No. 11-1160

# In The Supreme Court of the United States

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

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

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF *AMICI CURIAE* THE GEORGIA ALLIANCE OF COMMUNITY HOSPITALS, INC. AND THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

The Georgia Alliance of Community Hospitals, Inc. ("GACH"), a Georgia nonprofit corporation, is an industry association whose membership is comprised of 70 community public and nonprofit hospitals and hospital systems, urban and rural, large and small, from all areas of the State of Georgia, including the Respondent Phoebe Putney entities which are located in Dougherty County (Albany) in the rural Southwest region of the State.[2] Approximately 75 percent of

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[1] Pursuant to Rule 37.6, *amici curiae* state that undersigned counsel for *amicus curiae* GACH represented the Respondent Phoebe Putney entities below in the District Court and the Eleventh Circuit Court of Appeals. Undersigned counsel for *amici* have not appeared before this Court on behalf of any Respondent. No counsel appearing before this Court on behalf of Respondents has been involved in drafting this brief. The Respondent Phoebe Putney entities are members of *amicus curiae* GACH. The Phoebe Putney entities make regular contributions of membership dues to *amicus curiae* GACH. No counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* have secured consent from Petitioner and Respondents to file this brief.

[2] GACH members are listed at http://www.gach.org under Tab "Whom We Serve." Georgia's hospital authorities are listed at http://www.dca.state.ga.us/, under "Searchable Databases," "Registered Authorities Database," Type: "Hospitals." All licensed hospitals in Georgia are listed on the Department of Community Health's website, www.dch.georgia.gov at http://167.193.144.216/; searching "hospitals."

The 2010 Census population of Dougherty County was 94,565. A number of Georgia counties with a 2010 Census population substantially exceeding 100,000 have one hospital (*e.g.*, Cherokee; Clayton; Douglas; Forsyth; Henry; Houston; Paulding), and one has none (Columbia). *See* http://opb.georgia.gov/2010-census and

(Continued on following page)

GACH hospital facilities are owned by public hospital authorities, and approximately half of these are leased to nonprofit hospitals which operate the hospitals on behalf of the authorities that own them.

GACH is dedicated to furthering the ability of community hospitals to fulfill their primary mission of serving their communities. At a time when hospitals are being asked to do more with less, GACH works to help community hospitals to balance these demands. GACH serves as a unified voice for Georgia's mission-driven hospitals, working to advance health care policy and regulations that enable its hospital members to provide the best in medical care, quality, technology, training, and community service.

The purposes of GACH include advocacy with legislative assemblies to create partnerships to advance community hospital efforts and infrastructure; support for the safety net of community hospitals via a support system of polices and united goals; and advancement of critical issues including caring for the uninsured, providing neonatal intensive care, improving Georgia's trauma care system, and training Georgia's new physicians and health care workers. In furtherance of these goals, GACH has long been an advocate on behalf of its members regarding the advancement of the statutory policies established by the Georgia General Assembly in the Georgia Hospital

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http://2010.census.gov/news/pdf/cb11cn97_ga_totalpop_2010map.pdf.

Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, and in other comprehensive health care regulatory programs including the Certificate of Need statute, O.C.G.A. Ch. 31-6.

The National Association of Public Hospitals and Health Systems ("NAPH") comprises about 200 of the nation's largest metropolitan safety net hospitals and health systems,[3] committed to providing health care to all without regard to ability to pay. In addition to functioning as the country's default national health insurance system, NAPH members provide many essential community services, such as primary care, trauma care, and neonatal intensive care; and train many of the nation's physicians, nurses, and other health care providers. NAPH members include several that are organized as hospital authorities under state law, including members of GACH. In addition, NAPH's public hospital members are organized under a wide range of other governmental legal structures, including direct operation by city, county or state governments, hospital districts, and public benefit corporations.[4] As such, NAPH members have an interest in ensuring that their diverse local enabling authorities are

[3] NAPH members are listed at http://www.naph.org/Main-Menu-Category/About-NAPH/About-Our-Members/NAPH-Members.aspx.

[4] L. Gage, A. Camper & R. Falk, *Legal Structure and Governance of Public Hospitals and Health Systems*, National Association of Public Hospitals and Health Systems, Washington DC (2006), available at http://www.naph.org/Publications/legalstructure.aspx?FT=.pdf.

interpreted in a manner consistent with state law intent, and that state-action immunity not be improperly denied. NAPH represents members' interests in matters before Congress, the Executive Branch, and the courts.

*Amici* submit this brief because its members are significantly impacted by any court's interpretation of the state law governing hospitals, including interpretation of that state law by the United States Supreme Court.

## STATEMENT

*Amici* have an interest in having the law executed and the duties set forth in Georgia's Hospital Authorities Law applied and interpreted consistent with the intent of the legislature and the plain language of the statute, as has consistently been the case under leading precedents of the Georgia Supreme Court (*e.g.*, *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985)), and the Eleventh Circuit Court of Appeals (*e.g.*, *Crosby v. Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515 (11th Cir. 1996)). To that end, judicial interpretation of the scope of powers granted to local governmental hospital authorities by the Georgia legislature, and the effect such interpretation may have on all Georgia hospitals owned by hospital authorities, is of utmost importance here.

The FTC seeks to radically change the law and improperly circumvent the long-established "state-action" immunity defense with arguments that amount to a thinly-veiled grab for new powers to micro-manage the operations of hospital authority-owned hospitals in Georgia, and publicly served hospitals nationwide. As such, the positions advocated by the FTC have profound and far-reaching implications on both the structure and strategic day-to-day operations of all Georgia hospital authority-owned hospitals, whether operated directly by those authorities, or whether restructured via lease in compliance with the specific provisions of the Hospital Authorities Law and the seminal Georgia Supreme Court decision in *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985).

