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 NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER[1]

INTERESTS OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

NFIB members constantly face competition from state and local commercial competitors. In many instances, these government competitors hurt competition by taking advantage of government privilege—for example, below-cost pricing through taxpayer subsidies, tying or bundling products in government monopoly markets with products in competitive markets, and refusing to deal with certain private competitors. Competitive pressure faced by any business—large or small—does not necessarily signal an antitrust violation, but there are many instances where a state competitor will indeed violate the antitrust laws. These state-caused anticompetitive actions often harm NFIB members in a way that the federal antitrust laws were intended to prevent. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The NFIB, therefore, has a significant interest in this case, as it involves a blanket claim of state-action immunity from the antitrust laws by a state commercial competitor.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files ami-

cus briefs in cases that will impact small businesses.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

This is a much simpler case than the parties present. Neither precedent nor policy immunizes state commercial conduct from the federal antitrust laws. The Georgia state hospital entities, notwithstanding other goals, participate in markets for hospital services. Therefore, their activities as market participants are subject to antitrust scrutiny, just like other commercial actors.

The federal antitrust laws are the "Magna Carta of free enterprise," and "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). These laws "guarantee[] each and every business, no matter how small," the "freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Id.*

When a state regulates, the market participants compete on the same playing field within the framework of that regulation. But if a commercial actor—public or private—is free of antitrust scrutiny, the federal policy of interstate

competition suffers because participants do not play by the same rules. The National Federation of Independent Business therefore urges this Court to emphasize that state and local market-participants must follow the same federal competition rules as their private counterparts.

1. The idea that state commercial conduct should face different treatment than state regulatory conduct has permeated this Court's decisions from the genesis of the state-action immunity doctrine to this Court's most recent pronouncements on the topic. Indeed, in *Parker v. Brown*, the first case applying the doctrine, this Court specifically distinguished state market-participant conduct from the facts at issue. 317 U.S. 341, 51-52 (1943). More recently, in *City of Columbia v. Omni Outdoor Advertising*, this Court—addressing a related issue—emphasized that the rationale of excepting states from federal-antitrust-law scrutiny respects the States "in their government capacities as sovereign regulators," as opposed to "commercial participant[s] in a given market." 499 U.S. 365, 374-75 (1991).

2. Applying the state-action immunity doctrine to market-participant conduct does not fit the doctrine's underlying purpose. Anticompetitive state market-participant conduct is analytically distinct from state regulatory conduct in important ways. If antitrust laws do not limit the state commercial conduct, the government enti-

ties can profit from it off of businesses and individuals beyond the state or local government's border (and electorate). This would disturb the delicate balance between state sovereignty and the federal policy of interstate competition.

3. Federal courts can competently apply a market-participant exception to state-action immunity. It does not enmesh them in issues of state administrative law; it merely asks them to evaluate evidence of actual state activity. Ultimately, as the lines between public and private become more blurry, federal courts might more easily determine whether activity is commercial than whether it is public.

4. The fact that the state entities may have goals other than profit-maximization does not justify immunity for commercial entities, as it is well-established that non-profit entities engaging in commerce are subject to the antitrust laws. Moreover, there is no benevolent-monopolist exception to antitrust liability.

5. An alternative approach analyzes state market-participation in the context of the test for state-action immunity that requires a clear and affirmatively expressed state policy to displace competition. The State act of adding a competitor to the market should create a presumption that the State has not expressly displaced competition.

6. Finally, regardless of whether this Court determines that the acting entity here is public or private, the relevant activity involves market participation. For that reason, state-action immunity should not apply.

ARGUMENT

I. MARKET PARTICIPATION IS AN INDEPENDENT EXCEPTION TO THE STATE-ACTION-IMMUNITY DOCTRINE.

A. This Court has consistently recognized that state and municipal commercial activity is subject to federal competition laws.

The shape of state-action immunity from the federal antitrust laws has evolved since the early 1940's when this Court first announced the doctrine in *Parker v. Brown*, 317 U.S. 341 (1943). *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (noting evolution of *Parker* doctrine). Throughout, however, this Court has delivered a consistent message that "where the State acts not in a regulatory capacity but as a commercial participant in a given market," federal competitive restraints apply. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 374-75 (1991).

