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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL TRADE COMMISSION, :

Petitioner : No. 11-1160

v. :

PHOEBE PUTNEY HEALTH SYSTEM, :

INC., ET AL. :

- - - - - x

Washington, D.C.

Monday, November 26, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-1160, the Federal Trade Commission v. Phoebe Putney Health System.

Mr. Horwich?

ORAL ARGUMENT OF BENJAMIN J. HORWICH

ON BEHALF OF THE PETITIONER

MR. HORWICH: Thank you, Mr. Chief Justice, and may it please the Court:

The State Action Doctrine provides a defense to a Federal antitrust suit when a State has clearly articulated and affirmatively expressed an intent to displace competition with respect to the particular activity at issue in the suit.

Now, in practical terms, what that comes down to is whether application of Federal competition law would somehow subvert a sovereign State policy choice that's clearly evident in State law.

Now, that policy might be expressed in mandatory or compulsory terms, but, short of that, it would also be enough, if the -- the State had specifically permitted conduct that is inherently anticompetitive.

But a grant of general power to act --

1 JUSTICE SOTOMAYOR: You don't think that the
2 grant of powers in this case would permit the hospital
3 authorities, the corporation, to set prices for their
4 services that are below the competitive prices in order
5 to serve the needy?

6 MR. HORWICH: Well, Justice --

7 JUSTICE SOTOMAYOR: Isn't that inherent in
8 the regulations?

9 MR. HORWICH: I think it is, although for
10 reasons that don't affect the analysis of the question
11 about an anticompetitive acquisition. And let me
12 explain why the analysis might be different with respect
13 to prices.

14 There is specific authorization in the
15 statute for the hospital authorities, in conjunction
16 with the counties, to partly fund -- or, I guess,
17 entirely, in principle -- fund their services through
18 tax revenues. So they have another source of funding
19 that would allow them to price in ways that a
20 competitive actor would not necessarily price its
21 services.

22 So if we're talking about particular pricing
23 decisions, say -- I guess it would be below cost pricing
24 that is alleged to somehow be anticompetitive -- then
25 there might very well be a State action defense to that

1 because it -- because the State -- the power to price
2 services subsidized in a way that an ordinary actor
3 wouldn't be able to do --

4 JUSTICE SCALIA: Do you have --

5 MR. HORWICH: -- might very well displace
6 competition in that regard.

7 JUSTICE SCALIA: Do you have any cases in
8 which we -- we slice it that fine --

9 MR. HORWICH: Well, I do think --

10 JUSTICE SCALIA: -- that -- that you are a
11 State actor for some anticompetitive purposes and not
12 for others?

13 MR. HORWICH: Yeah, absolutely,
14 Justice Scalia. I think -- I think the best -- the best
15 example comes from Goldfarb v. Virginia State Bar. So,
16 in that case, the -- the issue was a challenge to a
17 practice of minimum fee schedules that were set by --
18 not by the State, but -- but agreed upon by a bar
19 organization.

20 Now, the State in that case, of course,
21 regulated the practice of law. It regulated admission
22 into the practice of law. It regulated certain aspects
23 of the conduct of the practice of law. And this Court
24 held, in Bates v. Arizona State Bar, that those sort of
25 regulations do constitute State action.

1 But the Court did not accept the submission
2 that the State action defense covered the setting of
3 minimum prices that was at issue in that case because
4 that was not something that there was State action over.

5 And as a -- and, taking a step back, the
6 justification for the State Action Doctrine is that the
7 State is trying to pursue some policy that is part of
8 its traditional sovereign prerogatives to regulate its
9 own economy and that Federal law was not understood to
10 intrude upon that.

11 But, if the State is not actually trying to
12 advance some other policy, with respect to the
13 particular conduct at issue, then it can't be said that
14 the State has done something that Federal law should
15 stand aside for.

16 The -- the --

17 JUSTICE GINSBURG: Mr. Horwich, you said
18 in -- in your reply brief that, if the Hospital
19 Authorities Law specifically authorized local hospital
20 authorities to acquire any and all hospitals within
21 their geographic area, then the clear articulation
22 requirement would be satisfied.

23 But the Authorities Law does authorize the
24 acquisition of other hospitals. And it doesn't say one
25 or two; it says other -- other facilities.

1 So why doesn't the hospital laws law do
2 exactly what you said would satisfy the -- the clear
3 articulation requirement?

4 MR. HORWICH: Well, I think the key
5 difference there, Justice Ginsburg, between the
6 hypothetical we offered in the -- the reply brief and
7 the statute here is that the -- the additional words
8 "any and all" make it clear that the State is
9 contemplating that there could -- the county might opt
10 for socializing its hospital services, putting all of
11 them under the control of the hospital authority.

12 And, by contrast, what we have here is an
13 ordinary corporate power to acquire property. And, like
14 all of the ordinary corporate powers that the authority
15 possesses that are -- that resemble those that -- that
16 an ordinary business corporation would have, the most
17 natural understanding of them is that the State expects
18 them to be exercised in conformity with the background
19 principles that -- that bind everybody. So --

20 CHIEF JUSTICE ROBERTS: Just so I understand
21 your answer to Justice Ginsburg, you're saying there
22 would be a difference if the charter said the authority
23 may require -- acquire any properties to fulfill its
24 mission and if it said the authority may acquire
25 properties to promote its mission?

1 MR. HORWICH: Well, I think it's probably in
2 our -- the hypothetical offered in our reply brief, it's
3 probably the "all" -- the "any and all" that -- that
4 would, I think, be what communicates the State's --

5 CHIEF JUSTICE ROBERTS: So you think a
6 general saying they may acquire properties doesn't
7 implicitly say they may acquire all properties?

8 That seems a pretty thin --

9 MR. HORWICH: No, I don't think it does --
10 well -- but I think, in this area, it's -- it's
11 important, for a couple reasons, that we actually
12 have -- have some substantial assurance of what the
13 State is trying to do here.

14 And a power to grant proper -- excuse me --
15 a power to acquire properties, generally speaking,
16 unadorned with any particular expression from the State
17 about how -- how that power is to be used, is -- is
18 something that can be used competitively or
19 anticompetitively.

20 And you can't infer from that that the State
21 really has an objective of, as I say, such as
22 socializing its hospital services because -- and -- and
23 it's -- and that clarity of expression from the State is
24 really important here, for several reasons.

25 First of all, this is an odd rule, to begin

1 with, in that it allows State law to displace Federal
2 law. So we would want some clarity from --

3 JUSTICE SCALIA: I assume -- I assume that
4 the normal corporate charter contains such a provision,
5 the authority to acquire property, right?

6 MR. HORWICH: Yeah, it absolutely does.
7 And --

8 JUSTICE SCALIA: And we don't -- that --
9 that charter is issued by the State, right?

10 MR. HORWICH: It is issued by the State.

11 JUSTICE SCALIA: And we don't -- we don't
12 think that that enables all corporations to ignore the
13 Sherman Act, do we?

14 MR. HORWICH: No, we don't. And we don't
15 generally think that those corporate powers express an
16 intent to displace any other background -- for instance,
17 if I could give some examples, maybe we could look at
18 some --

19 JUSTICE KAGAN: Mr. Horwich, could I just --

20 MR. HORWICH: Yes.

21 JUSTICE KAGAN: -- before you give examples,
22 just make sure I understand your basic position?

23 Suppose the State had said, very clearly,
24 that these hospital authorities had the power to engage
25 in acquisitions of hospitals that, for a normal actor,

1 would violate the antitrust laws, but -- but basically
2 said the -- the hospital authorities had the discretion
3 to do that or not.

