No. 11-1160

In The Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,

Respondents.

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

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. These goals will be seriously undermined if the court of appeals' broad application of the state action defense is not reversed. The court's permissive test for determining when a state intends to displace competition not only undercuts the nation's commitment to promoting competition in health care markets, it can subvert competition in all markets in which states or local authorities are involved and is inconsistent with the federalism principles on which the state action defense rests.[1]

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to its preparation or submission.

AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

INTRODUCTION

This case involves a challenge to a hospital merger creating a virtual monopoly for inpatient general acute care services in Albany, Georgia and its surrounding areas. According to the complaint brought by the Federal Trade Commission (FTC) and the State of Georgia, the merger would "eliminate the robust competitive rivalry" between Phoebe Putney Memorial Hospital (PPMH) and Palmyra Park Hospital (Palmyra). J.A. 29. The two hospitals, located merely two miles apart, are the only hospitals in Dougherty County and together have an 86% share of the surrounding six-county geographic market. J.A. 32. The FTC and Georgia alleged that the merger would lead to significant price increases and reduce both the quality and breadth of services offered. J.A. 55-58. PPMH is nominally owned by the Hospital Authority of Albany-Dougherty (Authority) and is operated by Phoebe Putney Health Systems, Inc. (PPHS), a nonprofit corporation. J.A. 38, 40. The complaint alleged that the merger was engineered by PPHS and the private owner of Palmyra under the auspices of the Authority in order to evade antitrust review. J.A. 44.

The district court dismissed the complaint on state-action grounds under Fed. R. Civ. P. 12(b)(6), and the Eleventh Circuit affirmed. This Court granted certiorari on two questions: First, whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to

displace competition" in the market for hospital services. And, second, whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

This brief addresses only the first question.[2] In particular, it urges the Court to reject the Eleventh Circuit's permissive "foreseeability" test for determining whether a state policy to displace competition is "clearly articulated and affirmatively expressed." The Court should clarify that there is a presumption that states do *not* intend to displace competition rules when they regulate or authorize conduct by political subdivisions, particularly when those subdivisions are engaged in proprietary activity. Such a presumption should be rebuttable by a clear statement (or other evidence of legislative intent divined by conventional tools of statutory interpretation) that the sovereign does intend to supplant competition in the manner at issue, which may include a showing that anticompetitive effects *necessarily* would result from authorized conduct.

[2] AAI fully endorses the Solicitor General's arguments on the active-supervision question.

SUMMARY OF ARGUMENT

1. This Court should disclaim the Eleventh Circuit's permissive "foreseeability" test for applying *Midcal*'s "clear articulation" prong of the state action defense under which a legislative intent to displace competition may be inferred from the fact that anticompetitive effects *may* result from authorized conduct. Commentators and other courts have sharply criticized this test as it applies in the context of general grants of corporate powers to political subdivisions and in other contexts. There is no reason to believe that merely because anticompetitive effects *may* follow from authorized conduct, a state legislature intends to immunize those effects from antitrust scrutiny.

This Court has never held that a policy to displace competition could be "clearly articulated" merely because foreseeable anticompetitive effects *may* result from authorized conduct. *Hallie* and *Omni*, which found clear state policies to displace competition, both involved authorized conduct that necessarily restricted competition, while *Boulder* and *Cantor* found state polices that were neutral, and hence did not displace competition, notwithstanding that authorized conduct may have had foreseeable anticompetitive effects. A number of lower courts have recognized that mere foreseeability of anticompetitive conduct is not sufficient to satisfy the clear-articulation requirement when benign effects are equally foreseeable.

This Court's precedents suggest that a "clear statement" by the sovereign to displace competition is required, and that ambiguities in state law should be resolved against *Midcal* authorization. Such a presumption flows from the fact that "state action immunity is disfavored" in light of our "fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), and from the fact that these assumptions are shared by the States, which have their own statutory and/or constitutional restrictions on monopolies and restraints of trade, and "regulate their economies in many ways not inconsistent with the antitrust laws," *id.* at 635-36. Accordingly, a clear-statement rule is consistent with the federalism concerns that animate the state action doctrine.

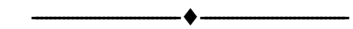
A presumption against legislative authorization is particularly appropriate when local governmental entities are engaged in proprietary activities, such as running hospitals, because "[w]hen a city acts as a market participant it generally has to play by the same rules as everyone else," *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011), and because "the economic choices made by public corporations in the context of their business affairs . . . are not inherently more likely to comport with the broader interests of national well-being than are those of private corporations," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978).

Absent other evidence of legislative intent, the fact that anticompetitive effects *may* (or may not) follow from authorized conduct is not sufficient to show a clearly articulated policy to displace competition. Rather, where the intent of the state legislature (or other sovereign entity) is otherwise unclear, only a showing that anticompetitive effects *necessarily* would result from authorized conduct is sufficient to demonstrate the legislature's intent to supplant competition and the normal antitrust rules. If state law reasonably can be interpreted so as not to create a conflict with the antitrust laws, such an interpretation should govern.

