No. 11-1160

IN THE
Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., AND PHOEBE NORTH, INC.

JAMES E. REYNOLDS, JR.
PERRY & WALTERS, LLP
P. O. Box 71209
Albany, GA 31708
General Counsel for the Hospital Authority

THOMAS S. CHAMBLESS
PHOEBE PUTNEY HEALTH SYSTEM, INC.
P.O. Box 1828
417 West Third Avenue
Albany, GA 31702
General Counsel for the Phoebe Respondents

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
ERIC F. CITRON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly held that, in light of Georgia's statutory scheme for hospital regulation and the local context in which the State has authorized certain hospital acquisitions by public authorities, this particular acquisition of a private hospital by a public hospital authority, resulting in increased concentration in a local hospital market, was shielded from federal antitrust scrutiny as a "'foreseeable result of what the [state] statute authorizes.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985)).

2. If so, whether the Federal Trade Commission may maintain an action to prevent a hospital acquisition on the theory that members of the local public hospital authority have improperly structured their operations or are defaulting on their duties under state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 11-1660

FEDERAL TRADE COMMISSION,
Petitioner,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,
Respondents.

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

BRIEF IN OPPOSITION

This case involves the application of settled law to particular facts. There is no dispute over the legal standard: Local government actions are not subject to federal antitrust scrutiny if they affect competition in ways that are a "'foreseeable result' of what [a state] statute authorizes.'" *See* Pet. 4; *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). That analysis ultimately turns on an understanding of state law. Here, both the district court and the Eleventh Circuit analyzed Georgia law relating to acquisitions by local hospital authorities and concluded that the State has displaced a model of consumer protection based solely on "free competition" (Pet. 17 n.3) with one that foreseeably led to the transaction at

issue. That determination is correct, and in any event raises no question warranting review by this Court.

The Federal Trade Commission argues that the Eleventh Circuit rested its decision on state law granting a political subdivision "general corporate powers." That is not correct. The court looked to a special set of state-law powers and duties that Georgia has assigned to local hospital authorities. It concluded that those powers and duties, in the context in which they were enacted, show a state policy of allowing these authorities to acquire existing hospitals within their jurisdictions and provide for their operation on a not-for-profit basis—with the foreseeable consequence of increasing local market concentration. *See, e.g.*, Pet. App. 2a-4a, 11a-13a. Nothing about that fact-bound determination conflicts with any decision of this Court or any other court of appeals.

The "general corporate powers" question the FTC purports to present (Pet. i) was resolved 30 years ago in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). The foreseeability question actually resolved by the court of appeals on the facts of this case is easier than the one this Court unanimously resolved in favor of state-action immunity in *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 41 (1985). And petitioner's second question, attacking the structure and quality of the system of local regulation on which Georgia has chosen to rely—*see, e.g.*, *Richmond Cnty. Hosp. Auth.* v. *Richmond Cnty.*, 336 S.E.2d 562, 567, 569 (Ga. 1985) (approving hospital authority's use of operational lease structure)—would require precisely the sort of intrusive inquiry into the workings of state and local governments that this Court refused to countenance in *Omni Outdoor Advertising*, 499 U.S. at

365. Under these circumstances, there is no basis for further review.

STATEMENT

Petitioner's argument depends on two central characterizations of the facts and issues in this case: (1) that Georgia law invests local hospital authorities with only "general corporate powers," and (2) that the court of appeals relied on that grant to immunize the creation of a "private monopoly" without state supervision or control. *See, e.g.*, Pet. i.[1] Even on a record based largely on the untested allegations of the FTC's complaint, neither characterization is sustainable.

1. a. Respondent the Hospital Authority of Albany-Dougherty County is a "public body corporate and politic," O.C.G.A. § 31-7-72, run by a nine-member board appointed by the Dougherty County Commission. After the Georgia General Assembly passed the Hospital Authorities Law in 1941, O.C.G.A. §§ 31-7-70 *et seq.*, the county immediately activated the Authority, which in turn immediately acquired Phoebe Putney Memorial Hospital. Under longstanding resolutions adopted by the County Commission, the Authority's board must include one member of the Commission and one member of the hospital medical staff. By law, members receive no compensation, O.C.G.A. § 31-7-74, operate under strict conflict-of-interest rules, *id.* § 31-7-74.1, and may be removed from office by a state court if they fail to fulfill their mission to provide "for the continued operation and maintenance of needed health care

[1] As to "general corporate powers," see also Pet. 2, 11, 12, 13, 15, 16, 18, 22, 23, 25, 31. As to "private" action, see also Pet. 6, 7, 11, 12, 16, 17, 27, 28, 29.

facilities in the county," *id.* § 31-7-76. From its inception to the present day, the Authority, through Phoebe Putney Memorial, has provided the vast majority of the hospital care available to residents of Dougherty County and surrounding areas who cannot afford to pay.

In 1990, the Authority restructured its operations by creating two non-profit corporations—respondents Phoebe Putney Hospital System, Inc. (PPHS), and its subsidiary Phoebe Putney Memorial Hospital, Inc. (PPMH)—and leasing the hospital to PPMH for day-to-day operations. (For simplicity, this brief sometimes refers to PPHS and PPMH together or interchangeably as "Phoebe Putney.") This restructuring was modeled closely on a similar transaction approved by the Georgia Supreme Court as consistent with the state Hospital Authorities Law and the mission of hospital authorities to promote public health and the care of the indigent. *See, e.g.*, *Richmond Cnty. Hosp. Auth.*, 336 S.E.2d at 564-569 (authorizing essentially identical lease terms as consistent with the public mission of hospital authorities under state law); *Bradfield* v. *Hospital Auth. of Muscogee Cnty.*, 176 S.E.2d 92, 99 (Ga. 1970) (similar). Neither Phoebe Putney entity has any equity holder or other private owner. *See* Pet. App. 4a & n.4, 27a n.10, 35a. The Authority holds the ultimate interest in all the Phoebe Putney assets, including operating funds and any reserves generated through operations. Those assets would revert to the Authority if the Phoebe Putney entities were to be dissolved—as would happen automatically if, for example, their lease agreement with the Authority either was terminated or expired. *Id.* at 4a n.4.

