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 LEE MEMORIAL HEALTH SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The Lee Memorial Health System is a political subdivision of the State of Florida. It has neither a corporate parent nor stockholders.

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INTEREST OF THE *AMICUS CURIAE*

The Lee Memorial Health System is an award-winning public health system and a political subdivision of the State of Florida. The Florida Legislature created Lee Memorial, then known as the Hospital Board of Directors of Lee County, by a special act in 1963, and changed its name in a codified enabling act in 2000. *See* Fla. Spec. Laws Ch. 2000–439 § 2. Lee Memorial is the largest public health system in Florida and second largest in the nation to operate without taxing authority or any direct tax subsidies from any government entity. *See* Lee Memorial Health Sys., 2011 Community Benefit Report at 5, *available at* http://www.leememorial.org/about/pdf/2011-Community-Benefit-Report.pdf (last visited Oct. 8, 2012) ("2011 Report"). Lee Memorial is governed by the Lee Memorial Health System Board of Directors ("the Board"), whose ten members are elected by the voters of Lee County, Florida. *See* Fla. Spec. Laws Ch. 2000–439 §§ 2, 6(1).

The Legislature created Lee Memorial for the crucial "public purpose" of operating as a public health system "primarily for the use and benefit of the residents of Lee County." *Id.* §§ 3, 11. The Legislature directed Lee Memorial to "establish[] policies providing for the treatment without charge of those patients . . . without the means to pay." *Id.* § 11. Pursuant to those policies, Lee Memorial provides hundreds of millions of dollars in

community benefit each year, including charity care, outreach and educational programs, donated service hours, and unreimbursed Medicaid and Medicare costs. *See* 2011 Report at 4.

In 1994, the Eleventh Circuit applied this Court's foreseeability test to conclude that the state action doctrine shields Lee Memorial from the federal antitrust laws. *See FTC v. Hosp. Bd. of Dirs. of Lee County*, 38 F.3d 1184 (11th Cir. 1994). Lee Memorial submits this brief *amicus curiae* in support of Respondents to explain that the state action doctrine has enabled the State of Florida to make policy choices it deems vital that, in turn, have conferred enormous benefits on the residents of Lee County, including those who otherwise lack the financial means to obtain adequate health care. As Lee Memorial's experience demonstrates, the Court should preserve the foreseeability test, which maximizes the flexibility of state and local authorities to address pressing policy problems, including problems in the vexing and complex area of health care. Because Lee Memorial is a public rather than a private entity, it takes no position on the active supervision question presented in this case.[1]

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than Lee Memorial or its counsel has made a 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.

SUMMARY OF ARGUMENT

States create public health systems like Lee Memorial to serve a host of "public purpose[s]" for the "use and benefit" of state and local residents. Fla. Spec. Laws Ch. 2000–439 §§ 3, 11. Many of these state purposes differ from—and, at times, are even diametrically opposed to—the goal of "free-market competition" that the federal antitrust laws were enacted to promote. FTC Br. at 3. For example, public health systems ordinarily are directed to "provid[e] treatment without charge of those patients . . . without the means to pay," Fla. Spec. Laws Ch. 2000–439 § 11, precisely because such patients are chronically underserved by private health care providers operating in the competitive marketplace, with far-reaching consequences for both those patients and the public at large.

The Eleventh Circuit's faithful application of this Court's foreseeability test promotes the interests of federalism that animate the state action doctrine. It maximizes the flexibility of state and local policymakers to address the provision of health care to individuals otherwise unable to afford it and other challenges in the complex area of health care. By virtue of that test, states can create public health systems that are politically accountable to the local citizens for whose "use and benefit" they primarily exist, *id.*, and empower them to improve the quality and availability of health care outside the constraints of federal antitrust law and without reordering the marketplace with costly, cumbersome regulatory structures. And because, unlike private parties, public health systems operate under a legal mandate to benefit the public and are charged to "act[] in the

public interest," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985), they frequently will increase the supply of health care, enhance the quality of their services, and improve their facilities and technology regardless of the size of their market share.

