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 THE AMERICAN HOSPITAL ASSOCIATION AND GEORGIA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Hospital Association and the Georgia Hospital Association respectfully submit this brief as *amici curiae*.

The American Hospital Association (AHA) represents nearly 5,000 hospitals, health care systems, and networks, plus 37,000 individual members. AHA members are committed to improving the health of the communities they serve and to helping ensure that care is available to, and affordable for, all Americans. The AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health care policy.

AHA has a specific interest in this case, because many of its member hospitals are publicly owned and operated by state and local governments. It seeks to ensure that the state-action doctrine is applied in a manner that does not impede the valuable work of America's public hospitals. More generally, the AHA has a longstanding interest in how the antitrust laws are applied to hospital mergers, which often foster, rather than diminish, competition, and in many cases are necessary for hospitals to deliver care effectively. *See, e.g.*, AHA Office of General Counsel, *Hospital Collaboration: The Need For An Appropriate Antitrust Policy*, 29 Wake Forest L. Rev. 107 (1994). Indeed, the need for hospital mergers is all the more

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[1] The parties have consented to the filing of this brief. The FTC's blanket letter of consent is on file with the Clerk. Respondents have also provided written consent. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

acute in today's rapidly changing health care environment. *See* Moody's Investors Serv., *U.S. Not-for-Profit Healthcare Outlook Remains Negative for 2012*, at 12-13 (Jan. 25, 2012), *obtained from* http://www.carelogistics.com/media/52520/120125_moody_s_2012_nfp_healthcare_outlook.pdf (last visited Oct. 5, 2012).

The Georgia Hospital Association (GHA) is a nonprofit trade association that represents over 170 member hospital and health systems throughout Georgia and the individuals in administrative and decisionmaking positions within those institutions. Established in 1929, GHA's mission is to promote the health and welfare of the public through the development of better hospital care throughout the state. GHA members are committed to providing high-quality affordable health care services to the communities they serve, and GHA is committed to supporting their efforts through advocacy, education, and policy development initiatives.

GHA has a strong interest in this case because almost half of its members are public hospitals owned by local governmental authorities. Applying the state-action doctrine in a manner that protects the continued efforts of these hospitals to meet the health care needs of their communities is of utmost concern to GHA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The federal antitrust laws are written in highly general terms without any indication whether Congress intended for their prohibitions to apply to actions taken by state and local governments. When deciding long ago that those antitrust laws do not

reach the states, the Court resorted to basic principles of our constitutional system—namely, that the Constitution seeks to balance sovereign powers between the federal government and the states. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943). Specifically, *Parker* held that the general language of the antitrust laws need not (and should not) be interpreted "to restrain a state or its officers or agents from activities directed by its legislature," because, "[i]n a dual system of government in which . . . the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*

That was an unsurprising result. The Constitution's framework of dual sovereignty has long affected this Court's interpretation of federal law. Under what has now come to be known as a "plain statement rule" of statutory interpretation, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the Court interprets federal laws against the background presumption that, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute,'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal citation omitted). This canon of construction, deeply rooted in federalism, has impacted the Court's interpretation of many federal laws, ranging from the Bankruptcy Code to the Age Discrimination in Employment Act. While the decision in *Parker* preceded this Court's formal acknowledgment of the plain-statement rule as such, its adoption of the state-action doctrine arises from, and is justified by, the same bedrock constitutional principles.

This "plain statement" origin of the state-action doctrine sheds substantial light on how the Court should resolve this case about local governments. For that doctrine to reach those governments, the Court has held, their anticompetitive conduct must originate with a "'clear articulation of a state policy.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). Interpreting this Court's cases, the Eleventh Circuit found this clear-articulation requirement to be met when a local government's anticompetitive conduct was a "'*reasonably* anticipated'" result of state law. Pet. App. 9a (emphasis added) (quoting *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1190 (11th Cir. 1994)).

The Eleventh Circuit's decision below is dictated by the Court's cases, as it best adheres to the plain-statement rule under which the state-action doctrine arises. The Court has not limited that rule simply to acts undertaken by states. Instead, "'[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)). As such, the Court has interpreted federal laws as applied to local governments against the same presumption, refusing to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). In other words, "[a]bsent . . . a 'clear and manifest purpose' to the contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on

the division of authority between the State's central and local units . . . ." *City of Columbus*, 536 U.S. at 439-40.

Applying this presumption here, there is no "'clear and manifest purpose'" in the antitrust laws to require federal authorities to scrutinize state laws to determine the precise scope of the powers delegated to local governments. *Id.* Rather, as in other areas, the plain-statement rule dictates that the antitrust laws be interpreted not to intrude on state action implemented by local governments, so long as a "'reasonable construction'" exists under which local governments have, in fact, been delegated that power. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal citation omitted). As the Eleventh Circuit put it, only where anticompetitive conduct is not "within the range of reasonable possibilities" from state law, *Lee Cnty.*, 38 F.3d at 1190, can it be said that a local government's conduct is wholly without authorization and outside the realm of the state-action doctrine.