1. Union Pacific Railroad Company v. United States

Two years before *Parker*, in *Union Pacific Railroad Company v. United States*, this Court applied the Elkins Act—a federal competition statute regulating interstate carriers of commerce—to certain rebates and concessions made by Kansas City, Kansas in its capacity as a market-participant. 313 U.S. 450, 470-71 (1941). *See City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 401 n.19 (1978) (describing the Elkins Act as "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act"). Responding to an argument that the city provided the rebates as business practices in "furtherance of its municipal interests," this Court explained that "the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers." *Union Pac. R. Co*, 313 U.S. at 464-65. The city had to follow the federal rules governing the interstate marketplace, just like every other participant.

2. Parker v. Brown

The *Parker* Court considered this decision when it held that state-sovereign activity is not—as a matter of statutory interpretation—regulated by the federal Sherman Act. 317 U.S. at

351-52. Indeed, citing *Union Pacific*, this Court explained in *Parker* that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52. Instead, the state—"as sovereign"—imposed the restraint as an act of government. . . ." *Id.* at 352. *See Omni*, 499 U.S. at 374-75 (clarifying that *Parker* was distinguishing the "States in their governmental capacities as sovereign regulators" from their capacity "as a commercial participant in a given market."). Thus, *Parker* did not include government commercial conduct within the bounds of activity free of antitrust scrutiny.

3. City of Lafayette, Louisiana v. Louisiana Power & Light Company

Over thirty-years later, the *City of Lafayette* Court examined whether the federal antitrust laws apply to municipalities. 435 U.S. at 391. This case addressed antitrust counterclaims against Louisiana cities that own and operate electric-utility systems, both within and beyond their city limits. *Id.* Once again citing *Union Pacific*, this Court explained that "it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon 'persons.'" *Id.* at 400.

This Court then rejected the argument that the antitrust laws are intended to protect the public only from private abuses and not from municipal activity. *Id.* at 403. In doing so, *City of Lafayette* articulated grounds for excepting market-participant conduct from state-action immunity: "Every business enterprise public or private, operates its business in furtherance of its own goals." *Id.* While, broadly speaking, municipally-owned utilities may have public goals, "the economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . . ." *Id.* Indeed, the counterclaim's allegations "illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they inter-relate as purchasers, suppliers, and sometimes, as here, competitors." *Id.*

Finally, pointing to the 62,437 local government units existing in 1972, this Court worried that when "these bodies act as owners and providers of services," there is the "potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408.

The reasoning in *Lafayette*, in rejecting an implied antitrust exclusion for local governments, applies most directly to municipal market-participation conduct. The Court did not express concern about exempting regulation from the antitrust laws, but rather sought to avoid freeing public entities that "inter-relate" with a market as "purchasers, suppliers, and . . . competitors" from the federal competition regime. *Id.* at 403.

Concurring in *Lafayette*, Chief Justice Warren E. Burger advocated that the case should simply turn on the fact that the cities were engaging in business activity: there "is nothing in *Parker v. Brown* . . . or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." 435 U.S. 418 (Burger, C.J. concurring). Allowing a state-action immunity defense in these circumstances, the Chief Justice wrote, "would inject a wholly arbitrary variable into a 'fundamental national economic policy." *Id.* at 419.

Chief Justice Burger recognized the distinction in the *Parker* doctrine "between a State's entrepreneurial personality and a sovereign's decision . . . to replace competition with regulation." *Id.* at 422. *Parker* "was grounded in principles of federalism," *Ticor Title*, 504 U.S. at 633, from re-

spect for the state as a sovereign, but "the running of a business enterprise is not an integral operation in the area of traditional government functions." *Lafayette*, 435 U.S. at 424 (Burger, C.J. concurring).

4. Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories

Five years after *Lafayette*, in *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, this Court held that a federal antitrust law applied to "state purchases for the purpose of competing against private enterprise." 460 U.S. 150, 154 (1983). There, an association of retail pharmacists and pharmacies sued several defendants, including public hospitals and medical centers with pharmacies, under the Robinson-Patman Act for price discrimination. *Id.* at 152. Defendants moved to dismiss on the ground that the state purchases were exempt from this federal antitrust law. *Id.* at 153.

