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Clarifying State Action Immunity under the Antitrust Laws: FTC v. Phoebe Putney Health System, Inc.

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CLARIFYING STATE ACTION IMMUNITY UNDER THE ANTITRUST LAWS: *FTC V. PHOEBE PUTNEY HEALTH SYSTEM, INC.*

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INTRODUCTION

The tension between federalism and national competition policy has come to a head. The state action doctrine finds its basis in principles of federalism, permitting states to replace free competition with alternative regulatory regimes they believe better serve the public interest.[1] In many instances, state exemption of certain conduct from the antitrust laws poses greater harm to competition than private price-fixing arrangements,[2] and the resulting decrease in competition is not offset by the achievement of the social benefits the legislatures sought in implementing the exemption.[3]

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1. *See generally* Parker v. Brown, 317 U.S. 341 (1943) (holding the Sherman Act's anti-competition policy does not apply to state action such as the California Agricultural Prorate Act, which was designed to conserve the agricultural wealth of the state by restricting competition among growers). The court declined to apply the Sherman Act to state action by the State of California based on federalist principles, indicating that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

2. *See* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1561–62 (2010).

> Public restraints may confer immunity from antitrust prosecution, and such restraints engage the machinery of the state in policing compliance with commands that set prices, output levels, or terms of entry. A competition policy that only addresses private restraints will motivate firms to turn away from private measures and to invest more effort in obtaining state-imposed restrictions. Without effective means to anticipate, and to discourage governments from acquiescing in, demands for public restraints, competition law enforcement merely alters the form of collusive activity and does not diminish its harmfulness.

Id.

3. *See, e.g.*, James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms* 2 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 10-32, 2010), *available at* http://ssrn.com/abstract_id=1641415 (arguing that anti-competitive state alcohol regulations that require alcohol distributors to "post" their prices in advance and "hold" those prices for a certain period of time cause consumers to pay higher prices because the regulations: (1) facilitate collusion among alcohol distributors, and (2) diminish alcohol distributors' incentive to cut their prices).

Therefore, public restraints have a unique ability to undermine the regime of free competition that provides the basis of federal and state commerce policies. Nevertheless, preservation of federalism remains an important rationale for protecting such restraints. Judicial application of the doctrine has become muddled since the inception of state action immunity in the seminal case of *Parker v. Brown*.[4] The elusive contours of the doctrine have caused circuit splits and overbroad application that threatens to subvert the goals of both federalism and competition.[5]

The recent United States Court of Appeals for the Eleventh Circuit decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*[6] epitomizes the concerns associated with misapplication of state action immunity. The United States Supreme Court recently granted the Federal Trade Commission's (the "FTC") petition for certiorari and now has the opportunity to more clearly define the contours of the doctrine.[7] The case involved a merger between private hospitals under an alleged sham authorization by a state hospital authority.[8] Allegations of a sham transaction test the boundaries of the state action doctrine and implicate the interpretation of a two-pronged test designed to determine whether consumer welfare-reducing conduct taken pursuant to purported state authorization is immune from antitrust challenge.[9]

In Part I of this Article, I set forth the current landscape of the state action doctrine.[10] In Part II, I explain the FTC's and the Eleventh Circuit's applications of the doctrine, highlighting the main points of contention that warrant clarification by the United States Supreme Court.[11] I discuss the

4. *See* Parker v. Brown, 317 U.S. 341 (1943) (creating the state action doctrine).

5. *See infra* Part I.B.

6. FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1378 (11th Cir. 2011) (affirming the district court's ruling that because the Georgia Legislature clearly articulated the intent to empower county hospitals to engage in anti-competitive activity, the Hospital Authority of Albany–Dougherty County's proposed acquisition of its only competitor was protected under the state action doctrine).

7. *Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, *cert. granted*, No. 11-1160, 2012 WL 985316 (June 25, 2012).

8. *Id. See generally Eleventh Circuit Hands FTC Defeat in Suit Over State Action Immunity Merger Defense*, 20 B.N.A. HEALTH L. REP. 1807 (2011).

> Although the FTC charged that the hospital authority had no real involvement in the takeover of the Palmyra hospital and that it was being used as a pawn to cloak a plainly private and plainly anticompetitive transaction with state action protection, the [Eleventh Circuit] had no interest in going down this road.

Id. (internal quotations omitted).

9. *See infra* Part II.B.

10. *See infra* Part I.

11. *See infra* Part II.

Court's interpretive options on certiorari in Part III.[12] There, I argue the Court should impose a higher standard than the Eleventh Circuit under the first prong of the test, which asks whether a state has clearly articulated a policy of displacing competition.[13] I also explain a conflict between the FTC and Eleventh Circuit under the second prong of the test, which asks whether private parties acting pursuant to a clearly articulated policy are actively supervised by the state.[14] I explain that both incorrectly interpret the implications of a sham transaction, and I resolve the resulting conflict through the lens of federalism principles and consideration of alternative checks on unnecessarily anticompetitive state action.[15] Finally, in Part IV, I present alternative options that can be taken to ensure the state action doctrine does not lead to the joint destruction of federalism and competition.[16]

I. PRIMER ON STATE ACTION IMMUNITY

A. THE BASIC DOCTRINE: *PARKER V. BROWN* AND ITS PROGENY

State action immunity is rooted in principles of federalism and finds its basis in the 1943 U.S. Supreme Court case of *Parker v. Brown*.[17] In *Parker*, the Court held that the State of California did not violate the Sherman Antitrust Act by enacting legislation that permitted raisin growers in the state to fix prices.[18] A raisin producer challenged a California program that authorized "stabilization" of the raisin market through state-controlled output.[19] The producer argued the program constituted a "contract, combination . . . or conspiracy, in restraint of trade" in violation of section one of the Sherman Act.[20] The Court rejected the claim, concluding the Sherman Act's legislative history did not suggest Congress intended to restrain state action but rather its purpose was to regulate private actors.[21] The Court held the program was immune from a Sherman

12. *See infra* Part III.
13. *See infra* Part III.B.
14. *See infra* Part III.B.2.
15. *See infra* Part III.B.2.
16. *See infra* Part IV.
17. Parker v. Brown, 317 U.S. 341, 352 (1943) (finding that a state's directive is not unlawful under the Sherman Act because the Sherman Act is a prohibition on certain *individual's* actions, not state action).
18. *Id.* at 352.
19. *Id.* at 348.
20. *See id.* at 350 (quoting 15 U.S.C. § 1 (2006)) (first alteration in original).
21. *See id.* at 351. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 15–90 (1978) (outlining the legislative history and early interpretation of

Act challenge because the Act was not intended to restrain the state's actions taken in its capacity as a sovereign entity.[22] This conclusion held despite the producer's key role in the establishment of the program; ultimately, the *Parker* Court concluded the state adopted and enforced the program, rendering it an execution of a governmental policy and thus immune from the reach of the Sherman Act.[23]

Parker left open the issue of whether and to what extent state-authorized private action may be shielded from the antitrust laws. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[24] the Court resolved this question by setting forth a two-pronged test for determining whether private action was sufficiently intertwined with the state to warrant immunity.[25] Pursuant to California law, wine wholesalers were required to post resale price schedules for the wine they sold and were prohibited from deviating from the prices they posted.[26] Midcal, a wine wholesaler, failed to post a price schedule for some wines and sold twenty-seven cases of wine at prices below an effective price schedule.[27] Accordingly, the Department of Alcoholic Beverage Control charged Midcal with violating the pricing system.[28] Midcal sought an injunction against the pricing system, alleging the scheme violated the Sherman Act.[29]

The U.S. Supreme Court, interpreting precedent that refined *Parker*'s general doctrine,[30] held that state action required both a clearly articulated state policy and active supervision of that policy's implementation.[31] In *Midcal*, the state clearly permitted resale price maintenance and therefore

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the Sherman Act).