Indeed, this application of the plain-statement rule is precisely what the Court has already said in this area. When determining whether a local government's conduct is clearly articulated in state law, the Court has adopted a broad foreseeability test that asks only whether the local government's anticompetitive conduct would have been a reasonably foreseeable result from state legislation. *See Omni*, 499 U.S. at 372-73. The Court has done so precisely to avoid "embroil[ing] the federal courts in the unnecessary interpretation of state statutes," and "undercut[ting] the fundamental policy of . . . the state action doctrine of immunizing state action from federal antitrust scrutiny." *Hallie*, 471 U.S. at 44 n.7.

The FTC's "demanding" test for local-government action to fall within the state-action doctrine, by contrast, unmoors that doctrine from its roots in the federalism principles that led to the plain-statement rule. The FTC simply rejects the presumption that "Congress does not readily interfere" with traditional state powers (such as the power to delegate authority to local governments), *Gregory*, 501 U.S. at 461, and instead presumes the opposite—that Congress meant for those laws to govern political subdivisions of the states absent compelling evidence to the contrary. In doing so, the FTC compels federal courts to sit as arbiters of state administrative law, closely examining the state statutes that delegate powers to political subdivisions to determine their precise effect as a state-law matter. But the FTC errs in "'lightly assum[ing] that [the state-action doctrine's] authorization requirement dictates transformation of state administrative review into a federal antitrust job.'" *Omni*, 499 U.S. at 372 (internal citation omitted). Because the Eleventh Circuit's decision below is faithful to the plain-statement rule and the federalism principles that gave rise to it (whereas the FTC's proposed approach is not), the Court should reject the FTC's interpretation in this case.

ARGUMENT

At issue in this case is the meaning of this Court's requirement that, to qualify for the state-action doctrine, a local government's anticompetitive conduct must come from a "'clear articulation of a state policy.'" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985)). The Eleventh Circuit interpreted this requirement to be met

when the local government's anticompetitive conduct was a "'*reasonably* anticipated'" result of state legislation. Pet. App. 9a (emphasis added) (quoting *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1190 (11th Cir. 1994)). Respondents have shown why the Eleventh Circuit's decision below necessarily follows from the Court's existing precedents in this area. *See* Br. of Resp'ts 15-47.

This brief, by contrast, focuses on broader principles, explaining why the decision below follows from the Court's general approach to interpreting federal statutes. In particular, the state-action doctrine is simply one application of the Court's general "plain-statement rule," which requires Congress to speak unambiguously in federal legislation before intruding on traditional state powers. *See infra* Part I. Additionally, the Court's cases extending the state-action doctrine to local governments are equally faithful to this plain-statement rule, which also requires Congress to speak unambiguously if it seeks to intrude on, or require federal entities to oversee, the relationship between the states and their local governments. *See infra* Part II. The Eleventh Circuit's decision below properly interprets the federal antitrust laws here, because (unlike the FTC's approach) it is faithful to the background principles that have guided the development of the general plain-statement rule and its specific application in the state-action doctrine. *See infra* Part III.

I. THE STATE-ACTION DOCTRINE ARISES FROM THE PRESUMPTION—ROOTED IN OUR FEDERALIST SYSTEM—THAT CONGRESS DOES NOT INTEND FOR FEDERAL LAW TO INTRUDE ON STATE POWER

The Court did not simply create the state-action doctrine from whole cloth. Rather, it follows from the Court's longstanding presumption—now incorporated into a "plain-statement rule"—that Congress must draft specific and unambiguous federal laws if it intends to intrude on traditional state prerogatives.

A. The Plain-Statement Rule Is A Bedrock Principle Of Federalism That The Court Has Applied To Many Federal Laws

"It is incontestible that the Constitution established a system of 'dual sovereignty'" between the federal government and the states. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). On the one hand, the federal government has only limited powers, but, under the Supremacy Clause, it "may impose its will on the States" so long as it acts within those powers. *Gregory*, 501 U.S. at 460. On the other, states retain broad police powers to take all actions they deem necessary to protect their citizens, but this expansive state power must give way if it conflicts with valid laws passed by the federal government. *Id.* at 458. "By splitting the atom of sovereignty" (and the powers that come with it) in this manner, *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotation marks and alterations omitted), the Constitution provides greater protection for individual liberty than would be possible if a single sovereign had undivided

power. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

This system of dual sovereignty and its purpose to protect individual liberty have long impacted this Court's interpretation of federal law. If the system's "'double security' is to be effective," the Court has noted, "there must be a proper balance between the States and the Federal Government." *Gregory*, 501 U.S. at 459. Yet the Supremacy Clause gives the federal government a "decided advantage" to tip this balance in its favor. *Id.* at 460. To protect the balance from unintentional federal encroachment, therefore, the Court interprets federal law against the presumption that Congress "is not lightly to be attributed" with an "unexpressed purpose" to intrude on traditional state powers. *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Gregory*, 501 U.S. at 460. Rather, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal citation omitted); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("'When the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit.'" (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947))).

