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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

Under the "state action doctrine," the federal antitrust laws do not apply to the anticompetitive conduct of certain subordinate public entities created by a State if the 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) (citations omitted). The doctrine extends to private entities if the state policy is so articulated and the private conduct is "'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). "[T]he State may not," however, "validate * * * anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39. In this case, a local government entity created by Georgia law, acting at the behest of a private actor and using the general corporate powers conferred on it by the State, acquired the only competitor of that private actor and immediately transferred control of the competitor to the private actor, creating a private monopoly. The questions presented are as follows:

1. Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services.

2. Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

PARTIES TO THE PROCEEDING

The petitioner is the Federal Trade Commission.

Respondents are Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA Inc., Palmyra Park Hospital, LLC,[*] and Hospital Authority of Albany-Dougherty County.

[*] According to records from the Georgia Secretary of State, Palmyra Park Hospital, Inc., which was a party in the court of appeals, was converted on December 15, 2011, from a profit corporation to a limited liability company called Palmyra Park Hospital, LLC. By letter filed June 1, 2012, counsel for HCA Inc. and Palmyra Park Hospital, Inc. notified the Clerk that those parties have no continuing interest in the outcome of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 663 F.3d 1369. The opinion of the district court (Pet. App. 16a-65a) is reported at 793 F. Supp. 2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2011. On February 29, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 23, 2012, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent parts of the Clayton Act, 15 U.S.C. 12 *et seq.*, the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, and Georgia's Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

This case concerns the application of the "state action doctrine" to a privately controlled hospital's acquisition of control over its only rival. A substate governmental entity known under Georgia law as a hospital authority facilitated that acquisition by acting as the nominal purchaser. The courts below held that the State of Georgia, by granting general corporate powers to local hospital authorities, had "clearly articulated and affirmatively expressed" a public policy to displace competition in the hospital services market, thereby exempting the acquisition from federal antitrust law.

1. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in our federal system, the national policy of free competition embodied in the federal competition laws gives way under appropriate circumstances to a State's policy to govern a market by alternative regulatory means. In *Parker*, the Court held that Congress did not intend the Sherman Act, 15 U.S.C. 1 *et seq.*, to reach an agricultural marketing program developed pursuant to the California Agricultural Prorate Act, which "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state." 317 U.S. at 346. This Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to re-

strain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-351. The Court concluded that the marketing scheme was exempt because the "state itself," by "exercis[ing] its legislative authority in making the regulation and in prescribing the conditions of its application," had "created the machinery for establishing the prorate program." *Id.* at 352.

Decisions of this Court since *Parker* have refined and clarified the state action doctrine to strike an appropriate balance between federalism values and our strong national policy favoring free-market competition. See *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632-637 (1992). The exemption from federal competition law extends only to conduct deemed to be "that of 'the State acting as a sovereign.'" *Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984) (quoting *Bates* v. *State Bar*, 433 U.S. 350, 360 (1977)). Thus, like the actions of a State's legislature, *Parker*, 317 U.S. at 350-351, "a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." *Hoover*, 466 U.S. at 568 (citing *Bates*, 433 U.S. at 360; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975)); see *id.* at 568 n.17 (leaving open the question "whether the Governor of a State stands in the same position * * * for purposes of the state-action doctrine").

In appropriate circumstances, the state action doctrine may preclude the application of federal antitrust law not only to the state officials who devise the relevant program, but also to the substate or private actors who carry it out. "Closer analysis is required," though, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others

pursuant to state authorization." *Hoover*, 466 U.S. at 568 (footnote omitted). To prevail on a state action defense, such actors (including respondents) must show that their challenged conduct flows from a State's decision to forgo free-market competition in favor of other means of pursuing its public policy goals. Thus, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), this Court held that private actors are protected by the state action doctrine only if their challenged actions are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition and (2) "actively supervised by the State itself." *Id.* at 105 (internal quotation marks and citation omitted).

To satisfy the "clear articulation" criterion, "[i]t is not enough that . . . anticompetitive conduct is prompted by state action." *Midcal*, 445 U.S. at 104 (quoting *Goldfarb*, 421 U.S. at 791) (internal quotation marks omitted). A "State's position * * * of mere *neutrality* respecting the * * * actions challenged as anticompetitive" likewise does not suffice. *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982). Although a state legislature need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects," *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985) (*Hallie*), those anticompetitive effects must "logically * * * result from [the] broad authority to regulate," or be the consequence of a state "regulatory structure that inherently 'displace[s] unfettered business freedom.'" *Id.* at 42 (quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)); accord *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (finding that a state-authorized municipal

zoning ordinance satisfied the "clear articulation" requirement because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition"). And the doctrine protects only conduct "in [the] particular field" where the State has articulated its intent to displace competition. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985).

The second criterion—that the anticompetitive conduct be "'actively supervised' by the State itself," *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (*Lafayette*) (opinion of Brennan, J.))—ensures that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. That requirement "prevent[s] the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106). Where private conduct is at issue, "sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that * * * States deem necessary," because "it cannot alone ensure * * * that *particular* anticompetitive conduct has been approved by the State." *Ticor*, 504 U.S. at 637 (emphasis added).

In *Hallie*, this Court held that the actions of municipalities, which "are not themselves sovereign," 471 U.S. at 38 (citing *Lafayette*, 435 U.S. at 412 (opinion of Brennan, J.)), are not categorically exempt from antitrust scrutiny as the actions of a state legislature are.

Rather, *Midcal*'s "clear articulation" requirement applies to the conduct of a municipality, but the "active supervision" requirement does not. That approach reflects this Court's recognition that, with respect to the allegedly anticompetitive conduct of municipalities, "[t]he only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* at 47. That danger is sufficiently neutralized by "the requirement that the municipality act pursuant to a clearly articulated state policy." *Ibid.*

However clearly it speaks, a State may not exempt its political subdivisions or residents from federal competition law without creating some alternative regulatory framework. "Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Ticor*, 504 U.S. at 633. Accordingly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351 (citing *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 332, 334-347 (1904) (plurality opinion)); accord *Hallie*, 471 U.S. at 39 ("[T]he State may not validate [an actor's] anticompetitive conduct simply by declaring it to be lawful.") (citing *Parker*, 317 U.S. at 351); *Ticor*, 504 U.S. at 633 ("[A] State may not confer antitrust immunity on private persons by fiat."). This Court has typically described the state action doctrine as triggered by a "state policy to *displace* competition" with some *alternative* approach to ordering the market. *Hallie*, 471 U.S. at 39 (emphasis added); see *Ticor*, 504 U.S. at 632-633 (referring to "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *Omni Outdoor*, 499 U.S.

at 372-373 (referring to "displacement of competition" and "suppression of competition").

2. In 1941, Georgia amended its constitution to enable its political subdivisions to offer health-care services. See *DeJarnette* v. *Hospital Auth.*, 23 S.E.2d 716, 723 (Ga. 1942). The State contemporaneously enacted the Hospital Authorities Law, 1941 Ga. Laws 241 (Ga. Code Ann. §§ 31-7-70 *et seq.*), to "provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." Ga. Code Ann. § 31-7-76(a); see *DeJarnette*, 23 S.E.2d at 723 ("The purpose of the constitutional provision and the statute based thereon was to authorize counties and municipalities to create an organization which could carry out and make more workable the duty which the State owed to its indigent sick.") (citations omitted).[1]

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[1] Georgia's legislation was part of a nationwide trend to expand access to health-care services through public ownership and operation of hospitals. See Ark. Code Ann. § 14-265-103 (1998) (originally enacted in 1947); Cal. Health & Safety Code § 32000 *et seq.* (West 2010 & Supp. 2012) (originally enacted in 1945); Colo. Rev. Stat. § 25-3-301 *et seq.* (2011) (originally enacted in 1943); Fla. Stat. Ann. § 155.01 *et seq.* (West 2012) (originally enacted in 1937); Minn. Stat. Ann. § 368.01 (West 2012) (originally enacted in 1949); Miss. Code Ann. § 41-13-15 (West 2007) (originally enacted in 1944); Mo. Ann. Stat. § 205.010 (West Supp. 2012) (originally enacted in 1945); Mont. Code Ann. § 7-34-2101 *et seq.* (2011) (originally enacted in 1953); Neb. Rev. Stat. Ann. § 17-961 *et seq.* (LexisNexis 2004) (originally enacted in 1945); Ohio Rev. Code Ann. § 749.01 *et seq.* (LexisNexis 2008 & Supp. 2012) (originally enacted in 1953); 16 Pa. Stat. Ann. § 2199.5 (West 2001) (originally enacted in 1955); Wis. Stat. Ann. § 66.0927 (West 2003) (originally enacted in 1949). The States' efforts were strengthened in 1946 by the federal Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040, which provided federal grants for the modernization and construction of new hospitals.

The Hospital Authorities Law authorizes each county and municipality, and appropriate combinations of multiple counties or municipalities, to activate under state law "a public body corporate and politic to be known as the 'hospital authority.'" Ga. Code Ann. §§ 31-7-72(a) and (d). "Every hospital authority shall be deemed to exercise public and essential governmental functions," *id.* § 31-7-75, and each hospital authority possesses "any and all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21). Those corporate powers include, *inter alia*, the powers to "make and execute contracts"; to "acquire * * * and * * * operate projects"; to "lease for [up to 40 years] for operation by others any project"; to "establish rates and charges for the services and use of the facilities of the authority"; to "[transact in] any real or personal property"; to "contract for the management and operation of [a] project"; and to "form and operate * * * one or more networks of hospitals, physicians, and other health care providers." *Id.* § 31-7-75(3), (4), (7), (10), (14), (23) and (27); see *id.* § 31-7-71(5) (defining "project" to include a variety of facilities, including "office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers," and other "health care facilities," as well as "hospitals").