4 And the State didn't know the hospital
5 authority might do it, but it also might not do it.
6 That would be subject to the immunity; is that correct?

7 MR. HORWICH: I -- I think the defense would
8 be available if -- if the beginning of your hypothetical
9 was kind of quoting the statute, yes.

10 JUSTICE KAGAN: Yes. It's a clear grant of
11 authority --

12 MR. HORWICH: Yes.

13 JUSTICE KAGAN: But the authority is
14 completely discretionary. So the State is basically
15 saying, we don't know, we're going to let the hospital
16 authority figure it out.

17 MR. HORWICH: Well, it's certainly -- the
18 hospital authority can figure it -- figure out, but what
19 it's figuring out is whether to actually invoke a
20 displacement of competition that the State has expressly
21 put on the table. And that's what is different in this
22 case --

23 JUSTICE KAGAN: What -- but what I'm trying
24 to get at is the State has put it on the table only as a
25 completely discretionary action. The State has not

1 expressed a preference for it.

2 The State has only said that the hospital
3 authority can think about conditions on the ground in
4 its particular locality and can decide whether such an
5 anticompetitive acquisition is appropriate.

6 MR. HORWICH: Yes, that's fine. We don't
7 have any quarrel with -- with States setting up a clear
8 set of tools, some of which, in your example, might
9 inherently displace competition --

10 JUSTICE KAGAN: So all of this language --

11 MR. HORWICH: -- and having it exercised,
12 actually, at a local level. That's fine.

13 JUSTICE KAGAN: So all this language in your
14 brief about necessarily and inherently and compelled,
15 all of those things really are not part of your -- your
16 governing test?

17 MR. HORWICH: No. I -- I disagree with
18 that. The reason they are part of our governing test is
19 this: Is that a State can certainly give a -- a menu of
20 specific options that sub-State entities can -- can
21 select from. And it might be that some of those are, in
22 fact, not anticompetitive.

23 Let me give you an example from -- from this
24 Court's cases. Southern Motor Carriers involved the
25 submission of -- by motor carriers, of their rates to a

1 public service commission that was -- that would accept
2 them as filed rates.

3 Now, the States -- some of the States there
4 said, well, you can file them individually, or you can
5 file them jointly, and we don't necessarily have a
6 preference, one way or the other, for it.

7 But the fact that the States had said you
8 can file them jointly, which is a horizontal agreement
9 among competitors and sure looks anticompetitive, the
10 fact that the State had said that and put that option on
11 the table qualified as a clear articulation from the
12 State that it intended the displacement of competition
13 to occur if that specific option was chosen.

14 The difference here is that, if you are
15 willing to say, in a case like what we have here with a
16 statute that -- that confers a -- a power that is
17 entirely neutral as to how it would be -- how it could
18 be exercised, you have the problem of not really knowing
19 what the State would intend. And so you can't say that
20 the State clearly intended that there be displacement
21 of competition --

22 JUSTICE BREYER: Well, what about the other?
23 The next line that they give is they give to the
24 hospital authority the power to acquire and operate
25 projects and the power to form and operate one or more

1 networks of hospitals, physicians, and other healthcare
2 providers.

3 Now, as I read that, it certainly includes
4 the rather specific power of acquiring a hospital. And
5 having read that -- not -- not just something you might
6 see in General Motors' charter.

7 MR. HORWICH: Well --

8 JUSTICE BREYER: And -- and those -- that's
9 the language of the -- of the grant of power.

10 Now, I want to know what you want us to do
11 because, in my mind, reading this, it's a statute that
12 provides for regulation -- price regulation of
13 hospitals. And you say -- and I have no doubt you
14 thought of one way in which that could be -- I can think
15 of 100 -- that you could have prices that are different
16 from those set by a free market. So I have no doubt
17 that this sets -- I start there.

18 Now, what is it -- I go back to
19 Justice Scalia's original question: What is it you want
20 us to say? Even though this -- this statute is immune,
21 does grant immunity from attack on a basis of cost and
22 price regulation, it is not immune in respect to
23 mergers, okay?

24 MR. HORWICH: Well, I think --

25 JUSTICE BREYER: I can, unfortunately, think

1 of about 50 examples, where a merger might be
2 anticompetitive, and yet, it would lead to lower prices.
3 And the Department of Justice might attack it, but this
4 statute -- and that's what's bothering me -- seems to
5 want to further that kind of thing.

6 MR. HORWICH: Well, I --

7 JUSTICE BREYER: That -- that's where I am,
8 and I -- I'm not at all decided.

9 MR. HORWICH: Sure. Well, I guess I
10 would -- I guess I would first point out that -- that
11 price competition is not the be-all and end-all of
12 anticompetitive consequences, right?

13 JUSTICE BREYER: Yes, I think I know that.

14 MR. HORWICH: I mean, we have this
15 concern -- obviously, we have a concern here that
16 without -- and this is detailed, very clearly, in the
17 complaint, I mean, I think starting with paragraph --
18 paragraph 8, that talks about some of the price -- some
19 of the pricing constraints. But you get on to the later
20 paragraphs of the complaint, you have all these
21 descriptions of loss of quality competition here.

22 So you have -- you have --

23 JUSTICE BREYER: You are not understanding
24 my question, I guess. You have to take as a given that,
25 even though what you say is true, I would find that this

1 statute clearly prohibits the application of the
2 antitrust laws to pricing decisions. That's the job of
3 the authority.

4 Now, if I start with that, then you will
5 say, okay, I have to decide against you. Or you might
6 say, even so, I win because mergers are different. Now,
7 that -- that's what I'm trying to get you to say.

8 MR. HORWICH: Yes, and I guess that is what
9 I'm -- I guess that is what I'm trying to say, is that
10 mergers are different because the challenged
11 anticompetitive act here is not a pricing decision by
12 the hospitals that --

13 JUSTICE BREYER: I want to ask you: Why are
14 they different?

15 MR. HORWICH: They are different --

16 JUSTICE BREYER: After all, we have, one,
17 the specific language I read; and, two, I can think of
18 examples where a merger would be anticompetitive under
19 the DOJ and your FTC rules --

20 MR. HORWICH: Yeah.

21 JUSTICE BREYER: -- and yet, probably would
22 further the purposes of the statute by lowering the
23 cost.

24 MR. HORWICH: Well, that's --

25 JUSTICE BREYER: Do you think that's the

1 null set? I -- I don't think that's --

2 MR. HORWICH: No, I -- well, I don't -- I
3 don't know whether that is -- I don't know whether that
4 is true or not, but I think -- I think we're relying on
5 the more -- I think you can't simply start with the idea
6 that, well -- well, you can't start with the premise
7 that this act exists to pursue an objective and to
8 pursue it at any cost, without regard to whether it
9 displaces competition in the market for paid healthcare
10 services, without regard to whether it displaces
11 competition for quality among these hospitals.

12 I mean, on that logic -- and I -- I think it
13 might help to look at some of the other powers here. If
14 we -- if you go to the back of the government's brief,
15 on page 6A, the authority has the power to make and --
16 and execute contracts. Well, I don't think that that
17 implies a privilege to enter price-fixing contracts.
18 That's part of the background principles of antitrust
19 law.

20 I also don't think it implies the power to
21 enter contracts against public policy. A State,
22 presumably, doesn't wish to abandon that background
23 principle, simply because it wants the authority to
24 pursue its mission.

