No.

In the Supreme Court of the United States

QUESTIONS PRESENTED

Under the "state action doctrine," the federal antitrust laws do not apply to the anticompetitive conduct of certain subordinate public entities created by a State if the 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

PARTIES TO THE PROCEEDING

The petitioner is the Federal Trade Commission.

Respondents are Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA, Inc., Palmyra Park Hospital LLC, [*] and Hospital Authority of Albany-Dougherty County.

[*] According to records from the Georgia Secretary of State, Palmyra Park Hospital, Inc., which was a party in the court of appeals, was converted on December 15, 2011, from a profit corporation to a limited liability company now known asPalmyra Park Hospital, LLC.

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In the Supreme Court of the United States

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Trade

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

competition. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (Midcal) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)); see Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39-40 (1985) (Hallie). In addition, private actors "'actively supervised' by the State itself" in complying with such a state policy enjoy a similar defense. Midcal, 445 U.S. at 105. This cluster of principles is commonly referred to as the "state action doctrine."

To satisfy the requirement of clear articulation, "[i]t is not enough that . . . anticompetitive conduct is prompted by state action." Midcal, 445 U.S. at 104 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)) (internal quotation marks omitted). Although the state legislature need not "have stated explicitly that it expected [the actor in question] to engage in conduct that would have anticompetitive effects," Hallie, 471 U.S. at 42; see id. at 43-44, a "State's position * * * of mere neutrality respecting the * * * actions challenged as anticompetitive" will not suffice, Community Commc'ns Co. v. City of Boulder, 455 U.S. 40, 55 (1982) (Boulder). Accordingly, this Court has often looked to whether the "statute provided [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" Hallie, 471 U.S. at 42 (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)) (second set of brackets in original). In City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), for example, the Court held that, where a municipal zoning ordinance had been authorized by state legislation (see id. at 370-371 & n.3), the clear-articulation requirement was satisfied because "[t]he very purpose of zoning regulation is to displace unfettered busi-

ness freedom in a manner that regularly has the effect of preventing normal acts of competition." Id. at 373. The Court has described that inquiry as examining whether "suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." Ibid. (quoting Hallie

ernmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." Id. § 31-7-75. Those corporate powers include, inter alia

emergency care, tertiary care, and outpatient services. Complaint ¶¶ 22-23.

The Authority now has no budget, no staff, and no employees. Complaint ¶ 27. It has never countermanded, approved, modified, or otherwise affected PPMH's actions on matters such as setting rates, offering services, making staffing decisions, or managing facilities capacity. Id. ¶ 30. As the Authority's Chairman acknowledged, in reaction to a new board member's concerns about PPMH's high prices, "the Authority really has no authority as far as running the hospital." FTC C.A. Br. 7 (citation omitted); see Complaint ¶ 5. Likewise, the Authority neither controls nor supervises PPHS. Id. ¶¶ 27-31.

Palmyra Medical Center, which was incorporated as Palmyra Park Hospital, Inc. (Palmyra), is located two miles from Memorial and was built in 1971. Before the transaction at issue here, Palmyra was owned by respondent HCA, Inc., one of the largest health care service providers in the United States. Palmyra has 248 beds and, like Memorial, provides general acute care services. Memorial and Palmyra are the only two hospitals in Albany. Complaint ¶¶ 1, 7-8, 25-26.

b. Respondents orchestrated a transaction in which PPHS was to acquire control of Palmyra from HCA, giving PPHS an absolute monopoly in the market for

7-8; see

3. On April 19, 2011, the FTC issued an administrative complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section 5(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(b). Phoebe Putney Health Sys., Inc, Docket No. 9348, 2011 WL 1595863. The complaint charged that respondents' agreement and proposed transaction would substantially lessen competition in the relevant markets, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18. The next day, the FTC and the State of Georgia filed suit against respondents in district court, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and Section 16 of the Clayton Act, 15 U.S.C. 26, seeking to enjoin the transaction pending the FTC's administrative proceedings. On July 15, 2011, at respondents' request, the FTC stayed its administrative proceedings pending conclusion of the court action.

4. The district court denied injunctive relief and dismissed the complaint for failure to state a claim. App., infra , 16a-65a. The court first held that the acquisition of Palmyra, the transfer of control over Palmyra to PPHS, and the long-term lease of Palmyra's assets to PPHS, form a single transaction subject to Section 7 of the Clayton Act. Id . at 26a-32a. The court concluded, however, that the Georgia legislature had clearly articulated an intent to displace competition because "the Au-

(3) required the Authority to operate on a non-profit basis. See id. at 54a-58a.

The district court held that the private respondents' conduct—which it characterized as no more than "seeking" or "influencing" actions by the Authority, App., infra, 47a—was protected by virtue of the Authority's "antitrust immunity" and privileged by the First Amendment under the Noerr-Pennington doctrine, id. at 60a. See id. at 59a-61a; see generally Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The court further concluded that PPHS's conduct would be exempt from antitrust scrutiny because PPHS was acting "as an agent of the political subdivision which has received antitrust immunity." App., infra, 49a; see id. at 61a-64a.

5. The court of appeals affirmed. App., infra, 1a-15a. The court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." Id. at 8a. Like the district court, it viewed "the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS * * * as parts of a single 'acquisition' under the Clayton Act." Id. at 10a n.11. It concluded, however, that the state action doctrine exempted the transaction from antitrust scrutiny. Id. at 8a-14a.

a. The court of appeals explained that "[t]he requirement of a clearly articulated state policy" is satisfied if "anticompetitive conduct is a 'foreseeable result' of [state] legislation." App., infra, 9a. It further explained that, under Eleventh Circuit precedent, a "'foreseeable anticompetitive effect' need not be 'one that or-

dinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" Ibid.

Phoebe, Albany Herald, Dec. 15, 2011, at 1A. PPHS apparently has begun blending management staffs at Memorial and Palmyra (which is now known as Phoebe North), and there have been some staff changes at Phoebe North. See Jennifer Maddox Parks, Phoebe North Blending with Phoebe Putney, Albany Herald, Feb. 17, 2012, at 1A. PPHS has indicated that it plans to centralize additional functions in the coming months, but it has not yet settled on longer-term plans for Phoebe North. Jennifer Maddox Parks, Hospital Board Updated on Phoebe North, Morningside, Albany Herald, Jan. 5, 2012, at 3A.[1]

REASONS FOR GRANTING THE PETITION

The court of appeals found Georgia's grant of general corporate powers to the Authority to justify exempting a merger to monopoly among private parties from all antitrust scrutiny. That was doubly in error. First, the court's reliance on a grant of general corporate powers reflects an entrenched misapplication of this Court's precedents that squarely conflicts with decisions from the Fifth, Sixth, Ninth, and Tenth Circuits. As many other courts have recognized, such commonplace grants of corporate authority reflect only a "State's position

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[1] As the D.C. Circuit recently explained in detail in another merger case arising in a materially identical procedural posture, the events described in the text do not render a case like this moot. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1033-1034 (2008) (opinion of Brown, J.). If this case is remanded for further proceedings, the FTC could ask the district court to enjoin respondents from reducing clinical services at Phoebe North; from allowing Phoebe North's deterioration; and from terminating or transferring employees or physicians practicing there. Such steps would preserve the status quo in a way that would facilitate the implementation of the FTC's final remedial decree, in the event the FTC determines the transaction was unlawful.

* * * of mere neutrality " that cannot support a state action defense. Community Commc'ns Co. v. City of Boulder, 455 U.S. 40, 55 (1982). Moreover, the general corporate powers relied on below closely resemble those an ordinary business corporation would possess, yet no one would suggest that such ordinary powers privilege every private company to engage in anticompetitive conduct. There are tens of thousands of political subdivisions in the Nation to which the court of appeals' corporate-powers logic might apply, and the public hospital context in particular has often led to litigation.

Second, the court of appeals compounded its error by assuming that Georgia's supposed policy authorizing the Authority to engage in anticompetitive conduct amounts to the State's endorsement of what in substance is an unsupervised private merger. Yet such a policy would violate this Court's clear rule that "a State may not confer antitrust immunity on private persons by fiat." FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992). The Court should grant review to correct a line of decisions that erroneously places a large segment of commerce outside the reach of federal competition law.

I. THE ELEVENTH CIRCUIT ERRED, AND DEPARTED FROM THE DECISIONS OF OTHER CIRCUITS, IN TREATING THE GEORGIA LEGISLATURE'S GRANT OF GENERAL CORPORATE POWERS TO A HOSPITAL AUTHORITY AS CLEARLY ARTICULATING A STATE POLICY TO DISPLACE COMPETITION

In holding that the Georgia legislature had clearly articulated a state policy displacing competition, the Eleventh Circuit relied exclusively on the State's grant to the Authority of general corporate powers, such as the powers to acquire and lease out property. The court's analysis misapplies this Court's precedents and conflicts with decisions from four other circuits. Although that approach has been criticized by courts and commentators alike, it is firmly entrenched in the Eleventh Circuit. This Court's review is necessary to correct

(1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978).