22. *See Parker*, 317 U.S. at 352.

23. *Id.*

24. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

25. *See id.* at 105.

26. *See id.* at 100.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See, e.g.*, City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 417 (1978) (finding state action immunity where the state's policymaker actively supervises implementation of the policy); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (finding state action immunity pursuant to a "clearly articulated and affirmatively expressed" goal of displacing unfettered business freedom in the automobile dealership industry); Cantor v. Detroit Edison Co., 428 U.S. 579, 598 (1976) (finding that a state's passive acceptance of a public utility's tariff did not confer immunity on the utility); Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975) (distinguishing between merely prompting anticompetitive conduct and directing others to engage in it, and finding immunity in only the latter circumstance); *see Midcal*, 445 U.S. at 104–05.

31. *See Midcal*, 445 U.S. at 105.

satisfied the first of these requirements.[32] The state failed, however, to actively supervise the resale price maintenance; rather than establishing or reviewing the reasonableness of resale prices, the state merely authorized and enforced the prices that private parties established.[33] Essentially, the state declared conduct lawful that ordinarily violates the Sherman Act,[34] an authorization outside the scope of the state action doctrine.[35] Thus, state action immunity did not apply to the program.

The Court later reaffirmed the applicability of state action immunity to private parties in *Southern Motor Carriers Rate Conference, Inc. v. United States*.[36] The Court also refined the first prong of *Midcal*, finding that a state action need not compel private parties to engage in anticompetitive activity in order to establish a clearly articulated state policy.[37] Accordingly, state laws that permitted motor common carriers to collectively propose rates for approval by a governmental commission—but that also permitted the common carriers to submit proposals individually—clearly articulated a policy to displace competition in ratemaking.[38] The Court similarly held in *Town of Hallie v. City of Eau Claire*[39] that compulsion to act in contravention of the Sherman Act is not necessary to satisfy the clear articulation prong.[40] *Hallie* established the often-cited proposition that clear articulation merely requires anticompetitive conduct to be a "foreseeable result" of implementation of a state regulatory regime.[41]

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,[42] the Court declared that the existence of corruption in a private entity's obtainment of favorable treatment from a municipality does not render that treatment

32. *See id.*

33. *See id.* at 105–06.

34. *See id.* at 103; Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881 (2007). At the time the case was decided, resale price maintenance was a per se violation of the Sherman Act. *PSKS, Inc.*, 551 U.S. at 881. The Court has since eschewed application of the per se rule in favor of the rule of reason. *Id.*

35. *See Midcal*, 445 U.S. at 106 (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.").

36. *See* S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 61 (1985) (holding that the two-prong test in *Midcal* was applicable to a state action immunity claim by a private party).

37. *See id.*

38. *Id.* at 61–62.

39. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

40. *Id.* at 47.

41. *Id.* at 42; *see infra* Part I.B. (explaining that a chasm exists between lower courts concerning the meaning of "foreseeability" in the context of the state action doctrine).

42. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991).

unforeseeable and thus unauthorized; there is no conspiracy exception to state action immunity.[43] Omni, a billboard builder, challenged city zoning ordinances allegedly designed to benefit Columbia Outdoor Advertising ("COA"), a competing billboard builder that Omni claimed unduly influenced the enactment of the ordinances.[44] COA's owner was allegedly personal friends with the mayor and various city council members and used his relationship with government officials to elicit special treatment that gave COA a competitive advantage over Omni.[45] Omni claimed state action immunity did not apply where corruption is the cause of the challenged conduct.[46] It proposed a definition of corruption that included "any governmental act not in the public interest."[47] The Court rejected the existence of a conspiracy exception to state action immunity, reasoning that such a rule would subject regulatory decisions to "*ex post facto* judicial assessment of the public interest."[48] The rule would be contrary to principles of federalism, permitting courts to opine on state policies and to apply a subjective test that asks whether public officials thought their actions were taken in the public interest.[49] The Court also pointed out that Congress has passed other laws designed to combat corruption in state and local governments; the Sherman Act does not create a code of ethics for political activity.[50]

The *Hallie* Court also refined the requirements of the second *Midcal* prong, finding the active supervision requirement does not apply to actions taken by municipalities (as opposed to private parties) pursuant to state policy.[51] The Court explained that the purpose of the state-supervision requirement is to ensure the action is being taken in furtherance of state policy.[52] Where a government entity is the actor, it is presumed to be pursuing state policy; thus, there is little risk the government entity is engaging in activity designed for private benefit.[53]

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43. *Id.* at 374.
44. *Id.* at 368–69.
45. *Id.* at 367.
46. *Id.* at 376.
47. *Id.* (internal quotation marks omitted).
48. *Omni Outdoor Adver., Inc.*, 499 U.S. at 377 (internal quotation marks omitted).
49. *Id.*
50. *Id.* at 378–79 (citing E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 140–41 (1961)).
51. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985).
52. *Id.*
53. *See id.* at 45, 47. *But see* Cooper & Kovacic, *supra* note 2, at 1560. Public choice theory suggests the risk may not be as small as the Court suggested. *Id.*

Therefore, the Court created a bright-line rule precluding municipalities from the active supervision requirement.[54]

For those subject to the active supervision requirement, the Court explained in *Federal Trade Commission v. Ticor Title Insurance Co.*[55] that "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State."[56] The circuit court had held there was active supervision due to "the existence of a state regulatory program, if staffed, funded, and empowered by law."[57] Contrary to the circuit court's standard, the U.S. Supreme Court concluded that the second *Midcal* prong required real, active supervision.[58] The conduct involved ratemaking by insurance rating bureaus, which was subject to state review.[59] According to the Court, two of the states whose programs were being challenged failed to review the ratemaking because they permitted the rates to go into effect *unless the state challenged them.*[60] That is, a default rule that inaction by the state should be construed as permission to set rates is not adequate supervision. The "vague *imprimatur* in form and agency inaction in fact" rendered the states' supervision inadequate to satisfy *Midcal*'s standard.[61] In short, more than the mere presence of a supervisory role is needed for state action immunity to apply; *active* supervision must exist.

The common thread running throughout the U.S. Supreme Court's application of state action immunity is the fulfillment of the doctrine's underlying purpose: to promote principles of federalism without unduly sacrificing national competition policy at the discretion of those pursuing private interests.[62] The Court has continually emphasized that there must be sufficiently clear reason that a state deliberately sacrificed competition in the pursuit of alternative social policies; the clear articulation requirement seeks to discern the state's intent.[63]

Additionally, the Court has recognized that the participation of private parties in state-sanctioned activities is inevitable.[64] *Midcal*'s active

54. *Town of Hallie*, 471 U.S. at 47.
55. FTC v. Ticor Title Ins., Co., 504 U.S. 621 (1992).
56. *Id.* at 638.
57. *Id.* at 632.
58. *Id.* at 633.
59. *Id.* at 629.
60. *Id.* at 638 (finding that, in Wisconsin and Montana, inaction was taken as substantive approval).
61. *Ticor Title, Ins., Co.*, 504 U.S. at 623.
62. *Id.* at 632–33.
63. *Id.* at 633.
64. *See* Patrick v. Burget, 486 U.S. 94, 100–01 (1988) (allowing the state-action doctrine to protect those private parties who further state regulatory policies).

supervision requirement accommodates this reality while requiring that those implementing the state's policy are pursuing the public interest rather than private interests.[65] Furthermore, the decision whether the active supervision requirement must be satisfied in the first place distinguishes and immunizes politically motivated activity that should be corrected through political accountability rather than judicial overreaching.[66] Preserving principles of federalism requires courts applying the state action doctrine to walk a narrow path between subjecting state policy goals to the whims of private interests and sacrificing sovereign immunity in the name of national competition policy. The proper interpretation by lower courts of what constitutes state action immunity is thus difficult—but essential—to pursuing the public interest.

