IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACKSON, TENNESSEE HOSPITAL COMPANY, LLC
Plaintiff-Appellant,

v.

WEST TENNESSEE HEALTHCARE, INC.; JACKSON-MADISON COUNTY GENERAL HOSPITAL DISTRICT; BLUE CROSS BLUE SHIELD OF TENNESSEE, INC.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE URGING REVERSAL IN SUPPORT OF APPELLANT

(CORRECTED)

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

JOHN F. DALY
Deputy General Counsel for Litigation

JOHN DELACOURT
Chief Antitrust Counsel, Office of Policy Planning
Federal Trade Commission
Washington, DC 20580

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
601 D Street NW
Washington, DC 20530-0001
(202) 514-4510

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IN THE UNITED STATES COURT OF APPEALS
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No. 04-5387

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Plaintiff-Appellant,

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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE URGING REVERSAL IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

The United States and the Federal Trade Commission (FTC) are principally responsible for enforcing the federal antitrust laws. They share a long-standing concern for proper application of the state action

[1]This concern is reflected in recent agency briefs, including two jointly filed amicus briefs in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999) (en banc),

entities threatens both public and private enforcement of those laws. Accordingly, the United States and the FTC have a strong interest in the proper determination of this appeal. We file pursuant to the first sentence of Fed. R. App. P. 29(a).

QUESTION PRESENTED

Whether the alleged anticompetitive conduct of a Tennessee private act hospital authority is exempt from the federal antitrust laws as state action pursuant to a state policy to displace competition by regulation or monopoly public service.

STATEMENT

1. Jackson, Tennessee Hospital Company ("JTHC"), which owns and operates Regional Hospital in Jackson, Tennessee, sued a Tennessee hospital district (the "District") and an affiliated corporation, West Tennessee Healthcare, Inc. (collectively, "WTH"), which also own and/or operate a hospital, Jackson-Madison County General Hospital. The complaint charged, among other things, antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. (R.1, JHTC's Complaint ¶¶ 97, 106, 114, 123.) The claimed violations were based on

various alleged anticompetitive acts, including contracts with managed care organizations and physicians prohibiting them from doing business with Regional Hospital. (R. 57, Opinion ("Op."), p.5.)[2]

2. The district court found the challenged conduct to be exempt from the federal antitrust laws under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and therefore dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Viewing the District as a political subdivision of the State of Tennessee (R. 57, Op., p.7 n.7) and relying on this Court's decision in *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527 (6th Cir. 2002), the district court treated as determinative whether the "anticompetitive effects are the logical and foreseeable result of the broad authority to own, operate and manage

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[2]Because JTHC's complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), we treat its allegations as true. *Stanek v. Greco*, 323 F.3d 476, 477 (6th Cir. 2003).

WTH "immune from antitrust liability under the state action immunity doctrine" and dismissed the antitrust claims against them. (*Id.*, p.12.) The court noted that one of the statutes in question "provides that the broad powers it confers are to be exercised 'regardless of the competitive consequences thereof.' Tenn. Code Ann. § 7-57-502(c)" (R. 57, Op., p.11), but it did not explain the role this phrase played in its analysis.

SUMMARY OF ARGUMENT

Relying on "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)). Subordinate state entities, such as municipalities and hospital districts, however, are not sovereign, and they may claim "state action" exemption from the Sherman Act only if they can "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39

(1985) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)). This Court has consistently recognized and applied this fundamental principle in its state action decisions. *See Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527 (6th Cir. 2002); *Consolidated Television Cable Serv., Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988); *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985).

The district court in this case, however, failed to follow this governing law, improperly concluding that the District was exempt from the antitrust laws because the state had given it broad authority, comparable to that of private firms, to operate and manage health care facilities. It reasoned that anticompetitive effects logically and foreseeably flow from that broad authority. (R. 57, Op., pp.10-11.) But unreasonable restraint of trade and monopolization do not logically and foreseeably flow from authority to operate as private firms operate. Nor does anything else in the relevant statutes suggest a state policy to displace competition by regulation or monopoly public service.