The FTC asks this Court to cast aside its prior precedents and to adopt an untenable legal standard. The FTC's proposed rule would recognize the applicability of the state action doctrine "only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that inherently, by design, or necessarily displaces unfettered business freedom." FTC Br. at 27 (citations and quotation marks omitted). This cramped view of the law contravenes this Court's precedents, which have applied the state action doctrine even in the absence of an affirmatively expressed state policy or alternative regulatory structure, *see Town of Hallie*, 471 U.S. at 41–45, and which at least twice have expressly applied the foreseeability test that the Eleventh Circuit adhered to below, *see id.*; *City of Columbia v. Omni Adver., Inc.*, 499 U.S. 365, 372–73 (1991); *see also* Pet. App. 9a.

Moreover, the FTC's proposed rule would create harmful results for health care policy because it would strip the protections of the state action doctrine from public health systems that, pursuant to state law, seek to supply health care to all citizens rather than to "necessarily displace[] unfettered business freedom." FTC Br. at 27. And the FTC's approach would undermine federalism because it would eliminate state and local authorities' flexibility to experiment with a variety of policy solutions.

Rather, the FTC would force them to implement an "affirmatively expressed public policy" or a costly, cumbersome "regulatory structure" (*id.*) any time they wish to address policy problems in ways other than those contemplated by the federal antitrust laws.

As explained more fully below, the Court should reaffirm its foreseeability test and reject the FTC's flawed proposed rule.

ARGUMENT

I. LEE MEMORIAL SERVES VITAL PUBLIC PURPOSES AND ITS ENABLING ACT FORESEEABLY DISPLACES COMPETITION

The Legislature created Lee Memorial for the "public and county purpose" of "establish[ing] and . . . provid[ing] for the operation and maintenance of a public hospital" primarily for "the use and benefit of the residents of Lee County." Fla. Spec. Laws ch. 63-1552 §§ 1, 7, 14, *superseded by* Fla. Spec. Laws Ch. 2000-439. Lee Memorial's first official act was to "build[] a new facility adjacent to the only hospital then in existence in Lee County." *Lee County*, 38 F.3d at 1186. Once the new facility was completed, Lee Memorial "acquired the assets and assumed the operations of the original hospital . . . giving it 100% of the market share at the time." *Id.*

In 1987, the Legislature amended Lee Memorial's enabling act to authorize it to acquire and operate additional hospitals. *See id.* Acting pursuant to that authority, Lee Memorial in 1994 approved acquisition of Cape Coral Hospital, a private hospital that had entered the Lee County market in the intervening decades. *See id.* The FTC challenged

that acquisition under Section 7 of the Clayton Act, arguing that the resulting reduction of hospitals in Lee County from four to three and increase in Lee Memorial's market share from 49% to 67% would deny "Lee County consumers of acute inpatient hospital services . . . the benefits of free and open competition based on price, quality, and service." *Id.* at 1187.

The Eleventh Circuit upheld dismissal of the FTC's complaint based on the state action doctrine. *See id.* at 1192. Invoking this Court's prior precedents, the Eleventh Circuit held that "a clear articulation" of a state policy to authorize anticompetitive conduct by a political subdivision "merely requires that anticompetitive conduct is the foreseeable result of the legislation" empowering the subdivision to act. *Id.* at 1188 (citing *Town of Hallie*, 471 U.S. at 41–43). The Eleventh Circuit pointed out that, in *Town of Hallie*, this Court had found the foreseeability test satisfied by the combination of authority to provide sewage treatment services and authority to "'refuse to serve unannexed areas.'" *Id.* at 1189 (quoting *Town of Hallie*, 471 U.S. at 42).

The Eleventh Circuit therefore rejected the FTC's preferred reading that "a foreseeable anticompetitive effect is one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation." *Id.* at 1188. As the Eleventh Circuit reasoned, this "attempt[] to impose a narrow definition on the term 'foreseeable' . . . essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition." *Id.* at 1190.