The mere grant to a political subdivision of general powers to act cannot provide the requisite "clear articulation" of a state policy to displace competition. That is particularly clear from this Court's decision in Boulder, which addressed the applicability of the state action doctrine to a city ordinance that prevented a cable television service provider from expanding. 455 U.S. at 45-46. The ordinance was enacted pursuant to Colorado's constitutional "home rule" delegation of authority, under which a city may exercise "the full right of self-government in both local and municipal matters." Id. at 43-44 (citation omitted).

Boulder argued that "it may be inferred, from the authority given to Boulder to operate in a particular area * * * that the legislature contemplated the kind of action complained of." Boulder, 455 U.S. at 55 (internal quotation marks, emphasis, and citation omitted). This Court rejected that contention, explaining that "plainly 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." Ibid. The Court further explained that "[a]cceptance of such a 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.'" Id. at 56. For purposes of the state action doctrine, the general powers of self-governance conferred on the City of Boulder are indistinguishable from

the general corporate powers to buy and lease property conferred on local hospital authorities in Georgia.

By contrast, each of the cases in which this Court has found the state action doctrine applicable has involved a regulatory structure or affirmatively expressed state policy calculated to order a particular market by means other than free-market competition. In City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), for example, the Court considered a challenge to an allegedly anticompetitive local zoning ordinance that had been enacted pursuant to a clear grant of authority from the state legislature. See *id.* at 370-371 n.3. The Court explained that federal competition law would not apply 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.* at 373.

Similarly in *Hallie*, the plaintiff townships challenged the defendant city's policy of providing sewage treatment services only to lands that agreed to be annexed to the city and to use the city's sewage collection and transportation services. 471 U.S. at 36-37. The city relied on state-law provisions that authorized it to regulate the boundaries of its service area and to refuse sewage treatment services to unannexed areas. See *id.* at 41. This Court held that the city's actions were not subject to federal competition law because the State had articulated a policy of allocating sewage services through governmental regulation and the politics of annexation rather than through market forces. The Court analogized the case to *Orrin W. Fox*, in which the relevant state statute likewise "provided [a] regulatory structure that inherently 'displace[d] unfettered busi-

ness freedom.'" Id. at 42 (quoting 439 U.S. at 109) (second set of brackets in original).

The state action doctrine thus applies to a political subdivision only when it acts pursuant to an affirmatively expressed state public policy or regulatory structure—in particular, a public policy or regulatory structure that "inherently," Hallie, 471 U.S. at 42, by "design[]," Orrin W. Fox, 439 U.S. at 109, or "necessarily," Omni Outdoor, 499 U.S. at 373, would be incompatible with, or would depart significantly from, federal law's "assumption that competition is the best method of allocating resources," National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978). By contrast, the State's "mere neutrality" reflects no affirmative expression at all (let alone one that inherently departs from normal competition principles), and therefore will not support a state action defense. Boulder, 455 U.S. at 55. Grants of general corporate powers belong to the latter category.

2. The court of appeals misapplied those precedents in treating the Georgia legislature's grant of general corporate powers to the Authority as an affirmatively expressed state policy of creating hospital monopolies and transferring them into private hands. The decision below adds to a line of incorrect Eleventh Circuit decisions on this important and recurring aspect of the state action doctrine.

a. The Hospital Authorities Law does not reflect a "clearly articulated and affirmatively expressed" policy of "displac[ing] competition," Hallie, 471 U.S. at 39 (citations omitted), and authorizing hospital mergers to monopoly. It is particularly clear that Georgia has no affirmative policy of using local hospital authorities to

facilitate the acquisition of monopoly power by private entities, as occurred here.

As an initial matter, the Georgia statute is silent (or as the Court put it in Boulder

The court of appeals stated that the Hospital Authorities Law "evidently contemplates anticompetitive effects" because the "legislature granted powers of impressive breadth to the hospital authorities." App., *infra*, 11a. The court placed particular emphasis on local authorities' powers to acquire and lease out property, including hospitals. See *id.* at 12a (citing Ga. Code Ann.

subject to the same legal restrictions as a private company engaged in the same line of business. See, e.g., Kay Elec. Coop. v. City of Newkirk, 647 F.3d 1039, 1041 (10th Cir. 2011) ("When a city acts as a market participant it generally has to play by the same rules as everyone else."), cert. denied, 132 S. Ct. 1107 (2012). The court of appeals' contrary reasoning is inconsistent with this Court's repeated holdings that a "clearly articulated and affirmatively expressed" state policy displacing competition, rather than mere "neutrality" as between competitive and anticompetitive conduct, is necessary to trigger the state action doctrine.[4]

b. The court of appeals reached an incorrect result because it applied longstanding circuit precedent that

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[4] The court of appeals also suggested that the Hospital Authorities Law necessarily contemplates anticompetitive acquisitions because "[t]he legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition." App., infra, 13a. The court's reasoning was faulty. In areas of the State served only by a single hospital, the acquisition of that hospital by the local authority would not typically be anticompetitive. See 1A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 224e, at 126 (3d ed. 2006) ("[S]ubstitution of one monopolist for another is not an antitrust violation."). And in an area served by many hospitals, a merger may not be anticompetitive if it does not "result[] in a significant increase in the concentration of firms in th[e] market." United States

misinterprets this Court's cases and that leading commentators have rightly criticized.

Relying on this Court's decision in *Hallie*, the court below held that the state action doctrine applies if "anticompetitive conduct is a 'foreseeable result' of the [state] legislation." App., *infra*, 9a (quoting *Hallie*, 471 U.S. at 42). The court further explained that, under Eleventh Circuit precedent, "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.' The clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" Ibid. (brackets in original) (citing FTC v. Hospital Bd. of Dirs. of Lee County, 38 F.3d 1184, 1188, 1190-1191 (11th Cir. 1994)).

The Eleventh Circuit has consistently found it "foreseeable" in this sense that ordinary corporate powers will be put to anticompetitive ends. See App. *infra*, 12a ("[I]n granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects."); *Bankers Ins. Co.* v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1298 (1998) (finding it "foreseeable that conferring * * * discretion on the [defendant public insurance association] to select policy servicing services could result in potentially anticompetitive" conduct, stn. tTy a ialegu(59(e)3-4(tly(59y ante)37[(c)-4.8ompetitiverpe-)]T

[such as an alleged group boycott] through its peer review activities.") (internal quotation marks and citation

articulation requirement will be satisfied if "anticompetitive effects logically would result from" the powers conferred by state law, or if the state regulatory regime "inherently" displaces competition. Hallie , 471 U.S. at 42; seeOmni Outdoor , 499 U.S. at 373 (applying the state action doctrine because the regulatory scheme at issue "necessarily protects * * * against some competi-

cause it would "compel * * * result[s] that the States do not intend but for which they are held to account." Ticor, 504 U.S. at 636; see id. at 632, 635 ("Continued

health services," or "the statutory license for hospitals to develop confidential marketing strategies." Id. at 233 (internal quotation marks omitted). The en banc Fifth Circuit unanimously reversed. It explained that, although state legislatures need not utilize any particular linguistic formula ("words federally dictated") for the state action doctrine to apply, the court would "not infer such a policy to displace competition from naked grants of authority." Id. at 236. By way of analogy, the Fifth

public record sales on relinquishment of the right to re-sell the records." Id. at 455. The court accepted the proposition that state law permitted the registers to impose such restraints. Id. at 456. But it explained that such a general authorization was insufficient to establish a state action defense because state law "leaves the counties free to provide duplicate title records * * * without mandating that the purchasers give up their right to re-sell the [records]," showing that "the Legislature is neutral toward the anticompetitive condition these registers have imposed." Ibid.

The Ninth Circuit has similarly refused to recognize a state action defense based on statutes conveying general corporate powers. In Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992), the court addressed an allegation that a public hospital district was using its monopoly in perinatal services to monopolize markets in non-perinatal services through tying arrangements. The court acknowledged that "[l]ocal hospital districts have been granted the powers needed to engage in the hospital business by the [S]tate." Id. at 402 n.11. But that grant of authority, it explained, "has not displaced competition" because the State "has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors." Id. at 402. Noting that state law otherwise contemplated health-care competition, the court concluded 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. at 403.

Most recently, the Tenth Circuit—citing Hammond and Antelope Valley approvingly—concluded that "a [S]tate's grant of a traditional corporate charter to a municipality isn't enough to make the municipality's subsequent anticompetitive conduct foreseeable" because "simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market." Kay Elec., 647 F.3d at 1043 (Gorsuch, J.). In that case, a city allegedly conditioned its provision of sewage services (in which it held a monopoly) on acceptance of its offer to provide electricity services as well. Id. at 1041. When a competing electricity provider challenged the city's demand as unlawful tying and attempted monopolization, the city asserted a state action defense predicated on state-law provisions that "authorize[d] municipalities to do business" and "allow[ed] municipalities to run utilities." Id. at 1041, 1045. The court of appeals rejected that argument, finding it "well settled that general municipal charters are never enough to trigger Parker's protections." Id. at 1045.

