1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	FEDERAL TRADE COMMISSION, :
4	Petitioner : No. 11-1160
5	v. :
6	PHOEBE PUTNEY HEALTH SYSTEM, :
7	INC., ET AL. :
8	x
9	Washington, D.C.
10	Monday, November 26, 2012
11	
12	The above-entitled matter came on for oral
13	argument before the Supreme Court of the United States
14	at 10:04 a.m.
15	APPEARANCES:
16	BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor
17	General, Department of Justice, Washington, D.C.;
18	on behalf of Petitioner.
19	SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
20	Respondents.
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Τ	PROCEEDINGS					
2	(10:04 a.m.)					
3	CHIEF JUSTICE ROBERTS: We'll hear argument					
4	first this morning in Case 11-1160, the Federal Trade					
5	Commission v. Phoebe Putney Health System.					
6	Mr. Horwich?					
7	ORAL ARGUMENT OF BENJAMIN J. HORWICH					
8	ON BEHALF OF THE PETITIONER					
9	MR. HORWICH: Thank you, Mr. Chief Justice,					
10	and may it please the Court:					
11	The State Action Doctrine provides a defense					
12	to a Federal antitrust suit when a State has clearly					
13	articulated and affirmatively expressed an intent to					
14	displace competition with respect to the particular					
15	activity at issue in the suit.					
16	Now, in practical terms, what that comes					
17	down to is whether application of Federal competition					
18	law would somehow subvert a sovereign State policy					
19	choice that's clearly evident in State law.					
20	Now, that policy might be expressed in					
21	mandatory or compulsory terms, but, short of that, it					
22	would also be enough, if the the State had					
23	specifically permitted conduct that is inherently					
24	anticompetitive.					
25	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

- 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?
- 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.
- 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.

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- 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.
- 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

properties to promote its mission?

25

- 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
- 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?
- 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 --
- if I could give some examples, maybe we could look at
- 18 some --
- 19 JUSTICE KAGAN: Mr. Horwich, could I just --
- MR. HORWICH: Yes.
- 21 JUSTICE KAGAN: -- before you give examples,
- 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 --
- MR. HORWICH: Yes.
- 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 --
- 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.
- Now, the States -- some of the States there
- 4 said, well, you can file them individually, or you can
- 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.
- 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.
- 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.
- 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?
- MR. HORWICH: Well, I think --
- JUSTICE BREYER: I can, unfortunately, think

- 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.
- 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.
- 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 --
- JUSTICE BREYER: I want to ask you: Why are
- 14 they different?
- MR. HORWICH: They are different --
- 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 --
- MR. HORWICH: Yeah.
- JUSTICE BREYER: -- and yet, probably would
- 22 further the purposes of the statute by lowering the
- 23 cost.
- 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 a 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.
- 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,
- on page 6A, the authority has the power to make and --
- 16 and execute contracts. Well, I don't think that that
- implies a privilege to enter price-fixing contracts.
- 18 That's part of the background principles of antitrust
- 19 law.
- 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.
- 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.
- 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 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
- 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.
- 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 --
- 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?
- 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 --
- 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.
- 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 this falls within the
- 15 words "to acquire and operate projects"?
- MR. HORWICH: It does. But so --
- JUSTICE BREYER: And --
- 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 quess 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?
- 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?
- 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 --
- 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.
- 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 --
- 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.
- 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 quess 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.
- Of course, that is not what this case is.
- 23 The -- the hospital --
- 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.
- 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.
- MR. HORWICH: Correct.
- JUSTICE SOTOMAYOR: And, in your answer, you
- 14 conceded that whether -- if -- if there is discretion,
- 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.
- 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.
- 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 --
- JUSTICE ALITO: If the State --
- 21 MR. HORWICH: To just relent and get the
- 22 sewage treatment service --
- 23 JUSTICE ALITO: If a 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, Georgia does seem to have such
- 10 a statute.
- 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.
- So sort of the 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.
- Mr. Waxman.
- 20 ORAL ARGUMENT OF SETH P. WAXMAN
- 21 ON BEHALF OF THE RESPONDENTS
- MR. WAXMAN: Mr. Chief Justice, and may it
- 23 please the Court:
- 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 --
- 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.
- 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.
- 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 --
- 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.
- 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.
- 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?
- 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.
- 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 explained 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."
- 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
- in Georgia, a hospital authority might require market
- 18 power or even a public service monopoly because that --
- JUSTICE SOTOMAYOR: Could you --
- 20 MR. WAXMAN: -- is the natural way to acquit
- 21 the statutory mandate.
- 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.
- MR. WAXMAN: Uh-huh.
- 11 JUSTICE SOTOMAYOR: I hear that much of
- 12 Georgia is rural, but your adversary says, in most
- 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.
- 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 quidelines for market concentration is anything up to
- 12 four, four or fewer participants.
- 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
- 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 --

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1 JUSTICE SCALIA: Well, a lot of States

- 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 a
- 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
- 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 --
- JUSTICE BREYER: Well, do you know what

Official

- 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?
- 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 do they come from.
- 21 MR. WAXMAN: Well, let's take -- let's take
- 22 the example --
- JUSTICE BREYER: You may not know.
- 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.
- JUSTICE BREYER: Okay. I've got it. I've
- 19 got it. Then --
- MR. WAXMAN: Then --
- 21 JUSTICE BREYER: Then he says this: I --
- MR. WAXMAN: Yes. Then --
- 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.
- 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.
- 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 --
- 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.
- 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 --
- 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?
- 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.
- JUSTICE SOTOMAYOR: Mr. Waxman, I'm showing
- 14 my ignorance. Is this -- would this merger be subject
- 15 to the rule of reason?
- 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?
- MR. WAXMAN: I am embarrassed to say I don't
- 21 know enough about Sherman Act laws --
- 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.
- MR. WAXMAN: Right.
- 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.
- 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.
- 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.
- 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.
- JUSTICE GINSBURG: Mr. Waxman --
- 4 MR. WAXMAN: And they do this in a backdrop
- 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 --
- 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?
- 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
- 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 --
- JUSTICE SCALIA: Mr. Waxman, if you don't
- 21 want to be interrupted, you have to pause between
- 22 sentences.
- 23 (Laughter.)
- MR. WAXMAN: I was taking a cue from Your
- 25 Honor the 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.
- 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.
- 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?
- MR. WAXMAN: Well, I -- for purposes of
- 20 Federal antitrust law, yes.
- JUSTICE SCALIA: Yes.
- 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,
- 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.
- MR. WAXMAN: Yes.
- 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 --
- JUSTICE SCALIA: Which is it?
- 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 --
- JUSTICE BREYER: And they -- they say on
- 23 that, that it's a sham. Well, just say 30 seconds on
- 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
- 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.
- 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.
- 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 --
- 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 quess, 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?
- 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.
- Thank you.
- 24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 25 Mr. Horwich, you have 4 minutes remaining.

Τ	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 see 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 quess.
- 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.
- JUSTICE SOTOMAYOR: Counsel, can I
- 7 interrupt --
- MR. HORWICH: Yes.
- JUSTICE SOTOMAYOR: -- you, just a moment,
- 10 to address a question raised by Justice Breyer, which is
- 11 your alternative argument?
- MR. HORWICH: Yes.
- 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?
- 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 literal 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.
- 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.

Official

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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