

In the

# Supreme Court of the United States

NATIONAL GERIMEDICAL HOSPITAL AND )  
GERONTOLOGY CENTER, )

PETITIONER, )

v. )

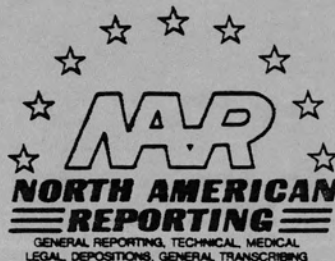
BLUE CROSS OF KANSAS CITY AND )  
BLUE CROSS ASSOCIATION )

No. 80-802

Washington, D.C.  
April 29, 1981

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ORIGINAL



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 NATIONAL GERIMEDICAL HOSPITAL AND :  
 GERONTOLOGY CENTER, :  
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 Petitioner, :  
 : No. 80-802  
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 BLUE CROSS OF KANSAS CITY AND :  
 BLUE CROSS ASSOCIATION :  
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Washington, D. C.  
Wednesday, April 29, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 1:16 o'clock p.m.

APPEARANCES:

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P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments next  
3 in National Gerimedical Hospital v. Blue Cross of Kansas City.  
4 Mr. Griswold.

5 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,  
6 ON BEHALF OF THE PETITIONER

7 MR. GRISWOLD: May it please the Court:

8 This is an antitrust case in the health care area.  
9 The issue turns on the construction of the National Health  
10 Planning and Resource Development Act of 1974. No constitu-  
11 tional question is involved.

12 The statute is long and diffuse. The respondents  
13 rely on 28 fairly general words in the statute as the basis for  
14 their contention that they have implied immunity from the anti-  
15 trust laws. We contend that there is no room for such a con-  
16 struction.

17 The district court accepted the implied immunity  
18 argument and granted summary judgment for the respondents.  
19 That judgment was affirmed by the Court of Appeals for the 8th  
20 Circuit and this Court granted certiorari to review that deci-  
21 sion.

22 The question arises on these facts. National Gerimedi-  
23 cal Hospital is a fully accredited general acute care community  
24 hospital which opened in October, 1978. It has been continu-  
25 ously licensed by the Missouri Division of Health, that is, the

1 state agency, since September, 1977, and has been fully certi-  
2 fied for Medicare and Medicaid by the Department of Health and  
3 Human Services, as it now is, since its opening. It did not re-  
4 ceive a certificate of need from any Missouri state agency be-  
5 cause Missouri had no certificate of need requirement, when it  
6 was built.

7 The respondents are Blue Cross of Kansas City and  
8 Blue Cross Association, both of which market and sell prepaid  
9 health reimbursement plans to the public and make contracts with  
10 health care providers to administer the plans. Several other  
11 persons are also named as nondefendant coconspirators.

12 Prior to its opening the petitioner sought to make a  
13 participating agreement with Blue Cross. A participating hos-  
14 pital receives direct reimbursement of 100 percent for covered  
15 services rendered to individual Blue Cross members. If the  
16 hospital is not granted participation, then Blue Cross pays no  
17 more than 80 percent of the cost of the services and it makes  
18 the payment directly to the subscriber and not to the hospital.  
19 A lack of participating hospital status discourages Blue Cross  
20 subscribers and their doctors from seeking service at National  
21 Gerimedical and places the hospital at a substantial competi-  
22 tive disadvantage.

23 QUESTION: But in a sense it would place the consumer  
24 in the long run at an advantage, would it not, in that a lot of  
25 unneeded medical facilities would not be built?

1 MR. GRISWOLD: That may or may not be the case. The  
2 question is whether there is any statutory authorization, state  
3 or federal, for restricting the construction of this hospital.  
4 And it is, as I have said, Missouri had no certificate of need  
5 legislation at the relevant time here. There was nothing ille-  
6 gal or inappropriate about the building of this hospital, and  
7 the question really is whether Congress by passing this statute  
8 has authorized private groups to enforce that approach to the  
9 question of the cost of medical care which you have suggested,  
10 and our position is that Congress has made no such authoriza-  
11 tion.

12 QUESTION: Mr. Griswold, does the state even now have  
13 a statewide planning agency?

14 MR. GRISWOLD: Yes. The state now has a statewide  
15 planning agency.

16 QUESTION: When did that come into being?

17 MR. GRISWOLD: Effective October, 1980. And under it  
18 National Gerimedical Hospital is deemed to be a covered hospi-  
19 tal, and --

20 QUESTION: Well, at the time it applied, at the time  
21 it sought an arrangement with Blue Cross, there was no state  
22 backing?

23 MR. GRISWOLD: There was no Missouri statute  
24 restricting --

25 QUESTION: And is this legislation enacted under the

1 spending power, this -- ?

2 MR. GRISWOLD: I would guess it would be under the  
3 commerce power.

4 QUESTION: Well, does it involve federal money going  
5 to the state?

6 MR. GRISWOLD: The states are encouraged by the stat-  
7 ute to have a state health planning and development agency  
8 which would have power to grant certificates of need, but the  
9 states are not required to have that.

10 QUESTION: If a state says, I don't want anything to  
11 do with this, I don't want to participate in this program at  
12 all, nevertheless, you think the statute is applicable in the  
13 state, in the sense that the regional planning agency should be  
14 formed?

15 MR. GRISWOLD: On the contrary, our position is that  
16 the statute is not applicable in the state unless the --

17 QUESTION: Well, it would be if it was under the  
18 commerce power.

19 MR. GRISWOLD: Unless the state -- well, it would be  
20 that the power of Congress might be under the --

21 QUESTION: But they didn't intend it to be?

22 MR. GRISWOLD: But they didn't intend it to, and I  
23 didn't quite complete my answer, which is that there is a para-  
24 graph in the statute which says that if the state doesn't choose  
25 to have a state agency, then it will not get certain grants.

1 But there is no requirement that the state take those grants,  
2 and Missouri deliberately chose not to take those grants and  
3 chose not to have a state planning agency.

4 QUESTION: Is it your position that this regional  
5 planning agency, one of the named coconspirators, what's --  
6 the initials are too complicated --

7 QUESTION: M-A-H-S-A.

8 QUESTION: But is it your position that that agency  
9 had no authority to operate under the federal law at all be-  
10 cause the state hadn't chosen to -- ?

11 MR. GRISWOLD: It had authority to operate under the  
12 federal law for the purpose of making plans and recommendations.

13 QUESTION: Even though the state didn't want anything  
14 to do with this at the time -- with the statute?

15 MR. GRISWOLD: It seems to me it's a little like the  
16 American Law Institute which proposes a federal securities code.  
17 The federal securities code has no significance, no meaning, no  
18 binding effect, unless Congress chooses to enact it. Congress  
19 has not so far chosen to enact it. There are two groups under  
20 the statute, health systems agencies, and in this case that is  
21 the lower group. In this case the health systems agency was a  
22 purely private, nongovernmental organization.

23 The statute also provides that there can be, if the  
24 state wants, a state health planning and development agency,  
25 which is required to be an agency of state government and which



1 is required to have governmental powers with provision for due  
2 process in the exercise of those powers, and with provision for  
3 court review of its decisions. The state is not required to  
4 have such an agency and during the relevant period here  
5 Missouri had no such agency.

6 QUESTION: Mr. Griswold, can I interrupt you to get  
7 something out of the way for me? I'm not thoroughly -- I don't  
8 thoroughly understand, under the statute, what the purpose of  
9 a certificate of need is. On the one hand, is it something  
10 that is a condition to getting a federal grant, or is it some-  
11 thing that the Federal Government says you've got to have before  
12 you can even build a hospital with your own money? What is a  
13 certificate of need? Why does the statute talk about it?

14 MR. GRISWOLD: I'm not sure that I can answer that.  
15 It is a -- it turns very heavily on what the state wants to  
16 make it. The state can provide that there can be no construc-  
17 tion without a certificate of need, and then with proper due  
18 process and proper procedure for appellate review, that can be  
19 binding and can be enforced in the state, in the courts.

20 QUESTION: Isn't one of the objectives, Mr. Griswold,  
21 to avoid the proliferation of unused beds?

22 MR. GRISWOLD: That is the reason for having a certifi-  
23 cate of need statute, but Missouri didn't have one and chose  
24 not to have one. Congress provided that there could be agen-  
25 cies in states which would have certificate of need power, that

1 the Secretary could make contracts with them, and if the  
2 Secretary did make contracts with them, then the states would  
3 be eligible for certain federal funds.

4 QUESTION: Do you suggest that the situation might  
5 be different now after the 1980 development? Missouri now has  
6 a planning -- .

7 MR. GRISWOLD: Missouri now has a planning, but it also  
8 has a statute which says that National Gerimedical shall be  
9 deemed to have a certificate of need. And yet Blue Cross still  
10 refuses to accept it as a participating hospital.

11 Now, the refusal of Blue Cross appears in the record  
12 on page 169, the letter from Blue Cross to National Gerimedical.  
13 "After deliberation the Board of Trustees voted unanimously at  
14 the Blue Cross Board meeting of March 21 to deny Blue Cross  
15 member hospital status to the National Gerimedical Hospital  
16 because your institution did not receive approval through the  
17 health planning process."

18 And I repeat that that health planning process to  
19 which reference was made was that of a purely private agency,  
20 MAHSA, Mid-America Health Planning Association, acting in con-  
21 cert with the Blue Cross associations which are also purely  
22 private. Neither had any governmental power. And I think this  
23 appears most clearly on page 147 of the record, which is a  
24 brochure put out by Blue Cross in 1976 or '77, about two inches  
25 above the bottom of the page: "Since the state planning agency

1 no longer exists, Blue Cross of Kansas City will look to the  
2 local health systems agency for approval of such capital pro-  
3 jects. That health systems agency in the Kansas City metro-  
4 politan area is the Mid-America Health Systems Agency."