2. There is no significant chance that the current

state action doctrine, the court of appeals refused to do so. See App., infra, 12a-14a.

ment and control" over the arrangement at issue here is evident in two related ways.

First, the terms under which ownership and control of Palmyra were transferred were negotiated entirely by private actors (PPHS and HCA). See p. 7, *supra*. Although the Authority was the nominal purchaser of Palmyra, its actual role in the transaction was akin to that of a notary public, certifying to the formalities of the purchase but playing no role in the fashioning of its terms. The transaction was in substance a simple transfer of Palmyra from one private entity to another. Cf. *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2209 (2010) (noting a preference for "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate").

Second, there is no reasonable likelihood that any governmental entity acting on behalf of the State would meaningfully supervise PPHS's operation of Palmyra after the transfer of control has been completed. See p. 6, *supra* (noting the statement of the Authority's Chairman that "the Authority really has no authority as far as running the hospital") (citation omitted). State law thus provides no alternative mechanism for ensuring that PPHS's acquisition of monopoly power will serve whatever purpose the State might have had in supposedly exempting certain hospital mergers from federal competition law. In the absence of such a state-law alterna-

Both courts below misunderstood this line of argument. The district court thought the Noerr-Pennington doctrine protected the private respondents' conduct. App.,

transaction here appears unequaled in other circuits' cases, there is no apparent division of authority among lower courts on the second question presented. Nonetheless, the court of appeals' decision is in conflict with this Court's precedents. In addition, the Court should not lightly conclude that the State intended to provide respondents a naked exemption from federal antitrust liability if conferral of such an exemption is beyond the State's power. Cf. *Ticor*, 504 U.S. at 636 ("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 that reason, the question whether Georgia's legislature intended to validate this transaction should be considered in tandem with the question whether the legislature could lawfully do so.

III. THE CASE IS A GOOD VEHICLE FOR ADDRESSING ISSUES OF RECURRING AND NATIONAL IMPORTANCE

A. As the abundance of cases involving hospitals suggests, the application of the state action doctrine to public hospitals is a recurring issue salient to communities across the Nation. See App., *infra*, 1a-15a (hospital merger); *Lee County*, *supra* (same); *Patrick* v. *Burget*, 486 U.S. 94 (1988) (hospital privileges determination); *Crosby*, *supra* (same); *Bolt*, *supra* (same); *Hammond*, *supra* (hospital service monopolization); *Antelope Valley*, *supra* (same); *Central Florida*, *supra* (same).

Ensuring robust competition among hospitals is an important part of the response to the fiscal challenges presented by health-care costs. Inpatient hospital care is one of two "key drivers of recent increases in [health-care] expenditures." See FTC & U.S. Dep't of Justice, Improving Health Care: A Dose of Competition 3 (July

2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf. In 2002, for example, nearly half a trillion dollars was spent on inpatient hospital care. Id. at 2. The federal antitrust agencies have extensively researched health-care markets and have concluded,

are the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers"). The political subdivisions of States number in the tens of thousands, and they include more than 35,000 "special district" entities like the Authority,

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§§ 155.01 et seq. (West) (hospitals); Ga. Code Ann. §§ 31-7-70 et seq. (hospitals); Haw. Rev. Stat. Ann. §§ 46-15.1 to -15.2 (LexisNexis) (housing); Idaho Code Ann. §§ 31-4301 et seq. (recreation districts); 65 Ill. Comp. Stat. Ann. 5/11-22-1 et seq. (West) (hospitals); Ind. Code Ann. §§ 16-22-1-1 et seq.

which provide citizens vital services such as health-care, education, water, electricity, and sewage treatment. See U.S. Gov't Accountability Office, State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years: Report to Congressional Committees 6 (2008), http://www.gao.gov/new.items/d08317.pdf. The extent to which these entities can operate in disregard of federal competition law is profoundly important to the citizens who use those services, as well as to the States, which are entitled to know the consequences of conferring corporate powers on a public entity.

B. For at least three reasons, this case is a particularly attractive vehicle for addressing the questions presented. First, there are no disputed facts or unsettled jurisdictional issues because the case arises from the grant of a motion to dismiss that was affirmed by the court of appeals. Second, the case is representative of a frequently litigated fact pattern in this field, since public hospital authorities have often asserted state action defenses to federal antitrust suits. See p. 30, *supra*. Third, if respondents' state action defense fails, the FTC will have a strong case on the merits that the merger to monopoly here is anticompetitive. The case thus presents the state action issues in a context where they are likely to be outcome-determinative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D.C. Docket No. 1:11-cv-00058-WLS

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

STATE OF GEORGIA, PLAINTIFF

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS-

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I.

A.

In 1941, the Georgia legislature enacted the Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at O.C.G.A. § 31-7-70 .). That statute creates a hospital authority, "a public body corporate and politic," for each city and county, O.C.G.A. § 31-7-72(a), or for multiple cities or counties combined, § 31-7-72(d). The hospital authority does not become operative, however, unless the governing body of the city or county determines that the authority is needed for the delivery of hospital services. § 31-7-72(a). Once such need is determined, the governing body appoints between five and nine individuals to manage the authority.

Each authority is given broad powers to meet the public health needs of its community. Among those specified by the statute are the powers to "operate projects," § 31-7-75(4), which include hospitals, clinics, nursing homes, and other public health facilities, § 31-7-71(5);[1] to "acquire by purchase, lease, or otherwise . . . projects," § 31-7-75(4); to "construct, reconstruct, improve, alter, and repair projects," § 31-7-75(5); to "lease . . . for operation by others any project," § 31-7-75(7); to "establish rates and charges for the services and use of the facilities of the authority," § 31-7-75(10); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," § 31-7-75(14); and to "form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care

[1] An authority may not, however, "operate or construct any project for profit." O.C.G.A. § 31-7-77.

B.[3]

In 1941, the City of Albany and Dougherty County (in which the City is located) determined the need for a hospital authority in Dougherty County and established the Hospital Authority of Albany—Dougherty County (the "Authority"). After it was formed, the Authority acquired Phoebe Putney Memorial Hospital in Albany ("Memorial"). Until 1990, the Authority operated Memorial. That year, however, the Authority exercised its § 31-7-75(7) power to lease the facility for operation by others; to such end, it formed two nonprofit corporations, Phoebe Putney Health System, Inc. ("PPHS") and, as a PPHS subsidiary, Phoebe Putney Memorial Hospital, Inc. ("PPMH"), and leased Memorial to PPMH.[4] Since 1990, PPMH has been operating the hospital.

PPMH's lease gives it the right to set the prices for the services Memorial provides. In exercising such right, however, PPMH is subject to the Hospital Authorities Law's proscription against charging prices greater than necessary to cover the cost of the services and provide reasonable reserves. § 31-7-77.

Memorial consists of 443 beds and offers, among other things, a full range of inpatient general acute-care services. Memorial's (and thus PPHS's and PPMH's) only real competitor is Palmyra Park Hospital, Inc.

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[3] The facts set out in subpart B are as reflected in the complaint in this case and are not materially disputed. In reciting the provisions of the Hospital Authorities Law we took judicial notice of such provisions.

[4] The Authority's contractual arrangement with PPMH and PPHS provides that, upon the termination or expiration of the lease to PPMH, both PPMH and PPHS are to be dissolved and their assets are to revert to the Authority.

Palmyra and subsequent lease to PPHS, or a PPHS subsidiary, would substantially lessen competition or tend to create a monopoly in the inpatient general acute-care hospital services market in Dougherty County and surrounding areas (the "relevant market") in violation of section 7 of the Clayton Act, 15 U.S.C. § 18. 15 U.S.C. § 21(a) (granting the Commission authority to enforce section 7 of the Clayton Act). Section 7 provides that "no person subject to the jurisdiction of the [Commission] shall acquire . . . the assets of another . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a

missi§ 18.

[section 7] . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act."). In order to demonstrate its likelihood of prevailing on the merits,[9] the Commission alleged that the Authority's purchase of Palmyra would create a monopoly in the relevant market.

Plaintiff," .; we are not, however, "bound to accept as true a legal conclusion couched as a factual allegation," . , 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (quoting , 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986)).

We agree with the Commission that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly. The question, then, is whether this anticompetitive conduct is immunized by the state-action doctrine.

A.

The doctrine of state-action immunity protects the states from liability under the federal antitrust laws. In , 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the Supreme Court held that the Sherman Act did not subject the states to liability for anticompetitive conduct within their jurisdiction. at 352, 63 S. Ct. at 314. Relying on principles of federalism, the Court refused to find in the antitrust laws "an unexpressed purpose to nullify a state's control over its officers and agents." . at 351, 63 S. Ct. at 313.

The same protection does not, however, extend automatically to municipalities or political subdivisions of the states. Political subdivisions, as the Supreme Court has explained, "are not themselves sovereign; they do not receive all the federal deference of the States that create them." , 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978) (plurality opinion). But because political subdivisions are "instrumentalities of the State," . at 413,

98 S. Ct. at 1137 (quoting
, 109 U.S. 285, 287, 3 S. Ct. 211, 213, 27 L. Ed. 936 (1883)), they may under some circumstances be entitled to state-action immunity. Thus, a political subdivision, like the Authority,[10] enjoys state-action immunity if it shows that, "through statutes, the state generally authorizes [it] to perform the challenged action" and that, "through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." , 38 F.3d 1184, 1187-88 (11th Cir. 1994) (citing , 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)).

