No. 11-1160

In the
Supreme Court of the United States

FEDERAL TRADE COMMISSION,
PETITIONER,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* STATES OF ILLINOIS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, TENNESSEE, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

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George W. Liebmann, *The New American Local Government*, 34 Urban Lawyer 93 (2002). 11, 12

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INTEREST OF THE *AMICI CURIAE*

The state-action doctrine exists solely to protect state regulatory prerogatives, and the States therefore have a powerful interest in correcting its misapplication. The Eleventh Circuit's rule threatens to undermine at least two fundamental state goals—to delegate appropriate authority to local government entities, and to protect markets from anticompetitive conduct. By displacing federal antitrust law even where there is no indication that the state legislature sought to do so, the Eleventh Circuit's rule undermines the States' ability to effectively delegate state authority to local bodies, while simultaneously weakening antitrust protections. Such a misreading of this Court's precedent has the perverse effect of using the state-action doctrine, which was created to promote state regulatory aims, to jeopardize essential state interests. The decision below strikingly illustrates the problem: the Eleventh Circuit immunized a hospital monopoly that will raise prices for patients and payors without any clear indication that Georgia legislators approved this conduct.

The States are interested not only in overturning the Eleventh Circuit's misapplication of the state-action doctrine, but in clarifying the doctrine to avoid such errors in the future. The Eleventh Circuit purported to derive its rule from language originating in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), that immunizes anticompetitive conduct by state-created bodies whenever that conduct would have been "'foreseeable'" to state legislators. Pet. App. 9a. As courts and commentators have observed, however, this "foreseeability" standard has led to confusion in the

lower courts. This case provides an ideal vehicle for abandoning "foreseeability" as the test for state action.

STATEMENT

Under the state-action doctrine, the federal antitrust laws do not apply to the anticompetitive conduct of a state-created government entity if "the challenged restraint [is] one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotations and citation omitted); see also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (asking whether "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct").[1] Critically, this requires more than "mere *neutrality*" by the State toward the actions challenged as anticompetitive. *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (emphasis in original). Purporting to apply this test, the Eleventh Circuit held that the State of Georgia's grant of general corporate powers to a local hospital authority—without indicating whether those powers may be exercised anticompetitively—immunized a monopoly-creating merger from federal antitrust scrutiny.

Georgia law provides for the creation of hospital authorities and permits these authorities to "deploy any power a private corporation could in its stead," including the power to acquire and lease hospitals. Pet.

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[1] The state-action doctrine immunizes the anticompetitive conduct of *private* entities if the state policy is clearly articulated *and* the private conduct is "'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105.

App. 11a-12a. The Authority, which already owned Phoebe Putney Memorial Hospital ("Memorial"), used its delegated powers to acquire Memorial's sole competitor, Palmyra Park Hospital, Inc. ("Palmyra"), and lease Palmyra, along with Memorial, to Phoebe Putney Memorial Hospital, Inc., which would operate both facilities. Pet. App. 4a-5a. The Authority thus effectively merged Memorial and Palmyra to create a monopoly in hospital services within the Authority's region. Pet. App. 7a.

In the decision below, the Eleventh Circuit applied the state-action doctrine to reject the FTC's challenge to the merger, although the court did not doubt that the merger was anticompetitive. Pet. App. 11a. The court pointed to this Court's statement in *Hallie* that the requirement of a clearly articulated state policy is satisfied if the challenged anticompetitive conduct is a "'foreseeable result'" of the State's legislation. Pet. App. 9a (quoting *Hallie*, 471 U.S. at 42). The Eleventh Circuit also applied its own gloss on *Hallie*, reasoning that "a 'foreseeable anticompetitive effect' need not be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.'" *Ibid.* (quoting *FTC v. Hosp. Bd. of Dirs. of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994)). Instead, "[t]he clear-articulation standard 'require[s] only that the anticompetitive conduct be reasonably anticipated.'" *Ibid.* (quoting *Lee County*, 38 F.3d at 1190-1191).

