is the catch-all provision the FTC likes to cite: "To exercise any or all powers now or hereafter possessed by private corporations performing similar functions." Ga. Code Ann. § 31-7-75(21). As the Georgia Supreme Court has explained, however, even this seemingly general grant is in fact strictly limited to whatever incidental unenumerated powers are necessary *to carry out the specific public-health mission set forth in the remainder of the Hospital Authorities Law. See, e.g., Tift County Hosp. Auth.* v. *MRS of Tifton, Ga., Inc.*, 335 S.E.2d 546, 547 (Ga. 1985) (hospital authority not authorized to operate store renting or selling medical equipment; "The primary design of the creation of a municipal corporation is, that it may perform certain public functions as a subordinate branch of government; and while it is invested with full power to do everything necessarily incident to proper discharge thereof, no right to do more

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[12] Authority actions, like those of other Georgia administrative agencies, are subject to judicial review in state courts and may be invalidated if "arbitrary and unreasonable." *Cobb County-Kennestone Hosp. Auth.* v. *Prince*, 249 S.E.2d 581, 585-586 (Ga. 1978). In reviewing hospital authority actions, Georgia courts have recognized the "complex task" confronting each authority, *id.* at 588, including the need to balance the provision of paid and unpaid care, *Richmond County Hosp. Auth.*, 336 S.E.2d at 567. State courts accord deference to any "rational administrative decision enacted in order for the Authority to carry out the [state] legislative mandate that it provide adequate medical care in the public interest." *Cobb County*, 249 S.E.2d at 588.

can ever be implied.").[13] Thus, far from simply creating an entity with "general corporate powers," Georgia has created local authorities that have *more* power than any private corporation within their particular sphere—but actually far *less* power in any other.

2. The Authority's Decision To Acquire Palmyra Reflects A Choice Delegated To The Authority By The State

In sum, Georgia authorized the creation of local hospital authorities to fill a particular, identified public need, on a non-profit basis, in a special context in which the State also specifically limits choices about what new or additional services may be provided in particular areas. Under these circumstances, it is clearly reasonable for a local authority to decide—and surely reasonably within the contemplation of the State, in creating the authority, that it *might* decide—to acquire an existing hospital in its specified geographical service area, rather than seeking to satisfy its additional capacity needs by undertaking building plans that (i) would be considerably more expensive and (ii) would require demonstrating to other state regulators that the addition would not be duplicative or wasteful. Although the FTC may view such a decision as potentially anticompetitive under some circumstances, there should be no question that it is precisely the sort of choice that the Georgia legislature understood it was empowering local hospital authorities to make. And that delegation by

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[13] *See also Flint Electric Membership Corp.* v. *Barrow*, 523 S.E.2d 10 (Ga. 1999) (electric authority could not sell propane); *Day* v. *Development Auth. of Adel*, 284 S.E.2d 275 (Ga. 1981) (development authority could not acquire property to lease to grocery store).

the State shields the decisions made by its local agents from second-guessing under the federal antitrust laws.

The FTC argues generally that Georgia's constitution reflects "a policy preference for free-market competition." Pet. Br. 28. That is true as far as it goes, but it does not address the question presented here. In the health care field, and in particular with respect to controlling entry and regulating the volume and type of services made available in each geographic area, Georgia's certificate-of-need system adopts a distinctly non-free-market approach—as the Georgia Supreme Court has made clear the State is free to do. *See supra* pp. 30-32; *Calhoun*, 213 S.E.2d at 602; *see also Phoebe Putney Mem. Hosp.*, 480 S.E.2d at 621 (certificate-of-need law must be enforced to ensure that health services are not "duplicated unnecessarily," as "[t]he result would be a costly, inefficient health plan"). The same principles apply to the State's delegation to local hospital authorities of the power to make acquisition decisions that serve their public mission, even if in particular circumstances they may have anticompetitive effects. Both legislation and court decisions emphasize, for example, the importance of protecting the solvency of public hospitals that could otherwise be left to serve only non-paying patients. *See, e.g.*, Ga. Code Ann. § 31-6-1; *Albany Surgical, P.C.* v. *Department of Cmty. Health*, 572 S.E.2d 638, 641 (Ga. Ct. App. 2002) (exemption from certificate-of-need law would violate state policy by "taking away centers of profit by paying patients and leaving indigent surgical patients to the hospitals"). Moreover, if the State of Georgia has concerns about any anticompetitive effect of hospital authority decisions, it is more than capable of addressing that concern through its own laws or executive actions. For purpos-

es of the *federal* antitrust laws, decisions by hospital authorities remain acts of the State.[14]

The FTC also cites an express invocation of state-action immunity in a 1993 amendment of state law addressing the potential consolidation of hospital authorities within seven large counties. Pet. Br. 34-35. But the original Hospital Authorities Law was enacted in 1941, before *Parker* was even decided. The enacting legislature had no reason to believe the federal government would seek to apply its antitrust laws to actions of state agents, and certainly no reason to draft its statute using terms that have talismanic significance now only because of cases this Court decided decades

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[14] The FTC's passing reliance (Br. 28-29) on *Thomas* v. *Hospital Authority*, 440 S.E.2d 195 (Ga. 1994), and *Cox* v. *Athens Regional Medical Center, Inc.*, 631 S.E.2d 792 (Ga. Ct. App. 2006), is misplaced. *Thomas* applied what was then the state-law test for ascertaining what public agencies or instrumentalities were entitled to immunity from suit in state court. *See generally Miller* v. *Georgia Ports Auth.*, 470 S.E.2d 426, 427-429 (Ga. 1996) (discussing later changes in state sovereign-immunity analysis); *Kyle* v. *Georgia Lottery Corp.*, 718 S.E.2d 801, 802-804 (Ga. 2011); *see also Crosby* v. *Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) (rejecting relevance of *Thomas* to antitrust state-action analysis), *cert. denied*, 520 U.S. 1116 (1997). In *Cox*, which involved breach of contract and deceptive trade practices claims against a hospital, the court noted that state law required the disclosure of hospital fees to patients to enable cost comparisons, and commented (in dictum and without citation) that this reflected a state decision "to let market forces control health care costs." 631 S.E.2d at 797. Whatever the force of the passages the FTC quotes when read in their original contexts, they say nothing about whether the Georgia legislature contemplated that local health authorities would be making acquisition or other policy decisions relating to their local service areas that federal antitrust authorities might view as potentially anticompetitive.

later. The inclusion of such words in a special-purpose amendment fifty years later has significance within the domain of that amendment, but gives rise to no negative implication concerning the original provisions of the Law. Indeed, any suggestion to the contrary is a good example of what this Court in *Hallie* called "an unrealistic view of how legislatures work and of how statutes are written." 471 U.S. at 43.