B. LOWER COURT INTERPRETATIONS OF THE STATE ACTION DOCTRINE

By definition, state laws immunized by the state action doctrine permit competition to be sacrificed in the pursuit of alternative public interests.[67] Overbroad application of state action immunity poses the danger of casting aside both state sovereignty and competition and permitting private interests to benefit at the public's cost.[68] The nature of publicly sanctioned displacement of competition enhances the ability of private interests to engage in anticompetitive conduct because it creates an environment in which private entities are encouraged to act in their own interests.[69] For example, many states have so-called post-and-hold schemes as part of their regulation of alcohol distribution.[70] Such schemes require alcohol wholesalers to publicly post the future prices at which they will resell their products and prohibit the wholesalers from deviating from those prices.[71] These laws encourage price fixing because they facilitate agreement upon prices and prohibit wholesalers from cheating on the

65. *Ticor Title Ins., Co.*, 504 U.S. at 634.

66. *Id.* at 636 (stating that real compliance with *Midcal's* test will ensure that the State will be responsible for any price fixing which it sanctions).

67. *See* Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 744 (2012) (discussing how the Supreme Court found that Congress must explicitly declare that states are not to be exempt from anticompetitive policies, or else the states can continue their acts under the state action doctrine).

68. *See Ticor Title Ins., Co.*, 504 U.S. at 622.

69. *See* Cooper & Kovacic, *supra* note 2, at 1560; Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 23–24 (1984).

70. *See* Cooper & Wright, *supra* note 3; *see also* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 99 (1980) (discussing a California post-and-hold law).

71. *See* Cooper & Wright, *supra* note 3.

legalized cartel.[72] The "fundamental principle governing commerce in this country" is a regime of competition.[73] For this reason, immunization from the antitrust laws is disfavored.[74] Many states operate under a similar governing principle of commerce.[75] Therefore, the grant of state action immunity is disfavored unless the state clearly intends to override the presumption.[76] Overbroad application of state action immunity threatens to upend the principle, simultaneously harming consumers and deriding principles of federalism. For this reason, state action immunity has been of ongoing interest to courts, the FTC, and scholars alike.

In 2003, the FTC issued a report documenting the legal landscape of the state action doctrine, identifying conflicts in lower court interpretation of U.S. Supreme Court precedent, and proposing ways in which courts can clarify application of the doctrine.[77] One major concern arising from the study was the expansive interpretation of the clear articulation prong from *Midcal*.[78] The FTC noted that lower courts have grasped onto the concept of "foreseeability" from *Hallie*, and, in doing so, have failed to advance the goals underlying the state action doctrine.[79] It emphasized the fact that *Southern Motor Carriers*, decided the same day as *Hallie*, made no mention of foreseeability as the standard for finding clear articulation.[80] The absence of the reference to foreseeability in *Southern Motor Carriers* therefore supports the proposition that while the concept is a useful tool for determining whether a state has clearly articulated a policy of displacing competition, it is by no means the standard by which to measure clear articulation.[81] Similarly, Professors Phillip E. Areeda and Herbert Hovenkamp have explained that "the meaning of 'foreseeable' is not self-evident."[82] As an example, where a state legislature has vested land-use-planning power in a municipality, the power to create monopolies is unlikely to be a foreseeable result.[83] Furthermore, Professors Areeda and

72. *Id.*

73. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978).

74. *Id.* (finding that antitrust laws will be enforced unless they are "plainly repugnant").

75. FTC v. Ticor Title Ins., Co., 504 U.S. 621, 636 (1992).

76. *Id.*

77. *See* OFFICE OF POLICY PLANNING, FTC, REPORT OF THE STATE ACTION TASK FORCE 5 (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf [hereinafter FTC STATE ACTION REPORT].

78. *See id.* at 26.

79. *Id.*

80. *Id.* at 11; *see* S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985).

81. FTC STATE ACTION REPORT, *supra* note 77, at 11.

82. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 225b3, 144 (3d ed. 2006).

83. *Id.*

Hovenkamp caution against a clear articulation inference from the mere grant of ordinary corporate powers to a political subdivision.[84]

Some courts have disregarded this warning and made precisely such an inference. For example, the Eleventh Circuit has held the power of a state hospital to acquire other hospitals is evidence of a legislative intent to displace unfettered competition.[85] Importantly, the legislature enacted the statute in that case at a time when only one hospital existed in the relevant geographic market.[86] Thus, it was foreseeable that competition would be harmed as a result of an acquisition by the monopoly hospital.[87] Based upon this fact, the Fifth Circuit distinguished the Eleventh Circuit's opinion when it denied immunity to a state hospital that operated under a statute designed to eliminate a competitive disadvantage between the state hospital and private hospitals.[88] The Fifth Circuit distinguished statutes that contemplate anticompetitive activity from ones that "merely allow . . . municipalit[ies] to do what other businesses can do."[89] It thus cautioned against an "overly lax" application of the clear articulation standard similar to the Eleventh Circuit's.[90]

> To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.[91]

Similarly, inferring immunity from the mere grant of other ordinary corporate powers would disserve principles of federalism as well as competition policy.[92]

Courts have also disagreed in interpreting the active supervision requirement. The Supreme Court has broadly outlined the requirements for active supervision,[93] but it has never articulated the precise contours of the

84. *Id.* ¶ 225b4 at 151.

85. FTC v. Hosp. Bd. of Dirs. of Lee Cnty., 38 F.3d 1184, 1192 (11th Cir. 1994).

86. *See id.*

87. *Id.*

88. Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish, 171 F.3d 231, 236 (5th Cir. 1999).

89. *Id.* at 235; *see also* AREEDA & HOVENKAMP, *supra* note 82, ¶ 225b4, at 151 ("Ordinary corporate powers do not contemplate antitrust violation.").

90. *Hammond*, 171 F.3d at 236 (emphasizing that a monopoly existed at the time of the enactment of the statute analyzed by the Eleventh Circuit and criticizing the Eleventh Circuit's opinion as "skating close to an overly lax view of the necessity of expressed legislative will").

91. *Id.*

92. *See* AREEDA & HOVENKAMP, *supra* note 82, ¶ 225b4, at 151.