Armed with this expansive interpretation of the state-action doctrine, the court below held that the clear-articulation requirement was satisfied because the Georgia legislature could have "anticipated" anticompetitive effects when it empowered local

authorities to acquire hospitals. Pet. App. 12a.[2] Because it was "foreseeabl[e]" that an authority's hospital acquisition could diminish competition, the merger of Memorial and Palymra qualified as state action immune from federal antitrust laws. *Ibid.*

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in protecting anticompetitive conduct under the state-action doctrine without evidence that Georgia's legislature intended that result. Such a misreading of the doctrine has significant, negative consequences. It converts an antitrust exemption designed to respect state sovereignty into a means of undercutting the States' longstanding efforts to combat anticompetitive conduct. And this, in turn, undermines the States' ability to effectively delegate authority to local bodies, even when doing so is otherwise in the State's best interest.

The court below reached this erroneous result only by disregarding this Court's requirement that a State "clearly articulate" its intent to displace competition. The Eleventh Circuit presumed from Georgia's general grant of the power to acquire and lease hospitals that the State intended to immunize a local hospital

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[2] The Eleventh Circuit reached this holding notwithstanding that the Georgia legislature had expressly immunized hospital mergers under limited circumstances inapplicable here, confirming the legislature's capacity to clearly articulate a state policy to displace competition when it sees fit to do so. See Pet. App. 13a (discussing Georgia statute authorizing mergers between two hospital authorities within a single, high-population county, and stating that such mergers are entitled to state-action immunity).

authority's monopolistic conduct. It is impossible to square this ruling with this Court's clear-articulation requirement, however, much less with its related pronouncement that a State's "mere *neutrality*" toward anticompetitive conduct is inadequate to trigger the state-action exemption. *Boulder*, 455 U.S. at 55 (emphasis in original).

The Eleventh Circuit's error arose from its reading of language in *Hallie* and a subsequent state-action decision, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). As courts and commentators alike have observed, the "foreseeable result" test articulated (but unnecessary to the judgment) in those cases has created uncertainty in the lower courts. The Court should use this case to jettison mere foreseeability as the test for state-action immunity. The state-action doctrine should exempt conduct only when a State clearly indicates its intent to displace competition with regulation—that is, when the State makes its intent express, or when anticompetitive conduct will "ordinarily" or "routinely occur[]," or is "inherently likely to occur[,] as a result of the empowering legislation."

ARGUMENT

The Court granted certiorari on two questions. The first asks whether Georgia's delegation of general corporate power to local hospital authorities also authorized respondents to engage in monopolistic conduct; the *amici* States urge the Court to answer this question in the negative, consistent with the States' interests in giving their political subdivisions freedom to operate *and* fostering competitive markets. Resolving the first question as *amici* request will dispose of this

case. Accordingly, *amici* do not address the second question, which asks whether, if Georgia law did authorize anticompetitive hospital mergers, the private respondents' conduct was nevertheless unprotected because Georgia did not actively supervise these respondents.

I. RATHER THAN HONORING STATE SOVEREIGNTY, THE ELEVENTH CIRCUIT'S RULE UNDERMINES CORE STATE INTERESTS.

The state-action doctrine, first recognized in *Parker v. Brown*, 317 U.S. 341 (1943), is "grounded in principles of federalism." *Ticor*, 504 U.S. at 633. Specifically, in *Parker*, this Court held that "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374. Thus, "the *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Boulder*, 455 U.S. at 53. The doctrine only serves this purpose as long as it excuses anticompetitive conduct that a State *wishes* to excuse, however. This presents a challenge in cases where, as here, a state legislature delegates authority without addressing the intended antitrust implications of that delegation.