The requirement of a clearly articulated state policy, as the Supreme Court explained in , does not require the state legislature to "expressly state in a statutes or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. at 43, 105 S. Ct. at 1719. Instead, it is enough that such anticompetitive conduct is a "foreseeable result" of the legislation. . at 42, S. Ct. at 1718. And, as we explained in , 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." 38 F.3d at 1188. The clear-articulation standard "require[s] only that the

B.

The Authority's immunity therefore turns on whether the state has authorized the Authority's acquisition[11] of Palmyra and, in doing so, clearly articulated a policy to displace competition.[12] , 471 U.S. at 40, 105 S. Ct. at 1717. That standard, as explained above, is satisfied as long as anticompetitive consequences were a foreseeable result of the statute autho-

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[11] For purposes of our state-action anal

rizing the Authority's conduct. We conclude that in this case that standard is met.

The Hospital Authorities Law, O.C.G.A. § 31-7-70 , evidently contemplates anticompetitive effects, including just the sort of anticompetitive conduct challenged here. Through that law, the Georgia legislature granted powers of impressive breadth to the hospital authorities. Those powers include the powers to "operate projects," . § 31-7-75(4), which include hospitals, . § 31-7-71(5); to "construct, reconstruct, improve, alter, and repair projects," . § 31-7-75(5); to "establish rates and charges for the services and use of the facilities of the authority," § 31-7-75(10); to "sue and be sued," § 31-7-75(1); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," . § 31-7-75(14); and to "borrow money for any corporate purpose," § 31-7-75(17).

The statute, indeed, goes further. It also authorizes more generally to "make and execute contracts and other instruments necessary to exercise the[ir] powers," . § 31-7-75(3), and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," . § 31-7-75(21). To fulfill its mission to promote public health, the Authority can in effect deploy any power a private corporation could in its stead. And it enjoys powers that private corporations do not. It may "acquire by the exercise of the right of eminent domain any property essential to [its] purposes." . § 31-7-75(12). And although the Authority has no power to tax, § 31-7-84(a), the statute authorizes local governments to impose a tax to cover some of

the Authority's expenses, . § 31-7-84(a)-(b), freeing the Authority to price its health services below cost.

Most important in this case, however, is the Georgia legislature's grant of the power to "acquire by purchase, lease, or otherwise . . . projects," . § 31-7-75(4), which, again, include hospitals, § 31-7-71(5), and the

tal acquisitions by the authorities. It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition. We therefore conclude that, through the Hospital Authorities Law, the Georgia legislature clearly articulated a policy authorizing the displacement of competition.

The Commission also points to a 1993 amendment to the Hospital Authorities Law. Act of Apr. 13, 1993, sec. 1, § 31-7-72.1, 1993 Ga. Laws 1020, 1020-22 (codified at O.C.G.A. § 31-7-72.1). That amendment allows mergers between two hospital authorities when they exist within a single, high-population county, O.C.G.A. §§ 31-7-72.1(a), 31-7-73(a), and declares that, in under-

What matters, though, is whether anticompetitive effects were anticipated "at the time the legislation was enacted." , 38 F.3d at 1192. At that time—when the original Hospital Authorities Law created the authorities and empowered them to acquire hospitals, §§ 3, 5, 1941 Ga. Laws at 242-44—anticompetitive effects were indeed anticipated. The views of a much later legislature do not change that fact. , , 513 U.S. 64, 77 n.6, 115 S. Ct. 464, 471 n.6, 130 L. Ed. 2d 372 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight. . . . "); , 392 U.S. 157, 170, 88 S. Ct. 1994, 2001, 20 L. Ed. 2d 1001 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance." (internal quotation marks omitted)). We accordingly conclude that the acquisition of Palmyra and its subsequent operation at the Authority's behest by PPHS are authorized pursuant to a clearly articulated state policy to displace competition.[13] The execution of the plan, consequently, is protected by state-action.

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[13] The Commission's argument that no such policy has been articulated also emphasizes that the Authority's acquisition of Palmyra was engineered by PPHS, with the Authority approving the transaction after little or no deliberation, and that it leaves PPHS in control of Palmyra. We reject the suggestion that such private influence, or such private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable. This argument

IV.

For the reasons stated in part III, , the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Case No. 1:11-cv-58 (WLS)

FEDERAL TRADE COMMISSION
AND THE STATE OF GEORGIA, PLAINTIFFS

PHOEBE PUTNEY HEALTH SYSTEM INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., PALMYRA PARK HOSPITAL INC., AND HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, DEFENDANTS

Filed: June 27, 2011

ORDER

Before the Court are Plaintiffs Federal Trade Commission's (FTC) and State of Georgia's Motion for Preliminary Injunction (hereinafter "PI Motion") (Doc. 5); Hospital Authority of Albany-Dougherty County's ("the Authority")[1] Motion to Dismiss or Alternatively, for

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[1] The Authority, a hospital authority organized and existing under the Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70, ., owns Phoebe Putney Memorial Hospital, the hospital currently leased and

Summary Judgment and to Vacate the Temporary Restraining Order ("TRO") (Doc. 45); HCA, Inc.'s ("HCA") and Palmyra Park Hospital, Inc.'s ("Palmyra")[2] Cross-Motion to Dismiss or Alternatively, for Summary Judgment and to Dissolve the TRO (Doc. 46); and Defendants Phoebe Putney Health System Inc.'s ("PPHS"), Phoebe Putney Memorial Hospital, Inc.'s ("PPMH"), and

PROCEDURAL and RELEVANT FACTUAL BACKGROUND

Pursuant to section 13(b) of the Federal Trade Commission Act (hereinafter "FTCA"), 15 U.S.C. § 53(b),[5] and section 16 of the Clayton Act, . § 26,[6] on April 21, 2011, Plaintiffs commenced this suit and

[5] Section 13(b) of the FTCA reads, in pertinent part:

> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . . "

FTCA § 13(b), 15 U.S.C. § 53(b).

[6] Section 16 of the Clayton Act permits

> [a]ny person, firm, corporation, or association . . . to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . , when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon . . . a showing that the danger of irreparable loss or damage is immediate, ...

Clayton Act § 16, 15 U.S.C. § 26.

filed a Motion for a Temporary Restraining Order (TRO) and PI Motion, which is pending before the Court, seeking to temporarily as well as preliminarily enjoin Defendants, including their divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from consummating the completion of the alleged acquisition of Palmyra by Phoebe Putney. (Doc. 2 at 1-2; Doc. 5 at 1-2). They base their Complaint on the following chronology of facts, which they, in turn, assert as grounds for the Court's grant of their PI Motion:

In July 2010, Joel Wernick, PPHS's President and CEO, authorized Robert Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney. (Doc. 2 ¶ 32). According to the Complaint, Baudino began negotiations on behalf of PPHS to acquire Palmyra in August 2010. ( ). HCA's significant cash offer demand, however, made it difficult for PPHS to find an independent investment bank to issue a fairness opinion opining that the price required by HCA for Palmyra was fair. Consequently, Baudino proposed that the transaction be structured so that the Authority would a7 Tc.0638 Tw
also avoid the risk of antitrust enforcement, as demanded by HCA. (¶ 37). As proposed, the Authority would simply buy Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. (¶ 38). Once the Authority obtained title, it would lease 638myra to PPHS for $1.00 per year for forty years on terms similar to the 1990 Lease between PPMH, Inc. and the Authority. ( ).

On October 21, 2010, Wernick and Tommy Chambless, PPHS's general counsel, held a thirty-minute informa-

therefore necessary and appropriate in this case to prevent competitive harm during the pendency of the FTC administrative proceedings. (Doc. 7 at 6-7).

In consideration of the foregoing factual allegations and assertions, the Court granted Plaintiffs' Motion for TRO (Doc. 4) on April 22, 2011 (Doc. 9).[7] Approximately a month thereafter, Defendan

trine indisputably immunizes their conduct from antitrust scrutiny and thereby moots Plaintiffs' PI Motion and require its denial. (Docs. 45-46, 53). To Defendants, the Authority's acquisition of Palmyra as documented in the Asset Purchase Agreement is state action that is immune from the federal antitrust laws. (Doc. 45-1 at 19).

After a day-long hearing on June 13, 2011, on Plaintiffs' PI Motion and Defendants' Motions to Dismiss, said Motions are left pending for the Court to decide. The Parties have fully briefed the issues surrounding Plaintiffs' request for preliminary injunctive relief and Defendants' request for dismissal—namely, state action antitrust immunity. Before assessing the substance of the Parties' arguments in the context of the relevant law, the Court first must resolve a preliminary dispute between the Parties concerning the scope of issues for the Court's review under section 7 of the Clayton Act.

Palmyra—and if the Court finds that state action is inapplicable, to Plaintiffs' PI Motion (Doc. 5).