93. *See* FTC STATE ACTION REPORT, *supra* note 77, at 20.

requirement.[94] It is clear, however, that its purpose is to ensure state authorization to engage in a given activity is actually being used in the public's interest and is therefore attributable to the state itself.[95] Thus, "[t]he state's supervision must reach the *substantive merits* of the challenged conduct, and the state's involvement must be meaningful."[96]

Circuit courts have disagreed upon the acceptable degree of supervision. The Tenth Circuit has broadly interpreted the requirement, finding the Oklahoma Corporation Commission's general supervisory authority over a state-regulated electric utility was sufficient supervision to satisfy the legal requirement.[97] Notably, the court did not address whether this supervisory authority satisfied *Ticor*'s holding that active supervision mandates supervision in fact and not simply the potential for supervision.[98] In contrast, the Second Circuit, citing *Ticor*, reversed and remanded a district court's holding that the state action doctrine immunized private conduct; the plaintiffs alleged the defendants exceeded the scope of the enabling statute's authorization and the defendants' contract with the state's political subdivision.[99] "[A] private party is not exempted from the 'active supervision' prong of the *Midcal* test simply by virtue of purporting to act pursuant to a contract with a governmental entity that itself would be entitled to state action immunity."[100] Though the Second Circuit did not hold that state action immunity did not apply, it made clear that more than a mere claim of compliance with a government's contract is necessary to obtain immunity.[101] The Ninth Circuit has discerned one type of state law

94. *See id.* at 52–53.

95. *See id.* at 53 (discussing that active supervision is designed to ensure that the anticompetitive action of a private party is shielded from antitrust liability when the state has made the challenged conduct its own).

96. *Compare id.* at 22 (relating this level of review to the state's supervision of private conduct) (emphasis in original), *with infra* notes 97–105 and accompanying text (stating different levels of judicial review of state supervision and noting that there is no consensus between the different circuits on the degree to which a court may inquire into the state's supervision).

97. *See* Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220, 1226 (10th Cir. 2001) (finding that the Commission's general authority over the gas and electric company met the *Midcal* requirement of state active supervision).

98. *See id.* at 1225–27 (applying only the *Midcal* test); *see also* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992) ("The mere potential for state supervision is not an adequate substitute for a decision by the state."); AREEDA & HOVENKAMP, *supra* note 82, ¶ 226c2 ("[T]he Supreme Court's *Ticor Title* decision, which the Tenth Circuit did not cite, made clear that active supervision requires not merely the statutory authorization to supervise, but evidence that the Commission has undertaken supervision in fact.").

99. *See* Lafaro v. N.Y. Cardiothoracic Grp., PLLC, 570 F.3d 471, 479–80 (2d Cir. 2009) (remanding to the district court and citing *Ticor* as guidance).

100. *Id.* at 480.

101. *See id.* (stating that the defendants must show that they were actually supervised).

to which it may be unnecessary to apply the active supervision prong: self-policing statutes.[102] An example of this type of statute would be one that specifies a permissible price margin between wholesale and retail prices.[103] The Ninth Circuit distinguished such a statute from the one it analyzed, finding no active supervision took place when the state permitted an electric utility to refuse consent to other electric companies that wished to use its electricity-transmission facilities to provide service to their customers.[104] By providing the electric utility with complete control to refuse consent to its competitors, the state failed to actively supervise the utilities, thus leaving the utility subject to the antitrust laws.[105]

II. *PHOEBE PUTNEY* PROVIDES AN OPPORTUNITY TO CLARIFY THE STATE ACTION DOCTRINE

A. THE DISTRICT AND CIRCUIT COURT DECISIONS

Phoebe Putney[106] illustrates the key disagreements among circuit courts of appeal concerning application of the state action doctrine. The decision also conflicts with the views of many scholars and policymakers regarding the doctrine's purposes and proper application.[107] Its broad reading of the clear articulation prong implicates the tension between principles of federalism and national competition policy, skewing the balance between the two in a way that threatens to erode both.[108] Furthermore, the facts of the case lend themselves to a U.S. Supreme Court decision providing a much-needed clearer statement of the active supervision requirement.[109] The case involves an FTC challenge of the merger of two hospitals to create a virtual monopoly for inpatient general acute-care services in the relevant geographic area.[110] The structure of the

102. *See* Snake River Valley Elec. Ass'n v. PacifiCorp, 238 F.3d 1189, 1194 (9th Cir. 2000) (discussing that self-policing statutes are an exception to the active supervision requirement).

103. *Id.* (citing 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n.6 (1987)).

104. *See id.* at 1194 (stating that by giving the electric company the option to opt out by refusing consent, the state has essentially given a private company partial control over the no competition policy).

105. *Id.* at 1194 (stating that this partial control by the private company fails the *Midcal* active supervision prong).

106. FTC v. Phoebe Putney Health Sys. Inc., 663 F.3d 1369 (11th Cir. 2011).

107. *See infra* Part II.C (discussing the scholarly reactions).

108. *See infra* Part III.A.1.

109. *See infra* Part III.A.2 (discussing the possibility that the Supreme Court may reinforce the second prong of *Midcal).*

110. *See Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1374 (stating that the FTC began investigations suspecting the merger would result in a monopoly).

acquisition implicated Georgia's Hospital Authorities Law, which in turn, created a hospital authority with "broad powers to meet the public health needs of its community."[111] The structure of the transaction is a relatively important feature of the analysis. The Hospital Authority of Albany-Dougherty County ("Authority") leased Phoebe Putney Memorial Hospital ("Memorial") to Phoebe Putney Memorial Hospital, Inc. ("PPMH"); the lease authorized PPMH to set prices for Memorial's services.[112] In mid-2010, PPMH's parent company, Phoebe Putney Health System Inc. ("PPHS"), began negotiations with HCA, Inc., for the acquisition of HCA's subsidiary, Palmyra Park Hospital ("Palmyra").[113] Upon the realization that it would be difficult to find an investment bank to issue a "fairness opinion" finding the substantial acquisition price was fair, the parties decided to structure the transaction so that the Authority would purchase Palmyra and lease it to PPHS for one dollar per year for forty years.[114] PPHS agreed to guarantee the purchase price and the Authority's performance under the purchase agreement.[115] The Authority held a hearing at which its board members were given minimal time to substantively review the proposal yet approved the acquisition anyway.[116] The Authority later clarified that it planned to lease Palmyra's and PPMH's assets to Phoebe Putney (collectively, PPHS, PPMH, and another PPHS subsidiary) under a single lease.[117] Thus, the FTC alleged, the plan called for Phoebe Putney to ultimately lease and operate both Palmyra and Memorial from the Authority, effectively merging the competitors.[118] The FTC alleged the solution was attractive to the parties because they believed it would avoid the risk of antitrust enforcement.[119] Nevertheless, the FTC challenged the acquisition, as well as the state action immunity defense.[120]

The FTC alleged the acquisition of Palmyra by the Authority and subsequent lease of Palmyra to Phoebe Putney would violate section seven of the Clayton Antitrust Act because it would substantially lessen competition in the inpatient general acute-care hospital services market in

111. *Id.* at 1372.
112. *See id.* at 1373 (discussing the lease provisions).
113. FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356, 1360 (M.D. Ga.), *aff'd*, 663 F.3d 1369 (11th Cir. 2011).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 1361.
119. *Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d at 1360.
120. *Id.* at 1361.