Notably, the state exemption issue applied to only "state purchases for the purpose of competing with private enterprise," as the facts did not concern state purchases for "traditional government functions." *Id.* at 154. Thus, *Jefferson County* decided the narrow issue of whether a federal antitrust law applied to a state actor participating in a commercial market.

Similar to Chief Justice Burger's concurrence in *Lafayette*, 435 U.S. at 424, this Court pointed out that "the retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty." *Jefferson County*, 460 U.S. at 154 n.6. Again separating commercial activity from traditional government functions, this Court also explained that it "is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaged in proprietary activities." *Id.*

This Court also emphasized that applying the antitrust laws to State market-participant conduct is important because public entities may have certain advantages in the commercial markets. *Id.* at 158 n.17. In the Robinson-Patman Act context, for example, "retail competition from state agencies can be more invidious than that from chain-stores, the particular targets" of the Act. *Id.* Though consumers may benefit from lower costs through economies of scale and volume purchases, "to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large." *Id.* Thus, an "exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps

enough to eliminate marginal or small private competitors." *Id.* (emphasis in original).

These same advantages may allow state market participants to eliminate competition in other ways. For example, predatory pricing by a private firm requires that the firm both price below its costs, and have a reasonable opportunity to recoup those losses after its pricing vanquishes competition. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). A public entity in the commercial market, by contrast, may not need to recoup below-cost pricing loses if it is subsidized by taxpayers or federal grants. Intentional or not, this public entity's competitors may begin dropping off, leaving consumers with only one choice—the government competitor—and no guarantee against higher prices, lower output, or (perhaps most likely) lower quality.

5. City of Columbia v. Omni Outdoor Advertising, Inc.

Finally, the market-participant exception again arose in *Omni*, albeit indirectly, in response to the holding in a lower court invoking a "conspiracy" exception to state-action immunity. 499 U.S. at 374. The seed for that exception emanated from certain language in *Parker*, which, clarified the *Omni* Court, instead suggested a commercial participant exception. *Id.* at 374-75. This Court

explained that the "rationale of *Parker* was 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 government capacities as sovereign *regulators*." *Id.* at 374. (emphasis added).

According to *Omni*, when the *Parker* Court stated that in the case before it there is "no question of a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade," 317 U.S. at 351-52, it was distinguishing a commercial-participant scenario, not a public-private conspiracy. *Omni*, 499 U.S. at 374-75. This Court drew that conclusion in part based upon the *Parker* Court's citation of *Union Pacific*, which involved a federal competition statute's application to "certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities." *Id.* at 375.

6. Lower Courts

Some federal circuits have recognized this market-participant exception to state-action immunity. *See, e.g., VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) ("[I]f a state acts as a 'commercial participant in a given market,' action taken in a market capacity is not protect-

ed."); *A.D. Bedell Wholesale Co., Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (declining to apply market-participant exception to state-action immunity because States did not enter the tobacco market as a buyer or seller); *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) ("To warrant *Parker* immunity the anti-competitive acts must be taken in the state's 'sovereign capacity', and not as a market participant in competition with commercial enterprise."), *abrogated* on another issue by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995);

But other circuits have declined to recognize the exception pending a more affirmative statement from this Court. *See, e.g., Paragould Cablevision, Inc. v. City of Paragould, Arkansas*, 930 F.2d 1310, 1312-13 (8th Cir. 1991) (citing *Omni* and remarking that "the market participant exception is merely a suggestion and is not a rule of law."); *Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit on exception).

B. Applying state-action immunity to public commercial conduct would exceed the doctrine's purpose.

Market-participant state conduct is not an "integral operation in an area of traditional government functions." *Lafayette*, 435 U.S. at 424

(Burger, C.J. concurring); *see also Jefferson County*, 460 U.S. at 154 n.6 ("The retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty."). The purpose of the state-action immunity doctrine is "grounded in principles of federalism," *Ticor Title*, 504 U.S. at 633, to respect "the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374; *Parker*, 317 U.S. at 352. Extending antitrust immunity to state commercial conduct would exceed the bounds of the doctrine's purpose, would introduce unintended consequences, and would disturb the balance between federal interstate regulation and state sovereignty.