The FTC's most insistent contention is that Georgia has granted hospital authorities only "general corporate powers," and thus the respondent Authority's decision to acquire Palmyra Hospital is more like the City of Boulder's decision to regulate cable service than like the City of Eau Claire's decision to limit access to its sewage treatment plant. That, however, is not a plausible application of this Court's cases.

Indeed, the Court rejected a similar attempt to rely on *Boulder* when it decided *Hallie*:

> Th[e] Amendment to the Colorado Constitution [in *Boulder*] allocated only the most general authority to municipalities simply to govern local affairs.... The Amendment did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects.

471 U.S at 43. Here, likewise, Georgia has specifically authorized the creation of local hospital authorities for

the purpose of providing hospital care to the public (including the non-paying public) in particular areas, and granted such authorities express powers to take particular actions in service of that goal—including actions, such as acquiring an additional hospital, that may be viewed as anticompetitive. That state-law structure does not reflect, as to acquisition decisions such as that made by the Authority here, a state position of "precise neutrality" in the *Boulder* sense. *See* 455 U.S. at 55. It is, instead, a clear articulation of state policy as to ends, combined with a delegation of power and discretion as to means. In exercising that discretion here, for federal antitrust purposes the Authority acted with the authorization and at the behest of the State.

A number of States, appearing as amici in support of the FTC, argue that the *Hallie* standard as applied here "undermines the States' ability to effectively delegate authority to local bodies," because any such delegation risks "inadvertently authorizing anticompetitive conduct." Illinois et al. Amicus Br. 4, 15. That argument is again based on the false premise that "the rule announced below [is] that a *naked grant of corporate powers* embodies the implied authorization to use those powers anticompetitively." *Id.* at 14 (emphasis added). As respondents have explained, application of *Parker* in this case is instead based on a particularized assessment that Georgia's authorization of the creation of local hospital authorities, with enumerated powers to act on behalf of the public in a specific, complex, and heavily regulated area, demonstrates both a clear state policy of intervention in that sphere and a delegation of implementation discretion to local officials. Sustaining that analysis does not entail holding that *any* sub-state entity is *automatically* insulated from federal antitrust scrutiny absent an express state disclaimer (*see id.* at

15), any more than it requires overruling *Boulder* or *Lafayette*. The *Parker* question is always one of assessing, in a particular statutory and factual setting, what range of conduct a State intended to authorize in the service of the State's policy goals.

In that regard, it seems remarkable for the FTC's amici States to argue that courts undertaking a *Parker* inquiry should err on the side of subjecting sub-state officers, agents, and entities to restraint and liability under federal law. That is not the right approach. *Parker* recognized that Congress did not intend to subject States themselves to federal antitrust regulation. Where it is clear that a State has affirmatively authorized subordinate officers or entities to engage in some conduct, but perhaps less clear whether the authorization contemplated any potential anticompetitive effect, the restrained and respectful approach is to err on the side of leaving the matter to the State. If the State did not in fact intend to shield any anticompetitive effect, it is fully capable of addressing the resulting situation in a variety of ways—including, for example, through informal or administrative action, or the enforcement of its own antitrust or consumer-protection laws.

In contrast, if a federal court errs by incorrectly declaring that particular sub-state acts are *not* authorized "state action" under *Parker*, the effects of the error will be both worse and harder to address. Improper interference with the State's policy choices, and untoward consequences for the state entity or officials involved, will be immediate and likely permanent with respect to the particular case. As to the future, the State will only be able to correct the error through new legislation. Such federal errors would thus impose serious and unjustified burdens on States and their public officials. They would also tend to chill the willingness

of sub-state public officials to use powers otherwise conferred on them by their States to address issues of local concern. *Cf. Omni*, 499 U.S. at 373 n.4 (noting that "the criminal liability of public officials" for antitrust violations would depend upon the articulation of the state-action rule adopted by the Court).

Importantly, this is not a case like *Ticor*, where *private, for-profit* parties claimed immunity from federal antitrust scrutiny for conduct that was, in fact, entirely unsupervised by state officials—and thus could not, under this Court's cases, properly be attributed to the State. *See, e.g.*, 504 U.S. at 639 (noting "the involvement of private actors throughout, and the clear absence of state supervision"); *id.* at 638 (respondents' conduct involved "private price-fixing arrangements" without "active [public] supervision in fact"). In *Ticor*, a number of States plausibly argued that federalism interests were not served by shielding the private parties from federal liability under the guise of "state action," because States could not properly be held politically accountable for conduct that was neither undertaken directly nor in fact overseen by public officials. *See id.* at 636 (agreeing with States that federal law ought not "compel a result that the States do not intend but for which they are held to account"). The Court noted that a State should be able to "provide for peer review by its physicians without approving anticompetitive conduct by them," or to regulate private utility companies "without authorizing monopolization in the market for electric light bulbs." *Id.* at 636 (citations omitted). The decision thus involved the core concern of the "active supervision" prong of *Parker* analysis, and recognized that it would hinder rather than promote clear lines of political accountability to extend immunity to a scheme under which *private* price-fixing

was in fact *not* "actively supervised" by public officials. Here, in contrast, clear lines of public accountability are present both in Georgia's decision to permit county officials to entrust the running of public hospitals to local hospital authorities and in the decisions made by those authorities on the local level, such as the respondent Authority's decision to acquire Palmyra.[15]

The precedents most directly on point here are instead *Hallie* and *Omni*. In each case, a State delegated power to a sub-state public entity to act with respect to specific fields (sewage treatment or zoning) in a specific geographical area. The delegated powers permitted, *but did not require*, the local entities to act in those fields in ways that could be challenged as anticompetitive. In each case, the Court held that the States had articulated state policies contemplating and authorizing such acts with sufficient clarity to make them the acts of state "officers or agents," *Parker*, 317 U.S. at 350, for purposes of the non-interference principle established by *Parker* under the federal antitrust laws.

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[15] As discussed above, the Authority made the acquisition decision at issue here in a public meeting in December 2010. *See supra* pp. 8-10. It reconsidered and reaffirmed that decision, after the challenge by the FTC and considerable public discussion, in May 2011. *Id.* The decision to approve a revised and restated lease agreement providing for PPMH to manage both Putney Memorial and Palmyra (now Phoebe North) was likewise made through a public process and after extensive notice, comment, and public hearing. *Id.* There is nothing unclear about who serves on the Authority, or about who serves on the County Commission that appoints Authority members. As noted above, there are also state-law tools available to any county resident who believes Authority members have defaulted on their public duties. *See supra* pp. 4, 33 & n.9, 36-37.