This federalism-based presumption of statutory interpretation has now come to be known as a "plain-statement rule" that requires Congress to speak un-

ambiguously if it seeks to intrude on traditional state prerogatives. *Gregory*, 501 U.S. at 461. It ensures that "Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). The breadth and importance of the plain-statement rule are demonstrated by the Court's consistent use of it in a variety of different contexts:

Scope of Employment Laws. The Court has relied on the plain-statement rule when interpreting federal employment laws not to apply to high-ranking state officers. *See Gregory*, 501 U.S. at 467. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution." *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900). Thus, in *Gregory*, the Court refused to "read the [Age Discrimination in Employment Act] to cover state judges," as Congress did not "ma[k]e it clear that judges are *included*" in the Act. 501 U.S. at 467.

Preemption of State Action. Similarly, the Court routinely refuses to interpret federal law to preempt state law if it touches on traditional state powers. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "[B]ecause the States are independent sovereigns in our federal system, [the Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. Instead, the Court "start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

This presumption against preemption has even been used to "temper" the usual rule giving controlling weight to the ordinary meaning of the words Congress has chosen. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). In *Travelers*, for example, the Court refused to interpret the word "related" in its normally broad manner, as that result would "read the presumption against preemption out of the law whenever Congress speaks to the matter with generality." 514 U.S. at 655.

Waivers of Sovereign Immunity. The Court likewise applies the plain-statement rule when determining whether states maintain their sovereign immunity from lawsuits. For one thing, while Congress may waive that immunity when acting under certain provisions of the Constitution, the Court has "required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)). This "requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011).

For another thing, while a state may enact state laws that voluntarily relinquish its immunity, the "test for determining whether a State has waived its

immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Only "a 'clear declaration' that [the state] intends to submit itself to [federal] jurisdiction" will suffice. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *see Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (noting that a waiver will be found "only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction'" (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). "So, for example, a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court." *Sossamon*, 131 S. Ct. at 1658.

Conditions on Federal Funds. The plain-statement rule has also come into play for conditions on federal funds granted to the states under the Spending Clause. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 n.26 (1982); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court has adopted the "federalism-based limit" that such conditions must "'unambiguously' inform States what is demanded of them." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2634 (2012) (opinion of Roberts, C.J.) (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)). "By insisting that Congress speak with a clear voice, [the Court] enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17. Thus, in *Arlington*, the Court refused to include expert fees within a fee-shifting provision

for suits against the states under the Individuals with Disabilities Education Act ("IDEA"), because the statute "fail[ed] to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." 548 U.S. at 300.

Interpretation of Bankruptcy Code. The Court has also made clear that "our federalism . . . must influence [its] interpretation of the Bankruptcy Code." *Kelly v. Robinson*, 479 U.S. 36, 49 & n.11 (1986). The "Code will be construed to adopt, rather than to displace, pre-existing state law" unless Congress unmistakably requires a different result. *BFP*, 511 U.S. at 544-45. This plain-statement rule has been invoked when interpreting the Bankruptcy Code not to disrupt state criminal restitution orders, *see Kelly*, 479 U.S. at 53, or to displace state foreclosure proceedings, *see BFP*, 511 U.S. at 545.

Breadth of Federal Criminal Laws. As a final example, the Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see Rewis v. United States*, 401 U.S. 808, 812 (1971). It thus rejected an interpretation of the Travel Act—which prohibited interstate travel in pursuit of certain criminal activity—to reach individuals who operate an illegal gambling enterprise, simply because that enterprise had out-of-state customers. *Rewis*, 401 U.S. at 812. Such an interpretation would have intruded on state criminal laws, because "substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers." *Id.*

In sum, as these cases show, the Court's federalism-based plain-statement rule has an exceptional pedigree. It generally requires federal laws *not* to interfere with state regulatory powers unless those laws unambiguously require that result.

B. The State-Action Doctrine Is Simply Another Application Of The General Plain-Statement Rule

The state-action doctrine that this Court has developed has its roots in the federalism principles that led this Court to adopt the plain-statement rule. Indeed, that doctrine can only be explained as a particular application of that rule. On their face, the Sherman Act, the Clayton Act, and other antitrust laws do not exclude state regulatory schemes or state actors implementing them. *Parker*, 317 U.S. at 351; *see, e.g.*, 15 U.S.C. §§ 1, 2, 18. But neither do these laws specifically indicate that they apply to those state regulatory regimes or actors. Rather, the antitrust laws use highly general language that "makes no mention of the state as such, and gives no hint that [they were] intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351.