Other provisions of the Hospital Authorities Law establish standards for the operation of an authority's projects that generally mirror those that apply to private nonprofit hospitals. "No authority shall operate or construct any project for profit." Ga. Code Ann. § 31-7-77. A hospital authority exercising its power to lease a project for operation by a private party must determine that doing so 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). An authority leasing a project to others must also "retain[] sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project." *Ibid.* Proceeds from the sale or lease of a hospital owned by a hospital authority must be held in "an irrevocable trust fund," to be "used exclusively for funding the provision of hospital care for the indigent residents of the [area]." *Id.* § 31-7-75.1(a). The statute exempts from disclosure under public-records laws "any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of [an authority-chartered] corporation or [the] authority or its medical facilities." *Id.* § 31-7-75.2.

The statute also authorizes the creation of additional hospital authorities within large-population counties (those of 100,000 or more residents), Ga. Code Ann. § 31-7-73(a), and permits certain consolidations of hospital authorities within each such large-population county, *id.* § 31-7-72.1(a). The statute provides that, in exercising that consolidation power, "hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." *Id.* § 31-7-72.1(e).

3. a. Phoebe Putney Memorial Hospital (Memorial) has operated in the city of Albany, Georgia, since 1911. J.A. 38. Memorial has 443 beds and offers a full range of general acute-care hospital services, as well as emergency-care, tertiary-care, and outpatient services. J.A. 38-39. In 1941, pursuant to Georgia's Hospital Authorities Law, Albany and the surrounding Dougherty County activated respondent Hospital Authority of Al-

bany-Dougherty County (Authority). The Authority has held title to Memorial's assets since it acquired them in 1941, and it operated Memorial until 1990. Pet. App. 4a.

That year, the Authority formed two private corporations, respondent Phoebe Putney Health System, Inc. (PPHS) and a subsidiary, respondent Phoebe Putney Memorial Hospital, Inc. (PPMH). Pet. App. 4a. The Authority holds reversionary interests in the assets of both corporations. *Id.* at 4a n.4. The Authority ceded control of Memorial by leasing it to PPMH in a 40-year, dollar-a-year lease that, as extended, was scheduled to expire in 2042. J.A. 40, 67-119 (lease); see Pet. App. 19a. As a result, PPMH and PPHS have full economic, operational, and competitive control over Memorial, including "total control over the establishment of all rates and charges for services by the Hospital" during the period of the lease. J.A. 89; see J.A. 40-42. In the lease, the Authority also forswore any future competition with Memorial by agreeing not to "own, manage, operate or control or be connected in any [such] manner with * * * any hospital or other health care facility" (a condition PPMH has waived as part of the transaction at issue in this case). J.A. 94; see J.A. 41-42.

The Authority now has no budget, no staff, and no employees. J.A. 40. It has never countermanded, approved, modified, or otherwise affected PPMH's actions on matters such as setting rates, offering services, making staffing decisions, or managing facilities capacity. J.A. 41. As the Authority's Chairman acknowledged, in reaction to a new Authority board member's concerns about Memorial's high prices, "the Authority really has no authority as far as running the hospital." J.A. 135; see J.A. 31. The Authority likewise does not control or supervise PPHS. J.A. 40-42.

Palmyra Medical Center, which was incorporated as Palmyra Park Hospital, Inc. (Palmyra), is located two miles from Memorial and was built in 1971. Before the transaction at issue here, Palmyra was owned by respondent HCA Inc., one of the largest health-care service providers in the United States.[2] Palmyra has 248 beds and, like Memorial, provides general acute-care services. Memorial and Palmyra are the only two hospitals in Dougherty County. J.A. 29-30, 32-33, 39-40.

b. Respondents orchestrated a transaction through which PPHS was to acquire control of Palmyra from HCA, giving PPHS an absolute monopoly in the market for inpatient general acute-care hospital services sold to commercial health-care plans and their customers in Dougherty County. Even within a broader market that includes six counties surrounding Albany, the merger increases PPHS's market share (as measured by commercial patient discharges) from 75% to 86%, with the hospital possessing the next-largest market share (of only 4%) 40 miles from Albany. J.A. 29-30, 32-33, 54. By any reasonable measure, the acquisition is presumptively unlawful. See J.A. 52-54 (analyzing the transaction under the Horizontal Merger Guidelines developed by the U.S. Department of Justice and the FTC). In the courts below, respondents did not contest the anticompetitive effects of the transaction. Pet. App. 7a.

The transaction was structured using the Authority as a conduit. Under an integrated purchase-and-lease transaction, the Authority would act as a nominal purchaser of Palmyra's assets using PPHS-controlled funds. J.A. 44-45. The Authority would then lease Pal-

[2] In response to this Court's call for a response to the petition for a writ of certiorari, HCA and Palmyra informed the Clerk that they have no continuing interest in the outcome of this case.

myra to PPHS for a dollar a year for 40 years (much like PPHS's existing lease, through PPMH, for Memorial). *Ibid.* As a result, PPHS would gain full economic, operational, and competitive control over both Memorial and Palmyra.

PPHS's consultant described this purchase-and-lease mechanism as a "proven format," to "avoid any antitrust Hart-Scott[-]Rodino Pre-Merger Notification filing," and to engineer "attachment of the state action immunity to prevent an antitrust enforcement action." J.A. 149-150, 154; see J.A. 44-47; see generally Am. Bar Ass'n Section of Antitrust Law, *Mergers and Acquisitions* 30-36 (3d ed. 2008) (discussing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383). To that end, without the Authority's involvement, PPHS and HCA negotiated an "Asset Purchase Agreement" under which the Authority would acquire Palmyra's assets for $195 million of PPHS-controlled funds, and PPHS would guarantee the purchase price or pay HCA a $35 million break-up fee. Pet. App. 5a & n.7. PPHS also prepared a "Management Agreement," to be executed at the closing of the transaction, giving PPHS immediate control of Palmyra, pending an amendment to its existing lease with the Authority. J.A. 49. The Authority did not participate in the negotiation of any of those terms.

In a separate "Termination Fee Agreement" between PPHS and HCA/Palmyra, PPHS agreed to pay Palmyra $17.5 million if the Authority failed to approve the Asset Purchase Agreement for Palmyra "in exactly the form" already agreed to by PPHS and HCA. J.A. 163-165; see J.A. 31, 47-48. Those parties acknowledged that PPHS did not have "the authority to negotiate on behalf of the Authority or to bind the Authority," and that, at the

time the Termination Fee Agreement was concluded, "neither the form of the Asset Purchase Agreement nor the transactions contemplated thereby ha[d] been presented to, or approved by, the Authority." J.A. 160; see J.A. 31, 47-48. On learning of that side agreement during the FTC's investigative hearing, the Authority's chairman stated that the agreement "was something between [PPHS] and HCA that I was unaware of, so what they do again is not the Authority. We're not involved in that." J.A. 183; see J.A. 180-184.

The Authority first considered the transaction at its December 21, 2010, meeting. The Authority unanimously approved the transaction then and there, in exactly the form presented to it by PPHS, without any inquiry into its details. J.A. 48-49.

4. On April 19, 2011, the FTC issued an administrative complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. 45(b). *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348, 2011 WL 1595863, http://www.ftc.gov/os/adjpro/d9348/110420phoebecmpt.pdf. The complaint charged that respondents' agreement and proposed transaction would substantially lessen competition in the relevant markets, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The next day, the FTC—joined by the State of Georgia—sued respondents in district court under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and Section 16 of the Clayton Act, 15 U.S.C. 26, seeking to enjoin the transaction during the pendency of the FTC's administrative proceedings. On July 15, 2011, at respondents' request, the FTC stayed its administrative proceedings pending the conclusion of the court action.

5. The district court denied injunctive relief and dismissed the complaint for failure to state a claim. Pet. App. 16a-65a. The court first held that the acquisition of Palmyra, the transfer of control over Palmyra to PPHS, and the long-term lease of Palmyra's assets to PPHS should be viewed together as a single integrated transaction for purposes of Section 7 of the Clayton Act, 15 U.S.C. 18. Pet. App. 26a-32a. The court concluded, however, that the Georgia legislature had clearly articulated an intent to displace competition because "the Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case." *Id.* at 56a. In reaching that conclusion, the court principally relied on provisions of the Hospital Authorities Law that (1) empowered the Authority to acquire and lease out hospitals and to form networks of hospitals, (2) limited the Authority's geographic scope, and (3) required the Authority to operate on a nonprofit basis. See *id.* at 54a-58a.

The district court stated that "the challenged action at issue here is really directed by the Authority and not [PPHS and PPMH]." Pet. App. 60a. It held that the private respondents' conduct—which it characterized as no more than "seeking" or "influencing" actions by the Authority, *id.* at 47a—was protected by virtue of the Authority's "antitrust immunity," and privileged by the First Amendment under the *Noerr-Pennington* doctrine, *id.* at 60a. See *id.* at 59a-61a; see generally *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The district court further concluded that PPHS's conduct would be exempt from antitrust scrutiny because, in the court's view, PPHS was acting "as an agent of the political subdivision which has received antitrust immunity," Pet. App. 49a, elimi-

nating "the need for evaluation of the *Midcal* 'active state supervision' element for private parties," *id.* at 48a (quoting *Crosby* v. *Hospital Auth.*, 93 F.3d 1515, 1530 (11th Cir. 1996), cert. denied, 520 U.S. 1116 (1997)); see *id.* at 61a-64a.