Dougherty County and its surrounding areas.[121] The FTC challenged the defendants' state action defense on grounds that there was no clearly articulated state policy overriding unfettered competition in hospital operations and that the Authority's nominal involvement in the merger did not and could not constitute state action.[122] It alleged the Authority's involvement was a sham intended only to avoid antitrust scrutiny.[123] Both the district court and the Eleventh Circuit disagreed with the FTC, with both courts finding the state action doctrine immunized the merger from the antitrust laws.[124]

In both the district court and the Eleventh Circuit, the clear articulation analysis hinged upon whether an anticompetitive merger was a reasonably foreseeable result of the law's grant of powers when the Georgia Hospital Authorities Law was enacted.[125] The courts relied upon *Federal Trade Commission v. Hospital Board of Directors of Lee County*[126] in support of the proposition that *Hallie* required only reasonable foreseeability of anticompetitive conduct arising from a regulatory scheme to establish clear articulation.[127] The district court held the combination of the Authority's power to acquire and lease hospitals, to operate on a nonprofit basis, to operate in a limited geographic area, and to "either *directly or indirectly*" operate hospital networks demonstrated that Georgia's legislature "intended to guarantee that hospital authorities could accomplish their mission of promoting public health notwithstanding the anticompetitive results."[128]

The Eleventh Circuit also found important the fact that the Georgia Hospital Authorities Law empowered the Authority to acquire and lease hospitals.[129] The court reasoned it would have been highly unlikely for the Georgia legislature to believe competition would be so vigorous that no anticompetitive mergers could be contemplated.[130] It therefore concluded that the legislature reasonably anticipated anticompetitive harm could result

121. Complaint ¶ 1, *Phoebe Putney Health Sys. Inc.*, 793 F. Supp. 2d 1356 (No. 1:11-cv-58).

122. *See* Corrected Brief of Appellant at 21–22, FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011) (No. 11-12906-EE).

123. *Id.* at 26.

124. FTC v. Phoebe Putney Health Sys. Inc., 663 F.3d 1369, 1378 (11th Cir. 2011); *Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d at 1381.

125. *Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1376; *Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d at 1375.

126. FTC v. Hosp. Bd. of Dirs. of Lee Cnty., 38 F.3d 1184 (11th Cir. 1994).

127. *Id.* at 1188.

128. *Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d at 1377.

129. *Id.*

130. *Id.*

from hospital acquisition by the authorities; thus, when enacting the law, the legislature clearly articulated a policy that authorized displacement of competition.[131] In other words, because anticompetitive mergers are a likely, if not inevitable, subset of the mergers over which the Authority was granted jurisdiction, the state's silence with respect to competition concerns could be interpreted as a clearly articulated state policy. Accordingly, the Eleventh Circuit held the state action doctrine immunized the Authority from antitrust liability.[132]

The Eleventh Circuit considered the multiple transfers of management authority to collectively compose a single transaction—the acquisition of Palmyra by the Authority.[133] The district court held the Authority directed the challenged activity, thus immunizing Phoebe Putney's action from antitrust liability.[134] The Eleventh Circuit did not address whether Phoebe Putney was subject to the Clayton Act, and instead relegated the discussion to a footnote and found the FTC's claim constituted second guessing of the intent underlying the Authority's approval—an inquiry prohibited by U.S. Supreme Court precedent.[135] The FTC had in fact argued the Authority's involvement did not constitute state action at all because the challenged conduct was a merger between private hospitals.[136] Under this theory, it would be unnecessary to consider whether the transaction was immune from antitrust liability.[137] The Eleventh Circuit disagreed, finding a single transaction approved by the Authority.[138] Thus, it considered the FTC's claim to be that the alleged sham transaction was unforeseeable and therefore unauthorized, failing to satisfy the clear articulation prong.[139]

131. *Id.*

132. *Id.* at 1381.

133. *Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1376 n.11 (11th Cir. 2011).

134. *Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d at 1379, *aff'd*, 663 F.3d at 1369. In addition to the state action doctrine, the district court considered the private parties' immunity under the *Noerr-Pennington* doctrine, which is related to the state action doctrine but immunizes from antitrust liability the petitioning of government authorities rather than actions taken pursuant to the direction of the state and principles of common-law agency. *Id.* at 1379–80. Further discussion of the *Noerr-Pennington* doctrine and agency is outside the scope of this paper, as they are not the subject of the FTC's appeal and figure only tangentially in the case.

135. *Id.* at 1376 n.12.

136. Petition for Writ of Certiorari at 29, FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011) (No. 11-1160), *available at* http://www.ftc.gov/os/caselist/1110067/120323phoebeputneypetition.pdf.

137. *See id.*

138. *Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1376 n.12.

139. *Id.*

B. THE FTC'S PETITION FOR WRIT OF CERTIORARI

The FTC filed a petition for writ of certiorari that raises two issues for review.[140] First, it presents the question concerning the appropriate interpretation of foreseeability of anticompetitive conduct.[141] The FTC also argues that there is a circuit split on the standard required to demonstrate clear articulation.[142]

The FTC argues that a higher standard than the one the Eleventh Circuit implemented is warranted because it more adequately addresses the concerns of protecting federalism, which underlie the state action doctrine and are outlined in Supreme Court precedent.[143] Under the higher standard, the Georgia Hospital Authorities Law does not clearly articulate a state policy of displacing competition because it merely vests authorities with the same powers as other state laws vest ordinary businesses.[144] According to the FTC, the standard the Eleventh Circuit applied would encompass an overly broad range of conduct that would unintentionally undermine national competition policy in the name of federalism.[145]

Second, the FTC presents the question of whether the Authority's passive role can be construed as state action or whether its approval of the merger was a sham.[146] It argues state supervision over the transaction was inadequate to satisfy the requirement that states exercise independent judgment and control over authorized conduct so that it is clear the state intervention was deliberate.[147] The FTC analogizes the Authority's role in the acquisition to that of a notary public.[148] That is, it merely "rubberstamped" a merger negotiated and agreed to by private parties.[149] Essentially, the Authority was only involved in the transaction for the purpose of avoiding antitrust scrutiny; its involvement was otherwise a sham.[150]

140. *See* Petition for Writ of Certiorari, *supra* note 136, at I.
141. *Id.*
142. *Id.* at 11.
143. *Id.* at 13.
144. *Id.*
145. *See id.* at 22–23.
146. *See* Petition for Writ of Certiorari, *supra* note 136, at 28.
147. *Id.* at 27.
148. *Id.* at 28.
149. *See* FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1376 n.12 (11th Cir. 2011).
150. Petition for Writ of Certiorari, *supra* note 136, at 7.

C. SCHOLARLY REACTIONS TO *PHOEBE PUTNEY*

There is limited scholarly commentary on the Eleventh Circuit's decision because it was handed down so recently; however, the commentary that does exist is quite effective. Professor Hovenkamp argues the court's broad grant of immunity gives reason for concern.[151] Like the FTC, he identifies a circuit split on the issue of foreseeability. Professor Hovenkamp finds that the Eleventh Circuit has carried the idea of "authorization" too far.[152] Whereas other circuits have required legislatures to have contemplated the possibility of approving conduct that violates the antitrust laws, the *Phoebe Putney* court required only that the legislature contemplate engagement in "ordinary corporate activities" in order to find authorization of such conduct.[153] Professor Hovenkamp argues *Phoebe Putney*'s interpretation is wrong for two reasons. First, many states' antitrust laws clarify that the authorization of firms to acquire other firms does not exempt them from antitrust liability.[154] Second, finding immunity based upon a grant of ordinary corporate powers would create an exemption for most activities engaged in by corporations.[155] Such a broad grant of immunity fails to fulfill the purpose of the state action doctrine: to permit states to displace competition where they *intend* to do so[156] and have the ability to regulate actions taken pursuant to their expressed intent.