By presuming an intent to excuse anticompetitive conduct even where such conduct is not the kind "that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation," Pet. App. 9a (internal quotations omitted),

the Eleventh Circuit chose the wrong solution to this problem. The lower court's rule assumes away any downside to the overbroad application of the state-action doctrine, as if state legislators wish to delegate authority to local bodies at any price. But that is not so. The States are also committed to protecting their markets from anticompetitive conduct, and it should take more than a bare grant of authority to conclude that a State has abandoned this commitment. The Eleventh Circuit's rule also threatens a second state interest, by making it more perilous for the States to delegate authority to local bodies, a practice with a long pedigree and many obvious benefits for the States and their residents. The rule forces the States to balance the risk of unwanted antitrust immunity against the advantages of delegation, a balancing that proper application of the state-action doctrine would avoid.

This Part explains why the Eleventh Circuit's rule misapplies the state-action doctrine in a manner that compromises two essential state interests. Part II then urges the Court to avoid these dangers by abandoning "foreseeability" as the touchstone of the doctrine and reaffirming that a state law's mere neutrality toward competitive market behavior is insufficient to immunize anticompetitive conduct from federal law. Contrary to the Eleventh Circuit's decision here, respecting the States' interest in preserving a competitive marketplace requires a state-action doctrine that protects such behavior only where the state legislature plainly seeks that protection, either by invoking it expressly or by delegating authority that ordinarily (and therefore predictably) leads to anticompetitive conduct.

A. The States Are Committed To Maintaining Competitive Markets.

The States have a powerful interest in preserving free and open markets to benefit consumers and foster robust economic growth. State laws across the country are a testament to that interest. Forty-eight States and the District of Columbia have enacted antitrust legislation to foster competition within their borders.[3]

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[3] See Ala. Code §§ 8-10-1 to -3 (West 2012); Alaska Stat. Ann. §§ 45.50.562-.598 (West 2012); Ariz. Rev. Stat. Ann. §§ 44-1401 to -1416 (West. 2012); Ark. Code Ann. §§ 4-75-201 to -217, -301 to -320 (West 2012); Cal. Bus. & Prof. Code §§ 16700-16770, 17000-17101, 17200-17209 (West 2012); Colo. Rev. Stat. Ann. §§ 6-4-101 to -122 (West 2012); Conn. Gen. Stat. Ann. §§ 35-24 to -46 (West 2012); Del. Code Ann. tit. 6, §§ 2101-2114 (West 2012); D.C. Code §§ 28-4501 to -4518 (West 2012); Fla. Stat. Ann. §§ 542.15-.36 (2012); Haw. Rev. Stat. §§ 480-1 to -24 (West 2012); Idaho Code Ann. §§ 48-101 to -118 (West 2012); 740 Ill. Comp. Stat. 10/1-12 (2012); Ind. Code Ann. §§ 24-1-1-1 to -1-4-5 (West 2012); Iowa Code Ann. §§ 553.1-.18 (West 2012); Kan. Stat. Ann. §§ 50-101 to -162 (West 2012); Ky. Rev. Stat. Ann. §§ 367.110-120, 367.175-176, 367.230-300 (West 2011); La. Rev. Stat. Ann. §§ 51:121-152 (West 2011); Me. Rev. Stat. Ann. tit. 10, §§ 1101-1108 (West 2011); Md. Code Ann., Com. Law §§ 11-201 to -213 (West 2012); Mass. Gen. Laws Ann. ch. 93, §§ 1-14A (West 2012); Mich. Comp. Laws Ann. §§ 445.771-.788 (Mich. 2012); Minn. Stat. Ann. §§ 325D.49-.66 (West 2012); Miss. Code Ann. §§ 75-21-1 to -39 (West 2011); Mo. Ann. Stat. §§ 416.011-.161 (West 2012); Mont. Code Ann. §§ 30-14-201 to -226 (West 2011); Neb. Rev. Stat. Ann. §§ 59-801 to -831 (West 2011); Nev. Rev. Stat. Ann. §§ 598A.010-.280 (West 2011); N.H. Rev. Stat. Ann. §§ 356:1-14 (2012); N.J. Stat. Ann. §§ 56:9-1 to -19 (West 2012); N.M. Stat. Ann. §§ 57-1-1 to -19 (West 2012); N.Y. Gen. Bus. Law §§ 340-347 (McKinney 2012); N.C. Gen. Stat. Ann. §§ 75-1 to -16.2 (West 2012); N.D. Cent. Code Ann. §§ 51-08.1-01 to -12