25 CHIEF JUSTICE ROBERTS: Well, you've already

1 told us that there can be State action for some purposes
2 and not others.

3 MR. HORWICH: Exactly.

4 CHIEF JUSTICE ROBERTS: So the fact that you
5 have examples where you might conclude, no, they didn't
6 mean to do that, doesn't seem to categorically suggest
7 that you prevail with respect to another one of the
8 powers that are granted.

9 MR. HORWICH: No, I agree with that, that it
10 doesn't categorically, but it does -- it does seem to me
11 that -- that if we're looking through this list of
12 powers that -- that the hospital authority has, there is
13 not anything meaningfully different about the power to
14 acquire -- acquire property versus make contracts
15 versus, as Justice Scalia said, any other powers that
16 are -- that exist in a general corporation's business
17 charter.

18 CHIEF JUSTICE ROBERTS: I -- this may be
19 completely wrong. You can tell me. I would -- would
20 doubt that, in counties or municipalities of this size,
21 you are going to have -- you know, five hospitals, and
22 so that a -- the authority could acquire a hospital and
23 yet still it not have any significant merger
24 consequences on its face.

25 In other words, when this law was passed,

1 giving them the power to acquire hospitals, wasn't it
2 the case that there would likely be only one other
3 hospital or two, so that any acquisition of another
4 hospital would have the merger consequences that this
5 one had?

6 MR. HORWICH: Well, no, because I think
7 the -- the baseline when the statute was enacted was
8 that the hospital authorities didn't even exist. So
9 they didn't own any hospitals.

10 And the first acquisition of a hospital
11 can't raise a competitive concern because it's not
12 concentrating the market in any way. It's simply
13 transferring ownership of the hospital from one actor to
14 another.

15 JUSTICE KENNEDY: Well, but to -- to follow
16 the Chief Justice's question, suppose it were shown that
17 there were many rural counties -- rural areas in
18 Georgia, very much like this one. Would that change
19 this case? I thought that was the purport of the -- the
20 thrust of the question.

21 MR. HORWICH: I think you'd have to imagine
22 a very stylized hypothetical, to see that the State had
23 clearly intended to displace competition. You would
24 want to see, for example -- let me give you an
25 example --

1 JUSTICE KENNEDY: Well, I know Georgia has
2 158 counties or something.

3 MR. HORWICH: Right.

4 JUSTICE KENNEDY: So I think they probably
5 have many rural areas with one or two hospitals. That's
6 just a guess.

7 MR. HORWICH: Well, right, but I suppose
8 that -- that the guesswork is not going to be a basis
9 for saying a State has clearly intended to displace
10 competition.

11 The situation in which I think you might
12 recognize it is, if the hospital authorities were
13 already in existence, but they -- and they all each
14 owned a hospital, but they had never had the power to
15 acquire a hospital, and you knew that they were all --
16 that each of them had their neighboring competitor, and
17 then the legislature comes in and says -- you know,
18 we -- we would like you now to actually be able to
19 acquire -- acquire additional hospitals.

20 I mean, the power here is not the power to
21 acquire additional hospitals. But, if the legislature
22 had said, we have the power to acquire additional
23 hospitals and we know you already have one and we know
24 that the one you are going to acquire is going to be
25 your neighbor and we know there is not lots of hospitals

1 out there, then you might say that, yes, the -- the
2 clear implication of that is that that's going --

3 JUSTICE BREYER: What does the words mean,
4 "to form and operate one or more major networks of
5 hospitals"?

6 MR. HORWICH: Well, I think the networks --

7 JUSTICE BREYER: Which follow -- which
8 follow the words "to acquire and operate projects,
9 defined to include hospitals." So -- so what about
10 those words? Why aren't they good enough?

11 MR. HORWICH: Well, I guess I'm not sure
12 where Your Honor is looking. They -- they aren't
13 actually -- they don't follow themselves in the statute,
14 but --

15 JUSTICE BREYER: I'm looking at
16 Section 30 -- well, where are we? 31-7-75(3).

17 MR. HORWICH: Right. And so I think what
18 you are referring to is number -- number 27 on the list.

19 And -- and I think, in the healthcare
20 industry, the idea of forming a network is not the idea
21 of socializing all of the available resources under
22 government control. A network is an integrated system
23 where you can go to the hospital for your emergency
24 care, and they can refer you to an outpatient clinic
25 that they have somewhere else, and there is a physician

1 who has an arrangement with both of those who can track
2 your care, and you can go acquire your durable medical
3 equipment from some -- from some store they operate.

4 JUSTICE SOTOMAYOR: Tying.

5 MR. HORWICH: That's what a network is.
6 That's not vertical integration.

7 JUSTICE SOTOMAYOR: A network is tying
8 products, to tie products.

9 MR. HORWICH: Yes, that's exactly right.
10 That's a tying situation.

11 This is -- this is a merger within -- within
12 one relevant market. And -- and that's what's
13 different. So I don't think the 27 --

14 JUSTICE BREYER: And that falls within the
15 words "to acquire and operate projects"?

16 MR. HORWICH: It does. But so --

17 JUSTICE BREYER: And --

18 MR. HORWICH: It does, but there is nothing
19 about acquiring a project that is inherently -- that's
20 inherently anticompetitive. Acquisitions are not always
21 anticompetitive.

22 JUSTICE SOTOMAYOR: I -- I guess that just
23 adds on to the issues that we have a price-fixing
24 mechanism, we have a tying mechanism that is expressed,
25 so what's left after that? Just this? Mergers and

1 acquisitions?

2 MR. HORWICH: Well, I -- well, no, I
3 think -- I think horizontal --

4 JUSTICE SOTOMAYOR: At -- at what point --

5 MR. HORWICH: -- generally horizontal
6 agreements, I think you -- so the contracting power
7 doesn't -- doesn't allow the hospital authority to go --
8 I don't think the -- the hospital here could any more
9 merge with Palmyra than it could go enter into a
10 contract with Palmyra that says, hey, we are going to --
11 you know, fix the prices that we --

12 JUSTICE BREYER: And can't -- in other
13 words, the -- the two hospitals in the town, when they
14 say, the price here -- you shall see that the price is
15 not higher than 38 cents, whatever, and would you please
16 get together and be certain that you have similar terms
17 and you have similar agreements and similar prices
18 there, we don't want either of you to be higher, that --
19 you would then proceed against them for that?

20 MR. HORWICH: Absolutely, Your Honor.
21 This -- this statute -- and take a step back --

22 JUSTICE BREYER: And would you also do the
23 same if -- if the electricity regulator in any State or
24 telephone -- a local telephone regulator --

25 MR. HORWICH: No, Your Honor. I think

1 that --

2 JUSTICE BREYER: -- or gas pipeline
3 regulator -- what they did is the same thing; they said,
4 our prices are -- you're to file tariffs, and the
5 tariffs are to be reached after you go meet in
6 committee; and that -- that would also fall within the
7 antitrust laws?

8 MR. HORWICH: No, I think those would likely
9 be very different.

10 I want to be clear about --

11 JUSTICE BREYER: How is that?

12 MR. HORWICH: -- the point. The point of
13 this law is to grant counties the opportunity to
14 participate in this market by providing care to
15 indigents.