5 And then the next clause relates to the rest of the  
6 state. "All projects not reviewed and approved by these health  
7 systems agencies will not be reimbursable by Blue Cross of  
8 Kansas City." And I repeat again, that MAHSA and Blue Cross are  
9 purely private agencies which do not exercise governmental  
10 power.

11 Now, the respondents here rely on a provision of the  
12 statute which is set out on page 2 of our blue brief, and at  
13 various other places in the brief, which provides that "A health  
14 systems agency shall implement its" -- and this is the statutory  
15 wording -- "HSP" -- which I put in brackets, means, health sys-  
16 tems plan -- "and AIP" -- which is annual implementation plan --  
17 "and in implementing the plans it shall perform at least the  
18 following functions: (1) The agency shall seek, to the extent  
19 practicable, to implement its HSP and AIP with the assistance of  
20 individuals and public and private entities in its health ser-  
21 vice area."

22 And the respondents say, look, that's all we did. We  
23 just complied with that provision. There was a plan and we  
24 undertook to help MAHSA implement it.

25 The significance of that section of the statute on

1 which the respondents' case entirely turns becomes clearer when  
2 the entire context of the statute is examined. It's a long  
3 statute, perhaps less intricate than the Internal Revenue Code,  
4 but more diffuse. And in an effort to assist the Court in de-  
5 termining how the various parts of the statute mesh, we've in-  
6 cluded substantial excerpts from it in the Appendix to our  
7 reply brief, the yellow brief. Actually, the statute itself is  
8 55 pages long in the Statutes at Large. It would be more than  
9 that in this print, and I have included some 15 pages of it  
10 here. These are, of course, excerpts. I have tried to make  
11 them a fair representation but Mr. Greenberg may have other por-  
12 tions which he thinks are relevant.

13 Incidentally, I would like to point out an error. We  
14 overdid things a little bit on page, the bottom part of page  
15 8a of the Appendix, where we repeated a part of Section 300m.  
16 It begins at the bottom of page 4a and continues to 8a, and then  
17 we started over again with 300m.

18 QUESTION: Psychologically sound.

19 MR. GRISWOLD: And if the Court will cross out the  
20 bottom two-thirds of page 8a and the top half of page 9a it  
21 will avoid a confusion for which I apologize.

22 QUESTION: Now, let's see, that's strike out all of  
23 (b) and (1) at 8a, is it, Mr. Griswold?

24 MR. GRISWOLD: On 8a, you strike out everything below  
25 the black letter heading, "Section 300m."

1 QUESTION: Is this a commitment not to charge this as  
2 a taxable cost if you prevail?

3 MR. GRISWOLD: We certainly cannot appropriately,  
4 except that briefs don't come within taxable costs, and so I'm  
5 afraid we'll have to pay for it.

6 Now, in the statute Congress set up a planning struc-  
7 ture in several tiers. At the very top there is a National  
8 Council on Health Planning and Development, and then there  
9 are statewide health coordinating councils. They are to take  
10 care of a situation like Missouri where there's one group in  
11 St. Louis and another group in Kansas City, so there's a state-  
12 wide one which coordinates them. Neither of these is involved  
13 in this case, and I have not included in the Appendix the statu-  
14 tory provisions relating to them. But when the statute is  
15 examined it becomes clear that the key distinction is between  
16 the next two tiers of agencies. These are health system  
17 agencies, HSA, on the one hand, and state health planning and  
18 development agencies on the other. I have found from my work  
19 on this case that it is very easy to confuse them, and I suggest  
20 to the Court that it is very important not to confuse them, that  
21 they are different agencies with different functions, and  
22 MAHSA -- Mid-America Health Planning Agency -- is a health  
23 systems agency and not a state health planning and development  
24 agency.

25 Now, the codifiers in the U.S. Code have helped out a

1 little bit because the health systems agencies are all in the  
2 300L sections. Now "ell" becomes confusing when you put it  
3 in print because it looks like "one" so we've put it in italics.  
4 But there are several sections printed in the Appendix through,  
5 near the bottom of page 4a, which are 300L's, and they all  
6 relate to health systems agencies.

7 But Congress knew that state health planning and  
8 development agencies were something very different, and in the  
9 codification they are in the 300m sections. And they begin  
10 at the bottom of page 4a and continue to the page 15a in the  
11 Appendix.

12 Now, if you will look at Section 300L-1(b)(1)  
13 which is on the first page of the Appendix, you will see that a  
14 health systems agency for a health service area must be one of  
15 three types of entities. It can be (a) a nonprofit private  
16 corporation, and that's what MAHSA is, Mid-American Health  
17 Planning Agency is a nonprofit private corporation. It can also  
18 be a public regional planning body or it can be a single unit  
19 of general local government. But MAHSA is not one of those.

20 Under subsequent provisions in the 300L sections,  
21 health systems agencies including MAHSA are given what I call  
22 grass roots responsibility. Their basic function is to gather  
23 information and make recommendations. This is shown by the  
24 passage in the Senate report which is printed on the bottom half  
25 of page four of our brief. The report says that the

1 responsibilities of the health systems agencies are the accumu-  
2 lation of data in order to assess the existing status of the  
3 health care delivery system in the area it serves, and develop-  
4 ing short and long-term recommendations in order to achieve the  
5 rational and equitable distribution of personal health care  
6 services throughout its planning agency area.

7 An important part in the legislative history is the  
8 Senate report which is printed on page five of our reply brief,  
9 where the Senate said that "the establishment of priorities  
10 within the state" -- the Senate committee said -- "the estab-  
11 lishment of priorities within the state and the performance of  
12 regulatory functions are most appropriately carried out at the  
13 state level. The latter function" -- namely, regulatory func-  
14 tions -- "can appropriately be carried only by an agency of  
15 state government." And that was repeated in another Senate  
16 report and a House report at the same time said, "The Committee  
17 feels that regulatory activities are appropriately vested in  
18 units of state government."

19 QUESTION: Well, Mr. Griswold, what if the Missouri  
20 Legislature had taken up a proposal for the formation of a  
21 state regulatory body and come to the conclusion that 95 percent  
22 of Missourians were Christian Scientists, and so they simply  
23 didn't want anything to do with this and they didn't want any  
24 hospital building in the state; and so they enacted a statute  
25 saying, there will be no hospitals constructed in the state for

1 two years?

2 MR. GRISWOLD: Well, then they would have determined  
3 by legislative action the policy of the State of Missouri. The  
4 only question would be the constitutionality of that statute,  
5 and subject to some qualifications about retroactivity and  
6 things of that kind, it would seem to me that it would be found  
7 to be constitutional. But here Missouri made no enactment; it  
8 made no provision for certificate of need, for restricting the  
9 construction of hospitals. That has been done solely by these  
10 private agencies here, which it is our contention are not au-  
11 thorized by any state or federal statute, and there is no basis  
12 for an implied immunity under the antitrust laws.

13 QUESTION: You wouldn't think that, apparently, that  
14 Justice Rehnquist's hypothetical enactment was a valid zoning  
15 ordinance?

16 MR. GRISWOLD: Well, I think it would be very similar  
17 to enacting a valid zoning ordinance. That's why I said I  
18 thought such a statute, except for conceivable things about  
19 retroactivity, the hospital was half built when the statute was  
20 passed, or something like that, bond issues had been put out,  
21 that it would be valid.

22 Now we come to the provision of the statute relating  
23 the state health planning and development agencies, and these  
24 are all in the 300m sections. And the important thing to note  
25 here is that these are not agencies set up by Congress.



1 They are state agencies which the state can provide if it  
2 chooses to do so. If the state does not provide such an agency  
3 the state loses certain grants. Section 300m(d) on page 8a of  
4 the Appendix. The significant fact in this case is that  
5 Missouri chose not to have a state health planning and develop-  
6 ment agency. Under the statute now passed, National Gerimedical  
7 is fully qualified statewide, it receives payments under Medi-  
8 caid and Medicare, it just doesn't receive payments under Blue  
9 Cross because of the private determination of Blue Cross.

10 QUESTION: Mr. Griswold, you keep on saying Missouri  
11 chose not to. Is that entirely correct, or is it just a situa-  
12 tion of Missouri not getting around to making the choice at all?

13 MR. GRISWOLD: No, on the contrary, I think Missouri  
14 did have one for a while and repealed it, which would be a  
15 choosing not to.

16 Now, let me point out Section 300m(b)(1), which is on  
17 page 5a. "A state health planning and development agency must  
18 be an agency of the government of that state, selected by the  
19 governor" -- the statute itself says "state agency" -- "and it  
20 is to administer the state administrative program." It has to  
21 be an agency which has the authority and resources to adminis-  
22 ter the program, and has a budget.

23 Then, in Section 300m(1), "A state administrative  
24 program is a program for the performance within the state by  
25 its state agency," which is the agency which did not exist at

1 this time. And, on page 10a of the Appendix, the state agency  
2 has to be designated by the state "as the sole agency" for the  
3 performance of such functions. It has to be one which under  
4 state law has authority to carry out such functions.

5 Over on page 11a, in paragraph 6, are due process  
6 provisions. It must hold public hearings, give notice, provide  
7 a record. On page 12a, in paragraph (a) near the bottom of  
8 the page, there must be provision for court review of its  
9 decisions.