Georgia, one of the two remaining States, restricts anticompetitive conduct and prohibits monopolies, specifically, in its state constitution,[4] as do at least six other States.[5] And Pennsylvania, the final State, prohibits anticompetitive conduct under its common law. See *Collins v. Maine Line Bd. of Realtors*, 304 A.2d 493, 496 (Pa. 1973); *Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 14 A.2d 438, 441 (Pa. 1940). These laws and constitutional provisions reflect legislative and popular determinations "that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); see also *ibid.*

(West 2011); Ohio Rev. Code Ann. §§ 1331.01-.99 (West 2011); Okla. Stat. Ann. tit. 79, §§ 201-212 (West 2012); Or. Rev. Stat. Ann. §§ 646.705-.836 (West 2012); R.I. Gen. Laws Ann. §§ 6-36-1 to -26 (West 2012); S.C. Code Ann. §§ 39-3-10 to -360 (West 2011); S.D. Codified Laws §§ 37-1-3.1 to -33 (2012); Tenn. Code Ann. §§ 47-25-101 to -206 (2011); Tex. Bus. & Com. Code Ann. §§ 15.01-.40 (West 2011); Utah Code Ann. §§ 76-10-911 to -926 (West 2012); Vt. Stat. Ann. tit. 9, §§ 2453, 2458-61, 2461c, 2465 (West 2012); Va. Code Ann. §§ 59.1-9.1 to -9.18 (West 2012); Wash. Rev. Code Ann. §§ 19.86.010-.920 (West 2012); W. Va. Code Ann. §§ 47-11A-14, 47-18-1 to -23 (West 2012); Wis. Stat. Ann. §§ 133.01-.18 (West 2011); Wyo. Stat. Ann. §§ 40-4-101 to -114 (West 2012).

[4] The Georgia Constitution provides: "The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared unlawful and void." Ga. Const. Art. 3, § 6 ¶ 5(c)(1).

[5] See Ariz. Const. art. 14 § 15; Miss. Const. art. VII, § 198; N.C. Const. art. 1, § 34; Okla. Const. art. 11, § 32; Tenn. Const. art. 1, § 22; Wyo. Const. art. 1 §§ 8, 30.

("The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

Moreover, state antitrust laws often are patterned on, and construed in line with, federal antitrust statutes, which were designed to "preserv[e] free and unfettered competition as the rule of trade." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). To that end, the Sherman Act, the Clayton Act, and other federal antitrust laws prohibit agreements, combinations, and conspiracies in restraint of trade, including monopolization and attempts to monopolize, as well as anticompetitive mergers. Moreover, the States may sue to enjoin conduct that violates federal antitrust laws, see *Georgia v. Pennsylvania*, 324 U.S. 439, 447 (1945), including mergers that, like the one here, allegedly violate Section 7 of the Clayton Act, see *California v. Am. Stores Co.*, 495 U.S. 271, 297 (1990) (Kennedy*, J.*, concurring). The States and the federal government thus share "fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws." *Ticor*, 504 U.S. at 636.

B. The States Have Long Recognized The Value Of Delegating Authority To Local Bodies.

At the same time, the States seek to preserve their ability to enter into effective power-sharing arrangements with units of local government. States traditionally have had "wide discretion * * * in forming and allocating governmental tasks to local

subdivisions," *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 269 (1977), and such delegations of power serve essential state interests. "[L]ocal self-government * * * allows a state legislature to devote more time to statewide problems without being burdened with purely local matters." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 434-435 (1978) (Stewart, *J.*, dissenting).[6] Local self-government also "allows municipalities to deal quickly and flexibly with local problems" and "experiment[] with innovative social and economic programs." *Id.* at 435, 439 & n.27 (Stewart, *J.*, dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, *J.*, dissenting)). As a result, the States "leave much policy and decisionmaking to their governmental subdivisions," declining "to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level." *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968).

