No. 11-1160

In the Supreme Court of the United States

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

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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*, 471 U.S. 34, 38-39 (1985) (citations omitted). The doctrine extends to private entities if the state policy is so articulated and the private conduct is "'actively supervised' by the State itself," *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). "[T]he State may not," however, "validate * * * anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39. In this case, a local government entity created by Georgia law, acting at the behest of a private actor and using the general corporate powers conferred on it by the State, acquired the only competitor of that private actor and immediately transferred control of the competitor to the private actor, creating a private monopoly. The questions presented are as follows:

1. Whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services.

2. Whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital's operation.

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 as Palmyra Park Hospital, LLC.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Trade Commission (FTC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 663 F.3d 1369. The order of the district court (App., *infra*, 16a-65a) is reported at 793 F. Supp. 2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2011. On February 29, 2012, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 23, 2012.

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

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Clayton Act, 15 U.S.C. 12 *et seq.*, the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Georgia Hospital Authorities Law, Ga. Code Ann. §§ 31-7-70 *et seq.*, are reproduced in the appendix to the petition (App., *infra*, 69a-82a).

STATEMENT

This case presents the question whether a hospital's acquisition of its only rival, effectuated by using a substate governmental entity's general corporate powers, is exempt from antitrust scrutiny under this Court's "state action doctrine." Both courts below held that the transaction was exempt because the use of general corporate powers to engage in "anticompetitive conduct [could] be reasonably anticipated." App., *infra*, 9a (quoting *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1190-1191 (11th Cir. 1994) (*Lee County*)), 44a-45a.

1. a. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in our federal system, the national policy of free competition embodied in the federal competition laws (which include the Clayton Act, 15 U.S.C. 12 *et seq.*) gives way under appropriate circumstances to a State's policy to govern a market by alternative means. Accordingly, a State acting as a sovereign is not subject to federal competition laws. *Parker*, 317 U.S. at 350-351. Certain political subdivisions of a State—paradigmatically, counties or municipalities—are likewise exempt from those laws when they act pursuant to "clearly articulated and affirmatively expressed * * * state policy" to displace

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*, 471 U.S. at 42).

A State may not simply declare that its political subdivisions or residents are exempt from federal competition law. "[T]he State may not validate [an actor's] anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39 (citing *Parker*, 317 U.S. at 351); accord *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("[A] State may not confer antitrust immunity on private persons by fiat."). This Court has typically described the state action doctrine as triggered by "a state policy to *displace* competition" with some *alternative* approach to ordering the market. *Hallie*, 471 U.S. at 39 (emphasis added); see *Ticor*, 504 U.S. at 632-633 (referring to "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *Omni Outdoor*, 499 U.S. at 372-373 (referring to either "displacement of competition" or "suppression of competition"). Thus, "[i]mmunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Ticor*, 504 U.S. at 633.

b. Georgia's Hospital Authorities Law, 1941 Ga. Laws 241 (codified, as amended, at Ga. Code Ann. §§ 31-7-70 *et seq.*), creates "a public body corporate and politic to be known as the 'hospital authority'" for each county and municipality, Ga. Code Ann. § 31-7-72(a), or for appropriate combinations of multiple counties and municipalities, *id.* § 31-7-72(d). "Every hospital authority shall be deemed to exercise public and essential gov-

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*, the powers to "make and execute contracts"; "acquire * * * projects"; "lease for [up to 40 years] for operation by others any project"; "establish rates and charges for the services and use of the facilities of the authority"; "[transact in] any real or personal property"; "contract for the management and operation of [a] project"; "form and operate * * * one or more networks of hospitals, physicians, and other health care providers"; and "exercise any or all powers [of] private corporations performing similar functions." *Id.* § 31-7-75(3), (4), (7), (10), (14), (23), (27) and (21); see *id.* § 31-7-71(5) (defining "Project" to include "hospitals").

2. a. Phoebe Putney Memorial Hospital (Memorial) has operated in the City of Albany, Georgia, since 1911. Complaint ¶ 22. In 1941, Albany and the surrounding Dougherty County activated respondent Hospital Authority of Albany-Dougherty County (Authority). The Authority acquired and has held title to Memorial's assets since 1941, and it operated Memorial until 1990. App., *infra*, 4a.

That year, the Authority formed two private corporations, respondent Phoebe Putney Health System, Inc. (PPHS) and a subsidiary, respondent Phoebe Putney Memorial Hospital, Inc. (PPMH), in whose assets the Authority holds reversionary interests. App., *infra*, 4a & n.4. The Authority ceded control of Memorial by leasing it to PPMH in a 40-year, dollar-a-year lease that, as extended, is set to expire in 2042. Complaint ¶ 27; see App., *infra*, 19a. Memorial has 443 beds and offers a full range of general acute care hospital services, as well as

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 inpatient general acute care hospital services sold to commercial health-care plans and their customers in Dougherty County. Even within a broader market that includes six counties surrounding Albany, the merger would increase PPHS's market share (as measured by commercial patient discharges) from 75% to 86%. By any reasonable measure, the acquisition is a merger to monopoly and presumptively unlawful. Complaint ¶¶ 1,

7-8; see *id.* ¶¶ 64-68 (analyzing transaction under the Horizontal Merger Guidelines developed by the U.S. Department of Justice and the FTC).

The transaction was structured using the Authority as a conduit, in what PPHS's consultant described as a "proven" method of avoiding antitrust scrutiny. FTC C.A. Br. 12 (citation omitted); see Complaint ¶¶ 38, 44. Under an integrated purchase-and-lease transaction, the Authority would act as a nominal purchaser of Palmyra's assets using PPHS-controlled funds and then lease Palmyra to PPHS for a dollar a year for 40 years (much like PPHS's existing lease for Memorial). *Ibid.* As a result, PPHS would gain full economic and operational control over both Memorial and Palmyra.

Without the Authority's involvement, PPHS and HCA negotiated an agreement under which the Authority would acquire Palmyra for $195 million of PPHS-controlled funds, and PPHS would guarantee the purchase price or pay HCA a $35 million break-up fee. App., *infra*, 5a & n.7. PPHS further agreed (without the Authority's knowledge) to pay HCA $17.5 million if the Authority failed to approve the transaction "in exactly the form" previously agreed to by PPHS and HCA. Complaint ¶¶ 4, 48. PPHS also prepared a "Management Agreement," to be executed at closing, giving PPHS immediate control of Palmyra, pending an amendment to its existing lease with the Authority. *Id.* ¶¶ 50-51.

The Authority did not participate in the negotiation of any of those terms. The Authority first considered the transaction at its December 21, 2010, meeting. The Authority unanimously approved the transaction then and there, in exactly the form presented to it by PPHS, without any inquiry into its details. Complaint ¶¶ 49-50.

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 Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case." *Id.* at 56a. It reached that conclusion principally because the Hospital Authorities Law (1) empowered the Authority to acquire and lease out hospitals and to form networks of hospitals, (2) limited the Authority's geographic scope, and

(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.* (quoting *Lee County*, 38 F.3d at 1188).

Pointing to the corporate powers noted above, see pp. 4-5, *supra*, the court of appeals reasoned that because "the Georgia legislature granted powers of impressive breadth to the hospital authorities"—including, "[m]ost important[ly] in this case," the powers to acquire and lease out hospitals—"the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." App., *infra*, 11a-12a. The court further stated that "[i]t defies imagination to suppose the [Georgia] 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." *Id.* at 13a.

b. The FTC also argued that the state action doctrine does not shield a transaction, like the one at issue here, in which private actors engage in the unsupervised creation of a monopoly. See FTC C.A. Br. 25-36; see also *id.* at 43-48. The court of appeals summarily rejected what it understood to be the FTC's "suggestion that * * * private influence, or * * * private benefit, somehow makes the transaction and its anticompetitive effects unforeseeable." App., *infra*, 14a n.13.

6. On December 15, 2011, after issuing its decision on the merits, the court of appeals dissolved the injunction it had granted pending the FTC's appeal. See App., *infra*, 66a-67a (granting injunction); *id.* at 68a (dissolving injunction). The transaction closed that day. Jennifer Maddox Parks, *Hospitals to Merge with*

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

[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 an error that exempts a large class of anticompetitive activity from antitrust scrutiny.

A. The Eleventh Circuit's Approach To The State Action Doctrine Conflicts With This Court's Precedents And Does Not Serve The Doctrine's Purposes

1. Because the state action doctrine exempts conduct that would otherwise be illegal from federal law's "fundamental and accepted assumptions about the benefits of competition," it is "disfavored" and must be narrowly construed. *Ticor*, 504 U.S. at 636. To ensure that the doctrine remains true to its roots in federalism, this Court has insisted that the displacement of competition on which the doctrine depends be "clearly articulated and affirmatively expressed" as the State's adopted policy. *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, 40

(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*, "neutral[]," 455 U.S. at 55) on the issue of anticompetitive conduct by the Authority (and, *a fortiori*, the anticompetitive conduct of private parties).[2] The law neither expresses a legislative preference for consolidating ownership of local hospitals, nor "provide[s] [a] regulatory structure that inherently 'displace[s] unfettered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Orrin W. Fox*, 439 U.S. at 109).[3]

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[2] Ga. Code Ann. § 31-7-72.1 permits consolidation of hospital authorities existing within certain high-population counties. When such authorities consolidate, they "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." *Id.* § 31-7-72.1(e). But that section neither applies to the Authority (because Dougherty County is not a high-population county) nor to the transaction here (because it is a merger of privately controlled hospitals, not a consolidation of public hospital authorities). Indeed, if the Georgia legislature had intended the Hospital Authorities Law to effect a general displacement of competition, the exemption in Section 31-7-72.1(e) would be superfluous. But see App., *infra*, 13a-14a.

[3] Ga. Code Ann. § 31-7-75(7) states that the lease of a project "for operation by others," as occurred here, must "promote the public health needs of the community by making additional facilities available * * * or by lowering the cost of health care." There is no reason to believe, however, that the transaction at issue here would satisfy either of those requirements. See Complaint ¶¶ 69-80, 90. More to the point, the stated objective of increasing output and decreasing price in response to consumer needs is the "fundamental goal of antitrust law." *NCAA* v. *Board of Regents*, 468 U.S. 85, 107 (1984). And neither Section 31-7-75(7) nor any other provision of the Hospital Authorities Law reflects a legislative judgment that, in the context of local hospital services, that objective is best realized through means other than free competition. Section 31-7-75(7) therefore cannot be said to "clearly"

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. § 31-7-75(4) and (7)). But except for the power of eminent domain, Ga. Code Ann. § 31-7-75(12), which has no bearing on this case, the powers that Georgia law confers upon local hospital authorities—*e.g.*, the powers to make contracts, set the price for its products, sue and be sued, transact in real and personal property, and so on—closely resemble those an ordinary business corporation would possess. No one would suggest that a general power to make contracts implies a privilege to enter a price-fixing agreement; or that the power to set prices implies a privilege to engage in predatory pricing; or that the power to sue implies a privilege to monopolize a market through sham lawsuits. Indeed, in its first merger case, this Court held that the authorization for merger transactions conferred by state corporation law did not exempt a merger from federal antitrust scrutiny. *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 345-346 (1904) (plurality opinion).