16 This is not a law about public utility
17 regulation. If you think that this is a law about
18 public utility regulation, that all hospitals
19 are supposed to be -- that the State intends counties to
20 be able to elect to put all hospitals under their
21 control and -- and manage them as such and manage them
22 in the way that a -- that a public service commission
23 would regulate all of the utilities --

24 JUSTICE BREYER: Well, the language is
25 awfully similar to what you find in public utility

1 statutes, to set reasonable rates, to be certain that
2 nobody is higher than a reasonable rate.

3 MR. HORWICH: Well, this -- the authority
4 does not have the power to -- Justice Breyer, the
5 authority does not have the power to establish rates at
6 private hospitals. And that -- that would be a signal
7 difference between the -- the authority's power in
8 this -- in this case and the power of a public service
9 regulator over a -- over a utility.

10 JUSTICE BREYER: Well, what does it mean to
11 establish rates and charges for the services and use of
12 the facilities of the authority?

13 MR. HORWICH: The facilities of the
14 authority, yes, but not other hospitals within the
15 jurisdiction. It's only -- it's only the hospitals that
16 the authority itself is -- is operating.

17 And so -- so I guess we -- we also have
18 here -- I want -- I want to be clear that, in all of
19 this discussion, we are -- we are operating on the
20 premise that it's actually the authority itself that is
21 operating the hospital.

22 Of course, that is not what this case is.
23 The -- the hospital --

24 JUSTICE SOTOMAYOR: Could you define
25 "necessity," as you use it? I am harkening back to

1 Justice Kagan. We have plenty of cases that say you
2 don't need to find out whether the exemption is
3 necessary to make the program work.

4 MR. HORWICH: Right. No, we don't think it
5 means that.

6 JUSTICE SOTOMAYOR: We don't make that
7 judgment.

8 MR. HORWICH: No, it's not a normative
9 judgment.

10 JUSTICE SOTOMAYOR: The State makes that
11 judgment. Exactly.

12 MR. HORWICH: Correct.

13 JUSTICE SOTOMAYOR: And, in your answer, you
14 conceded that whether -- if -- if there is discretion,
15 it's not necessary to make it work because the -- the
16 authority can say yes or no -- it's not --

17 MR. HORWICH: Exactly.

18 JUSTICE SOTOMAYOR: So what's your
19 definition of "necessity"?

20 MR. HORWICH: Our definition -- our
21 definition -- well, I have to be honest with you, it's
22 hard to define it because it's going to arise in a
23 number of different contexts.

24 But what this -- but the times where this
25 Court has used it, it has -- it has used it to convey

1 the idea that the choice that the State is offering is
2 no choice at all, if Federal law is going to come in;
3 that -- that Federal law would just negate the choice.

4 So to be concrete about this, in -- in
5 Hallie, for example, the choice that the State provided
6 at the end of kind of a complicated line of -- of
7 statutory rules about how -- how cities do or don't have
8 to provide their sewage treatments to -- to their
9 neighbors, at the end of the day the city had a choice
10 to say, fine, we will give you sewage treatment
11 services, but you have to be annexed to us and -- you
12 know, take the other things that come with annexation to
13 the city.

14 Now, if that choice is -- is -- if that
15 choice is anticompetitive, it's going to be taken away
16 by Federal law. And the choice that the State has tried
17 to offer is no choice at all. It's going to be negated,
18 and the only choice left for the -- the city in Hallie
19 is going to be to -- to opt --

20 JUSTICE ALITO: If the State --

21 MR. HORWICH: To just relent and get the
22 sewage treatment service --

23 JUSTICE ALITO: If the State legislature
24 articulates clearly and expresses affirmatively that it
25 wants municipalities to share the State's antitrust

1 immunity, is that sufficient? Or is there a degree of
2 specificity that's necessary as to the particular
3 anticompetitive conduct that the State wants to cover?

4 MR. HORWICH: Well, I think, in your
5 hypothetical, we are imagining kind of a municipality
6 enabling act that just has -- you know, a section in it
7 that says, municipalities shall enjoy the State's
8 exemption from the --

9 JUSTICE ALITO: Well, that's -- that's
10 what's here.

11 MR. HORWICH: Yes. So -- so that -- that's
12 not a clear articulation problem because it's plenty
13 clear what the State's trying to do.

14 There might be what I would call an
15 affirmative expression problem there because simply
16 saying that the State doesn't want the antitrust laws to
17 apply, that's not the basis in federalism for the -- for
18 the State Action Doctrine.

19 The basis in federalism is that the State
20 has made some affirmative choice that it wants to
21 accomplish something else, and that it's offered some
22 principle on which the sub-State actors can -- can act
23 to serve the State's policy interests.

24 And so I think you might have to hesitate in
25 a case like that to say, well, if the -- if the State is

1 just passing out indulgences to -- to get out of Federal
2 competition law, that may not be something that,
3 substantively, Federal law will stand aside for.

4 JUSTICE ALITO: Well, I don't want to take
5 up your rebuttal time, but I don't see how that's
6 consistent with your answer to Justice Kagan about a
7 grant of discretionary authority.

8 MR. HORWICH: Well, I -- I was assuming, in
9 Justice Kagan's hypothetical, that we had some of the
10 other things going on here that -- that manifested a
11 particular objective that the State was trying to
12 pursue.

13 So sort of a State trying to pursue
14 municipal governance doesn't seem to me to be enough of
15 an affirmative State policy to say that works. So I
16 think that would distinguish the two.

17 And if I could reserve? Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Waxman.

20 ORAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE RESPONDENTS

22 MR. WAXMAN: Mr. Chief Justice, and may it
23 please the Court:

24 In the specific area of local hospital
25 services, the Georgia legislature has adopted a model of

1 local public choice, including the choice to reduce or
2 eliminate competition.

3 There is no issue here, Justice Scalia, with
4 respect to your earlier question, of general corporate
5 powers. The Hospital Authorities Law creates local
6 public authorities to, quote, "exercise public and
7 essential government functions to provide hospital care
8 for residents, especially residents who cannot pay. It
9 empowers authorities to acquire projects" -- plural --
10 "specifically including each authority the ability to
11 acquire hospitals" -- plural -- but with limitations.

12 They have to -- it has to be within a very
13 confined geographic and demographic jurisdiction. And
14 for authority hospitals, it replaces any pure market
15 model with statutory mandates, a mandate to provide
16 services to all indigent in the community and to price
17 all services on a not-for-profit basis and with a
18 statutory limitation on rate of return.

19 There are --

20 JUSTICE SCALIA: Well, I -- I don't see how
21 any of that pertains to whether they can create a
22 hospital monopoly. You can do all of that, even though
23 you are not the only hospital in the area.

24 MR. WAXMAN: The -- I guess my point here is
25 that the -- that the legislature's -- the powers that

1 the -- the legislature has given hospital authorities
2 are not, by any means, general corporate powers. They
3 are broader than what a corporation may have in certain
4 respects and much narrower in other respects.

5 And they --

6 JUSTICE SCALIA: Well, but the only respect
7 relevant here is -- is -- the only respect relevant is
8 the ability to acquire other hospitals.

9 MR. WAXMAN: That's right. And there is --

10 JUSTICE SCALIA: Right? And that's -- and
11 that's a general corporate power. Every corporation in
12 Georgia has the power to acquire, including acquire
13 other businesses.

14 MR. WAXMAN: There -- there -- these --
15 these are -- the supervening wish, mandate, of the
16 legislature -- and this is well-explained in Georgia
17 Supreme Court cases, particularly DeJarnette, which was
18 decided right after Georgia amended its constitution,
19 enacted the Hospital Authorities Law -- was the desire
20 to -- the goal to provide adequate hospital services,
21 particularly for the indigent --

22 JUSTICE GINSBURG: Georgia wasn't so sure
23 because didn't it come in originally on the side of the
24 FTC in this case?