2. Georgia has no policy that the acquisition of hospitals by hospital authorities is exempt from antitrust scrutiny. There is no reason to believe that the legislature's grant of corporate powers to authorities to acquire and lease property was intended to give them carte blanche to monopolize hospital markets by acquiring rival hospitals, any more than similar powers granted to private corporations are intended to exempt them from the antitrust laws. On the contrary, a straightforward reading of the statute – which specifically declares a policy to exempt only mergers of hospital *authorities* from antitrust scrutiny – reveals an intent not to exempt hospital acquisitions from the antitrust laws. Inferring an intent to displace competition here is particularly inappropriate given that "[t]he state of Georgia has expressed, both in its constitution and its statutory law, a strong public policy disfavoring contractual restraints on competition

and trade." *Atlanta Center Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146, 148 (11th Cir. 1988).

3. Our national commitment to fostering competitive health care markets provides an additional basis for carefully scrutinizing the use of hospital authorities to immunize anticompetitive hospital mergers or other forms of anticompetitive activity from review under the antitrust laws. Federal health care policy depends crucially on maintaining competitive provider markets, particularly for the acute care services offered by hospitals. The nonprofit status of hospitals provides no basis for altering antitrust standards.



ARGUMENT

I. THIS COURT SHOULD DISCLAIM THE ELEVENTH CIRCUIT'S FORESEEABILITY TEST

The "clear articulation" prong of the state action defense requires that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quote marks omitted); *see also Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("the conduct [must be] pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation") (internal quote marks omitted). The court of appeals held that the clear-articulation

requirement is satisfied if "anticompetitive conduct is a 'foreseeable result' of the legislation." Pet. App. 9a (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985)). The court reiterated its long-standing view that "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Id.* (quoting *FTC v. Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994)). Rather, the court found that anticompetitive hospital mergers were a foreseeable result of legislation authorizing the Authority to "'acquire by purchase, lease or otherwise . . . projects,' . . . which . . . include hospitals," *id.* at 12a (quoting Ga. Code Ann. § 31-7-75(4)) (first ellipsis in original), because "acquisitions *could* consolidate ownership of competing hospitals, eliminating competition between them," *id.* (emphasis added); *see also id.* at 13a (legislature must have "believed that . . . authorizing acquisitions . . . *could* have . . . serious anticompetitive consequences") (emphasis added).

As the Solicitor General argues, a grant of ordinary corporate powers to a local government entity, as here, is insufficient to establish a "clearly articulated and affirmatively expressed state policy" to displace competition. More generally, the Eleventh Circuit's permissive foreseeability test is inconsistent with this Court's precedents and the fundamental premises of the state action defense. The Court has never made foreseeability of anticompetitive effects the touchstone

of the "clear articulation" requirement, and never used the concept of foreseeability as permissively as the Eleventh Circuit. Yet, in the absence of the Court's guidance, some lower courts in addition to the Eleventh Circuit have followed a similarly lax foreseeability test, a development that commentators and other courts have criticized. The Court should clear up the confusion by disclaiming the Eleventh Circuit's foreseeability test.

A. Commentators Have Sharply Criticized Lower Courts' Use of a Foreseeability Test That Is Satisfied When Anticompetitive Effects *May* Result from Authorized Conduct

In its 2007 report to the President and Congress, the bipartisan Antitrust Modernization Commission (AMC) observed, "Following *Town of Hallie*, some courts have applied a low standard for 'foreseeability,' reasoning that once a state authorizes certain conduct, anticompetitive forms of that conduct may occur and therefore are 'foreseeable.'" Antitrust Modernization Comm'n, *Report and Recommendations* 372 (2007) (*AMC Report*).[3] However, the AMC maintained, "[t]o

[3] The AMC was created by Congress to undertake a comprehensive review of U.S. antitrust law and determine whether it should be modernized. Antitrust Modernization Act of 2002, Pub. L. No. 107-273, §§ 11051 *et seq.*, 116 Stat. 1856-59 (2002). The AMC Report echoed the findings of a Federal Trade Commission study. *See* Fed. Trade Comm'n, Office of Policy Planning, *Report of the State Action Task Force* 2 (Sept. 2003) (*FTC State Action*

(Continued on following page)

say that anticompetitive types of conduct are 'foreseeable' in this way . . . is not the same as finding 'a deliberate and intended state policy' to replace competition with regulation." *Id.* (quoting *Ticor*, 504 U.S. at 636). Accordingly, the AMC endorsed the recommendation of the FTC State Action Task Force that courts should "refocus the inquiry on the existence of deliberate and intended state policies to displace competition that can justify setting aside national competition goals." *Id.* at 371;[4] *see also* ABA Section of Antitrust Law, Comments on FTC Report re State Action Doctrine 9, 10 (May 2005), *available at* http://www.americanbar.org/groups/antitrust_law.html (noting that "some lower courts have been lax in applying the clear articulation test," and supporting the FTC's "recommendation that the foreseeability test should be refined to require some additional showing of an intent to displace competition with respect to the activity at issue"); 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 133 (3d ed. 2006) ("*Hallie* requirement [of foreseeability] has proven to be far too lenient"); C. Douglas Floyd, *Plain*

Report) (canvassing cases and concluding that "[t]his focus on theoretical 'foreseeability' leads some courts to apply the doctrine expansively, as many forms of anticompetitive conduct are arguably foreseeable in the sense that they could possibly occur").