10 Now there is no such provision for Mid-America Health  
11 Systems Agency. It just made a decision and that's it. There  
12 is no way to review it.

13 QUESTION: Mr. Griswold, I take it there's no provi-  
14 sion or indication in the federal law that if Blue Cross had  
15 chosen to make a contract with this hospital, despite the refu-  
16 sal of a certificate of need from MAHSA, that there would have  
17 been no violation of federal law?

18 MR. GRISWOLD: Well, let me say, MAHSA never refused  
19 to issue a certificate of need.

20 QUESTION: Well, assume it had, though.

21 MR. GRISWOLD: Assume it had? That would be simply  
22 two private groups agreeing together that they would --

23 QUESTION: Yes, but suppose MAHSA had refused to  
24 certify this, what did it do that led Blue Cross to refuse to  
25 make the contract?

1 MR. GRISWOLD: It did that thing which I read from  
2 the record in which it said that they -- well, what MAHSA did  
3 was to put out an elaborate health planning thing which occu-  
4 pies hundreds of --

5 QUESTION: And Blue Cross read it as saying, as  
6 meaning it wasn't needed. Is that it?

7 MR. GRISWOLD: Blue Cross read it as meaning --

8 QUESTION: Well, what if it had read it as meaning  
9 that this facility wasn't needed, exactly the way it read it  
10 now, but had said, well, nevertheless, we're going to make a  
11 contract with the -- that would not have violated any federal  
12 law?

13 MR. GRISWOLD: No, it wouldn't have violated any --

14 QUESTION: It might have made MAHSA mad but --

15 MR. GRISWOLD: It would not have violated any federal  
16 or state law whatever.

17 QUESTION: Mr. Griswold, supposing, though, that  
18 Missouri had authorized the program and then the planning agency,  
19 whatever its proper name is, refused to designate the hospital,  
20 give it the certificate, and thereafter Blue Cross entered into  
21 the contract with them. Then would it have violated federal law? In  
22 other words, if you had a state program in place and the state  
23 program did not certify a new hospital, would the federal  
24 statute be violated if Blue Cross decided to insure the hospital?

25 MR. GRISWOLD: I don't recall, Mr. Justice, at this

1 point, any provision of the federal statute which that would  
2 have violated.

3 QUESTION: Well, it would have resulted in cutting  
4 off funds.

5 MR. GRISWOLD: No, not in my understanding.

6 QUESTION: We're not talking about federal funds. I'm  
7 just saying --

8 MR. GRISWOLD: Not in my understanding of what --

9 QUESTION: Would it violate the statute for Blue Cross  
10 to say, well, we'll go ahead and insure you anyway?

11 MR. GRISWOLD: The federal funds are cut off from the  
12 state only if it doesn't have a state health planning and  
13 development agency. In the case of --

14 QUESTION: Well, then, the one that operates ac-  
15 cording to federal rules.

16 MR. GRISWOLD: In the case put by Justice Stevens,  
17 the state has a state health plan, so the state funds would not  
18 be cut off. The extent to which funds would be cut off from  
19 this hospital would turn on other federal laws. It is my  
20 understanding that there were not federal funds in this hospi-  
21 tal, that it was built by the nonprofit group which conducts  
22 the hospital.

23 I would suggest to the Court that the distinction  
24 between health systems agencies and state health planning and  
25 development agencies is crucial to this case. Health systems

1 agencies, which is what MAHSA, Mid-America Health Systems  
2 Agency, was, have no governmental powers. The judgment below  
3 grants powers to private bodies, MAHSA and the Blue Cross Asso-  
4 ciation, which cannot be found either in the federal or the  
5 state law, and the judgment below should be reversed.

6 MR. CHIEF JUSTICE BURGER: Very well, Mr. Griswold.  
7 Mr. Solicitor General.

8 ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,  
9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

10 MR. McCREE: Mr. Chief Justice, and may it please the  
11 Court:

12 The statutory scheme that Mr. Griswold described  
13 resulted in, of course, the 8th Circuit determining that there  
14 was an implied exemption created by this national health plan-  
15 ning and resources development statute from the impact of the  
16 antitrust laws, because there was a repugnancy between the  
17 statute, which was enacted subsequent to the antitrust laws,  
18 which of course have been fundamental laws in this country since  
19 1980, at least the Sherman Antitrust Act has.

20 We do not contend that there can never be implied  
21 exemption from the antitrust laws, but we are mindful that the  
22 teachings of this Court are that an implication from, an implied  
23 exemption from a regulatory statute is strongly disfavored and  
24 would be found only in cases of a plain repugnancy between the  
25 antitrust acts and the regulatory provisions.

1 QUESTION: Do you think this disfavor of implied re-  
2 peal is stronger in the case of antitrust laws than in the case  
3 of other regulatory laws?

4 MR. McCREE: I think it may well be, perhaps, just  
5 because of their age and their fundamental nature. But I don't  
6 think we have to decide that here.

7 QUESTION: How about the Logan Act, passed in 1796?

8 MR. McCREE: Well, I just don't think we have to de-  
9 cide that here. I think the principles would be the same. If  
10 the Congress has enacted a comprehensive scheme and then enacts  
11 subsequent legislation, if there is a conflict it's the duty of  
12 the Court to try to give meaning to both statutes. And if the  
13 Court cannot give meaning to both statutes because of a plain  
14 repugnancy, then it will find that the later statute pro tanto,  
15 by implication, modified the earlier one. And so I don't think  
16 it makes any difference for the problem of statutory construc-  
17 tion whether we're talking about the Logan Act or the Sherman  
18 Act or Capper-Volstead, or whatever it is.

19 We contend here that there is no plain repugnancy,  
20 and that this Court's attention to this matter can really be  
21 concluded at that point. The Joint Appendix contains, of  
22 course, the opinion of the 8th Circuit, which adopts, after  
23 making its own ascertainment of repugnancy, the findings of the  
24 district court. I would

25 I would like to direct the attention of the Court to

1 page 187a of the Joint Appendix, in the sentence just before  
2 the paragraph break about a quarter of a page down, and with  
3 leave of the Court I'd like to read that sentence if I may.

4 The district judge wrote, "If the court were to find  
5 that private business working in conjunction with a health  
6 systems agency established by the Act in their area to achieve  
7 the goals of the Act were liable or might be liable under the  
8 antitrust law for their actions, then the court believes that  
9 the accomplishment of the purpose of the goals of the Act would  
10 be effectively foreclosed."

11 Now, that's as close as either of these courts gets  
12 to the finding of a plain repugnancy, and yet on several occa-  
13 sions this Court has held that activities which come clearly  
14 within the jurisdiction of a regulatory agency nevertheless may  
15 be subject to scrutiny under the antitrust laws.

16 As Mr. Griswold has pointed out, the National Health  
17 Planning and Resource Development Act of 1974, which is the  
18 basic piece of legislation here, created two types, or at least  
19 two types of agencies; one, the health systems agency, of which  
20 MAHSA, the Mid-America Health Systems Agency -- which was, inci-  
21 dentally, a multistate agency -- is one; and it created the  
22 state agency, or authorized the creation of a state agency which,  
23 as he pointed out, didn't exist at this time. All the first  
24 type of agency, the health systems agency, could do is plan and  
25 recommend. It could do nothing more than plan and recommend.

1 And the district court, and subsequently the Court of Appeals  
2 for the 8th Circuit, found that respondent here, who is accused  
3 of having conspired with MAHSA and others to prevent the entry  
4 of petitioner into a hospital agreement, to prevent petitioner  
5 and Blue Cross from entering into an agreement, somehow violated  
6 a regulatory scheme with a clear and plain repugnancy. And that  
7 just isn't so. Because all the Act required was cooperation  
8 with the health systems agency, and if a private party like  
9 Blue Cross in this case is immune from the antitrust acts, just  
10 because it does what it thinks a health planning agency would  
11 like it to do, and at that point the approval of this Court,  
12 we've moved a long way from cases like United States v. RCA,  
13 California v. FPC, U.S. v. Borden Company, Silver v. New York  
14 Stock Exchange, where there was strict regulation by an agency,  
15 and yet the Court found a place for the application of the  
16 antitrust laws.

17 We contend that in the absence of a strict repugnancy  
18 the Court can conclude its consideration of this matter here,  
19 because there isn't any repugnancy between the activities of the  
20 health systems agency and the antitrust laws.

21 QUESTION: General McCree, was there any finding in  
22 the district court or court of appeals that the actions of the  
23 Blue Cross in effect violated the antitrust acts here, or was  
24 it just the whole thing turned on whether they were exempt from  
25 the antitrust acts?



1 MR. McCREE: The latter, Mr. Justice Rehnquist. The  
2 posture of the case as it went to the 8th Circuit was on summary  
3 judgment and the court assumed it to be true that this was a  
4 wrongful refusal to deal in violation of Sections 1 and 2.  
5 And the case would have to go back if this Court agrees that  
6 there is no implied exemption from the antitrust laws to see  
7 whether petitioner can actually establish it. But we have to  
8 accept it for the purposes of this litigation.

9 QUESTION: Mr. Solicitor General, may I ask the same  
10 question I asked Mr. Griswold, what is your understanding of  
11 the statutory purpose of a certificate of need? Does it relate  
12 merely to eligibility for federal funding or is it a condition,  
13 a federal prohibition against the building of new hospitals  
14 without such a certificate?