25 MR. WAXMAN: It did. And Georgia's

1 complaint and its theory in the district court, which it
2 did not pursue in the court of appeals or here, not --
3 was not that the authorities weren't exercising State
4 power, but that the contention that the operation of the
5 hospital by the -- the special purpose corporations that
6 the hospital authority created was not adequately
7 supervised.

8 That is what the State was arguing in the
9 district court. And when it lost that point, it
10 withdrew from the case and has remained absent ever
11 since.

12 JUSTICE KAGAN: Mr. Waxman, we do have a
13 brief from quite a number of States, and the brief
14 basically says, we do this all the time, we set up these
15 local authorities, and then we give them powers because
16 they have to act in the world, and we give them normal
17 powers, like the ability to make contracts and the
18 ability to buy property.

19 And when we do that, we don't mean that they
20 can do anything they want, notwithstanding the antitrust
21 laws. And to construe these very normal powers that we
22 would give to a State entity, in order to allow it to
23 operate as a permission to violate the antitrust laws,
24 is not at all consistent with our own intentions.

25 MR. WAXMAN: I -- I have no problem with the

1 amicus brief filed by the States supporting the FTC in
2 this case, which is positive, quite expressly and at the
3 outset, on an understanding that what is involved here
4 is simply a State authorization of creation of a local
5 entity with general corporate powers and nothing more.

6 That could not be farther from this case.
7 These special purpose authorities do not simply have
8 general corporate powers. They have a mandate. There
9 is a Georgia constitutional amendment that coincided
10 with the enactment of the Hospital Authorities Law that
11 derogated the State's duty to provide indigent care
12 to its -- hospital care to its citizens.

13 JUSTICE KAGAN: But I'm --

14 JUSTICE KENNEDY: Well, is it a fair
15 characterization of your argument -- is it a fair
16 characterization of your argument to say that the
17 possibility that the hospital authority can use this
18 general power in this way is tantamount to or equivalent
19 to the legislature intending that it be used that way?
20 Is that your argument?

21 MR. WAXMAN: No. We take seriously the
22 standard that this Court announced in self-consciously
23 clarifying the level of explicitness that a legislature
24 has to use in Town of Hallie.

25 This Court said -- the Court asked whether,

1 quote, "suppression of competition was a foreseeable
2 result of what the State legislature authorized," and it
3 derived that formulation expressly from its earlier
4 decision in City of Lafayette, which explains that a,
5 quote, "adequate State mandate exists when it can
6 reasonably be inferred," quote, "from the authority
7 given a local entity to operate in a given area that the
8 legislature contemplated the kind of action complained
9 of."

10 In other words, as I understand this Court's
11 test, whether what was done by the hospital authority or
12 any sub-State entity was foreseeable by a reasonable
13 legislator, which in this case is that -- was it
14 foreseeable that in -- in pursuing the State-imposed
15 mandate to serve the indigent in a -- in a confined
16 jurisdiction, especially in rural counties which abound
17 in Georgia, a hospital authority might require market
18 power or even a public service monopoly because that --

19 JUSTICE SOTOMAYOR: Could you --

20 MR. WAXMAN: -- is the natural way to acquit
21 the statutory mandate.

22 JUSTICE SOTOMAYOR: There's -- there is a
23 problem here, which is, I understand the public mandate
24 to serve the indigent, but you are asking us to take
25 this a step further. You're elevating that public

1 mandate to a public command, that serving the indigent
2 has to override the needs of the majority, in terms of
3 price competition.

4 MR. WAXMAN: No. I don't -- I don't --

5 JUSTICE SOTOMAYOR: And -- and that -- that
6 step -- that further step that the State intended to
7 immunize their -- the monopoly power, is the step we are
8 trying to find in this grant. And that's what I don't
9 see. I see the -- the compulsion to serve the needy.

10 MR. WAXMAN: Uh-huh.

11 JUSTICE SOTOMAYOR: I hear that much of
12 Georgia is rural, but your adversary says, in most
13 instances, there is only one hospital, so the
14 municipality's taking it over is not going to be a
15 merger issue. To the extent that they step in and take
16 over one of two hospitals, there is no merger issue
17 because it's only substituting one owner for another.

18 This situation, they claim, is a rarity,
19 where there are only two or three providers and a
20 hospital's going to -- and a public -- a municipality is
21 going to then get monopoly power by an acquisition.

22 MR. WAXMAN: So, Justice Sotomayor, as to
23 your first point, our position is not that the only
24 mandate is to serve the indigent. The actual mandate in
25 the constitution and the Hospital Authorities Law is to

1 provide hospital services for all residents, with a
2 particular note to the obligation to serve indigent
3 clients.

4 Second of all, we are not here to -- I mean,
5 I don't know where the government is coming up with its
6 speculation that, out of Georgia's -- I think it's 154
7 counties, for a population of 10 million people, it is
8 the rare instance in which there will be anything other
9 than just one or -- you know, a multiplicity of
10 hospitals. I mean, the Federal Trade Commission
11 guidelines for market concentration is anything up to
12 four, four or fewer participants.

13 The notion that the legislature, in 1941,
14 was providing the express authority to acquire multiple
15 hospitals in a single municipality or county was focused
16 only on huge metropolises, of which there was only one,
17 or on counties that were so small that they couldn't
18 otherwise even attempt to support more than one hospital
19 is just fanciful; it's made up.

20 And --

21 JUSTICE KAGAN: Mr. Waxman, could -- could I
22 understand where you think this expressed approval is
23 coming from? Because you said general corporate powers
24 is not enough. So the general ability to buy property,
25 you said, is insufficient.

1 Then you have this idea they have a mission.
2 But the mission can be accomplished in all kinds of ways
3 that are perfectly consistent with the antitrust laws,
4 so that doesn't seem to get you all that far.

5 So what else have you got to show that the
6 State actually thought about this issue and approved
7 this power for the hospital authorities?

8 MR. WAXMAN: Okay. I mean, for one -- one
9 other thing is in Section 7 -- 7-77, as -- as was noted
10 before, the authorities are subject to regulation of
11 rate of return. Now, if that doesn't bespeak the
12 foreseeable consequence of market power, I don't know
13 what -- what does. That is the hallmark of a regulated
14 public service monopoly or at least the regulation of a
15 return by a participant with market power.

16 The other thing that exists -- and the
17 government pooh-poohs this as somehow not part of the
18 Hospital Authorities Law -- is that the Georgia State
19 legislature has -- this is -- this law was enacted in
20 the backdrop of other laws in which Georgia has quite
21 deliberately displaced, quote, "unfettered private
22 market competition."

23 The certificate of need law is the
24 paradigmatic example of the imposition of regulation at
25 the expense of free market competition and, in fact --

1 JUSTICE SCALIA: Well, a lot of States have
2 that. You can't open a new hospital without getting a
3 certificate of need. Are you saying that, in all of
4 those, States the -- the result is that the antitrust
5 laws can be ignored?

6 MR. WAXMAN: No, no, no. Our argument is
7 not that the certificate -- that the existence of the
8 certificate of need law indicates an intent by the
9 legislature to fully displace the antitrust laws with
10 respect to anybody else.

11 My point is, in the context of other Georgia
12 systems that strictly limit entry into -- or expansion
13 into these local markets, combined with very severe rate
14 restrictions and obligations and mandates to serve --
15 excuse me.