Accordingly, "in light of our national commitment to federalism," the Court has interpreted the general language of the antitrust laws not "to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374. This interpretation is "premised on the assumption that Congress, in enacting [the antitrust laws], did not intend to compromise the States' ability to regulate their domestic commerce." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471

U.S. 48, 56 (1985). That is the same assumption that led the Court formally to adopt the plain-statement rule when interpreting other federal statutes. *See Gregory*, 501 U.S. at 461.

II. THE PLAIN-STATEMENT RULE JUSTIFIES THE FEDERALISM-BASED STANDARDS THAT THE COURT HAS ADOPTED WHEN APPLYING THE STATE-ACTION DOCTRINE TO LOCAL GOVERNMENTS

The recognition that the state-action doctrine established in *Parker* originates with the plain-statement rule sheds substantial light on the manner in which that doctrine should be interpreted and applied. In particular, the Court has repeatedly relied on that rule when choosing to interpret federal laws not to intrude on the actions of local governments or to interfere with the relationship between those governments and their states. As such, the plain-statement rule justifies the federalism-based standards that the Court has adopted for determining when local-government actions qualify for the state-action doctrine.

A. The Plain-Statement Rule Presumes That Federal Laws Are Not Meant To Interfere With The Relationship Between States And Their Political Subdivisions

The general plain-statement rule has never stopped at the state capital. Rather, the Court has repeatedly invoked the rule in cases involving actions of political subdivisions of the states. *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). To be sure, those subdivisions are not themselves sovereign ac-

tors. *See, e.g.*, *Alden*, 527 U.S. at 756. But that does not mean that Congress lightly intrudes on the powers delegated to them by the states.

According to the Court, "[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal quotation marks and alterations omitted); *see, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108 (1967); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). As such, the Court has repeatedly invoked the plain-statement rule as justification for interpreting federal laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

In *Mortier*, for example, the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted local regulations of pesticides. 501 U.S. at 600. FIFRA permitted "states" to regulate pesticides, but only if their regulation did not allow anything prohibited by the Act. *Id.* at 602. Partially because FIFRA did not include political subdivisions within its definition of "state," the lower court had found local pesticide regulations preempted. *Id.* at 606-607. This Court reversed. FIFRA "plainly authorize[d] the 'States' to regulate pesticides and just as plainly [was] silent with reference to local governments." *Id.* at 607. "Mere silence," the Court held, "cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.* Rather, the Court interpreted FIFRA

against this plain-statement rule, finding "the more plausible reading" to "leave[] the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608.

The Court took *Mortier* a step further in *City of Columbus*. There, the Interstate Commerce Act preempted state and local action related to motor carriers, but saved from this preemption the safety regulatory authority of the states. 536 U.S. at 429. The Court held that—even though the Act's preemption provision covered *both* state and local action whereas the Act's savings clause reached *only* state action—the savings clause should nevertheless be interpreted to cover local action as well. *Id.* at 437. The Court reached that seemingly atextual result because a contrary holding "would yield a decision at odds with [the traditional principle of] our federal system[]" that states maintain absolute discretion to delegate their sovereign powers to local governments without federal interference. *Id.*

In short, while *Mortier* and *City of Columbus* are preemption cases, the logic underlying those decisions is not limited to that context. Instead, the cases rest on *Gregory*'s plain-statement rule, which, in this context, establishes the "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." *Nixon*, 541 U.S. at 140.

B. This Plain-Statement Rule For Local Governments Is Evident In The Court's Cases On The State-Action Doctrine

Because the Court has extended the plain-statement rule to local-government action, it is not surprising that the rule is evident in the Court's cases applying the state-action doctrine to those governments. To be sure, like the Court's cases on the plain-statement rule, these cases recognize that municipalities are not themselves sovereign and so need state-delegated authority to displace competition. *See Hallie*, 471 U.S. at 38-39. But, when assessing whether a state has clearly articulated this displacement of competition, the Court has long shown a healthy respect for the federalism principles animating the plain-statement rule.

To begin with, the Court has indicated that, to satisfy the clear-articulation requirement, a local government's anticompetitive action need only be a "'*foreseeable* result' of what [a state] statute authorizes." *Omni*, 499 U.S. at 373 (quoting *Hallie*, 471 U.S. at 42) (emphasis added). This broad standard takes account of two concerns underlying the plain-statement rule. One, the standard adheres to the presumption "that a State may frequently choose to effect its policies through the instrumentality of its cities and towns," rather than its executive officers and agencies. *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982); *see Mortier*, 501 U.S. at 607-08. Two, the standard adheres to the presumption that federal laws should be interpreted not to interfere with the relationship between states and local governments. *City of Columbus*, 536 U.S. at 439-40. It does so by refusing to "embroil the federal courts in

the unnecessary interpretation of state statutes," and thus promotes "the fundamental policy of . . . the state action doctrine of immunizing state action from federal antitrust scrutiny." *Hallie*, 471 U.S. at 44 n.7.