15 MR. McCREE: Well, first let me say that I'm not al-  
16 together clear either in my understanding of it, but it is not,  
17 it is not a compulsion of the Federal Government, which was part  
18 of Mr. Justice Stevens' inquiry, because it can only be accom-  
19 plished by a state agency which was not in place at the relevant  
20 time of the refusal, alleged refusal to deal here, but it has  
21 since come into being. It would be a refusal by the state, and  
22 I suppose it would be possibly to accredit it; to permit it to  
23 perform.

24 QUESTION: Well, let me rephrase the question. Sup-  
25 posing you had a state agency and it granted one hospital a

1 certificate of need and another one it did not. And I assume  
2 the first one could get federal funding and all sorts of things.  
3 The second one, I assume, would not be eligible for federal  
4 funds but would it violate any federal law if it nevertheless  
5 went ahead and offered its hospital services available to the  
6 general public?

7 MR. McCREE: I'm not aware of any federal law that it  
8 would violate. My answer is no; I'm not aware of any.

9 QUESTION: Nor would it violate a federal law if Blue  
10 Cross made a contract with it?

11 MR. McCREE: I would agree with that too. I know of  
12 no federal law that would violate. But we're in an area here  
13 where it's necessary to determine whether Congress intended by  
14 implication to exempt certain private activity which is to be  
15 totally unregulated from the impact of the antitrust laws.  
16 And we submit that this Court has never done that. I can't  
17 think of a single instance where this Court by implication has  
18 found that the Congress by implication meant to enable a private  
19 party to do the things forbidden by the antitrust acts when  
20 there was no other regulatory scheme imposed to promote competi-  
21 tive activity.

22 And we say it's particularly, the error is particu-  
23 larly egregious here because in this National Health Planning  
24 Act the Congress made express exemptions from the antitrust  
25 laws and did not exempt the behavior condemned here.

1 It expressly in 1974 exempted, or immunized, and in a qualified  
2 way, too, because it was for good faith and nonnegligent activi-  
3 ty, individuals who would participate in a health systems plan-  
4 ning activity from money damages only, and not from injunctive  
5 relief. Subsequently, in 1979, it extended the immunity, again  
6 just for money damages, to the health systems agencies and spe-  
7 cifically rejected an effort on the part of the Senate to immu-  
8 nize persons who might cooperate with them, which would have  
9 been, possibly, Blue Cross in this instance. And we set these  
10 matters out on pages 25 through 27 in the Government's brief,  
11 and we say that where there is an express exemption this Court  
12 should be reluctant to find an implied blanket exemption which  
13 would be broader than the qualified exemption expressly made  
14 by the Congress.

15 We think that the Congress was certainly concerned  
16 with delivering quality health services at reasonable cost to  
17 the American people, but that it did not intend it to be done  
18 in disregard of the antitrust laws, that it intended the  
19 antitrust laws to coexist except to the extent that it made  
20 express exceptions with its planning system, which is set out  
21 in the statute that Mr. Griswold described in his argument to  
22 the Court. If there are no further questions, we will rest on  
23 our brief. Thank you.

24 MR. CHIEF JUSTICE BURGER: Mr. Greenberg.

25 ORAL ARGUMENT OF JOSHUA F. GREENBERG, ESQ.,

ON BEHALF OF THE RESPONDENTS  
**North American Reporting**

GENERAL REPORTING, TECHNICAL, MEDICAL, LEGAL, GEN. TRANSCRIPTION

1 MR. GREENBERG: Mr. Chief Justice, and may it please  
2 the Court:

3 The intent of Congress in the Health Planning Act of  
4 1974 was deliberately anticompetitive. What Congress did in the  
5 statute itself was fashion health systems agencies throughout  
6 the nation and it directed that each one draft a plan, a plan  
7 which would blueprint the future development and structure of  
8 health systems in the various communities.

9 Congress directed in the statutory words that the  
10 agencies reduce documented inefficiencies. It was the statutory  
11 test -- these are words in the statute -- to prevent unnecessary  
12 duplication of health resources.

13 QUESTION: Mr. Greenberg, under what authority did  
14 Congress take that action?

15 MR. GREENBERG: I think that the authority was  
16 generally under the spending authority. There were grants made  
17 to the states; rather substantial grants are made to the states.  
18 It also --

19 QUESTION: It simply provided that if the states didn't  
20 comply they would not get the funding?

21 MR. GREENBERG: That is correct; that is correct.  
22 Lest there be any doubt, there is no claim here that there  
23 will be a violation of federal law if Blue Cross does not go  
24 along. That is not our point. Our point is one of cooperation,  
25 and cooperation within the statutory scheme established by

1 Congress in order to effectuate a particular result.

2 Now, these statutory words are very clear: planning,  
3 reduce documented inefficiencies, prevent unnecessary dupli-  
4 cation.

5 QUESTION: Where are those words?

6 MR. GREENBERG: These are words in various sections  
7 of the statute. I'm going to have the same --

8 QUESTION: It's an awfully long statute.

9 MR. GREENBERG: I'm going to have the same problem  
10 Mr. Justice Rehnquist had earlier. In 300L-(b)(2)(A),  
11 300L-2(a), and 300L-2(a)(4).

12 QUESTION: But the one, I'm particularly interested in  
13 the one about reducing the amount of hospital services or what-  
14 ever it was.

15 MR. GREENBERG: It says, "prevent unnecessary dupli-  
16 cation of health resources."

17 QUESTION: And, in particular, where is that?

18 MR. GREENBERG: 300L-2(a)(4).

19 QUESTION: 300L-2(a)(4). Thank you.

20 MR. GREENBERG: These statutory words, planning --

21 QUESTION: Where do we put our finger on that  
22 correctly here?

23 MR. GREENBERG: In our brief it's at page 15.

24 QUESTION: You can't tell the players without a  
25 program.

1 QUESTION: Sixteen, did you say?

2 MR. GREENBERG: Fifteen.

3 QUESTION: Fifteen. Now we'll try to tack with you.

4 MR. GREENBERG: These are short words. Mr. Griswold  
5 seems concerned that there are only 28 words on which we rely.  
6 Having been trained in the antitrust laws I am used to short  
7 statutes. There are 28 words.

8 These statutory words, words like planning, reduce  
9 documented inefficiencies, prevent unnecessary duplication,  
10 are plainly antithetical to all of antitrust. There could be  
11 nothing that could be more antithetical. Solicitor General  
12 talks about a promotion of competitive activity. There was no  
13 talk of any kind, none whatsoever, in the 1974 act, which is  
14 the only act before this Court, about competitive activity.  
15 There's not a whisper of it, not in the legislative history, not  
16 in the statute. Everything that Congress wanted to do in 1974  
17 was deliberately anticompetitive.

18 Now, petitioner's reply brief, at page 4, note 1,  
19 relies on a House report on the 1974 act and petitioner argues  
20 that there is no indication that Congress understood, as they  
21 put it, "planning to be synonymous with cartel regulation."  
22 However, that same 1974 House report at pages 60 and 61 dis-  
23 cusses the key provision here with respect to implementation.  
24 Words that were in the House bill at the time that finally be-  
25 came incorporated in those very same words in the final act.

1           This is what the House report said. With your per-  
2 mission, I would like to quote. "The planning done by HSAs is  
3 to include as an integral part of the planning process the im-  
4 plementation of plans." These are not two separate activities,  
5 for the definition of planning includes implementation, not just  
6 recommending; not just the American Law Institute, with respect.

7           Petitioner sees a difference between planning and  
8 implementation. The 1974 House report on which petitioner  
9 relied did not. Now, lest there be any doubt here I would like  
10 to quote further from that House report. It puts it this way and  
11 it makes very clear the two-track system which Congress had to  
12 adopt in 1974, makes its point this way. "The apparently  
13 modest initial means of implementing health plans seeking the  
14 assistance of individuals and entities in the health service  
15 area to do so is in fact the most important method available.  
16 Without credibility in the community and close working rela-  
17 tionships" -- close working relationships -- "with those who  
18 operate the health system guided change will be impossible."

19           Then the House report goes on, putting away any  
20 lingering doubt: "The governing body" -- they're talking now  
21 about the governing body of the health systems agency --  
22 "should include representation of third party payers" -- third  
23 party payers like Blue Cross -- "who once the plans are drawn  
24 can assist the agency in implementing them." These are the  
25 words of the Congress. "Without close working relationships

1 with those who operate the health system guided change will be  
2 impossible."

3           Those are the words of a Congress that wanted to  
4 repeal the antitrust laws. It didn't say anything about it,  
5 it didn't say anything about it because in 1974, if we take  
6 that slice of time, nobody thought that the antitrust laws  
7 applied in this business. It was before Rex Hospital, it  
8 was before Royal Drug, it was before Goldfarb. Antitrust was  
9 the furthest thing in anyone's mind. We've had the petitioner,  
10 we've had the Solicitor General, we have an amicus, we have our  
11 particular group. No one has found a word in the 1974 legisla-  
12 tive history suggesting that anyone wanted any kind of antitrust  
13 or competition. All of the legislative history says, there  
14 are too many beds, it's adding to cost. If you build a bed it  
15 gets filled up, and we don't want it.

16           The the House report talks about third party payers  
17 who once the plans are drawn can assist the agency in imple-  
18 menting them. Those are the facts of this case, and those are  
19 facts which, with respect, are glossed over by the petitioner,  
20 and are also glossed over by the Solicitor General.

21           We are not asking for a blanket exemption here. What  
22 we're asking for is an implied repeal with respect to the very  
23 specific facts of this very case.

24           QUESTION: What is the scope, Mr. Greenberg, of the  
25 implied repeal. In other words, would it cover a group, say, a



1 group of contractors who refuse to enter into a contract with a  
2 new hospital unless it first got a certificate of need?