Such a narrow definition not only contravenes this Court's precedents, but runs counter to the entire purpose of the state action doctrine, which is "to preserve the rights of a state to provide for the well being of its citizens on a local level without being burdened by federal antitrust laws." *Id.* at 1191.

Applying the foreseeability test, the Eleventh Circuit pointed out that, like the political subdivision in *Town of Hallie*, public health systems such as Lee Memorial are authorized to provide services, but only within their boundaries. *See id.* at 1189–91. The Eleventh Circuit also pointed out that "the Florida Legislature implicitly gave [Lee Memorial] the power to acquire other hospitals in an effort to provide low-cost healthcare primarily to indigent citizens of Lee County." *Id.* at 1191. And Lee Memorial's unique history—including its acquisition of a monopoly in the 1960s—meant that "the legislature must have reasonably anticipated that further acquisitions . . . would increase [Lee Memorial's] market share in an anticompetitive manner." *Id.* at 1192. Thus, "anticompetitive conduct was reasonably anticipated" from the Legislature's grant of authority to Lee Memorial, and Lee Memorial qualified for the state action doctrine. *Id.*

II. THE FORESEEABILITY TEST COMPORTS WITH THIS COURT'S PRECEDENTS AND PROMOTES THE GOALS OF FEDERALISM

The foreseeability test faithfully applies this Court's precedents, empowers states to implement the policy solutions they favor, and thereby benefits the public.

First, this Court twice has applied the foreseeability test to conclude that political subdivisions were entitled to the protection of the state action doctrine. *See Town of Hallie*, 471 U.S. at 42; *City of Columbia*, 499 U.S. at 372–73. In *Town of Hallie*, the Court unanimously upheld a political subdivision's coverage under the state action doctrine even though the state had not expressly authorized anticompetitive conduct or adopted an "alternative regulatory structure" for reordering the market. FTC Br. at 17. Instead, the "authority to regulate" triggering the state action doctrine in that case was the political subdivision's power to provide sewage treatment services and to "refuse to serve unannexed areas." *Town of Hallie*, 471 U.S. at 42.

Public health systems such as Lee Memorial likewise may not operate under "an affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom." FTC Br. at 27. Instead, they are authorized to provide services within their boundaries to those in need. *Compare Town of Hallie*, 471 U.S. at 42, *with* Fla. Spec. Laws Ch. 2000–439 § 11. *Town of Hallie* therefore not only confirms the Eleventh Circuit's construction of the governing test, but also demonstrates that public health systems qualify for the state action doctrine. *See* 471 U.S. at 42–44; *see also Lee County*, 38 F.3d at 1186–90.

Second, the foreseeability test promotes federalism by maximizing the flexibility of state and local authorities to experiment with a variety of solutions to pressing policy problems. This Court recognized the state action doctrine in large part because

Congress made no statement in the federal antitrust laws, express or otherwise, to override the baseline "assumption that the historic police powers of the States" to regulate on behalf of the health, safety, and welfare of their residents were preserved. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Parker v. Brown*, 317 U.S. 341, 351 (1943). Congress, moreover, evinced no "clear and manifest" purpose to "disturb a State's decision on the division of authority between the State's central and local units," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439–40 (2002), or to limit states' "wide discretion . . . in forming and allocating governmental tasks to local subdivisions," *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 269 (1977).

The foreseeability test preserves this backdrop of states' traditional police powers and relationship to their subdivisions because it guarantees to states the broadest possible range of options to combat local policy challenges. Under that test, states are *not* required to adopt an "affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom" (FTC Br. at 27) every time they seek to act outside the superintendence of the federal antitrust laws. Rather, states may do so if they wish—but they also may address policy problems in other ways, including by authorizing their political subdivisions to provide services within their boundaries to those in need. *See, e.g.*, *Town of Hallie*, 471 U.S. at 40–42; *Lee County*, 38 F.3d at 1186–90.