Moreover, when providing greater clarity to this general foreseeability standard, the Court has adopted federalism-based rules that are justified by the plain-statement rule. The Court, for example, has repeatedly "rejected the contention that [the clear-articulation] requirement can be met only if the delegating statute *explicitly* permits the displacement of competition" by local governments. *Omni*, 499 U.S. at 372 (emphasis added); *see Hallie*, 471 U.S. at 42 ("It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects."). The Court reached this result precisely because the contrary rule (one requiring states to affirmatively and specifically indicate that local governments qualify for the state-action doctrine) disrespects our federalist system. *Hallie*, 471 U.S. at 43. It "embodies an unrealistic view of how [state] legislatures work and of how statutes are written." *Id.* And it would have "detrimental side effects upon municipalities' local autonomy and authority to govern themselves." *Id.* at 44.

Similarly, the Court has rejected an interpretation of the antitrust laws that would require local anticompetitive conduct to be *compelled* by state legislation, holding instead that those laws allow states to adopt a permissive policy by which local governments themselves may (or may not) choose to take anticompetitive action depending on their local conditions.

Id. at 45. To require the states to compel their local governments to engage in anticompetitive conduct would "reduce[] the range of regulatory alternatives available to the State," *S. Motor Carriers*, 471 U.S. at 61, and intrude on the principle that states have "'absolute discretion'" to delegate their police powers to their political subdivisions as they see fit, *Mortier*, 501 U.S. at 607-08 (internal citation omitted). Such a requirement prohibiting local flexibility also overlooks that a local government, no less than a state agency, "is an arm of the State" presumed to "act[] in the public interest." *Hallie*, 471 U.S. at 45.

The Court likewise has rejected an interpretation of the antitrust laws that would require a local government's anticompetitive conduct to be *legally valid* under state law. *See Omni*, 499 U.S. at 371-72. This decision, too, was justified on federalism grounds. Federal courts do not lightly intervene into state-law questions concerning the propriety of local conduct. Rather, it is for state regulators—not the federal courts under the guise of the antitrust laws—to police their local government's compliance with state law. *Id.* at 372 ("'We should not lightly assume that [the clear-articulation] requirement dictates transformation of state administrative review into a federal antitrust job.'" (internal citation omitted)). As such, "to prevent [the state-action doctrine] from undermining the very interests of federalism it is designed to protect," the Court has found "it is necessary to adopt a concept of authority" for local governments that is "*broader* than what is applied to determine the legality of the [local government's] action under state law." *Id.* (emphasis added).

Finally, the Court has found that state legislation only needs to be more than "neutral" regarding local-government conduct. A comparison of this Court's leading cases on local-government action (*Boulder* and *Hallie*) confirms that this rule merely requires state legislation to have addressed the type of conduct at issue. In *Boulder*, the State of Colorado had adopted a Home Rule Amendment that gave municipalities supremacy over local matters. 455 U.S. at 43-44. Boulder enacted a moratorium that prohibited the plaintiff from expanding its cable business. *Id.* at 44-46. This Court rejected Boulder's argument that its actions fell within the state-action doctrine. It held that the Home Rule Amendment did not address any particular subject—let alone cable television—and so could not reasonably be interpreted to authorize anticompetitive conduct in the cable market. *Id.* at 55. "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* Instead, "[t]he relationship of the State of Colorado to Boulder's moratorium ordinance [was] one of precise neutrality" in that Colorado was entirely silent on the cable regulation at issue. *Id.*

In *Hallie*, by contrast, the State of Wisconsin authorized municipalities to construct and operate sewage systems and identify the areas to be served. 471 U.S. at 41. The City of Eau Claire had refused to provide sewage-treatment services to neighboring areas unless they agreed to be annexed by the City and obtain their sewage-collection and transportation services from it. *Id.* at 36-37. Neighboring towns brought suit against the City, alleging that it had unlawfully acquired a monopoly over sewage-treatment

services and tied those services to sewage-collection and transportation services. *Id.* The Court found the clear-articulation requirement satisfied, holding that "it [was] sufficient that the [Wisconsin] statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.* at 42. In so doing, the Court rejected comparisons to *Boulder*, noting that the Wisconsin statutes were not "neutral in the same way that Colorado's Home Rule Amendment was": the Wisconsin statutes addressed the type of conduct at issue (sewage services), whereas the Colorado Home Rule "Amendment simply did not address the regulation of cable television." *Id.* at 43. Thus, while the state legislation in *Hallie* permitted both competitive and anticompetitive conduct, the state-action doctrine applied because the City's conduct was reasonably contemplated. *Id.*

The Court's cases on the state-action doctrine's application to local governments establish broad standards for meeting the doctrine's requirements, standards that are justified by the presumption that federal laws are not intended to intrude on the relationship between states and their political subdivisions.