The clear implication of this Court's cases is that the mere conferral of ordinary business powers on political subdivisions does not reflect a legislative plan that the powers be used to anticompetitive ends. The general corporate powers conferred on the Authority are thus more naturally understood as powers to be exercised

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and "affirmatively" reflect Georgia's intent to "displace competition," *Hallie*, 471 U.S. at 39 (citations omitted).

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* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). It is in the intermediate case, where (as here) the number of hospitals serving a market is small but greater than one, that transfers of ownership raise the clearest competitive concerns. And even in that setting, a transfer will likely be problematic only if the purchaser of one hospital is already the owner of another. Nothing in the Hospital Authorities Law suggests that the Georgia legislature specifically contemplated such mergers when it authorized hospital authorities to transact in property.

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, such as an allegedly anticompetitive refusal to contract with the plaintiff insurer for servicing); *Crosby* v. *Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1534 (1996) ("[I]t is at the very least foreseeable, and most certainly reasonably anticipated, that [a statute permitting hospital staff privileges determinations to be made by peer review] would enable a hospital authority to engage in anticompetitive conduct

[such as an alleged group boycott] through its peer review activities.") (internal quotation marks and citation omitted), cert. denied, 520 U.S. 1116 (1997); *Lee County*, 38 F.3d at 1192 ("The [public hospital] Board's allegedly anticompetitive [hospital acquisition] could have been reasonably anticipated by the Florida Legislature when it gave the Board the implicit power to acquire other hospitals and was, therefore, a foreseeable consequence of the legislature's delegation of power to the Board."); *Bolt* v. *Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (similar to *Crosby*), reh'g denied, 988 F.2d 1220 (Table) (1993); *Central Fla. Clinic for Rehab., Inc.* v. *Citrus County Hosp. Bd.*, 738 F. Supp. 459 (M.D. Fla.) (public hospital board's alleged monopolization of market for outpatient services was exempted from antitrust scrutiny as the foreseeable result of its power to operate hospitals), aff'd, 888 F.2d 1396 (11th Cir. 1989) (Table), cert. denied, 495 U.S. 947 (1990).

In applying the state action doctrine, this Court has described the relevant inquiry as whether "suppression of competition is the 'foreseeable result' of what the [state] statute authorizes." *Omni Outdoor*, 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42). But the Court has not endorsed the Eleventh Circuit's view of foreseeability, under which a broad grant of general powers, coupled with the absence of an express state-law prohibition on particular anticompetitive conduct, is enough to render such conduct foreseeable and thus exempt from federal antitrust scrutiny. That approach could greatly expand the state action defense by rendering it applicable to virtually all cases involving public corporate powers.

Rather than endorse so broad a conception of foreseeability, this Court has indicated that the clear-

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; see *Omni Outdoor*, 499 U.S. at 373 (applying the state action doctrine because the regulatory scheme at issue "necessarily protects * * * against some competition"). When the State simply grants general corporate powers whose exercise does not inherently restrict competition, the most foreseeable result is that the recipient will exercise those powers in conformity with the background rules that bind similarly situated private actors. See pp. 18-19, *supra*. That approach reserves the state action doctrine for circumstances in which anticompetitive conduct is the natural and expected (and thus, presumably, intended) consequence of the State's regulatory choices. It also respects the Court's admonition that state neutrality is *not* sufficient to displace the federal competition laws. *Boulder*, 455 U.S. at 55.

The state action doctrine is intended "to foster and preserve the federal system," *Ticor*, 504 U.S. at 633, by allowing affirmative state policy choices to prevail even when they are inconsistent with the preference for free competition reflected in the federal antitrust laws. The Eleventh Circuit's understanding of "foreseeability," by contrast, "stand[s] federalism on its head." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999) (*Hammond*). Under the Eleventh Circuit's approach, "[a] state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Ibid.* That result is anathema to the state action doctrine be-

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 enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," yet "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then [the] doctrine will impede their freedom of action, not advance it."); see also 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225b4, at 153 (3d ed. 2006) ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into otherwise unlawful mergers.") (citing *Lee County*, *supra*).

B. The Decision Below Conflicts With Decisions Of Four Other Circuits

The line of Eleventh Circuit precedents discussed above, in which that court has recognized a state action defense based on a mere grant of general corporate powers, conflicts in both reasoning and result with decisions from the Fifth, Sixth, Ninth, and Tenth Circuits.

1. In the Fifth Circuit's leading precedent, *Hammond*, *supra*, a political subdivision owned a hospital, and a rival hospital accused it of attempting to extend its monopoly in acute care services to outpatient surgical care. The political subdivision asserted that its possession of general corporate powers precluded federal antitrust liability. 171 F.3d at 232-233. The district court agreed that the alleged anticompetitive practices were "the foreseeable result" of either "statutory authority to contract with any entity to promote the delivery of

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 Circuit observed that state-law authorization to form joint ventures was insufficient to trigger the state action doctrine because "[n]ot all joint ventures are anticompetitive. Thus, it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct." *Id.* at 235.

The Sixth Circuit has likewise held that "granting [political subdivisions] the general power to contract or manage their business affairs cannot imply state authorization to impose [an] anticompetitive restriction." *First Am. Title Co.* v. *Devaugh*, 480 F.3d 438, 456 (2007). That court has instead insisted on a showing that the legislature contemplated the "particular anticompetitive mechanisms" at issue. *Id.* at 445 (quoting *Ticor*, 504 U.S. at 636). In *First American Title*, private businesses that purchased title information from county registers of deeds alleged that the registers stifled competition by restricting the purchasers' resale of duplicate title documents. The Sixth Circuit rejected the county registers' state action defense, holding that state law did not contemplate restraints on competition in the resale of duplicate title documents. *Id.* at 447-448. As relevant here, the county registers argued that a "county's state-granted general powers to make contracts and manage its own business affairs" could be used "to condition bulk

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 division of authority will be resolved without this Court's review. The Eleventh Circuit's position has become entrenched through at least five decisions spanning 20 years. One of the early decisions, *Bolt*, *supra*, was issued over a forceful dissent that identified the key errors that still pervade the Eleventh Circuit's approach, see 980 F.2d at 1392-1395 (Clark, J., dissenting), but the court of appeals nonetheless denied rehearing en banc, 988 F.2d 1220. In the subsequent Eleventh Circuit cases discussed above, no judge has cast a dissenting vote. And even though the FTC offered reasonable arguments for distinguishing circuit precedent and limiting the reach of the court's corporate-powers approach to the

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

II. THE ELEVENTH CIRCUIT FURTHER DEPARTED FROM THIS COURT'S PRECEDENTS BY HOLDING THAT THE STATE ACTION DOCTRINE PERMITS THE UNSUPERVISED TRANSFER OF MONOPOLY POWER INTO PRIVATE HANDS

A. Even if the Georgia legislature had clearly articulated an intent to exempt the transaction at issue here from the federal competition laws, the state action doctrine would not apply, because such an exemption would impermissibly "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. Although the States have broad authority to displace the federal competition laws, that power is not unlimited. A State cannot simply declare its political subdivisions or residents to be exempt from federal antitrust liability; it must instead adopt some alternative regulatory mechanism. See *ibid.* (explaining that the protection of the state action doctrine is "conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint").

As detailed in the complaint and summarized above (pp. 6-7, *supra*), the substance of the present transaction is that private parties have arranged for PPHS to acquire a private monopoly. Even if state law clearly contemplated such a scheme, the transaction would not be protected by the state action doctrine because it fails *Ticor*'s requirement that "the State [must] exercise[] sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention." 504 U.S. at 634. Georgia's lack of "independent judg-

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 alternative, Georgia could not lawfully exempt respondents from federal antitrust liability, even if the relevant Georgia statutes reflected a clear legislative intent to take that step.[5]

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[5] In leasing a project for operation by others, the Authority is directed to "ensure that the lessee will not in any event obtain more

Both courts below misunderstood this line of argument. The district court thought the *Noerr-Pennington* doctrine protected the private respondents' conduct. App., *infra*, 60a. The court's analysis failed to distinguish, however, between those respondents' efforts to secure the Authority's endorsement (which are protected but not challenged here) and their use of the Authority's nominal involvement to obtain an unsupervised monopoly. The district court also believed that PPHS's conduct was protected because PPHS was the Authority's "agent" (*id.* at 61a-64a), but this Court's cases rely on "active supervision," not on common-law agency principles. See *Ticor*, 504 U.S. at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State."). The court of appeals rejected the FTC's argument as impermissibly inviting "deconstruction of the governmental process." App., *infra*, 14a n.13 (quoting *Omni Outdoor*, 499 U.S. at 377). The FTC's argument, however, went to the antecedent question whether "the action complained of . . . was that of the State itself," not to "the State's motives in taking the action," *Omni Outdoor*, 499 U.S. at 377-378 (quoting *Hoover* v. *Ronwin*, 466 U.S. 558, 579-580 (1984)).

B. This second question presented warrants the Court's review. Perhaps because the brazenness of the

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than a reasonable rate of return on its investment." Ga. Code Ann. § 31-7-75(7). But "the active supervision prong of the *Midcal* test requires that *state officials* have *and exercise* power to review particular anticompetitive acts of private parties." *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988) (emphasis added). This Court has never addressed whether a mere political subdivision can provide the necessary active supervision, and in any event, the FTC's complaint in this case alleges in detail that the Authority does not actually exercise meaningful supervision over PPHS. Complaint ¶¶ 5, 27-31, 49-50.

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, *inter alia*, that particular attention should be paid to the effects on competition of hospital mergers like the one at issue here. See *id.* at 25-27.

Many hospitals are owned by public entities, like the Authority, that have the general corporate powers that the Eleventh Circuit found to give rise to an exemption from federal competition law. In 2008, nearly 20% of hospitals were owned by States and local governments. See Nat'l Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., *Health, United States, 2010: With Special Feature on Death and Dying* 354 (2011), http://www.cdc.gov/nchs/data/hus/hus10.pdf. Such hospitals are of particular importance to the taxpayer-funded Medicaid program because they serve Medicaid patients at nearly twice the rate of private hospitals. See Congressional Budget Office, *Nonprofit Hospitals and the Provision of Community Benefits* 19 (2006), http://www.cbo.gov/publication/18256.