[4] Specifically, the AMC endorsed the Task Force's proposal that "courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue." *AMC Report* at 371.

Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies, 41 B.C. L. Rev. 1059, 1083 (2000) ("[T]he Court's general 'foreseeability' standard for satisfaction of the clear articulation requirement as it has developed in the lower courts under *Hallie* is subject to substantial criticism and should be reexamined.").

The foreseeability test is being misused not only in cases like this one to find a state policy to displace competition based on a general grant of authority, *see FTC State Action Report* at 27-29 (citing appellate cases following overbroad analysis), but also in cases where states adopt a regulatory program that displaces competition to some extent, but does not specifically authorize the type of anticompetitive conduct at issue, *see id.* at 34-35 (citing examples); *see also* Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. Rev. 627, 640 (2006) ("[T]oo many courts interpret the authorization requirement far too broadly.").[5]

Using foreseeability as a standard is problematic because "this word, much favored in the law though it

[5] Some courts use a lax clear-articulation standard to dismiss cases that are questionable on the merits. *See* Areeda & Hovenkamp, ¶ 225b4, at 153 ("many decisions inferring a broad immunity . . . are driven by the belief that no antitrust violation has occurred"). This is problematic because, among other reasons, these cases create a bad precedent in other cases when the alleged violation is more serious, especially if the other cases involve the same general state authorization.

is, is maddeningly vague." Richard A. Posner, *Economic Analysis of Law* 141 (5th ed. 1998); *see Kay Elec.*, 647 F.3d at 1043 ("what does and doesn't qualify as foreseeable is hardly 'self-evident' or self-defining, itself perhaps another reason to eschew the test" (quoting Areeda & Hovenkamp, ¶ 225b3, at 144)). As the AMC recognized, "foreseeability is a matter of degree." *AMC Report* at 372 (quoting *FTC State Action Report* at 33) (internal quote marks omitted). In negligence law, for example, low probability effects can be foreseeable and give rise to liability. *See Restatement 3d of Torts: Liability for Physical and Emotional Harm* § 3, cmt. f (2010) (actor may be negligent even when foreseeable likelihood of harm is slight, if magnitude of harm is great). On the other hand, intent for purposes of intentional torts requires a subjective purpose to produce the consequence, or that the actor knows that the consequence is substantially certain to occur. *See id.* § 1.

There is no reason to believe that merely because anticompetitive effects *may* follow from authorized conduct, the legislature *intends* to authorize those effects. Indeed, even if anticompetitive effects are highly likely, such effects may not be intended; rather, the legislature may authorize antitrust-risky conduct on the assumption that the antitrust laws will prevent the untoward effects. As the Ninth Circuit has observed,

> [A] state may unintentionally create a scheme that in some way fosters anticompetitive conduct. But this unintended consequence –

> even if foreseeable – does not satisfy the "clear articulation" prong of *Midcal* because the underlying scheme does not indicate an intention to displace competition.

Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1084 (9th Cir. 2010) (by authorizing rental car companies to pass on tourism fee to consumers, legislature did not necessarily intend to permit companies to conspire to do so).

B. A Permissive Foreseeability Test Is Inconsistent with This Court's Precedent

This Court has never held that a state policy to displace competition could be "clearly articulated" merely because foreseeable anticompetitive effects *could* result from conduct permitted by state law. In *Town of Hallie*, the plaintiff towns challenged the adjacent City of Eau Claire's refusal to supply unbundled sewage treatment services to the towns as unlawful monopolization and tying, which prevented the towns from competing to offer sewage collection and transportation services to the towns' residents. The city would only provide sewage treatment services directly to residents of the towns, and only in areas in which a majority voted to have their homes annexed to the city and thus to use the city's collection and transportation services as well. 471 U.S. at 37. The Court found that Wisconsin had "clearly contemplate[d]" and "specifically authorized" the challenged conduct because the state statutes provided that a city had no obligation to extend sewage service

outside its boundaries, and could refuse to extend service to an unincorporated territory if the residents in the territory refused to become annexed to the city. *Id.* at 41-43; *see id.* at 44 n.8 (noting that Wisconsin Supreme Court "concluded that the legislature had 'viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer service to the area.'" (quoting *Town of Hallie v. City of Chippewa Falls*, 314 N.W.2d 321, 325 (Wisc. 1982))).