The district court's reasoning robs of meaning the Supreme Court's

repeated admonitions that an indispensible component of the state action doctrine is a state policy to displace competition by a sovereign act of government. The court's reasoning would allow subordinate state entities participating in commercial markets to nullify the procompetitive national policy embodied in the Sherman Act in the absence of any state policy determination that anticompetitive conduct serves the public interest. Indeed, the district court's reasoning displaces federal antitrust law even if, as in this case, the state has acted to promote competition rather than displace it.

The absence of state action *exemption* does not, of course, establish antitrust *liability*. Whether the District's conduct violated the antitrust laws is a distinct question, on which the government expresses no view.[3] But in the absence of a state policy to displace competition, the District's conduct is not shielded from antitrust scrutiny.

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[3]Nor do we address issues specific to the non-governmental defendant in this case.

ARGUMENT

I. The State Action Doctrine Protects Subordinate State Entities from Liability under Federal Antitrust Laws Only When They Act Pursuant to State Policy to Displace Competition by an Alternative Means of Advancing the Public Interest

The district court fundamentally misapplied the state action doctrine. In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court determined that statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. *Id.* at 351. Accordingly, it held that when a "state in adopting and enforcing [a] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government[,] . . . the Sherman Act did not undertake to prohibit" the restraint. *Id.* at 352.

While states may, within certain limits, adopt and implement policies that depart from the policies of the Sherman Act,[4] subordinate

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[4]States, however, do not have unlimited freedom to implement such policies. *See*, *e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal*

Aluminum, Inc.

at 39 ("the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful") *with id.* at 38-39 (municipal activities are exempt only if "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service'") (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)). Accordingly, in *Hallie*, the Court emphasized that the subordinate state entity must prove not only its authority to act, but also "that a state policy to displace competition exists." *Id.*

The state need not follow any particular formula in expressing its intent to displace competition; indeed, it need not even refer expressly to anticompetitive effects if it is clear from the nature of the policy the state has articulated that it contemplates such an outcome. *See Hallie*, 371 U.S. at 43-44. The municipal conduct at issue in *Hallie* was a refusal to supply sewage treatment facilities outside the city's borders

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effects on sewage collection and transportation services competing with the city's. After reviewing "the statutory structure in some detail," *id.* at 41, the Court found it "clear that anticompetitive effects logically would result from this broad authority *to regulate*." *Id.* at 42 (emphasis added). Thus, the Court concluded, "the statutes obviously contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.*

Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the challenged municipal ordinance restricting the size, spacing, and location of new billboards was exempt because the state had clearly articulated a policy to rely on zoning rather than competitive market forces to regulate billboards. *Id.* at 373. Although the state legislature had not specifically stated that it expected municipalities to use their zoning powers to limit competition, the Court found "suppression of competition" to be the "foreseeable result" of what the statute authorized because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly

has the effect of preventing normal acts of competition." *Id.*[6]

The critical question is whether the state has decided to displace competition (or to authorize subordinate entities to choose to do so) as an act of government to which federalism principles demand deference. To provide sufficient evidence of such a decision, the state law must at least clearly articulate a public policy that intrinsically departs from the Sherman Act's competitive model.[7] In the absence of such a state policy, the conduct of a nonsovereign subordinate entity, even conduct that plainly falls within its authority under state law, does not constitute state action for purposes of the Sherman Act.[8]

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[6]Although foreseeability is a "useful tool in inquiring about state policy to displace competition[, i]t is not an end in itself." FTC Staff Report 11. The end is a conclusion about that state policy, and any inference about policy from the foreseeability of conduct must be a reasonable one. *See id.* at 34-35.