DISCUSSION

I. Defendants' Motions to Dismiss

a. Standard of Review

In light of Defendants' asserted antitrust immunity, Defendants' Motions to Dismiss are brought pursuant to Fed. R. Civ. P. 12(b)(6)[9] for what Defendants contend is Plaintiffs' failure to state claims against Defendants for violations of the Clayton Act and FTCA. (Docs. 45, 46, 53). As a defense to a claim for relief in any pleading, Rule 12(b)(6) may be raised as a motion to dismiss. Fed. R. Civ. P. 12(b)(6). Such a motion should not be granted unless the plaintiff fails to plead enough facts to state a claim to relief that is plausible, and not merely just conceivable, on its face. . , 550 U.S. 544, 570 (2007). The recent Supreme Court decision of reaffirmed the pleading standards enunciated in . 129 S. Ct. 1937, 1949-54 (2009). There, the Supreme Court instructed that while on a motion to dismiss "a court must accept as true all of the allegations contained in a complaint," this principle "is inapplicable to legal conclusions," which "must be

[9] Defendants also move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, seemingly asserting that because the state action doctrine immunizes Defendants from antitrust laws, the Court lacks federal subject matter jurisdiction to hear Plaintiffs' Complaint. Defendants' Motions to Dismiss, however, are more

supported by factual allegations." at 1949-50 (citing , 550 U.S. at 555, for the proposition that courts "are not bound to accept as true a legal conclusion couched as a factual allegation" in a complaint).

In other words, "[a] motion to dismiss is granted only

b. The Meaning and Scope of the Alleged Transaction

The Parties differ as to the events constituting the "transaction" that Plaintiffs contend violate antitrust laws under section 7 of the Clayton Act. As a result, the parameters of the conduct to which the state action immunity exception may apply are blurred. Plaintiffs allege that the acquisition includes three stages: (1) the Authority's purchase of Palmyra's assets from HCA using PPHS's money, (2) the Authority's immediate provision of control of Palmyra to Phoebe Putney, specifically

regarding the Management Agreement as part of the "acquisition" subject to antitrust review because it is unexecuted. (, Doc. 47-2 at 14).

Section 7 of the Clayton Act provides, in pertinent part, "no person subject to the jurisdiction of the [FTC] shall acquire the whole or any part of the assets of another person . . . , where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[10] 15 U.S.C. § 18. "[W]hen it prohibited the acquisition of the whole or any part of the assets of another corporation," "Congress was painting with a broad brush. . . . "

584 F. Supp. 1134, 1137 (S.D

, 399 F. Supp. 1025, 1027 (S.D. Cal. 1975). Accordingly, courts have applied the term "acquisition" to a wide variety of transactions, including putative and ongoing leases. , , 790 F.2d at 1047-48 (indicating that lease of property by private parties, as approved by city and urban development corporation, constituted "acquisition" under Clayton Act); , 584 F. Supp. at 1137-38 (construing operating lease as acquisition within reach of section 7, as lessee of operating lease acquires property rights of possession and use in leased assets); , 399 F. Supp. at 1028-1030 (holding that despite abandonment of agreement for acquisition between par-

mated, all Dougherty County hospital competition will cease and Phoebe Putney will be able to control Palmyra assets pursuant to the Management Agreement.

Following the consummation of the sale to the Authority and execution of the Management Agreement between the Authority and PPHS, any additional steps that any Defendant takes such as the execution of the lease agreement—no matter the number of months and steps required before such a lease may be created and executed—are in furtherance of the alleged merger to monopoly and thus, the transaction. In fact, if it were not for the Court's grant of Plaintiffs' Motion for TRO to block the acquisition, Defendants would have proceeded with their plans to consummate the acquisition; execute the Management Agreement for Phoebe Putney's maintenance and operation of Palmyra's assets; and begin steps to negotiate, draft, and execute the purported lease of Palmyra to Phoebe Putney.

In effect, therefore, along with the acquisition of Palmyra by the Authority, the lease, which will follow the execution of the Management Agreement under which Phoebe Putney will immediately control Palmyra assets, makes possible the alleged harm of the acquisition on hospital competition in the relevant market of Albany, Dougherty County, Georgia. The inclusion of the lease stage in the Court's review of the "acquisition" is consistent with the court's finding in that a terminated acquisition agreement, which was never executed, fell within the purview of section 7. It also comports with 's decision to implicitly construe a lease granted to private parties as an acquisition under the Clayton Act. It is the mere alleged plausibility that Phoebe Putney could achieve control of the decision

making processes of Palmyra, its only competitor—even

For all of the above reasons, the Court similarly finds no reason to exclude the Management Agreement from the purview of the alleged "transaction," as the Authority's approval of the Management Agreement represents the "transfer of a sufficient part of the bundle of legal rights and privileges [in Palmyra] from [the Authority, the owner, as lessor,] to [Phoebe Putney, as lessee,] to give the transfer economic significance and the prescribed adverse 'effect'" under the Clayton Act. , 584 F. Supp. at 1137 (quoting , 189 F. Supp. at 181-82). These facts, coupled with the approximately $200 million Phoebe Putney has guaranteed for the transaction, remove the lease of Palmyra to PPHS by the Authority from the speculative realm into the realistic. Accepting the truth of these allegations, as the Court is required to do at this pleading stage, the Court rejects Defendants' narrow view of the breadth of section 7 that excludes the purported second and third stages of the transaction.

c. State Action Immunity

Having determined the scope of the transaction that is subject to the Court's review, the Court is left to resolve the issue of Defendants' asserted entitlement to state action immunity. In their Motions to Dismiss, all six Defendants argue that the Authority's acquisition of Palmyra, as well as any subsequent lease of Palmyra to Phoebe by the Authority, triggers state action; thereby immunizes the subject transaction from antitrust laws; and requires the dismissal of Plaintiffs' Complaint, the denial of Plaintiffs' PI Motion, and an order vacating the TRO. (Doc. 45-1 at 4, 7, 13, 17). Defendants base this proposition on the proposed transaction's satisfaction of

all three elements of the state action immunity doctrine.
((analogizing and relying on

action immunity doctrine by extension, and Phoebe Putney, as a non-profit affiliated with the Authority, does not require active supervision by the state. (, Doc. 53-1 at 14). Defendants

(Doc. 53-1 at 17). Thus, it maintains that "there is no cause of action involving a private actor" in this case. ( ). According to Phoebe Putney, PPHS has neither the ability nor the incentive to engage in actions for its private benefit given that it must function as a non-profit and in a way that furthers state policy and that all Palmyra assets, like the current ownership of all PPMH assets, will be owned by the Authority. (at 19). Thus, active supervision of Phoebe Putney by the Authority is unnecessary to conclude that state action applies in this case, argues Phoebe Putney. (at 18-19 ("PPMH's interests are completely aligned with, and controlled by, the interests of the Authority and the State.")).

And even if active supervision does apply, Phoebe Putney argues that "the existing longstanding lease terms between PPMH and the Authority, plus the Authority's recent resolution to lease Palmyra only if it contains certain terms that clearly constitute active supervision under the relevant law, is sufficient." (at 20). Lastly, Phoebe Putney as well as HCA, Palmyra, and the Authority argue that under the doctrine, the only "conduct" alleged against Phoebe Putney is legally and constitutionally protected petitioning of a government entity under the First Amendment of the U.S. Constitution. (Doc. 53 at 2; Doc. 53-1 at 12 to 13; Doc. 45-1 at 6, 26 to 27, 35).

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those arguments given its discussion of the application of the relevant state action tests to each Defendant. Part I.c.ii. The Court also must note that non-profit entities are subject to section 7 and thus, FTC jurisdiction. . ., 938 F.2d at 1215, 1216 (explaining congressional intent for FTC's expansive and vigorous enforcement of section 7 of Clayton Act, regardless of distinction between type of corporation); note 10.

In response, Plaintiffs argue that the state action defense to antitrust enforcement cannot be invoked by Defendants for several reasons. First, according to Plaintiffs, Defendants have failed to discuss or even mention the standards of review applicable to a motion to dismiss, as they fail to construe all facts in a light most favorable to Plaintiffs.[13] (Doc. 61 at 9-10, 17). Second, Plaintiffs state that the transaction is an undisguised attempt to apply "a cloak of state involvement to a de facto merger to monopoly," thereby eliminating Defendants' ability to immunize their action from antitrust scrutiny. (. at 17, 20; Doc. 62 at 19).

As to the Authority, Plaintiffs contend that although the Authority is a political subdivision of state, Georgia Hospital Authorities Law does not authorize the usurpation of the decision and supervision powers of an authority by private actors for the private actor's benefit and without meaningful oversight by an authority. (Doc. 62 at 8-9, 12, 18-19; Doc. 7 at 21, 22-23). Thus, Plaintiffs maintain that the Authority cannot be considered to have acted pursuant to state policy authorized by the state legislature, and the displacement of private competition by Palmyra's sale to the Authority and subsequent lease by Phoebe Putney cannot be considered to be reasonably foreseeable by the Georgia legislature. (Doc. 7 at 21-23 (distinguishing , 38 F.3d

[13] Plaintiffs also state that Defendants do not apply the correct standard of review for summary judgment because Plaintiffs fail to raise undisputed material facts. However, as previously noted, the Court does not resolve Defendants' Motions to Dismiss as ones for summary judgment but as ones to dismiss. note 8. Thus, the Court does not need to apply the standards applicable at the summary judgment stage and thus, declines to consider Plaintiffs' allegations and Defendants' arguments within the context of summary judgment.