In that decision, the Georgia Supreme Court held that the determination of whether entering into such a transaction promoted the public health needs of the community was "a decision to be made by the [local hospital authority] alone" and in reviewing the actions of a local hospital authority, a reviewing court "was restricted to a determination of whether the hospital authority's action [ . . . ] was arbitrary and unreasonable." *Richmond Cnty. Hosp. Authority*, 255 Ga. at 187-189; *see also Cobb Cnty.-Kennestone Hosp. Authority v. Prince*, 242 Ga. 139, 150, 249 S.E.2d 581, 588 (1978) (deferring to a local hospital authority's "reasonable and rational administrative decision enacted in order for the [a]uthority to carry out the

legislative mandate that it provide adequate medical care in the public interest").

## SUMMARY OF ARGUMENT

The Court granted certiorari on two questions. First, whether a duly constituted local government hospital authority's decision to acquire another local hospital in order to meet the needs of the community, as specifically contemplated and provided for by Georgia statute, is an act of state "officers or agents" that is not subject to the federal antitrust laws as this Court has construed them since *Parker v. Brown*, 317 U.S. 341, 350 (1943). Second, whether, based on allegations below by the FTC regarding this specific transaction, the transaction may be enjoined due to the alleged failure of the Respondent Hospital Authority to sufficiently participate in the consummation of the transaction or sufficiently oversee the operations of the newly-acquired facility. *Amici* address only the first question and urge the Court to answer that question consistent with its holdings in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L.Ed.2d 24 (1985), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and affirm the judgment of the court of appeals below.

The FTC asks the Court to reverse the court of appeals' decision below, and overrule a long-standing line of cases from the Eleventh Circuit Court of Appeals, all of which were based upon predominantly

state law arguments under different state authorities. The FTC argues for reversal based on its claim that Georgia's Hospital Authorities Law bestows only general corporate powers upon local hospital authorities in Georgia. That premise is incorrect. The specific powers the Georgia General Assembly bestowed upon local hospital authorities are markedly different than the powers of an ordinary private or nonprofit corporation in Georgia. What makes the FTC's argument on this point particularly remarkable here is that it was not made in the Complaint. Notably, the State of Georgia, which was a plaintiff along with the FTC at the district court level, did not join the FTC in its appeal to the Eleventh Circuit and is not a party before the Court. When the State of Georgia was involved in the case, there was no claim, by either the FTC or the State of Georgia, that the Hospital Authorities Law empowered local hospital authorities with merely general corporate powers. Indeed, the focus of the litigation below was on the active supervision argument that is the second issue before the Court.

The FTC further argues that Georgia possesses no "alternative regulatory structure" displacing competition with respect to public hospital services and, thus, the Court should not infer that the Georgia General Assembly intended to displace federal antitrust law. Yet, the FTC fails to acknowledge here what it and the United States Department of Justice's Antitrust Division have publicly proclaimed elsewhere, that Georgia's Certificate of Need ("CON")

law has the natural effect of restraining competition. Georgia's CON law also acts in concert with Georgia's staff privileges statute, peer review statute and the aforementioned Hospital Authorities Law to establish the comprehensive alternative regulatory structure in Georgia the FTC somehow claims is lacking. This comprehensive state health care regulatory structure serves important public needs and reflects a careful policy determination of the Georgia General Assembly to restrain competition in the "public interest."



## ARGUMENT

### I. GEORGIA LAW CONTEMPLATES A LOCAL HOSPITAL AUTHORITY'S ACQUISITION OF A NEARBY HOSPITAL, CLEARLY ESTABLISHING THAT SUCH ALLEGEDLY ANTICOMPETITIVE CONDUCT IS PROTECTED STATE-ACTION.

#### A. The Powers And Obligations That Georgia Law Confers Upon Local Hospital Authorities Differ Significantly From The General Corporate Powers Conferred Upon Private Corporations.

The FTC's claim for reversal of the judgment below relies upon a central, yet flawed premise: that the various powers and obligations Georgia law confers upon local hospital authorities are the same as the general corporate powers conferred upon any private corporation in Georgia. *See, e.g.*, Pet. Br. 8, 17, 28, 30, 32. From this flawed premise, the FTC argues

that because this supposed grant of general corporate powers to local hospital authorities is merely a "neutral" grant of authority, there has been no clear articulation by the Georgia legislature of its intent to displace federal competition law. *Id.* at 29.

However, any cursory reading of the Hospital Authorities Law reveals that the powers bestowed, and the limitations imposed, upon local hospital authorities by the Georgia General Assembly are vastly different than the "general corporate powers" that the FTC repeatedly uses as its mantra. Pet. Br. 8, 17, 28, 30, 32. In some instances, the Hospital Authorities Law grants powers to local hospital authorities, such as eminent domain, that no private or nonprofit corporation enjoys. O.C.G.A. § 31-7-75(12). In other instances, the Hospital Authorities Law imposes unique restrictions upon local hospital authorities that are not similarly imposed upon ordinary private or nonprofit corporations, such as a restricted area of geographic operation, a limitation on the types of projects that may be operated, a requirement that local hospital authority board members reside in the local area, and public hearing and disclosure requirements. O.C.G.A. §§ 31-7-71(5), -72, -74, -90, -90.1, -91. Thus, far from "closely resembl[ing] those an ordinary corporation would possess[,]" Pet. Br. 17, the powers granted to local hospital authorities by the Georgia General Assembly through the Hospital Authorities Law are different, and limited to those necessary to fulfill "public and essential governmental functions,"

which is precisely what the Georgia General Assembly intended. *See* O.C.G.A. § 31-7-75.

### 1. The Georgia Supreme Court Has Refuted The FTC's "General Corporate Powers" Premise In Its Interpretation Of The Hospital Authorities Law.

The FTC does not make its flawed "general corporate powers" argument against a blank slate. Importantly, and contrary to the FTC's central premise regarding the Hospital Authorities Law, the Georgia Supreme Court has long held that the powers of local hospital authorities are limited. To that end, unlike ordinary corporations, local hospital authorities may not engage in activities beyond specifically enumerated statutory powers through the purchase, lease or operation of anything that is not a statutorily defined "project" under the Hospital Authorities Law.[5] *Tift Cnty. Hosp. Authority v. MRS of Tifton, Ga., Inc.*, 255 Ga. 164, 165, 335 S.E.2d 546, 547 (1985).