In much the same fashion, Georgia has authorized the creation of local hospital authorities to pursue a public-service mission using enumerated powers, including the power to acquire existing hospitals in their specified local service areas. Each of Georgia's 159 counties covers a small geographical area, and nearly three-quarters have fewer than 50,000 residents even now—much less in 1941.[16] Because (i) many service areas in the State thus have limited capacity to support multiple hospitals and (ii) in any event, state law regulates entry into or expansion in hospital markets, the acquisition power expressly conferred by the State almost necessarily entails the prospect that a particular acquisition decision will be viewed by some as increasing market concentration to anticompetitive levels.

The FTC points out that in a few instances an acquisition decision might *not* raise antitrust concerns—where an acquired hospital already has a monopoly, for example, or in a large city where the acquisition may not reduce competition. *See* Pet. Br. 31-32. But the question is not whether local officials might occasionally be able to use their state-conferred powers without raising federal antitrust concerns; it is whether, in conferring those powers, the State meant to authorize local officials to act in the public interest whether their action raised such concerns or not. Under the circumstances of this case, it must reasonably be "found from the authority given [hospital authorities] to operate in a particular area, that the [Georgia] legislature contemplated *the kind of action* complained of" in this case.

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[16] For a map showing Georgia's counties and their population ranges, see http://2010.census.gov/news/pdf/cb11cn97_ga_totalpop_2010map.pdf.

Lafayette, 435 U.S. at 415. That conclusion makes the Authority's action in acquiring Palmyra "foreseeable" in the sense this Court required in *Hallie* and *Omni*, and an act of the State or its agents for purposes of *Parker*.

II. THIS CASE INVOLVES NO PRIVATE, UNSUPERVISED ANTICOMPETITIVE CONDUCT

The FTC further argues that, even if the Authority's actions here would otherwise be treated as those of the State, the involvement of PPMH and PPHS has created a "private monopoly" that cannot be shielded from federal antitrust scrutiny in the absence of "active supervision" by the State. Pet. Br. 44-51. That argument misses the mark for at least three reasons. *First*, the only actions relevant to *Parker* immunity here are those of the Authority itself, which made the decisions to acquire Palmyra and to lease both its hospitals for joint operation. *Second*, even if the Phoebe entities' actions were relevant, for present purposes the entities act as special-purpose agents of the Authority to carry out its functions. Under *Parker*, such an entity cannot be distinguished from the Authority itself. *Third*, if *Parker* required "active supervision" of the Phoebe entities, that condition would be satisfied on the facts of this case.

A. The Acts Relevant Here Are Those Of The Authority Itself

The "active supervision" aspect of state action analysis "serves essentially an evidentiary function," "ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. It becomes relevant "[w]here a private party is engaging in the anticompetitive activity," because in that

circumstance "there is a real danger that [the private actor] is acting to further his own interests, rather than the governmental interests of the State." *Id.* In contrast, "active supervision" has little or no relevance to sub-state governmental entities performing public functions authorized by the State. *See id.* at 46-47 & n.10.

The FTC has not contended here that the Authority's actions must be actively supervised by the State of Georgia. It argues only that "active supervision" is required because "private parties arranged for PPHS to acquire a private monopoly by using the Authority as a conduit." Pet. Br. 45-46. The contention appears to be that the involvement of the Phoebe Putney entities transforms the Authority's decision to acquire Palmyra from an action by authorized state agents to a "private" transaction. That is incorrect.

The transactions at issue here are the Hospital Authority's acquisition of Palmyra and perhaps its further decision to have the two hospitals operated together.[17] There can be no dispute that it was the Authority, not PPMH or PPHS, that legally had to and did make those decisions, under procedures prescribed by state and local law and not challenged here as legally flawed in any respect. If a monopoly was created, it was those actions that created it. And for the reasons explained above, for purposes of *Parker* they were acts of the "State itself," shielded from federal antitrust scrutiny "regardless of the State's motives in taking the action."

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[17] The case does not involve allegations of anticompetitive conduct by PPMH or PPHS in the day-to-day operation of Putney Memorial or Palmyra, or any question about to what extent those routine operations are supervised by the Authority.

Omni, 499 U.S. at 377, 379 (quoting *Hoover*, 466 U. S. at 579-580).

The FTC argues that even if the Authority could make such decisions under some circumstances, here it served as no more than a "nominal purchaser," a "conduit," or a "notary public." Pet. Br. 45, 49. The Authority's members have refuted these contentions as a factual matter, proudly defending their public service. *See, e.g.*, J.A. 201-253. Even, however, if one were to credit the Commission's unwarranted aspersions, in applying *Parker* this Court has rightly refused to "deconstruct[] ... the governmental process" or "look behind the actions of state sovereigns" for "perceived conspiracies to restrain trade." *Omni*, 499 U.S. at 377, 379.

Indeed, in *Omni* the Court squarely rejected an effort to create an exception to *Parker* based on similar allegations that "politicians or political entities [were] involved as conspirators with private actors in the restraint of trade." 499 U.S. at 374 (internal quotation marks omitted). Any such exception, the Court recognized, would "swallow up the *Parker* rule," because "[a]ll anticompetitive regulation would be vulnerable to a 'conspiracy' charge." *Id.* at 375. Moreover, inquiring into the quality of official state acts would enmesh the federal courts in questions regarding the legality of those acts and the processes that led to them under state law—contrary to the understanding that lies at *Parker*'s very core, that Congress never intended the federal antitrust laws to be tools for questioning the governmental acts of States or their officers or agents. The FTC's brief here, with its attacks on the character and performance of Authority members, aptly illustrates the point. *See, e.g.*, Pet. Br. 10, 51. What is relevant under *Parker* is whether the Authority was au-

thorized to act by the State and whether it acted—not whether federal agencies or courts think its actions were diligent or wise.

B. For Purposes Of *Parker*, PPMH And PPHS Acted Here As Authority Agents

Even if the actions of PPMH and PPHS were relevant here, the fact that the Authority has determined to structure its operations by leasing Putney Memorial and now Palmyra to a special-purpose non-profit entity does not affect the *Parker* analysis.

The Authority created PPMH to carry out the Authority's public functions as operating lessee of Putney Memorial. PPHS is a holding company, with similar provisions in its incorporating documents and equally bound by relevant terms of the lease. *See supra* pp. 4-6. The entities are organized as non-profit corporations, they have no equity holder or other private owner, and their assets and income cannot inure to the benefit of any private party. J.A. 111, 116.[18] The Authority has the full reversionary interest in all of their assets, which will return to the Authority if and whenever they are dissolved—such as upon any termination of the hospital lease. *See, e.g.*, J.A. 112-113, 117-119; *see also* Pet. App. 52a ("the Authority holds title to and is therefore the legal owner of PPMH's assets"). While

[18] Again, the point is not that there is any "non-profit exception" to the antitrust laws. *See supra* pp. 35-36; *cf.* Pet. Br. 35-36; Economists' Amicus Br. 3-6. It is that PPMH and PPHS are unusual entities, not at all like the "private persons" involved in cases such as *Ticor*. *See* Pet. Br. 44 (quoting 504 U.S. at 633). For *Parker* purposes, they are properly treated as agents of the Hospital Authority that created them and that they serve. It is the Authority, as a state actor, that the federal antitrust laws do not reach.

they exist and operate the Authority's hospitals or other facilities, they are bound to do so only in service of the Authority's public mission and for the purpose of discharging the Authority's duties under Georgia law. *See, e.g.*, J.A. 76, 78-79, 84-89.