Special districts—political subdivisions established to provide particular services, like the hospital authority here—play a uniquely important role. As one commentator observed, these districts may enjoy substantial advantages over even general-purpose local governments. See George W. Liebmann, *The New American Local Government*, 34 Urban Lawyer 93, 111 (2002). In particular, special districts are geographically flexible and effective at addressing problems that cross

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[6] This aspect of Justice Stewart's dissent from the plurality opinion in *Lafayette*, itself a state-action immunity case, was discussed favorably by a unanimous Court in *Hallie*. See 471 U.S. at 44.

city lines. See *id.* at 211-212; see also Gerald E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763, 1781-1782 (2002). They typically provide a specific service and thus benefit from greater expertise and efficiency than general-purpose governments. See Liebmann, *supra*, at 111; Frug, *supra*, at 1782. And, because they are insulated from political pressures, special districts can make decisions faster. See Liebmann, *supra*, at 111; Frug, *supra*, at 1782.

In light of the many advantages of local governance in general—and special districts in particular—it is not surprising that the States have created "a staggering number" of local government entities—"and an even more staggering diversity." *Avery*, 390 U.S. at 483. The Bureau of the Census calculated that in 2007 (the most recent year for which data are available), there were 89,476 units of local government in the United States, 37,381 of which were special districts. See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 429 (131st Ed.) Washington, D.C., 2011. Like the preservation of competitive markets, the States and their residents benefit from the delegation of authority to these local bodies, so long as that delegation is not accompanied by an unintended *carte blanche* to act anticompetitively.

C. The Eleventh Circuit's Rule Jeopardizes The Foregoing State Interests.

As applied by the Eleventh Circuit in this case, the state-action doctrine undercuts state antitrust efforts and, consequently, makes it perilous for States to delegate authority to local bodies—even when such delegation would otherwise be in the States' best interest. "Neither federalism nor political responsibility

is well served by a rule," like the Eleventh Circuit's, "that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ticor*, 504 U.S. at 636.

When state legislatures delegate power, they routinely do so by conferring broad corporate powers on local authorities, see *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011) ("Municipal charters typically endow the municipality with the authority to make contracts, to buy and sell property, to enter into joint ventures."), for such broad delegations allow the States to maximize the benefits of local governance. And there are myriad ways to exercise such general corporate authority without acting anticompetitively. See *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 235 (5th Cir. 1999) (power to form joint ventures is not power to engage in anticompetitive conduct, because "[n]ot all joint ventures are anticompetitive"). Thus, as the authors of the leading antitrust treatise have observed, "[w]hen a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006).

The Eleventh Circuit reached the opposite conclusion. From Georgia's bare grant of authority to acquire and lease hospitals, which could be exercised *without* undermining competition, the Eleventh Circuit concluded that Georgia legislators harbored an unspoken intent to immunize anticompetitive conduct. But it is unlikely that Georgia, whose constitution *favors* competition, see *supra*, at p. 9 & n.4, and whose legislature knows how to invoke state-action immunity

clearly when it wants to, see *supra*, at n.2, contemplated any such thing. The rule announced below—that a naked grant of corporate powers embodies the implied authorization to use those powers anticompetitively—thus undermines Georgia's ability to preserve competitive markets.

Nor is the Eleventh Circuit's rule limited to the delegated authority to acquire and lease property. If the power to perform these tasks (which are usually exercised competitively) implies the power to enter into otherwise monopolistic mergers, then the power to make contracts must imply the power to enter into anticompetitive exclusive contracts, even though most such arrangements are not anticompetitive. See Areeda & Hovenkamp, *supra*, at 151-152 & n.76 (criticizing lower courts' holdings to that effect). Likewise, the authority to acquire intellectual property rights must imply the authority to commit patent misuse and other antitrust violations, even though most patent holders comply with antitrust laws. See *id.* at 153-154 & n.85 (same).