16 JUSTICE BREYER: Your point -- I don't mean
17 to interrupt, but the point that he's making in response
18 to my earlier questions along these lines, I think, was
19 the following: Where do they get their hospitals, these
20 authorities? The -- the law sets up a hospital
21 authority. All right. Where did they get their
22 hospitals?

23 MR. WAXMAN: They can -- I mean, the
24 legislature permits them to be built, bought --

25 JUSTICE BREYER: Well, do you know what

1 actually happened? Do you -- do you know, in fact,
2 where these hospital authorities got their hospitals
3 from?

4 MR. WAXMAN: You mean all of the hospitals
5 authorities in Georgia?

6 JUSTICE BREYER: No, not all of them, but --
7 I now am in a county, and suddenly, I'm the mayor, and I
8 see this law, and it says we can set up a hospital
9 authority. So Joe, I say, you are -- you are the boss,
10 you are the hospital authority guy. And he says -- you
11 are to run the hospital. And he says, what hospital?
12 We don't have a hospital.

13 (Laughter.)

14 JUSTICE BREYER: So I want to know where did
15 they get their hospitals?

16 MR. WAXMAN: The -- the answer,
17 Justice Breyer, I think -- I mean, there is nothing in
18 the record to indicate where all the hospitals --

19 JUSTICE BREYER: I don't need to know all of
20 them. I just want some rough idea where they come from.

21 MR. WAXMAN: Well, let's take -- let's take
22 the example --

23 JUSTICE BREYER: You may not know.

24 MR. WAXMAN: No, no, no. Let's take the
25 example of this county, in terms of what was done and

1 what is now being challenged. So when the hospital --
2 there was a public hospital, beginning in 1911, in
3 Dougherty County.

4 JUSTICE BREYER: Yes.

5 MR. WAXMAN: When the State constitution was
6 amended to impose on counties the State's obligation to
7 provide adequate hospitalization care, it enacted the
8 Hospital Authority Law for counties that chose to make
9 use of that device, in order to acquit their public
10 service mandate.

11 And Dougherty County did, soon thereafter --

12 JUSTICE BREYER: Okay.

13 MR. WAXMAN: -- establish a -- an authority,
14 and the assets -- all of the assets and all of the
15 operations of the existing hospital, were transferred.
16 There then -- and there was a natural monopoly in that
17 county.

18 JUSTICE BREYER: Okay. I've got it. I've
19 got it. Then --

20 MR. WAXMAN: Then --

21 JUSTICE BREYER: Then he says this: I --

22 MR. WAXMAN: Yes. Then --

23 JUSTICE BREYER: He says, I have been
24 thinking of it the wrong way. I have been thinking of
25 it like the California State Public Utilities

1 Commission. They regulate all the electricity
2 producers. That isn't this.

3 MR. WAXMAN: Right.

4 JUSTICE BREYER: These were a group of
5 people that ran some hospitals -- some municipal
6 hospitals, and now, they can acquire, not just
7 general -- I agree with you, it isn't just general.
8 They have a lot of power there to acquire other
9 hospitals from outside the system.

10 But, when they do that, there's no reason to
11 think that that gives them the power to acquire it,
12 where it's anticompetitive.

13 MR. WAXMAN: Well, I think that --

14 JUSTICE BREYER: Now, the fact that you can
15 regulate your own hospitals, which is one track and one
16 group, doesn't say that you have to bring in
17 anticompetitive people -- I mean, you have to bring in
18 others, where they're anticompetitive. That -- that, I
19 think, is his point.

20 MR. WAXMAN: Yes.

21 JUSTICE BREYER: Don't think of it as one
22 thing; think of it as two separate systems.

23 MR. WAXMAN: We're not arguing that the
24 Hospital Authority Law gives the hospital authorities
25 the right to regulate non-authority hospitals. We're

1 not arguing that. We're not arguing --

2 JUSTICE BREYER: No, no. I know that. But
3 once you don't -- once you don't -- he says, you see,
4 they don't regulate prices at non-authority hospitals,
5 they don't do this for non-authority, they don't do that
6 for non-authority, even though they might have the power
7 to bring them in; but, when they have the power to bring
8 them in, why read this -- it's at least ambiguous -- why
9 read this as saying you can bring them in, where it's
10 anticompetitive to do so?

11 MR. WAXMAN: I mean, this doesn't say, you
12 can bring them in where it's anticompetitive to do so.
13 That's their any and all hypothetical. And this Court
14 has never required, for good reason, express authority.
15 That was the whole point of City of Hallie and City of
16 Lafayette -- Town of Hallie and City of Lafayette.

17 The point here is, okay, so they created a
18 hospital authority, it ran a public hospital, it was a
19 natural monopoly. The county grew. A private hospital
20 developed. The public hospital, which is serving more
21 than ten times the number of indigent patients than the
22 private hospital, which is very underused, the county
23 hospital has been -- the hospital authority has been
24 saying, for years and years and years, we need more
25 capacity, we need more capacity.

1 There are -- in order to accomplish our
2 mission, there are two ways to do it. We can only
3 operate in this confine. We can build a new hospital,
4 and here's what it would cost, and here's what we would
5 get. And we would, by the way, have to satisfy the
6 State authorities that we are entitled to a certificate
7 of need in the context in which the private hospital is
8 severely underutilized.

9 Or we can talk with the private hospital
10 about whether they would like to be acquired. And the
11 record shows that they did that for many, many years,
12 even before the Phoebe Putney entities were created.

13 JUSTICE SOTOMAYOR: Mr. Waxman, I'm showing
14 my ignorance. Is this -- would this merger be subject
15 to the rule of reason?

16 MR. WAXMAN: You mean if it --

17 JUSTICE SOTOMAYOR: If it were -- if we were
18 not to find State immunity, would the merger be subject
19 to the rule of reason?

20 MR. WAXMAN: I am embarrassed to say I don't
21 know enough about Sherman Act laws --

22 JUSTICE SOTOMAYOR: I was embarrassed to ask
23 the question, but I was taught to ask the question. If
24 it is -- I'm going to assume that we'll both be -- we'll
25 both be corrected by our respective colleagues, soon

1 enough.

2 (Laughter.)

3 JUSTICE SOTOMAYOR: But -- but if it --

4 MR. WAXMAN: Probably me sooner than you.

5 JUSTICE SOTOMAYOR: That's likely.

6 (Laughter.)

7 JUSTICE SOTOMAYOR: But -- but my question
8 is really more fundamental, which is, yes, I understand
9 that you have a great defense, potentially, to a rule of
10 reason challenge that -- that there was necessity in its
11 truest sense, in its economic sense, in this situation.

12 So why should we undo our decades of
13 writings that say that we should construe immunity
14 narrowly and not broadly, when it comes to displacing
15 our antitrust laws?

16 MR. WAXMAN: Because the point of State
17 action immunity, which is respect for the sovereign
18 choices of sovereign States, is -- exists not only to
19 provide a -- an ultimate defense in litigation on the
20 merits, it's to protect States and sub-State entities
21 from the cost of litigating.

22 I mean, the question, ultimately, in this
23 case -- and in all these cases -- is who gets to decide?
24 Who gets to decide if this is reasonable or not?