Professor Peter C. Carstensen has also criticized an overly broad interpretation of the clear articulation standard.[157] It is true that the *Hallie* Court used the term "foreseeable" in its opinion; however, based upon the statute at issue in that case, Professor Carstensen argues the term should be "equated with substantially certain."[158] Contemplation of anticompetitive conduct in *Hallie* occurred when the legislature provided a means for resolving disputes over potentially anticompetitive refusals to deal.[159] In relation to *Phoebe Putney*, Professor Carstensen described the district court's finding of immunity to be an indication of a judicial tendency away from interfering with state and local governments, even in the face of "what

151. *See* Herbert J. Hovenkamp, Antitrust's State Action Doctrine and the Ordinary Powers of Corporations 6–7 (July 12, 2012) (unpublished research paper on file with University of Iowa College of Law), *available at* http://ssrn.com/abstract=2012717.

152. *Id.* at 2.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* at 3.

157. Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where is Attorney General "Waldo"?*, 56 ANTITRUST BULL. 773, 778 (2011).

158. *Id.* at 791 n.62.

159. *Id.*

appear to be transparent manipulations of the category of state action."[160] Accordingly, a broad interpretation of what constitutes clear articulation enables private parties to abuse state action immunity to satisfy their anticompetitive goals—a consequence the U.S. Supreme Court has sought to avoid through its limitations on the doctrine's applicability.[161]

III. HOW THE U.S. SUPREME COURT MIGHT RULE AND HOW IT SHOULD

The state action doctrine is a source of great confusion in the lower courts. The confusion has serious consequences both with respect to the purposes of the antitrust laws—protecting consumer welfare by sanctioning abuses of the competitive process—and the principles of federalism. In granting certiorari in *Phoebe Putney*, the U.S. Supreme Court has indicated it recognizes the implications of state action immunity and that the issue is ripe for further clarification.

A. POSSIBLE INTERPRETATIONS

There are a number of areas in which the Court can clarify the state action doctrine.[162] This Article limits the analysis to the two most prominent areas in which clarification is warranted: the *Midcal* prongs. First and most obviously, *Phoebe Putney* exemplifies the growing disparity in interpreting *Midcal*'s clear articulation prong. Second, the case raises the issue of whether a sham transaction constitutes state action.[163] I will discuss each in turn.

160. *Id.* at 775.

161. *Id.* at 779. The Court has limited state action immunity in situations where the state has indicated a desire to displace competition when private parties are involved and where the state not only has the capacity to but actively does supervise the activity it authorizes. *Id.* at 778. For a lengthier discussion of the limitations on the state action doctrine, see *infra* Part III.B.

162. *See* FTC STATE ACTION REPORT, *supra* note 77. *See generally* Crosby v. Hosp. Auth. of Valdosta & Lowndes Cnty., 93 F.3d 1515 (11th Cir. 1996) (discussing whether a bright-line rule is appropriate). For example, although Eleventh Circuit law treats hospital authorities, which are subdivisions of municipalities, as political subdivisions, their possession of both public and private characteristics makes it unclear whether such a bright-line rule is appropriate. *Crosby*, 93 F.3d at 1522, 1524. The FTC does not challenge the Authority's status as a political subdivision. FTC STATE ACTION REPORT, *supra* note 77. Therefore, this Article assumes arguendo that the Authority is not a private entity that must be actively supervised by the municipality.

163. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Although the FTC did not make an active supervision argument concerning the alleged sham transaction, I argue that this issue should be considered under the active supervision prong. In the interest of clarity, I classify this argument as one concerning active supervision. *See supra* Part III.A.2.

1. Clear Articulation

The Eleventh Circuit's longstanding interpretation of the clear articulation prong adopts *Hallie*'s statement that the enacting legislature must reasonably foresee that anticompetitive conduct could result from its stated policy.[164] Yet the U.S. Supreme Court in *Southern Motor Carriers* did not use the language of reasonable foreseeability when it held state laws permitting collective ratemaking clearly stated a policy allowing the displacement of competition.[165] Rather, as the FTC, Professors Areeda and Hovenkamp, and Professor Carstensen have pointed out, something more than mere foreseeability is necessary for a state to have authorized engagement in anticompetitive activities.[166] Thus, it is plausible the Court would hold that foreseeability of competitive harm is a useful tool for determining whether state policy authorizes displacement of competition but that foreseeability alone is insufficient to be determinative. It may go further and state, as Professors Areeda and Hovenkamp have argued, that merely vesting a political subdivision with ordinary corporate powers does not suffice to authorize it to engage in anticompetitive conduct. Alternatively, the Court might decide that to best preserve principles of federalism, so long as a state authorizes a political subdivision to engage in activities that affect commerce, it may displace competition in the pursuit of its public-interested goals.

2. Active Supervision

The Court may also consider the issue of active supervision. The Eleventh Circuit did not address the issue of whether the merger of PPMH and Palmyra's assets and subsequent lease required active supervision by the Authority over Phoebe Putney.[167] The FTC alleged that the Authority, without meaningful deliberation, "rubberstamped" the proposal for it to acquire Palmyra and lease it to Phoebe Putney; the court therefore concluded that state action was altogether absent from the transaction, eliminating the need to determine whether the transaction was immune at all.[168] The absence of meaningful and independent review of the acquisition might indicate that Phoebe Putney pursued its private interests

164. Town of Hallie v. City of Eau Claire, 47 U.S. 34, 41–42 (1985).

165. S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 65 (1985).

166. AREEDA & HOVENKAMP, *supra* note 82, ¶ 225b3; FTC STATE ACTION REPORT, *supra* note 77, at 26; Carstensen, *supra* note 157, at 792.

167. Petition for Writ of Certiorari, *supra* note 136, at 28–29.

168. *Id.* at 53a.

in merging with Palmyra. Thus, the Court could use the opportunity to reaffirm *Ticor*'s mandate that supervision be active and meaningful.

However, *Omni* suggests that judicial inquiry into the underlying intent of the Authority's acquisition and lease might be inappropriate.[169] *Omni* made clear there is no conspiracy exception to the state action doctrine; therefore, the fact that state action is elicited via corruptive means does not render it unforeseeable in light of the fact that making such a determination would constitute judicial overreaching.[170] The *Omni* Court reasoned that alternative legal avenues are often available to address corruption of the political process.[171] Therefore, it is plausible the Court would hold that the Authority's authorization of the merger—even without meaningful review of whether doing so benefited the public interest—constitutes active supervision. In doing so, it would likely emphasize that antitrust law is inapposite to the complained-of conduct, and, in the interest of federalism and judicial restraint, refuse to subject private entities engaging in sham agreements with public authorities to the antitrust laws. Yet, another alternative exists. Courts have refused to subject private entities acting in concert with state entities to the antitrust laws out of concern for tangential attacks on the political process.[172] Phoebe Putney arguably works in concert with the Authority in the lease of state-owned hospitals. Therefore, the Court might hold that to preserve principles of federalism, it is appropriate to immunize private parties working in concert with state authorities.

B. WHAT IS THE COURT LIKELY TO DECIDE?

Parker established that the purpose of state action immunity is to preserve principles of federalism and thus protect certain state-sanctioned

169. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 (1991).

170. *Id.* at 374.

171. *Id.* at 378–79.

172. *See id.*

> To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed at combating corruption in state and local governments. Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade. We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is *ipso facto* . . . exempt from the operation of the antitrust laws.