That is especially significant because a Georgia hospital authority may not enter into such a lease

unless it "first determine[s] 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." O.C.G.A. § 31-7-75(7). The lease itself must impose a duty on the lessee to fulfill the authority's public health and indigent care missions—as the Authority's lease with Phoebe Putney does. *See id.*; Dkt. 52-7 (Lease) ¶¶ 4.02(g)-(h), 4.03(b), 4.18. The authority must also "retain[] sufficient control … so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return" from operation of the hospital. O.C.G.A. § 31-7-75(7); *see also id.* § 31-7-77 (providing that no project of a hospital authority may be operated for profit or charge prices greater than necessary to cover costs and create reasonable reserves). Here, the Authority may terminate the lease, cause the dissolution of PPHS and PPMH, and retake immediate control of all the assets involved upon any material failure by Phoebe Putney to honor its public service obligations. *See* Dkt. 52-7 ¶¶ 9.01-9.07.

In practice, this structure for pursuing the Authority's mission has resulted in an efficient hospital operation that provides high-quality care at comparatively low prices to both paying and indigent citizens in Dougherty County and surrounding areas. With 443 beds, Phoebe Putney Memorial has over 14,000 inpatient admissions annually; sees over 5,200 Medicaid patients, at state reimbursement rates that cover far less than the actual cost of services; and provides substantial additional charity care, outpatient, and emergency services, while increasing prices at a rate far lower than the rate of increase of the medical consumer price index and receiving no additional support from county taxpayers. *See* Dkt. 52-13 (Dec. 2010 presentation to

Authority regarding acquisition) at 22, 27; *see also* Dkt. 52-8 (report by PricewaterhouseCoopers) at 3 (independent study comparing Phoebe Putney favorably to peers in nearly all respects, including indigent care and community benefit). The net result has been that—at current prices—demand for Phoebe's services far exceeds supply: Phoebe Putney Memorial must often divert patients it would otherwise be able to treat to other hospitals because of a lack of available beds. *See* Dkt. 52-13, at 10; Dkt. 52-18 (May 2011 presentation to Authority regarding acquisition) at 8-9.

b. In contrast, before the transaction at issue in this case, Palmyra Medical Center was operated for profit by the Hospital Corporation of America. Despite having more than half as much nominal capacity as Phoebe Putney Memorial (248 beds), Palmyra had one-fifth the number of admissions and saw less than one Medicaid patient per bed—less than one-tenth of Phoebe's rate of service to the disadvantaged. Dkt. 52-13, at 22. Palmyra was in physical decline, and its owner was not making necessary investments in either expanding its output or improving the quality of the services that Palmyra provided.

2. a. Georgia law does not permit free entry into, or major expansions within, the hospital services market. Any party wishing to establish or substantially expand a hospital facility must first secure a "certificate of need" from state regulators. *See* O.C.G.A. §§ 31-6-40 *et seq*. This requirement embodies "[t]he policy of [Georgia] … to ensure that health care services and facilities are developed in an orderly and economical manner," which in the State's view makes it "essential that appropriate health planning activities be undertaken and implemented and that a system of mandatory review of new institutional health services be provided

… in a manner that avoids unnecessary duplication of services." O.C.G.A. § 31-6-1. Such state certificate-of-need laws are paradigmatic examples of "a state policy to *displace* competition with some *alternative* approach to ordering the market." Pet. 4 (internal quotation marks omitted).

b. In Georgia, hospital authorities are a critical element of the alternative system. The mission of all hospital authorities is to "carry out and make more workable the duty which the State owe[s] to its indigent sick," *DeJarnette* v. *Hospital Auth. of Albany*, 23 S.E.2d 716, 723 (Ga. 1942), by providing for the "operation and maintenance of needed health care facilities," O.C.G.A. § 31-7-76. Thus, hospital authorities are "deemed to exercise public and essential governmental functions" and given "all the powers necessary or convenient to carry out and effectuate" these purposes. *Id.* § 31-7-75. These powers include twenty-seven specific grants of authority, including the quintessential public power of eminent domain. *Id.* § 31-7-75(12). The statute also specifically confers the power to acquire existing hospitals, *id.* § 31-7-75(4), and to lease them for operation by others under specified conditions, *id.* § 31-7-75(7). Being "necessary for the welfare of the citizens of the state," the Hospital Authorities Law preempts any contrary state or local law. *Id.* § 31-7-96.

The Hospital Authorities Law also confers on authorities "all powers now or hereafter possessed by private corporations performing similar functions"—the so-called "general corporate powers" identified by petitioner. O.C.G.A. § 31-7-75(21). In construing such provisions, however, the Georgia Supreme Court has looked to the purposes for which particular public entities, including hospital authorities, were created as a *limitation* on the general grant of corporate powers.

See, e.g., *Tift Cnty. Hosp. Auth.* v. *MRS of Tifton, Ga., Inc.* 335 S.E.2d 546, 547 (Ga. 1985) (banning hospital authorities from selling durable medical equipment); *Flint Elec. Membership Corp.* v. *Barrow*, 523 S.E.2d 10 (Ga. 1999) (banning electric authorities from selling propane); *Day* v. *Development Auth. of Adel*, 284 S.E.2d 275 (Ga. 1981) (banning development authority from acquiring property to lease to grocery store). Thus, far from being the sole or even primary grant of power to hospital authorities, as the FTC implies, this general grant is informed and limited by the more specific provisions accompanying it and the purposes for which the authorities are formed. *See, e.g.*, *Kendall* v. *Griffin-Spalding Cnty. Hosp. Auth.*, 531 S.E.2d 396, 397-399 (Ga. Ct. App. 2000) (striking down particular hospital authority lease as *ultra vires*). Hospital authorities do not function as "ordinary business corporation[s]," Pet. 12, to which the State has granted "'simple permission to play in a market,'" Pet. 26 (quoting *Kay Elec. Coop.* v. *City of Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011)).