Anticompetitive state commercial conduct is analytically distinct from state regulatory conduct. *Cf.* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 299 (2012) ("In the *Politics*, Aristotle distinguished between governments aimed for the benefit of the ruled and those that aim at the ruler's benefit."). Regardless of their purpose, state regulatory actions may sometimes harm competition, hurting both businesses and consumers. That is a cost of applying state-action immunity to our federal-competition regime. To the extent that immunity stems from respect for federalism, these are costs of maintaining our federal system as we do.

But when a state commercial participant behaves in anticompetitive ways, besides the costs to consumers and others, the government entity itself expropriates consumer surplus, in the form of monopoly rents for its own enrichment. *See* Daniel Rubinfeld, *Antitrust Damages*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 385 (Einer Elhauge ed., 2012) ("[T]he monopolizing behavior will have led to higher prices; this involves a transfer of income from consumers to the monopolizing producer or producers."). Or—if the claim involves attempted monopolization, a merger challenge or other prospective anticompetitive harm—there is a dangerous probability that the public entity will take the surplus as a profit for itself.

This distinction between state regulatory anticompetitive harm and market-participant anticompetitive harm has significant consequences. First, if permitted a free-pass from the antitrust laws, state and local entities have a financial incentive to participate in commercial markets in anticompetitive ways. It is profitable. Thus, an enterprising municipality may decide to solve its fiscal woes by entering a market and taking monopoly rents from consumers (not to mention, creating an additional dead-weight loss from reduced supply). *See* Einer Elhauge, U.S. ANTITRUST LAW AND ECONOMICS 14 (2d ed. 2011) ("plaintiffs have difficulty proving harm from the

fact that the anticompetitive overcharge caused them not to buy the product at all (that is, the deadweight loss triangle cannot be collected).").

Second, the political corrections that normally may occur for harmful state or local conduct are less likely to function because the rents—the competitive harm—will likely percolate beyond the jurisdiction of the electorate. That is because the public entity may compete in a geographic market beyond the scope of its authority. Many of the costs may fall on those that don't have a vote. Markets are not typically divided by state or municipal lines. Thus, deference for this type of state conduct should be even less when the commercial enterprise creates costs that seep beyond the state's borders. *See* F.T.C. Office of Policy Planning, *Report of the State Action Task Force*, September 2003, pp. 41-42 (expressing concern that "out-of-state citizens adversely affected by spillovers typically have no participation rights and effectively are disenfranchised on the issue.").

This consequence, of course, also undercuts any federalism or respect for state-sovereignty reason for immunizing state commercial-participant conduct from the antitrust laws. Within the federal system, the Commerce Clause assigns to the federal government the right to regulate interstate commerce. *See United States v. California*, 297 U.S. 175, 184 (1936) ("The sov-

ereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."). And the federal antitrust laws have developed a policy of competition. *Topco*, 405 U.S. at 610. Allowing state commercial conduct to create anticompetitive harm without antitrust recourse would disturb the balance between federal prerogative and deference to state sovereignty. *See Lafayette*, 435 U.S. at 419 (Burger, C.J. concurring) ("To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a 'fundamental national economic policy.'").

C. A market-participant exception to state-action immunity is within the expertise of the federal courts to administrate.

This Court has expressed caution about federal courts becoming arbiters of state administrative law. *See Omni*, 499 U.S. at 372; *Town of Hallie*, 471 U.S. at 44 n.7. Thus, in *Omni*, this Court declined to adopt a state "authorization" standard that requires federal courts to analyze whether state agency decisions are substantively and procedurally correct. *Id.* at 371-72. The concern was that enmeshing federal courts into these state-agency issues could "undermine[] the very interests of federalism [the immunity] is designed to protect." *Id.* at 371.

A market-participant exception does not suffer from this defect. In fact, federal courts need not analyze what state law permits; they need only determine what the state or its subdivision is doing. Is the state entity competing as a commercial participant in the relevant market? This is not much different than what a federal court would review in a typical case with private parties. This evidence-taking role is within the purview of the federal courts and does not encroach upon state sovereignty or require interference with state administrative law.