6. The court of appeals affirmed. Pet. App. 1a-15a. The court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." *Id.* at 8a. Like the district court, it viewed "the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS * * * as parts of a single 'acquisition' under the Clayton Act." *Id.* at 10a n.11. The court concluded, however, that the state action doctrine exempted the transaction from antitrust scrutiny. *Id.* at 8a-14a.

a. The court of appeals stated that "[t]he requirement of a clearly articulated state policy" is satisfied if "anticompetitive conduct is a 'foreseeable result' of [state] legislation." Pet. App. 9a. The court observed that, under Eleventh Circuit precedent, a "'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Ibid.* (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1188 (11th Cir. 1994) (*Lee County*)). Rather, the court explained, the state action doctrine applies if anticompetitive conduct is "reasonably anticipated." *Ibid.* (quoting *Lee County*, 38 F.3d at 1190-1191).

The court of appeals reasoned that, because "the Georgia legislature granted powers of impressive breadth to the hospital authorities"—including, "[m]ost important[ly] in this case," the powers to acquire and lease out hospitals—"the legislature must have antici-

pated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." Pet. App. 11a-12a. The court further stated that "[i]t defies imagination to suppose the [Georgia] legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences." *Id.* at 13a.

b. The FTC also argued that the state action doctrine cannot shield a transaction, like the one at issue here, in which private actors engage in the unsupervised creation of a monopoly. See FTC C.A. Br. 25-36, 43-48. The court of appeals summarily rejected what it understood to be the FTC's "suggestion that * * * private influence, or * * * private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable." Pet. App. 14a n.13. The court of appeals did not discuss *Midcal*'s active-supervision requirement.

7. On December 15, 2011, after issuing its decision on the merits, the court of appeals dissolved the injunction it had granted pending the FTC's appeal. Pet. App. 66a-67a (granting injunction); *id.* at 68a (dissolving injunction). The transaction closed that day. See Br. in Opp. 17; Jennifer Maddox Parks, *Hospitals to Merge with Phoebe*, Albany Herald, Dec. 15, 2011, at 1A. On July 25, 2012, the Authority approved an amended and fully restated lease, under which PPHS will control Memorial and Palmyra (now known as Phoebe North) under a single lease. See Jennifer Maddox Parks, *Hospital Authority Approves Lease*, Albany Herald, July 26, 2012, at 1A.

SUMMARY OF ARGUMENT

1. a. Although a State can authorize substate or private actors to engage in conduct that would otherwise violate federal antitrust law, the State's intent to take that step should not lightly be inferred. This Court's decisions require a "clearly articulated and affirmatively expressed" state policy "to displace competition" with an alternative regulatory structure. Those precedents make clear in particular that a broad, "neutral" conferral of powers that can readily be exercised in either procompetitive or anticompetitive ways cannot provide the requisite "clear articulation" of a state policy to displace competition. Rather, displacement of competition must be the "inherent" or "necessary" result of the State's alternative regulatory structure for ordering the relevant market. If the state regime can function properly and achieve its intended purposes without departing from the federal policy of free-market competition, then the State's intent to supersede federal competition law cannot properly be inferred.

b. Georgia's Hospital Authorities Law does not clearly articulate a state policy to displace competition in the provision of hospital services. The law grants local hospital authorities general corporate powers to function as market participants in the hospital-services market, including through the acquisition of hospitals and other health-care facilities, but it does not suggest a state intent to consolidate hospital ownership and displace competition. The powers the statute confers on local hospital authorities closely resemble those possessed by typical private corporations, which of course are subject to federal antitrust law. The Hospital Authorities Law is therefore the type of "neutral" law, con-

ferring powers that are readily susceptible of both procompetitive and anticompetitive uses, that this Court has held does *not* trigger the state action doctrine. Indeed, several features of the statute suggest that the Georgia legislature expected and intended hospital authorities to face competitive market forces.

c. In holding that the Hospital Authorities Law clearly articulates Georgia's intent to displace competition, the court below stated that the anticompetitive sale-and-lease arrangement at issue here was a "foreseeable" result of the Georgia legislature's grant of general corporate powers to local hospital authorities. Although this Court has used the word "foreseeable" in applying the state action doctrine, it has never embraced the expansive conception of foreseeability reflected in the Eleventh Circuit's jurisprudence. Rather, this Court has described anticompetitive behavior as "foreseeable" only when a State has authorized specific conduct that is inherently inconsistent with pure free-market competition, thus giving rise to a sound inference that the State intended to displace competition in the particular field, as the state action doctrine demands. That limitation is essential to ensure that the state action doctrine serves its intended purpose of vindicating affirmative state policy choices. The court of appeals' approach, by contrast, creates a serious risk that States will *unwittingly* confer antitrust exemptions, by enacting general grants of authority without contemplating their potential anticompetitive uses.

2. The purchase-and-lease arrangement at issue here would be unlawful even if the Georgia legislature had unambiguously empowered local hospital authorities to undertake anticompetitive acquisitions. Although the private parties to the transaction used the Authority as

a conduit, the transaction's ultimate effect is to create an unsupervised private monopoly. This Court's precedents make clear that, to shield the anticompetitive actions of private actors from the federal antitrust laws, a State must adopt some alternative regulatory mechanism that provides active state supervision of that conduct. Because no such program of active supervision exists here, Georgia could not exempt respondents from federal antitrust liability.

ARGUMENT

Based on Georgia's grant of general corporate powers to the Authority, the court of appeals held that a merger to monopoly among private parties was exempt from all antitrust scrutiny under the state action doctrine. The court's analysis is fundamentally flawed. Georgia's grant of general corporate powers cannot support a state action defense because it reflects "mere *neutrality*" regarding possible anticompetitive behavior, not an affirmative preference for consolidation of hospital ownership. *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 55 (1982) (*Boulder*). The effect of the integrated transaction at issue here, moreover, is to create an unsupervised private monopoly. Even if Georgia had clearly expressed its intention to exempt such private conduct from federal antitrust scrutiny, such a policy would violate the established rule that "a State may not confer antitrust immunity on private persons by fiat." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

I. THE STATE ACTION DOCTRINE DOES NOT SHIELD THE TRANSACTION AT ISSUE HERE BECAUSE GEORGIA HAS NOT CLEARLY ARTICULATED AN INTENT TO DISPLACE COMPETITION IN THE MARKET FOR HOSPITAL SERVICES

To ensure that the state action doctrine serves federalism values by vindicating actual, affirmative state policy choices, this Court has required a "clear articulation" of the State's intent to displace federal competition law. That requirement is satisfied if the State has authorized specific conduct that is inherently anticompetitive, or if the application of federal antitrust law to particular activities would otherwise prevent the State's regulatory scheme from accomplishing its purposes or operating in its intended manner. By contrast, a broad grant of general corporate powers, which can readily be exercised in either procompetitive or anticompetitive ways, does not give rise to any sound inference that the State anticipated and condoned particular anticompetitive conduct. To treat such "neutral" grants of authority as triggering the state action doctrine, as the court of appeals did here, would impinge substantially and unnecessarily on the important national policy favoring free-market competition. And, far from vindicating state policy choices, that approach would create a significant risk that States will unwittingly confer antitrust exemptions that they have no intention of creating.

A. To Trigger The State Action Doctrine, State Law Must Clearly Articulate An Intent To Displace Competition Through A Public Policy Or Regulatory Structure That Necessarily And Inherently Is Incompatible With The Federal Policy Of Free-Market Competition

1. Through the federal antitrust laws, the "Magna Carta of free enterprise," Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 & n.16 (1978) (citation omitted). Those "laws will not be displaced"—whether by Congress through implied repeal, or by a State through the implications of its regulatory structure—"unless it appears that the antitrust and regulatory provisions are plainly repugnant." *Id.* at 398; see *id.* at 398-399 (citing, *inter alia*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 786-788 (1975)).

That standard is demanding. "[A]ssuming * * * state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976). Thus, "[t]he mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws." *Id.* at 596. Rather, because the state action doctrine protects conduct that is otherwise illegal under federal competition law, the doctrine is "disfavored" and must be given a narrow application. *Ticor*, 504 U.S. at 636.

2. To guard against unwarranted narrowing of federal law, while ensuring that the state action doctrine remains true to its roots in federalism, this Court has insisted that the displacement of competition on which the doctrine depends be "clearly articulated and affirmatively expressed" as the State's adopted policy. *Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); see *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 40 (1985); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978).

A State's grant to a political subdivision of general powers to regulate or participate in commerce cannot provide the requisite "clear articulation" of a state policy to displace competition. That is particularly clear from this Court's decision in *Boulder*, which addressed the applicability of the state action doctrine to a city ordinance that prevented a cable television service provider from expanding. 455 U.S. at 44-46, 54-56. The ordinance was enacted pursuant to Colorado's constitutional "home rule" delegation of authority, under which a city may exercise "the full right of self-government in both local and municipal matters." *Id.* at 43-44 (citation omitted).

Boulder argued that "it may be inferred, from the authority given to Boulder to operate in a particular area[,] * * * that the legislature contemplated the kind of action complained of." *Boulder*, 455 U.S. at 55 (internal quotation marks, emphasis, and citation omitted). This Court rejected that contention, 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. 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 further explained that "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression.'" *Id.* at 56.