In *Tift County Hospital Authority*, a durable medical equipment (DME) provider claimed that the Tift County Hospital Authority's operation of a competing

[5] The Hospital Authorities Law empowers local hospital authorities to purchase, lease or operate "projects." O.C.G.A. § 31-7-71(5). "Project" is a statutorily defined term and includes "hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities[.]" *Id.*

DME business was outside of its statutorily enumerated powers because the sale of DME was not specifically included by the Georgia General Assembly in the Hospital Authorities Law's list of approved projects. *Id.* at 164. The Georgia Supreme Court agreed and held that the Tift County Hospital Authority's acts were not authorized by the Hospital Authorities Law, and thus were *ultra vires*. *Id.* at 165. In doing so, the Georgia Supreme Court stated that a comprehensive review of the Hospital Authorities Law "discloses no legislative authorization – express or implied – for an enterprise which offers durable medical equipment for sale or rent to the general public." *Id.*; *see also Richmond Cnty. Hosp. Authority*, 255 Ga. at 190-91 (noting that a local hospital authority is subject to suit for injunction of acts taken in violation of the Hospital Authorities Law).

Moreover, the Georgia Supreme Court's opinion refutes the flawed "general corporate powers" premise upon which the FTC bases its argument. In considering what a local hospital authority, as a public entity, could and could not do under the Hospital Authorities Law, the Georgia Supreme Court held that a local hospital authority:

> may perform certain public functions as a subordinate branch of government; and while it is invested with full power to do everything necessarily incident to proper discharge thereof, no right to do more can ever be implied. Accordingly, in the absence of express legislative sanction, such a corporation has

> no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

*Tift Cnty. Hosp. Authority*, 255 Ga. at 165, 335 S.E.2d at 547. Thus, in analyzing the statutory grant of powers that the FTC somehow claims "closely resemble those possessed by typical private corporations," Pet. Br. 17, the Georgia Supreme Court has concluded that a local hospital authority does not have the same powers of a private corporation or any other market participant, or even powers that closely resemble those of a private corporation. Thus, the Georgia Supreme Court's holding in *Tift Cnty. Hosp. Authority* is contrary to the FTC's strained interpretation of O.C.G.A. § 31-7-75(21), which empowers local hospital authorities to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions[.]" *Id.*, § 31-7-75(21). The FTC claims that this provision reflects the Georgia General Assembly's intent for local hospital authorities to compete in the marketplace like any other private corporation. Pet. Br. 34. The FTC's interpretation, however, is exactly the type of "ultra-liberal" construction of the Hospital Authorities Law that the Georgia Supreme Court expressly disavowed in *Tift Cnty. Hosp. Authority*, 255 Ga. at 165, 335 S.E.2d at 547.

The Georgia Supreme Court's construction of the Hospital Authorities Law is significant and should give the Court considerable pause in relying upon the FTC's flawed premise. *See Hallie*, 471 U.S. at 44

n.8 (crediting Wisconsin State Supreme Court's interpretation of state statutory scheme at issue as "instructive on the question" of the Wisconsin state legislature's intent to displace competition); Philip Areeda and Herbert Hovenkamp, *An Analysis of Antitrust Principles and Their Application* Para. 225c (2006) ("in *Hallie* the Supreme Court looked to state judicial decisions interpreting the state authorizing statute to see whether, in that court's view, the state legislature had contemplated the challenged conduct").

### 2. Hospital Authorities Have Statutory Obligations And Operating Restrictions That Typical Private Corporations Do Not Have.

Further undermining the FTC's "general corporate powers" premise, the Hospital Authorities Law places numerous limitations, restrictions and obligations upon local hospital authorities that are not similarly imposed upon ordinary private or nonprofit corporations. In that sense, it strains credulity to argue, as the FTC does, that the Hospital Authorities Law empowers local hospital authorities with broad powers that "closely resemble those possessed by typical private corporations." Pet. Br. 17.

Among other things, the Hospital Authorities Law:

- limits each local hospital authority's geographic area of operation of projects, such as hospitals, to no more than 12 miles from the

city or county that created the authority, *O.C.G.A.* § 31-7-72(f);

- requires that hospital authority members be appointed by the local governing authority of the city or county that created the authority, and that the hospital authority members reside in the city or county that created the authority, *id.* §§ 31-7-72(b), -74;

- requires that hospital authority members serve without compensation and take an oath to faithfully discharge duties as authority members, and prohibits authority members and their families from transacting business with the local hospital authority, *id.* §§ 31-7-74, -74.1, -74.2;

- requires annual public disclosure by individual members of the authority and their family members of any financial relationship with any entity that sells products or services to the local hospital authority, *id.* § 31-7-91(b);

- subjects individual members to removal from the authority upon petition by 5% of the local electorate and a judicial hearing considering whether, among other things, the authority failed to fulfill its obligations under the Hospital Authorities Law, *id.* § 31-7-76;

- requires local hospital authorities to publicly file an annual report and budget, to publicly file an annual community benefit report that discloses the number of indigent persons treated and the cost of such treatment,

and to publicly file a certified outside audit "containing a balance sheet, profit and loss statement, and statement of receipts and disbursements," *id.* §§ 31-7-90, -90.1, -91;

- limits the ability of the local hospital authority to sell or lease the assets of the authority, including by requiring that any lease be solely for the purposes of promoting "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 limiting the lessee to no "more than a reasonable rate of return on its investment," *id.* § 31-7-75(7);

- requires that public notice and a public hearing be held prior to the sale or lease of any authority-owned hospital, that the authority publicly disclose the reasonably foreseeable adverse and beneficial effects of any proposed sale or lease of an authority-owned hospital and value of the assets to be transferred, requires the inclusion of certain lease terms in any lease of an authority-owned hospital, and requires that the proceeds from any sale or lease of an authority-owned hospital be held in an irrevocable trust to be used "exclusively for funding the provision of hospital care for the indigent residents of the political subdivision which owned the hospital" that was sold or leased, *id.* §§ 31-7-74.3, -75.1;

- subjects local hospital authorities to sunshine laws applicable to governmental

entities, such as the Georgia Open Records and Open Meetings Acts, *id.* § 31-7-75(27); and

- forbids local hospital authorities from operating any project, including hospitals, for profit and requires that the rates and charges of such hospitals be fixed to produce revenues only sufficient to service debt, provide for the maintenance and operation of the hospital, and to "provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services," *id.* § 31-7-77.