This flexibility is especially crucial in the complex area of health care, where state prerogatives may

collide with the goals of the federal antitrust laws. States frequently create public health systems at least in part to promote policies other than the "free-market competition" (FTC Br. at 3) that the federal antitrust laws are designed to protect. Indeed, one of the most common purposes for public health systems is to "provid[e] for the treatment without charge of those patients . . . without the means to pay," Fla. Spec. Laws Ch. 2000–439 § 11, who are chronically underserved by private actors operating in free-market competition. By extending the state action doctrine to those activities, the foreseeability test guarantees that states will not be constrained by the advancement of free-market competition when they seek to advance other policy objectives they deem valid.

The State of Florida's adoption of a policy extending the protection of the state action doctrine to Lee Memorial has enabled it to pioneer innovative solutions and to capture economies of scale when addressing the care of needy patients and other community health care challenges. In recent years, the need for Lee Memorial's charity care and other community benefit programs has exploded, as "[l]ocal economic challenges . . . have caused many to lose jobs and/or insurance." 2011 Report at 2. In 2011, only 21% of the patients Lee Memorial treated had conventional private insurance, with the majority either uninsured or insured through government programs such as Medicaid or Medicare. *See id.* at 5. Lee Memorial thus provided $223 million in community benefits in 2011, including charity care, outreach and educational programs, donated service hours, and unreimbursed Medicaid and Medicare

costs. *See id.* at 4–5. Of that total, $39.1 million represented the value of charity care Lee Memorial performed for uninsured or underinsured patients. *See id.*

Due to the growing need for charity care in Lee County, Lee Memorial has undertaken other initiatives to improve the availability and quality of such care. These initiatives include partnering with other charity and health care organizations to establish new community-based facilities to help eligible patients receive the care they need at no cost and to obtain "access to other social services." *Id.* at 2.

Lee Memorial's commitment to charity care is typical of public health systems across the country. For example, the public health systems represented by the National Association of Public Hospital and Health Systems comprise only 1.6% of the nation's acute care hospitals—but they delivered 17.8% of the uncompensated care provided by U.S. hospitals in 2010. *See* Nat'l Ass'n of Pub. Hospitals and Health Sys., America's Safety Net Hospitals and Health Systems, 2010, at x, App'x C, *available at* http://www.naph.org/Main-Menu-Category/Publications/Safety-Net-Financing/2010-NAPH-Characteristics-Report.aspx?FT=.pdf (last visited Oct. 8, 2012). In fact, 18% of those hospitals' costs were uncompensated, compared with 6% of costs for hospitals nationally. *See id.*

Lee Memorial's efforts to improve the quality and availability of health care have not focused exclusively on Lee County's most needy citizens. In the years since the Eleventh Circuit's decision recognizing that Lee Memorial qualifies for the state

action doctrine, Lee Memorial has dramatically *increased* the supply of health care services for all Lee County residents. In 2006, ten years after acquiring Cape Coral Hospital, *see Lee County*, 38 F.3d at 1186, Lee Memorial acquired two other hospitals in Lee County from a for-profit corporation that was under no obligation to provide charity care. *See* Lee Memorial, Media Relations, *available at* http://www.leememorial.org/publicaffairs/pressfaq.asp (last visited Oct. 8, 2012). Lee Memorial thus has grown into an award-winning system of four acute care hospitals, two specialty hospitals, and a variety of other facilities that serves more than 1 million patients per year. *See* 2011 Report at 2–5; *see* Lee Memorial Health System, Hospital Facilities, *available at* http://www.leememorial.org/Services/Hospitalfacilities.asp (last visited Oct. 8, 2012). It also has invested heavily in upgrading facilities, purchasing new technologies, and developing health education programs, *see* 2011 Report at 2–5, all for the "use and benefit" of local residents and patients, Fla. Spec. Laws 2000–439 § 11.