On the contrary, state law imposes on hospital authorities specific obligations and constraints. In particular, each authority may operate only in a narrowly defined geographic area. *See* O.C.G.A. § 31-7-71(1). Typically, an authority's powers may be exercised only in its own county or, in limited circumstances, within 12 miles thereof. *Id.* §§ 31-7-71(1), -72(f). Georgia has 159 counties for 10 million residents, about 3 million of whom live in the four largest counties. Authorities thus exercise their hospital-related powers in very narrow geographic zones.

In addition, authority projects may not be operated for profit, and their prices must not exceed the amount necessary to cover costs and create reasonable re-

serves. O.C.G.A. § 31-7-77. These constraints apply whether a project is operated by an authority itself or by a lessee. *Id.* § 31-7-75(7). Before entering a lease, an authority must find that the arrangement is likely to expand services or reduce price. *Id.* Moreover, the law requires public hearings and other procedures designed to ensure community benefit before any lease may be entered. *See id.* § 31-7-74.3. Lessees must make annual financial reports to their authority lessors, *id.* § 31-7-74.3(b)(2), and authorities must make annual reports to their county commissions regarding fulfillment of their community benefit obligations, *see id.* § 31-7-90.1; *see also id.* §§ 31-7-90, -91, -92 (imposing further auditing and reporting requirements). Failure to meet the public mission requirement makes authority members subject to removal under a special statutory petition process, *id.* § 31-7-76; and any action that might lead to pecuniary gain for individual board members would be subject to immediate sanction, *id.* § 31-7-74.1.

In short, state law does not pursue the goal of providing reasonably priced health services by merely creating hospital authorities, granting them general corporate powers, and setting them loose to participate in an otherwise competitive market. Rather, it directs these authorities to pursue a tightly defined public mission in specific local areas, while subjecting them to public supervision and statutory price constraints.

c. A set of state-law provisions dealing with the specific issue of hospital acquisitions makes it even clearer that Georgia does not regard hospital authorities as "ordinary" participants in the hospital market. Georgia law demonstrates significant concern regarding the sale of *non-profit* hospitals, including authority projects. *See* O.C.G.A. §§ 31-7-400 *et seq.* When such a transaction is proposed, the parties must generally

make detailed disclosures to the Attorney General and various showings regarding market effects before a sale or lease will be allowed. *Id.* §§ 31-7-402, -405, -406. These provisions do not apply to any acquisition of a *for-profit* hospital (*id.* § 31-7-401)—demonstrating that Georgia law shows less concern with moving hospitals between or out of the hands of for-profit owners. And while these provisions also do not apply to leases by local hospital authorities, as just described the State has an even more detailed system for ensuring community benefit in that situation. *See supra* p. 9; O.C.G.A. §§ 31-7-74.3, -75(7), -77.

In fact, Georgia law remains particularly skeptical about the *sale* of public hospitals, such as authority projects, which would allow the assets to escape the statutory rigors of a lease such as the one in place here. Such a transaction requires not only the procedures just outlined but also a new certificate of need, which is not ordinarily required for the acquisition of an existing provider. O.C.G.A. § 31-6-47(9). That requirement does not apply, however, to an acquisition by a hospital authority, *id.* § 31-6-47(9.1), which would leave the hospital in public hands and subject to the price and community benefit constraints already described.

State law thus subjects to special scrutiny any transfer of a hospital *out of* the local authority system, applying specific protections not required for most transfers of private, for-profit facilities. In contrast, the State shows special confidence in acquisitions *by* hospital authorities—including the transfer of for-profit assets into the non-profit, publicly structured authority system, as occurred here.

d. Finally, a series of cases from the Georgia Supreme Court confirms that, within the State's system

for the provision of health services, hospital authorities have a unique role. In cases such as *Bradfield*, 176 S.E.2d at 99, *Richmond County*, 336 S.E.2d at 565, and *Cobb County Kennestone Hospital Authority* v. *Prince*, 249 S.E.2d 581, 585-586 (Ga. 1978), the Court has recognized that the business plans and policies of hospital authorities are created in the exercise of the public functions assigned to the authorities by state law. Accordingly, as with other state administrative agencies, judicial review "is limited to a determination of whether [a] Hospital Authority's action in adopting [a] resolution was arbitrary and unreasonable." *Cobb Cnty.*, 249 S.E.2d at 585-586. State law recognizes the "complex task" confronting each authority, *id.* at 588, including the need to balance paid and indigent care, *Richmond Cnty.*, 336 S.E.2d at 567. Recognizing the public character of this pursuit, the state courts accord deference to any "rational administrative decision enacted in order for the Authority to carry out the legislative mandate that it provide adequate medical care in the public interest." *Cobb Cnty.*, 249 S.E.2d at 588.

3. The Authority has long been considering how best to address the capacity constraints discussed above, *supra* p. 6, which interfere with its mission of providing necessary care to the local community. For a hospital that is already operating at high efficiency, there are only two ways to increase capacity: build it or buy it.

Of the two options, buying existing unused or under-used capacity is generally much faster, cheaper, and less disruptive to existing patient care than designing a new facility, securing the many needed approvals (including a new certificate of need), and completing construction. *See* Dkt. 52-13, at 16-18; *see also* Dkt. 52-18, at 10-18. Accordingly, the Authority has been con-

sidering acquiring the under-used Palmyra facility since 1988—when the Authority was still running Phoebe Putney Memorial directly, and before PPHS or PPMH even existed. *See* Dkt. 52-26 (Wernick Decl.) ¶¶ 29-46; Dkt. 45-5 (1988 Minutes); Dkt. 45-6 (1989 Minutes). At that time, however, negotiations between Palmyra's owners and the Authority's chief executive officer—an employee named Joel Wernick—did not lead to an agreement. *See* Dkt. 52-26 ¶¶ 4, 24-35.