Unlike any ordinary corporation, local hospital authorities face all of these significant and important operational limitations, restrictions and obligations. And unlike private corporations, local hospital authorities are statutorily charged by the Georgia General Assembly with, among other things, "promot[ing] the public health needs of the community." *Id.* § 31-7-71(5).

### 3. Hospital Authorities Have Certain Statutory Powers That Are Greater Than Ordinary Corporations.

The Hospital Authorities Law also empowers local hospital authorities with grants of power that, unlike those of ordinary corporations, are in keeping with the public health mission that local hospital authorities are required to serve. As noted *supra*, the Georgia General Assembly specifically charges local hospital authorities with "promot[ing] the public health needs of the community." *Id.* In that regard,

local hospital authorities are empowered with certain statutorily delineated functions and powers that the Georgia General Assembly has deemed are "public and essential governmental functions." *Id.* § 31-7-75.

For instance, unlike an ordinary private or nonprofit corporation, a local hospital authority may "acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority." *Id.* § 31-7-75(12). Local hospital authorities also have the ability to contract with the political subdivisions affiliated with the authority in order to cause the political subdivision to levy a dedicated ad valorem local tax in order to pay for "providing medical care or hospitalization for the indigent sick and others entitled to the use of the services and facilities of the authority." *Id.* § 31-7-84. A hospital authority's power of eminent domain, and its power to obligate the political subdivision that it is affiliated with to levy a tax, are not the powers of a typical corporation.

#### 4. The FTC's Reliance Upon Certain Isolated Statutory Provisions In The Hospital Authorities Law And Georgia Nonprofit Corporation Code Is Misplaced.

In support of the flawed "general corporate powers" premise, the FTC argues that local hospital authorities are expected to compete like any other private corporation because they enjoy an exemption from Georgia's Open Records Act, O.C.G.A. Ch. 50-18,

and Open Meetings Act, O.C.G.A. Ch. 50-14 (collectively "Sunshine Laws"), for "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." Pet. Br. 34. In support, the FTC cites to selected statutory language in the Hospital Authorities Law from O.C.G.A. § 31-7-75.2. *Id.* The omitted statutory language, however, clearly shows that this exemption is only temporary. *See* O.C.G.A. § 31-7-75.2 (Sunshine Laws' "exemption shall terminate at such time as such plan, proposal, or strategy has either been approved or rejected by the governing board of such corporation or hospital authority").

Accordingly, the aforementioned Sunshine Laws' exemption is limited. Once a hospital authority's board acts either to approve or reject the commercially valuable plan, proposal or strategy, such meeting and information are fully subject to the Sunshine Laws. Thus, unlike ordinary corporations, which are not subject at all to the Sunshine Laws, hospital authorities cannot conceal from the public the actions of their board to approve or reject commercially valuable information of a competitive nature.

The FTC also erroneously claims that nonprofit corporations chartered by hospital authorities are "in all relevant respects indistinguishable from other nonprofit corporations[,]" Pet. Br. 46, n.8, and as support cites to O.C.G.A. § 14-3-305(b), contained within the Georgia Nonprofit Corporation Code. The plain

language of that statutory provision, however, actually refutes the FTC's argument.

Under the specific statutory provision cited by the FTC, and unlike other nonprofit corporations, nonprofits such as Respondent Phoebe Putney Memorial Hospital, Inc., which are "formed, created or operated by or on behalf of a hospital authority," are specifically required to comply with the Hospital Authorities Law's conflict of interest provisions for directors, the requirements for reporting of community benefits, the disclosure of related party transactions, and to adhere to Georgia's Sunshine Laws in the same manner as local hospital authorities. *Id.* §§ 14-3-305(c), (d), (e). Thus, not only are hospital authorities treated vastly different under Georgia law than ordinary corporations; so are nonprofit corporations that are operated on behalf of hospital authorities, which includes Phoebe Putney Memorial Hospital, Inc., the lessee of Phoebe Memorial Hospital and Phoebe North (formerly Palmyra Park Hospital).

### 5. The FTC's "General Corporate Powers" Premise Differs With The Position Taken By The State Of Georgia Below Through Its Attorney General.

The FTC points out in its brief that the State of Georgia was a plaintiff along with the FTC at the district court level. Pet. Br. 13. It conveniently omits the fact, however, that after the district court

dismissed the case based upon the state-action immunity defense, the State of Georgia did not join in the FTC's appeal.

Notably, when the State of Georgia was involved in this matter, neither the State of Georgia nor the FTC argued that state-action immunity did not apply because the Hospital Authorities Law granted local hospital authorities only general corporate powers. Rather, the FTC and the State of Georgia asserted in their Complaint that state-action immunity did not shield the transaction at issue from antitrust scrutiny because the conduct of the Phoebe Putney entities was not actively supervised by the Hospital Authority of Albany-Dougherty County. J.A. 32, Para. 6 ("[t]here is no bona fide state-action whatsoever associated with the Transaction [ . . . ] [t]he Authority does not plan to engage in any meaningful additional oversight of the de facto monopoly, falling far short of the active state supervision required to satisfy the state-action doctrine").