The implications of the Eleventh Circuit's decision, moreover, extend well beyond the hospital setting. Every State has political subdivisions with ordinary corporate powers.[6] *See Hammond*, 171 F.3d at 236 ("These

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[6] See, *e.g.*, Ala. Code §§ 11-95-1 *et seq.* (LexisNexis) (hospitals); Alaska Stat. §§ 18.26.010 *et seq.* (hospitals); Ariz. Rev. Stat. Ann. §§ 5-801 *et seq.* (tourism and sports authority); Ark. Code Ann. §§ 14-263-101 *et seq.* (hospitals); Cal. Health & Safety Code §§ 32000 *et seq.* (West) (hospitals); Colo. Rev. Stat. §§ 25-3-301 *et seq.* (hospitals); Conn. Gen. Stat. Ann. §§ 7-130a *et seq.* (West) (recreational facilities); Del. Code Ann. tit. 16, §§ 9201 *et seq.* (hospitals); Fla. Stat. Ann.

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.* (LexisNexis) (hospitals); Iowa Code Ann. §§ 347.7 *et seq.* (West) (hospitals); Kan. Stat. Ann. §§ 12-2801 *et seq.* (transit); Ky. Rev. Stat. Ann. §§ 80.010 *et seq.* (LexisNexis) (housing); La. Rev. Stat. Ann. §§ 2:311 *et seq.* (airports); Me. Rev. Stat. Ann. tit. 22, §§ 2051 *et seq.* (hospitals); Md. Code Ann., Hous. & Cmty. Dev. §§ 12-101 *et seq.* (LexisNexis) (housing); Mass. Ann. Laws ch. 40, §§ 12B *et seq.* (LexisNexis) (beach facilities); Mich. Comp. Laws §§ 331.1101 *et seq.* (West) (hospitals); Minn. Stat. Ann. §§ 368.01, subdiv. 8 (West Supp. 2012) (hospitals); Miss. Code Ann. §§ 41-13-10 *et seq.* (West) (hospitals); Mo. Ann. Stat. §§ 205.010 *et seq.* (West) (health centers and hospitals); Mont. Code Ann. §§ 7-34-2101 *et seq.* (hospitals); Neb. Rev. Stat. Ann. §§ 17-961 *et seq.* (LexisNexis) (hospitals); Nev. Rev. Stat. Ann. §§ 450.005 *et seq.* (LexisNexis) (hospitals); N.H. Rev. Stat. Ann. §§ 38-A:1 *et seq.* (LexisNexis) (transit); N.J. Stat. Ann. §§ 30:9-13 *et seq.* (West) (hospitals); N.M. Stat. §§ 3-44-1 *et seq.* (hospitals); N.Y. Pub. Auth. Law §§ 1400 *et seq.* (McKinney) (parking); N.C. Gen. Stat. §§ 131E-5 *et seq.* (hospitals); N.D. Cent. Code §§ 11-36-01 *et seq.* (ports); Ohio Rev. Code Ann. §§ 749.01 *et seq.* (LexisNexis) (hospitals); Okla. Stat. Ann. tit. 11, §§ 30-101 *et seq.* (hospitals); Or. Rev. Stat. §§ 267.010 *et seq.* (transit); 16 Pa. Stat. Ann. §§ 2199.5 *et seq.* (hospitals) (West); R.I. Gen. Laws §§ 42-99-1 *et seq.* (convention center); S.C. Code Ann. §§ 44-7-2010 *et seq.* (hospitals); S.D. Codified Laws §§ 34-9-1 *et seq.* (hospitals); Tenn. Code Ann. §§ 7-5-101 *et seq.* (ports); Tex. Health & Safety Code §§ 264.001 *et seq.* (Vernon) (hospitals); Utah Code Ann. §§ 9-4-602 *et seq.* (housing); Vt. Stat. Ann. tit. 24, §§ 5101 *et seq.* (transit); Va. Code Ann. §§ 15.2-1121 (2008) (cemeteries); Wash. Rev. Code §§ 14.08.010 *et seq.* (West) (airports); W. Va. Code Ann. §§ 7-11-1 *et seq.* (LexisNexis) (parks and recreation); Wis. Stat. Ann. § 66.0127 (West 2003) (hospitals); Wyo. Stat. Ann. § 15-10-116 (2011) (housing).

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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MARCH 2012

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

v.

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-APPELLEES

[Filed: Dec. 9, 2011]

Appeal from the United States District Court for the Middle District of Georgia

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Before: TJOFLAT and CARNES, Circuit Judges, and MICKLE,* District Judge.

TJOFLAT, Circuit Judge:

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* Honorable Stephan P. Mickle, United States District Judge for the Northern District of Florida, sitting by designation.

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 *et seq*.). 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, *id.* § 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. *Id.* § 31-7-72(a). Once such need is determined, the governing body appoints between five and nine individuals to manage the authority. *Id.*

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," *id.* § 31-7-75(4), which include hospitals, clinics, nursing homes, and other public health facilities, *id.* § 31-7-71(5);[1] to "acquire by purchase, lease, or otherwise . . . projects," *id.* § 31-7-75(4); to "construct, reconstruct, improve, alter, and repair projects," *id.* § 31-7-75(5); to "lease . . . for operation by others any project," *id.* § 31-7-75(7); to "establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id.* § 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.

providers and to arrange for the provision of health care services through such networks," *id.* § 31-7-75(27).

The statute also grants the authorities more general powers to "make plans for unmet needs of their respective communities," *id.* § 31-7-75(22), to "make and execute contracts and other instruments necessary to exercise the[ir] powers," *id.* § 31-7-75(3), and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 31-7-75(21). And, the statute makes clear, these enumerated powers—broad as they are—are not exhaustive: each authority has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article." *Id.* § 31-7-75.[2]

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[2] Each authority's exercise of these powers, however, is generally limited to its own city or county, or, under limited circumstances, only slightly beyond those boundaries. The statute defines an authority's "[a]rea of operation" as "the area within the city or county activating an authority," as well as "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." *Id.* § 31-7-71(1). And the statute's definition of "project" suggests that an operation qualifies as a project only if it falls within the city or county in which the authority is located, within the authority's area of operation, or within a city or county whose governing bodies and hospital authority have approved the project. *See id.* § 31-7-71(5). An authority in a low-population county, however, may locate a project in a county contiguous to its area of operation. *Id.* § 31-7-89.1(d). The statute also sometimes allows projects as far as 12 miles from the city or county in which an authority is located. *Id.* § 31-7-72(f).

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. *See id.* § 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"), a subsidiary of HCA, Inc. established in Albany in 1971.[5] Palmyra consists of 248 beds and provides essentially the same services as Memorial. Memorial controls 75 percent and Palmyra 11 percent of their geographic market.[6]

In December 2010, PPHS presented the Authority with a plan to acquire Palmyra's assets, i.e., the Palmyra hospital facility, with funds provided by PPHS[7] and to lease such assets to PPHS or a nonprofit PPHS subsidiary. The terms of the lease would be essentially the same as the Authority's PPMH lease.[8] The Authority approved the plan to the extent that it called for the purchase of the Palmyra hospital and its temporary management by a subsidiary to be established by PPHS. In April 2011, the Authority approved the terms of the proposed lease to PPHS or its subsidiary.

II.

On April 19, 2011, the Federal Trade Commission (the "Commission") initiated an administrative proceeding to determine whether the Authority's purchase of

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[5] HCA, Inc. is a for-profit corporation that operates hospitals in twenty states.

[6] The geographic market for Memorial and Palmyra consists of Dougherty and five surrounding counties.

[7] PPHS would provide $195 million, and the Authority would use such funds to purchase Palmyra's assets. If the plan were not carried to fruition, PPHS would pay HCA, Inc. a fee of $35 million.

[8] The plan called for the cancellation of PPMH's Memorial lease and the execution of an instrument under which the Authority would lease both Memorial and Palmyra to PPHS or a PPHS subsidiary for a term of 40 years. Prior to the execution of this lease, the Authority would contract with a newly organized PPHS subsidiary, Phoebe North, Inc., to operate Palmyra.

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. *See* 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 monopoly." 15 U.S.C. § 18. According to the Commission, the proceeding was to be held in September 2011. If a section 7 violation were to be found, the Commission would issue a cease and desist order to prevent the Authority going forward with the plan to acquire the Palmyra hospital facility. The order would be subject to review in this court. 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist . . . may obtain a review of such order in the [appropriate circuit] court of appeals of the United States.").

To prevent the consummation of the plan prior to the completion of the administrative proceeding, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991) ("[O]nce an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'"), the Commission brought this action, on April 20, 2011, to obtain a preliminary injunction against the Authority, PPHS, PPMH, HCA, Inc., and Palmyra (collectively "Appellees"). *See* 15 U.S.C. § 53(b) ("Whenever the Commission has reason to believe (1) that any person, partnership, or corporation is violating, or is about to violate

[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.

The Appellees, in response, moved the district court to dismiss the Commission's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. They did not contest the Commission's claim that the acquisition of Palmyra and effective merger of Palmyra and Memorial would tend to create, if not actually create, a monopoly in the relevant market. Instead, they asserted that the "state-action doctrine" immunized the Authority and its operation of the two hospitals under the planned arrangement with PPHS from antitrust liability. The district court agreed that the Authority, PPHS, and PPMH were entitled to such immunity and dismissed the Commission's complaint with prejudice. The Commission now appeals.

III.

We review *de novo* a district court's order dismissing a complaint under Rule 12(b)(6). *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2012). We "accept[] the factual allegations in the complaint as true and construe[] them in the light most favorable to the

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[9] Section 13(b) of the Federal Trade Commission Act allows courts to grant a preliminary injunction against defendants in an action brought by the Commission provided there is a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, [granting the injunction] would be in the public interest." 15 U.S.C. § 53(b).

Plaintiff," *id.*; we are not, however, "bound to accept as true a legal conclusion couched as a factual allegation," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007) (quoting *Papasan v. Allain*, 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 *Parker v. Brown*, 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. *Id.* 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." *Id.* 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." *City of Lafayette v. La. Power & Light Co.*, 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," *id.* at 413,

98 S. Ct. at 1137 (quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 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." *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1187-88 (11th Cir. 1994) (citing *Town of Hallie v. City of Eau Claire*, 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 *Town of Hallie*, 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. *Id.* at 42, S. Ct. at 1718. And, as we explained in *Lee County*, 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 anticompetitive conduct be reasonably anticipated." *Id.* at 1190-91.

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[10] We held in *Crosby* v. *Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515 (11th Cir. 1996), that a hospital authority created by the Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70 *et seq.*, was, for purposes of state-action immunity, a political subdivision of the state. 93 F.3d at 1525.

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] *See Town of Hallie*, 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 analysis, we consider all the anticipated stages of the plan approved by the Authority—the purchase of Palmyra's assets, as well as their temporary management by, and subsequent lease to, PPHS or a PPHS subsidiary—as parts of a single "acquisition" under the Clayton Act.