[7]Monopoly public service and classic public utility-style regulation are not the only permissible departures from the competitive model. *Omni* offers zoning as another species of regulation. 499 U.S. at 373-74

[8]Generally, a party asserting a state action defense that is not a sovereign state entity must demonstrate not only that it acted pursuant to a state policy to displace competition by an appropriate alternative, but also that its conduct was actively supervised by the state. *Midcal*, 445 U.S. at 105. *See generally* FTC Staff Report 12-24, 36-40. There are, however, exceptions to the active supervision requirement. *See*

This Court's decisions consistently apply these principles. In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985), the Court recognized that "a municipality's anticompetitive behavior" is exempt state action only if that conduct "promote[s] a 'clearly articulated and affirmatively expressed state policy' . . . 'to displace competition with regulation or monopoly'"[9] and "'the legislature contemplated the kind of action complained of,'" *id.* at 329 (citations omitted). Applying that test to an allegedly anticompetitive denial of an application for industrial revenue bonds the defendant had been authorized to grant, the Court found state action "because decisions increasing or restricting competition, though not explicitly stated or recognized in the Ohio statute, are a logical and

Hallie, 471 U.S. at 46-47 (recognizing exception for municipalities). In this case, the parties did not dispute below the District's status as a "political subdivision" of the state. (R. 57, Op., p.7 n.7.) Although status as a political subdivision under state law does not necessarily determine whether active supervision is required, *see* FTC Staff Report 16-19, we assume for purposes of this brief that active supervision is not required here.

[9]The Court also noted that such a conclusion of state action could alternatively "derive from action of the state in its sovereign capacity," *Riverview*, 769 F.2d at 329, a basis for exemption not at issue here.

necessary outcome of the authority to grant industrial revenue bonds for the purpose of protecting jobs." *Id.* That conclusion is clearly correct. Unless the defendant were required to approve all bond applications, it would inevitably deny some. In adopting a policy that provides bonds for some applicants while denying them to others, the state necessarily adopted a policy of affecting competition in this manner; it displaced pure market-based financing by an administered scheme to promote goals that the market might otherwise inadequately promote.[10]

In *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), the Court drew upon *Riverview* in holding that actions by a municipality that favored one cable television provider

[10]Whether the *Riverview* defendant was exempt, however, turned on whether it "is a private, nonmunicipal party, and, if so, whether it is actively supervised." 769 F.2d at 330.

own and operate their own facilities for providing public utility-type services. *Id.* at 360-61. The Court found that "displacement of competition in the provision of CATV service . . . is a foreseeable result of granting the city power to franchise public utilities or own and operate a municipal plant," *id.* at 361. In other words, the state effectively authorized displacement of competition by municipal regulation and service provision, thus triggering the state action doctrine.

Statutory authorization for the conduct complained of may have been less clear in *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527 (6th Cir. 2002), but once the Court concluded that the city's conduct was authorized, it properly addressed the foreseeability of anticompetitive effects from that authorization and upheld the city's state action defense. Plaintiff Michigan Paytel and defendant Ameritech were competing bidders to provide the Detroit Police Department with an in-cell telephone system for its prisons. Ameritech won the contract, and Paytel sued, alleging that Ameritech and Detroit had acted "to maintain Ameritech's dominance in the pay telephone service market in

the Detroit metropolitan area." *Id.* at 534. The Court held that the relevant municipal conduct, the awarding of an exclusive contact for the provision of telephone service in prisons, was authorized by statute and the state constitution. *Id.* at 535-36. The anticompetitive effect complained of – Ameritech got the prison business, while its smaller rival Michigan Paytel did not – was a "logical and foreseeable result," *id.* at 536, of that authorization: "'Under the bidding process, there would be only one successful bidder. Thus, only one bidder would have the right to install and service the pay telephones.'" *Id.* (quoting the district court). The authorized selection process substituted for continuing competition in telephone service provision within the prisons.

