No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 11-1160

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

---

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

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

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

---

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

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

ing competition in the market for paid health care services.

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

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

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

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

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

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

---

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

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

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

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

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

* * * * *

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

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2012