The Court also found that the Wisconsin legislature intended to authorize the city to displace competition. It rejected the argument that "to pass the 'clear articulation' test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects," as "embod[ying] an unrealistic view of how legislatures work and of how statutes are written." *Id.* at 43. Although the statutes at issue made no express mention of anticompetitive effects, the Court explained that anticompetitive "conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas," and that Wisconsin "has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* at 42, 43. However, the foreseeable anticompetitive effects were not merely a possibility. Rather, the authorized refusal of the city to provide sewage treatment services necessarily precluded competition by the towns. The Court explained that "anticompetitive effects *logically would result from*" the

regulatory scheme, and quoted *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), in support, where the "statute provided [a] regulatory structure that *inherently* 'displace[d] unfettered business freedom.'" 471 U.S. at 42 (emphasis added) (second alteration in original). It is plain that there was a conflict between the State's regulatory program and the federal antitrust laws,[6] and *that* is the touchstone for state action immunity. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976) (no immunity where "Michigan's regulatory scheme does not conflict with federal antitrust policy"); *Hardy v. City Optical Inc.*, 39 F.3d 765, 769 (7th Cir. 1994) (Posner, J.) (state action exemption comes into play if "the state's regulatory objectives would be impaired if the act were forbidden in the name of antitrust law").

In *Omni*, this Court said that the clear-articulation requirement was satisfied where a city has "authority to regulate" and "suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372-73 (1991) (quoting *Hallie*, 471 U.S. at 42). Notably, the Court did not say that

[6] As the Solicitor General noted in *Hallie*, "[I]f petitioners are granted the injunction they seek [requiring the city to provide sewage treatment services] the State's reconciliation of the possible conflicts between cities and unincorporated areas over the provision and financing of sewage services would be frustrated." Brief for the United States as *Amicus Curiae* Supporting Respondent at 25, 471 U.S. 34 (No. 82-1832), 1984 WL 564129.

suppression of competition is *a* foreseeable result; rather it said that suppression of competition is *the* foreseeable result. As in the facts of *Hallie*, anti-competitive consequences were not merely a possibility. The Court explained:

> The very purpose of zoning regulation is to displace unfettered business freedom in a manner that *regularly* has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) *necessarily* protects existing billboards against some competition from newcomers.[7]

Id. at 373 (emphasis added); *see also Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985) (collective ratemaking by common carriers was sanctioned by the state when it left "[t]he details of the *inherently anticompetitive* rate-setting process" to the regulatory agency; no mention of foreseeability (emphasis added)).

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[7] In the Supreme Court respondent (plaintiff) all but conceded that the clear-articulation requirement was satisfied. *See* Respondent's Brief, *Omni*, 499 U.S. 365 (No. 89-1671), 1990 WL 505646 (not arguing the point, and noting only in a footnote (n.8) that respondent "has taken the position" that the South Carolina zoning enabling laws "do not contemplate authorizing anticompetitive activities").

At the same time, this Court's cases finding no state policy to displace competition make clear that foreseeability of possible anticompetitive effects is not sufficient to satisfy *Midcal*'s first prong. In *Boulder*, the Court held that *Parker* did not apply to a city's cable television moratorium ordinance because Colorado's home-rule provisions did not "'contemplate[]' the *specific anticompetitive actions* for which municipal liability is sought." *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (emphasis added). Accordingly, the "State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," *id.*, even though broad delegations of authority, like home-rule provisions, have a wide range of foreseeable consequences. Likewise, in *Cantor*, the Court found that Michigan's policy on the question of whether a utility should offer "free" light bulbs was "neutral," 428 U.S. at 585, even though the practice was approved by the state utility commission and presumably was a foreseeable (but not a necessary) result of the state's grant of authority to the commission to regulate electric utilities, which post-dated the start of the light-bulb practice, *see id.* at 583 (noting that utility had been providing light bulbs to customers without charge since 1886).

A number of lower courts have recognized that mere foreseeability of anticompetitive conduct is not sufficient to satisfy the clear-articulation requirement when benign effects are equally foreseeable. That is the upshot of the cases holding that a policy

to displace competition will not be inferred from naked grants of authority. *See Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 235 (5th Cir. 1999) (en banc) ("Not all joint ventures are anticompetitive. Thus, it is not *the* foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct.") (emphasis added); *Kay Elec.*, 647 F.3d at 1043 ("simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully"); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("The Legislature does not contemplate the displacement of competition in the unofficial-copy/title information market any more than it contemplates free competition in that secondary market."); *Lancaster Cmty. Hosp. Dist. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991) ("a mere statutory authorization to engage in business will not be so readily viewed as a displacement of competition"); *see also Hardy*, 39 F.3d at 768 ("Permission is not policy unless the state has a definite intention as to how the permission will be exercised. . . .").