II. The District Court Erred in Holding Conduct Exempt from the Sherman Act in the Absence of a State Policy to Displace Competition

Although the district court quoted both this Court's recent *Michigan Paytel* formulation of the state action doctrine (R. 57, Op., pp.8-10) and *Hallie*'s, (R. 58, Op., pp.7-8), it never found that, or even considered whether, Tennessee had a policy to displace competition by

some alternative means of channeling the behavior of economic actors to serve the public interest in health care.

The court found that statutes intended to remedy a “competitive disadvantage” of some public hospitals resulting from certain “legal constraints upon” their operations, Tenn. Code Ann. § 7-57-501(b), quoted in R. 57, Op., p.2 n.1; *see also* R. 57, Op., p.1, implicitly gave those hospitals a license – denied to their private competitors – to restrain trade and monopolize without regard to the prohibitions of the Sherman Act. It reasoned that “anticompetitive effects are the logical and foreseeable result of the broad authority to own, operate and manage hospitals and other health care facilities” that Tennessee statutes confer on hospital districts. (R. 57, Op., p.11.) The court thus concluded that the Sherman Act does not apply to these defendants because it is foreseeable that a public business entity, armed with the authority to take actions private business entities routinely take, might act anticompetitively, just as some private business entities do from time to time.[11]

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[11]The predictability of anticompetitive conduct is legendary: “People of the same trade seldom meet together, even for merriment and

That conclusion stands the *Parker* doctrine and *Hallie* on their heads. If merely authorizing a public business entity to act means exempting it from the federal antitrust laws, the State is indeed "giv[ing] immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351. That is precisely what *Parker*, *id.*, and *Hallie*, 471 U.S. at 39, reject. That conclusion is also contrary to this Court's admonition, in *Michigan Paytel*, that "[g]rants of general or neutral authority" do not supply the "clear articulation" needed to invoke the state action doctrine. *See* 287 F.3d at 534.

A. Authorizing Public Entities to Act as Their Private Competitors May Act Does Not Imply a State Policy to Displace Competition

The District Court misapplied the foreseeability test. As noted above, *see* pp.10-12 *supra*, the Supreme Court focuses on foreseeability in considering whether the nature of the authorized conduct – such as regulation (*Omni*) or monopoly public service (*Hallie*) – demonstrates

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diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 128 (Modern Library ed., 1937).

that the state legislature must have contemplated that competition would be displaced, i.e., that the authorized conduct would have foreseeably anticompetitive effects. As this Court has explained, the question is whether "'decisions increasing or restricting competition . . . are a logical and necessary outcome of the authority'" granted the relevant actor. *Consol. Television*, 857 F.2d at 360, quoting *Riverview*, 769 F.2d at 329; *see also Michigan Paytel*, 287 F.3d at 536 ("logical and foreseeable result").

The range of conduct alleged in the complaint here was not a logical or necessary result of the broad grant of authority to act as private business may act. The state of Tennessee authorized only functions that economic actors in freely competitive markets routinely carry out without unreasonable restraint of trade, monopolization, or indeed any anticompetitive consequences. That authorization implies no policy to depart from the Sherman Act's competitive model in the markets in which the District competes.[12] To the contrary, the district court itself

[12]Although clearly not all the alleged conduct is exempt, close parsing of the applicable statues and of the complaint perhaps might reveal that some of that conduct, and the alleged anticompetitive consequence of it, is a logical and necessary result of the statutory authorization. But the

noted the statutory purpose of making public hospital authorities better able "to effectively compete with private hospital authorities" by removing "legal constraints" on them and giving them "the same operating and organizational powers enjoyed by private hospital authorities." (R. 57, Op., pp.2-3.) Such a purpose suggests a policy to embrace more fully, not displace, the competitive model.

The two courts of appeals to have considered similar state grants of authority to public hospitals and hospital authorities properly concluded that they do not produce general state action exemption.[13] In *Surgical*

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district court performed no such parsing, and in any event exemption of some portion of the alleged conduct would not serve to exempt the District across the board.