Georgia law expressly authorizes hospital authorities to structure their operations in this manner. *See Richmond County Hosp. Auth.* v. *Richmond County*, 336 S.E.2d 562, 567, 569 (Ga. 1985); *Bradfield* v. *Hospital Auth. of Muscogee County*, 176 S.E.2d 92, 99 (Ga. 1970). It places particular requirements on the arrangement to ensure that it advances public purposes. An authority cannot enter into a lease unless it "first determine[s] that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community," Ga. Code Ann. § 31-7-75(7), and the authority must maintain sufficient control over the lessee—as the district court found the Authority did here, Pet. App. 58a. All authority actions in this regard are subject to judicial review by Georgia courts. *Richmond County Hosp. Auth.*, 336 S.E.2d at 565; *see, e.g., Kendall* v. *Griffin-Spalding County Hosp. Auth.*, 531 S.E.2d 396, 397-399 (Ga. Ct. App. 2000) (striking down particular authority lease as *ultra vires*).

In short, as a matter of state law and practice, operation of the Authority's hospitals through the lease to PPMH is little different from direct operation. Under these circumstances, there is no sensible basis for the FTC's contention that PPMH and PPHS's involvement in the negotiation and funding of the Authority's acquisition of Palmyra should make any difference to the Court's analysis of the transaction under *Parker*.

C. Any "Active Supervision" Requirement Is Nevertheless Satisfied

Finally, even if there were any question of active supervision here (which there is not), there would be no basis for the FTC's contention that in approving the acquisition of Palmyra the Authority has merely sought to confer antitrust immunity on private persons "by fiat," or by casting over them a "'gauzy cloak of state involvement.'" *See* Pet. Br. 44 (quoting *Ticor*, 504 U.S. at 633); *id.* at 51 (quoting *Midcal*, 44 U.S. at 106).

The possibility of acquiring Palmyra has been a topic of discussion since at least 1986—well before PPMH and PPHS were even created. J.A. 120-123 (minutes of Authority meetings in 1988 and 1989). When the issue arose again in September 2010, Joel Wernick, who had run Putney Memorial as an Authority employee before 1990 and was now CEO of PPMH and PPHS, met with the Authority's Chairman and Vice Chairman and was directed to negotiate on the Authority's behalf. J.A. 246. During the negotiations, Wernick continued to brief the Chairman and Vice Chairman, other Authority members, and the Authority's general counsel individually. J.A. 242-245, 207-208, 223-224. In November, Wernick reviewed a formal acquisition offer to HCA with the Authority's Chairman, Vice Chairman, and general counsel, who approved it. J.A. 247. The offer was conditional—as was the entire deal at all times—on final approval by the full Authority board.

The final terms of the acquisition were developed in December 2010, with the participation and review of the Authority's general counsel. J.A. 248-249. On December 21, 2010, the Authority discussed the transaction and then voted unanimously to approve it. J.A.

250-251. Finally, after the FTC challenged the acquisition and questioned the approval process, the Authority revisited the issue. On May 5, 2011, "after reviewing the allegations and complaints," the members again voted unanimously to "reaffirm and ratify the previous decisions ..., it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will further the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolutions) at 2. Under these circumstances, there can be no serious contention that the Authority, acting as a public body, did not in fact make the decision to acquire Palmyra and approve the terms of the transaction. Any "supervision" requirement was amply discharged, and for federal antitrust purposes the Authority's action was an act of the State.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2012

No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Federal competition law does not apply to the anti-competitive conduct of certain substate entities if that conduct is authorized as part of a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" in state law. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (*Hallie*) (citations omitted). The court of appeals held that the merger to monopoly at issue in this case is exempt from federal competition law, finding such a clearly articulated policy in Georgia's "grant[ing] powers of impressive breadth to the hospital authorities," including, "[m]ost important[ly] in this case," the general corporate powers to acquire and lease out hospitals. Pet. App. 11a-12a. As the government's opening brief explains (Br. 22-36), that reasoning is flawed because a broad, neutral conferral of powers that can readily be exercised in pro-

competitive or anticompetitive ways does not clearly articulate a State's intent to displace competition.

Respondents largely ignore the particular provisions of Georgia law that the court of appeals found most important. Much like that court, however, respondents contend that a clear articulation of a state intent to displace competition can be found in the Authority's general mission of providing indigent care, backed by general grants of power that can be exercised in procompetitive or anticompetitive ways, entirely at the Authority's discretion. But this Court has twice rejected that line of reasoning, see *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 54-56 (1982) (*Boulder*); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413-417 (1978) (opinion of Brennan, J.) (*Lafayette*), requiring instead a showing that the State granted "authority to suppress competition," *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991). And even if respondents could satisfy the clear articulation requirement, the judgment of the court of appeals should still be reversed, because the transaction here is in substance the creation of an unsupervised private monopoly—something a State can never authorize.

A. Respondents Misconceive This Court's Approach to "Clear Articulation"

1. As the government's opening brief explains (Br. 21-27), the state action doctrine shields a substate governmental entity's anticompetitive conduct only when that conduct is undertaken pursuant to a State's clearly articulated and affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42 (citation omitted); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985), by "design[]," *New Motor Vehicle Bd.* v. *Orrin W. Fox*

Co., 439 U.S. 96, 109 (1978), or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 n.9 (1980) (quoting *Orrin W. Fox*, 439 U.S. at 109). The critical ingredient in that test—the State's intended displacement of competition—cannot be found "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55.

2. Although the state action doctrine sometimes has the effect of insulating private conduct from potential antitrust liability, its purpose is to vindicate *state* policy choices in order "to foster and preserve the federal system." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992). As leading commentators explain:

> Sufficient state authorization comprises two elements. *First*, the state itself must have authorized the challenged activity in the state law sense of permitting the relevant actor to engage in it; *second*, it must have done so with an intent to displace the antitrust laws. Decisions such as *Boulder* make clear that authorization in the first sense alone is insufficient.

1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006) (internal quotation marks and footnotes omitted); see *Omni Outdoor*, 499 U.S. at 372 ("Besides authority to regulate, however, the [state action] defense also requires authority to suppress competition.").