C. A Permissive Foreseeability Test Is Inconsistent with the Requirement That a State Policy to Displace Competition Is "Clearly Articulated" and "Affirmatively Expressed"

It should be obvious that *Midcal*'s requirement that "the challenged restraint be one clearly

articulated and affirmatively expressed as state policy" means that the state's intent to displace the ordinary rules of competition must be clear. *See Midcal*, 445 U.S. at 105 ("The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance."); *see also Southern Motor Carriers*, 471 U.S. at 64 ("As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."). Perforce, this means that if the state's intention is ambiguous, the first prong of the *Midcal* test is not satisfied.

Leading commentators have long interpreted the Court's precedents to require a "clear statement" to displace competition. As Professors Areeda and Hovenkamp explain:

> Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting noncompetitive policies with the strong national policy favoring competition and is consistent with the canon of federal statutory construction that exemptions to the antitrust laws are not to be lightly inferred. . . . [I]t ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.

Areeda & Hovenkamp, ¶ 221d8, at 62; *see also* 1 Phillip Areeda and Donald F. Turner, *Antitrust Law* ¶ 214e, at 91-92 (1978) (same).

Resolving ambiguities in state law against *Midcal* authorization not only flows from "the fact that the antitrust laws declare a clear national policy of preventing anticompetitive restraints," but also from the fact that "most states via their own antitrust laws or regulatory provisions declare a similar policy." Areeda & Hovenkamp, ¶ 225a, at 131.[8] Accordingly, one should not expect states to displace competition rules absent a clear indication to the contrary. Moreover, a clear-statement rule ensures that state legislators give due deliberation to the question of excepting municipal or private entities from the normal rules of competition,[9] and do so in a politically accountable

[8] Today, virtually every state has an antitrust statute, many of which were enacted prior to the Sherman Act. *See* 1 ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* 1-1, 1-25 (4th ed. 2009). Indeed, approximately 20 state constitutions, including Georgia's (see *infra*) "indicate a policy against trusts or monopolies." William T. Lifland, *State Antitrust Law* § 1.02, at 1-2 (2011); *see, e.g., Northern Sec. Co. v. United States*, 193 U.S. 197, 363 (1904) (Brewer, J., concurring) (applying Sherman Act to merger did not interfere with state authority because "[t]his merging of control and destruction of competition was not authorized, but specifically prohibited by the state"); *cf. Minnesota v. Northern Sec. Co.*, 194 U.S. 48 (1904) (companion case brought by State of Minnesota to block merger under Minnesota antitrust law).

[9] *See* Floyd at 1109 (clear-articulation requirement "is designed to ensure that even an authorized state decision-maker does not repeal the fundamental national policy of the antitrust

(Continued on following page)

manner, "'rather than falling back on the ambiguity-creating compromises that often characterize the legislative process.'" *Kay Elec.*, 647 F.3d at 1043 (quoting Areeda & Hovenkamp, ¶ 225a, at 133, and stating that clear-statement rule "makes quite a lot of sense").[10]

This rationale for a clear-statement rule is fully supported by *Ticor*, which recognized that both parts of the *Midcal* test are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." 504 U.S. at 636. *Ticor* rejected a broad interpretation of state-action immunity because "state-action immunity is disfavored, much as are repeals by implication," and because a broad interpretation is *inconsistent* with federalism concerns. *Id.* at 636. As the Court noted, "States regulate their economies in many ways not inconsistent with the antitrust laws," so "[b]y adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the

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laws without clear recognition of what it is doing and a deliberate decision to act in that way").

[10] *See* Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 Iowa L. Rev. 185, 191 (2007) ("*Midcal*'s clear-articulation requirement . . . can be framed as a type of penalty default rule designed to promote clarity in lawmaking and to deter interest groups from promoting, and lawmakers from adopting, ambiguous laws that purport to make excessively broad delegations to regulators.").

States' regulatory flexibility." *Id.* at 635-36.[11] The Court emphasized:

> Neither 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. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [anti-competitive conduct] it has sanctioned and undertaken to control.

Id.

Consistent with *Ticor*, the Fifth Circuit recognized that "an overly lax view of the necessity of expressed legislative will," which the Eleventh Circuit "skat[ed] close to," did not advance federalism principles "because implementing federalism here produces a rule of construction with two sides – a path to be traversed because federalism is disserved by straying off in either direction." *Surgical Care Ctr.*, 171 F.3d at 236. The court explained that "[t]o infer a policy to displace competition" from a general grant of authority

[11] *See also Cantor*, 428 U.S. at 595 ("merely because certain conduct may be subject both to state regulation and the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1972) ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

"would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Id.*; *see also id.* at 234 (noting that "[t]he doctrine of clear statement is vital to the concreteness of federalism").