25 JUSTICE KAGAN: Well, if that --

1 MR. WAXMAN: Is it the Federal Trade
2 Commission that comes in and files a lawsuit for this
3 poor hospital authority?

4 JUSTICE KAGAN: Mr. Waxman, I mean, that's
5 right, it is about choices, but -- but the question is
6 whether the State has made a choice. And that's what
7 all these cases are about --

8 MR. WAXMAN: Right.

9 JUSTICE KAGAN: -- is our trying to find
10 whether the State has made a choice as to this kind of
11 conduct.

12 MR. WAXMAN: Right.

13 JUSTICE KAGAN: So now, we have your
14 corporate powers aren't enough, your general mission
15 isn't enough.

16 You said a certificate of need, but a
17 certificate of need, it isn't even given out by this
18 authority. It's something that has nothing to do with
19 the powers of this authority.

20 Then you said there -- there's some kind of
21 a price regulation that happens as to the -- the
22 hospitals that the authority owns, but not with respect
23 to other hospitals.

24 So I guess I'm still looking for the things
25 that show that the State has made a choice that it wants

1 these -- these hospital authorities to be able to make
2 anticompetitive purchases. Where do I find that?

3 MR. WAXMAN: I may not be able to convince
4 you, but let me take another run. I think it's the
5 combination because, as this Court has expressed
6 repeatedly, it's -- one has to look at the specific
7 power granted, which here is the power to acquire
8 hospitals within a very circumscribed jurisdiction, in
9 the context of the law as a whole.

10 The context of the law as a whole here --
11 and I hope this works for the Court, but if it
12 doesn't -- you know, perhaps I am wrong; it certainly
13 makes this a stronger case than Hallie -- here, we have
14 a law that says counties have the obligation now, unlike
15 the State, to provide adequate hospitalization services.

16 They will exercise -- what they do is deemed
17 to exercise public and essential government function
18 within strictly limited areas. And they have the power
19 to acquire hospitals in those areas, subject to very
20 strict rate of return regulations and very, very strict
21 conditions on how they operate those hospitals,
22 including the power to lease to an operator for -- in
23 order to serve the public mission.

24 And they do that against the backdrop of a
25 series of -- they have eminent domain power. They can

1 take another hospital, if it is essential to fulfill
2 their mission.

3 JUSTICE GINSBURG: Mr. Waxman --

4 MR. WAXMAN: And they do this in a backdrop
5 of a State that has -- notwithstanding the advocacy of
6 the Federal Trade Commission, has repeatedly
7 strengthened, rather than abrogated, a -- a certificate
8 of need law that leads --

9 JUSTICE GINSBURG: Mr. Waxman, you are
10 essentially interpreting the Georgia statute that sets
11 up the hospital authority. And you -- you're saying
12 this is how we read it. We start with the antitrust
13 exemption is for the State, not subdivisions, so the
14 State has to give it to the subdivision, for the
15 subdivision to have it.

16 Could the Federal court have said,
17 we -- we'd like to know what the Georgia legislature --
18 what the Georgia authorities think this statute means?
19 So, could a question have been certified -- I don't know
20 if Georgia has a certification procedure, but to the
21 Georgia Supreme Court, and said, tell us, does this
22 statute, is it intended to transfer the State's immunity
23 to the locality -- to the local unit?

24 MR. WAXMAN: I don't -- I mean, I -- I
25 assume that the Georgia State courts could do that; but,

1 Justice Ginsburg, I think it's important to recognize
2 that the FTC doesn't dispute that the -- that hospital
3 authority -- county hospital authorities are, in fact,
4 agents or arms of the State --

5 JUSTICE GINSBURG: But the question is does
6 this -- does this legislature mean that the State is
7 transferring its immunity to this local unit?

8 MR. WAXMAN: And I believe the FTC --
9 Mr. Horwich can correct me if I'm wrong -- but I believe
10 the FTC's position is, generally, yes, but not with
11 respect to the -- what is alleged to be a merger to
12 monopoly.

13 And the question in this case is whether or
14 not the acts, under this law and applying the
15 foreseeable result standard, whether the acts of the
16 hospital authority in this case in approving and
17 acquiring the second hospital are fairly attributable to
18 the State.

19 And if I could just --

20 JUSTICE SCALIA: Mr. Waxman, if you don't
21 want to be interrupted, you have to pause between
22 sentences.

23 (Laughter.)

24 MR. WAXMAN: I was taking a cue from Your
25 Honor's last argument.

1 JUSTICE SCALIA: I understand. That's
2 right.

3 You've given a -- you know, an appealing
4 example of a small county that has one -- one hospital,
5 and this operation purchases that one -- one hospital.
6 Seems nothing wrong with that; although, as Justice
7 Sotomayor suggests, I doubt whether the FTC would be
8 pursuing a situation in which there is a natural
9 monopoly. It's a question of whether the monopoly would
10 be owned by the State or not.

11 But your argument, if we follow it, embraces
12 a quite different situation, a very large county which
13 has five hospitals that are competing vigorously in
14 price, in specialties, they advertise on the radio, as
15 some hospitals do.

16 And what you're saying is that this
17 operation can take over all of those hospitals and
18 eliminate all of that competition. Isn't that so?

19 MR. WAXMAN: Well, I -- for purposes of
20 Federal antitrust law, yes.

21 JUSTICE SCALIA: Yes.

22 MR. WAXMAN: But for purposes of State law,
23 almost certainly no. And the point here is -- and that
24 is the point here. The point is that Georgia, either
25 through both private suits and actions authorized by its

1 attorney general, can take steps in order to restrain
2 hospital authorities from doing what they -- and, in
3 fact --

4 JUSTICE SCALIA: We have no -- we have no
5 idea whether they are willing to do that.

6 MR. WAXMAN: Oh, yes, we do.

7 JUSTICE SCALIA: And we have a Federal
8 antitrust law.

9 MR. WAXMAN: We -- we absolutely do,
10 Justice Scalia. There is a solid line of cases in which
11 the Georgia Supreme Court has -- has quite rigorously
12 enforced the limitations of the Hospital Authority Law,
13 in order to prevent hospital authorities from doing
14 things that it says the legislature didn't intend. The
15 Tift County case is the best example, but there are
16 others cited in our brief.

17 The last point --

18 JUSTICE SCALIA: Why -- why didn't it intend
19 this? I don't understand. You -- you've told us that
20 they did intend this, that they did intend to displace
21 competition.

22 MR. WAXMAN: Yes.

23 JUSTICE SCALIA: And now, you say, but
24 Georgia will say, oh, no, they didn't intend to displace
25 competition.

1 MR. WAXMAN: No, no, no. My --

2 JUSTICE SCALIA: Which is it?

3 MR. WAXMAN: My point is that, with respect
4 to your hypothetical, whether the hospital authority of
5 Fulton County -- and I believe there is more than one
6 hospital authority in Fulton County, and they are
7 authorized to merge, in any event -- but could they
8 acquire, by purchase or eminent domain, all of the
9 hospitals in metropolitan Atlanta to do so? And my
10 point is that for purposes of Federal antitrust law the
11 answer is you are out -- that's -- you are not the
12 authority to inquire.

13 The question is -- just as this Court -- you
14 explained for the Court in *Omni*, there may be very many
15 things that a local authority can do that would violate
16 State law, and there are State law remedies. And my
17 point only was that the Georgia Supreme Court has been
18 very quick to enforce the limitations.

19 But as a matter of Federal antitrust law,
20 the only question is were they -- were they authorized
21 to do things like this? And if I --

22 JUSTICE BREYER: And they -- they say on
23 that, that it's a sham. Well, just say 30 seconds on
24 their argument, that the FTC looked into it, these
25 people had never regulated anything, they'd never looked

1 at any price anywhere, they've never done a single
2 thing, it's a sham; and therefore, that's the end of it.
3 What about that?