In arguing to the district court why its and the FTC's Complaint should not be dismissed, the State of Georgia claimed that the "central question" before the district court was "whether state action immunity from federal antitrust law shields both a local government authority and private entities when that government authority has abdicated control of its functions to the private entities seeking to exercise monopoly power." Brief of State of Georgia In Further Support of Motion for Preliminary Injunction and In Response to Defendants' Motions to Dismiss,

Summary Judgment, And To Vacate Temporary Restraining Order, at 1, *Federal Trade Comm'n, et al. v. Phoebe Putney Health Sys., et al.*, No. 1:11-cv-0058-WLS (N.D. Ga. Jun. 1, 2011). The State of Georgia even went so far as to cite the *Crosby* decision, which the FTC now claims was wrongly decided by the Eleventh Circuit Court of Appeals, in support of its "active supervision" arguments to the district court. *Id.* at 7-10.

Further, with respect to the powers and obligations of hospital authorities, the State of Georgia took a different position than the FTC's current stance. Below, the State of Georgia acknowledged "that the Authority is a 'political subdivision' of Georgia and thus only subject to the 'clearly articulated state policy' requirement for immunity." *Id.* at 11.

In discussing the Hospital Authorities Law in its attempt to distinguish *FTC v. Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), and *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir. 1993), the State of Georgia never asserted, as the FTC does before the Court, that those cases were wrongly decided by the Eleventh Circuit Court of Appeals. Rather, the State of Georgia claimed that *Lee County* and *Askew* were distinguishable because of, among other things, the alleged absence of active supervision in this case. *Id.* at 20 ("[n]either of the courts in *Lee County* or *Askew* were presented with facts in this case where all substantive decision making of the authority was delegated to private actors").

And of course, during its lengthy discussion of the Hospital Authorities Law, the State of Georgia never argued that because the Hospital Authorities Law allegedly bestowed only general corporate powers upon local hospital authorities, the state-action immunity doctrine did not apply. Rather, the State of Georgia conceded away what the FTC now principally premises its case upon in the first issue before the Court, plainly stating that "the State does not dispute that the Georgia Hospital Authorities Law broadly authorizes the Authority to acquire and lease facilities." *Id.*

Accordingly, it is no surprise that the State of Georgia did not join a number of other States as the FTC's *Amici*. *Amici* States repeat the FTC's false premise, claiming, among other things, that the reversal of the decision below is required because the case involves the "naked grant of corporate powers." Illinois Br. 14.[6] The fact that the State of Georgia did not join with the FTC or *Amici* States in making this erroneous claim about the Hospital Authorities Law speaks volumes.

[6] The *Amici* States make this bold assertion without a single citation to the Georgia Hospital Authorities Law or to any Georgia case law interpreting the Hospital Authorities Law.

### B. Delivery Of Health Care In Georgia Occurs Pursuant To A Comprehensive State Regulatory Scheme That Provides An Alternative Regulatory Framework Displacing Pure Competition.

The FTC also asserts that to invoke the "state-action" doctrine, a state actor must point to some "alternative regulatory structure" that displaces competition. Pet. Br. 17, 19, 44. Of course, placing such a burden upon a state actor seems at odds with the federalism-based roots of the state-action immunity doctrine. *See Parker*, 317 U.S. at 351 ("in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress").

In any event, an "alternative regulatory structure" applicable to the provision of health services does exist in Georgia. In addition to the comprehensive regulatory framework applicable to local hospital authorities, described *supra*, established by the Hospital Authorities Law, Georgia also has a comprehensive Certificate of Need ("CON") Act (O.C.G.A. § 31-6-1 *et seq*.), a hospital staff privileges statute (O.C.G.A. § 31-7-7), and a physician peer review statute (O.C.G.A. § 31-7-15), which collectively result in "one of the most extensively regulated healthcare industries in the country." 2008 Legislative Review: Health, 25 Ga. St. U. L. Rev. 219, 223 (2008).

### 1. Georgia's CON Act Is An Alternative Regulatory Mechanism That Restrains Competition, As Both The FTC And The United States Department Of Justice Have Previously Acknowledged.

The CON Act's restraints upon competition in health care in Georgia cannot be overstated. Simply put, the CON Act requires anyone who wishes to establish or expand certain new health facilities, including hospitals and specialized health services to obtain a "certificate of need" from the Georgia Department of Community Health. *See* O.C.G.A. § 31-6-40; *see also* O.C.G.A. § 31-6-1 ("to ensure that health care services and facilities are developed in an orderly and economical manner, [ . . . it is] essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided . . . in a manner that avoids unnecessary duplication of services"); *Phoebe Putney Mem'l Hosp., Inc. v. Roach*, 267 Ga. 619, 480 S.E.2d 595, 601 (1997) (certificate of need law necessary to "the orderly implementation of the [State's] health plan," specifically that health-care facilities and services are "made available to all citizens and that only those health-care services found to be in the public interest shall be provided in this state").

Both the FTC and the United States Department of Justice have publicly stated that CON laws in general, and Georgia's in particular, are anticompetitive. According to a senior official with the U.S.

Department of Justice's Antitrust Division, who testified in 2007 before the Georgia General Assembly in opposition to continuation of Georgia's CON Program, CON laws:

- "create barriers to entry and expansion and thus are anathema to free competition";
- "stifle competition, protect incumbent market power, frustrate consumer choice and keep prices and profits high";
- "harm the consumers who would have chosen alternative, lower priced, higher quality, or more convenient sources of care"; and
- "lead to less competition and higher prices."

*Competition in Healthcare and Certificates of Need: Before a Joint Session of The Health and Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia* (written testimony of Mark J. Botti, Chief, Litigation I Section, U.S. Department of Justice, Antitrust Division) (www.justice.gov/atr/public/comments/223754.htm) (February 23, 2007). In his written testimony, Mr. Botti specifically stated that the Department of Justice had conferred "closely with the attorneys and economists at the Federal Trade Commission." *Id.*

Following Mr. Botti's testimony before the Georgia General Assembly, the FTC and DOJ issued a joint

statement on competition in health care and certificates of need, in which these federal antitrust enforcement agencies stated that "Certificate-of-Need laws impede the efficient performance of health care markets. By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers." *See* Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission, *Competition in Health Care and Certificates of Need* (www.justice.gov/atr/public/comments/237351.pdf) (September 15, 2008).