By 2010, the lease structure for Phoebe Putney Memorial had been in place for many years and Wernick had become CEO of PPHS and PPMH, but the capacity problem remained. *See* Dkt. 52-26 ¶ 47. Analysis again showed that, compared to the most reasonable construction plan, purchase of the Palmyra facility would provide Phoebe Putney with more than three times the number of additional beds at less than half the average cost per bed, and would be less disruptive to existing patient care. *See* Dkt. 52-18, at 13. Because of Phoebe Putney's non-profit structure and public mission, those savings would be passed on to local patients and their insurers and enable the provision of more services for elderly or indigent patients at the reimbursement rates fixed by Medicare and Medicaid. *See, e.g.*, *id.* at 15, 18. Accordingly, Wernick again set out to negotiate an acquisition. *See* Dkt. 52-26 ¶¶ 47-49.

Palmyra's private, for-profit owner insisted on confidentiality during negotiations, while formal Authority meetings must be public. Until a conditional deal was reached, therefore, Wernick held individual meetings with the Authority's Chairman, Vice Chairman, general counsel, and other members, briefing them on the proposed transaction, answering any questions, and obtaining tentative approval from each. Dkt. 52-26 ¶¶ 39-46, 51, 55, 62; Dkt. 52-22 (Decl. of Authority Chairman

Rosenberg) ¶¶ 13-14; Dkt. 52-25 (Decl. of Authority Vice Chairman Lingle) ¶ 7. Once the conditional agreement had been negotiated, the Authority's board formally considered it at a public meeting on December 21, 2010, and voted unanimously to approve the transaction and purchase Palmyra. The funds would come from Phoebe Putney's operating income and reserves—which are ultimately, and appropriately, the Authority's only source of funds, just as if the Authority were still operating the hospital directly—but title to all assets would pass solely to the Authority. *See* Dkt. 52-11 (Purchase Agreement) at 7, 16 (defining "Buyer" and outlining terms of transfer). It was further contemplated that, after the procedural and substantive requirements of state law were met, Palmyra would be incorporated into the Authority's lease arrangement with PPMH and PPHS. On April 4, 2011, the Authority approved a set of detailed recommendations from its general counsel regarding the types of terms that should be included in any revised lease, including both public-mission requirements and substantial reporting obligations regarding Phoebe Putney's prices and business practices. *See* Dkt. 52-16 (Authority Resolution). Until that lease is signed, the Authority will operate Palmyra under a separate management agreement with PPMH. *See* Dkt. 52-15 (Management Agreement).

After the FTC challenged the transaction, including alleging that members of the Authority exercised inadequate care in approving it, the Authority revisited its vote. On May 5, 2011, "after reviewing the allegations and complaints," the board again voted unanimously to "reaffirm and ratify the previous decisions …, it being the Authority's judgment and determination that such acquisition continues to be in the best interest of the citizens of Dougherty County, and will fur-

ther the Authority's principal mission to provide such citizens quality healthcare at reasonable cost." Dkt. 52-20 (Board Resolution) at 2.

4. On April 19, 2011, the FTC initiated an administrative proceeding challenging the acquisition of Palmyra and brought this action for a preliminary injunction. Pet. 8; *see* 15 U.S.C. § 53(b).

a. The district court denied the injunction and dismissed the case. Pet. App. 16a-65a. After reviewing relevant facts and resolving preliminary issues, *id.* at 18a-32a, the court turned to respondents' argument that the Authority's acquisition of Palmyra and contemplated lease of the facility to Phoebe Putney was shielded from federal antitrust scrutiny by the doctrine of state-action immunity, *see id.* at 32a-38a. It recognized that, under precedent from this Court and the Eleventh Circuit, that question turned on whether a challenged action was undertaken by, on behalf of, or under the supervision of a political subdivision of the State, pursuant to state statutory authorization, and whether any potential anticompetitive effect was "reasonably foreseeable to the legislature based on the statutory power granted to the political subdivision." *Id.* at 42a; *see id.* at 38a-49a.

Assessing the Authority's "[f]ormation, [p]urpose, and [p]owers" under state law, Pet. App. 51a, the court held that a local acquisition and lease like the transaction at issue here was "reasonably foreseeable." It noted that Georgia had narrowly limited the geographic scope in which an authority could operate while broadly authorizing authorities to acquire other hospitals, lease them to private parties, and operate networks of providers. Combining these factors with the State's statutory protections for consumers, including non-profit

status and limitations on pricing, the court concluded that the legislature must have foreseen that an authority might end up providing many or all of the hospital services available in its designated geographic service area. *Id.* at 54a-55a. The foreseeability of concentration was "underscored" by the "significant barriers to entry into the healthcare market," including Georgia's certificate-of-need law. *Id.* at 56a.

The district court reached these conclusions despite accepting the FTC's characterization of PPHS and PPMH as "private parties." *See, e.g.*, Pet. App. 57a. Relying, however, on decisions of the Georgia Supreme Court approving structures such as the Authority's lease arrangement with Phoebe Putney as ways of carrying out an authority's public mission, *id.*, the court recognized that the Authority could properly collaborate with private entities, or use them as its agents, to fulfill its public mission so long as it "retain[ed] public control[,] … which it has done here," *id.* at 58a. The court concluded that the same analysis extended immunity to PPHS and PPMH, either because they could not be held liable for merely seeking to "prompt or engender" conduct by a public body or because they acted in effect as Authority agents. *Id.* at 60a-63a; *see, e.g.*, *id.* at 62a ("[A]ny actions of Phoebe Putney in its operation of Palmyra are therefore intended to effectuate the Authority's [public] purpose.").

b. The court of appeals affirmed. Pet. App. 1a-15a. It first reviewed the provisions of the state Hospital Authorities Law, *id.* at 2a-3a, the FTC's factual allegations, *id.* at 4a-5a, the procedural history of the case, *id.* at 5a-7a, and the contours of the state-action immunity doctrine, *id.* at 8a-9a. Immunity, the court explained, turned on "whether the state has authorized the Authority's acquisition of Palmyra and, in doing so,

clearly articulated a policy to displace competition." *Id.* at 10a (footnotes omitted). The "clearly articulated" standard would be "satisfied as long as anticompetitive consequences were a foreseeable result of the statute authorizing the Authority's conduct." *Id.* at 10a-11a.