[12] The Commission would have us approach the state-action issue differently. It argues that this case involves no "genuine state action" at all. Appellant's Br. 24. According to the Commission, the challenged plan is, in substance, a transfer of control of a hospital from one private party to another—a transfer engineered by a private party and only rubber-stamped by a governmental entity. In the absence of genuine state action, the Commission insists, we can dispose of the immunity issue without even reaching the question whether the state authorized the transaction and clearly articulated a policy to displace competition.

The Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), forbids us to accept the Commission's argument. We may not "look behind" governmental actions for "'perceived conspiracies to restrain trade.'" *Id.* at 379, 111 S. Ct. at 1353 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580, 104 S. Ct. 1989, 2001, 80 L. Ed. 2d 590 (1984)). We may not "deconstruct[] . . . the governmental process" or "prob[e] . . . the official 'intent'" to determine whether the government's decision-making process has been usurped by private parties. *Id.* at 377, 111 S. Ct. at 1352. We therefore must reject the Commission's argument that because the plan at issue was formulated by PPHS and HCA, Inc. and presented by PPHS to the Authority, the plan's execution would constitute only private action.

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 *et seq.*, 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," *id.* § 31-7-75(4), which include hospitals, *id.* § 31-7-71(5); to "construct, reconstruct, improve, alter, and repair projects," *id.* § 31-7-75(5); to "establish rates and charges for the services and use of the facilities of the authority," *id.* § 31-7-75(10); to "sue and be sued," *id.* § 31-7-75(1); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id.* § 31-7-75(14); and to "borrow money for any corporate purpose," *id.* § 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," *id.* § 31-7-75(3), and to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id.* § 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." *Id.* § 31-7-75(12). And although the Authority has no power to tax, *id.* § 31-7-84(a), the statute authorizes local governments to impose a tax to cover some of

the Authority's expenses, *see id.* § 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," *id.* § 31-7-75(4), which, again, include hospitals, *id.* § 31-7-71(5), and the power to "lease . . . for operation by others any project," *id.* § 31-7-75(7). This grant makes clear that the Authority is authorized to acquire and lease Palmyra. Moreover, in granting the power to acquire hospitals, the legislature must have anticipated that such acquisitions would produce anticompetitive effects. Foreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them. This case, therefore, is not materially different from *Lee County*, where we held that the Florida legislature must have anticipated that granting the power to acquire hospitals to a county hospital board of directors would likely diminish competition. 38 F.3d at 1191-92.

The Commission argues that *Lee County* is distinguishable because the Florida statute in that case concerned the hospital board of only one county. *See id.* at 1186. For that reason, the Commission insists, the Florida legislature likely acted on detailed knowledge of the competitive conditions in that specific county. Here, by contrast, the Hospital Authorities Law applies statewide. We thus have no reason, according to the Commission, to believe that when the Georgia legislature enacted that statute, it was similarly familiar with competitive conditions in the geographic area affected by the Authority's acquisition of Palmyra.

Nevertheless, the Georgia legislature must have anticipated anticompetitive harm when it authorized hospi-

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. *See* 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 undertaking such mergers, "hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia," *id.* § 31-7-72.1(e). According to the Commission, this amendment suggests that in 1993 —more than fifty years after the original Hospital Authorities Law, 1941 Ga. Laws 241 (codified as amended at O.C.G.A. § 31-7-70 *et seq.*), was enacted—the Georgia legislature concluded that other provisions of the law, including those that authorize the authorities to acquire hospitals, did not clearly articulate a policy to displace competition. And, the Commission suggests, the legislature chose—again, in 1993—not to change the state of affairs.

What matters, though, is whether anticompetitive effects were anticipated "at the time the legislation was enacted." *Lee Cnty.*, 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. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 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. . . . "); *United States v. Sw. Cable Co.*, 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 is no more than another manifestation of the Commission's insistence that we disregard *City of Columbia*'s injunction against "deconstruction of the governmental process and probing of the official 'intent.'" 499 U.S. at 377, 111 S. Ct. at 1352. *See supra* note 12.

IV.

For the reasons stated in part III, *supra*, 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

v.

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, *et seq.*, 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 Phoebe North, Inc.'s ("PNI") (hereinafter collectively referred to as "Phoebe Putney")[3] Motion to Dismiss and Vacate the TRO (Doc. 53) (hereinafter collectively referred to as "Motions to Dismiss"). For reasons thoroughly set forth below, the Court **DENIES** Plaintiffs' Motion for Preliminary Injunction (Doc. 5), and **GRANTS** Defendants' Motions to Dismiss (Docs. 45, 46, 53)[4].

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operated by Phoebe Putney Health System, Inc. affiliate Phoebe Putney Memorial Hospital, Inc. (Doc. 2 ¶ 27).

[2] HCA is a for-profit health system that owns Palmyra Park Hospital, Inc., which was created in 1973 and does business as Palmyra Medical Center, an acute care hospital incorporated in the State of Georgia. (Doc. 2 ¶¶ 25-26).

[3] All Phoebe Putney Defendants are not-for-profit corporations under IRS Code § 501(c)(3) and the Georgia Nonprofit Corporate Code. PPMH, Inc. is a Georgia corporation wholly-owned by PPHS, also Georgia corporation, and was created to operate Phoebe Putney Memorial Hospital, which was founded in 1911. Like Palmyra, PPMH offers a full range of general acute care hospital services. (Doc. 2 ¶¶ 22-23). According to the Complaint, Phoebe North, Inc., is the entity created by PPHS in connection with the subject transaction to manage and operate Palmyra under the control of PPHS. (Doc. 2 ¶ 21).

[4] Except where otherwise indicated, for concision and because Defendants make identical arguments in their supporting briefs, the instant Order often only cites to one of Defendants' supporting briefs instead of the briefs of all three Defendants. Similarly, this Order often only cites to one of Plaintiffs' briefs instead of both.

PROCEDURAL and RELEVANT FACTUAL BACKGROUND

Pursuant to section 13(b) of the Federal Trade Commission Act (hereinafter "FTCA"), *see* 15 U.S.C. § 53(b),[5] and section 16 of the Clayton Act, *see id.* § 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. (*See* Doc. 2 at 1-2; *see also* 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. (*Id.*). 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 acquire Palmyra, a solution that would also avoid the risk of antitrust enforcement, as demanded by HCA. (*Id.* ¶ 37). As proposed, the Authority would simply buy Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. (*Id.* ¶ 38). Once the Authority obtained title, it would lease Palmyra to PPHS for $1.00 per year for forty years on terms similar to the 1990 Lease between PPMH, Inc. and the Authority. (*Id.*).

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

tional session with two of the Authority's members, Ralph Rosenberg and Charles Lingle. The entire Authority, however, was not presented with the proposed transaction until December 21, 2010, after PPHS made a formal offer to HCA for Palmyra on November 16, 2010; the PPHS Board approved the final terms of the deal between PPHS and HCA on December 2, 2010, including PPHS's guarantee of $195 million payment and agreement to pay a $35 million break-up fee and/or rescission fee; and PPHS and HCA entered into a Termination Agreement that required PPHS to pay $17.5 million if the Authority did not approve, in the exact form as negotiated, the Asset Purchase Agreement. (*Id.* ¶¶ 47-49).

At the December 21, 2010 special Authority meeting on the proposed transaction, Baudino, who appeared as special counsel to the Authority, presented the terms of the transaction using a presentation from PPHS's December 2, 2010 Board meeting. (Doc. 2 ¶¶ 37, 49). The members then voted to approve the Asset Purchase Agreement and the Termination Agreement, exactly as negotiated, Ex. PX008-04, as well as a Management Agreement between the Authority and Phoebe Putney. (*Id.* ¶ 50). Effective March 1, 2011, and set to "automatically terminate upon the effective date of [the putative] executed lease," the Management Agreement granted the entity formed by PPHS control over Palmyra's operations immediately upon the closing of the transaction. Ex. PX009 § 7.03(c). Several months later, on April 4, 2011, the Authority approved a lease term sheet prepared by Baudino that clarifies the December 21, 2011 Resolutions approved by the Authority as well as the

Authority's plan to lease Palmyra's and PPMH's assets to Phoebe Putney under a single lease. (Doc. 2 ¶ 52).

On these facts, Plaintiffs assert in their Complaint and Memorandum in Support of their PI and TRO Motions that Phoebe Putney and the Authority have structured the subject transaction to avoid antitrust enforcement by the FTC through the sale of Palmyra to the Authority, the grant of management and operational control over Palmyra's assets to PPHS pursuant to the Management Agreement, and the subsequent lease of Palmyra to a PPHS entity for forty years. (*Id.* ¶¶ 2-7). Thus, the acquisition of Palmyra—the acquirer of which Plaintiffs claim is the Authority only on paper but Phoebe Putney in reality—will create a virtual monopoly for inpatient general acute care services in Albany, Dougherty County, Georgia, by eliminating competition between PPMH and Palmyra, the only two major hospitals that service not only the Albany, Dougherty County community, but the communities of the surrounding six counties. (*Id.* ¶ 1).

Accordingly, Plaintiffs center their Complaint on the need for the Court to aid in the maintenance of the *status quo* during the FTC's ongoing administrative proceedings, which includes a September 19, 2011 trial on the merits of the legality of Phoebe Putney's alleged acquisition of Palmyra. (*See id.* ¶¶ 91-95; *see also* Doc. 7). They further maintain that Defendants are not entitled to state action immunity because the Authority was not sufficiently involved in the transaction, and PPHS, as a private party, entirely negotiated, structured, and executed the subject transaction without the independent analysis and oversight of the Authority. (*See* Doc. 2 ¶¶ 85-89). Injunctive relief, according to Plaintiffs, is

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, Defendants filed their Motions to Dismiss,[8] wherein they argue that the state action doc

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[7] The Court's grant of temporary injunctive relief has been extended, pursuant to Defendants' consent, until the Court's issuance of a decision on the pending PI Motion.

[8] Defendants HCA, Palmyra, and the Authority alternatively move for summary judgment in their Motions to Dismiss. (The Phoebe Defendants only move to dismiss and vacate the TRO.) However, the Court construes Defendants HCA's, Palmyra's, and the Authority's Motions as motions to dismiss instead of ones for summary judgment because the Court's findings and conclusions herein with respect to the state action immunity issue are made without reference to matters outside of the pleadings. *Harper v. Lawrence County, Ala.*, 592 F.3d 1227, 1232 (11th Cir. 2010) ("A judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings."). And to the degree the Court has referred to matters beyond the pleadings that are attached to Defendants' Motions to Dismiss—for example, the Asset Purchase Agreement, Management Agreement, and documents concerning the negotiations for the transaction—the Court is permitted to do so because these matters are (1) central to the complaint and (2) undisputed. *See Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (citing Fed. R. Evid. 201)). For this reason, Defendants' Motion to Strike (Doc. 73) Plaintiff FTC's Statement of Undisputed Material Facts (Doc. 64) is **DENIED**, for the decision herein does not reference or rely on the FTC's or Defendants' Rule 56 Statements.