A clear-statement rule is particularly appropriate for applying the state action doctrine to governmental entities engaged in proprietary activities, such as running hospitals. *See Lafayette*, 435 U.S. at 422, 425 n.6 (Burger, C.J., concurring) (would treat the "proprietary enterprises of municipalities" like private corporations and "require a strong showing on the part of the defendant that the State . . . intended" to displace competition with regulation); Areeda & Hovenkamp, ¶ 224e, at 126 ("ambiguous authorizing provisions might be construed more narrowly when the government unit is engaged a proprietary activity"); *see also Omni*, 499 U.S. at 374-75 ("immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market"). The rationale is that "[w]hen a city acts as a market participant it generally has to play by the same rules as everyone else." *Kay Elec.*, 647 F.3d at 1041; *see Reeves, Inc. v. Stake*, 447 U.S. 429, 438 (1980) (justifying dormant Commerce Clause exemption for states when they act as market participants, rather than as regulators, partly on the basis that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market

participants"); *e.g.*, *Thomas v. Hospital Auth.*, 440 S.E.2d 195, 197 (Ga. 1994) (holding that Georgia hospital authorities are not subject to sovereign immunity because "[i]f an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not 'governmental,' there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation."). In addition, "the economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations." *Lafayette*, 435 U.S. at 403 (majority opinion); *see also* Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol. Pol'y & L. 587, 604 (2006) ("incentives and institutional impulses [of public hospitals] differ very little from those of private firms, suggesting the appropriateness of applying antitrust principles to govern their behavior").[12]

To be sure, a clear-statement rule itself is not self-defining. *See*, *e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 287 (1994) (Scalia, J., concurring)

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[12] Insofar as a local governmental entity need not be subject to active state supervision, *see Hallie*, 471 U.S. at 46-47, then only a strict "clear articulation" requirement can ensure "that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636.

(criticizing majority for relying on legislative history in applying "clear statement" rule for retroactive application of statute). And *Hallie* rejected the argument 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.[13] However, even if the "clear articulation" requirement is merely a presumption that states do not intend to displace competition rules, which may be rebutted by something other than a clear statement on the face of the statute, an interpretation of state law that is merely plausible is not sufficient. *See Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427, 1439 (9th Cir. 1996) ("permissive inference" does not supply the "forthright and clear statement" required "to satisfy *Midcal*'s stringent requirements"); *cf. Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877, 2883 (2010) ("possible interpretations of statutory language do not override the presumption against extraterritoriality," which requires "'an affirmative intention of Congress clearly expressed' to give a statute extraterritorial effect" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

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[13] The Court was referring to the question of whether specifically authorized conduct was intended to displace competition rules. Even if a state specifically approves certain conduct for one purpose, it may not intend to oust the antitrust laws. *Cf. United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351-52 (1963) (federal banking regulators' approval of bank merger in the public interest was not intended by Congress to bar application of Section 7 of the Clayton Act).

This means that, absent other evidence of legislative intent, the fact that authorized conduct may or may not be undertaken in an anticompetitive manner (i.e., anticompetitive effects are possible), is not sufficient to show a clearly articulated policy to displace competition. Rather, where the intent of the state legislature (or other sovereign entity) is otherwise unclear, only a showing that anticompetitive effects *necessarily* would result from authorized conduct is sufficient to demonstrate the legislature's intent to displace competition. *See* Areeda & Hovenkamp, ¶ 225b, at 137-38 ("A policy to displace the antitrust laws will . . . be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity."); *Surgical Care Ctr.*, 171 F.3d at 235 (distinguishing "a statute that in empowering a municipality necessarily contemplates the anticompetitive activity"). If state law reasonably can be interpreted so as not to create a conflict with the antitrust laws, such an interpretation should govern. *See Cantor*, 428 U.S. at 596 ("The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws.").

II. GEORGIA HAS NO POLICY THAT THE ACQUISITION OF HOSPITALS BY HOSPITAL AUTHORITIES IS EXEMPT FROM ANTITRUST SCRUTINY

As noted above, the court of appeals found a state policy to displace antitrust scrutiny of hospital

mergers undertaken by hospital authorities based on the fact that state law authorizes authorities "[t]o acquire by purchase, lease, or otherwise and to operate projects," Ga. Code Ann. § 31-7-75(4) (2012), which are defined to "include[ ] the acquisition, construction, and equipping of hospitals, health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities. . . . ," *id.*, § 31-7-71(5) (2012). The Solicitor General demonstrates that there is no reason to believe that a grant of ordinary corporate powers to hospital authorities to acquire and lease property, as here, was intended by the State of Georgia to exempt authorities from antitrust review of their hospital acquisitions. *See also* Areeda & Hovenkamp, ¶ 225b4, at 151 (grant of "ordinary corporate powers" to private corporations to make contracts, acquisitions, and so forth does not imply state authorization for anticompetitive behavior; "[w]hen the corporation is of a public or quasi-public character, no different presumption is warranted"); *e.g.*, *United States v. Northern Sec. Co.*, 120 F. 721, 727 (C.C. D. Minn. 1903) ("however extensive and comprehensive" are powers granted to corporations under New Jersey charter, they are not intended by state to be used in conflict with other lawfully enacted statutes, including the Sherman Act), *aff'd*, 193 U.S. 197 (1904).