In applying that standard, the court focused on the powers granted to hospital authorities by the Georgia General Assembly to acquire and operate hospitals within defined local areas, including the power to lease facilities for operation by others. Pet. App. 11a-13a; *see also id.* at 2a-3a & n.2. "To fulfill its mission to promote public health," the court noted, an authority could deploy not only "any power a private corporation could," but also "powers that private corporations do not." *Id.* at 11a. Moreover, in authorizing authorities to acquire and operate hospital projects only in small local areas, and only on a non-profit basis at potentially tax-subsidized, below-cost prices, the state legislature "must have anticipated" that acquisitions in some areas would result in the "displacement of competition." *Id.* at 12a-13a ("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 authorities could have no serious anticompetitive consequences."); *see id.* at 2a n.1, 3a n.2, 11a-12a.

In setting out the facts of the case, the court of appeals noted the Authority's 1990 formation of PPHS and PPMH; the state-law provisions forbidding PPMH from "charging prices greater than necessary to cover the cost of services and provide reasonable reserves"; and the lease provisions under which all assets of PPHS and PPMH will be returned to the Authority when the lease expires or is otherwise terminated. Pet. App. 4a & n.4. In its discussion, the court rejected the FTC's

argument that the acquisition of Palmyra involved "no 'genuine state action' at all" because it was "a transfer … from one private party [HCA] to another [PPMH] … engineered by a private party [PPHS] and only rubber-stamped by a governmental entity." *Id.* at 10a n.12 (quoting FTC's brief). The court concluded that, under this Court's decision in *Omni Outdoor Advertising*, it would not "look behind governmental actions for perceived conspiracies to restrain trade" or engage in "deconstruction of the governmental process and probing of the official intent." *Id.* at 10a n.12, 14a n.13 (internal quotation marks omitted). The significant point was, instead, "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." *Id.* at 14a.

Several days after issuing its opinion, the court of appeals dissolved the injunction it had entered pending appeal. Pet. App. 68a. In the absence of any further stay or injunction, the Authority completed its acquisition of Palmyra. *See* Pet. 10-11. Since that time, the Authority, through a management agreement with PPMH, has been investing heavily in planning and executing its contemplated expansion of the quantity and quality of services offered at the Palmyra site. This is, of course, the opposite of the behavior expected after an "anticompetitive" merger. *Compare FTC* v. *Whole Foods Market, Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008) ("Whole Foods has already closed some Wild Oats stores[.]").

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THIS COURT'S CASES

The FTC's petition proceeds by catastrophizing the decision below, arguing that it would cloak political subdivisions with state-action immunity based on nothing more than a statutory grant of "general corporate powers." *See, e.g.*, Pet. i, 11, 13-23. That is not what the Eleventh Circuit held. Indeed, the rule the FTC posits was rejected thirty years ago in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). Here, the courts below held only that a State's creation of a system of public hospital authorities with special powers and obligations, in order to provide nonprofit health services in local areas, could signal a state policy of partially displacing market competition as a means for providing residents with high-quality medical care at reasonable prices. Those courts relied heavily on their conclusion that the nature of local markets at the time the State gave authorities the power to acquire existing hospitals made it foreseeable that such acquisitions would increase market concentration. That decision is a particular application, by the courts most familiar with local law and circumstances, of guiding principles firmly established by this Court.

In *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985), one state statute gave a city the power to "construct … sewage systems," while another provided that municipal utilities had no obligation to serve areas outside their corporate limits. *Id.* at 41. The city of Eau Claire made sewage treatment services, over which it had a local monopoly, available only to those who also used the city's sewage collection and transportation services, thus foreclosing competition in the market for collection and transportation services from

the Town of Hallie. *Id.* at 37. This Court held that the city's conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas," *id.* at 42, and therefore immune from antitrust scrutiny.

The Court reaffirmed this foreseeability inquiry in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), where a South Carolina statute gave cities broad power to enact land use regulations, *see id.* at 370-371 & n.3. The City of Columbia used its zoning power to restrict the erection of new billboards, severely hindering competition in a market in which Omni had a 95% market share. *Id.* at 367-368. Quoting *Town of Hallie*, this Court held that "suppression of competition [was] the 'foreseeable result' of what the statute authorize[d]," and applied state-action immunity. *Id.* at 373-374.

The decision below is a routine application of these precedents. The State of Georgia has provided for the creation of local hospital authorities (where local governments see a need for them); prescribed a narrow geographic area in which each authority may operate; imposed on the authorities both a public health mission and statutory pricing restrictions; and given each authority the express power, among others, to acquire existing facilities already operating in their narrow service areas. With the possible exception of major metropolitan areas, local markets for hospital services are likely to be highly-concentrated—that is, to have only a few providers.[2] Moreover, Georgia law restricts entry

[2] Under the FTC's guidelines for evaluating horizontal mergers, any market with four or fewer competitors is "highly concentrated." DOJ & FTC Horizontal Merger Guidelines (2010) § 5.3, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

into or significant expansion within any hospital market by requiring the entering or expanding party to secure a state "certificate of need." *See* O.C.G.A. §§ 31-6-40 *et seq*. Under these circumstances, the statutory power to acquire and operate another hospital in a restricted local service area is almost necessarily the power to increase concentration, and thus potentially limit competition, within an already concentrated market. *See* Pet. App. 12a-13a.[3] The courts below thus had ample reason to conclude that the displacement of some competition, in favor of the operation of hospitals by a public body with a public mission and under a public mandate for non-profit operation, was a foreseeable result of Georgia's statutory regime. *Id.*; *see also*, *e.g.*, *Omni Outdoor Adver.*, 499 U.S. at 372-373. And that determination, rooted in an understanding and assessment of local law, is entitled to "the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction." *E.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998).