For this reason, the Court also **OVERRULES** the Authority's objection to the exhibits that Plaintiffs moved to admit into evidence at the close of the June 13, 2011 hearing on Defendants' Motions to Dismiss and Plaintiffs' PI Motion. The Authority contends that these

trine indisputably immunizes their conduct from antitrust scrutiny and thereby moots Plaintiffs' PI Motion and require its denial. (*See generally* 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. It then turns to Defendants' Motions to Dismiss (Docs. 45, 46, 53)—specifically, the potential application of state action to the Authority, Phoebe Putney, and HCA/

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exhibits are irrelevant to Defendants' Motions to Dismiss because they do not deal with the state action defense; rather, the Authority assets, they deal with Plaintiffs' application for a preliminary injunction. The Court finds, however, that these documents are relevant to the state action defense in that they provide context for the Court's assessment of the transaction, specifically whether Defendants' actions qualify for state action. Furthermore, all of the documents on Plaintiffs' Exhibit List on which the Court's analysis relies are referenced in the Complaint, which is the only focus of a Court's ruling on a motion to dismiss. Finally, many of the most relevant documents to which the Authority objects—and all of the documents relied on by the Court—were previously filed by Plaintiffs as well as Defendants—for example, the 1990 Lease—or were provided to Defendants.

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. (*See* 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. *See* 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. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The recent Supreme Court decision of *Ashcroft v. Iqbal* reaffirmed the pleading standards enunciated in *Twombly*. 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 appropriately grounded in 12(b)(6), instead of in Rule 12(b)(1), as they require the Court to review the sufficiency of the pleadings. As such, the Court's review of Plaintiffs' Complaint is governed by Rule 12(b)(6) standards.

supported by factual allegations." *Id.* at 1949-50 (citing *Twombly*, 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 when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004) (citation omitted). In evaluating the sufficiency of a plaintiff's pleadings, while the court must "accept[ ] the allegations in the complaint as true[,] construe[] them in the light most favorable to the plaintiff," *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003), and "make reasonable inferences in [p]laintiff's favor, ' . . . [the court is] not required to draw plaintiff's inference,'" *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)). Thus, although the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . exceedingly low[, it is not nonexistent]." *Ancata v. Prison Health Servs. Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation and quotation marks omitted). In view of these legal standards applicable to the pleading stage, the Court now turns to its discussion of a preliminary issue concerning the scope of its review, and then addresses Defendants' state action argument in opposition to Plaintiffs' Complaint and PI Motion.

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 PNI, under a Management Agreement, and (3) Phoebe Putney's entry into a lease with the Authority to grant Phoebe Putney managerial control of Palmyra assets for forty years. (Doc. 2 at 2).

In contrast, Defendants contend that the first stage of the alleged transaction is the only event relevant to the Court's analysis of the state action immunity issue. Thus, they contest the inclusion of the third stage as part of an "acquisition" subject to antitrust review. This third stage, particularly with respect to the alleged lack of adequate supervision by the Authority of Phoebe Putney's control of Palmyra operations, is "speculative," Defendants maintain, because the lease and its terms do not yet exist and have not even been negotiated. (*See* Docs. 45-47, 53 (arguing that Article III of the U.S. Constitution prohibits Court from enjoining Authority's acquisition of Palmyra based on non-existent lease)). Moreover, Defendants argue that neither the putative lease nor the Management Agreement is alleged to have competitive impact beyond the acquisition of Palmyra itself by the Authority. (Doc. 75 at 6). Accordingly, they also seemingly contest the inclusion of the second stage

regarding the Management Agreement as part of the "acquisition" subject to antitrust review because it is unexecuted. (*See, e.g.*, 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. . . . " *United States v. Archer-Daniels-Midland Co.*, 584 F. Supp. 1134, 1137 (S.D. Iowa 1984) (emphases added) (quoting *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 181-82 (S.D.N.Y. 1960)). As such, section 7 has been construed as forward looking: unlawful conduct triggers the provision's protections as soon as the potential anticompetitive results can be detected. *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1040 (2d Cir. 1986) ("[The Clayton Act's] focus is . . . on the future, . . . whether today's acquisition will bring tomorrow's loss of competition.").

Language on the breadth of section 7 from a popularly quoted case from a court in the Southern District of Illinois is particularly instructive:

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[10] Section 7 also applies to stock or share capital acquisitions. *See* 15 U.S.C. § 18. Many nonprofit entities like Phoebe Putney and Palmyra, however, have no stock or share capital to acquire. This part of section 7 is therefore inapplicable to many acquisitions of nonprofit enterprises such as the one at issue here. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1214 n.14 (11th Cir. 1991) (finding inapplicable stock-acquisition clause of section 7 to acquisition of nonprofit hospital).

> [section 7] is primarily concerned with the end result of a transfer of a *sufficient part of the bundle of legal rights and privileges from the transferring person to the acquiring person to give the transfer economic significance and the proscribed adverse "effect."*
>
> The broad sweep to be given to the term "acquire" is also suggested by the circumstance that the following words are unrestricted, i.e., "the whole or any part of the assets." . . . Those words likewise must be given a *liberal interpretation* . . .
>
> The language [of section 7] was deliberately couched in *general and flexible* terms. . . .

Archer-Daniels-Midland Co., 584 F. Supp. at 1137 (emphases added) (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82). Thus, as one court in the Northern District of Georgia held, "[t]he words 'acquire' and 'assets' are not terms of art or technical legal language[, but] . . . are generic, imprecise terms encompassing a *broad spectrum* of transactions whereby the acquiring person may accomplish the acquisition by means of *purchase, assignment, lease, license*, or otherwise." *See S. Concrete Co. v. U.S. Steel Corp.*, 394 F. Supp. 362, 374 (N.D. Ga. 1975) (emphases added) (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82). Therefore, "[t]he test [for whether an acquisition falls under section 7] is pragmatic, ..." *Archer-Daniels-Midland*, 584 F. Supp. at 1137 (quoting *Columbia Pictures Corp.*, 189 F. Supp. at 181-82).

Courts have consequently found the consummation of an acquisition unnecessary for a Clayton Act violation; a planned acquisition created by the parties' entry into an agreement is sufficient. *Nelson v. Pacific Southwest*

Airlines, 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. *See, e.g.*, *Cine 42nd Street*, 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); *Archer-Daniels-Midland Co.*, 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); *Nelson*, 399 F. Supp. at 1028-1030 (holding that despite abandonment of agreement for acquisition between parties, acquirer's ability to have gained substantial control over decision-making process of airline during pendency of acquisition agreement created genuine issue of threat of acquirer's purchase of corporation's controlling of stock in airline to airline transportation competition). Such broad applications of section 7 are sensible in light of the Clayton Act's purpose to prevent acquisitions that "may" or "tend to" cause specified harm. *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969) (explaining that acquisitions that directly bring about harm or that even make possible acts that do, can violate Clayton Act).

Based on the above rationale, this Court finds that the inchoate or unexecuted nature of the subject transaction should not limit this Court's review. The putative lease alleged in Plaintiffs' Complaint should constitute a part of the subject "acquisition" and therefore part of the transaction that this Court must review and assess. According to the well-pleaded allegations of the Complaint, the moment the acquisition by the Authority is consum-

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 *Nelson* that a terminated acquisition agreement, which was never executed, fell within the purview of section 7. It also comports with *Cine 42nd Street*'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 through an unexecuted Management Agreement and unnegotiated lease arrangement with the Authority—that triggers the Clayton Act.

Several documents referenced in the Complaint, including a Memorandum on the Required Terms for a Revised Lease between the Authority and PPMH, Inc., as well as the Resolutions adopted by the Authority at the December 21, 2010 special meeting, indicate that Phoebe Putney and the Authority intended to draft a lease for PPHS's control of Palmyra. *See, e.g.*, Ex. PX0082. One of the Resolutions adopted by the Authority states that Phoebe Putney and the Authority would enter into a lease for the operation of Palmyra by Phoebe Putney on terms substantially similar to those of the 1990 Lease between PPMH, Inc. and the Authority for PPMH's operation.[11] *See* Ex. PX0082. Additionally, the applicable provisions of the Hospital Authorities law, *see infra* note 16 & Part I.c.ii.1.a, and controlling legal authority within this Circuit indicate that an arrangement for an acquisition and/or lease between a hospital authority and private hospital similar to the arrangement between the Authority and Phoebe Putney is often necessary, given an authority's inability to operate for profit and thus, its lack of offices, staff, and funds; and an authority's statutory power to delegate to other entities, even those private in nature, its responsibility to provide healthcare to the community.

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[11] On November 10, 2010, Baudino, acting as special counsel to PPHS, also detailed this proposition in a six-page letter to HCA, which explained that the Authority would "lease Palmyra to a non-profit entity controlled by PPHS . . . [on] substantially the same terms as the Authority's existing lease of [PPMH]." Ex. PX207-02.

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. *See Archer-Daniels-Midland Co.*, 584 F. Supp. at 1137 (quoting *Columbia Pictures Corp.*, 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. (*See id.* (analogizing and relying on *FTC v. Hosp. Bd. of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994); *Crosby v. Hosp. Auth. of Valdosta & Lowndes County*, 93 F.3d 1515 (11th Cir. 1996))).

As to the Authority's immunity, they contend that (1) the Authority is a political subdivision of the state; (2) Georgia state statutes authorize the Authority to acquire other hospitals as part of its authority to operate, control, and maintain a public hospital and other hospital facilities; and (3) the anticompetitive effect of the Authority's acquisition is reasonably foreseeable by the Georgia state legislature, given the express acquisition powers broadly conferred by the Georgia legislature to hospital authorities. (*Id.* at 4-5, 17-18, 21-23). According to Defendants, because a hospital authority can operate only within its sponsoring city or county, the Georgia legislature certainly knew that any acquisition was likely to be of a competing local hospital and that intra- county acquisitions would often result in the combination of two or more hospitals in a single county. (*Id.* at 21 (citing O.C.G.A. § 31-1-71(1)). Because such a conclusion flowed from similar express acquisition, operational, and management powers conferred on Florida hospital authorities by the Florida legislature in *Lee County*, the same conclusion logically flows from the powers legislatively granted to Georgia hospital authorities to acquire and operate hospitals. (*Id.*).