3 MR. GREENBERG: With respect, sir, the certificate of  
4 need is only a matter of state law, and I think it points up  
5 what was going on here. Again --

6 QUESTION: There was no provision at the time of the  
7 operative facts here for a state certificate of need. Am I  
8 correct?

9 MR. GREENBERG: That's absolutely correct. And, in-  
10 deed, there were no certificates --

11 QUESTION: So there was none, but there couldn't have  
12 been any?

13 MR. GREENBERG: Pardon me?

14 QUESTION: There was no certificate of need, but there  
15 couldn't have been any?

16 QUESTION: There could have been a certificate of  
17 need in Missouri. There could have been a certificate of need  
18 law in Missouri. Missouri did not have one. Absolutely; did  
19 not have one.

20 QUESTION: So what is the scope of the exemption that  
21 you contend existed in Missouri in the year in question here?

22 MR. GREENBERG: The scope of the exemption should be  
23 related to the facts of our particular case, and the facts of  
24 our case can be ascertained not from statements of it being  
25 certified by the State of Missouri --

1 QUESTION: Well, I mean, let's say, instead of Blue  
2 Cross, say it's a group of contractors?

3 MR. GREENBERG: We have specific facts here, and the  
4 specific facts here are, according to the complaint, according  
5 to the very complaint --

6 QUESTION: But, no, the thrust of my question is, what  
7 is the exemption that you contend Congress created? I don't  
8 think you're suggesting Congress had in mind this particular  
9 hospital or this particular --

10 MR. GREENBERG: I think they had in mind this situa-  
11 tion, this kind of situation, where the health systems --

12 QUESTION: What I want to know is, what is the scope  
13 of the situation they had in mind to grant an exemption?

14 MR. GREENBERG: I understand. And the health --

15 QUESTION: What is it? Just an exemption for Blue  
16 Cross?

17 MR. GREENBERG: Oh, no; oh, no.

18 QUESTION: Would it cover then, say, a group of con-  
19 tractors who refuse to build a hospital or a group of doctors  
20 who refuse to offer their services unless they get -- would it  
21 cover all kinds of collusive activity or cooperative activity  
22 designed to prevent the construction of a new hospital?

23 MR. GREENBERG: Provided that -- the answer is yes,  
24 provided that, key, provided that, that the health systems  
25 agency, the federally created, the federally funded agency --

1 this isn't some private interloper; it's supervised by the  
2 Secretary of Health and Human Services. Provided that the  
3 health systems agency had made the prior determination, and the  
4 complaint here states that what Blue Cross did is it delegated  
5 to the health systems agency the determination of need. We  
6 don't have Blue Cross making the decision. The decision here  
7 is made by the health systems agency.

8 QUESTION: But it had no power to require Blue Cross --

9 MR. GREENBERG: That is absolutely correct.

10 QUESTION: And if it talked the pharmaceutical people  
11 into refusing to sell a new hospital drugs, I suppose you would  
12 say the same thing?

13 MR. GREENBERG: Yes, sir.

14 QUESTION: Anything that MAHSA could talk anybody  
15 into doing, whether they were required to do it or not, is  
16 exempt.

17 MR. GREENBERG: Is exempt because that's what Congress  
18 wanted to have done.

19 QUESTION: Yes, your answer is yes.

20 MR. GREENBERG: The answer is yes.

21 QUESTION: Could they have turned it over to a sub-  
22 sidiary?

23 MR. GREENBERG: A subsidiary of whom?

24 QUESTION: Blue Cross turn it over to a subsidiary of  
25 called the Hospital Opportunists Association?

1 MR. GREENBERG: I don't have to reach that question  
2 on these particular facts.

3 QUESTION: Would you mind, would you mind meeting  
4 it?

5 MR. GREENBERG: I think that that would surely be a  
6 broader exemption than is being called for here and might not  
7 be covered.

8 QUESTION: But this is a purely private organization,  
9 isn't it?

10 MR. GREENBERG: Are we talking about MAHSA or Blue  
11 Cross?

12 QUESTION: MAHSA.

13 MR. GREENBERG: MAHSA is not a "purely private organi-  
14 zation." It was created by a federal statute, it is funded up  
15 to 90 percent with federal funds, and it is specifically regu-  
16 lated by the Secretary of Health and Human Services on an on-  
17 going basis.

18 QUESTION: Is it a public or private organization?

19 MR. GREENBERG: It's a state incorporated organization.

20 QUESTION: I thought it was a private organization.

21 MR. GREENBERG: It is private but federally funded.

22 QUESTION: American Tel and Tel is a state-incorporated  
23 organization too, you know, but is it a private corporation or a  
24 public corporation?

25 MR. GREENBERG: It's a private corporation.

1 However, it is a unique private corporation in that it is  
2 federally funded and created by federal statute and is super-  
3 vised in its entirety by the Secretary of Health and Human  
4 Services. In fact, it is --

5 QUESTION: Well, is it entirely accurate to say it's  
6 created by federal authority? It's authorized.

7 MR. GREENBERG: It's authorized, established. I'm  
8 sorry, Your Honor. It is not created. It is actually incor-  
9 porated by a state.

10 QUESTION: It isn't even told very specifically what  
11 to do. For example, if MAHSA appeared at the statewide meeting  
12 of the druggists, the wholesale druggists in Missouri, and said,  
13 we recommend that you all agree not to sell this hospital any  
14 drugs, and they thought that was a good idea since they wanted  
15 to -- so they passed a resolution, and everybody agreed that  
16 they wouldn't sell any. Do you say that that would be exempt  
17 because MAHSA had recommended it, because they were authorized  
18 to seek the cooperation of private parties? They sought the  
19 cooperation and they got it. That's the end of it.

20 MR. GREENBERG: It would be authorized only  
21 in the event, or only in the event that it was  
22 authorized by the statute and in the supervision by the Secre-  
23 tary of Health and Human Services was determined --

24 QUESTION: Well, is that any -- that certainly isn't  
25 any farther outside the scope of its authority than going to

1 Blue Cross, is it?

2 MR. GREENBERG: No, it would not be here. If MAHSA  
3 had determined, as it did here, that the number one priority  
4 in the community was to stop the proliferation of hospital beds  
5 and the statute says, that it was an unnecessary duplication  
6 of health resources, so this statement was clearly within the  
7 statutory authority. If in terms of Mr. Justice White's hypo-  
8 thetical example, rather than going to Blue Cross it went to a  
9 group of pharmaceutical suppliers and it said, don't supply  
10 them, Congress intended that that be impliedly exempt from the  
11 antitrust laws. That's what at stake here. Congress is  
12 deliberately anticompetitive. There is no doubt about that.  
13 That must be faced up to.

14 QUESTION: Is it true that Blue Cross could not have  
15 done this without MAHSA, whatever this thing is?

16 MR. GREENBERG: Pardon me?

17 QUESTION: Could Blue Cross have acted without MAHSA  
18 and you still have your same position?

19 MR. GREENBERG: No.

20 QUESTION: So, is it not true that MAHSA is giving  
21 antitrust exemptions?

22 MR. GREENBERG: That is correct. Congress has --

23 QUESTION: No, no, that wasn't my question. MAHSA did.

24 MR. GREENBERG: I understand. That's correct. It's a  
25 participation of MAHSA in this scheme that provides the

1 antitrust exemption as derived from the statutory scheme which  
2 is deliberately anticompetitive and says, we want to achieve  
3 the reduction of hospital beds in different ways. One of the  
4 ways is the cooperative --

5 QUESTION: But Mr. Greenberg, there's a difference  
6 between saying you don't want a duplication and saying, we want  
7 a reduction. The statute doesn't ever say you need a reduction,  
8 does it?

9 MR. GREENBERG: No, it doesn't. It talks about --

10 QUESTION: Is there anything in the statute that says  
11 there are too many hospital beds?

12 MR. GREENBERG: -- reducing -- it talks about reducing  
13 documented inefficiency and it talks about the unnecessary du-  
14 plication of health resources.

15 QUESTION: There's no statutory finding that I've  
16 been able to find that says there are too many hospital beds;  
17 nothing in the statute. In fact, the statute's somewhat incon-  
18 sistent with your whole concept because as I understand it it's  
19 authorizing federal subsidies, which presumably would enlarge  
20 the total supply of hospital services available to begin with.

21 MR. GREENBERG: There are various things at stake.  
22 There is not a determination by the Congress that we need  
23 absolutely no more hospital beds anywhere in the nation.

24 QUESTION: Or in any specific place.

25 MR. GREENBERG: Or in any specific place.

1 Because there may be -- and Congress recognizes this -- you may  
2 have sunbelt growth, which will require more hospital beds.  
3 The key point here is that in Kansas City, in Kansas City  
4 MAHSA said, we're not in the sunbelt, unfortunately, we have too  
5 many beds.

6 QUESTION: But Congress didn't say that. But Congress  
7 didn't say --

8 MR. GREENBERG: But Congress said --

9 QUESTION: And Congress didn't say that nowhere shall  
10 there be any more hospitals unless they're approved, did it?

11 MR. GREENBERG: No, but what Congress did say is, we  
12 are going to create 205 health systems agencies and they're  
13 going to determine within each standard metropolitan area -- as  
14 the Solicitor General points out, MAHSA covers Kansas City,  
15 Kansas and Missouri. They wanted it a true economic group.  
16 Within that economic area MAHSA determines if you need beds.  
17 Now, the petitioner complains; they said, well, they wouldn't  
18 allow any more beds. But the point is, they didn't ask, and  
19 the mere fact that one doesn't ask or would get a turn-down  
20 doesn't mean there's no due process.