III. THE ELEVENTH CIRCUIT'S DECISION IS FAITHFUL TO FEDERALISM PRINCIPLES WHEREAS THE FTC'S POSITION IS NOT

When viewed through the lens of the traditional plain-statement rule, it is clear that the Eleventh Circuit properly applied the state-action doctrine in this case. The FTC's contrary view, by contrast, is simply irreconcilable with that rule.

A. The Decision Below Comports With The Plain-Statement Rule And The Cases Applying It Under The State-Action Doctrine

The Eleventh Circuit found the state-action doctrine's "clear articulation" requirement satisfied when a local government's anticompetitive conduct was a "'reasonably anticipated'" result of state legislation. Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1188). Conversely, the local government's anticompetitive conduct need not "'ordinarily occur[], routinely occur[], or [be] inherently likely to occur as a result of the empowering legislation.'" Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1190-91). This interpretation follows from the general plain-statement rule, the rule's application to local-government conduct, and the Court's cases applying the rule under the state-action doctrine.

To begin with, the Eleventh Circuit's decision fully comports with the general plain-statement rule. At bottom, that rule establishes an "assumption that the historic police powers of the States were not to be superseded by [a] Federal Act," *Rice*, 331 U.S. at 230, so the Court interprets federal legislation *not* to interfere with traditional state powers unless there exists "'such overwhelming implications from the text as will leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (quoting *Murray*, 213 U.S. at 171). Stated another way, if a reasonable construction exists under which state power is retained, the Court adopts that construction.

Applying that standard here, so long as it is a "reasonable construction" to interpret state law to authorize the local-government conduct at issue, the plain-statement rule dictates that it be interpreted in that

manner. Just as a state law should not be interpreted to waive the state's sovereign immunity where it can reasonably be read to retain that immunity, *see Coll. Savings*, 527 U.S. at 675, so too a state law delegating power to a local government should not be found to waive application of the state-action doctrine if it is reasonable to conclude that the state law contemplated the local government's anticompetitive conduct, *see Hallie*, 471 U.S. at 44.

Equally true, the decision below adheres to the "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism." *Nixon*, 541 U.S. at 140. There is absolutely no "'clear and manifest purpose'" in the antitrust laws "to disturb a State's decision on the division of authority between the State's central and local units . . . ." *City of Columbus*, 536 U.S. at 439-40. Indeed, unlike in *City of Columbus*—where the federal law explicitly distinguished between state and local governments—the antitrust laws "contain[] no reference at all to 'political subdivisions of a State.'" *Id.* at 432. So there is even less evidence to believe that Congress intended that result. Rather, as long as the local anticompetitive conduct was reasonably foreseeable, *see Hallie*, 471 U.S. at 43, that conduct should fall within the state-action doctrine to the same extent as the same conduct by state officers.

The Eleventh Circuit's decision below, moreover, interprets the antitrust laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon*, 541 U.S. at 140. It recognizes that states have "'absolute discretion'" for expanding or limiting their municipalities' powers. *Mortier*, 501

U.S. at 607-08 (internal citation omitted). It is thus for the *states* to make clear that they intend to depart from the background presumption that federal laws not intrude on their ability to delegate powers to local governments. And, by adhering to an expansive concept of state authorization, it keeps the federal courts out of the "interpretation of state statutes," *Hallie*, 471 U.S. at 44 n.7, thereby leaving "state administrative review" in the state courts where it belongs, *Omni*, 499 U.S. at 372.

The decision below also follows from the federalism-based principles that the Court has adopted under the state-action doctrine. The Court has explained that its clear-articulation requirement is met so long as anticompetitive conduct is a foreseeable result of state legislation, even if that legislation (1) does not explicitly indicate that local governments may engage in anticompetitive conduct, (2) does not, in operation, even require local governments to engage in that conduct; and (3) in fact, could be interpreted to prohibit the particular local government's conduct at issue. *See Omni*, 499 U.S. at 371-73; *Hallie*, 471 U.S. at 42-46. These various standards, when considered together, illustrate that the local anticompetitive conduct need only be "within the range of reasonable possibilities" from state legislation. *Lee Cnty.*, 38 F.3d at 1190.