In short, the Eleventh Circuit's rule threatens to "'wholly eviscerate the concepts of clear articulation and affirmative expression that [this Court's] precedents require.'" *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 457 (6th Cir. 2007) (quoting *Boulder*, 455 U.S. at 56). For it presumes that although a function may be performed either competitively *or* anticompetitively—and even though it is "ordinarily" done competitively—a general authorization to perform that task presumes the power to do so in violation of the antitrust laws. The decision below thus creates a needless hurdle for States wishing to grant broad corporate authority to local bodies, for the States are

able to reap the many benefits of delegation only at the risk of inadvertently authorizing anticompetitive conduct.

Worse, defining "foreseeable" outcomes as broadly as the court below has, to include even atypical results, makes it difficult for constituents to know that a particular piece of legislation immunizes future anticompetitive conduct. The state-action doctrine, properly applied, "serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. But the Eleventh Circuit's overbroad approach deprives voters of their chance to oppose immunity-creating legislation before it is passed and makes it harder to hold legislators accountable after the fact, for they can credibly say that they failed to foresee any anticompetitive consequences. As this case illustrates, there are many out-of-the-ordinary, anticompetitive effects that are "foreseeable" within the Eleventh Circuit's meaning that legislators and voters are unlikely to predict.

For the same reason, it is no answer to force state legislatures to anticipate every possible, anticompetitive consequence of local delegation and expressly *disclaim* antitrust immunity ahead of time for those situations. Legislatures cannot be expected to predict atypical anticompetitive conduct. See *Hallie*, 471 U.S. at 43 ("No legislature can be expected to catalog all of the anticipated effects of a statute of this kind."). And even if they could, it is unrealistic to presume that they then can legislate against all such possibilities. See Areeda & Hovenkamp, *supra*, at 133 (describing "the ambiguity-creating compromises that often characterize the legislative process"). Yet the Eleventh Circuit's rule—finding state action in every statute with, at least

in hindsight, a "foreseeable anticompetitive effect," even if not "ordinar[y]," "routine[]," or "inherently likely to occur," Pet. App. 9a (internal quotations omitted)—requires States "to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant." *Hammond*, 171 F.3d at 236. This State-disserving rule "stand[s] federalism on its head." *Ibid.*

Instead, as this Court made plain in *Boulder*, courts must require something more than "mere *neutrality*" toward anticompetitive conduct before reading state legislation to protect it. 455 U.S. at 55 (emphasis in original). To be sure, a State need not "expressly state in a statute or its legislative history that [it] intends for the delegated action to have anticompetitive effects." *Hallie*, 471 U.S. at 43. Any such requirement of "magic words" would intrude improperly on the state legislative process. See *id.* at 44 n.7. But the Eleventh Circuit here read Georgia's neutral delegation of power to authorize a local monopoly in healthcare, an outcome that undermines state interests and scuttles this Court's reasoning in *Boulder* for an unbounded "foreseeability" standard.

* * *

"The fact of the matter is that the States regulate their economies in many ways not inconsistent with the antitrust laws." *Ticor*, 504 U.S. at 635-636. But when a federal court uses one of these ways—a bare grant of corporate powers—"to compel a result that the States do not intend," that court disserves rather than serves the federalism principle underlying the state-action doctrine. *Id.* at 636. By disregarding "fundamental and

accepted assumptions about the benefits of competition within the framework of the antitrust laws," the Eleventh Circuit's rule impedes rather than advances the States' "freedom of action," because it forces the States to "act in the shadow of state-action immunity whenever they enter the realm of economic regulation." *Id.* at 635-636. The decision below should be reversed "to prevent *Parker* from undermining the very interests of federalism it is designed to protect." *Omni*, 499 U.S. at 372.