Defendants further argue that the actions of HCA, Palmyra, and Phoebe Putney are also immune from antitrust laws. As private parties that contract with a political subdivision of the state such as the Authority, they contend that HCA and Palmyra are immune under state

action immunity doctrine by extension, and Phoebe Putney, as a non-profit affiliated with the Authority, does not require active supervision by the state. (*See, e.g.*, Doc. 53-1 at 14). Defendants state, as a result, that an antitrust plaintiff challenging the act of a public hospital authority cannot avoid the state action doctrine by re-characterizing the transaction as one between private parties (in this case, as a sale from Palmyra to Phoebe Putney) (Doc. 75 at 3) and thus, cannot argue that the transaction is a mere pretext to advance private, anti-competitive interests rather than the public good (Doc. 45-1 at 25 to 26 (citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 369-70 (1991))).

Once the state action doctrine is established, Defendants argue, the individual motives underlying the transaction—specifically, Phoebe Putney's financial interests in acquiring Palmyra—become irrelevant. (Doc. 45-1 at 25 to 27; *see also* Doc. 72 at 3 ("[There is simply no point at which] the influence of a private actor becomes so great that that . . . the state doctrine [does not] appl[y]."")). Rather, the fact that the Authority is the only entity acquiring Palmyra, as determined from a plain reading of the Asset Purchase Agreement, confirms that the transaction is immune from antitrust laws under the state action doctrine. (Doc. 75 at 4).

Phoebe Putney goes further to state that because no Phoebe entity is the buyer of the assets underlying Plaintiffs' allegations, only the Authority will own Palmyra and will have ultimate responsibility for its operation.[12]

[12] Phoebe Putney as well as the Authority and HCA/Palmyra, who join Phoebe Putney in this argument, assert a number of other grounds for this proposition, including the Court's lack of jurisdiction over non-profit entities. (*See* Docs. 45, 46). However, the Court does not address

(Doc. 53-1 at 17). Thus, it maintains that "there is no cause of action involving a private actor" in this case. (*Id.*). 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. (*Id.* 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. (*Id.* 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." (*Id.* at 20). Lastly, Phoebe Putney as well as HCA, Palmyra, and the Authority argue that under the *Noerr-Pennington* 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; *see also* 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. *See infra* Part I.c.ii. The Court also must note that non-profit entities are subject to section 7 and thus, FTC jurisdiction. *See Univ. Health, Inc.*, 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); *see also supra* 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. (*Id.* at 17, 20; *see also* 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; *see also* 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. (*See* Doc. 7 at 21-23 (distinguishing *Lee County*, 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. *See supra* 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 *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1040-41 (11th Cir. 1993), because law at issue in *Lee County* was "special act[ ]" of Florida Legislature that applied to that specific county's health system, and health care authorities act in *Askew* 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; *see also* 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. (*Id.* 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-

tract with the state does not immunize private conduct.[14] (Doc. 61 at 23).

The foregoing dispute between the Parties as to the application of state action immunity raises the following central question for the Court to resolve: whether the Authority's approval of the acquisition as negotiated and structured by Phoebe Putney is sufficient to shield the transaction from antitrust scrutiny under the state action immunity doctrine. Pursuant to the Court's conclusion as to the scope of the subject "acquisition," *see supra* Part I.b., and Phoebe Putney's role in bringing about and executing the transaction, this question must be answered as to the *Authority's* conduct as well as to *Phoebe Putney's* and HCA-Palmyra's conduct. Such an analysis begins with an exploration of the controlling and authoritative case law on state action immunity.

i. *U.S. Supreme Court and Eleventh Circuit Case Law on State Action Immunity*

The origins of the state action doctrine derive from the reasoning of the U.S. Supreme Court's decision in *Parker v. Brown*. *See* 317 U.S. 341 (1943). In *Parker*, relying on principles of federalism and state sovereignty,[15] the Supreme Court refused to construe the Sher-

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[14] For purposes of deciding the application of state action immunity to Defendants, the Court combines its assessment of the immunity of Phoebe Putney with that of HCA/Palmyra for reasons explained below. *See infra* note 21 and accompanying text.

[15] *Cine 42nd Street* explained the conflict between these principles and a competitive free market that are raised by a state's attempt to anticompetitively regulate its own domestic economy under the shield of state action immunity. Principles of federalism and state sovereignty, embedded in the United States' federalist system, hold that states are sovereign powers and are entitled to act independently, even where

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. *Id.* 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. *Id*. 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." *Id.* 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 combination . . . ."; rather, the required vote on the referendum was one condition of the application of the regulations enacted and prescribed by the state under the enabling language of the Agricultural Prorate Act. *Id.* at 352 (citation omitted). According to *Parker*, therefore, the Sherman Act—and by extension, the Clayton Act—is not meant to restrain acts of the state that are directed by the legislature. *Id.* at 350-51; *see also Lee County*, 38 F.3d at 1186

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such leads to anticompetitive economic activity. The tenet surrounding the free market, however, is that the U.S. economy is grounded on the free enterprise system and that anticompetitive economic activity is prohibited by antitrust law. *Cine 42nd Street*, 790 F.2d 1032, 1035 (2d Cir. 1986).

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

Several years later, in *Cal. Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, the U.S. Supreme Court extended the parameters of *Parker* to apply to alleged restraints of trade brought about by *private actors*. 445 U.S. 97 (1980). There, the Court held that to qualify private action for state action immunity, the challenged action first "must be 'one clearly articulated and affirmatively expressed as state policy;' [and] second, . . . must be 'actively supervised' by the State itself." *Id.* at 105 (quoting City of *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

Applying these elements to the wine pricing scheme established by private wine producers under the California Business and Professionals Code, the Court found that although the relevant provisions of the state Code represented a policy to permit the price resale maintenance by California wine sellers, the price setting program did not meet second requirement of *Parker* immunity because the state merely authorized price setting, enforced prices established by private parties, and never reviewed the reasonableness of price schedules or regulated the terms of the fair trade contracts. Simply put, the wine producers held the power to prevent price competition by dictating the prices charged by wholesalers, while the state played a passing, indirect role in pricing and management that was insufficient to establish antitrust immunity. *Id.* at 103-04 (explaining that without extensive official oversight by state, *Parker*, 317 U.S. at 351, may have found violation of Sherman Act).

Since *Parker* and *Midcal*, the Supreme Court and Eleventh Circuit have determined that state action immunity is applicable to political subdivisions such as municipalities, *City of Columbia*, 499 U.S. 365, and hospital authorities, *Lee County*, 38 F.3d at 1188 (applying *Parker* immunity to Florida hospital authority); *Askew*, 995 F.2d at 1039 (same as to Alabama hospital authority). Yet, the determination that a political subdivision's anticompetitive activities constitute state action "is not a purely formalistic inquiry" that a party can establish by simply declaring the political subdivision's actions to be lawful. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985).

Nonetheless, anticompetitive effects can result from broad authority to regulate. *Id.* In fact, "the [political subdivision] need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit," as a requirement for such explicit authorization would unnecessarily impose on municipalities' local authority and autonomy. *Id.* at 39, 42, 44 (finding that state statute broadly empowering cities to provide sewage services and to refuse to provide sewage services to unannexed areas clearly contemplated that city could engage in anticompetitive conduct that would result in monopoly over provision of sewage services).

Rather, to obtain protection under state action immunity doctrine, a political subdivision of the state must "demonstrate that their anticompetitive activities were authorized by the state 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1385 (quoting *Town of Hallie*, 471 U.S. at 38-39)).

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. *Id.* at 1386.

1. Immunity of Hospital Authorities

Here, Plaintiffs do not contest the Authority's satisfaction of the first and second elements of state action immunity, nor does the Court reject Defendants' contention that these items have been met. It is well established that the Authority is a political subdivision of the state under Eleventh Circuit law. *See Crosby*, 93 F.3d at 1525 (treating Hospital Authority of Valdosta and Lowndes County, Georgia, as Georgia political subdivision). The Georgia Code also authorizes Defendants to perform the challenged conduct of acquiring and leasing hospital property for purposes of meeting the healthcare needs of the community.[16]

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[16] O.C.G.A. § 31-7-75(4) and (6), respectively, authorize a hospital authority to acquire by lease, purchase, or otherwise, and to sell to others or lease to others for any number of years not to exceed forty, any land, buildings, structures, or facilities constituting any part of an existing or future project, O.C.G.A. § 31-7-75(4), (6), (7), which includes "the acquisition, construction, and equipping of hospitals, health care facilities, . . . and other public health facilities . . . 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 . . . ," O.C.G.A. § 31-7-71(4) (emphases added). 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 authority determines that lease will promote public health needs of community by making additional facilities available or reducing healthcare costs, and that authority retains sufficient control over any project

For this reason, the Court's analysis as to the Authority's immunity hinges on the third element: whether the suppression of competition in the manner alleged in the Complaint is a reasonably foreseeable result of the conduct authorized and the powers granted to the Authority under Georgia Hospital Authorities law. To answer this question in the affirmative, the Court must be satisfied that the Georgia legislature reasonably foresaw a private entity taking managerial and operational control of its only former competitor through a management agreement and lease granted to it by a hospital authority following the authority's acquisition of that competitor.

In *Lee County*, the primary authority on which Defendants rely in their Motions to Dismiss, the Eleventh Circuit easily found this element met, even without an "explicit[ ] [statement by the legislature] that it expect[ed] anticompetitive conduct to result from [the subject] legislation." 38 F.3d at 1188 (citing and quoting *Town of Hallie*, 471 U.S. at 41-43; *Askew*, 995 F.2d at 1040-41); *see also Askew*, 995 F.2d at 1040, 1041 (explaining that although enabling legislation, unlike that in *Lee County*, explicitly recognized potential anticompetitive results of state code's provision of broad acquisition and operational powers to healthcare authority, court was not required to find such explicit language to render such results foreseeable). The court held that the Florida legislature foresaw possible anticompetitive effects of the Hospital Board of Directors of Lee County's ("The Board") proposed in-county purchase of a private non-

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so leased so as to ensure that lessee will not in any event receive more than reasonable rate of return on its investment in the project. *Id.* § 31-7-75(7).

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. *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. *Id.* Thus, when the Board's power was legislatively extended in 1987 to permit it to "*establish* and *provide* for the *operation* and *maintenance* of additional hospitals . . . and other facilities devoted to the provision of healthcare services" in Lee County only, the court held that the legislature must have reasonably anticipated that further acquisitions would increase the Board's market share in an anticompetitive manner. *Id.* at 1186, 1192 (emphases added) (quoting Florida Special Laws (citation omitted)).