Conversely, the decision below comports with the requirement that state legislation not merely be "neutral" toward local anticompetitive conduct. *Hallie*, 471 U.S. at 43. It would be unreasonable to conclude that state legislatures foresaw anticompetitive effects from a broad grant of government power not touching any particular subject. This case proves

the point. The Georgia Hospital Authority Law, like other hospital authority laws throughout the country, does not simply grant political subdivisions general police powers. Rather, it grants them *precise* powers related *specifically* to establishing and running hospitals. Pet. App. 12a. It is much more analogous to the state statute in *Hallie* authorizing the provision of sewage services, *see* 471 U.S. at 41, than to the Home Rule Amendment in *Boulder* that merely authorized "'the full right of self-government,'" 455 U.S. at 43.

Finally, the decision below recognizes that political subdivisions like local hospital authorities are arms of the state with "different goals, obligations, and powers from private corporations." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 747 (2004). Like the Respondent here, *see* O.C.G.A. § 31-7-77, these hospital authorities are tasked not with making a profit but with ensuring that their communities have needed health care and a proper safety net. This means that these authorities often provide the only option for certain care. For example, a survey of public hospitals shows that they "are either the only level I trauma center or the only trauma center of any level" "[i]n 31 communities across the country." Nat'l Ass'n of Pub. Hosps. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2010*, at 7-8, *available at* http://www.naph.org/Main-Menu-Category/Publications/Safety-Net-Financing/2010-NAPH-Characteristics-Report.aspx?FT=.pdf (last visited Oct. 5, 2012). And it means that these authorities serve a larger percentage of poor patients. For example, while California's 19 public hospitals represent just 6% of all California hospitals, they "provide nearly half of all hospital care to the state's 6.7 mil-

lion uninsured." Cal. Ass'n of Pub. Hosps. & Health Sys., *Fast Facts*, *available at* http://caph.org/content/FastFacts.htm (last visited Oct. 5, 2012). Thus, the outcome below "is consistent with the . . . public responsibilities" of local hospital authorities (and other arms of the state). *U.S. Postal Serv.*, 540 U.S. at 747.

B. The FTC's Contrary Interpretation Is Not Reconcilable With Traditional Federalism Principles

While conceding that the Eleventh Circuit's decision is a "literally plausible" reading of the Court's cases, Br. of Pet'r 43, the FTC argues that the decision is nevertheless wrong. In its place, the FTC would ask the Court to require states to adopt an "affirmatively expressed public policy or regulatory structure that 'inherently,' by 'design[],' or 'necessarily' 'displaces unfettered business freedom'" before the conduct of their local governments may fall within the state-action doctrine. *Id.* at 27, 43 (internal citations omitted). This demanding interpretation conflicts both with general principles of the plain-statement rule and with the Court's specific application of them under the state-action doctrine.

Indeed, the FTC simply flips the general plain-statement rule on its head. Rather than requiring merely a "'*reasonable* construction'" under which the federal antitrust laws are interpreted not to apply, *Edelman*, 415 U.S. at 673 (internal citation omitted) (emphasis added), the FTC would require that construction to be the "*necessar[y]*"one. Br. of Pet'r 27 (emphasis added). Such a standard, if applied generally, would overrule decades of the Court's precedents in areas ranging from criminal laws to employment laws. *See supra* Part I.A.

The FTC bases its complete reversal of the general plain-statement rule on its claim that the state-action doctrine, like an implied repeal, is "'disfavored' and must be given a narrow application." Br. of Pet'r 21. But, in support of that view, it relies on cases that have extended the state-action doctrine beyond *governments* to *for-profit corporations*. *Id.* (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, 635-36 (1992); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-97 (1976)). Those cases are inapposite. The question is not whether state laws should be interpreted to immunize private entities who would otherwise be subject to the antitrust laws, but whether those antitrust laws should be interpreted to apply to governments at all. And the whole point of the plain-statement rule is to *favor* a construction under which they do not apply to those governments. Thus, the antitrust laws *automatically* do not apply to state action, a result incompatible with the FTC's narrow-construction argument. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act.").

And while local governments must qualify for the state-action doctrine through state authorization, the FTC's test is equally incompatible with the plain-statement rule's application to local governments. *See, e.g.*, *City of Columbus*, 536 U.S. at 437-39; *Mortier*, 501 U.S. at 607-08. The FTC nowhere demonstrates that the federal antitrust laws have a "'clear and manifest purpose'" to intrude on the relationship between states and their subdivisions. *City of Columbus*, 536 U.S. at 439. Yet the FTC would require that exact result. Federal courts would have to

scrutinize state laws delegating powers to local governments to determine the specific powers that the state intended to grant (and not to grant) local governments. As in other areas, the FTC's request to have federal courts intrude into such sensitive areas of state government "should be treated with great skepticism." *Nixon*, 541 U.S. at 140.