[13]The grant of broad authority to operate like a private hospital is analogous to the broad home rule authority granted Colorado municipalities that the Supreme Court found not to exempt municipal regulation of cable television competition from the antitrust laws. As the Court said, accepting that proposition "that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances . . . would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Cmty. Communications Co. v. City of Boulder*, 455 U.S. 40, 56 (1982).

Circuit considered Louisiana statutes granting additional powers to hospital service districts so they could compete with other entities on a "level . . . playing field." *Id.* at 235. Drawing upon *Hallie* to distinguish between "a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do," *id.*, the court had no trouble rejecting application of the state action doctrine. Borrowing the approach of the other court of appeals to consider the issue, the Fifth Circuit noted that "when there are abundant indications that a state's policy is to support competition, a subordinate state entity must do more than merely produce an authorization to 'do business' to show that the state's policy is to displace competition." *Id.*, quoting *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991).[14]

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[14]The Fifth Circuit correctly distinguished *Coastal Neuro-Psychiatric Associates v. Onslow Memorial Hospital*, 795 F.2d 340 (4th Cir. 1986), which found the exercise of a specific statutory power that inherently resulted in the consequence complained of exempt from federal antitrust law. 171 F.3d at 235-36. And it found the result in *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), consistent with its approach, although questioning the Eleventh Circuit's "lax view" of foreseeability. 171 F.3d at 236. Nothing in *Lee*

Court has expressed reservations regarding a market participant

inappropriateness of applying the state action doctrine here.[17]

B. The Statutory Language Regarding Competitive Consequences Does Not Transform the Statute to Exempt the District from the Antitrust Laws

The district court referred to, but did not expressly rely on, statutory language providing that the powers granted to entities like the District may be exercised "regardless of the competitive consequences thereof." Tenn. Code Ann. § 7-57-603 (incorporating Tenn. Code Ann. § 7-57-502(c)), *see* R. 57, Op., pp.10-11. To construe that language as authorizing the relevant entities to exercise their authority to operate and manage hospitals in disregard of the standards of the Sherman Act would, however, be unwarranted.[18]

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action doctrine, 317 U.S. at 351 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"), could be evaded. *Freedom Holdings*, 363 F.3d at 156.

[17] *Freedom Holdings* explains that "a state's explanation of its reason for displacing competition will aid a court in determining whether the state has satisfied the requirements for *Parker* immunity" and views "[a]iding judicial inquiry in this way" as "an ancillary purpose" of the clear articulation requirement. *Id.*

[18] Moreover, such an attempt to "validate a [hospital district's] anticompetitive conduct simply by declaring it to be lawful," *Hallie*, 471 U.S. at 39, would not provide antitrust exemption. *See* p. 10, *supra*.

The Tennessee Supreme Court has construed the "regardless" phrase to have much narrower significance.[19] In *City of Cookeville v. Humphrey*, 126 S.W.3d 897 (Tenn. 2004), the court observed that before the 1995 Hospital Authority Act expanded the statutory authority of public hospitals to remove legal constraints under then existing law, private hospitals could exclude licensed physicians and surgeons from use of the hospital for what management deemed sufficient cause, while public hospitals could not. *Id.* at 902. Thus, private, but not public, hospitals could contract with one group of doctors to provide a particular service in the hospital, while excluding other doctors from providing that service – they could, that is, contract exclusively. The court read the statute, with its "regardless" phrase, to overrule this constraint on public hospitals: "[t]he apparent intent of the Legislature was that public hospitals be authorized, like private hospitals, to contract exclusively with particular providers, *even if it is to the disadvantage of other physicians*." *Id.* (emphasis added). The

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[19] An opinion of the Tennessee Supreme Court does not decide a question of antitrust coverage under federal law, but "it is instructive on the question of the state legislature's intent in enacting the statutes" at issue. *Hallie*, 471 U.S. at 45 n.8.

[20]The reach of federal antitrust law was, of course, not before the Tennessee Supreme Court. We note, however, that the exclusive contracts discussed in *Cookeville* resemble quite closely the exclusive contract at issue in *Michigan Paytel*. In both cases, a logical and foreseeable result of exercise of the authority granted is that some actual or potential service providers are excluded.