1184, and ., 995 F.2d 1033, 1040-41 (11th Cir. 1993), because law at issue in was "special act[ ]" of Florida Legislature that applied to that specific county's health system, and health care authorities act in expressly exempted authorities whose exercise of their authorized powers resulted in anticompetitive activities)).

As to Phoebe Putney, Plaintiffs contest the ability of the Phoebe entities, as private parties, to show that (1) the challenged transaction was clearly articulated and affirmatively expressed as state policy, and (2) that such policy was actively supervised by the state, so as to receive state action immunity. (Doc. 7 at 21-24; Doc. 61 at 20). They base this contention on the role of Phoebe Putney, and not the Authority, as the effective decision maker in planning, funding, and executing the transaction. (Doc. 7 at 7). In support thereof, Plaintiffs highlight the Authority's lack of meaningful review of the acquisition, failure to acknowledge the transaction until shortly before the day of its approval, and failure to ask questions during the presentation of the transaction. (at 8-12). Plaintiffs further note that the Resolutions for the transaction for the Authority's approval were prepared by Phoebe Putney for the Authority members' signatures. Such conduct by Phoebe Putney, according to Plaintiffs, was beyond the type of state action that may qualify for antitrust immunity. (Doc. 62 at 9). As to HCA and Palmyra, they contend that a mere con-

man Act as applicable to the anticompetitive conduct of a state acting through its legislature—specifically a marketing program adopted for the 1940 raisin crop by the California Director of Agriculture. at 350-51. The marketing program was adopted pursuant to the California Agricultural Prorate Act, which authorized state officials to establish marketing programs of agricultural commodities in the state to restrict competition among growers and to maintain prices in the distribution of their commodities to packers. . at 346.

Although the establishment of the challenged marketing program, approved by the Prorate Advisory Commission, was initially petitioned by private producers and was approved by referendum of producers, the Court found that "the state . . . ha[d] created the machinery for establishing the prorate program." at 346-47, 352. "The prerequisite approval of the program upon referendum by a prescribed number of producers [wa]s not the imposition by them of their will upon the minority by force of agreement or combr

(holding that state action doctrine is available under Clayton Act).

Several years later, in

Since and , the Supreme Court and Eleventh Circuit have determined that state action immunity is applicable to political subdivisions such as municipalities,

This requires proof of the challenged action (1) by a political subdivision of the state, (2) undertaken pursuant to state statutes authorizing the challenged action, (3) the anticompetitive effects of which are reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision. at 1386.

1. Immunity of Hospital Authorities

Here, Plaintiffs do not contest the Authority's satis-

profit hospital, Cape Coral Medical Center, Inc., when the state legislatively authorized the Board to make acquisitions of medical facilities and to own general acute care hospitals in Lee County. , 38 F.3d at 1186.

According to the Court, only one hospital, Lee Memorial Hospital, existed in Lee County when the Board was created in 1963; once authorized by the 1963 legislation, the Board's purchase of the hospital thereby created a monopoly. . Thus, when the Board's power was legislatively extended in 1987 to permit it to " and for the and of additional

rather than inevitable, ordinary, or routine. , 38 F.3d at 1191.

Anticompetitive conduct by a political subdivision under Eleventh Circuit law is even reasonably foreseeable when it is heavily influenced by the interests of, or involves, a private party. In , for example, the Court found that because the South Carolina statutes under which the city acted authorized municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries, the suppression of billboard advertising competition from newcomers and the protection of existing billboards, including those owned by the company which had enjoyed a majority of the market share, were reasonably anticipated to result from the city ordinances at issue that regulated the size, location, and spacing of billboards. 499 U.S. at 373. The Court reached this finding notwithstanding the city's and private billboard company's alleged involvement in a secret anticompetitive agreement to protect the company's monopoly position in billboard advertising, the close relationship between city officials and the company, and the alleged

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the enactment of the ordinances, was immaterial, for public officials, the Court reasoned, often agree to do what groups of private citizens urge upon them.

, 499 U.S. at 374, 368, 375, 378; .

, 790 F.2d at 1035 (acknowledging necessity of government involvement in effectuating policies and goals to cure ailing economy and reverse urban blight when private parties in the free market enterprise cannot alone do so). It was enough that the suppression of competition was, at the very least, a foreseeable result of the state's enabling legislation. , 499 U.S. at 368; , 471 U.S. at 39 (explaining that although compulsion is often best evidence of state policy, "clear articulation" requirement of state action test does not require that defendant show state "compelled" it to act, but at minimum, to only show reasonable anticipation). So long as this requirement is met, "the [state] action is exempt from private antitrust liability regardless of the State's motives in taking the action," , 499 U.S. at 377-78 (citation omitted), and even where an authority conspires to bring about anticompetitive conduct based on a pretext for the public good, , 980 F.2d at 1387.

For this reason, the Supreme Court and Eleventh Circuit have rejected inquiries into the motives and reasons for a government's anticompetitive actions. Not only are "very few government actions . . . immune from charges that they are not in the public interest," but "judicial [probing] and assessment of the public interest after the fact . . . compromise[s] the ability of the states to regulate their own commerce," thereby rendering state action immunity meaningless. at 1388-89 (quoting , 499 U.S. at 377)

(prohibiting inquiry into whether authority's allegedly anticompetitive denial of staff privileges to plaintiff were pretextual or furthered public good).

2. Immunity of State Actors' Agents and of Private Parties

Because of this prohibition into possible private motives of state anticompetitive action, federal antitrust laws cannot regulate the conduct of private individuals in seeking anticompetitive action or in influencing government officials to engage in conduct of such behavior. , 499 U.S. at 378-80. This action is protected by the doctrine, a corollary to the state action doctrine, which shields from antitrust review concerted efforts to influence public officials regardless of intent or purpose, and even where anticompetitive results are brought about by deception or bribery.[17] .

Furthermore, actions of a private party also can be considered actions taken by the same as an agent of a

"there is

view in Georgia, that is, the statutory requirement that hospitals provide for the review of professional practices in a hospital. at 1530-31. Had the court held otherwise—that is, had the authority but not the private defendants been deemed immune for an action performed with or on behalf of the authority—it would have defeated the purpose of antitrust immunity by permitting the plaintiff to sue the private defendants for the conduct of the authority that had already been declared immune. ; , 790 F.2d at 1048.

In sum, therefore, a greater level of state involvement in anticompetitive conduct must be demonstrated if the defendant is a private party rather than a political subdivision. If not a state actor or a private party, a defendant travels under the three-part test from and to show "clear articulation"; if, however, the defendant is a private party, it travels under the two-prong test—i.e., defendant must show clear articulation and active supervision, unless it can establish that it acted pursuant to or as an agent of the political subdivision which has received antitrust immunity. Thus, the Court now turns to its analysis of whether the Authority, Phoebe Putney, and HCA/Palmyra should be evaluated as private actors, political subdivisions, or agents thereof.[18]

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[18] What raises the close but difficult question for the Court to decide in this case is the identification of the exact Defendants that Plaintiffs can actually enjoin under the Clayton Act and the FTCA. The difficulty arises based on the factual distinctions between the structure of the alleged transaction in this case and the acquisitions at issue in Supreme Court and Eleventh Circuit state action immunity precedent. and , for example, primarily concern a party's challenge to a political subdivision's (or state actor's) "acquisition" of the competi-

ii. ***Analysis***

1. Immunity of the Authority of Albany-Dougherty County, Georgia

The Court first analyzes the Authority's entitlement to state action immunity. As previously established, the enabling legislation need not explicitly authorize the exact actions undertaken to establish foreseeability. Rather, "it is only necessary that the permitted actions produce anticompetitive consequences that foreseeably flow from the grant of state authority; that is, "the enabling statute must . . . create grounds for a

that

." , 790 F.2d at 1043-44 (emphases added). To grant state action immunity to the Authority in this case, the Court, therefore, must find it reasonably foreseeable that when the legislature equipped a hospital authority with the power to lease a hospital to another (the lessee) and grant the lessee the right to operate said hospital, it contemplated that the lessee could have once been a competitor of the Author-

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tor of the entity already owned and operated by the political subdivision. Plaintiffs, however, do not solely challenge the Authority's acquisition of the competitor (Palmyra) of the hospital which it already owns (PPMH). Rather, the crux of the challenged action is the Authority's intended assignment of its control and operation of the acquired hospital, Palmyra, to the parent company of the acquired hospital's only current competitor, PPHS, so as to circumvent the antitrust laws. In light of this distinction, the Parties rightfully dispute whether the challenged acquisition is being directed by the Authority or the private Phoebe Putney and HCA/Palmyra Defendants or both. Accordingly, the Court assesses both the challenged conduct of the Authority as a political subdivision the conduct of Phoebe Putney and HCA/Palmyra as private entities under the appropriate state action immunity tests, which vary based on the nature of the party which seeks its protection.