The Court used similar reasoning in *Cantor*, where it held that the state action doctrine did not shield a state-regulated electrical utility's program of providing light bulbs without extra cost to its electricity customers. The Court explained that inclusion of the program on the utility's tariff filed with, and approved by, the Michigan Public Service Commission, 428 U.S. at 582-583, was not enough to attribute the utility's program to the State. No Michigan statutes regulated the light-bulb sales market, and neither the Michigan legislature nor the state Public Service Commission had ever passed on the desirability of the utility's program. Accordingly, the Court held that the Public Service Commission's approval did not "implement any statewide policy relating to light bulbs"; at most, "the State's policy [wa]s neutral on the question whether a utility should, or should not, have such a program." *Id.* at 585. The Court also considered whether Michigan's regulatory scheme could coexist with the national competition policy. Finding "no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively" "if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange

program," the Court rejected the utility's state action defense. *Id*. at 598.

By contrast, each of the cases in which this Court has upheld a state action defense has involved a regulatory structure, or an affirmatively expressed state policy, calculated to order a particular market by means incompatible with free-market competition. *Parker* v. *Brown*, 317 U.S. 341 (1943), involved a California regulatory framework designed "to restrict competition among the growers and maintain prices in the distribution of their commodities," with the avowed output-restrictive purposes of "conserv[ing] the agricultural wealth of the State" and "prevent[ing] economic waste in the marketing of agricultural products of the state." *Id.* at 346. State officials extensively regulated various private actors (producers, handlers, and packers) in the service of a detailed and comprehensive proration program enforced through civil and criminal sanctions. See *id*. at 346-348. Although *Parker* antedates this Court's formulation of the "clearly articulated and affirmatively expressed" standard, California plainly satisfied that standard by designing and implementing a regulatory substitute for unfettered competition in the State's agricultural commodities markets.

A similarly anticompetitive state statute was at issue in *Hallie*. There, the plaintiff Wisconsin townships challenged the defendant city's policy of providing sewage treatment services (over which the city held a monopoly) only to lands that agreed to be annexed to the city and to use the city's sewage collection and transportation services. 471 U.S. at 36-37. The townships argued that the challenged policy had enabled the city "to gain an unlawful monopoly over the provision of sewage collection and transportation services," and that "the City's

actions constituted an illegal tying arrangement and an unlawful refusal to deal with the Towns." *Id.* at 37. The city raised a state action defense, relying on state statutes that authorized it both to regulate the boundaries of its service area and to refuse sewage services to unannexed areas. See *id.* at 40-41.

This Court held that the city's actions were not subject to federal competition law because the State had articulated a policy of allocating sewage services through governmental regulation and the politics of annexation, rather than through market forces. The Court attached particular weight to Wisconsin-law provisions that (a) granted cities that operate public utilities the power to "by ordinance fix the limits of such service in unincorporated areas," and (b) stated that "the municipal utility shall have no obligation to serve beyond the area so delineated." *Hallie*, 471 U.S. at 41 (quoting Wis. Stat. § 66.069(2)(c) (1981-1982)). Because these provisions granted the city the power to insist upon annexation—which would necessarily eliminate competition in the provision of sewage collection and transportation services—the Court found it "clear that anticompetitive effects logically would result from this broad authority to regulate." *Id.* at 42. The Court analogized the case to *Orrin W. Fox*, in which the relevant state statute restricted the location of new or relocated auto dealerships in relation to their incumbent rivals, thus "provid[ing] [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" *Ibid.* (quoting 439 U.S. at 109) (third pair of brackets in original).

In *Southern Motor Carriers Rate Conference* v. *United States*, 471 U.S. 48 (1985), decided the same day as *Hallie*, this Court held that Mississippi's Motor Carrier Regulatory Law of 1938, Miss. Code Ann. § 77-7-1

et seq., clearly articulated a state policy to displace competition with regulation. The statute required the State's Public Service Commission to "prescribe 'just and reasonable' rates for the intrastate transportation of general commodities" by common carrier. *Southern Motor Carriers*, 471 U.S. at 63 (citing Miss. Code Ann. § 77-7-221 (1973)). Such rates were to be determined "on the basis of statutorily enumerated factors," having "no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market." *Id.* at 65 n.25 (citing Miss. Code Ann. § 77-7-221 (1973)). The Court explained that the clear articulation standard was met because the "Commission [wa]s not authorized to choose free-market competition," but was required instead to follow a statutorily prescribed and "inherently anticompetitive rate-setting process." *Id.* at 64, 65 n.25.

City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991), involved another "necessarily" anticompetitive state regime. There, a city zoning ordinance regulating the erection of billboards had the effect of benefitting a company whose billboards were already in place, thereby hindering a new rival's ability to compete. *Id.* at 368. The Court concluded that the South Carolina statutes authorizing municipal zoning in general, and the challenged ordinance in particular (see *id.* at 370-371 & n.3), satisfied the "clear articulation" requirement of the state action doctrine. *Id.* at 370-373. The Court explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition," and that "[a] municipal ordinance restricting the size, location, and spacing of bill-

boards * * * necessarily protects existing billboards against some competition from newcomers." *Id.* at 373.

A consistent principle underlies the contrasting outcomes of this line of cases. The clear articulation requirement of the state action doctrine is satisfied only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64, by "design[]," *Orrin W. Fox*, 439 U.S. at 109, or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *Midcal*, 445 U.S. at 106 n.9 (quoting *Orrin W. Fox*, 439 U.S. at 109). Enactment of such a law reflects the State's rejection, with respect to a particular field of endeavor, of federal law's background "assumption that competition is the best method of allocating resources." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). By contrast, a state action defense is not available if the State's purposes and objective can be realized, and its laws can "function effectively," *Cantor*, 428 U.S. at 598, without displacing free-market competition. In particular, a state action defense cannot be premised on a broad, general state-law grant of authority, since such a grant (though capable of anticompetitive uses) gives no indication that the State anticipated and condoned specific anticompetitive practices. See *Boulder*, 455 U.S. at 55.

B. The Relevant Georgia-Law Provisions Do Not Suggest, Let Alone Clearly Articulate, Any Legislative Intent To Displace Competition In The Provision Of Hospital Services

The court of appeals erred in applying the principles described above to the transaction at issue in this case.

In accepting respondents' state action defense, the court did not identify any Georgia law reflecting an intent to consolidate hospital ownership and displace competition. Nor did the court identify any state policy or regulatory program whose effective implementation will be hindered if transactions like the challenged purchase-and-lease arrangement are subject to federal antitrust scrutiny. Rather, the court treated the Georgia legislature's grant to the Authority of general corporate powers as an affirmative expression of state policy to displace competition in the provision of hospital services. That analysis is unsound.

1. Like the federal antitrust laws, Georgia's constitution reflects a policy preference for free-market competition. See Ga. Const. Art. III, Sec. VI, Para. V(c)(1) ("The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void.").[3] That preference extends to the market for public-hospital services. The Georgia Supreme Court has observed:

> The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these

[3] Effective 2011, the Georgia Constitution permits the legislation and enforcement of "reasonable restrictive covenants contained in employment and commercial contracts," Ga. Code. Ann. § 13-8-50 (Supp. 2011). See Ga. Const. Art. III, Sec. VI, Para. V(c)(1) ("[e]xcept as otherwise provided in subparagraph (c)(2) of this paragraph * * * "); *id.* Para. V(c)(2) and (3) (enumerating fields of permissible restrictive covenants and permitting judicial enforcement); Ga. Code Ann. §§ 13-8-2(a), 13-8-50 *et seq.* (Supp. 2011) (new restrictive covenants statute). That new exception is not relevant to this case.

> private hospitals for patients. If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental," there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation.

Thomas v. *Hospital Auth.*, 440 S.E.2d 195, 197 (Ga. 1994) (footnote omitted);[4] see, *e.g.*, *Cox* v. *Athens Reg'l Med. Ctr., Inc.*, 631 S.E.2d 792, 795, 797 (Ga. Ct. App. 2006) (rejecting a challenge to the rates that a public, authority-owned hospital charged to uninsured patients, in light of "the public policy of Georgia, as established by the General Assembly, * * * that purchasers of hospital services use [certain] pricing information to compare hospital charges and make cost-effective decisions," reflecting "the Georgia General Assembly's decision to let market forces control health care costs in Georgia").

2. Georgia's Hospital Authorities Law itself is silent—*i.e.*, "neutral[]," *Boulder*, 455 U.S. at 55; *Cantor*, 428 U.S. at 585—on the issue of anticompetitive conduct by the Authority (and, *a fortiori*, on the private respondents' anticompetitive conduct). As discussed above, pp. 7-9, *supra*, the statute allows the State's political subdivisions to enter the hospital-services market, but it neither expresses a legislative preference for consolidating ownership of local hospitals, nor "provide[s] [a] regulatory structure that inherently 'displace[s] unfettered

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[4] Part of the reasoning in *Thomas* has been superseded by subsequent changes in state law, see *Kyle* v. *Georgia Lottery Corp.*, 718 S.E.2d 801, 802-804 (Ga. 2011), but the decision remains valid with respect to the status of hospital authorities.

business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109).