On the contrary, a straightforward reading of the statutory scheme reveals that Georgia did not intend the Hospital Authorities Law to exempt hospital

mergers from the antitrust laws. This is clear from the fact that the Hospital Authorities Law contains an express exemption from the antitrust laws, but only for mergers of hospital *authorities*, which are permitted in certain circumstances. Ga. Code Ann. § 31-7-72.1(e) (2012) ("It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them *by this Code section*, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." (emphasis added)).[14]

The court of appeals rejected this *expressio unius* argument because it thought the relevant question is what the Georgia legislature intended when the original Hospital Authorities Law was enacted in 1941, whereas the provision exempting mergers of hospital authorities was enacted in 1993. According to the

[14] The Attorney General of Georgia relied on this point below in arguing that "Defendants did not act according to state policy in this case." Br. of State of Georgia in Further Support of Motion for Preliminary Injunction and in Response to Defendants' Motions to Dismiss, Summary Judgment, and to Vacate Temporary Restraining Order at 17-20 (June 14, 2011). In their opposition to certiorari, respondents contended that the views of a federal court interpreting the law of a state within its jurisdiction should be given deference, but the district court improperly ignored the views of the Attorney General in interpreting Georgia law. *See Moore v. Ray*, 499 S.E.2d 636, 637 (Ga. 1998) (attorney general opinions are persuasive, but not binding, authority on the meaning of state law); *cf. Ticor*, 504 U.S. at 635 (fact that *amici curiae* States were against broad interpretation of state action immunity was significant).

court, "[t]he views of a much later legislature do not change [the] fact" that "anticompetitive effects were indeed anticipated" in 1941. Pet. App. 14a. The court put the cart before the horse. "The starting point for our interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *see Surgical Care Ctr.*, 171 F.3d at 234 ("'State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions.'" (quoting 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 222b, at 393 (1997 rev. ed.))). The extent to which the Hospital Authorities Law authorizes a displacement of the antitrust laws with respect to hospital mergers is ambiguous at most, and parsing the meaning of the statute under the *expressio unius* maxim is a more reliable method of statutory construction than hypothesizing, in the absence of any legislative history, what legislators must have meant.[15]

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[15] The court of appeals cites cases that question the value of the views of a subsequent Congress's interpretation of an act of a prior Congress, but "[w]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (citations omitted), quoted by *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, *Inc.,* 552 U.S. 148, 163 (2008) (giving "weight to Congress' amendment to the Act restoring aiding and abetting liability in certain cases and not others").

Inferring an intent to displace competition rules here is particularly inappropriate given that "[t]he state of Georgia has expressed, both in its constitution and in its statutory law, a strong public policy disfavoring contractual restraints on competition and trade." *Atlanta Center*, 848 F.2d at 148; *see Executive Town & Country Services, Inc. v. Young*, 376 S.E.2d 190, 192 (Ga. 1989) (relying on "state policy against defeating or lessening competition, or encouraging a monopoly" to question validity of ordinance setting minimum limousine fares to Atlanta airport (internal quote marks omitted)). Indeed, Georgia's constitution has prohibited the legislature from authorizing contracts that "may have the effect, or be intended to have the effect, to defeat or lessen competition . . . or to encourage monopoly" since 1887. *Hamilton v. Savannah, F. & W. Ry. Co.*, 49 F. 412, 422 (C.C. S.D. Ga. 1892) (railroad merger creating monopoly held to be *ultra vires* and void under quoted constitutional provision) (internal quote marks omitted); *see* Ga. Const., art. 3, § 6, ¶ V(c)(1) (Supp. 2012).

Ultimately, the court of appeals relied on the theory that "the Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities." Pet. App. 12a-13a. However, as argued above, the fact that authorized conduct may have anticompetitive effects simply does not mean that the legislature condoned those effects, rather than intended that state and federal antitrust law would continue to apply. *See* Areeda & Hovenkamp, ¶ 225b4, at 28 (Supp. 2012) (criticizing

Eleventh Circuit's reasoning in this case; "a more logical reading is that the statute gave the hospital districts the power to make acquisitions, provided that these acquisitions were not unlawful on other grounds").[16]

III. FEDERAL HEALTH CARE POLICY ALSO SUPPORTS CAREFUL REVIEW OF PURPORTED STATE EXEMPTIONS FROM ANTITRUST SCRUTINY

The merger challenge at issue is part of the ongoing effort of the FTC, Department of Justice, and many states to ensure competitive health care markets. Federal policy regarding health care has long relied on competition to encourage the provision of low-cost, high-quality care. Most recently, Congress created a variety of institutions and programs designed to foster competition, including health insurance exchanges, delivery system innovations such as