In fact, the case for immunity is clearer here than in *Omni* or *Hallie*. In *Omni*, state law gave cities undifferentiated zoning powers. Here, Georgia's Hospital Authorities Law is limited to the hospital-services market and specifically authorizes acquisitions and op-

[3] *See* Merger Guidelines § 5.3 (increasing concentration in an already highly concentrated market is "presumed to be likely to enhance market power"). In a footnote, petitioner suggests that an authority's acquisition of a hospital in some markets would not reduce competition, either because it would replace one monopoly provider with another or because there might be widespread competition. Pet 19 n.4. The test, however, is not whether displacement of competition is inevitable, but only whether it is "a foreseeable result" of state law. *Town of Hallie*, 471 U.S. at 42.

erating leases of the very kind at issue in this case. If protection of incumbent billboard providers is a foreseeable result of the broad power to enact land-use regulations, then consolidation of local hospital markets is surely a foreseeable result of empowering local hospital authorities to acquire existing hospitals within restricted geographic markets.

Similarly, in *Hallie*, state law simply authorized the city to build a sewage plant and choose which customers to serve. That authorization did not expressly extend to tying access to the city's unique sewage treatment facilities to the purchase of non-monopoly waste collection services (and, indeed, to accepting political annexation). Nonetheless, this Court unanimously held that, in context, the State effectively authorized those actions when it allowed the city to restrict the provision of services to those within its corporate limits.[4] That conclusion reflects an understanding of what the state legislature must have foreseen about likely, or at least possible, conditions in local markets for sewage treatment services within the State. The court of appeals undertook the same sort of analysis in this case, which involves a much more detailed system of state-law powers and obligations.

Indeed, even the truncated record here reveals myriad ways in which Georgia law entrusts to hospital

---

[4] Of course, the power to create a service and then provide it only to certain customers is an "ordinary corporate power"—a fact that had no effect on the Court's unanimous determination in *Hallie*. Thus, the effort to characterize expressly granted, statutory powers as "ordinary" has no effect on whether those express grants demonstrate the foreseeability of the action or transaction at issue.

authorities the role of providing local services at reasonable prices despite the foreseeable possibility of displacing private-market competition. Provisions limiting hospital authorities or their lessees to reasonable, non-profit rates of return, *supra* p. 8, demonstrate the State's awareness that authorities might otherwise be able to take advantage of some degree of market power to raise prices. That is particularly clear because, as noted above, *supra* pp. 6-7, state law also restricts entry into or expansion in hospital markets through the certificate-of-need process, reflecting a judgment that citizens may benefit from fewer providers and regulated entry—the antithesis of open competition. *See New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state scheme preventing free entry was "designed to displace unfettered business freedom" and provided state-action antitrust immunity).

Likewise, state-law provisions disfavoring *sales of* authority projects relative to *acquisitions by* local hospital authorities—especially with respect to for-profit hospitals, *supra* p. 9-10—confirm that hospital authorities are not ordinary players in the market, and demonstrate a state judgment expressly favoring transitions from for-profit to authority ownership of the sort that occurred here. The Georgia Supreme Court has approved very similar actions and accords regulatory deference to hospital authorities because state law gives them primary responsibility for complex determinations concerning how best to provide care for patients with private, public, or no insurance. *Richmond Cnty.*, 336 S.E.2d at 569. Under state law, a hospital authority could even seize a "competitor" hospital by eminent domain in order to operate it for the public good. *See supra* p. 7. This state policy mix quite plainly foresees departures from otherwise "accepted assumptions

about the benefits of competition." Pet. 13 (internal quotation marks omitted).

There is, accordingly, no force to the FTC's repeated attempts to compare the state-law context in this case to the grant of "general corporate powers" at issue in *City of Boulder*. Indeed, this Court rejected a similar argument in *Hallie*:

> Th[e] Amendment to the Colorado Constitution [in *Boulder*] allocated only the most general authority to municipalities to govern local affairs. … The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects.

471 U.S. at 43. Here, as in *Hallie*, Georgia has created special-purpose entities to fill a particular public need, on a mandatory non-profit basis, in a market in which the State itself limits entry or expansion, and in which the specific statutory power at issue—acquisition of existing hospitals in a local authority's specified geographic service area—would pose obvious risks to any model of price control based on "free competition" (Pet. 17 n.3). There is no reason for this Court to review the Eleventh Circuit's faithful application of the foreseeability standard to that set of facts.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

For similar reasons, there is also no substance to petitioner's claim of a conflict among the circuits. *See* Pet. 23-27.

In *Surgical Care Center of Hammond* v. *Hospital Service District*, 171 F.3d 231 (5th Cir. 1999) (en banc), the Fifth Circuit emphasized that the express purpose of Louisiana's hospital district law was to allow such districts "to compete … equally" with other hospitals in the market. *Id.* at 235 (quoting state law); *see also id.* (Louisiana intended to "level the playing field but no more."). The court viewed a law providing only a "naked grant of authority to contract," *id.* at 234, as signaling the State's effort to put hospital districts *into* competition, not to insulate them from it. *Id.* at 235. The court recognized, however, the need for any decision in this area to "dr[a]w upon the complete context of the legislation." *Id.* at 236. It thus refused to overrule its own precedent finding immunity under a statutory scheme that combined a similar grant of authority with a certificate-of-need law. *Id.* Here, Georgia law does not endorse unfettered hospital competition, provides local authorities with far greater powers, restraints, and obligations than a grant of naked contracting authority, and includes certificate-of-need regulation. There is no reason to suppose that the Fifth Circuit would reach a different conclusion from the Eleventh on those facts.

Similarly, in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397, 402-403 (9th Cir. 1991), the Ninth Circuit held that "a mere statutory authorization to engage in business" was an insufficient indication of state policy to overcome "numerous concrete legislative actions that indicate California, instead of making regulation the order of the day in the hospital service sector … has committed it-

self to a competitive market." Among these was the State's *repeal* of its previous certificate-of-need law. *Id.* at 403 n.12. Like the Fifth Circuit, the court expressly recognized that the outcome would be different if the broader legislative scheme evidenced a different attitude towards competition as the dominant regulatory model. *Id.* at 403-404. Thus, like *Hammond*, *Antelope Valley* provides no basis for predicting that the Ninth Circuit would disagree with the Eleventh if faced with the very different setting of this case.