ity's newly acquired and leased hospital. To reach such a finding, a review of Georgia Hospital Authorities Law is required.

a. ***Formation, Purpose, and Powers of the Albany-Dougherty County Hospital Authority***

Pursuant to the Hospital Authorities Law, O.C.G.A. § 31-7-70, , the Georgia legislature "created of the state a public body corporate and politic to be known as the 'Hospital Authority' of such county or city . . . . "O.C.G.A. § 31-7-72(a) (emphasis added). A hospital authority is "deemed to exercise public and essential governmental functions and [has] all the powers necessary and convenient to carry out and effectuate the purposes and provisions of [the Hospital Authorities Law]." O.C.G.A. § 31-7-75. An authority may not operate for profit, however, and must set its rates and charges only in amot.[(ee powers necuu)-4.7(t)-3[g-1ffrpoe Hospij-12.2,(t)-3 Hospij-12.ice debrry

and equipping of hospitals . . . to promote the public health needs of the community," O.C.G.A. § 31-7-71(5). Section 31-7-75(7) also authorizes a hospital authority to lease for any number of years not to exceed forty for the operation of any project by another, provided that authorityears fo

fact, because PPMH and PPHS are dissolved "upon the expiration or earlier termination of" the Lease, Ex. PX002-007, all leased assets, along with PPMH's and PPHS's assets, revert to the full control of the Authority upon such expiration, Ex. PX002 § 3.02.

Pursuant to the Lease terms, the Authority has delegated to PPMH, Inc., among other responsibilities, its powers to provide indigent care in fulfillment of the Authority's agreement with Dougherty County, Ex. PX002 §§ 4.02, 4.18, and to set rates and charges for PPMH, Ex. PX002 § 4.03(b). Moreover, Phoebe Putney, which owns PPMH, Inc., pays all expenses of the Authority, which has no budget, no staff and no employees, and the Authority is composed of appointed, unpaid members. (Doc. 2 ¶ 27). Despite the delegation of rights to Phoebe Putney with respect to PPMH, the Authority may terminate the Lease if PPMH, Inc. materially fails to operate PPMH in compliance with the Lease terms and delegated responsibilities. Ex. PX000246 §§ 9.01-9.03, 9.07.

Plaintiffs reason that this relationship between Phoebe Putney and the Authority under the 1990 Lease indicates that the Authority will have no authority over or interest in overseeing the administration of Palmyra once the transaction now at issue is consummated. (Doc. 61 at 26). On the totality of the foregoing allegations, along with those provided in the Procedural and Relevant Factual Background Section,

Defendants, however, submit that this relationship represented by the 1990 Lease evidences that PPMH, Inc. exists to operate and support PPMH and does so only for so long as it complies with the 1990 Lease. To Defendants, therefore, a similar relationship will exist between Phoebe Putney, specifically PNI, and the Au-

cal subdivision to knowingly bring about anticompetitive results, free of the risk of antitrust enforcement.

Contrary to Plaintiffs' claims, therefore, whether the Authority authorized the purchase of Palmyra without considering, among other factors, the anticompetitive adverse effect of the acquisition on healthcare in the community and alternatives to leasing Palmyra to Phoebe Putney becomes irrelevant. Like the Court's treatment of the producers' required referendum and approval of the marketing program in , the Court here finds that "[the Authority] . . . has created the machinery for" structuring and executing the transaction, although Phoebe Putney negotiated, promoted, and lobbied for the transaction. , 317 U.S. at 346-47, 352. The power to produce anticompetitive effects rests with hospital authorities like the Hospital Authority of Albany-Dougherty County, which has the authority to structure hospital management and operation in a number of ways. Simply put, the state therefore has put the ultimate say-so for the provision and management of healthcare in the hands of the healthcare authorities,

2. The Immunity of Phoebe Putney and HCA/Palmyra

The Court also holds that state action immunity applies to the private Defendants as well, as the challenged action at issue here is really directed by the Authority and not Phoebe Putney.[21] While PPHS allegedly served as the negotiator, guarantor, and funder of the transaction, the Court holds that such conduct constitutes private encouragement of, private involvement in, or agency action on behalf of a local government that is permitted under or the principles established in and that establish a private actor's enjoyment of the state's antitrust immunity under . Accordingly, as Defendants note, Plaintiffs are incorrect in their implied position that even if the Authority is entitled to immunity, Phoebe Putney is not. Once the Authority is deemed immune for its anticompetitive conduct, any actions taken by the private actors to prompt or engender that conduct must also be immune.

, along with the state action doctrine, therefore forbids Plaintiffs' attempt to hold Phoebe Putney, a private party, liable for a hospital acquisition by the Authority, a local government actor that has received antitrust immunity. The fact that Phoebe

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[21] The Court's analysis solely centers on the immunity of Phoebe Putney, as Plaintiffs claim that Phoebe Putney, not HCA/Palmyra, directed, engaged in, and brought about the anticompetitive conduct. Phoebe Putney, along with the Authority, is therefore the primary alleged violator of the FTCA and Clayton Act. (Doc. 2). Moreover, any finding as to the application of immunity to Phoebe Putney would necessarily extend to HCA/Palmyra, as the transaction cannot proceed without HCA/Palmyra's sale of Palmyra to the Authority.

Putney may have an interest in controlling Palmyra and that it has acted on this interest in petitioning the Authority and negotiating and structuring the transaction means nothing; what governs is the enabling legislation, as assessed above and whether it expresses a policy that makes the anticompetitive conduct now at issue reasonably foreseeable. Part I.c. Because the Court has found that it does, Phoebe Putney's interest in controlling Palmyra and its associated actions to actualize their interests are protected and thereby have no relevance to this Court's analysis of Phoebe Putney's entitlement to state action immunity as a private party.

Moreover, even if Phoebe Putney is not considered a private party whose actions are protected under , it may be considered an effective agent of the Authority based on its negotiation of, planning for, and funding and facilitation of the subject transaction. The Phoebe Putney's actions which are challenged in this case can thereby be considered actions taken in performance of its official duties as an agent of the Authority, such that Phoebe Putney should share the Authority's state action immunity. Several of the documents associated with the execution of the transaction confirm this agency role assumed by Phoebe Putney and that the Authority, not Phoebe Putney, is responsible for actions relevant to the Court's review and will retain legal and economic control over Palmyra.

To illustrate, the Asset Purchase Agreement between PPHS and Palmyra states that it is being entered into by "the Authority, , Palmyra, , [Phoebe Putney], as of the obligations of the Authority and PNI." Ex. PX226-01 (emphases added); Ex. PX009 § 2.02 (explaining that Authority remains owner

of Palmyra's sold assets and therefore, "shall at all times have during the Operating Period have ultimate control over the assets and operations of [Palmyra]"). As such, pursuant to the terms of the Management Agreement, PNI was created by PPHS to serve, under PPHS's control, as the day-to-day Manager of assets used exclusively in the operation of Palmyra. Yet Phoebe Putney is still required to operate Palmyra, through PNI, according to the Authority's instructions and not its own desires: it "shall be responsible for the performance of all acts reasonably necessary or required in connection with the operation of [Palmyra] in " and "in managing [Palmyra] shall and under Hospital Authorities Law. , Ex. PX009 §§ 3.03(c), (e) (Management Agreement) (emphases added).

Much like the private party theatre operators in who operated in concert with the urban development corporation and to whom the urban development corporation had delegated its rights for the operation ofcoo

duty with regard to the performance of its responsibilities on the Authority's behalf, Ex. PX009 § 2.01; Ex. PX009 §§ 3.09, 3.10 (explaining Phoebe Putney's obligation to ensure Authority's continuous compliance with applicable laws required for ongoing operation of Palmyra and protection of confidentiality of records of Authority).

Thus, while Phoebe Putney or a PPHS entity such as PNI will operate Palmyra as lessee once it is acquired and leased by the Authority to Phoebe Putney, the Management Agreement and to a degree, the Asset Purchase Agreement thereby ensure that Phoebe Putney understands that it does not operate Palmyra independ-

Because Phoebe Putney will not be able to exercise

Phoebe North, Inc.'s Motion to Dismiss and Vacate the TRO (Doc. 53) are **GRANTED**.[23] Plaintiffs' Complaint (Doc. 2) is also **DISMISSED WITH PREJUDICE**. Plaintiffs' Motion for Preliminary Injunction (Doc. 5) is therefore **DENIED**, and the Court's April 22, 2011 Order (Doc. 9) granting Plaintiffs' Motion for Temporary Restraining Order (Doc. 4) is **DISSOLVED**.

SO ORDERED, this 27th day of June 2011.

/s/ W. Louis Sands
THE HONORABLE W. LOUIS SANDS, UNITED STATES DISTRICT COURT

[23] For this reason, and for reasons stated in note 8, , the Authority's and HCA's and Palmyra's Alternative Motions for Summary Judgment (Docs. 45, 46) are **DENIED**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906-EE

F

The motion by Appellant Federal Trade Commissions ("FTC") to file under seal certain of the exhibits to its "Emergency Motion . . . " is GRANTED.