### 2. Georgia's Hospital Credentialing And Peer Review Statutes Are Alternative Regulatory Mechanisms.

In addition to the Hospital Authorities Law and the CON Act, health care and hospital services in Georgia are also regulated at the state level by comprehensive hospital staff privileges and peer review statutes. *See* O.C.G.A. §§ 31-7-7, -15. Peer review and credentialing are unique and sensitive procedures that are vital to the functioning of the health care system, as reflected by Georgia law mandating such processes for the purpose of maintaining quality of care.

Section 31-7-7 of the Georgia Code provides that a publicly owned hospital should consider applications from physicians for staff privileges "on the basis of the applicant's demonstrated training, experience,

competence, and availability and reasonable objectives, including, but not limited to, the appropriate utilization of hospital facilities. . . ." O.C.G.A. § 31-7-7(a). In addition, the law provides for a hospital's refusal to grant a physician staff privileges, or the revocation of such privileges. O.C.G.A. § 31-7-7(b).

As specifically recognized by the Eleventh Circuit Court of Appeals, Georgia's hospital staff privilege statute allows hospitals to make "make staff privilege decisions based on any reasonable objective, 'including, but not limited to, the appropriate utilization of hospital facilities.'" *See Crosby*, 93 F.3d at 1534. Thus, the *Crosby* court concluded that Georgia's staff privileges statute "explicitly provides for . . . anticompetitive conduct" in holding that "O.C.G.A. § 31-7-7 evidences a state policy in favor of the anticompetitive conduct challenged in this case and . . . that all defendants are shielded from suit for injunctive relief by state-action immunity." *Id.*

*Crosby* also noted that O.C.G.A. § 31-7-15, which provides for physician peer review, further "indicates the legislature's recognition that staff credentialing decisions will be aided by the use of peer review committees." *Id*. at 1534 n.30. Georgia's peer review statute provides that a hospital must "provide for the review of professional practices in the hospital . . . for the purposes of reducing morbidity and mortality and for the improvement of the care of patients in the hospital." O.C.G.A. § 31-7-15(a). That review must include "[t]he evaluation of medical and health care services or the qualifications and professional

competence of persons performing or seeking to perform such services." *Id.* § 31-7-15(a)(3).

*Crosby*'s holding that a state's authorization and protection of hospitals' peer review and credentialing decisions constitutes a "clearly articulated" state policy authorizing anticompetitive conduct is not an aberrant decision unique to the Eleventh Circuit. Several circuits have concluded that, where state law authorizes a publicly owned hospital to determine staff privileges and conduct peer reviews, the state policy to displace competition is "clearly articulated." *See Coastal Neuro-Psychiatric Assoc. v. Onslow Mem'l Hosp., Inc.*, 795 F.2d 340, 342 (4th Cir. 1986) (holding that hospital has state-action immunity from antitrust liability, in part, because North Carolina statutes authorize municipality-owned hospitals to determine which physicians may practice in them, which "may reduce the supply or variety of medical services to the surrounding community"; "[t]he North Carolina legislature must have foreseen this anticompetitive consequence and decided that the regulatory benefits conferred by the statute simply outweighed it"); *Patrick v. Burget*, 800 F.2d 1498, 1505-1506 (9th Cir. 1986) (holding Oregon statutes requiring peer review and authorizing restrictions or denial of privileges reflect clearly articulated policy to authorize anticompetitive conduct; "Oregon, by compelling physicians to review their competitors, affirmatively has expressed a policy to replace pure competition with some regulation"), *reversed on other grounds*, 487 U.S. 1243, 108 S. Ct. 1658 (1988); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 388 (7th Cir. 1984) (holding that Indiana

statutes which require hospitals to establish a peer review committee to evaluate patient care and qualifications of providers constitutes a "clearly articulated and affirmatively expressed" state policy to exempt such activities from federal antitrust laws), *abrogated on other grounds by Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842 (1991); *see also LaFaro v. New York Cardiothoracic Grp., PLLC*, 570 F.3d 471, 477-78 (2d Cir. 2009) (holding that statutory scheme which enabled publicly owned hospital to, *inter alia*, determine when to grant privileges and enter into contracts, reflected a clearly articulated state policy to authorize anticompetitive conduct, such as the hospital's entering into anticompetitive, exclusive contracts with private physicians' groups).

Based upon these multiple statutory schemes, Georgia law plainly provides an extensive "alternative regulatory framework" displacing competition sufficient for local hospital authorities to avail themselves of the state-action immunity doctrine.

## II. GEORGIA LAW VALIDATES REGULATORY SCHEMES THAT RESTRICT COMPETITION WHERE THE GEORGIA LEGISLATURE HAS DETERMINED THAT SUCH RESTRICTION IS IN THE "PUBLIC INTEREST."

### A. Restraints Of Trade In The "Public Interest" Have Been Upheld Frequently By The Georgia Supreme Court.

The FTC argues that the public policy of Georgia strongly favors free market competition, including in

the market for the delivery of public hospital services. Pet. Br. 28-29. However, in keeping with the validation of the comprehensive alternative regulatory structure governing the delivery of health care in Georgia, described *supra*, which in and of itself significantly restricts competition, Georgia courts have repeatedly and expressly approved statutory regulatory schemes that have an effect of restricting competition. In doing so, Georgia courts have deferred to the Georgia General Assembly's determination that such regulatory schemes were in the "public interest."