In *First American Title Co.* v. *Devaugh*, 480 F.3d 438 (6th Cir. 2007), the Sixth Circuit held that county Registers of Deeds were not entitled to state-action immunity from charges that they had improperly imposed no-resale conditions on certain types of access to public records where the claim of immunity rested on state law merely authorizing the registers to make contracts. *See id.* at 456-458. On the other hand, where one register refused to make non-paper copies available or to offer discounts for bulk sales of paper copies, the court held those practices were immune from scrutiny because state law "expressly granted the registers discretion to determine the medium in which records are reproduced" and otherwise "address[ed] the registers' provision of title record copies in some detail," and it was either "easily" or "reasonably foreseeable" that registers would use these authorizations to impose the challenged restrictions. *Id.* at 458-459. This case is like the second portion of the Sixth Circuit's decision, not the first.

Finally, in *Kay Electric Cooperative* v. *City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011), a city claimed immunity for tying access to its monopoly sewage services to use of its high-priced electricity services. The Tenth Circuit rejected that claim because "[t]he Oklahoma legislature ha[d] spoken with specificity to the

question whether there should be competition for electricity services in annexed areas," and in doing so had "expressed a clear preference for, not against, competition." *Id.* at 1044; *see id.* at 1044-1047. The FTC can point to nothing similar in the Georgia law relating to local hospital authorities. On the contrary, as respondents have demonstrated, Georgia law "has authorized" Georgia hospital authorities to acquire other hospitals operating in their assigned areas of responsibility—"the *specific form* of [putatively] anticompetitive conduct under attack." *Id.* at 1046.[5]

In sum, the courts of appeals are in perfect agreement concerning how to approach state-action cases. They consider what state law as a whole reveals about the State's policy toward a particular market and particular challenged behavior, applying the foreseeability test established by this Court in *Hallie* and *Omni*. No court rejects *Boulder* and, as the FTC asserts, treats a mere grant of corporate powers as enough. Of course, under the foreseeability test, different facts will lead to different outcomes, and state legislatures will remain free to adopt different approaches to different markets. That is not a reason for further review.

---

[5] Notably, the Tenth Circuit explained that state law provisions allowing municipalities to annex an area and then "expropriate the facilities of the incumbent rural electric cooperative" would, had they been in effect, have provided "the strongest evidence yet of a legislative intent to allow municipalities to monopolize electricity markets within their borders." 647 F.3d at 1046. The court thus found it particularly significant that "as part of its plan to bring more competition to electricity markets, the state legislature recently and expressly *suspended* these very powers." *Id.* Georgia has not suspended the provisions of state law that would permit a local hospital authority to acquire an existing facility, such as Palmyra, by eminent domain. *See supra* p. 7.

III. THE HOSPITAL AUTHORITY'S STRUCTURING OF ITS OPERATIONS PROVIDES NO BASIS FOR REVIEW

In the courts below, the FTC's principal argument was that this case involved no genuine state action because the transaction at issue was a kind of sham in which the Authority would "lend its name" to a monopolistic private acquisition without exercising any independent judgment. *See* FTC C.A. Br. 24-36. In this Court, the Commission reframes the argument as a part of an analysis under *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992), and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), regarding the extent to which public authorities either supervised the acquisition, *see* Pet. 28 ("First, …"), or will supervise Phoebe Putney's operations in the future, *id.* ("Second, …). Either way, this case does not present the question whether "state action doctrine permits the unsupervised transfer of monopoly power into private hands." Pet. 27 (formatting altered). No such transfer has occurred.

To begin with, the FTC's argument about a scheme by "private parties" to secure a "private monopoly" (Pet. 27) is inapposite on the facts of this case. While non-profits entities can in some circumstances violate the antitrust laws, *see, e.g.*, *United States* v. *Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990), the Phoebe Putney entities are special-purpose lessees created by a public authority to carry out its public functions in a manner specifically authorized by state law. *See supra* p. 4; *Richmond Cnty.*, 336 S.E.2d at 564-569. Their assets and income not only cannot inure to the benefit of any private party; they in effect belong to the public Authority, to which they will revert if and when the lease is terminated or expires. In the meantime, they can be deployed only in the service of the Author-

ity's public mission, and only in accordance with the terms of the lease under which the Authority has deputized Phoebe Putney to carry out its projects. Those terms include, for example, the requirement that prices be only high enough to cover costs and the maintenance of reasonable reserves, and that Phoebe Putney report to the Authority regarding its practices. *See supra* p. 5. The only truly "private" actor in this case was HCA—Palmyra's seller. As formed and used under Georgia law, PPHS and PPMH are not "private" in any sense that is relevant here.[6]

Even if the Phoebe Putney entities were "private," however, the FTC would still be challenging only the public actions of the Authority—its decisions to approve the transaction, acquire the Palmyra facility, and then lease it to Phoebe Putney subject to the statutory restrictions and approved conditions described in detail above. *See supra* pp. 4-5, 8-9. The FTC questions the quality of the Authority's decision-making process, suggesting that the Authority "did not participate in the negotiation[s]," Pet. 7; approved the purchase "without any inquiry into its details," *id.*; and merely "notar[ized]" the result, *id.* at 28.[7] But this Court has never suggested that actions affirmatively approved by

---

[6] This is the substance of the district court's conclusion (Pet. App. 61a) that "Phoebe Putney's actions which are challenged in this case can … be considered actions taken in performance of its official duties as an agent of the Authority[.]"