II. THE "FORESEEABLE RESULT" TEST IS SUSCEPTIBLE TO MISINTERPRETATION AND SHOULD BE ABANDONED.

As noted above, the Eleventh Circuit derived its overbroad approach to state-action immunity from *Hallie*'s "'foreseeable result'" test, see Pet. App. 9a, notwithstanding the limiting language in *Midcal* and *Boulder*. But the "foreseeable result" test was not necessary to the holding of *Hallie* or any decision of this Court and, as the decision below strikingly illustrates, has created confusion among lower courts. The test should be jettisoned and the Court's original articulation of state-action immunity reaffirmed.

Midcal requires that "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105 (internal quotations omitted). In *Hallie*, the Court elaborated on this requirement, stating that *Midcal* is satisfied if anticompetitive consequences are a "foreseeable result" of the legislation in question. 471 U.S. at 42. The Court repeated this language in *Omni*. See 499 U.S. at 373 ("It is enough, we have held, if suppression of competition is the 'foreseeable result' of what the

statute authorizes.") (quoting *Hallie*, 471 U.S. at 42). In neither *Omni* nor *Hallie*, however, did the Court reject the *Midcal* standard or the Court's later statement that *Midcal* "is not satisfied when the State's position is one of mere *neutrality* respecting the * * * actions challenged as anticompetitive." *Boulder*, 455 U.S. at 55 (emphasis in original).

The "foreseeable result" language in *Hallie* and *Omni* has created problems for lower courts, however, as the decision below illustrates. Notwithstanding *Midcal* and *Boulder*, the Eleventh Circuit read the phrase "foreseeable result" in its broadest possible sense, to include even a result that does not "ordinarily" or "routinely occur[]," or is not "inherently likely to occur[,] as a result of the empowering legislation." Pet. App. 9a (internal quotations omitted). Under the Eleventh Circuit's overbroad approach to state-action immunity, it suffices if "the anticompetitive conduct [may] be reasonably anticipated." *Ibid.* (internal quotations omitted).

Others have observed the problems arising from *Omni* and *Hallie*'s use of the phrase, "foreseeable result." Referring to *Midcal* and *Hallie*, another circuit court found it difficult "to reconcile * * * the Court's competing statements in this area." *Kay Elec.*, 647 F.3d at 1043; see also *ibid.* ("what does and doesn't qualify as foreseeable is hardly self-evident or self-defining") (internal quotations omitted). And Professor Hovenkamp concluded that the "*Hallie* requirement has proven to be far too lenient, leading courts to find authorization of anticompetitive practices from highly general grants of corporate powers." Areeda & Hovenkamp, *supra*, at 133.

Given the pitfalls of the foreseeable result test, "the *Midcal* articulation seems to do a much better job of identifying the relevant principle of federalism that undergirds the *Parker* doctrine—namely, that while the policy favoring competition is national the states are permitted to establish an alternative regime, but they must declare their intentions clearly." *Ibid.* As explained, a State need not "expressly state in a statute or its legislative history that [it] intends for the delegated action to have anticompetitive effects." *Hallie*, 471 U.S. at 43. But absent a clear statement of the State's intent to displace competition, the anticompetitive effect must be "one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." Pet. App. 9a (internal quotations omitted). Although directly contrary to the Eleventh Circuit's rule, this is consistent with *Boulder*'s holding that there must be more than"mere *neutrality*" by the State toward the actions challenged as anticompetitive. 455 U.S. at 55 (emphasis in original). For only then is it fair to assume from silence that state legislators intended to displace antitrust law in favor of another objective, and only then can constituents hold legislators accountable for this displacement.