A correct statement of the public policy of Georgia, therefore, is that Georgia courts have long recognized and sanctioned statutory regulatory schemes having the effect of restricting competition when such schemes have been legislatively determined to be in the public interest, with the courts refusing to second-guess that legislative judgment. *See City of Calhoun v. N. Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

In *City of Calhoun*, the Georgia Supreme Court upheld the constitutionality of the Georgia Territorial Electrical Service Act and discussed at length the aforementioned policy:

> It is conceded that not all restraints of trade are unconstitutional and that the test in Georgia is whether the restraint involved is "injurious to the public interest." *State v. Central of Ga. Ry. Co*., 109 Ga. 716, 717 (35 SE 37, 48 LRA 351).

> The long history of regulated monopoly in this state shows that the General Assembly is free to restrict competition among public utilities where, in the judgment of the legislature or its duly authorized delegate, such competition may be injurious to existing public service. See, e.g., The Motor Contract Carrier Act (Ga. L. 1931, Ex. Sess., p. 99 et seq.; Code § 68-501 et seq.); The Motor Common Carrier Act (Ga. L. 1931, p. 199 et seq.; Code § 68-601 et seq.); Ga. L. 1950, p. 311 (Code Ann. § 93-324), requiring a certificate of public convenience and necessity to operate a telephone system in this state, or an intrastate pipeline system (Ga. L. 1956, pp. 104, 107; Code Ann. § 93-707); and the Georgia Radio Utility Act (Ga. L. 1972, p. 439 et seq.; Code Ann. § 93-901 et seq.).

233 Ga. at 767-68, 213 S.E.2d at 603.

*City of Calhoun* has repeatedly been cited by the appellate courts of Georgia in subsequent decisions considering regulatory schemes that have the effect of restraining competition when in the public interest. *See, e.g.*, *Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 706, 544 S.E.2d 158, 161 (2001) (relying upon *City of Calhoun* in upholding application of statute that limits provision of residential electrical services to certain service providers in limited geographic area because "[t]o rule otherwise would frustrate the legislative intent of the territorial act – 'restrain[ing] competition . . . for the benefit of the public in minimization of duplication of facilities

and prevention of other adverse economic and environmental effects'"); *Sumter Elec. Membership Corp. v. Ga. Power Co*., 286 Ga. 605, 606, 690 S.E.2d 607, 609 (2010) (citing *City of Calhoun* in holding that "legislation was intended to minimize the duplication of electrical facilities in a geographic area for the public benefit"). In *Sawnee*, the Georgia Supreme Court also cited and quoted its earlier decision in *North Fulton Medical Center v. Stephenson*, 269 Ga. 540, 501 S.E.2d 798 (1998), a decision invalidating the relocation of an ambulatory surgery center due to noncompliance with the CON Act, which as discussed *supra*, p. 20-22, restricts the duplication of health care facilities and services. *Sawnee Elec. Membership Corp.*, 273 Ga. at 706, 544 S.E.2d at 162.

### B. Georgia's Constitutional Monopoly Clause And The Georgia Supreme Court's Decisions In *Thomas* And *Cox* Do Not Express A Strong Public Policy In Favor Of Competition.

In support of its argument that Georgia's public policy favors free competition in the market for the delivery of public hospital services, the FTC cites to three authorities that supposedly evidence such an expression of public policy: the monopoly clause of the Georgia Constitution; *Thomas v. Hospital Authority*, 264 Ga. 40, 440 S.E.2d 195 (1994); and *Cox v. Athens Regional Medical Center*, 279 Ga.App. 586, 631 S.E.2d 792 (2006). Pet. Br. 28-29. Each are inapposite.

As the *Amici* States concede, Georgia is one of only two states that do not have their own antitrust legislation – so-called "mini-Sherman acts" – which in and of itself undermines any claim that Georgia's public policy strongly favors free market competition. Illinois Br. 8-9. Georgia's Constitution does have a monopoly clause regarding "contracts and agreements" authorized by the General Assembly.[7] However, that clause has a specific and limited historical context that hardly expresses the public policy of Georgia, much less the public policy of Georgia with respect to the market for public hospital services.

The Georgia Supreme Court long ago recognized that the monopoly clause was added to the Georgia Constitution in 1877, to curb the Georgia General Assembly's power to pass laws authorizing contracts for the "purchase, sale, lease or consolidation of connecting railroads." *State v. Cent. Ry. Co*., 109 Ga. 716, 727-29, 35 S.E. 37 (1900). While the monopoly clause is not limited to railroads, the Georgia Supreme Court's detailed discussion of its history in *State v. Central Railway Co*. makes clear that it is limited to the approval by the General Assembly of particular contracts or agreements. *Id*.

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[7] The clause states that "[t]he 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 defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void." Ga. Const. Art. III, Sec. VI, Para. V(c)(1).

Thus, while the Georgia General Assembly no longer authorizes individual contracts or agreements as it once did, the monopoly clause still comes into play today, but only when the legislature enacts a statute that specifically authorizes enforcement of private contracts that restrain trade in an unreasonable manner. *See Jackson & Coker v. Hart*, 261 Ga. 371, 372, 405 S.E.2d 253, 254 (1991). The reach of the Georgia Constitution's monopoly clause, therefore, is limited and in no way expresses a public policy in favor of free market competition in the market for the delivery of public hospital services. It means what it says – it is a limitation on the legislature's authority to approve specific contracts or agreements. Notably, the State of Georgia, through its Attorney General, did not raise the monopoly clause when it was a party to this case in the district court.

Immediately following its citation to the Georgia Constitution's monopoly clause, the FTC cites to specific language in *Thomas*, implicitly suggesting that the language in *Thomas* concerns the Georgia Constitution's monopoly clause. Pet. Br. 28-29. Not so. The analysis in *Thomas* relates to a completely different clause of the Georgia Constitution, the sovereign immunity clause (Ga. Const. Art. I, Sec. II, Para. IX(e)), and not the monopoly clause.

Thus, *Thomas*' reasoning is wholly inapplicable here because it was a sovereign immunity case involving a slip-and-fall accident on hospital premises, and the Georgia Supreme Court in *Thomas* analyzed only the sovereign immunity clause of the Georgia

Constitution. 264 Ga. at 40. The sovereign immunity clause of the Georgia Constitution provides that "sovereign immunity extends to the state and all of its departments and agencies." Ga. Const. Art. I, Sec. II, Para. IX(e). The *Thomas* Court concluded that the phrase "state and all of its departments and agencies" does not include hospital authorities, because although hospital authorities are an "instrumentality of government," they "are neither the state nor a department or agency of the state." *Id.* at 41-42.