The motion by Appellees HCA, Inc., and Palmyra Park Hospital, Inc., for leave to file under seal their response to the "Emergency Motion . . . ," togesP

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906-EE

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.,
DEFENDANTS-APPELLEES

[Filed: Dec. 15, 2011]

Appeal from the United States District court for

APPENDIX E

1. 15 U.S.C. 18 provides in pertinent part:

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen the competition, or to tend to create a monopoly.

* * * * *

2. 15 U.S.C. 21 provides in pertinent part:

Enforcement provisions

(a) Commission, Board, or Secretary authorized to enforce compliance

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested * * * in the Federal Trade Commission where applicable to all other character of commerce * * * .

* * * * *

3. 15 U.S.C. 53(b) provides in pertinent part:

False advertisements; injunctions and restraining orders

* * * * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance

4. Ga. Code Ann. § 31-7-70 provides in pertinent part:

Short title.

This article shall be known and may be cited as the "Hospital Authorities Law."

* * * * *

5. Ga. Code Ann. § 31-7-71 provides:

Definitions.

As used in this article, the term:

(1) "Area of operation" means the area within the city or county activating an authority. Such term shall also mean any other city or county in which the authority wishes to operate, provided the governing authorities and the board of any hospital authorities of such city and county request or approve such operation.

(2) "Authority" or "hospital authority" means any public corporation created by this article.

(3) "Governing body" means the elected or duly appointed officials constituting the governing body of a city or county.

(4) "Participating units" or "participating subdivisions" means any two or more counties, or any two or more municipalities, or a combination of any county and any municipality acting together for the creation of an authority.

(5) "Project" includes 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 for the use of patients and officers and employees of any institution under the supervision and control of any hospital authority or leased by the hospital authority for operation by others to promote the public health needs of the community and all utilities and facilities deemed by the authority necessary or convenient for the efficient operation thereof. Such term may also include any such institutions, utilities, and facilities located outside the city or country in which the authority is located, provided that the acquisitions, construction, equipping, and operation thereof is requested or approved by the governing bodies of such city and county in which the project is located by the board of any hospital authorities located within such city and county or provided that the acquisition, construction, equipping, and operation is to be located in the area of operation of the authority.

(6) "Resolution" means the resolution or ordinance to be adopted by governing bodies pursuant to which authorities are established.

6. Ga. Code Ann. § 31-7-72 provides in pertinent part:

Creation of hospital authority in each county and municipality.

(a) There is created in and for each county and municipal corporation of the state a public body corporate and politic to be known as the "hospital authority" of such county or city, which shall consist of a board of not less than five nor more than nine members to be appointed by the governing body of the county or municipal corporation of the area of operation for staggered terms as specified by resolution of the governing body * * * .

* * * * *

(d) Any two or more counties or any two or more municipalities or any county or municipality, or a combination of any county and any municipality, by a like resolution or ordinance of their respective governing bodies, may authorize the exercise of the powers provided for in this article by an authority * * * .

* * * * *

7. Ga. Code Ann. § 31-7-75 provides:

Functions and powers.

Every hospital authority shall be deemed to exercise public and essential governmental functions and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including, but without limiting the generality of the forgoing, the following powers:

(1) To sue and be sued;

(2) To have a seal and alter the same;

(3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;

(4) To acquire by purchase, lease, or otherwise and to operate projects;

(5) To construct, reconstruct, improve, alter, and repair projects;

(6) To sell to others, or to lease to others for any number of years up to a maximum of 40 years, and lands, buildings, structures, or facilities constituting all or any part of any existing or hereafter established project. In the event a hospital authority undertakes to sell a hospital facility, such authority shall, prior to the execution of a contract of sale, provide reasonable public notice of such sale and provide for a public hearing to received comments from the public concerning such sale. This power shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such lands, buildings, structures, or facilities, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to selling or leasing to others within 20 years after completion of construction;

(7) To lease for any number of years up to a maximum of 40 years for operation by others any project, provided that the authority shall have first deter-

mined that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community and that the authority shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project, which

facilities of such lessee, the authority may use proceeds of any revenue anticipation certificates issued for such purpose to acquire such outstanding debt or obligation, in whole or in part, and may itself or through a fiduciary or agent hold and pledge such acquired debt or obligation as security for the payment of such revenue anticipation certificates. The powers granted in this paragraph shall be unaffected by the language set forth in paragraph (13) of this Code section or any implications arising therefrom unless grants of assistance have been received by the authority with respect to such project, in which case approval in writing as set forth in paragraph (13) of this Code section shall be obtained prior to leasing to others within 20 years after completion of construction. Any revenues derived by the authority from any such lease shall be applied by the authority to the payment of any revenue anticipation certificates issued in connection with the acquisition and construction of the project and the payment, in whole or in part, of any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of facilities of such lessee (including any redemption or prepayment premium due thereon) or to the payment of any other ex-

or fees or charges, for a term not to exceed 40 years, and upon such terms and conditions as the authority shall determine reasonable in connection with such loans, including provisions for the establishment and maintenance of reserves and insurance funds, and in the exercise of powers granted by this Code section in connection with a project, to require the inclusion in any contract, loan agreement, security agreement, or other instrument such provisions for guaranty, insurance, construction, use, operation, maintenance, and financing of a project as the authority may deem necessary or desirable;

(9) To acquire, accept, or retain equitable interests, security interests, or other interests in any property, real or personal, by mortgage, assignment, security agreement, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(10) To establish rates and charges for the services and use of the facilities of the authority;

(11) To accept gifts, grants, or devises of any property;

(12) To acquire by the exercise of the right of eminent domain any property essential to the purposes of the authority;

(13) To sell or lease within 20 years after the completion of construction of properties or facilities operated by the hospital authority where grants of financial assistance have been received from federal or

state governments, after such action has first been approved by the department in writing;

(14) To exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein;

(15) To mortgage, pledge, or assign any revenue, income, tolls, charges, or fees received by the authority;

(16) To issue revenue anticipation certificates or other evidences of indebtedness for the purpose of providing funds to carry out the duties of the authority; provided, however, that the maturity of any such indebtedness shall not extend for more than 40 years;

(17) To borrow money for any corporate purpose;

(18) To appoint officers, agents, and employees;

(19) To make use of any facilities afforded by the federal government or any agency or instrumentality thereof;

(20) To receive, from the governing body of political subdivisions issuing the same, proceeds from the sale of general obligation bonds or other county obligations issued for hospital authority purposes;

(21) To exercise any or all powers now or hereafter possessed by private corporations performing similar functions;

(22) To make plans for unmet needs of their respective communities;

(23) To contract for the management and operation of the project by a professional hospital or medical facilities consultant or management firm. Each such contract shall require the consultant or firm contracted with to post a suitable and sufficient bond;

(24) To provide management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services to another hospital authority, hospital, health care facility, as said term is defined in Chapter 6 of this title, person, firm, corporation, or any other entity or any group or groups of the foregoing; to enter into contracts alone or in conjunction with others to provide such services without regard to the location of the parties to such transactions; to receive management, consulting, and operating services including, but not limited to, administrative, operational, personnel, and maintenance services from another such hospital authority, hospital, health care facility, person, firm, corporation, or any other entity or any group or groups of the foregoing; and to enter into contracts alone or in conjunction with others to receive such services without regard to the location of the parties to such transactions;

(25) To provide financial assistance to individuals for the purpose of obtaining educational training in nursing or another health care field if such individuals are employed by, or are on an authorized leave of absence from, such authority or have committed to be employed by such authority upon completion of such educational training; to provide grants, scholarships, loans or other assistance to such individuals

and to students and parents of students for programs of study in fields in which critical shortages exist in the authority's service area, whether or not they are employees of the authority; to provide for the assumption, purchase, or cance

> now or hereafter amended, a hospital authority shall be permitted to and shall comply with the requirements of Chapter 21 of Title 33 to the extent that such requirements apply to the activities undertaken by the hospital authority pursuant to this paragraph. No hospital authority, whether or not it exercises the powers authorized by this paragraph, shall be relieved of compliance with Article 4 of Chapter 18 of Title 50, relating to inspection of public records unless otherwise authorized by law. Any health care provider licensed under Chapter 30 of Title 43 shall be eligible to apply to become a participating provider under such a hospital plan or network which provides coverage for health care services which are within the lawful scope of his or her practice, provided that nothing contained in this Code section shall be construed to require any such hospital plan or network to provide coverage for any specific health care service.

8. Ga. Code Ann. § 31-7-77 provides:

Rates and charges.

No authority shall operate or construct any project for profit. It shall fix rates and charges consistent with this declaration of policy and such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay principal and interest on certificates and obligations of the authority, to provide for maintenance and operation of the project, and to create and maintain a reserve sufficient to meet principal and interest paymentsnnues only i2 amountsone yea*.d,

provide reasonable reserves for the improvement, replacement, or expansion of its facilities or services.