[21]Considering only hospitals, we note that Michigan grants municipal health facilities corporations extensive powers to operate hospitals, including the power to enter into contracts, Mich. Comp. Laws Ann. §§ 331.1301, .1303, .1304, and Kentucky grants hospital districts extensive powers, including the power to enter into contracts,

special license to restrain trade unreasonably and monopolize and thereby to limit the very competition the authorization was intended to foster. This would divorce the state action doctrine from its roots in "principles of federalism and state sovereignty." *See Omni*, 499 U.S. at 370; *Parker*, 317 U.S. at 352. It would allow nonsovereign, subordinate entities independently to decide – without any state policy to displace competition – not to obey the federal antitrust laws when participating in competitive markets. Such a result has nothing to do with deferring to state sovereignty.

Indeed, this mistaken version of the state action doctrine has the potential to undercut state policy as well as federal law. *See Hallie*, 471 U.S. at 47 (noting that the requirement that a municipality act pursuant to state policy provides protection against the danger that the municipally owned enterprise "will seek to further purely parochial public interests at the expense of more overriding state goals"). Automatically exempting subordinate entities from the Sherman Act when the state has sought to promote competition by authorizing their participation on an equal basis in competitive markets interferes with the state's ability to implement its policies. As the Supreme Court

observed in rejecting a broad application of the state action doctrine in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635 (1992), "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it."

At the same time, the ruling undermines the principle that in enacting the Sherman Act, "Congress mandated competition as the polestar by which all must be guided in ordering their business affairs." *Lafayette*, 435 U.S. at 406. The Supreme Court in *Lafayette* and subsequent decisions has made it clear that this fundamental national policy applies to non-sovereign government participants in competitive markets. It is true that the Court has held that municipalities, unlike private defendants, need not be actively supervised by the state in carrying out a state policy to displace competition. But that holding rested on the assumption that the state action doctrine would be available to the municipality only when it acted pursuant to a clearly articulated state policy. When combined with the protections afforded by the political process, a sufficiently clear articulation of state policy adequately protects the public interest. *Hallie*, 471 U.S. at 46-47. By

contrast, granting a nonsovereign entity a license to violate the federal antitrust laws when the state has merely authorized participation in a competitive market "would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *Lafayette*, 435 U.S. at 415.

CONCLUSION

The district court's order dismissing the case on the ground that the conduct alleged is exempt from the federal antitrust laws under the state action doctrine should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted.

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R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
601 D Street NW
Washington, DC 20530-0001
(202) 514-4510

JOHN F. DALY
Deputy General Counsel for Litigation

JOHN DELACOURT
Chief Antitrust Counsel, Office of Policy Planning

Federal Trade Commission
Washington, DC 20580

June 1, 2004 (corrected)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 5850 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14 point New Century Schoolbook), using WordPerfect 10.

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David Seidman
Attorney for the United States
June 1, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2004, I caused two copies of the Brief for the United States and the Federal Trade Commission as Amici Curiae Urging Reversal in Support of Appellant to be served by commercial carrier for service within 3 calendar days on each of the following:

Harry M. Reasoner
Vinson & Elkins
1001 Fannin Street
Suite 2300 First City Tower
Houston, TX 77002-6760
Counsel for Jackson, Tenn. Hospital Co.

David Marx, Jr.
312-984-7668
McDermott, Will & Emery
227 W. Monroe Street
31st Floor
Chicago, IL 60606-5096
Counsel for West Tenn. Healthcare, Inc.

Kevin M. Jones
McDermott, Will & Emery
227 W. Monroe Street
31st Floor
Chicago, IL 60606-5096
Counsel for Jackson-Madison County General Hospital District

Kevin D. McDonald
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
Counsel for BlueCross BlueShield of Tennessee, Inc.

____
David Seidman