Similarly, in *Askew*, the Eleventh Circuit granted state action to DCH, a public healthcare facility created by Alabama legislature, when it sought to expand through the acquisition of a private healthcare facility. The court found that the state's legislative authorization to hospital authorities to "*acquire*, . . . enlarge, expand, alter, . . . and *operate* health care facilities" and "*create*, *establish*, *acquire*, *operate* or support subsidiaries and affiliates, . . . for profit or non-profit" made the displacement of competition foreseeable at the time the legislature gave DCH the power to acquire other hospitals. *Askew*, 995 F.2d at 1035 n.2 (quoting Ala. Code § 22-21-318; § 22-21-358). According to *Lee County* and *Askew*, therefore, anticompetitive conduct need only be

reasonably anticipated rather than inevitable, ordinary, or routine. *See Lee County*, 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 *City of Columbia*, 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 efforts of the company to lobby the city to enact the challenged ordinances. *Id.*; *cf. Cine 42nd Street*, 790 F.2d at 1046-48 (permitting private parties, as well as urban development corporation (UDC), to enjoy state's immunity from antitrust liability for anticompetitive consequences resulting from acquisition and lease of five movie houses to private party theatre operators, to which UDC had designated operational powers).

The absence of public health, safety, morals, or the general welfare of the community from the city ordinances, as well as the company's alleged motivation of

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. *City of Columbia*, 499 U.S. at 374, 368, 375, 378; *cf. Cine 42nd Street*, 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. *City of Columbia*, 499 U.S. at 368; *see also Town of Hallie*, 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," *City of Columbia*, 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, *Bolt*, 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. *Id.* at 1388-89 (quoting *City of Columbia*, 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. *See City of Columbia*, 499 U.S. at 378-80. This action is protected by the *Noerr-Pennington* 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] *Id.*

Furthermore, actions of a private party also can be considered actions taken by the same as an agent of a political subdivision, such that it should share the political subdivision's immunity. *See Crosby*, 93 F.3d at 1529. The appropriate inquiry for this rule focuses on whether

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[17] *Noerr-Pennington* has recognized a "sham" exception to this rule: where a private party's petitioning of a governmental entity is not a genuine attempt to procure favorable government action but is instead an attempt to directly interfere with the business relationships of a competitor through improper means, for example, of delay and expense, federal antitrust laws apply. *See City of Columbia*, 499 U.S. at 380, 381 (explaining as example where delay is sought to be achieved by lobbying process itself and not by governmental action that lobbying seeks). Here, however, Plaintiffs have not alleged that this exception applies, and for reasons explained in Part I.c.ii, *see supra* pp. 31-39, the Court does not find that the facts warrant the application of this exception.

"there is *little or no danger that the actor is involved in . . . private*" conduct "as opposed to state action vindicating a truly governmental interest." *Id.* at 1530 (emphases added) (quoting *Town of Hallie*, 471 U.S. at 47). If the action is truly that of the state and not of an individual or private actor, then the private parties will receive the state action immunity of the political subdivision, and the need for evaluation of the *Midcal* "active state supervision" element for private parties is eliminated. *Id.* at 1530-31; *see, e.g.*, *Cine 42nd Street*, 790 F.2d at 1047-48 (declining to apply active supervision requirement because private party theatre operators operating in concert with urban development corporation enjoyed state's antitrust immunity, given clearly articulated state policy that private parties and government necessarily work together to effectuate city's mission to cure urban blight).

To illustrate, in *Crosby*, a suit challenging an allegedly anticompetitive peer review decision to deny a doctor staff privileges at a hospital, the Eleventh Circuit considered the actions of individual doctors on peer review committees as the actions of a hospital authority, without an assessment of the "active supervision" element. 93 F.3d at 1530-31; *cf. Univ. Hosp., Inc.*, 938 F.3d at 1213 (explaining that where state's policy is exercised by hospital authority—even where it has delegated its statutory powers to university hospital—active supervision is not required).

The court's ruling was based on the fact that the (1) the control exercised by the hospital authority over the peer review decisions, specifically its retention of power over decisions to grant or deny hospital privileges, and (2) the overall statutory context of peer re-

view in Georgia, that is, the statutory requirement that hospitals provide for the review of professional practices in a hospital. *Id.* 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. *See id.*; *see also Cine 42nd Street*, 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 *Bolt* and *Town of Hallie* to show "clear articulation"; if, however, the defendant is a private party, it travels under the two-prong *Midcal* test—i.e., defendant must show clear articulation and active supervision, unless it can establish that it acted pursuant to *Noerr-Pennington* 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. *Lee County* and *Askew*, 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 *reasoned belief* that *some anticompetitive activity could be envisioned*." *Cine 42nd Street*, 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 *as well as* 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, *et seq.*, the Georgia legislature "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 . . . . "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 amounts sufficient to operate, service debt and bond obligations, and maintain "reserves for improvement, replacement, or expansion of its facilities or services." O.C.G.A. § 31-7-77. In 1941, the Hospital Authority of Albany-Dougherty County, Georgia, was jointly activated pursuant to a resolution by the City of Albany and Dougherty County, Georgia, to execute the goals represented by the Georgia Hospital Authorities Law. *See* Ex. PX008.

As noted above, *see supra* note 16, a hospital authority's powers include, in addition to those necessary to operate a hospital, "[t]o acquire by purchase, lease, or otherwise and to operate projects," O.C.G.A. § 31-7-75(4), which are defined as "the acquisition . . .

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 authority determines that lease will promote public health needs of community by making additional facilities available or reducing healthcare costs, and that authority retain sufficient control over any project so leased so as to ensure that lessee will not in any way receive more than reasonable rate of return on its investment in the project. *Id.* § 31-7-75(7). Hospital authorities may also execute their acquisition and leasing powers by partnering directly or indirectly with other hospitals, facilities, and health care providers to arrange for the provision of health care services. § 31-7-75(27). Thus, an authority's powers, including those of the Authority in this case, appear to be as broad and diverse as the problems they are designed to address.

b. *The 1990 Lease of PPMH by the Authority*

Pursuant to the Hospital Authorities Law, in December 1990, the Authority entered into a Lease and Transfer Agreement, with respect to the assets and operation of PPMH. Under the Lease, which has been extended on several occasions to a 2042 expiration date (Doc. 2 ¶ 27), the Authority operates PPMH as a lessee for purposes of carrying out the mission of the Authority. Ex. PX002; *see also* Ex. PX008 (resolutions explaining acknowledgments of Authority). Although the Authority leases PPMH assets to PPMH, Inc. for $1.00 annum under the Lease, the Authority holds title to and is therefore the legal owner of PPMH's assets (Doc. 2 ¶ 27). In

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, *see supra*, Plaintiffs claim that the Authority "rubberstamped the transaction" and used the Authority as a "strawman," thereby disqualifying Defendants for antitrust immunity (*See id.* at 17, 23; *see also* Doc. 2 ¶ 85).

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 Authority for the former's operation of Palmyra pursuant to the terms of the subject transaction and in a manner immune from antitrust scrutiny. (Doc. 45-1 at 9-10). The Court agrees for reasons discussed below.

While the Court must accept Plaintiffs' well-pleaded version of the facts as true and view them in a light most favorable to Plaintiffs, it is not required to accept Plaintiffs' legal conclusions as to the unavailability of state action immunity to Defendants. Pursuant to its own review of the Supreme Court and circuit precedent and relevant Georgia statutes, the Court concludes that the provisions of Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70, *et seq.*, that concern the powers of hospital authorities in the State of Georgia have created a scheme for establishing and enforcing anticompetitive conduct, particularly through leasing authority-owned hospital facilities or property to another hospital or its affiliated entity as manager and lessee.

As previously established, *see supra* pp. 29-30, Georgia has broadly authorized the Authority to "acquire by purchase" hospital projects and to lease these hospitals to others for a period of up to forty years, O.C.G.A. § 31-7-75(4), (6), limited the Authority's execution of such powers to the city or county that activated the Authority, i.e., its "area of operation," *id.* § 31-7-71(1), and required that the Authority operate on a non-profit basis, *id.* § 31-7-77. Moreover, § 31-7-75(27) authorizes a

hospital authority "[t]o form and operate, either *directly or indirectly*, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks." *Id.* § 31-7-75(27) (emphases added).

The totality of these grants of authority, the geographic limitation, and the non-profit requirement demonstrates that the Georgia legislature intended to guarantee that hospital authorities could accomplish their mission of promoting public health notwithstanding the anticompetitive results.[19] Much like the language of the hospital authorities law at issue in *Lee County*, the Hospital Authorities Law's restriction of a hospital authority's power to acquire and lease in the city or county in which it was created, so as to carry out its statutorily designated duties and powers, is bound to result in an authority's—here, the Authority of Albany-Dougherty, County's—acquisition of multiple hospitals that possibly were once competitors of each other, and its lease of those hospitals—Palmyra and PPMH—to other hospital entities or networks—here, PPHS—that may own, operate, or manage existing hospitals that once competed with those authority-owned and -acquired hospitals. Specifically, because the authority's exercise of the abovementioned powers, which was restricted to Lee County in *Lee County* was likely to result in an authority's monopolistic control of hospitals in Lee County, the

[19] By inference, therefore, the public may benefit from anticompetitive acquisitions authorized under Georgia Hospital Authorities Law. In this light, state action that results in public good and state action that results in anticompetitive effects are not absolutely mutually exclusive if such actions are taken pursuant to the aforementioned hospital authorities powers.

Authority's exercise of the same powers here, which are restricted to the "area of operation" of Albany, Dougherty, County, Georgia, makes the Authority's ownership and lease of PPMH and Palmyra, the two major hospital competitors in Albany, Dougherty County, Georgia, reasonably foreseeable. The same reasoning flows from *Askew*.[20]

Only one hospital, PPMH, existed in Albany, Dougherty County, when the Authority was created. Thus, once authorized to acquire additional hospitals and in view of the reality of its lack of funds and resources, the Authority was foreseeably likely to acquire and lease hospitals in the manner proposed in this case. And the fact that the Authority, with no staff or budget of its own, is statutorily empowered to add new facilities and to lease facilities to other hospitals—which, once again, must be within its area of operation—increases the likelihood that it may enter into a lease for the operation of one of its acquired hospitals by another hospital or hospital network with which the acquired hospital once competed. Such a finding is underscored by the fact that significant barriers to entry into the healthcare market already exist, for example, under Georgia Certificate of Need (CON) laws, which require the issuance of a CON prior to a hospital's provision of specific types of healthcare services at newly built facilities. *See* O.C.G.A. §§ 31-6-41, 31-6-42.

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[20] Although the Georgia legislation does not explicitly authorize the anticompetitive acquisition and operation of multiple hospitals in a single county, as did the Alabama legislation in *Askew*, controlling precedent has confirmed that the enabling legislation need not be explicit. *See supra* pp. 22-23.