Id. (internal citations and quotation marks omitted).

policies that contemplate sacrificing competition in the pursuit of alternative goals.[173] The clear articulation requirement ensures anticompetitive conduct is only immunized from antitrust scrutiny when state legislatures have contemplated such a result. The active supervision requirement ensures that the competitive harm the state sanctioned has taken place in the pursuit of the public interest and has not subjected the state's policies to private whim. A policy of free competition is presumed, and a policy overriding competition is disfavored.[174] The Antitrust Modernization Commission concluded that the Supreme Court's standards should be applied "with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm."[175] With the purpose of state action immunity in mind, it is likely the Court will narrow the doctrine to more adequately address the tension between federalism and national competition policy.

1. Clear Articulation

The Court is likely to significantly narrow the broad foreseeability standard the circuit court applied in *Phoebe Putney*. Therefore, in addressing the circuit split on what constitutes clear articulation, the Court is likely to side with the Fifth Circuit[176] over the Eleventh Circuit and conclude mere authorization of a political subdivision to engage in ordinary corporate activity does not satisfy the standard. Commentators favor a stricter standard more highly than *Phoebe Putney*'s broad foreseeability standard that essentially asks whether the authorized activity can sometimes be anticompetitive.[177] Under the stricter standard, silence will

173. *See* Parker v. Brown, 317 U.S. 341, 358 (1943) (finding the conditions imposed by the Secretary of Agriculture "must be taken as an expression of opinion by the Department of Agriculture that the state program . . . is consistent with the policies of . . . Agricultural Marketing Agreement Acts."). "We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act." *Id.*

174. *See* Fedway Assocs., Inc. v. U.S. Treasury, Bureau of Alcohol, Tobacco & Firearms, 976 F.2d 1416, 1423 (D.C. Cir. 1992) ("This [policy] derives not only from the traditional benefits of competition in terms of lower prices and improved quality, but also-as mentioned above-from the fact that a competitive alcohol market helps deter the formation of a corrupt black market.").

175. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 371 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

176. *See* Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish, 171 F.3d 231, 235–36 (5th Cir. 1999) (distinguishing *Lee County*).

177. *See, e.g., id.*; ANTITRUST MODERNIZATION COMMISSION, *supra* note 175, at 345 (discussing certain courts' applicability of the "foreseeability" standard, and other courts using "a deliberate and intended state policy" standard); AREEDA & HOVENKAMP, *supra* note 82, ¶ 225b3;

more often preserve the baseline presumption that competition is the fundamental commercial policy.[178] The Eleventh Circuit's *Phoebe Putney* foreseeability standard would require state legislatures to affirmatively foreclose the possibility of state action immunity in order to preserve competition because almost any activity a political subdivision is authorized to engage in might adversely affect competition.

Moreover, the Eleventh Circuit is flawed in its conclusion that the Georgia legislature's clearly articulated authorization of competitive harm. The court stated,

> [T]he Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities. It defies imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition. We therefore conclude that, through the Hospital Authorities Law, the Georgia legislature clearly articulated a policy authorizing the displacement of competition.[179]

The court's reasoning is flawed because it requires the reviewing court to replace the state's silence, with respect to competition policy, with an inference that the state must have contemplated competitive concerns because it would be unreasonable not to do so.[180] That inference in the face of silence from the state statute is bolstered by nothing more than the coupling of the fact that seriously anticompetitive transactions are a subset of all transactions with the implicit assumption that legislatures simply do not ever fail to contemplate policies relevant to specific subsets of groups it regulates. Were such an inference a reasonable one in the modern political economy, there would be little need for the state action doctrine.

FTC STATE ACTION REPORT, *supra* note 77, at 51 (discussing the "foreseeability" analysis and a different, "clear articulation" standard); Carstensen, *supra* note 157, at 792 (discussing Mercatus Group, LLC v. Lake Forest Hosp., 641 F.3d 834 (7th Cir. 2011), where the Lake Forest Hospital lobbied to prevent Mercatus Group from opening a competing medical center and succeeded, the court excused this behavior).

178. *See Fedway Assocs., Inc.*, 976 F.2d at 1423 (reasoning that traditional benefits of fair competition improve quality and lower prices for consumers).

179. FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1377 (11th Cir. 2011).

180. *Id.* ("[T]he Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities.").

It is unlikely the U.S. Supreme Court would sanction such a broad standard that relates so tangentially to the preservation of federalism and grants antitrust immunity so freely.[181]

2. Active Supervision

Midcal's active supervision prong presents a more difficult issue.[182] It is plausible that the U.S. Supreme Court would avoid consideration of the active supervision requirement if it found the Georgia legislature did not clearly articulate a policy authorizing displacement of competition. It also has the alternative of finding clear articulation and remanding to the Eleventh Circuit to consider the active supervision prong. However, it could consider *Midcal*'s second prong as applied to Phoebe Putney's engagement of the Authority in the acquisition and its subsequent lease of Memorial and Palmyra.[183] Relying upon *Ticor*'s statement that a state may not impermissibly "confer antitrust immunity on private persons by fiat,"[184] the FTC claims in *Phoebe Putney* that the Authority merely "rubberstamped" the private merger and, therefore, no state action occurred at all.[185] In doing so, it engages in an initial inquiry into whether the merger can be described as state action.[186] The Eleventh Circuit disposed of this argument on the grounds that the FTC sought to inquire into the government's deliberative process, an inquiry prohibited by *Omni*,[187] which holds that corruption in obtaining authorization to displace competition

181. *See* FTC v. Ticor Title Ins., Co., 504 U.S. 621, 636 (1992); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398–99 (1978); ANTITRUST MODERNIZATION COMMISSION, *supra* note 175, at 335.

182. Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

183. *See Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1376 (finding the issue turned on whether the state authorized the Hospital Authority of Albany–Dougherty County's acquisition of Palmyra Park Hospital, Inc., and, in doing so, clearly articulated a policy to displace competition). "That standard . . . is satisfied as long as anticompetitive consequences were a foreseeable result of the statute authorizing the Authority's conduct." *Id.* (finding that the standard was met).

184. Corrected Brief of Appellant, *supra* note 122, at 30–31; Petition for Writ of Certiorari, *supra* note 136, at 12. The FTC also relied upon other cases explaining the importance of ensuring state involvement in the transactions the state is purported to have authorized. Corrected Brief of Appellant, *supra* note 122, at 31.

185. Corrected Brief of Appellant, *supra* note 122, at 25–26; Petition for Writ of Certiorari, *supra* note 136, at 33.

186. *See* Petition for Writ of Certiorari, *supra* note 136, at 29 (first omission in original) (explaining that the court of appeals misunderstood the fact that "[t]he FTC's argument, however, went to the antecedent question whether the action complained of . . . was that of the State itself. . . .'").

187. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); *see also Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1376 n.12.

does not render the subsequent anticompetitive activity unforeseeable.[188] Such an inquiry inappropriately questions the government's decisions on when and how to properly oversee state-directed private action.[189] The FTC and the Eleventh Circuit disagreed upon the analytical element under which the complained-of activity—that is, the absence of substantive review over the merger—fell.[190]

It appears both missed the mark. The FTC, in arguing there was no state action involved in the merger between Phoebe Putney and Palmyra, relies upon analysis concerning the second *Midcal* prong—active supervision—and not an initial inquiry into whether the state took action at all.[191] The Eleventh Circuit, in rejecting the FTC's argument, relied upon *Omni*, a case rejecting the theory that corruption in eliciting anticompetitive government action was not foreseeable and thus not clearly authorized under *Midcal*'s first prong.[192] Practically, the FTC's argument is that there was no active supervision over the merger of private hospitals.[193] Because the state action doctrine's overarching goal of preserving principles of federalism cuts against second guessing the motives of public officials generally, *Omni*'s proclamation that judicial inquiry into public officials' intent is inappropriate should apply equally to *Midcal*'s first and second prongs. Therefore, the proper application of both the FTC and the Eleventh Circuit's rationales is to the active supervision requirement.