The court of appeals stated that the Hospital Authorities Law "evidently contemplates anticompetitive effects" because "the Georgia legislature granted powers of impressive breadth to the hospital authorities." Pet. App. 11a. But except for the power of eminent domain, Ga. Code Ann. § 31-7-75(12), which has no bearing on this case, the powers that Georgia law confers upon each local hospital authority—*e.g.*, the powers to make contracts, set the price for its products, sue and be sued, transact in real and personal property, and so on—closely resemble those an ordinary business corporation would possess. See, *e.g.*, Ga. Code Ann. § 14-2-302 (general corporate powers granted to Georgia's corporations); *id.* § 14-2-1101 (permitting corporate mergers); *id.* §§ 14-2-1201 to -1202 (permitting sale of corporate assets to other corporations). No one would suggest that a general power to make contracts implies a privilege to enter a price-fixing agreement; or that the power to set prices implies a privilege to engage in predatory pricing; or that the power to sue implies a privilege to monopolize a market through sham lawsuits. Indeed, in its first Sherman Act merger case, this Court held that the authorization for merger transactions conferred by state corporation law did not exempt a merger from federal antitrust scrutiny. *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 345-346 (1904) (plurality opinion).

The court below placed particular emphasis on the hospital authorities' granted powers to "acquire by purchase, lease, or otherwise . . . projects," and to "lease . . . for operation by others any project." See Pet. App. at 12a (citing Ga. Code Ann. § 31-7-75(4) and (7)). But neither of these powers "inherently 'displace[s] unfet-

tered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109). To the contrary, the powers to acquire and lease out property are routinely exercised, by a broad range of commercial and noncommercial entities, in ways that are fully consistent with federal competition law. See 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (Areeda & Hovenkamp) ¶ 225b4, at 153 (3d ed. 2006) ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into otherwise unlawful mergers.").

The court of appeals also suggested that the Hospital Authorities Law necessarily contemplates anticompetitive hospital acquisitions because "[t]he legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition." Pet. App. 13a. The court's reasoning was faulty in two independent respects.

First, the court's inference assumes that granting Georgia hospital authorities a general statutory power to make acquisitions will necessarily tend to increase concentration of the market for acute-care hospital services. Respondents make a similar assumption. See Br. in Opp. 20 (suggesting that the Authority has "the statutory power to acquire and operate *another* hospital") (emphasis added). But the statute refers broadly to acquisitions of "projects," which include not only hospitals but also, *inter alia*, nursing homes, clinics, and rehabilitation centers. Ga. Code Ann. § 31-7-71(5). The acquisition of such businesses would not threaten to lessen competition in the acute-care hospital-services market.

Second, even if the statute referred only to acquisitions in a single market, it still would not inherently dis-

place competition. In areas of the State served by a single hospital, the acquisition of that hospital by the local authority would not typically be anticompetitive, as it would not increase concentration. See 1A Areeda & Hovenkamp ¶ 224e, at 126 ("[S]ubstitution of one monopolist for another is not an antitrust violation."). And in an area served by many hospitals, a merger may not be anticompetitive if it does not "result[] in a significant increase in the concentration of firms in th[e] market." *Philadelphia Nat'l Bank*, 374 U.S. at 363; see U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 5, 9, 10, at 15-19, 27-31 (2010) (discussing the relevance of market concentration, entry barriers, and efficiencies, respectively, to the potential for anticompetitive effects of mergers). It is in the intermediate case, where (as here) the number of hospitals serving a market is small but greater than one, that transfers of ownership raise the clearest competitive concerns. And even in that setting, a transfer will likely be problematic only if the purchaser of one hospital is already the owner of another. Nothing in the Hospital Authorities Law suggests that the Georgia legislature specifically contemplated that subset of mergers when it authorized hospital authorities to transact in property.

Like the power of an ordinary corporation to acquire property, the power of Georgia hospital authorities "[t]o acquire * * * projects," Ga. Code Ann. § 31-7-75(4), can be used both in ways that are anticompetitive and in ways that raise no antitrust concerns. Rather than evidencing the State's intent to displace federal competition law, the Georgia statute is more naturally understood to authorize such acquisitions subject to the same legal restrictions that bind a private company engaged in the same line of business. See 1A Areeda &

Hovenkamp ¶ 225a, at 131 ("When a [S]tate grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively."); *id.* ¶ 225b4, at 28 (Supp. 2012) ("[A] more logical reading" of the Hospital Authorities Law "is that the statute gave the hospital districts the power to make acquisitions, provided that these acquisitions were not unlawful on other grounds.").[5] The preference for free-market competition set forth in the State's constitution (see pp. 28-29, *supra*) further undermines the court of appeals' inference that the Georgia legislature intended, through the conferral of general corporate powers, to grant an antitrust exemption that other corporations do not possess.

3. No other provision of the Hospital Authorities Law reflects a design to displace competition in the hospital-services market. To the contrary, several features of the statute suggest that the Georgia legislature expected and intended hospital authorities to face competitive market forces.

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[5] See also *Kay Elec. Coop.* v. *City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) ("When a city acts as a market participant it generally has to play by the same rules as everyone else."), cert. denied, 132 S. Ct. 1107 (2012); *First Am. Title Co.* v. *Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("[G]ranting counties the general power to contract or manage their business affairs cannot imply state authorization to impose * * * anticompetitive restriction[s]."); *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc) ("[C]ourts will not infer * * * a policy to displace competition from naked grants of authority."), cert. denied, 528 U.S. 964 (1999); *Lancaster Cmty. Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991) ("[A] subordinate state entity must do more than merely produce an authorization to 'do business' to show that the [S]tate's policy is to displace competition."), cert. denied, 502 U.S. 1094 (1992).

For example, the statute empowers local hospital authorities to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions." Ga. Code Ann. § 31-7-75(21). That provision reflects the legislature's understanding that hospital authorities and private hospitals will provide services on a level playing field in competition with one another. See *Thomas*, 440 S.E.2d at 197 ("Hospital Authority is in direct competition with * * * private hospitals for patients."). And because "private corporations performing similar functions" are presumptively subject to federal competition law, the provision reinforces the inference that local hospital authorities are subject to the same constraints. The statute also exempts from disclosure under public-records laws hospital authorities' "potentially commercially valuable" plans "that may be of competitive advantage in the operation of * * * medical facilities." Ga. Code Ann. § 31-7-75.2. That provision likewise reflects an expectation of competition between the authorities and private hospitals.

Section 31-7-72.1 also undermines respondents' position. That section permits the consolidation of hospital authorities existing within certain large-population counties. When such authorities consolidate, they "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." Ga. Code Ann. § 31-7-72.1(e). That section does not apply to the Authority involved in this case (because Dougherty County is not a large-population county, and it has no other hospital authorities, see *id.* § 31-7-73), or to the transaction at issue here (because the transaction involves a merger of hospitals, not a consolidation of public hospital authorities). That express conferral of an antitrust exemp-

tion in narrowly defined circumstances reflects the Georgia legislature's premise that local hospital authorities are otherwise subject to federal competition law. If the legislature had intended the Hospital Authorities Law to effect a general displacement of competition in the hospital-services market, the antitrust exemption in Section 31-7-72.1(e) would be superfluous. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). But see Pet. App. 13a-14a (court of appeals refusing to draw such an inference).

Respondents also rely (see Br. in Opp. 8-9, 22) on provisions of the Hospital Authorities Law that limit the lessee of an authority project (such as PPMH) to a "reasonable rate of return on its investment," Ga. Code Ann. § 31-7-75(7), and prohibit local hospital authorities from "operat[ing] or construct[ing] any project for profit," *id.* § 31-7-77. Contrary to respondents' contention, those provisions do not suggest that the Georgia legislature intended to displace competition in the hospital-services market.

There is no inconsistency between those provisions and federal competition law. The provision governing lease of a project "for operation by others" requires that the lease "promote the public health needs of the community by making additional facilities available * * * or by lowering the cost of health care in the community." Ga. Code Ann. § 31-7-75(7). That objective is in no way inconsistent with the "fundamental goal of antitrust law," which is to increase output and lower price in response to consumer needs. *NCAA* v. *Board of Regents*,

468 U.S. 85, 107 (1984). And because nonprofit entities are subject to federal antitrust restrictions (see pp. 46-47, *infra*), Section 31-7-77 likewise does not suggest a legislative intent to displace the application of those laws.

To be sure, States may permissibly displace federal antitrust law by clearly articulating an intent to pursue the same objectives through alternative means. But nothing in Sections 31-7-75(7) and 31-7-77 suggests a legislative judgment that, in the context of local hospital services, the goal of federal antitrust law would be better realized through means other than free-market competition. Those provisions are most naturally understood as serving the Hospital Authorities Law's "purpose of * * * carry[ing] out * * * the duty which the State owe[s] to its indigent sick." *DeJarnette*, 23 S.E.2d at 723. At most, those provisions suggest a legislative awareness that *lawful* monopoly conditions may sometimes exist with respect to the provision of hospital services, as when a local authority or its lessee operates the only hospital in a given market. Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (explaining that the mere existence of monopoly conditions does not violate federal antitrust law). "There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Cantor*, 428 U.S. at 596. Georgia's effort to alleviate the practical harms that such monopolies might cause does not suggest a state policy of displacing competition with *additional* monopolies through local hospital authorities' acquisition of privately owned competitors.

C. The Decision Below Typifies A Recurring Misunderstanding Of The Role Of "Foreseeability" In The State Action Doctrine

The erroneous application of the state action doctrine by the court below is traceable in part to a recurring misunderstanding of this Court's prior use of the word "foreseeable" in connection with the state action doctrine. The Court should take the opportunity to address that misunderstanding to ensure that lower courts' application of the doctrine remains aligned with its justifications.