None of Lee Memorial's acquisitions postdating the Eleventh Circuit's application of the state action doctrine to it has been challenged through a federal antitrust suit. In fact, Lee Memorial has been named as a defendant in only one federal antitrust suit during that time—and that suit was dismissed at the pleading stage. *See Med. Sav. Ins. Co. v. HCA, Inc.*, No. 2:04-cv-156, Opinion and Order (M.D. Fla. Oct. 25, 2004); *Med. Sav. Ins. Co. v. HCA, Inc.*, No. 2:04-cv-156, 2005 WL 1528666 (M.D. Fla. June 24, 2005), *aff'd*, 186 F. App'x 919 (11th Cir. 2006). The foreseeability test therefore has preserved Lee

Memorial's ability to expand in the marketplace in order to serve the needs of the local community. And it also has allowed Lee Memorial to avoid the threat of antitrust discovery that may be so "expensive" as to "push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007). As a result, Lee Memorial has devoted more of its limited resources to providing health care to needy patients rather than diverting them to the defense of costly litigation.

Finally, while maximizing state and local policymakers' flexibility, the foreseeability test maintains political subdivisions' accountability and responsiveness to the local communities they serve. Lee Memorial's Board consists of ten members comprised of two directors elected from each of five districts in nonpartisan elections. *See* Fla. Spec. Laws 2000–439 §§ 2, 6(1). The Board also is subject to financial restrictions and auditing requirements; must make its minutes, records, and books "open and subject to inspection and copying" by the public; and must hold all meetings "open to the general public." *Id.* § 7. Thus, unlike private parties seeking to maximize profits in "free-market competition" (FTC Br. at 3), political subdivisions like public health systems are transparent and politically accountable—and ultimately controlled by the very consumers for whose primary "use and benefit" they are created. Fla. Spec. Laws 2000–439 § 11.

Moreover, unlike a private party, which "may be presumed to be acting primarily on his or its own behalf," a political subdivision is presumed to "act[] in the public interest," *Town of Hallie*, 471 U.S. at 45—

and, like Lee Memorial, is subject to the electoral control of local voters. *See* Fla. Spec. Laws 2000–439 § 6(1). Thus, public health systems frequently will increase the supply and enhance the quality of their services regardless of the size of their market share or the pressures to profit-maximize that drive private actors in free-market competition. *See, e.g.*, 2011 Report at 2–5; *see also Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1040 (11th Cir. 1993) (noting that a public health system's acquisition of a privately owned hospital "expanded its ability to serve indigent care needs in the region, and . . . enhanced its ability to provide indigent and reduced-rate care at its existing facilities").

Indeed, "[t]he only real danger" in a case involving a political subdivision such as a public health system is "that it will seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie*, 471 U.S. at 47. The State *amici* supporting the FTC repeat this concern, arguing that the foreseeability test "forces the States to balance the risk of unwanted antitrust immunity against the advantages of delegation" to political subdivisions. Br. of *Amicus* States at 7. But, as this Court has recognized, the danger that local governments will override state prerogatives is "minimal . . . because of the requirement that the [political subdivision] act pursuant to a clearly articulated *state* policy." *Town of Hallie*, 471 U.S. at 47 (emphasis added). States always retain the authority to amend a political subdivision's governing laws to bring its activities into harmony with state policy or to expressly negate its coverage under the state action doctrine. And because the state action

doctrine at issue here applies only to *federal* antitrust laws, states may implement their *own* antitrust laws in any way they deem fit. *See id.*; *see also* Br. of *Amicus* States at 7–9. Thus, the foreseeability test accords states complete freedom to calibrate their preferred "balance" between state antitrust policy and delegations of authority to political subdivisions. Br. of *Amicus* States at 7.

The foreseeability test thus has proven the wisdom of "the concepts of federalism and state sovereignty . . . emphasized" in this Court's state action doctrine cases. *Lee County*, 38 F.3d at 1191 (citing *Parker*, 317 U.S. 341). By virtue of that test, public health systems such as Lee Memorial have been accorded appropriate flexibility to serve a variety of public purposes, including purposes different from—and, at times, at odds with—the goals of federal antitrust law. The foreseeability test therefore reflects the commonsense conclusion that states should act as laboratories of policy experimentation without fear of expensive federal antitrust enforcement or of being compelled to adopt an "affirmatively expressed public policy" or a costly "regulatory structure" (FTC Br. at 27) when they seek to address issues of state and local concern. The Court should reaffirm this test as applied by the Eleventh Circuit below.