Respondents persistently treat the "clear articulation" inquiry as if satisfaction of the first criterion were sufficient. See, *e.g.*, Br. 2 (arguing that state action doctrine "shields decisions made by local public officials

from federal challenge so long as they fall within the range of operational or policy discretion in a particular field that has been delegated to these officials by the State"). Respondents either ignore the second criterion or assume that the State can delegate to substate entities the decision whether to displace the federal antitrust laws. But questions concerning the legality under state law of particular substate action are largely beyond a federal antitrust court's purview. See *Omni Outdoor*, 499 U.S. at 371-372. By contrast, enforcement of the second criterion—*i.e.*, determining whether the State itself has chosen to regulate a market through alternative means incompatible with free-market competition—is the heart of the "clear articulation" inquiry. Under this Court's precedents, what must be "clearly articulated" is the State's intent to displace competition with some other means of ordering the market, not simply the State's intent to confer general powers that are capable of anticompetitive exercise. That approach ensures that the national policy favoring free-market competition will give way only to "deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

The same flaw appears when respondents apply their approach to Georgia law. Respondents assert that Georgia has "delegat[ed] to counties and municipalities the duty which the State owed to its indigent sick," Br. 32 (internal quotation marks and citation omitted), by granting those substate entities "'all the powers necessary or convenient to carry out and effectuate' *that mission*," *id.* at 33 (quoting Ga. Code Ann. § 31-7-75). That "clear articulation of state policy as to ends, combined with a delegation of power and discretion as to means," *id.* at 42, does indicate that the acquisition at issue here complied with Georgia law. The relevant

state-law provisions do not suggest, however, that the local hospital authority's decision to exercise its powers in an anticompetitive way is properly attributable to the State itself. Respondents contend that Georgia has permissibly delegated to substate entities the power to determine whether displacement of competition is an appropriate means of achieving the State's policy objective. See *ibid.* ("In exercising [its] discretion here, for federal antitrust purposes[,] the Authority acted with the authorization and at the behest of the State."). But this Court has already twice rejected that approach as inconsistent with the federalism principles animating the state action doctrine.

In *Boulder*, the home-rule city argued that its cable television moratorium ordinance satisfied "the 'state action' criterion" because it was "an 'act of government' performed by the city *acting as the State* in local matters." 455 U.S. at 53. In particular, Boulder argued that the "clear articulation" criterion was "fulfilled by the Colorado Home Rule Amendment's guarantee of local autonomy." *Id.* at 54 (internal quotation marks omitted). Under that state-law regime, Boulder explained, it could "pursue its course of regulating cable television competition, while another home rule city [could] choose to prescribe monopoly service, while still another [could] elect free-market competition." *Id.* at 56. Boulder contended that "it may be inferred, from the authority given to Boulder to operate in a particular area—here, the asserted home rule authority to regulate cable television—that the *legislature* contemplated the kind of action complained of." *Id.* at 55 (internal quotation marks omitted).

This Court rejected that argument, explaining that "the requirement of 'clear articulation and affirmative

expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55. The Court held that Colorado's broad grant of home-rule authority did not trigger the state action doctrine because a "State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Ibid.* The Court's decision in *Lafayette* reflects the same approach. While recognizing that "the actions of municipalities may reflect state policy," the plurality observed that "[w]hen cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anti-competitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State." 435 U.S. at 413, 414. Like the cities' proposed approach in *Boulder* and *Lafayette*, acceptance of respondents' argument "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that [the Court's] precedents require." *Boulder*, 455 U.S. at 56.

3. The correct approach is to examine whether the State itself affirmatively intends to "displace the free market." *Ticor*, 504 U.S. at 636.

a. Because "[t]he preservation of the free market and of a system of free enterprise" is a "national policy of * * * a pervasive and fundamental character," *Ticor*, 504 U.S. at 632, "state-action immunity is disfavored," *id.* at 636: States are not readily presumed to reject the "regime of competition [that is] the fundamental principle governing commerce in this country." *Lafayette*, 435 U.S. at 398. To be sure, there are markets in which greater economic welfare may be realized

by alternative regulation (*e.g.*, in the case of some public utilities), or in which a greater social purpose may be served by displacing competition (*e.g.*, through laws restricting trade in narcotics). The state action doctrine recognizes that, within its sovereign sphere, a State may decide that the benefits of displacing free-market competition justify the costs. That choice, however, is not one to be assumed or lightly inferred.

b. Amici American Hospital Association, et al. (AHA), contend that this Court's "plain statement" cases in the federalism field support the decision below. See AHA Br. 15-27 (citing, *inter alia*, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991)). The essence of the plain-statement rule is that, if one reading of a federal statute would alter the usual federal-state balance by intruding significantly on traditional state prerogatives, a court should not adopt that interpretation unless it is clearly compelled by the statutory text. See *Gregory*, 501 U.S. at 460-461. Where it applies, the "plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme." *Id.* at 461. In *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943), the Court invoked plain-statement principles in holding that the Sherman Act does not apply to the States themselves.

The question in this case, by contrast, is whether substate and private actors can be enjoined under federal antitrust law from conduct that the State has neither specifically authorized nor expressly forbidden. Application of federal law under these circumstances intrudes on no traditional state prerogative. To the contrary, by allowing States effectively to authorize some substate and private conduct that federal law would otherwise forbid, the state action doctrine gives States *greater*

authority in the antitrust sphere than they possess under most federal regulatory regimes. Like a congressional decision to intrude on traditional state prerogatives, a State's decision to displace federal competition law is the sort of departure from the norm that should not lightly be inferred. It therefore is no affront to federalism to insist that a "state policy to displace competition" must be "clearly articulated and affirmatively expressed" if it is to supersede federal law. *Hallie*, 471 U.S. at 39 (citations omitted); see *Ticor*, 504 U.S. at 636 (explaining that the clear articulation requirement ensures that "particular anticompetitive mechanisms operate because of a deliberate and intended state policy"). As the Court confirmed in *Ticor*—which was decided the Term after *Gregory*—the clear articulation requirement faithfully implements principles of federalism because "[n]either federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ibid.*

c. The question whether a State has clearly articulated a policy to displace competition is best answered by looking at what the legislature said and did, with attention to what alternative approach (in lieu of free-market competition) the State has taken to ordering a market. Several features of state law will tend to support a finding of clear articulation:

- Express direction in the state statute that competition-law principles should not apply. See Pet. Br. 34-35 (discussing Ga. Code Ann. § 31-7-72.1(e), which provides that when two hospital authorities consolidate under conditions prescribed by Georgia law, they "are acting pursuant to state policy and shall be immune from antitrust liability").