21 QUESTION: Well, no, it's not a due process claim,  
22 but I'm still puzzled as to what, even if everything were in  
23 place, what is the legal effect of one of these determinations?  
24 Is it anything more than a recommendation for good sound future  
25 planning?



1 MR. GREENBERG: It is positively a recommendation. It  
2 is not binding on anyone.

3 QUESTION: If it's just a recommendation, how can it  
4 possibly give an exemption from some legal -- ?

5 MR. GREENBERG: Because Congress went further. Con-  
6 gress said, they shall implement it. They shall seek to imple-  
7 ment the plans to the extent practicable in the area.

8 QUESTION: Only by recommending them.

9 MR. GREENBERG: No, it says, shall seek to the extent--

10 QUESTION: Oh, I know, but they didn't have any  
11 authority to bind anybody.

12 MR. GREENBERG: That is correct.

13 QUESTION: They could only recommend.

14 MR. GREENBERG: That is correct. They had no -- but  
15 the congressional determination here was that they wanted --  
16 there were two tracks, as we've said. One of the tracks has to  
17 do with planning and implementation, not a requirement to be  
18 sure, planning and implementation in the very route that we've  
19 taken here.

20 QUESTION: Suppose, Mr. Greenberg, that a state law  
21 set up a state health planning agency and authorized it to make  
22 some plans about hospitals and avoid having too many hospital  
23 beds and authorized it to seek the cooperation of private in-  
24 terests in effecting its recommendations. And this state agency  
25 went around to a group of pharmaceutical people and recommended

1 that they refuse to sell to a new hospital. Now, certainly,  
2 that wouldn't be within the Parker v. Brown exemption, would it?

3 MR. GREENBERG: I think not. The point, though, is --

4 QUESTION: But you say that precisely the same thing  
5 is an implied exemption under this federal law?

6 MR. GREENBERG: That's correct, Your Honor. The rea-  
7 son I'm saying that, taking the Parker v. Brown determination --  
8 I think the scope of Parker v. Brown at this point is in enough  
9 difficulty -- in terms of implied --

10 QUESTION: Well, it's rather difficult for you, I would think.

11 MR. GREENBERG: I understand. You assumed --

12 QUESTION: I have not understood your argument as a  
13 Parker v. Brown immunity. It isn't, it isn't. It is positively

14 MR. GREENBERG: It isn't, it isn't. It is positively  
15 not a Parker v. Brown --

16 QUESTION: But as an implied exception or pro tanto repealer,  
17 which I in my limited knowledge of antitrust law have thought of as two  
18 two different things. One is that if the state authorizes raisin pro-  
19 ration it's exempt from the antitrust laws, not by virtue of anything  
20 Congress has done but by virtue of the fact that the state is behind it;  
21 and other federal statutes, such as NASD and the Gordon v. New York  
22 Stock Exchange, where the Congress has authorized regulation of a  
23 particular industry that's inconsistent with the antitrust  
24 laws, there will be implied a pro tanto repealer. And those are  
25 two different doctrines, are they not?

1 MR. GREENBERG: We agree. The point that we make is,  
2 the issue before the Court, with respect, is to take the slice  
3 of time in 1974 and say, what did that Congress that passed the  
4 National Health Planning Act of 1974 intend with respect to the  
5 antitrust laws? And we think that by reading the entire statute  
6 and not just what is here irrelevant, Section "m", a different  
7 section from what's involved, but rather if one reads the  
8 statutory purposes in the "L" sections that have to do with  
9 our case, the health systems agency and the implementation,  
10 that Congress said, we want to do it two ways. Why did they  
11 say they wanted to do it two ways? The reason was, again,  
12 taking the slice of time in 1974, the states didn't have certifi-  
13 cate of need statutes yet.

14 QUESTION: This was two alternative ways?

15 MR. GREENBERG: That's correct. Two -- and that's  
16 what the House report makes very explicit and I think is very  
17 clear from the statute, and is also clear from the Senate report.  
18 In 1974 Congress said, let's get on with it, let's stop this  
19 proliferation of hospital beds, but we can't force states to go  
20 enact certificate of need laws, and they gave them four years to  
21 do so.

22 QUESTION: Can I back up a minute to my MAHSA  
23 point? You said a minute ago that it wasn't binding on anybody.

24 MR. GREENBERG: That's correct.

25 QUESTION: But aren't you trying to make it binding

1 on us? Why pick us out?

2 MR. GREENBERG: With respect --

3 QUESTION: You say it wasn't binding on Blue Cross or on  
4 anybody else, but we have to take it. Isn't that what you said?

5 MR. GREENBERG: That's correct, but I say that that's  
6 what Congress said in the 1974 act in the 28 words.

7 QUESTION: Oh, you're back to the 28 words?

8 MR. GREENBERG: Oh, yes; oh, yes. There's no doubt  
9 about those 28 words being the basis of our position.

10 QUESTION: If you lose one of them, do you lose?

11 MR. GREENBERG: Pardon me?

12 QUESTION: Suppose you've only got 26 of them?

13 MR. GREENBERG: It depends -- well, let me do some-  
14 thing. One of the words that the petitioner is very interested  
15 in is "to the extent practicable." To the extent practicable.  
16 And what petitioner does in its brief is it incorporates a lot  
17 of baggage on top of "to the extent practicable." It says,  
18 what "to the extent practicable" Congress meant was, except in-  
19 sofar as the antitrust laws are concerned. Well, let me read  
20 from another section of the law, the 1974 law now, 42 U.S.  
21 Code 300-1(a)(2), which is not in any of the briefs at this  
22 point. But it says that, "to the extent practicable the area  
23 shall include at least one center for the provision of highly  
24 specialized health services." What Congress is talking about  
25 there is how big the health systems agency can be. It couldn't

1 be clearer if one reads the entire Act that "to the extent  
2 practicable" means what it means to everyone: if you can do it,  
3 and not insofar as the antitrust laws are violated.

4 QUESTION: Mr. Greenberg, suppose that MAHSA instead  
5 of being what it was, was Blue Cross. I suppose, can't an  
6 HSA, it can be any private group -- can't it? -- or a public  
7 agency?

8 MR. GREENBERG: It can be any particular entity.

9 QUESTION: So, what if Blue Cross had volunteered to  
10 be the HLS or the -- whatever it is -- HSA? Suppose that -- it  
11 could have been, couldn't it?

12 MR. GREENBERG: No, it could not.

13 QUESTION: Why not?

14 MR. GREENBERG: Because the HSA had to have as its  
15 governing body --

16 QUESTION: I see.

17 QUESTION: And only 49 percent, I think, could be --

18 MR. GREENBERG: Providers.

19 QUESTION: I see.

20 MR. GREENBERG: And it had to have a majority of con-  
21 sumers. And the staff had to be funded by -- all the staff was  
22 funded, at least 90 percent were, by the Federal Government.  
23 The problem the petitioner has is that MAHSA doesn't look  
24 exactly like the SEC. It isn't composed only of federal employ-  
25 ees. But what it had on it was volunteers, all volunteers --

1 in this case 30 volunteers, 16 of them consumers coming out of  
2 the plain old people, 16 being consumers and 14 being providers,  
3 hospitals, Blue Cross, doctors, nurses, professors, what have  
4 you.

5 QUESTION: So you're saying this is no different than  
6 if the statute had authorized the secretary of one of the  
7 departments to go out in the field and try to talk people,  
8 private parties into preventing excess hospital beds, and the  
9 Secretary of Health went out to the pharmaceutical convention  
10 and persuaded them not to sell to the new hospital?

11 MR. GREENBERG: That is what Congress wanted. That's  
12 what it said.

13 QUESTION: And so you think, then, that the phar-  
14 maceutical people, although they weren't required to do that at  
15 all, by the federal law, and couldn't have been told to do it  
16 by the Secretary, they're nevertheless exempt?

17 MR. GREENBERG: That's correct, Your Honor.

18 QUESTION: Mr. Greenberg, suppose -- I'll try a hypo-  
19 theoretical -- that the Federal Government, the Congress, developed  
20 the idea erroneously or otherwise, that the country needed more  
21 lawyers, and provided for \$500 million for matching grants to  
22 the states to build additional law schools but required that  
23 no grant would be made to a state unless the bar association  
24 of that state certified that there was a need for a law school  
25 and specified the size and capacity of that law school.

1 Would you think there'd be some analogy with what you've got  
2 here?

3 MR. GREENBERG: With respect, no. Because wholly  
4 apart from the problem of hospitals and too many lawyers --  
5 I'd rather not get into that -- the point here is that your  
6 analogy relates to the certificate of need arrangement insofar  
7 as the states are concerned. What's going on here was that  
8 there already were a number of certificate of need programs in  
9 essay. Not in Missouri, to be sure, and Congress in 1974  
10 didn't want to foul up that arrangement in the various states.  
11 It was very sensitive to those certificate of need arrangements  
12 that have been adopted in a number of states. What it wanted  
13 to do was to get all the other states to adopt certificate of  
14 need legislation and in fact that's what happened.

15 QUESTION: Well, is there any analogy with respect to  
16 a bar association being a private entity as against a govern-  
17 mental entity, and yet having in mind that the bar association  
18 would probably be about as qualified to determine need for a  
19 new law school as anyone could possibly be?