III. THE FTC'S PROPOSED RULE CONTRAVENES THE COURT'S PRECEDENTS AND UNDERMINES THE GOALS OF FEDERALISM

The FTC concedes that the Eleventh Circuit's "approach reflects a literally plausible understanding of th[e] term" "'foreseeable.'" FTC Br. at 38. Yet the

FTC nonetheless proposes that this Court abandon that approach in favor of a restrictive test that would apply the state action doctrine "only when the challenged conduct is undertaken pursuant to a State's affirmatively expressed public policy or regulatory structure that inherently, by design, or necessarily displaces unfettered business freedom." *Id.* at 27 (citations and quotation marks omitted).

This proposed rule would eviscerate the state action doctrine's protection of numerous public health systems such as Lee Memorial that care for patients lacking the ability to pay by providing charity services rather than by "necessarily displac[ing] unfettered business freedom." *Id.* As a result, states would lose the flexibility to extend the state action doctrine's protections to such systems even when they address the crushing public policy problem of providing health care to underserved communities. This result would be particularly regrettable in Lee County, where Lee Memorial invests hundreds of millions of dollars in annual community benefit, provides jobs for thousands of local residents, and performs charity care in a community devastated by the recent economic downturn that has "caused many to lose jobs and/or insurance." 2011 Report at 2.

The FTC's proposed rule not only would lead to harmful consequences in the complex health care arena, but also would create a flawed rule of law. *First*, the FTC's proposed rule contravenes this Court's prior precedents, at least two of which have expressly applied the foreseeability test. *See Town of Hallie*, 471 U.S. at 42; *City of Columbia*, 499 U.S. at 372–73. The FTC's approach is antithetical to this Court's foreseeability test because it "essentially

seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition." *Lee County*, 38 F.3d at 1190. And it is simply irreconcilable with *Town of Hallie*, where the Court recognized the state action doctrine's protections for a political subdivision even though the state had not expressly authorized anticompetitive conduct or adopted "an alternative regulatory structure." FTC Br. at 17.

Second, the FTC's approach contradicts the rationale of the state action doctrine because it ignores the default "assumption that the historic police powers of the States" are preserved where, as here, Congress does not expressly override it. *Rice*, 331 U. S. at 230; *see also Parker*, 317 U.S. at 351. The FTC, however, would dramatically limit states' exercise of their traditional police powers and reshape their relationships with their political subdivisions. Indeed, the FTC would turn the ordinary rules of statutory construction on their head by reinterpreting Congress's statutory silence as an express command that states obey those laws or adopt an "affirmatively expressed public policy or regulatory structure that . . . necessarily displaces unfettered business freedom." FTC Br. at 27.

Finally, the FTC's approach would harm the public by hamstringing state legislatures and undermining the very principles of federalism that animated this Court's recognition of the state action doctrine in the first place. *See, e.g.*, *Parker*, 317 U.S. 341; *Town of Hallie*, 471 U.S. at 43–44. Under the FTC's rule, instead of flexibly responding to the preferences of local communities, states would be unable to

experiment with options to care for citizens lacking the ability to pay for health care and to advance other state policy goals. Rather, the FTC would force states that wish to address such goals to the Hobson's choice of either exposing political subdivisions to the federal antitrust laws, or of adopting an "affirmatively expressed public policy" or a costly, cumbersome "regulatory structure" that may carry unwanted and unwarranted consequences. FTC Br. at 27. States thus would find their policy choices severely constrained by the federal antitrust laws even though this Court has repeatedly emphasized that they are not subject to those laws. *See, e.g.*, *Parker*, 317 U.S. 341; *Town of Hallie*, 471 U.S. at 43–44; *City of Columbia*, 499 U.S. at 372–73.

CONCLUSION

The Court should reaffirm the foreseeability test for the state action doctrine under the federal antitrust laws.

Respectfully submitted,

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