The Court reaches this finding notwithstanding the accomplishment of a hospital authority's acquisition and lease of a hospital with the assistance of private parties. In fact, the Court finds that the statutory language concerning hospital authorities' powers encourages and may reasonably require hospital authorities to work with private parties so as to realize hospital authorities' statutorily imposed duties and powers. Sections 31-7-75(4), (6), (7), and (27), *see supra*, indicate that the governmental obligation of a hospital authority to provide for the health of the people can be discharged by its acquisition of existing hospital facilities (as well as by the construction of new hospitals) and by the sale or lease of the hospital to *others*, including *private corporations* which operate the hospitals *to promote the health functions of government*. *Bradfield v. Hosp. Auth. of Muscogee County*, 174 S.E. 2d 92, 99 (Ga. 1970). Provided the lease is consistent with the authority's obligation to provide for the health of the people, an authority may even delegate its duties of operation to a private non-profit corporation. § 31-7-75(7), (27); *see, e.g., Richmond County Hosp. Auth. v. Richmond County*, 336 S.E. 2d 562, 564 (Ga. 1985) (holding that Hospital Authorities Law authorizes corporate restructuring of hospital authority through lease and transfer of hospital assets to a new 501(c)(3), nonprofit corporation and establishment of parent holding company structure).

Furthermore, the absence of the Authority's own budget, as well as the statutory prohibition on authorities' operation for profit, makes it reasonably foreseeable that hospital authorities would work with private hospitals or hospital networks to operate hospitals. Without the assistance of third parties for funding, resources,

and personnel, hospital authorities likely find it difficult to operate and discharge their mission for the provision of healthcare services. The Court finds that this represents a reality that the legislature reasonably foresaw, similar to the court's acknowledgment in *Cine 42nd* of the reasonable foreseeability of the necessary collaboration between private entities and the local government to revitalize blighted urban areas in New York City.

Therefore, so long as the Authority determines that the proposed transaction will continually fulfill the Authority's mission to promote public health needs of the community and allow it to retain public control of Palmyra as is contemplated by the Hospital Authorities Law—which it has done here, *see* Ex. PX008—the Authority may collaborate with private parties such as Phoebe Putney to execute the proposed transaction, without being subject to antitrust liability. In this light, the subject transaction, including the lease stage, merely represents the application of approved principles of the Hospital Authorities Law to new conditions. *See Richmond County*, 336 S.E. 2d at 564.

The Court reaches the above findings, even accepting Plaintiffs' allegations that the subject transaction was effectively motivated and controlled by PPHS through its own independent private and pecuniary interests and that the transaction was structured to circumvent antitrust law. Not only does *City of Columbia* expressly forbid the Court's inquiry into such reasons for and motivations behind acquisitions and their structure, but it, along with *Cine 42nd Street*, also illustrates that the private Defendants, specifically Phoebe Putney, can motivate, influence, and work on behalf of and with a politi-

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 *Parker*, 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. *Parker*, 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, even if private actors whose conduct brings about anticompetitive conduct have some role in that decisionmaking process. For this reason, as well as those previously discussed, the Court holds that the Authority is immune from antitrust scrutiny in the current case. The Hospital Authority of Albany-Dougherty County's Motion to Dismiss (Doc. 45) is therefore **GRANTED**.

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 *Noerr-Pennington* or the principles established in *Cine 42nd Street* and *Crosby* that establish a private actor's enjoyment of the state's antitrust immunity under *Parker*. 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.

Noerr-Pennington, 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. (*See generally* 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. *See supra* 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 *Noerr-Pennington*, 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, *as buyer*, Palmyra, *as seller*, [Phoebe Putney], as *guarantor* of the obligations of the Authority and PNI." Ex. PX226-01 (emphases added); *see also* 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 *accordance with the Authority's directions*" and "in managing [Palmyra] shall *follow the charity and indigent care policies of Authority* and *shall assist Authority in meeting all of Authority's required obligations* under Hospital Authorities Law. *See, e.g.*, Ex. PX009 §§ 3.03(c), (e) (Management Agreement) (emphases added).

Much like the private party theatre operators in *Cine 42nd Street* who operated in concert with the urban development corporation and to whom the urban development corporation had delegated its rights for the operation of the theatres, any actions of Phoebe Putney in its operation of Palmyra are therefore intended to effectuate the Authority's purpose. Although the Authority has "delegated control and authority for overseeing Medical Staff affairs, treatment and related functions [at Palmyra] to [Phoebe Putney]," Phoebe Putney is merely an "agent" of the Authority in operating Palmyra, *see, e.g.*, Ex. PX009 § 3.03(b) (stating that Phoebe Putney "acts in Authority's name and as agent for" Authority in making deposits and disbursements), and as stated in the Management Agreement, owes the Authority a fiduciary

duty with regard to the performance of its responsibilities on the Authority's behalf, Ex. PX009 § 2.01; *see also* 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 independent of the Authority and that the Authority is the ultimate decisionmaker of all project decisions.[22] For example, Phoebe Putney must obtain prior Authority approval for its retention of consultants, accountants, or other professional personnel or for its entry into contracts on behalf of the Authority whose costs exceed $10,000, Ex. PX009 §§ 3.02, § 3.05; its Chief Compliance Officer must report directly to the Authority, Ex. PX009 § 3.13(g); Phoebe Putney must prepare and present to the Authority for its review annual budgets for Palmyra, Ex. PX009 § 3.04(g); and Phoebe Putney shall not make "any change in the licensure, payment model, classification or operations of [Palmyra, without the Authority's] . . . prior written approval," Ex. PX009 § 3.14.

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[22] As a corollary to this power of the Authority, the Authority also bears the ultimate risk of loss with respect to Palmyra's operations as well as the ultimate liability incurred by the Authority as a result of Phoebe Putney's performance of its duties under the Management Agreement. Ex. PX009 §§ 4.01, 4.02.

Because Phoebe Putney will not be able to exercise control over Palmyra's operations independent of the Authority, the Court therefore holds that Phoebe Putney's actions in the transaction are considered those of the Authority, which the Court has already ruled is entitled to immunity. Were the Court to hold otherwise, the state action immunity afforded to the Authority would be meaningless. *See Crosby*, 93 F.3d at 1532. Phoebe Putney's and HCA/Palmyra's Motions to Dismiss (Docs. 46, 53) are thereby **GRANTED**.

II. Plaintiffs' PI Motion

In view of the Court's grant of Defendants' Motions to Dismiss, the Court need not further address Plaintiffs' PI Motion. *See Lee County*, 38 F.3d at 1192 ("[If] the allegedly anticompetitive results were foreseeable under the state action doctrine, it is unnecessary to determine whether the acquisition [potentially] violates the Clayton Act [for purposes of granting preliminary injunctive relief."). Plaintiffs PI Motion (Doc. 5) is thus **DENIED**.

CONCLUSION

For all of the foregoing reasons, the Court rules that Defendants are immune from antitrust liability under the Clayton Act and the Federal Trade Commission Act. Thus, the Hospital Authority of Albany-Dougherty County's Motion to Dismiss or Alternatively, for Summary Judgment and to Vacate the Temporary Restraining Order (Doc. 45); HCA, Inc.'s and Palmyra Park Hospital, Inc.'s Cross-Motion to Dismiss or Alternatively, for Summary Judgment and to Dissolve the TRO (Doc. 46); and Defendants Phoebe Putney Health System Inc.'s, Phoebe Putney Memorial Hospital, Inc.'s, and

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, *see supra*, 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

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

STATE OF GEORGIA,
PLAINTIFF

v.

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-APPELLEES

[Filed: July 8, 2011]

Appeal from the United States District Court for the Middle District of Georgia

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Before: BARKETT, HULL, and WILSON, Circuit Judges.

BY THE COURT:

We hereby VACATE the Order issued on July 6, 2011 and issue the following corrected Order:

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 . . . ," together with the accompanying declaration, is GRANTED.

The FTC's motion for an injunction pending appeal is GRANTED, WITHOUT PREJUDICE to Appellees' right to move for dissolution of the injunction once briefing has been completed.

The FTC's motion to expedites this appeal is GRANTED. The FTC's brief and expanded record excerpts shall be due on July 27, 2011. Appellees' brief and expanded record excerpts shall be due within twenty-one (21) days of service of the FTC's brief. The FTC's reply brief, if any, shall be due within seven (7) calendar days of service of Appellees' briefs. All briefs and expanded record excerpts are to be physically received in the Clerk's Office on the date due.

The Clerk is directed to expedite submission of this appeal for merits consideration as soon as briefing is completed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12906-EE

FEDERAL TRADE COMMISSION,
PLAINTIFF-APPELLANT

v.

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

[Filed: Dec. 15, 2011]

Appeal from the United States District court for the Middle District of Georgia

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ORDER

The injunction pending appeal granted by July 6, 2011, order of the Court is hereby DISSOLVED.

JOHN LEY
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT—BY DIRECTION

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 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 by any of its attorneys designated by it for such purpose 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: * * * .

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 reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that no authority shall operate or construct any project for profit. Any lessee shall agree in the lease to pay rent sufficient in each year to pay the principal of and the interest on any revenue anticipation certificates proposed to be issued to finance the cost of the construction or acquisition of any such project and to pay off or refinance, in whole or in part, any outstanding debt or obligation of the lessee (including any redemption or prepayment premium due thereon) which was incurred in connection with the acquisition and construction of facilities of such lessee and the amount necessary in the opinion of the authority to be paid each year into any reserve funds which the authority may deem advisable to be established in connection with the retirement of the proposed revenue anticipation certificates and the maintenance of the project. Any such lease shall further provide that the cost of all insurance with respect to the project and the cost of maintenance and repair thereof shall be borne by the lessee. In carrying out a refinancing plan with regard to any outstanding debt or obligation of the lessee which was incurred in connection with the acquisition and construction of

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 expenses incurred in connection with acquiring, financing, maintaining, expanding, operating, or equipping the project;

(8) To extend credit or make loans to others for the planning, design, construction, acquisition, or carrying out of any project, which credit or loans may be secured by such loan agreements, mortgages, security agreements, contracts, or other instruments

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 cancellation of repayment of any loans, together with interest and charges thereon, made for educational purposes to students, postgraduate trainees, or the parents of such students or postgraduate trainees who have completed a program of study in a field in which critical shortages exist in the authority's service area; and to provide services and financial assistance to private not for profit organizations in the form of grants and loans, with or without interest and secured or unsecured at the discretion of such authority, for any purpose related to the provision of health or medical services or related social services to citizens;

(26) To exercise the same powers granted to joint authorities in subsection (f) of Code Section 31-7-72; and

(27) To form and operate, either directly or indirectly, one or more networks of hospitals, physicians, and other health care providers and to arrange for the provision of health care services through such networks; to contract, either directly or through such networks, with the Department of Community Health to provide services to Medicaid beneficiaries to provide health care services in an efficient and cost-effective manner on a prepaid, capitation, or other reimbursement basis; and to undertake other managed health care activities; provided, however, that for purposes of this paragraph only and notwithstanding the provisions of Code Section 33-3-3, as

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 payments due on any certificates in any one year after the issuance thereof. The authority may

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