20 MR. GREENBERG: If what Congress did, as I said, we  
21 will establish you and we want you to go this route, bar asso-  
22 ciations, and we're going to supervise you -- which were the  
23 facts here -- by the Attorney General of the United States, then  
24 you would have an analogy to what we have here.

25 QUESTION: Mr. Greenberg, am I oversimplifying your

1 position? You're saying in effect, the statute says that an  
2 agency like MAHSA shall be created with federal funds money,  
3 and unless that agency approves the construction of new hospi-  
4 tals within the area subject to its jurisdiction, no new hospi-  
5 tal shall be constructed. That's basically what the statute  
6 was intended to say.

7 MR. GREENBERG: Yes.

8 QUESTION: It surely could have said it more simply.

9 MR. GREENBERG: Pardon me?

10 QUESTION: They surely could have said that more  
11 simply than they did.

12 QUESTION: Well, no, no. It directs the agency to  
13 get input from providers such as Blue Cross?

14 MR. GREENBERG: Oh, yes. That's another factor here.  
15 In other words, what Mr. Justice Stewart is emphasizing --

16 QUESTION: But once they say, in effect --

17 MR. GREENBERG: -- here, is all of the other  
18 baggage around it.

19 QUESTION: They are to be kind of a licensing authori-  
20 ty, really, for the area over which they have special planning  
21 interests and the like?

22 MR. GREENBERG: This was what Congress said. And  
23 what Congress --

24 QUESTION: It didn't say it in so many words, but  
25 you say that's a fair reading of the entire conglomerate of --



1 MR. GREENBERG: I think it does say it in those words,  
2 because it says, they shall have planning, they shall have docu-  
3 ments, and they shall seek to implement it.

4 QUESTION: And not only shall they seek to implement  
5 it, but no one shall build in contravention of any of their  
6 plans. That's what you're saying the statute means.

7 MR. GREENBERG: No, Congress does not say that, be-  
8 cause what --

9 QUESTION: Yes, it does, if you are right.

10 MR. GREENBERG: No, because what Congress wanted here  
11 was cooperation.

12 QUESTION: Well, I mean -- or there is open season  
13 on other hospitals can get together and take whatever anticom-  
14 petitive measures are necessary to prevent any building that  
15 is not approved in advance by the agency? But you're saying  
16 that's --

17 MR. GREENBERG: Well, what Congress is saying is, that in the  
18 particular circumstances of the hospital industry -- which is the  
19 wrong word; remember that back in 1974, virtually all hospitals  
20 were nonprofit hospitals, they were nonprofit hospitals with  
21 boards of governors composed of distinguished members of the  
22 community, and what was intended here, the whole theory was, we  
23 need cooperation from people like this. And the way to get  
24 cooperation from them was not, in Mr. Justice White's words, to  
25 say, you've got to do it, but to get them into the act.

1 Congress says in the findings, it's imperative that providers  
2 be involved in this. It's imperative that providers be on the  
3 boards. Whoever heard of a Congress interested in antitrust  
4 laws saying a bunch of competitors have to get together and  
5 make plans? This was a field of hospitals, which has nothing  
6 to do with any of the prior fact situations which have been  
7 before this Court. They don't resemble industry, they don't  
8 resemble regulated industries. It's just a different sort of thing.

9 QUESTION: Well, there would be no antitrust risk if  
10 they merely made plans. That's why you wouldn't need an  
11 exemption if you so read the statute?

12 MR. GREENBERG: Well, what was Blue Cross supposed to  
13 do in this situation? Here they had been part of the MAHSA as  
14 Congress said they should be, they helped to create the plan,  
15 the plan says the number one priority in the area is the elimi-  
16 nation of excess capacity, the number one priority. Blue Cross  
17 then delegates, according to the complaint, Blue Cross has  
18 delegated its certificate of need position to MAHSA. Blue  
19 Cross then said to MAHSA -- or says to the petitioner, the sole  
20 exclusive reason we're turning you down -- that's what the  
21 complaint says, the sole and exclusive reason we're turning you  
22 down is because MAHSA has not said you need it. What was  
23 Blue Cross supposed to do in that situation, then? Say, okay,  
24 petitioner, we'll go along with you?

25 Now, I should point out that --

1 QUESTION: Well, all I'd suggest is you're confusing  
2 two different problems. One is whether there's a violation of  
3 the antitrust laws, which we don't have to decide, and secondly  
4 whether, assuming there was a violation. I mean, it may well be  
5 that they could have done exactly what they did without violat-  
6 ing the antitrust laws.

7 MR. GREENBERG: That's correct. I'd rather not get  
8 into that but for present purposes, obviously, we're assuming  
9 a violation of the antitrust laws. Otherwise we don't have to  
10 reach this point.

11 In its reply brief petitioner states that all involved  
12 in 1979 would have been quite surprised to hear that Congress  
13 had already impliedly repealed the antitrust laws. Nevertheless,  
14 the Solicitor General in his amicus brief states unequivocally  
15 at page 16, note 11 -- I'd like to quote: "To be sure, there  
16 are some activities that must" -- must -- "by implication be  
17 immune from antitrust attack, if HSAs and state agencies are to  
18 exercise their authorized powers."

19 So the Solicitor General concedes that there would be  
20 repeal of antitrust by implication when private parties assist  
21 the HSAs in developing plans. But that's not all. The Solici-  
22 tor General goes on:

23 "There may be occasions in implementing" -- note, he  
24 uses the word "implementing" and not just "recommended" -- "in  
25 implementing health systems plans when an implied exemption

1 might be necessary in order to effectuate the statutory scheme  
2 as required by Congress."

3 In a word, what the Solicitor is conceding here is  
4 that there's room for a narrow, implied exemption from anti-  
5 trust. We say that the limited facts on the record before this  
6 Court, not a blanket exemption, not somebody who's interested  
7 in goals and goes along and does things on their own, but on the  
8 limited facts here, we have the agency making a determination  
9 to avoid excess capacity, which it calls the number one priority  
10 for implementation; where according to the complaint Blue Cross  
11 designated the health systems agency as the agency to conduct  
12 need review; and the hearing of the agency, the Solicitor  
13 General says at page 16, note 11, was public and open and  
14 carefully supervised. Not some private interloper; public and  
15 open and carefully supervised, and the Solicitor General is  
16 correct.

17 Now, it should also be emphasized that once the  
18 Solicitor General concedes that there is repeal of antitrust  
19 by implication in some cases, this demolishes the rationale of  
20 the expressio unius argument. Expressio unius means that if  
21 we said one thing, then everything else is out. Now, this --

22 QUESTION: If you accept that, you're in a little  
23 trouble too.

24 MR. GREENBERG: Pardon me?

25 QUESTION: If you accept that, you're in a little

1 trouble too, because you said there was no antitrust involved.

2 MR. GREENBERG: I said there was no antitrust involved  
3 on the specific facts of this case.

4 QUESTION: No, no. I mean, when you're talking about  
5 in 1974, when the statute was passed, they had no idea of  
6 antitrust.

7 MR. GREENBERG: That's correct.

8 QUESTION: But you now say that you agree with the  
9 Solicitor General, there were some, didn't you?

10 MR. GREENBERG: No, no, no. Excuse me?

11 QUESTION: Oh, I misunderstood you.

12 MR. GREENBERG: What the Solicitor General is saying,  
13 the Solicitor General is acknowledging that there was some im-  
14 plied repeal. What we're saying is, we obviously disagree with  
15 the Solicitor General as to where on the line that should be  
16 cut, but once the Solicitor General acknowledges that there's  
17 some implied repeal, it's the end of the expressio unius  
18 argument.

19 QUESTION: Well, is your suggestion that after Blue  
20 Cross had sat on the board of MAHSA and the MAHSA as a unit had  
21 said, the number one priority is oversupply of beds, it would  
22 have been in effect reneging on its role in MAHSA if it had gone  
23 ahead and paid the plaintiff in this case?

24 MR. GREENBERG: It would have been encouraging another  
25 120 unnecessary beds in the community, which would add to costs,

1 which would add to possible morbidity, mortality, and all of the  
2 other things that MAHSA and most particularly that the Congress  
3 of the United States found in the statute in 1974 and throughout  
4 the legislative history.

5 QUESTION: But it would have been no violation of  
6 federal law if it had done that?

7 MR. GREENBERG: That's correct. The petitioner has  
8 pointed out that at this time there is a certificate of need  
9 legislation in Missouri. Missouri for present purposes is the  
10 49th state to have certificate of need legislation. Only  
11 Louisiana has held out, having before it the carrots of sub-  
12 stantial federal funds. The four years are up. So what hap-  
13 pens now is, the certificate of need legislation takes over,  
14 and the other course, what the House report, House Report 1382  
15 said, in 1974, the apparently modest initial means of implement-  
16 ing now is no longer so important because now we have certifi-  
17 cate of needs in the 49 states and just can't get to build a  
18 hospital. Once --

19 QUESTION: Now what happens if there's a --

20 MR. GREENBERG: It varies. Each state is a little  
21 different and --

22 QUESTION: I see.

23 MR. GREENBERG: -- it's hard enough going through the  
24 '74 and '79 acts. Each state is a little different, but as a  
25 practical matter, what's happened today is that the building of

1 hospital beds is now a state deal, except in Louisiana; as it  
2 is in Missouri. Now, the petitioner says, well, Missouri has  
3 approved my hospital, they've approved my hospital. They've  
4 done no such thing. What they've done is they grandfathered it.  
5 They've grandfathered it in Missouri Statute 197.345, having in  
6 mind the problems of retroactivity. The petitioner goes outside  
7 the record in pointing out that whether or not there is a con-  
8 tract at the present time with Blue Cross or not is not in the  
9 record. What is also not in the record is whether or not  
10 petitioner has asked Blue Cross for a contract. It is very  
11 dangerous, as this Court well knows, to go outside records. I  
12 don't know the answer, and I don't know if petitioner does at  
13 this point. And in any event, it's not in this record, which  
14 cuts off in 1978, before the 1979 act and before the Missouri  
15 certificate of need legislation.