- The fact that a state-authorized regulatory program, such as municipal zoning ordinances, "necessarily" or "regularly has the effect of preventing normal acts of competition." *Omni Outdoor*, 499 U.S. at 373.
- A showing that the State has "designed" a system to make choices about who shall be allowed to compete in a market. *Orrin W. Fox*, 439 U.S. at 109.
- An identification of anticompetitive acts that are "inherent[]" in the State's scheme. *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64.

Such features favor a finding of clear articulation because they suggest the State has considered the matter, balanced competing considerations, and reached an affirmative judgment that substate or private actors should be permitted to engage in particular conduct that would otherwise violate federal competition law. As discussed below, see pp. 14-20, *infra*, none of the foregoing features (or anything comparable) is found in the Georgia laws relevant here.

Respondents suggest that, under the government's approach, the state action doctrine would apply only when "anticompetitive effects [are] compelled by state law." Br. 13. That is incorrect. While such a showing would be sufficient, it is not necessary. For example, several of the state laws at issue in *Southern Motor Carriers* permitted carriers to file rates with the States' public service commissions either jointly (which is anticompetitive) or individually (which is not). 471 U.S. at 51 & nn.4, 6. Those regimes satisfied the clear articulation requirement because they authorized with relative

specificity particular conduct that is inherently anticompetitive, even though the States did not compel that conduct. See Pet. Br. 43-44.

If the Georgia Hospital Authorities Law specifically authorized local hospital authorities to acquire "any and all hospitals" within their local geographic areas, the clear articulation requirement would be satisfied (although other aspects of the state action doctrine would remain to be considered). It would be clear that the State had contemplated, and approved, the authorities' acquisition of monopoly power over the provision of hospital services, even if state law did not *compel* the authorities to make such purchases. But no such inference is available here because the local authorities' statutory powers are defined at a high level of generality and are readily capable of being exercised in procompetitive as well as anticompetitive ways.

Contrary to respondents' contention, the government's approach does not require a judicial inquiry into what measures are "necessary to make a state program work." Resp. Br. 13. When a federal antitrust court is asked to infer an intent to displace competition from a State's authorization of substate or private conduct, it is appropriate to ask whether the State has authorized conduct that is inherently or necessarily anticompetitive. An intent to displace competition cannot properly be inferred from a grant of general corporate powers because such powers can be given meaningful practical effect even if the powers must be exercised in compliance with federal competition laws. By contrast, displacement of antitrust law is logically implicit in state authorization of conduct that is inherently or necessarily anticompetitive, because the application of antitrust law to such conduct would effectively negate the authoriza-

tion, thereby interfering with the State's sovereign prerogatives. See Pet. Br. 42. In the latter case, the antitrust court need not (and should not) go on to attempt to determine whether the authorization is actually necessary to achieve the State's objectives.

4. Respondents and their amici offer several criticisms of what they perceive to be the government's understanding of the state action doctrine. None is persuasive.

a. Respondents and their amici portray the government's position as a request for a radical revision of the state action doctrine. See Resp. Br. 24-28; AHA Amicus Br. 27-32. Respondents contend that "considerations of reliance and congressional acquiescence weigh heavily in favor of adhering to basic principles of *stare decisis*." Br. 27. But the question before this Court is not whether to refashion the state action doctrine. The question instead involves the application of established state action principles to the recurring scenario in which a state legislature has conferred general corporate powers on a substate entity, while neither affirmatively authorizing nor expressly forbidding particular anticompetitive exercises of those powers. The predominant view among the circuits that such general grants of corporate power do not trigger the state action doctrine (see Pet. 23-27) belies respondents' contention that reversal of the judgment below would subvert genuine reliance interests.[1]

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[1] The government's understanding of the state action doctrine comes directly from this Court's cases. Compare Resp. Br. 17 (faulting the government for formulating the issue as whether displacement of competition is the "necessary" or "inherent" result of state law), with *Omni Outdoor*, 499 U.S. at 373 (explaining that a zoning ordinance "necessarily protects [incumbents] against some competi-

b. Respondents and one amicus argue that the government's approach is "inflexible" and will cause the States great trouble. Resp. Br. 13; see Lee Mem'l Amicus Br. 13-18. No State has raised that concern here, however, and the state amici supporting the government express the contrary view that "the Eleventh Circuit's rule impedes rather than advances the States' 'freedom of action.'" States Amicus Br. 17 (quoting *Ticor*, 504 U.S. at 635). The requirement that a State clearly articulate its intentions is intended to "increase the States' regulatory flexibility" by ensuring that deference is paid only to "a deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

c. In a similar vein, respondents (Br. 43-44) and their amici hospitals (*e.g.*, Lee Mem'l Amicus Br. 13-15) argue that, in doubtful cases, the state action doctrine should be found to apply because "the restrained and respectful approach is to err on the side of leaving the matter to the State." Resp. Br. 43. By "leaving the matter to the State," respondents evidently mean recognizing a state action exemption from federal law unless and until the state legislature expresses a contrary intent. That approach inverts the established requirement that an *intent to displace competition* must be "clearly articulated." This Court has always begun from the premise that States do *not* wish to authorize private and substate conduct that would otherwise violate federal competition laws, because commitment to free-market competition is a fundamental national value, because state displacement of federal law is unusual in any context, and be-

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tion from newcomers"), and *Southern Motor Carriers*, 471 U.S. at 64 (relying on "the inherently anticompetitive rate-setting process" prescribed by state law).

cause that approach best respects the doctrine's roots in federalism.

Far from vindicating actual state policy choices, respondents' readiness to find an intent to displace competition from the most general state-law authorizations would "make[] it perilous for States to delegate authorities to local bodies—even when such delegation would otherwise be in the States' best interest." States Amicus Br. 12. Just as "Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them," *Ticor*, 504 U.S. at 636 (citing *Patrick* v. *Burget*, 486 U.S. 94, 105 (1988)), Georgia is free to vest its hospital authorities with the general power to "acquire projects" without allowing them to destroy competition by combining competing hospitals. Meaningful application of the clear articulation standard preserves that freedom to States. By contrast, respondents' approach—which labels any conceivable use of a general power "foreseeable" and thus intended by the State—burdens States by creating antitrust exemptions "that the States do not intend but for which they are held to account." *Ibid.*

On respondents' theory, any public entity with a statutory mission and a toolbox of ordinary corporate powers—which is to say many thousands of substate entities, see Pet. 31-33 & n.6—might obtain a free pass to violate the federal antitrust laws. No one has suggested that Congress or the States intended that result, and there may be ample reasons to avoid it, see Nat'l Fed'n of Indep. Bus. Amicus Br. 17-18. Adopting respondents' approach could demand wide-ranging corrective efforts from many States.

d. Respondents also express concern about the "untoward consequences" (Br. 43) of holding local officials

to account for compliance with federal law. But suits like the FTC's here seek only an injunction to comply with federal law; they are no more intrusive than, for example, suits under *Ex Parte Young*, 209 U.S. 123 (1908), that seek to enjoin official conduct that violates federal law. As this Court's state action jurisprudence has developed, Congress has displayed particular sensitivity in calibrating the relief available in private suits, barring recovery of monetary relief against local entities and officials while maintaining the availability of injunctive relief. See 15 U.S.C. 35 (enacted 1984). The ultimate question in this case, moreover, is whether operational control over two hospitals that previously competed in the same market can lawfully be concentrated in *private* hands. See pp. 20-23, *infra*. Outright dismissal of the FTC's suit, in which both public and private entities were named as defendants (and are respondents in this Court), would be a disproportionate response to any concerns that are specific to governmental defendants.