4 MR. WAXMAN: Okay. If I can just finish my
5 answer to Justice -- I have one other point to make
6 for -- to Justice Kagan, who has asked it twice.

7 The -- my last point I want to make -- and
8 then I will answer this -- is that this county -- this
9 hospital authority, like many, facing a capacity
10 constraint and a -- and a nondiscretionary mandate to
11 serve the public needs for hospitalization, had two
12 choices.

13 It could have tried to convince the State to
14 spend three times as much money to get half the number
15 of beds, notwithstanding the existence of excess
16 capacity; or it could buy the other hospital and get
17 that capacity in a consensual transaction by the
18 authority.

19 And here's my point, Justice Scalia, this
20 case is on all fours with this Court's decision in Omni.
21 The notion that this may have long been desired by
22 this -- this special-purpose entity is totally
23 irrelevant. This -- this acquisition was proposed to,
24 considered by, and -- and approved by the hospital
25 authority.

1 And not only that, when the FTC came and
2 complained about it, they reconvened another public
3 meeting and discussed it again and came to the
4 conclusion again that they wanted to acquire this
5 hospital.

6 And before they signed the lease, they
7 issued a notice and comment period. There was three
8 months for people to tell the authority whether this
9 lease was or was not consistent with community
10 interests. They had a public meeting, and they approved
11 it. And that is the act of the State.

12 CHIEF JUSTICE ROBERTS: Can the State --
13 does the State have a procedure where it can give
14 real-time approval? In other words, this is going on,
15 and the hospital authority says, boy, the FTC is sending
16 us these letters. State, could you do something to show
17 that you approve this transaction, whether it's a
18 special law or there is some organization, I guess, in
19 some other case, setup, that could give its approval?

20 Is there --

21 MR. WAXMAN: I mean, this is -- the Hospital
22 Authorities Law says, counties, this is your
23 responsibility, here are your powers. If anybody in the
24 State or any competitor or the attorney general thinks
25 that you are abusing those statutory powers, the courts

1 are open and quite receptive to those concerns. But
2 there's no --

3 CHIEF JUSTICE ROBERTS: No, I know. But I
4 guess my point is can the burden of going forward be
5 switched the other way? And can this hospital authority
6 say -- you know, to the State, we would like some
7 blessing on this, so that we can go ahead with it?

8 So the choices aren't really build your own
9 hospital or acquire the other one, in the abstract, but
10 ask the State -- you know, what do you want us to do?
11 Do you want us to build a new hospital? Or is it okay
12 if we acquire this one?

13 MR. WAXMAN: I don't believe there is any
14 such mechanism, and I believe that the -- the State --
15 the legislature didn't contemplate anything like that,
16 because the mandate and the responsibility and the
17 authorization was devolved to the counties.

18 Now, Mr. Chief Justice, what the -- what the
19 hospital authority could do and did do, although it's
20 not in the record of this case, is evaluate the
21 likelihood of getting a certificate of need to build the
22 additional required facilities.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Horwich, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF BENJAMIN J. HORWICH
2 ON BEHALF OF THE PETITIONER

3 MR. HORWICH: Thank you.

4 I guess I -- I heard several members of the
5 Court asking Mr. Waxman, specifically, Where do you find
6 this? Where can you locate this intent to displace
7 competition in the statute? And I would like to just
8 run through, if I could, each of his answers and why I
9 think they are insufficient.

10 So the first one, of course, we've talked a
11 lot about the existence of general corporate powers, but
12 the most natural inference there is that the State
13 expects those to be exercised in conformity with the
14 background principles that anybody else who has general
15 powers has.

16 Now, the idea that the authority has a
17 mandate, a purpose it's supposed to serve, of course,
18 that's always true. States always have some purpose in
19 mind when they set up some sub-State entity. The
20 question isn't whether there is particular ends the
21 State is trying to pursue.

22 The question here is whether the State
23 intended to pursue those ends through the particular
24 means of displacing competition, here, displacing
25 competition in the market for paid healthcare services.

1 And Mr. Waxman also pointed to the rate of
2 return provision in the statute. Now, as a sort of a
3 threshold matter, there's -- if past is prologue, there
4 is not any reason to think that that will be not be
5 rigorously enforced with respect to the privately
6 controlled operations here. But -- and that's sort of
7 the second question presented, and we can set that aside
8 for the moment, I guess.

9 But it seems to me there are two far more
10 natural explanations for the presence of the rate of
11 return provision in the statute than the one Mr. Waxman
12 would like you to -- to give to it.

13 The first explanation is this is a statute
14 about providing public care for indigents. Nobody
15 should be making a profit off of that, and the State
16 wants to say that. And that seems to be a very natural
17 explanation that doesn't depend at all on the State
18 intending to displace competition completely.

19 The -- the rate -- the price regulation
20 provision also can be naturally understood as a response
21 to the recognition that there will be some de facto
22 monopolies in the situation where there is only one
23 hospital in the county.

24 But it does not mean that the State wants
25 there to be more monopolies, so that it can bring in the

1 unfortunate medicine of rate regulation to respond to
2 those. Presumably, the State intends, as is the
3 accepted background principle of free market competition
4 in this country, that there won't be monopolies, unless
5 they -- unless they arise of necessity.

6 JUSTICE SOTOMAYOR: Counsel, can I
7 interrupt --

8 MR. HORWICH: Yes.

9 JUSTICE SOTOMAYOR: -- you, just a moment,
10 to address a question raised by Justice Breyer, which is
11 your alternative argument?

12 MR. HORWICH: Yes.

13 JUSTICE SOTOMAYOR: You have lots of
14 evidence that the authority does very little oversight
15 of these hospitals when they move forward. But is that
16 the issue before us? Is the question of immunity as to
17 what happens in the operation of the hospital or in
18 their merger and acquisition, their actual formation?

19 And -- so that to the extent that we were to
20 conclude that the State has delegated immunity on the
21 basis of merger, why do we need to look any further at
22 whether there has or has not been an appropriate degree
23 of supervision of that decision?

24 MR. HORWICH: Right. Well, the -- the --
25 I -- I don't think the two are entirely -- are entirely

1 separable, as a matter of competition law, because the
2 reason the competition law is concerned with mergers is
3 not because of the transaction as such, but it's because
4 of what it does going forward to the structure of the
5 market and the competitive behavior of those in the
6 market.

7 And so the State Action Doctrine says that
8 the State -- if the State's going to go create monopoly,
9 it needs to take ownership of that monopoly. And I'm
10 using ownership not in the literally sense, but at least
11 ownership in the sense of actively supervising the
12 monopoly, to be sure that it is pursuing the -- the
13 objectives that the State has in mind for creating it.
14 So that's -- that's why we are still concerned there.

15 Mr. Waxman referred to the Certificate of
16 Need Law. I think there is a very close analogy to be
17 drawn to Goldfarb here. That is the -- the question of
18 minimum fee schedules agreed to by lawyers. The State
19 of -- the State of Virginia regulated entry into the
20 market for the practice of law, just as the certificate
21 of need regulates entry into the hospital market.

22 But horizontal agreements among people
23 already in the market, such as here and such as the
24 minimum fee schedule in Goldfarb, are not exempt just
25 because of it.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 11:05 a.m., the case in the
5 above-entitled matter was submitted.)

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