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

Respondents largely ignore the particular provisions of Georgia law that the court of appeals found most important. Much like that court, however, respondents contend that a clear articulation of a state intent to displace competition can be found in the Authority's general mission of providing indigent care, backed by general grants of power that

Co., 439 U.S. 96, 109 (1978), or "necessarily Omni

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

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

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

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

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

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

by alternative regulation (e.g.

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

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

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

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

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

If the Georgia Hospital Authorities Law specifically authorized local hospital authorities to acquire "any and all hospitals" within their

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

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

a. Respondents and their amici portray the government's position as a request for a radical revision of the state action doctrine. See Resp. Br. 24-28; AHA Amicus Br. 27-32. Respondents contend that "considerations of reliance and congressional acquiescence weigh heavily in favor of adhering to basic principles of stare decisis." Br. 27. But the question before this Court is not whether to refashion the state action doctrine. The question instead involves the application of established state

b. Respondents and one amicus argue that the government's approach is "inflexible" and will cause the States great trouble. Resp. Br. 13; see Lee Mem'l Amicus Br. 13-18. No State has raised that concern here, however, and the state amici

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

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

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

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

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

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

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

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

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

General corporate power to acquire projects. As our opening brief explains (at 22-23), the Authority's general corporate powers do not support respondents' state action defense because those powers reflect Georgia's "mere neutrality," Boulder, 455 U.S. at 55, on the subject of anticompetitive activity. Respondents make little effort to explain how the general power to acquire projects, Ga. Code Ann. § 31-7-75(4), could reflect the State's intent to displace competition. Indeed, only once (Br. 33) do respondents cite the statute that the court of appeals thought was "[m]ost important in this case." Pet. App. 12a. Respondents' reluctance to invoke Section 31-7-75(4) is understandable, since that Georgia-law

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

Echoing the court of appeals (Pet. App. 13a), respondents suggest that the Georgia legislature "surely"

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

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

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

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

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

ing competition in the market for paid health care services.

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

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

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

supervised by the State itself." Midcal , 445 U.S. at 105

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

Respondents also contend that PPHS, in orchestrating, financing, and guaranteeing the transaction, was acting merely as an "agent" of the Authority. See Br. 50-51. That argument is factually and legally unsound.

PPHS doesnot act on the Authority's behalf and isnot subject to the Authority's control.

* * * * *

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

Respectfully submitted.

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Solicitor General

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