The language in *Thomas* cited by the FTC, therefore, sheds no light on the scope of, or policy preferences behind, the monopoly clause, despite the FTC's implicit suggestion to the contrary. Indeed, in considering a private antitrust litigant's reliance upon *Thomas* for this exact proposition, the Eleventh Circuit Court of Appeals in *Crosby* soundly rejected such an argument. *See Crosby*, 93 F.3d at 1524 (rejecting the contention that *Thomas*' holding is applicable to the analysis of the state-action immunity doctrine: "*Thomas* indicates that Georgia does not consider its hospital authorities to be 'political subdivisions' for purposes of sovereign immunity under the Georgia Constitution . . . However, the definition of 'political subdivisions' for purposes of state sovereign immunity does not control its definition for purposes of antitrust state-action immunity").

The fact that *Thomas*' reasoning is limited to the sovereign immunity context is further demonstrated by the fact that in other contexts, Georgia courts have recognized that hospital authorities are governmental

entities unlike private corporations, and are immune, under common law, against punitive damages in tort cases. *See Crisp Reg'l Nursing & Rehab. Ctr. v. Johnson*, 258 Ga. App. 540, 545, 574 S.E.2d 650 (2002) ("hospital authorities, as government entities, cannot be held liable for punitive damages"); *Martin v. Hosp. Authority of Clarke Cnty.*, 264 Ga. 626, 449 S.E.2d 827 (1994) (affirming that hospital authority, as governmental entity, is not liable for punitive damages, even where the hospital has insurance coverage for punitive damages); *Hosp. Authority of Clarke Cnty. v. Martin*, 210 Ga. App. 893, 894, 438 S.E.2d 103 (1994) (holding that "it is against Georgia public policy to allow an award of punitive damages against a hospital authority created as a governmental entity under the Hospital Authorities [Law]").

Finally, the validity of *Thomas*' analysis, even in the sovereign immunity context, has been questioned by the Georgia Supreme Court. *See Kyle v. Georgia Lottery Corp.*, 290 Ga. 87, 718 S.E.2d 801 (2011); *Miller v. Ga. Ports Authority*, 266 Ga. 586, 470 S.E.2d 426 (1996). Both *Miller* and *Kyle* concluded that because the Georgia Tort Claims Act includes both state instrumentalities and agencies in its definition of "state" (although it explicitly excludes local governmental entities, including hospital authorities), the earlier analysis used in *Thomas* is no longer viable. *See Miller*, 266 Ga. at 588 ("Our earlier cases distinguishing between instrumentalities of the state and state agencies are not dispositive since both instrumentalities and agencies are included in the

act's definition of the state."). The *Kyle* Court stated, "*Thomas* unequivocally cites to and espouses a narrow definition in determining what constitutes the state or a political division thereof, distinguishing the state and its political subdivisions from instrumentalities created by the state to carry out various functions. . . . *Miller*, quite plainly, stated that the analysis in *Thomas* is no longer viable." 290 Ga. at 92.

Nor does *Cox* support the FTC's claim of a public policy preference in Georgia for free market competition in the market for the delivery of public hospital services. *Cox* involved a suit by uninsured patients who brought multiple claims based on their allegation that a nonprofit hospital unfairly charged uninsured patients more than patients covered by insurance or Medicare or Medicaid. 279 Ga. App. at 586-87. The Georgia Court of Appeals rejected the patients' claims, relying in part on O.C.G.A. § 31-7-11, which requires hospitals to disclose certain identified charges, if requested, "so as to enable consumers to compare hospital charges and make cost-effective decisions in the purchase of hospital services." *Id.* § 31-7-11(a). The *Cox* court held that "[i]t is outside the role of this Court to question the merits of this policy, and appellants' remedy for any perceived failure in this scheme *is with the legislature not the courts*." 279 Ga.App. at 591 (emphasis added).

Viewed in the proper context then, *Cox* stands for the principle of proper judicial restraint, not for a broad expression of Georgia's public policy. Moreover,

to suggest that O.C.G.A. § 31-7-11 is anything more than simply a requirement that a hospital provide a written summary of certain (ten) specific charges is an inappropriate reading of the plain language of that statute. *See Cox*, 279 Ga. App. at 588-89, 591 (affirming trial court's dismissal of plaintiffs' claims where, *inter alia*, plaintiffs did not allege that hospital violated O.C.G.A. § 31-7-11 or "that the required written summary of charges would not have been available to them upon request").

Based upon the above principles, it is plain that to the extent that provisions of the Hospital Authorities Law restrain competition, that restriction lies within the traditional scope of the Georgia General Assembly's authority under its police powers. The Hospital Authorities Law regulates an area that has long been recognized to be affected with a public interest. *See Petty v. Hosp. Authority of Douglas Cnty.*, 233 Ga. 109, 111, 210 S.E.2d 317 (1974) (expenditure by hospital authority made in furtherance of a "valid public purpose in promoting the public health needs of Douglas County"). As such, the Hospital Authorities Law, which has consistently been upheld by the Georgia Supreme Court against a broad array of constitutional challenges, *see DeJarnette v. Hosp. Authority of Albany*, 195 Ga. 189, 23 S.E.2d 716 (1942); *Daughtry v. State*, 226 Ga. 758, 177 S.E.2d 716 (1970); *Bradfield v. Hosp. Authority of Muscogee Cnty.*, 226 Ga. 575, 176 (1970); *Richmond Cnty. Hosp. Authority*, 255 Ga. 183, 336 S.E.2d 562 (1985), does not run afoul of any supposed public

policy preference in the State of Georgia in favor of free competition in the market for the delivery of public hospital services.

## CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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