B. Respondents Misapply The "Clear Articulation" Requirement To Georgia Law

Georgia's goal of caring for the indigent sick is laudable. But the question is not whether Georgia wanted to pursue that goal (it obviously did, see *DeJarnette* v. *Hospital Auth.*, 23 S.E.2d 716, 723 (Ga. 1942)); or whether Georgia law permitted the Authority to acquire Palmyra (that is largely beyond the legitimate scope of a federal antitrust court's inquiry, see *Omni Outdoor*, 499 U.S. at 371-372); or whether the acquisition will in fact provide more care to indigents (maybe, maybe not). What matters is whether Georgia statutes manifest an intent that the Authority be permitted to pursue its mission by the particular means of "creat[ing] a virtual monopoly for inpatient general acute care services sold

to commercial health plans and their customers." J.A. 29 (Complaint ¶ 1).

Respondents and the court of appeals have identified a variety of Georgia statutory provisions that purportedly evidence the State's intent to authorize the merger-to-monopoly that occurred in this case. Those include the State's general grant of corporate power to acquire projects; laws on other subjects; the Authority's statutory mission to provide indigent care; and the barrier to entry created by a certificate-of-need (CON) law. None of those laws provides the requisite clear articulation of an intent to displace competition.

General corporate power to acquire projects. As our opening brief explains (at 22-23), the Authority's general corporate powers do not support respondents' state action defense because those powers reflect Georgia's "mere *neutrality*," *Boulder*, 455 U.S. at 55, on the subject of anticompetitive activity. Respondents make little effort to explain how the general power to acquire projects, Ga. Code Ann. § 31-7-75(4), could reflect the State's intent to displace competition. Indeed, only once (Br. 33) do respondents cite the statute that the court of appeals thought was "[m]ost important in this case." Pet. App. 12a. Respondents' reluctance to invoke Section 31-7-75(4) is understandable, since that Georgia-law provision is not meaningfully different from the many "enabling statutes by which myriad instruments of local government across the country gain basic corporate powers." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999). Just as Congress "does not, one might say, hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), a state legislature would not be expected

to hide a large-scale antitrust exemption in the plain vanilla language of the fourth of 27 enumerated corporate powers.

Echoing the court of appeals (Pet. App. 13a), respondents suggest that the Georgia legislature "surely" (Resp. Br. 14) must have intended to displace competition because anticompetitive acquisitions by hospital authorities could occur. Until the Georgia legislature enacted the Hospital Authorities Law, however, local hospital authorities did not exist and perforce did not own any projects. The local authorities' initial exercises of their power to acquire hospitals (and the other projects the statute covers) therefore were unlikely to raise antitrust concerns.

For the power to acquire projects to be put to anticompetitive use, several intervening events must occur. A county must (1) activate a hospital authority, which (2) decides it should operate a hospital, and (3) succeeds in acquiring or building such a hospital, whereupon it (4) decides it should increase capacity, (5) concludes that it is preferable to acquire an existing hospital, rather than build new capacity, (6) finds a hospital that it can acquire, and (7) negotiates a contract to acquire that second hospital. Even at the end of this chain of contingencies, the acquisition still may be consistent with federal competition law. See Pet. Br. 31-33. The general authorization to acquire projects therefore provides no reason to suppose that the Georgia legislature specifically contemplated, and intended to condone, the small subset of acquisitions that federal antitrust law would forbid.[2]

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[2] Respondents describe Section 31-7-75(4) as granting local hospital authorities "express powers to take * * * actions, such as acquiring an additional hospital, that may be viewed as anticompetitive." Br.

If the chain of contingencies described above supported an exemption from federal antitrust scrutiny, then a similar exemption could be inferred for almost anything that "would serve the Authority's public mission" (Resp. Br. 8; see *id.* at 39):

- The power to "make and execute contracts," Ga. Code Ann. § 31-7-75(3), would privilege the Authority to fix prices with other hospitals.
- The power to "establish rates and charges for the services and use of the facilities of the authority," Ga. Code Ann. § 31-7-75(10), would privilege the Authority to engage in predatory pricing.
- The power to "sue and be sued," Ga. Code Ann. § 31-7-75(1), would privilege the Authority to monopolize a market through sham lawsuits.

The government has repeatedly identified the unlimited reach of the Eleventh Circuit's reasoning (see Pet. 18; Pet. Br. 30), but respondents have never distinguished their case or disavowed the sweeping implications of their position.

Eminent Domain. Although respondents dispute (Resp. Br. 34) the government's assertion (Pet. Br. 30) that the power of eminent domain is not relevant here, they do not satisfactorily explain why that power would be relevant to a transaction in which the Authority did

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42. But local hospital authorities have "express" power to acquire "an additional hospital" only in the sense that their express power to acquire projects is not subject to any specific numerical limitation. The absence of any state-law *prohibition* on the acquisition of multiple hospitals by one local authority does not suggest a legislative focus on that scenario or support a state action defense. See pp. 3-4, 12-13, *supra*.

not use it.[3] Perhaps a State that confers the power of eminent domain on a substate entity has clearly articulated its intent to displace competition *regarding the purchase of the condemned property*. But there is no basis in logic or federalism for allowing an intended displacement of competition in the property-acquisition market to justify a state action defense in the market for health-care services. As this Court explained in *Southern Motor Carriers*, the question is whether "the State as sovereign clearly intends to displace competition *in a particular field*." 471 U.S. at 64 (emphasis added); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-792 (1975) (holding that despite Virginia's extensive regulation of the practice of law, no state action defense was available against price-fixing claims because there was no showing that the State intended to displace price competition for legal services).[4]

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[3] Respondents are unwilling to say outright that the Authority could have used its eminent domain power to acquire Palmyra. They offer no case in which the power was so used; we have found none; and it is doubtful that a going concern like Palmyra could be condemned—executory contracts, employment relationships, patients, and all—as simple "property" under Georgia law, Ga. Code Ann. § 31-7-75(12). At most, respondents "presum[e]" the Authority could have condemned Palmyra. Resp. Br. 35. But if that were so, the Authority should have condemned Palmyra long ago, instead of respondents negotiating with HCA for decades (see *id.* at 7-8) and ultimately agreeing to pay HCA a price that far exceeded Palmyra's market value (see J.A. 47).