[16] Another indication that the legislature did not intend to exempt hospital authorities from ordinary market competition rules is that it exempted them from the state's Open Meetings Act and Open Records Act when public disclosure might be competitively harmful. *See* Ga. Code Ann. § 31-7-75.2 (2012) (hospital authorities not required "to disclose or make public any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the . . . authority or its medical facilities and which has not been made public"); *see also Thomas*, 440 S.E.2d at 197 ("The very functions performed by the Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients.").

accountable care organizations, and enhanced competitive bidding for medical devices and for private plan participation in the Medicare Advantage program. *See* Thomas L. Greaney, *The Affordable Care Act and Competition Policy: Antidote or Placebo?*, 89 Or. L. Rev. 811 (2011). Because the success of the competitive strategy depends crucially on maintaining competitive provider markets, the existence of hospital monopolies, many created by mergers, poses a serious problem. *See id.* at 839; Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 Or. L. Rev. 847 (2011) (arguing that market power is *more* harmful in health care markets than in others).

Numerous studies demonstrate that hospital mergers that increase market power raise prices for commercial health plans and their customers (employers and employees). *See* William B. Vogt & Robert Town, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care?*, http://www.rwjf.org/files/research/15231.hospitalconsolidation.report.pdf (Feb. 2006) (meta-analysis of economic studies documenting the price-elevating effect of concentrated hospital markets); Martin Graynor & Robert Town, *The Impact of Hospital Consolidation – Update* 1, 2, http://www.rwjf.org/files/research/5973.74582.synthesisprojectupdate.hospitalconsolidation.pdf (June 2012) (update confirming conclusions of prior report; noting that "magnitude of price increases when hospitals merge in concentrated markets is typically quite large, most exceeding 20 percent"). These studies also show that

increased hospital concentration reduces the quality of care, at least for some procedures. *See* Graynor & Town at 3, 4 (finding is more robust for Medicare patients). Moreover, hospital mergers creating market power adversely affect the Medicare and Medicaid programs insofar as Medicare Advantage plans and Medicaid managed care plans rely on competitive contracting with hospitals. And, hospital market power tends to reduce hospitals' incentives to reduce their costs, which affects services provided to all patients. *See* Medicare Payment Advisory Commission, *Report to Congress: Medicare Payment Policy* 46, 62-64 (March 2009) (*Medpac Report*) (explaining that hospitals with market power tend to have higher costs and lower Medicare margins).

The nonprofit status of hospitals provides no grounds for altering antitrust standards.[17] Although nonprofit hospital defendants have frequently asserted that they are less likely to take advantage of their market power, courts have rarely credited such claims. Nonprofit entities enjoy no exemption from the Sherman Act, *see NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984), or from the Clayton Act, *see FTC v.*

[17] Nor does the existence of state certificate of need laws and other forms of state regulation diminish antitrust concerns. On the contrary, the effects of such regulation in restricting competition have been cited as increasing the competitive risks from mergers in concentrated markets. *See FTC v. University Health, Inc.*, 938 F.2d 1206, 1219 (11th Cir. 1991).

University Health, Inc., 938 F.2d 1206, 1214 (11th Cir. 1991), and the vast majoirty lower courts have rejected the argument that the nonprofit corporate form signals that nonprofit hospitals lack incentives to exercise market power. *See FTC v. OSF Healthcare System*, No. 11-C-50344, 2012 WL 1134731, at *21-22 (N.D. Ill. Apr. 5, 2012) (joining growing list of courts that find nonprofit hospitals will seek to exercise market power if they have it). Indeed, market power in the hands of nonprofit hospitals can be especially problematic because they lack institutional incentives and controls to keep costs down. *See* Havighurst & Richman at 855-56; *Medpac Report* at 62.

Accordingly, the use of hospital authorities to shield anticompetitive hospital mergers is not only inconsistent with the federal antitrust laws, but also with the critically important national imperative to reduce health care costs. Many states have hospital authorities. *See* Pet. Br. 7 n.1; *see also* Am. Hosp. Ass'n, Fast Facts on US Hospitals, http://www.aha.org/research/rc/stat-studies/fast-facts.shtml (Jan. 3, 2012) (more than 20% of general hospitals are owned by state and local governments). So, exempting this transaction from antitrust scrutiny could have significant consequences beyond the State of Georgia. Of course, states are free "to displace competition with regulation" (*Hallie*, 471 U.S. at 44) in health care markets, as in other markets, but the state action doctrine requires, and federal health care policy supports, careful scrutiny to ensure that no exemption is

granted unless it is clear that the antitrust laws do in fact conflict with a state regulatory policy.

CONCLUSION

For the foregoing reasons, and those set forth in petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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