1. The Eleventh Circuit held in this case that the state action doctrine applies if "anticompetitive conduct is a 'foreseeable result' of the [State] legislation." Pet. App. 9a (quoting *Hallie*, 471 U.S. at 42). The court further explained that, under its circuit precedent, "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.' The clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" *Ibid.* (brackets in original) (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1188, 1190-1191 (11th Cir. 1994)); accord Pet. App. 44a-45a (district court opinion). The Eleventh Circuit has consistently found it "foreseeable" in this sense that ordinary corporate powers will be put to anticompetitive ends.[6]

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[6] See Pet. App. 12a ("[I]n granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects."); *Bankers Ins. Co.* v. *Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (1998) (finding it "foreseeable that conferring * * * discretion on the [defendant public insurance association] to select policy servicing services could result in potentially anticompetitive" conduct, such

If the word "foreseeable" is viewed in isolation, the court of appeals' approach reflects a literally plausible understanding of that term. Because anticompetitive behavior often furthers the economic and other interests of those who engage in it, it is foreseeable (in the sense that it can "reasonably [be] anticipated," Pet. App. 9a (citation omitted)) that broad, general grants of power will sometimes be used in anticompetitive ways. Cf. *United States* v. *Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir.) (Posner, J.) ("Most people do not like to compete, and will seek ways of avoiding competition by agreement tacit or explicit."), cert. denied, 498 U.S. 920 (1990); 1 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 145 (R.H. Campbell et al., eds., 1979) ("People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices.").

2. Although this Court has used the word "foreseeable" in describing the circumstances under which the

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as an allegedly anticompetitive refusal to contract with the plaintiff insurer for servicing); *Crosby* v. *Hospital Auth.*, 93 F.3d 1515, 1534 (1996) ("[I]t is at the very least foreseeable, and most certainly reasonably anticipated, that [a statute permitting determinations of hospital staff privileges to be made by peer review] would enable a hospital authority to engage in anticompetitive conduct [such as an alleged group boycott] through its peer review activities.") (internal quotation marks and citation omitted), cert. denied, 520 U.S. 1116 (1997); *Lee County*, 38 F.3d at 1192 ("The [public hospital] Board's allegedly anticompetitive [hospital merger] could have been reasonably anticipated by the Florida Legislature when it gave the Board the implicit power to acquire other hospitals and was, therefore, a foreseeable consequence of the legislature's delegation of power to the Board."); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1388-1389 (1993) (similar to *Crosby*).

state action doctrine applies, the Court's decisions reject the expansive view of that doctrine that the court below adopted. Applying "foreseeability" so broadly would fail to distinguish between, on the one hand, situations where the State has clearly articulated and affirmatively expressed a policy to displace competition (in which a state action defense may be available), and, on the other hand, situations where the State has legislated generally but has not sought to displace competition. The Court has used the word "foreseeable" to describe conduct that the State can safely be presumed to have contemplated and endorsed, as evidenced by the State's conferral of specific powers that are inherently inconsistent with pure free-market competition. That approach ensures that the state action doctrine serves its intended purpose of vindicating actual state policy choices, rather than creating exemptions for aberrant anticompetitive conduct in spheres where the State has evinced no intent to displace competition.

Thus, in rejecting the townships' argument in *Hallie* that the lack of an "express mention of anticompetitive conduct" in state law precluded the city's state action defense, this Court observed that the challenged municipal conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas." 471 U.S. at 41-42. The Court clarified and expanded on that statement on the next page of its opinion, however, where it contrasted the Wisconsin laws involved in *Hallie* with the Home Rule Amendment at issue in *Boulder*. The Court explained that the Home Rule Amendment was "neutral" because it left the municipality "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." *Id.* at 43. By contrast, the state laws at issue

in *Hallie* had "specifically authorized Wisconsin cities to provide sewage services and ha[d] delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." *Ibid.*

This Court in *Hallie* thus linked the foreseeabilty of the city's anticompetitive conduct to the *specificity* of the relevant state-law authorization, and the *inherently* anticompetitive nature of the authorized conduct. The anticompetitive conduct at issue in *Hallie* was foreseeable in the sense of being the natural and expected result of the relevant state-law authorization and not merely one theoretically possible use of the authority conferred. In reaching that conclusion, the Court rejected the townships' effort to equate the broad, general authorization involved in *Boulder* with state laws authorizing conduct that is inherently anticompetitive. The decision of the court below, which held that anticompetitive behavior is a "foreseeable" result of a legislative grant of general corporate powers, rests on the very analogy that the Court rejected in *Hallie*. See Pet. App. 9a ("[A] foreseeable anticompetitive effect need not be one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.") (internal quotation marks and citation omitted).[7]

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[7] As leading commentators have explained:

> 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.

This Court in *Omni Outdoor* cited *Hallie* for the proposition that the "clear articulation" requirement of the state action doctrine is satisfied "if suppression of competition is the 'foreseeable result' of what the statute authorizes." 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42). In holding that this requirement was satisfied, however, the Court explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." *Ibid.* As in *Hallie*, the Court thus linked the foreseeability of anticompetitive effects to the relevant state law's specific focus on a form of regulation (zoning) that inherently displaces pure free-market competition.

3. "Foreseeability" can thus be an appropriate tool for discerning the State's intent to displace competition, which is the ultimate question under the state action doctrine. When a State authorizes the specific conduct that is challenged in a federal antitrust suit, and that type of conduct is inherently anticompetitive, a court may reasonably infer that the State has "clearly articulated and affirmatively expressed" in state law, *Hallie*, 471 U.S. at 38-39 (citations omitted), its intent "to displace competition in a particular field," *Southern Motor Carriers*, 471 U.S. at 64. But when a State simply grants general corporate powers whose exercise does not inherently restrict competition, the most foreseeable result is that the recipient will exercise those powers in conformity with the background rules that bind simi-

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Decisions such as *Boulder* make clear that authorization in the first sense alone is insufficient.

1A Areeda & Hovenkamp ¶ 225a, at 131 (internal quotation marks and footnotes omitted).

larly situated private actors, and there is consequently no basis for inferring an intent on the State's part to displace competition. See pp. 32-33, 34, *supra*. That approach preserves the full scope of federal competition law and reserves the state action doctrine for circumstances in which anticompetitive conduct is the natural and expected (and thus, presumably, intended) consequence of the State's regulatory choices. It also respects the Court's admonition that state neutrality is *not* sufficient to displace the federal competition laws. *Boulder*, 455 U.S. at 55; *Cantor*, 428 U.S. at 585.

The state action doctrine is intended "to foster and preserve the federal system," *Ticor*, 504 U.S. at 633, by allowing affirmative state policy choices to prevail even when they are inconsistent with the preference for free-market competition reflected in the federal antitrust laws. When a State authorizes a specific class of inherently anticompetitive conduct, application of federal antitrust law to the authorized activities can be expected to subvert the State's regulatory regime. In *Omni Outdoor*, for example, it would have made no sense to say that South Carolina municipalities could continue to engage in zoning so long as they did so without impairing free-market competition, since "[t]he very purpose of zoning regulation is to displace unfettered business freedom." 499 U.S. at 373. Application of the state action doctrine in that case thus vindicated a state policy choice that was clearly implicit in the authorization to zone.

The understanding of "foreseeability" reflected in the decisions below, by contrast, "stand[s] federalism on its head." *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). If the state action doctrine were triggered by every state-law grant of

general powers that are susceptible of anticompetitive misuse, a "[S]tate would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Ibid.* That result would disserve the federalism values that the state action doctrine is intended to protect, since it would "compel * * * result[s] that the States do not intend but for which they are held to account." *Ticor*, 504 U.S. at 636; see *id.* at 632, 635 ("Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," yet "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then [the] doctrine will impede their freedom of action, not advance it.").

4. Whatever superficial attraction there might be to the Eleventh Circuit's literally plausible understanding of "foreseeability" in this context, this Court's decisions make plain that the "clear articulation" requirement of the state action doctrine is satisfied only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that "inherently," *Hallie*, 471 U.S. at 42; *Southern Motor Carriers*, 471 U.S. at 64, by "design[]," *Orrin W. Fox*, 439 U.S. at 109, or "necessarily," *Omni Outdoor*, 499 U.S. at 373, "displace[s] unfettered business freedom," *Midcal*, 445 U.S. at 106 n.9 (quoting *Orrin W. Fox*, 439 U.S. at 109). For purposes of the Court's state action jurisprudence, anticompetitive conduct is the "foreseeable" result of a state-law authorization only if state law speaks with relative specificity to the particular conduct involved, and the conduct is inherently anti-

competitive, thereby supporting the inference that the State anticipated and endorsed such behavior as part of a policy to displace competition. By contrast, anticompetitive conduct is not (for these purposes) the "foreseeable" result of a broad, general grant of corporate powers, since "[a] State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions" that ultimately occur. *Boulder*, 455 U.S. at 55.

II. EVEN IF GEORGIA LAW HAD UNAMBIGUOUSLY CONDONED THE SALE-AND-LEASE ARRANGEMENT AT ISSUE HERE, THE TRANSACTION WOULD NOT BE EXEMPT FROM FEDERAL ANTITRUST LAW, SINCE A STATE CANNOT AUTHORIZE THE ACQUISITION BY PRIVATE PARTIES OF UNSUPERVISED MONOPOLY POWER

The state action doctrine does not permit a State to "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. Instead, to shield private conduct from the federal antitrust laws, a State must adopt some alternative regulatory mechanism that provides for active supervision of that conduct. See *ibid.* (explaining that the protection of the state action doctrine is "conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint"). Even assuming, *arguendo*, that supervision by a substate entity (like the Authority) can satisfy that requirement, there is no such supervision here. The absence of such supervision is both an independent basis for reversing the judgment of the court of appeals, and a further reason to doubt that the Georgia legislature intended to displace competition in the hospital-services market.