Indeed, federal courts already decide this question in another context: The market-participant exception to the Dormant Commerce Clause. *See New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 277 (1988) ("That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause."). While federal courts may develop techniques tailored specifically to antitrust cases, this experience provides a ready set of doctrine so courts do not have to begin with an empty slate.

In many instances, it may be simpler, in fact, for a federal court to objectively determine whether an entity is a competitor than whether the entity is public or private. That is because the

lines between public and private are becoming increasingly blurred. The federal government, for example, has taken large shares of major US companies. *See, e.g.* Neil King Jr. and Sharon Terlep, *GM Collapses Into Government Arms*, WALL STREET JOURNAL, June 2, 2009; David Enrich and Monica Langley, *U.S. Eyes Large Stake in Citi*, WALL STREET JOURNAL, February 23, 2009. State licensing boards, meanwhile, made up of private professional members, often control the scope of services requiring a license. Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 28 (Spring 2011) (examining the antitrust consequences of state-licensing boards that exercise their private incentives to expand their profession's exclusive scope of services). And state and local governments compete directly in various markets against private competitors.

Indeed, the present case involves a complicated entanglement between Georgia public entities and two apparently private corporations (created by the State), which lease a hospital from the Georgia Hospital Authority for a dollar-a-year. *See* Brief for the Petitioner 7-13 (describing the relevant parties and transactions). Then, somebody—public or private—purchased a private hospital. *Id.* Trying to determine what of a conglomeration like that is private and what is

public risks elevating form over function, which this Court in *American Needle, Inc. v. National Football League* criticized as inappropriate. 130 S.Ct. 2201, 2209 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."). When state actors begin competing, the line between public and private fades, leaving federal courts with limited objective criteria to determine whether the entity's actions are subject to our federal competition regime. A simpler approach would apply the antitrust laws to all commercial conduct.

D. Public and other non-profit-maximization goals or mandates are insufficient to remove antitrust scrutiny.

The Georgia public entities in this case might argue that they should not be subject to the antitrust laws—or are not ordinary business corporations—because they have public purposes distinct from maximizing profits. The federal case reports, however, are littered with losing antitrust defendants that felt that, for one reason or another, they did not need the antitrust laws to regulate them. The benevolent monopolist is not an accepted defense.

In *National Society of Professional Engineers v. United States*, for example, an engineering trade association argued that antitrust liability should not apply for its profession because price competition would create "inferior work with consequent risk to public safety and health." 435 U.S. 679, 693 (1978). This Court rejected that "public safety" and "ethics" defense as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695; *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986) (rejecting "quality of care" justification for anticompetitive boycott); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victim of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

This Court has also held that non-profit entities that engage in commerce are subject to the antitrust laws. *National Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-87 (1975); *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 765-769 (1999) (discussing the more limited instances in which the FTC Act applies to non-profit entities).

Finally, in *Lafayette*, this Court explained that every "business enterprise, public or private, operates its business in furtherance of its own goals." 435 U.S. at 403. Importantly, a public entity, operating "for the benefit of its citizens," is not, however, "more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." *Id.*

Thus, it is of no avail under antitrust precedent for the Georgia Hospital Authority—or any other public or private competitor—to plead for the right to violate federal antitrust law, merely because it has public or benevolent purposes. As this Court warned, if "municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Id.* at 408.

II. MARKET PARTICIPATION IS INCONSISTENT WITH A "CLEAR AND AFFIRMATIVELY" EXPRESSED STATE POLICY TO DISPLACE COMPETITION.

An alternative approach examines a state market participant in the context of the first prong of the *Midcal* test, which requires that to

avoid antitrust scrutiny, a state must "clearly articulate[]" and "affirmatively express[]" a state policy to displace competition. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). If a state introduces a market competitor, that act should create at least a presumption that a state has not expressly displaced competition. Simply stated, adding a competitor to a market is the opposite of displacing competition—it is enhancing competition. It is true that the state competitor could ultimately engage in anticompetitive conduct. But that is true of any competitor, public or private.