Nor is there anything special about the antitrust laws that would require the FTC's reversal of the general rule. While the antitrust laws undoubtedly illustrate a "long-standing congressional commitment to the policy of free markets and open competition," *Boulder*, 455 U.S. at 56; *see* Br. of Pet'r 21, so too the ADEA demonstrates a national policy "'to promote employment of older persons based on their ability rather than age,'" *Gregory*, 501 U.S. at 495 (Blackmun, J., dissenting) (quoting 29 U.S.C. § 621), and the Bankruptcy Code evinces a national policy to give debtors "'a complete discharge and fresh start,'" *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting) (internal citation omitted). Yet those other national priorities did not stop this Court from interpreting the ADEA *not* to apply to state laws mandating the retirement of state judges based on their age, *see Gregory*, 501 U.S. at 470, or from interpreting the Bankruptcy Code *not* to discharge state criminal restitution orders, *see Kelly*, 479 U.S. at 53. The national policy evidenced in the antitrust laws also does not compel a departure from a canon of construction that implements the Constitution's federalist design.

Not surprisingly, therefore, the FTC's test cannot be reconciled with the federalism-based standards the Court has adopted under the state-action doctrine. The Court has repeatedly rejected any re-

quirement that a state must "explicitly" allow local governments to engage in anticompetitive conduct, *see Omni*, 499 U.S. at 372; *Hallie*, 471 U.S. at 42, but the FTC would require an "affirmatively expressed public policy" that is anticompetitive, Br. of Pet'r 27. Equally true, the Court has rejected any requirement that local anticompetitive conduct be *compelled* by state law, *see Hallie*, 471 U.S. at 45, or even *legally valid* under it, *see Omni*, 499 U.S. at 372. This allowance for optional (or illegal) local anticompetitive conduct is fundamentally at odds with the FTC's view that state laws must "'necessarily'" or "'inherently'" dictate local anticompetitive conditions. Br. of Pet'r 27 (internal citation omitted). An optional policy with respect to restraining competition is, by definition, not necessarily or inherently anticompetitive.

For these reasons, the FTC (and attorneys general from a minority of states) are flat wrong to suggest that the decision below "'stand[s] federalism on its head.'" Br. of Pet'r 42 (citation omitted); *see* Br. of *Amici Curiae* States 6-17. Indeed, their reliance on *Ticor* for this point proves that the FTC (and, surprisingly, some state attorneys general) view *local governments* not as "political subdivisions of the State" to be controlled and managed by the state in its "absolute discretion," *Hunter*, 207 U.S. at 178, but as *private actors* that can be just as easily regulated by the federal government as by the state that created them. The FTC's position conflicts with the Court's federalism-based "hands off" approach to the relationship between the states and their subdivisions, *Nixon*, 541 U.S. at 140, an approach that dictates different treatment for private corporations and local governments. *Cf. Hallie*, 471 U.S. at 46-47 (exempt-

ing local governments from "active supervision" requirement).

The FTC (and the state attorneys general) also exaggerate the allegedly anticompetitive consequences that will follow from the decision below. The Eleventh Circuit did not grant a blanket license for local governments to restrain trade. Rather, it still requires the challenged anticompetitive action to be a "'*reasonably* anticipated'" result of state law. Pet. App. 9a (quoting *Lee Cnty.*, 38 F.3d at 1188) (emphasis added). The state-action doctrine will apply only where there is a reasonable basis for believing that the state legislature intended that result. Moreover, the FTC essentially suggests that local governments will be out to harm consumers, a view conflicting with the presumption that those governments (like the states that created them) "act[] in the public interest." *Hallie*, 471 U.S. at 45; *cf. U.S. Postal Serv.*, 540 U.S. at 747.

And even when the state-action doctrine would otherwise apply, it does not give local governments free rein to restrain trade. Rather, as the plain-statement rule directs, that result leaves it to the states—not the federal courts under the guise of the antitrust laws—to control their governments. They can, for example, pass a law that bars localities from ever taking advantage of the state-action doctrine. *Cf. Nixon*, 541 U.S. at 128-29 (upholding state law prohibiting local governments from providing telecommunications services). Or they can enforce their *state* antitrust laws against local conduct that they view as conflicting with their "powerful interest in preserving free and open markets." Br. of *Amici Curiae* States 8 & n.3. But what they cannot do is

"'transform[] state administrative review into a federal antitrust job,'" *Omni*, 499 U.S. at 372 (internal citation omitted), a result that the FTC seeks here by requiring federal courts to scrutinize state laws.

In sum, the decision below leaves the proper administration of local government law where it belongs—in the states. *See id.* It enhances federalism (and the purposes that federalism serves) in the same way that the plain-statement rule does: It ensures that states retain traditional powers (implemented via state or local agents) absent unambiguous evidence to the contrary, whether in the form of federal law plainly intruding on those prerogatives, *see Rice*, 331 U.S. at 230, or an unambiguous state relinquishment of them, *see Coll. Savings*, 527 U.S. at 676. That unambiguous evidence is lacking here.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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