A. The Transaction At Issue Here Creates A Private Monopoly That Must Be Actively Supervised If It Is To Be Shielded By The State Action Doctrine

1. As detailed in the complaint and summarized above, the substance of the present transaction is that private parties arranged for PPHS to acquire a private monopoly by using the Authority as a conduit. See J.A. 28-66; pp. 11-13, *supra*. More than 20 years ago, the Authority ceded economic and operational control of all hospital affairs to PPHS, a private corporation. J.A. 38, 40-41. Under the terms of the 1990 lease of Memorial to PPMH, it is PPHS—not the Authority—that controls Memorial's assets and operations, including control of Memorial's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. J.A. 41; see J.A. 88-89 (lease term giving PPMH "total control over the establishment of all rates and charges," subject only to the lease). The transaction at issue here will likewise give PPHS full economic and operational control over its rival, Palmyra, and hence a presumptive monopoly over acute-care hospital services in the Albany area for the next 40 years. J.A. 30, 49.

Although the Authority created PPMH and PPHS to provide health care to the residents of Dougherty County, see J.A. 76, and retains ownership of Memorial's assets, PPHS and PPMH are private entities that operate independently of the Authority. See J.A. 108 (lease term stating that "no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor [sic] other than the relationship of landlord and tenant"). PPHS's CEO has declared, in denying requests under Georgia's open records law for the

board-meeting minutes of PPHS and PPMH, that "[e]ach of the Phoebe Putney entities is a private corporation and is neither affiliated with nor controlled by the Hospital Authority of Albany- Dougherty County." *Phoebe Putney Hospital Denies Request for Records*, Rome News-Tribune, Sept. 29, 1995, at 6A. Compare *Hallie*, 471 U.S. at 45 n.9 (explaining that state "sunshine" laws tend to constrain municipalities to act in the public interest, making active supervision of such public entities unnecessary). Absent active supervision, "there is no realistic assurance" that PPHS's acquisition and operation of this monopoly will "promote[] state policy, rather than merely the [private] party's individual interests." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988); see *Hallie*, 471 U.S. at 47 (explaining that the active supervision requirement arises from "a real danger" that a private party "is acting to further his own interests, rather than the governmental interests of the State").

2. Respondents have argued that active supervision is not required here because PPHS and PPMH are nonprofit corporations charged with operating the Authority's projects for the public benefit. See Br. in Opp. 8-9, 22; Phoebe Putney C.A. Br. 27-30.[8] That argument is flawed in two respects.

First, PPHS's nonprofit status does not exempt it from federal restrictions on the formation of private monopolies. "There is no doubt that the sweeping language of [Sherman Act] § 1 applies to nonprofit entities." *NCAA*, 468 U.S. at 100 n.22. "No gulf separates

[8] The Georgia Nonprofit Corporation Code, Ga. Code Ann. §§ 14-3-101 *et seq.*, under which PPHS was chartered, see J.A. 38, provides that nonprofit corporations chartered by hospital authorities are in all relevant respects indistinguishable from other nonprofit corporations, see Ga. Code Ann. § 14-3-305(b).

the profit from the nonprofit sectors of the American economy. There are nonprofit hospitals and for-profit hospitals, nonprofit colleges and for-profit colleges * * * . When profit and nonprofit entities compete, they are driven by competition to become similar to each other." *Girl Scouts of Manitou Council, Inc.* v. *Girl Scouts of the United States, Inc.*, 646 F.3d 983, 987 (7th Cir. 2011) (Posner, J.). In particular,

> the absence of "profit" is no guarantee of eleemosynary intent or practice. Profit can appear not only in the form of dividends but also in the form of salaries and perquisites. Moreover, nonprofit organizations may be subject to the same incentives and temptations that for-profit firms are.
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> * * * * *
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> Indeed, the nonprofit hospital, including the publicly owned hospital, may have profit motives that are just as strong as those of the profit-making hospital.

1B Areeda & Hovenkamp ¶ 261a, at 166-167.

Second, respondents' claim of a unity of interest between the Authority and PPHS is untenable, since PPHS plainly has private interests distinct from those of the Authority. In addition to PPMH, PPHS has numerous other subsidiary affiliates—including for-profit business interests—that operate within and beyond Dougherty County. J.A. 168; Phoebe Putney C.A. Br. C-1 (corporate disclosure statement listing 11 subsidiaries of PPHS). PPHS had closed several significant transactions of a similar nature, all without any Authority involvement, before consummating the sale-and-lease arrangement at issue here. J.A. 167. Although PPHS could have purchased Palmyra without Authority in-

volvement, it sought to use the Authority as a "proven" vehicle to provide "exemption from [a Hart-Scott-Rodino] filing and attachment of the state action immunity." J.A. 150, 154. In addition, in leasing Memorial, the Authority entered a covenant not to compete with PPHS—a covenant that would be unnecessary if PPHS's and the Authority's interests were congruent. J.A. 94 (lease term providing that the Authority "shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than [Memorial]"); J.A. 41-42.[9]

Under these circumstances, active supervision would be necessary to ensure that this transaction advances the State's regulatory policies, rather than PPHS's own private interests. As the Court explained in *Ticor*, that standard demands that the State "exercise[] sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634-635.

B. Active Supervision Is Lacking Here

No official of Georgia or of any substate entity has exercised "independent judgment and control," *Ticor*, 504 U.S. at 634, over the arrangement at issue here. The lack of supervision is evident in two related ways.

First, as to the acquisition itself, the Authority did not exert any measure of control over any step in the

[9] That covenant would have prohibited the Authority's acquisition of Palmyra if PPHS had not agreed to waive it. J.A. 41-42; see J.A. 145-146 (personal notes of PPHS's Chief Operating Officer listing the transaction's benefits to PPHS as including "[c]ontrol all hospital beds in county" and "[i]ncrease negotiation power with all payors").

process. As detailed above, pp. 11-13, *supra*, PPHS conceived, structured, financed, and guaranteed the acquisition. It even pledged to pay HCA $17.5 million if the Authority did not approve the purchase agreement "in exactly the form" agreed to by PPHS and HCA. J.A. 163-164. PPHS took those steps without any input from, much less active supervision by, the Authority. Although the Authority was the nominal purchaser of Palmyra, its actual role in the transaction was akin to that of a notary public, certifying the formalities of the purchase but playing no part in fashioning its terms. As both courts below found (Pet. App. 10a n.11, 26a-32a), the sale-and-lease arrangement was in substance a single integrated transaction through which control over Palmyra was transferred from one private entity to another. Cf. *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2209 (2010) (noting a preference for "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate").

Second, there is no reasonable likelihood that any governmental entity acting on behalf of the State would sufficiently supervise PPHS's operation of Palmyra after the transfer of control of that hospital to PPHS has been completed. As the Authority's Chairman acknowledged, under the terms of the Memorial lease (which are substantially the terms that will apply to Palmyra), "the Authority really has no authority as far as running the hospital." J.A. 135; see J.A. 31-32. To be sure, the lease contains provisions ostensibly requiring PPHS to operate the hospital in conformance with the State's policy under the Hospital Authorities Law, and giving the Authority remedies for noncompliance. See J.A. 88-89 ("Transferee will fix rates and charges for services by

the Hospital * * * in accordance with the intent of and the policy established by the [Hospital Authorities Law]."); J.A. 102-108 (events of default and remedies). But "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. Instead, active supervision "requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 101 (emphasis added).

Neither the Authority nor any other governmental entity has undertaken to ensure that PPHS's actions comport with the State's policy. *Inter alia*, Georgia's Hospital Authorities Law directs the Authority, in leasing a project for operation by others, to "ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment." Ga. Code Ann. § 31-7-75(7). The statute further provides that no project of a hospital authority may charge prices greater than necessary to cover costs and create reasonable reserves. *Id.* § 31-7-77. Even assuming that those conditions could be implemented in a way that would supply the necessary supervision, that has not happened here. Despite serving one of the poorest counties in the Nation, PPMH amassed hundreds of millions of dollars in liquid reserves, and it paid its CEO more than $1.1 million in total compensation in fiscal year 2011 (see PPMH's IRS Form 990 (Return of Organization Exempt From Income Tax) (2010), http://www.phoebeputney.com/media/file/About%20Us/PPMH_FY2011_990.pdf, at 7). Both the Authority's chairman and vice-chairman testified that they were unaware of such basic and competitively salient financial matters as how PPMH's prices compared to Palmyra's, and wheth-

er prices at PPMH had risen in recent years. J.A. 178-180, 195. The Authority's vice-chairman further testified that the Authority has not reviewed what an appropriate level of reserves is for PPMH, that the Authority will continue to rely on PPHS to set reserves in the future, and that the Authority does not anticipate having any role in evaluating the prices PPHS charges or the rate of return PPHS receives in the future. J.A. 191-194.

Such passive acquiescence is insufficient to insulate private conduct from the federal competition laws. See *Ticor*, 504 U.S. at 638. As this Court stressed in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement." 445 U.S. at 106. The mere possibility that the Authority might someday play a more active role in overseeing PPHS is no reason to regard the transaction at issue here as anything but an unsupervised private merger to monopoly. See *Patrick*, 486 U.S. at 101.

Georgia law has not provided the oversight necessary to ensure that PPHS's acquisition of monopoly power will serve whatever purpose the State might have had in supposedly exempting certain hospital mergers from federal competition law. The State thus could not properly exempt the transaction at issue here from federal antitrust scrutiny, even if the relevant state laws clearly articulated the State's intent to take that step.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 18 provides in pertinent part:

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

2. 15 U.S.C. 21 provides in pertinent part:

Enforcement provisions

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * * .

* * * * *

3. 15 U.S.C. 53(b) provides in pertinent part:

False advertisements; injunctions and restraining orders

* * * * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: * * * .

4. Ga. Code Ann. § 31-7-70 (2012) provides:

Short title.

This article shall be known and may be cited as the "Hospital Authorities Law."

5. Ga. Code Ann. § 31-7-71 (2012) provides:

Definitions.

As used in this article, the term:

(1) "Area of operation" means the area within the city or county activating an authority. Such term shall also mean any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation.

(2) "Authority" or "hospital authority" means any public corporation created by this article.

(3) "Governing body" means the elected or duly appointed officials constituting the governing body of a city or county.

(4) "Participating units" or "participating subdivisions" means any two or more counties, or any two or more municipalities, or a combination of any county and any municipality acting together for the creation of an authority.

(5) "Project" includes the acquisition, construction, and equipping of hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers,

extended care facilities, and other public health facilities for the use of patients and officers and employees of any institution under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community and all utilities and facilities deemed by the authority necessary or convenient for the efficient operation thereof. Such term may also include any such institutions, utilities, and facilities located outside the city or county in which the authority is located, provided that the acquisition, construction, equipping, and operation thereof is requested or approved by the governing bodies of such city and county in which the project is located and by the board of any hospital authorities located within such city and county or provided that the acquisition, construction, equipping, and operation is to be located in the area of operation of the authority.

(6) "Resolution" means the resolution or ordinance to be adopted by governing bodies pursuant to which authorities are established.

6. Ga. Code Ann. § 31-7-72 (2012) provides in pertinent part:

Creation of hospital authority in each county and municipality.

(a) There is created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body. * * *

* * * * *

(d) Any two or more counties or any two or more municipalities or any county or municipality, or a combination of any county and any municipality, by a like resolution or ordinance of their respective governing bodies, may authorize the exercise of the powers provided for in this article by an authority. * * *

* * * * *

7. Ga. Code Ann. § 31-7-72.1 (2012) provides in pertinent part:

Merger of hospital authorities.

(a) A hospital authority activated for a county pursuant to Code Section 31-7-73 may be merged with a hospital authority activated for that county under Code Section 31-7-72 upon compliance with this Code section

and approval by resolution of the governing authority * * * .

* * * * *

(e) It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them by this Code section, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia.

8. Ga. Code Ann. § 31-7-75 (2012) provides:

Functions and powers.

Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the foregoing, the following powers:

(1) To sue and be sued;

(2) To have a seal and alter the same;

(3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;

(4) To acquire by purchase, lease, or otherwise and to operate projects;

(5) To construct, reconstruct, improve, alter, and repair projects;

(6) To sell to others, or to lease to others for any number of years up to a maximum of 40 years, any lands, buildings, structures, or facilities constituting all or any part of any existing or hereafter established project. In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, provide reasonable public notice of such sale and provide for a public hearing to receive comments from the public concerning such sale. This power shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such lands, buildings, structures, or facilities, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to selling or leasing to others within 20 years after completion of construction;

(7) To lease for any number of years up to a maximum of 40 years for operation by others any project, 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 and that the authority shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project, which reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that

no authority shall operate or construct any project for profit. Any lessee shall agree in the lease to pay rent sufficient in each year to pay the principal of and the interest on any revenue anticipation certificates proposed to be issued to finance the cost of the construction or acquisition of any such project and to pay off or refinance, in whole or in part, any outstanding debt or obligation of the lessee (including any redemption or prepayment premium due thereon) which was incurred in connection with the acquisition and construction of facilities of such lessee and the amount necessary in the opinion of the authority to be paid each year into any reserve funds which the authority may deem advisable to be established in connection with the retirement of the proposed revenue anticipation certificates and the maintenance of the project. Any such lease shall further provide that the cost of all insurance with respect to the project and the cost of maintenance and repair thereof shall be borne by the lessee. In carrying out a refinancing plan with regard to any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee, the authority may use proceeds of any revenue anticipation certificates issued for such purpose to acquire such outstanding debt or obligation, in whole or in part, and may itself or through a fiduciary or agent hold and pledge such acquired debt or obligation as security for the payment of such revenue anticipation certificates. The powers granted in this paragraph shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the

authority with respect to such project, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to leasing to others within 20 years after completion of construction. Any revenues derived by the authority from any such lease shall be applied by the authority to the payment of any revenue anticipation certificates issued in connection with the acquisition and construction of the project and the payment, in whole or in part, of any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee (including any redemption or prepayment premium due thereon) or to the payment of any other expenses incurred in connection with acquiring, financing, maintaining, expanding, operating, or equipping the project;

(8) To extend credit or make loans to others for the planning, design, construction, acquisition, or carrying out of any project, which credit or loans may be secured by such loan agreements, mortgages, security agreements, contracts, or other instruments or fees or charges, for a term not to exceed 40 years, and upon such terms and conditions as the authority shall determine reasonable in connection with such loans, including provisions for the establishment and maintenance of reserves and insurance funds, and in the exercise of powers granted by this Code section in connection with a project, to require the inclusion in any contract, loan agreement, security agreement, or other instrument such provisions for guaranty, insurance, construction, use, operation, maintenance,

and financing of a project as the authority may deem necessary or desirable;

(9) To acquire, accept, or retain equitable interests, security interests, or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(10) To establish rates and charges for the services and use of the facilities of the authority;

(11) To accept gifts, grants, or devises of any property;

(12) To acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority;

(13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or state governments, after such action has first been approved by the department in writing;

(14) To exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein;

(15) To mortgage, pledge, or assign any revenue, income, tolls, charges, or fees received by the authority;

(16) To issue revenue anticipation certificates or other evidences of indebtedness for the purpose of

providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years;

(17) To borrow money for any corporate purpose;

(18) To appoint officers, agents, and employees;

(19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;

(20) To receive, from the governing body of political subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;

(21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

(22) To make plans for unmet needs of their respective communities;

(23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm. Each such contract shall require the consultant or firm contracted with to post a suitable and sufficient bond;

(24) To provide management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services to another hospital authority, hospital, health care facility, as said term is defined in Chapter 6 of this title, person, firm, corporation, or any

other entity or any group or groups of the foregoing; to enter into contracts alone or in conjunction with others to provide such services without regard to the location of the parties to such transactions; to receive management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services from another such hospital authority, hospital, health care facility, person, firm, corporation, or any other entity or any group or groups of the foregoing; and to enter into contracts alone or in conjunction with others to receive such services without regard to the location of the parties to such transactions;

(25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; to provide grants, scholarships, loans or other assistance to such individuals and to students and parents of students for programs of study in fields in which critical shortages exist in the authority's service area, whether or not they are employees of the authority; to provide for the assumption, purchase, or cancellation of repayment of any loans, together with interest and charges thereon, made for educational purposes to students, postgraduate trainees, or the parents of such students or postgraduate trainees who have completed a program of study in a field in which critical shortages exist in the authority's service area; and to provide services and financial assistance to private not for

profit organizations in the form of grants and loans, with or without interest and secured or unsecured at the discretion of such authority, for any purpose related to the provision of health or medical services or related social services to citizens;

(26) To exercise the same powers granted to joint authorities in subsection (f) of Code Section 31-7-72; and

(27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks; to contract, either directly or through such networks, with the Department of Community Health to provide services to Medicaid beneficiaries to provide health care services in an efficient and cost-effective manner on a prepaid, capitation, or other reimbursement basis; and to undertake other managed health care activities; provided, however, that for purposes of this paragraph only and notwithstanding the provisions of Code Section 33-3-3, as now or hereafter amended, a hospital authority shall be permitted to and shall comply with the requirements of Chapter 21 of Title 33 to the extent that such requirements apply to the activities undertaken by the hospital authority pursuant to this paragraph. No hospital authority, whether or not it exercises the powers authorized by this paragraph, shall be relieved of compliance with Article 4 of Chapter 18 of Title 50, relating to inspection of public records unless otherwise authorized by law. Any health care provider licensed under Chapter 30 of Title 43 shall be eligible to apply to become a participating pro-

vider under such a hospital plan or network which provides coverage for health care services which are within the lawful scope of his or her practice, provided that nothing contained in this Code section shall be construed to require any such hospital plan or network to provide coverage for any specific health care service.

9. Ga. Code Ann. § 31-7-75.2 (2012) provides in pertinent part:

Exemption from disclosure for potentially commercially valuable plan, proposal, or strategy.

Notwithstanding any other provision of law to the contrary, no Georgia nonprofit corporation in its operation of a hospital or other medical facility for the benefit of a governmental entity in this state and no hospital authority shall be required by Chapter 14 of Title 50 or Article 4 of Chapter 18 of Title 50 to disclose or make public any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the corporation or authority or its medical facilities and which has not been made public. This exemption shall terminate at such time as such plan, proposal, or strategy has either been approved or rejected by the governing board * * * .

10. Ga. Code Ann. § 31-7-77 (2012) provides:

Rates and charges.

No authority shall operate or construct any project for profit. It shall fix rates and charges consistent with

this declaration of policy and such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay principal and interest on certificates and obligations of the authority, to provide for maintenance and operation of the project, and to create and maintain a reserve sufficient to meet principal and interest payments due on any certificates in any one year after the issuance thereof. The authority may provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services.