As described by *Jefferson County* in the Robinson-Patman Act context, a state agency may have certain advantages—like being subsidized by the taxpayers—that may make it a more formidable competitor. 460 U.S. at 158 n. 17. But that does not make it inevitable or even likely that the public entity will violate the antitrust laws. It might just become a strong competitor, which our federal antitrust policy encourages. *Pacific Bell Telephone Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 455 (2009). Even a monopolist does violate the antitrust laws by its mere presence as a monopolist. *Id.* at 447-48; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not un-

lawful; it is an important element of the free-market system."). Monopolies are not unlawful in and of themselves; it is only when a dominant entity takes certain actions that the antitrust laws come into play. *Linkline*, 555 U.S. at 447-48; *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (explaining that an antitrust violation results from the "willfull acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

This approach—a presumption against finding a clear state policy to displace competition when the State authorizes commercial conduct—naturally follows from *Community Communications Company, Inc. v. City of Boulder, Colorado.* 455 U.S. 40, 56 (1982). There, this Court rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." *Id. Boulder* involved the public power to regulate, whereas this case involves a public entity's decision to participate in a market. But defendants seeking immunity in both scenarios must argue that a general grant of power necessarily implies a specific anticompetitive exercise of that power. States that, for their own reasons, allow their subdivisions to compete in a market may be surprised to see their creations—now free

of competitive restraints—expanding beyond their contemplated role.

Several lower courts take a similar approach to state authorizations to compete. In *Surgical Care Center of Hammond v. Hospital Serv. Dist. No. 1 of Tangipahoa Parish*, for example, the Fifth Circuit reviewed a state-action immunity claim by a state hospital with the right to enter joint ventures, and distinguished between a state authorization of competition and of anticompetitive activity: "Thus arises a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do." 171 F.3d 231, 235 (5th Cir. 1999); *see also Kay Electric Coop. v. City of Newkirk, Oklahoma*, 647 F.3d 1039, 1043 (10th Cir. 2011) ("[S]imple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully."); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007) ("Granting counties the general power to contract or manage their business affairs cannot imply state authorization to impose this anticompetitive restriction."); *Lancaster Cmty Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 402-03 (9th Cir. 1991) (holding that state authorization to provide hospital services does not indicate that the state has "displaced

competition with regulation in the provision of hospital services").

III. THE FTC CHALLENGES COMMERCIAL-PARTICIPANT CONDUCT HERE, WHICH SHOULD NOT RECEIVE IMMUNITY FROM THE FEDERAL ANTITRUST LAWS.

The FTC argues that "the substance of the present transaction is that private parties arranged" the transaction resulting in a private monopoly. Brief for the Petitioner 45. The National Federation of Business does not take a position on whether the relevant acting party is public or private. Indeed, it should not matter. In either case, an entity—public or private—participated in one or more hospital markets and engaged in a challengeable transaction with another competitor in that market.

Respondents might argue that the state entities do not function as ordinary business corporations, and that state law imposes specific obligations on them, including geographic, profit, and price restraints. But these limitations do not make the Georgia market participants unique. Private commercial actors may also have constraints (limited capital, regulatory requirements, etc.) that reduce their effectiveness in the market. The State of Georgia's decision to place limits on its subdivision's ability to compete in the market-

place does not require federal courts to compensate them by allowing the State entities to extract monopoly rents from consumers.

As market participants, the respondents are not immune from federal antitrust scrutiny for two independent reasons: (1) both precedent and sound policy require the conclusion that market-participant conduct is not included within state-action immunity; and (2) the introduction of a state competitor is presumptively not a "clearly articulated" and "affirmatively expressed" state policy to displace competition.

The federal antitrust laws guarantee every business—"no matter how small," the "freedom to compete." *Topco Assocs.*, 405 U.S. at 610. But if state commercial participants engage in anticompetitive activity, and these laws are powerless to stop them, NFIB members and other businesses can no longer "assert with vigor, imagination, devotion, and ingenuity whatever economic muscle [they] can muster." *Id.* But beyond even the businesses, it is the consumers that suffer, as they lose the benefits of competition. Allowing these state and local commercial actors to evade the antitrust laws will undercut the "Magna Carta of free enterprise" created through these laws by Congress. *Id.*

CONCLUSION

For the foregoing reasons, the National Federation of Independent Business urges this Court to hold that state-action immunity from the federal antitrust laws does not apply to state and local market participants.

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