[4] The principle in the text also explains why respondents' amici are wrong in relying on other ill-fitting provisions of Georgia law. See, *e.g.*, Ga. Alliance of Cmty. Hosps. Amicus Br. 26-29 (discussing Georgia laws addressing hospital staff privileges and physician peer review). Even if those laws reflected Georgia's intent to displace competition in some fields, they would shed no light on whether

The Authority's statutory mission. Respondents rely heavily on the Authority's statutory mission to provide health care to the indigent sick, but they fail to link that mission to the specific anticompetitive acts alleged in this case. In particular, respondents contend that acquiring Palmyra will benefit the community by expanding the Authority's capacity to serve indigent patients.[5] But that supposed benefit comes at the cost of eliminating competition in the market for paid hospital services, with the predictable effect of lowering the output and quality of those services and increasing their price, as the FTC alleges. J.A. 55-58. Respondents' reliance on the Authority's statutory mission ultimately comes to nothing because they identify no clear articulation of a "deliberate and intended state policy," *Ticor*, 504 U.S. at 636, that the Authority's mission be achieved at the cost of, and by the particular means of, eliminat-

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Georgia wanted to displace competition in the market for paid health care services.

[5] Respondents' claimed capacity shortage is at odds with their public filings. Those filings show that, with the possible exception of its intensive care unit, Memorial's average occupancy rate has been falling steadily since 2005, to a pre-merger level of 62% (significantly below the 80% "full capacity" level). See PX0418 ¶ 71, at 31 (Decl. of FTC economist Christopher Garmon) (filed as part of Dkt. 7 Ex. 1). Moreover, any capacity problems at Memorial were at least partly self-inflicted. Respondents vigorously opposed Palmyra's efforts to expand into new services (see J.A. 33, 34, 42, 55) and enticed commercial insurers to exclude Palmyra from provider networks (see J.A. 33, 55). Both actions would tend to push patients toward Memorial. And in the end, transferring control of Palmyra does nothing to increase inpatient capacity in the Authority's service area; it merely enables respondents to "[c]ontrol all hospital beds in [the] county," and "[i]ncrease negotiation power with all payors." J.A. 145 (personal notes of PPHS's Chief Operating Officer listing the transaction's benefits to PPHS).

ing competition in the market for paid health care services.

Certificate of Need. Georgia's requirement of a CON for the construction or expansion of certain medical facilities (see Resp. Br. 30-32; Ga. Alliance of Cmty. Hosps. Amicus Br. 24-26) is not implicated by the transaction here, which required no such certificate. Of course, in some markets—certain public utilities, perhaps—a State might regulate both entry into the market and consolidation within the market, displacing competition in both respects. See Resp. Br. 31. But an evident legislative intent to restrict one type of competitive act (free entry into a market) does not logically imply an intent to displace a different form of competition (independent competitive decisionmaking by those in the market). Indeed, not even the Eleventh Circuit believes that Georgia's CON law supports a state action defense against a suit alleging an anticompetitive acquisition. *FTC* v. *University Health, Inc.*, 938 F.2d 1206, 1213 n.13 (1991).

C. The State Action Doctrine Cannot Shield The Transaction Here Because That Transaction Created An Unsupervised Private Monopoly

A State may not "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. A State similarly may not fashion a privately controlled monopoly from existing businesses and send the monopoly on its way unsupervised. Thus, even if Georgia had clearly articulated a state policy to displace competition by consolidating ownership of hospitals, the transaction here would not be exempt from federal competition law because it creates what is, in every meaningful sense, a private monopoly that must be (but is not) "actively

supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks and citation omitted).

Respondents contend that they need not establish active state supervision because "[t]he transactions at issue here are the Hospital Authority's acquisition of Palmyra and perhaps its further decision to have the two hospitals operated together," and it was the Authority that "had to and did make those decisions." Resp. Br. 48. That contention inappropriately concentrates on form rather than economic realities. See Pet. Br. 48-49. Both courts below recognized that, for antitrust purposes, respondents' purchase-and-lease arrangement constituted a single integrated transaction (see Pet. App. 10a n.11, 26a-32a), the practical consequence of which is that PPHS and PPMH, not the Authority, have full economic and operational—and thus competitive—control over both Memorial and Palmyra.[6]

Respondents also argue that the FTC's case depends on claims of "perceived conspiracies to restrain trade," of the sort that federal antitrust courts are foreclosed from entertaining. See Resp. Br. 49 (quoting *Omni Outdoor*, 499 U.S. at 379). But the issue here is not whether an alleged conspiracy between public officials and private interests can justify an antitrust court's refusal to respect a State's sovereign policy choices. Rather, the roles of PPHS and the Authority in the

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[6] Respondents' fallback position on the facts—which seems to contradict the allegations of the FTC's complaint (see J.A. 42-49) and the documentary evidence (see J.A. 160-161)—is that some members of the Authority actively supervised the development of the relevant transaction. That too misses the point for the reason discussed in the text: The net result of respondents' conduct is to create an unsupervised privately controlled monopoly, something federal competition law does not privilege a State to do.

challenged transaction are highly probative of whether the transaction is in substance the creation of an unsupervised private monopoly (see Pet. Br. 45-46)—something a State can never authorize. The Court in *Omni Outdoor* distinguished between the two situations, 499 U.S. at 379, and the FTC's claim falls on the permissible side of the line. The Authority's perfunctory role typifies the "gauzy cloak of state involvement" that cannot supply active state supervision over "what is essentially a private [anticompetitive] arrangement." *Midcal*, 445 U.S. at 106.

Respondents also contend that PPHS, in orchestrating, financing, and guaranteeing the transaction, was acting merely as an "agent" of the Authority. See Br. 50-51. That argument is factually and legally unsound. The mere existence of a principal-agent relationship between a public entity and a private actor does not satisfy the active supervision requirement because a principal has only "the *right* to control the conduct of the agent," and any actual "exercise [of control] may be very attenuated," Restatement (Second) of Agency § 14 & cmt. a (1958) (emphasis added) (*Restatement*). Courts have thus refused to hold that an agency relationship satisfies the active supervision requirement. See, *e.g.*, *Electrical Inspectors, Inc.* v. *Village of E. Hills*, 320 F.3d 110, 126-129 (2d Cir.), cert. denied, 540 U.S. 982 (2003).

In any event, PPHS did not act as the Authority's agent with respect to the transaction at issue here. An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." *Restatement* § 1(1). As the government's opening brief explains (Br. 45-46, 49-51), in practice and as a contractual matter,

PPHS does *not* act on the Authority's behalf and is *not* subject to the Authority's control.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

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