[7] *See also* FTC C.A. Br. 28, 44 (basing argument on assertions that "[n]o questions were asked by the Authority members," they did not insist on any changes to the purchase agreement, and "members hardly had time to read [the terms], much less review" them).

a public entity could become subject to federal antitrust scrutiny because of a federal agency's dissatisfaction with how local officials have discharged their duties. Indeed, it has held almost precisely the opposite: Even if the evidence might show that a local public authority and a private actor actively conspired to restrain trade, a court cannot "deconstruct[] … the governmental process" or "look behind the actions of state sovereigns" for "perceived conspiracies to restrain trade." *Omni Outdoor Adver.*, 499 U.S. at 377, 379.

The FTC suggests that *Omni* is irrelevant because its argument goes 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." Pet. 29 (internal quotation marks and alterations omitted). But the Authority *voted* to take the challenged action, just as the zoning commission did in *Omni*. The "antecedent question" of inadequate consideration by state officials is no more amenable to federal judicial review than the conspiracy, corruption, or bribery exceptions to the definition of "state action" considered and rejected by this Court in *Omni*. *See* 499 U.S. at 376-379.[8]

The FTC also suggests there is "no reasonable likelihood" that the Authority will "meaningfully supervise PPHS's operation of Palmyra" after the acquisition.

---

[8] Of course, respondents also reject the FTC's characterization of the Authority's actions here as a matter of fact. As described above, the Authority's members were kept abreast of negotiations while they were underway, and they twice considered and voted in favor of the transaction at issue. *See supra* pp. 12-13. The FTC's disagreement with the Authority's judgment that Phoebe Putney's operation of Palmyra will benefit the public does not change the fact that the judgment was made.

Pet. 28. This argument both misunderstands the purpose of the active supervision requirement and presumes wholesale disregard of state law by the Authority and the state courts.

First, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. But this is not a situation in which such evidence is needed because a public authority has purported to approve some private anticompetitive arrangement and then abdicated any further oversight function. *Compare Ticor*, 504 U.S. at 639-640. Rather, as the Georgia Supreme Court has already decided, the lease structure through which the Authority uses and superintends Phoebe Putney is a proper way for the Authority to discharge its *own* public functions under Georgia law. *Richmond Cnty.*, 336 S.E.2d at 564-569; *see also Bradfield*, 176 S.E.2d at 99 ("Under the Hospital Authorities Law, this governmental obligation ['to provide for the health of the people'] can be discharged by the acquisition of existing hospital facilities, as is here proposed … and by the sale or lease of the hospital to others, as is also here proposed … . There is no apparent reason why a suitable private corporation could not properly operate the hospital … so as to likewise promote the public health functions of government.")

Second, as a matter of controlling state law, the Authority "ha[s] and exercise[s] ultimate authority and control" over Phoebe Putney. *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). As discussed above, *supra* pp. 4-5, the Authority's leases require PPHS and PPMH to serve the Authority's public benefit mission; and state law requires the Authority to "retain[] sufficient control" to ensure fulfillment of that requirement, and in

particular "to ensure that [a] lessee will not in any event obtain more than a reasonable rate of return" from operation of a hospital. O.C.G.A. § 31-7-75(7). The law also imposes reporting requirements, along with a public hearing before any future lease can be entered. *Id.* §§ 31-7-74.3(b)(2), -90.1. These and similar factors will be even more firmly expressed in the new lease that is expected to be concluded as part of the present transaction. *See supra* p. 13. The FTC cannot simply brush these state-law protections aside. *Compare, e.g.*, Pet. 17 n.3, 28-29 n.5 (arguing that this Court should assume failure to comply with state law or provide public supervision), *with* O.C.G.A. § 31-7-74.2 (oath of office for Authority members).

Of course, the Authority can properly discharge its public functions without second-guessing day-to-day operational or management decisions. The Authority meets regularly, consults independent legal counsel, and obtains periodic reports from reputable outside auditors regarding the operation of Phoebe Putney Memorial. *See, e.g.*, Dkt. 52-8 (report by PricewaterhouseCoopers); Dkt. 52-17 (May 2011 minutes) at 3 (discussing and approving retention of outside auditor); *id.* at 4 (closing meeting to consult with legal counsel); Dkt. 52-22 ¶¶ 8-10 (declaration of Authority Chairman explaining operations and role of the Authority). Those reports have routinely concluded that the hospital is well run and compares favorably to its peers in all respects, including community benefit. The Authority need not interfere with successful operations simply to satisfy the FTC that it could do so if the need arose. Moreover, if Authority members were at some point to default in the performance of their duties by, say, allowing unreasonable prices or failures to provide for indigent care, state law would provide ample means for

holding them to account. *See supra* pp. 9-10; O.C.G.A. § 31-7-76; *Kendall*, 531 S.E.2d at 397-399 (entertaining and upholding challenge to actions of hospital authority and lessee). In the meantime, unfounded predictions of dereliction in a federal agency complaint provide no basis for further review by this Court.

* * *

The FTC evidently disagrees with Georgia's decisions about how best to order local hospital markets. For 70 years, however, it has been clear that federal antitrust law leaves such judgments to the States. *Parker* v. *Brown*, 317 U.S. 341 (1943). This case may be a good example of the wisdom of that course. Before the acquisition challenged here, Phoebe Putney Memorial was capacity-constrained. That gave the for-profit company running nearby Palmyra little incentive to improve quality, increase output, or reduce price. Assessing conditions in its own local area, the Authority approved this transaction as a means of *expanding* the provision of hospital services by putting Palmyra's idle beds to better use, for both paying and non-paying patients. In the months since the stay initially obtained by the FTC was dissolved, the Authority has invested heavily in doing just that. All of this is a foreseeable result of Georgia's comprehensive approach to local hospital regulation. Indeed, it is what the Hospital Authorities Law is all about.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMES E. REYNOLDS, JR.
PERRY & WALTERS, LLP
P. O. Box 71209
Albany, GA 31708
General Counsel for the Hospital Authority

THOMAS S. CHAMBLESS
PHOEBE PUTNEY HEALTH SYSTEM, INC.
P.O. Box 1828
417 West Third Avenue
Albany, GA 31702
General Counsel for the Phoebe Respondents

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
ERIC F. CITRON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MAY 2012