16 The petitioner's counsel talks about judicial review.  
17 And the Solicitor General has made an argument in its brief at  
18 various points, stating that the Health Planning Act specifi-  
19 cally provides for judicial review of state certificate of need  
20 determinations in state court, and that there is no similar  
21 statutory provision for judicial review of health systems  
22 agency determinations.

23 The premise of the Solicitor General is wrong. The  
24 citations at pages 9, 15, and 24 of the brief are all to the  
25 1979 act, not to the 1974 act, which is the only act involved

1 here. There was no provision in the 1974 act with respect to  
2 judicial review of state certificate of need provisions, so that  
3 particular foundation falls apart.

4 Also overlooked here is the fact that the health  
5 systems agencies are directly answerable to the Secretary of  
6 Health and Human Services, and their health systems plans are  
7 subject to review by the Secretary to assure that they conform  
8 to national guidelines on such things as hospital beds per  
9 capita and very relevant provisions. If the Secretary's review  
10 is unsatisfactory to any affected person, that person may then  
11 seek judicial review under the Administrative Procedure Act.  
12 Now, throughout here, the problem that petitioner has is it  
13 never asked anyone to do anything. It never went to MAHSA, it  
14 never said, do you know, we have not an acute care hospital, we  
15 just take care of the elderly? And maybe your determination  
16 with respect to acute care hospitals is wrong.

17 In its complaint it says it was very special. It was  
18 going to be a national hospital for the elderly. They also  
19 possibly could have gone to MAHSA and said, well, this little  
20 suburb of Lee's Summit, where we're going to build our hospital,  
21 they really need a hospital there, they really do. And there-  
22 fore you ought to give us, you ought to say, there's enough  
23 beds, but we need another 120-bed hospital up there in Lee's  
24 Summit. It didn't do any of those things. The fact that pe-  
25 titioner doesn't ask doesn't eliminate the capacity to ask,



1 it doesn't eliminate the fact that there was complete due pro-  
2 cess in terms of the promulgation of the plan and it doesn't  
3 eliminate the fact this is not like Silver, it bears no resem-  
4 blance to Silver. In this situation the petitioner could have  
5 gone to MAHSA, it could have asked -- it might have been turned  
6 down, but that doesn't eliminate the due process -- and then it,  
7 could have gone up through the Secretary and then into court.

8           Particularly here, petitioner has pointed out that  
9 there was only a conditional designation of the health systems  
10 agency, a conditional designation meant there was a 90-day contract.  
11 There were contracts between the Secretary, Mr. Law, between  
12 the Secretary of Health and Human Services and the MAHSA. And  
13 a contract meant money followed after you signed your contract.  
14 That contract was cancellable in 90 days. Petitioner could have  
15 gone to the Secretary and said, along the lines of, cancel that  
16 contract, give them 90 days notice, cancel them, because  
17 there's a desperate need for a hospital here. There isn't any  
18 need for the hospital; there's no such thing.

19           Now, the petitioner in his reply brief quotes very  
20 extensively at page 10 from Undersecretary Hale Champion. If  
21 one reads what is said there, it is quite clear that Mr. Champion  
22 in that slice of time said, there is indeed implied repeal from  
23 antitrust laws in some situations; this is what he says. The  
24 concern is misplaced. If the agency itself considers the ques-  
25 tions and makes the decisions based on an institutions's specific

1 kind of data, then we don't think, we don't think there are any  
2 antitrust questions involved. Then he goes on -- I'll come  
3 back to the next paragraph in a moment -- then he says, "I think  
4 in some cases there has been an effort to make people more wor-  
5 ried about that subject than they ought to be. That's our  
6 present view."

7 The place where Mr. Champion has a problem is that the  
8 agency delegates the responsibility. That turns the facts in  
9 our case topsy turvy. The agency didn't delegate the respon-  
10 sibility to Blue Cross. Blue Cross, according to the complaint  
11 here, delegated to the health systems agency. Now, we're told  
12 by petitioner, that the agency administering the planning act  
13 had a specific interpretation and had it obviously escaped their  
14 attention that there was any implied repeal?

15 With respect, petitioner has a very short memory.

16 In the brief of respondent, Blue Cross of Kansas  
17 City, in reply to the brief of amicus curiae, there's a letter  
18 from Secretary Harris to Attorney General Civiletti, and at  
19 page 5 Secretary Harris says, "Both the district court and the  
20 8th Circuit held that the Act provides an implied exemption from  
21 the antitrust laws for Blue Cross conduct and accordingly dis-  
22 missed the complaint. This is consistent with this Department's  
23 legal interpretation of the Act and our policy for implementa-  
24 tion of the Act."

25 Just as does the petitioner, we turn to the agency

1 administering the planning act for guidance as of that period of  
2 time.

3 To conclude, the plain repugnancy of the Health  
4 Planning Act of 1974 and the antitrust laws is illuminated by  
5 the very discrete facts of this case. We submit that in 1974 --  
6 in 1974, now -- Congress did not intend to visit possible anti-  
7 trust liability on Blue Cross for cooperating with the local  
8 health systems agency to implement that agency's plan, which  
9 found that excess hospital beds were leading to high financial  
10 cost for the community, not to speak of increased morbidity and  
11 mortality. No rational Congress would direct a health systems  
12 agency to seek to implement a plan with the assistance of pro-  
13 viders, providers like Blue Cross -- stated to be a provider in  
14 the statute -- and then to intend to leave those providers ex-  
15 posed to possible antitrust treble damages because it furnished  
16 the assistance to the health systems agency. Thank you.

17 MR. CHIEF JUSTICE BURGER: Mr. Griswold, I think you  
18 have three minutes remaining.

19 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

20 ON BEHALF OF THE PETITIONER -- REBUTTAL

21 MR. GRISWOLD: In the brief time remaining I would like  
22 to cover a couple of points.

23 Mr. Greenberg said that antitrust was simply ignored  
24 in 1974. This was before Rex Hospital and other cases and  
25 everybody assumed there wasn't any antitrust problem. That, of

1 course, is quite inconsistent with the statute which Congress  
2 passed, because it did include in Section 300L-1(4) 15 lines  
3 dealing with exemption from liability. "Except as provided in sub-  
4 paragraph (b)(1) a health systems agency shall not by reason of  
5 the performance of any duty, function, or activity, required of  
6 or authorized to be undertaken by the agency, be liable for  
7 the payment of damages under any law of the United States."

8 And it goes on that the exemption extends only to  
9 health systems agencies. The next paragraph applies to --  
10 "No individual member of the governing body of the health sys-  
11 tems agency or employee shall be liable under any law of the  
12 United States" but there is nothing there that is broad enough  
13 to cover Blue Cross.

14 QUESTION: There was no mention of the antitrust laws,  
15 but one --

16 MR. GRISWOLD: "Under any law of the United States,"  
17 and I think it is reasonable to assume that --

18 QUESTION: One can argue whether or not health --

19 MR. GRISWOLD: -- that was what was involved. It  
20 does not say specifically the antitrust law. Now, this is  
21 covered specifically at the bottom of page 25 of the Solicitor  
22 General's brief, and in our reply brief we have relied further  
23 on the 1979 act where that exemption was broadened, and there  
24 wouldn't have been any need to broaden it if Congress had as-  
25 sumed, well, we've already granted them implied exemption from

1 the antitrust acts.

2 Now, reference was made to the footnote in the Solicitor  
3 General's brief, which indicates that there might be some implied  
4 immunity from the antitrust laws. The plans include recommenda-  
5 tions about centralizing certain specialized services in par-  
6 ticular hospitals for the purpose of improving care. For exam-  
7 ple, there might be two hospitals two blocks apart duplicating  
8 services and they might agree that the obstetrical work would  
9 be done in one hospital and the cardiac work be done in another.  
10 I don't think that that is really a question of implied immunity.  
11 I think that is really a question of rule of reason. It is a  
12 question related to what this Court has before it now in the  
13 Maricopa County case coming from Arizona. It may well be that  
14 such agreements under these circumstances in the health care  
15 area do not violate the antitrust law, not because they're  
16 exempt but because the proper construction of the antitrust laws  
17 is that they were not intended to be covered.

18 In this case Congress made it plain both in the  
19 statute and in the committee reports that regulatory functions  
20 could be exercised only by state health planning and development  
21 agencies. MAHSA had so such powers. There's nothing under  
22 which Blue Cross Association can find umbrage. Their effort to  
23 do so not only finds no support in the statute but is a clear  
24 infringement on the sovereign choice made by the state of  
25 Missouri.

1 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
2 case is submitted.

3 (Whereupon, at 2:49 o'clock p.m., the case in the  
4 above-entitled matter was submitted.)

5 ERASE  
6 COTTON CONTENT

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CERTIFICATE

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2 North American Reporting hereby certifies that the  
3 attached pages represent an accurate transcript of electronic  
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6 No. 80-802

7 NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER

8 V.

9 BLUE CROSS OF KANSAS CITY AND BLUE CROSS ASSOCIATION  
10

11 and that these pages constitute the original transcript of the  
12 proceedings for the records of the Court.

13 BY: Gill G. G. G.  
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