No. 11-1160

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

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

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

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BRIEF FOR RESPONDENTS

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

1. Development Of The *Hallie* Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THIS CASE INVOLVES NO PRIVATE, UNSUPERVISED ANTICOMPETITIVE CONDUCT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Any "Active Supervision" Requirement Is Nevertheless Satisfied

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

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

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

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

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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