Articulating the standard in this way would not require the Court to overrule *Hallie* or *Omni*. In *Hallie*, the Court considered a state statute authorizing cities to build, add to, alter, and repair sewage systems, and to set the boundaries of the service area. See 471 U.S. at 41. After a city refused to provide sewage service to neighboring towns unless they agreed to be annexed, the towns sued, claiming that the city had an unlawful monopoly over sewage treatment services

and—objecting to the city's immunity defense[7]—that the state legislature had not "stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." 471 U.S. at 36-37, 41-42. Rejecting this argument, the Court held that the city's actions were immunized because they were a "foreseeable result" of the state legislature's statutory authorization to refuse to provide sewage services to unannexed areas. *Id.* at 42.

Thus, the thrust of *Hallie* was to caution against parsing state statutes in an attempt to find an express authorization for a particular activity, because "[n]o legislature can be expected to catalog all of the anticipated effects of a statute." 471 U.S. at 43. In this way, the "foreseeable result" language was less a precise articulation of the state-action immunity test than a response to the towns' overbroad argument. Moreover, the *Hallie* Court discussed *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), with favor. See *Hallie*, 471 U.S. at 42. And *Fox* is on all fours with *amici*'s view that the first *Midcal* prong should require more than foreseeable anticompetitive effects. In *Fox*, the Court immunized enforcement of a state statute allowing existing auto dealers to obstruct new dealerships within their market areas; although the

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[7] As commentators have observed, *Hallie* might more easily have been resolved in the city's favor by finding that the antitrust laws were not violated. See Areeda & Hovenkamp, *supra*, at 139-140. By requiring annexation, the city did "nothing more" than insist "that it would supply sewage treatment to its own inhabitants but not to others." *Ibid.* Because "[e]ven a monopolist has no duty to provide * * * services to rivals or other firms," the towns' antitrust claims likely would have failed on the merits. *Id.* at 140.

statute did not expressly declare the State's intent to displace the antitrust laws, it "provided [a] regulatory structure that inherently 'displace[d] unfettered business freedom.'" *Hallie*, 471 U.S. at 42 (quoting *Fox*, 439 U.S. at 109).

Anticompetitive effects similarly "inhere[ed]" in the authority to operate the sewage treatment facility in *Hallie*. Such a facility has natural monopoly characteristics. See Areeda & Hovenkamp*, supra*, at 154. Within its service area, the introduction of rivals requires a wasteful duplication of effort. Accordingly, "one can easily infer from the power to operate the [waste treatment facility] the collateral power to exclude other firms wishing to perform the same function." *Ibid.*; see also *Lancaster Comm'y Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-402 & n.8 (9th Cir. 1991) ("electric utilities, water works, and cable television * * * are paradigmatic examples of natural monopolies," justifying immunity). Accordingly, a decision abandoning the "foreseeable result" test in favor of a more restrictive approach to state-action immunity would not change the outcome of *Hallie*.

The same is true of *Omni*, the only other case in which this Court used the "foreseeable result" test. There, a billboard company sued a city for passing a zoning ordinance effectively preventing the company from entering the billboard market and thus advantaging the incumbent billboard company. See 499 U.S. at 367-369. This Court held that the city's actions were immunized, reasoning that the city acted within its state-given authority to pass a zoning ordinance, and that the suppression of competition was at the very least a "foreseeable result" of passing such an ordinance. *Id.* at 373 (holding that "'foreseeable result'" test "is amply

met here”). Indeed, suppression of competition was inevitable. As the Court explained, “[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants.” *Ibid.*

In short, this Court has relied on the “foreseeable result” test only twice to confer state-action immunity, and the test was not critical to the holding in either case. Because it has created confusion in the lower courts, to the detriment of state interests in preserving market competition, the “foreseeable result” test should be abandoned. In its place, the Court should reconfirm that when a state statute is neutral regarding whether delegated powers may be exercised competitively or noncompetitively, the first *Midcal* prong is not satisfied. This Court should reserve antitrust immunity for cases in which the State either affirmatively expresses its intent to displace competition or in which, as a result of the empowering legislation, the anticompetitive effect ordinarily occurs, routinely occurs, or is inherently likely to occur.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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