The discord highlights a problematic area in which the state has provided for official review but substantive supervision is nonexistent. The FTC's State Action Report stipulates that *Ticor* is "helpful in principle [but

188. *Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1378 n.13.

189. *Id.*

190. *Id.* at 1376 n.12.

191. *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (discussing the two-part test announced in *Midcal* requiring that the restraint to be "clearly articulated and affirmatively expressed as state policy" and actively supervised by the state); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980) (noting that it must first be established that there was actual state action before immunity may even be considered).

192. *See Phoebe Putney Health Sys., Inc.*, 663 F.3d at 1376 n.12 (explaining that an inquiry into the influence of private actors is irrelevant and impermissible in the analysis of state action authorization); *see also Omni Outdoor Adver., Inc.*, 499 U.S. at 365.

193. *See* Brief of Appellant, *supra* note 122, at 43.

> Here, *as discussed above*, PPHS, a private actor, was the driving force behind the transaction, for the purpose of gaining a monopoly over acute care hospital services in Albany and the surrounding counties—with the Authority but a strawman, set up by PPHS as the nominal acquirer of Palmyra for the express purpose of evading antitrust scrutiny.

Id. (emphasis added). "[T]he Authority had no role in negotiating the terms of the purchase . . . ." *Id.* at 27. Notably, in the active supervision section of its brief to the Eleventh Circuit, the FTC referred back to its original argument that the Authority merely "rubberstamped" the deal. *Id.*

provides] limited practical benefit" on the standard for determining what constitutes sufficient supervision.[194] *Ticor* was an extreme case in which there was a clear absence of supervision.[195] "The case therefore did not clarify the standards that would apply to the more ordinary situation in which states have provided some substantive review, but where shortcomings of that review are nevertheless apparent."[196] The report goes on to suggest a "*Ticor II*" would be useful for setting forth a standard in these more common situations.[197] *Phoebe Putney* might well be precisely that case.

The U.S. Supreme Court can resolve the apparent conflict between *Ticor* and *Omni* by emphasizing the distinction between the structure of the regulatory regimes at issue in *Phoebe Putney* and *Ticor*. Whereas the regulatory structure in *Ticor* provided for governmental inaction as the default rule for ratemaking, the regulatory structure in *Phoebe Putney* provides for a hearing, review, and approval of the Authority's acquisitions and leases.[198] Like *Ticor*, the post-and-hold law in *Midcal* failed to provide for reasonable review of the prices the wholesalers were permitted to set.[199] The judicial active supervision inquiry need not require courts to discern the degree to which a political subdivision supervised private activity. To the contrary, in furtherance of federalism principles, it should only require courts to determine whether supervision occurred. As Professors Areeda and Hovenkamp explain,

> The . . . authorization requirement should not be manipulated in such a way as to thwart the fundamental *Parker* policy against antitrust scrutiny of state action. The antitrust court should require no more than that the result of the agency's act or decision was of the sort contemplated by state anticompetitive policy.[200]

Even if private parties unduly elicited approval of anticompetitive action from a political subdivision, the fact that the political subdivision approved of it without active deliberation should satisfy the active supervision prong.

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194. FTC STATE ACTION REPORT, *supra* note 77, at 53.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Compare Ticor Title Ins., Co.*, 504 U.S. 621, 629 (1992) (discussing the fact that the regulatory structures at issue in the case operated on a "negative option" system which provided that a rate would become effective unless the state objected within a set period time, thereby permitting rulemaking by state inaction), *with* Petition for Writ of Certiorari, *supra* note 136, at 7 (explaining that the Authority was authorized to review the action taken and pursuant to such authority held a hearing and approved the transaction challenged in the case).

199. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 (1980).

200. AREEDA & HOVENKAMP, *supra* note 82, ¶ 224d2. Although the discussion concerns the first *Midcal* prong, as explained above, the rationale should apply to the second prong as well. *Id.*

Assuming *Hallie* was correct in its conclusion that there is little risk of abuse of competition exemptions by state actors, the benefits of this rule are numerous. As an initial matter, such a rule accords with U.S. Supreme Court precedent in *Omni* without completely abrogating *Ticor*'s requirement that supervision be independent and meaningful.[201] Authorization of anticompetitive conduct is a subset of the vast regulatory capabilities political subdivisions might have.[202] Moreover, the rule is a bright-line one, rather than the alternative—a standard inquiring into the degree of supervision that occurred. The rule also preserves principles of federalism because it assumes the governmental entity is subject to political accountability and favors public input over judicial inquiry into politically motivated deliberation. A related benefit is that it requires judicial restraint. These two benefits are likely to reduce error costs, assuming voters are better than courts at holding the government accountable for pursuing the public interest. Additionally, as *Omni* pointed out, antitrust law may be inapposite to providing a check on political corruption.[203] Finally, the clear articulation prong, if narrowed, would be expected to provide a strong check on political subdivisions authorizing competitively harmful activity. These benefits weigh in favor of a general rule finding the active supervision prong is satisfied even where the authorization of anticompetitive activity is alleged to be merely nominal.

IV. OTHER ANTITRUST STRATEGIES FOR HANDLING ANTICOMPETITIVE STATE LAWS

Although the U.S. Supreme Court has granted the FTC's petition for certiorari, there is a chance it will only partially resolve the problems faced by the lower courts in applying *Midcal*. In the previous Part, I explained one way for the Court to solve the problem of anticompetitive state regulation in a way that serves federalism principles as well as competition policy.[204] In this Part, I discuss alternative strategies for re-equilibrating antitrust doctrine to address the issue.

State laws supplanting competition with a regulatory regime "in the name of quality assurance and consumer protection tend to be overly

201. *See Ticor Title Ins., Co.*, 504 U.S. at 634 (explaining that an inquiry must be made to determine whether the anticompetitive conduct is the result of actual state involvement and action); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379 (1991) (holding that a challenge to state action immunity may not be based on an inquiry into the purposes behind the actions of the state sovereign).

202. *Omni Outdoor Adver., Inc.*, 499 U.S. at 370.

203. *See id.* at 383.

204. *See supra* Part II.A.2.

exclusive, prescriptive, and anticompetitive in part because [they] emerge from a political process that is highly responsive to the concerns of industry participants and comparatively neglectful of the true interests of ordinary consumer-voters."[205] Indeed, public choice theory predicts that special-interest legislation tends to be oversupplied because it narrowly confers benefits to special interest groups while widely distributing the costs on the public at large.[206] The fact that these state laws are enacted at the behest of special interests means the laws are not generally designed with the main purpose of achieving social policy goals.[207]

A prime example of such state regulation is the post-and-hold law, which *Midcal* addressed.[208] James Cooper and Professor Joshua Wright conducted a study of the competitive and social effects of post-and-hold laws, and they concluded the laws "have a predictably negative impact on alcohol consumption, but no measurable effect on drunk driving accidents and various measures of teen drinking."[209] Additionally, it is possible to tailor laws more directly at the social harms complained of.[210] Cooper and Wright's conclusion is cause for concern because the purported goal of strict alcohol regulation by states is to address the social harms associated with alcohol consumption.[211] The alternative view of state regulation displacing competition in the context of post-and-hold laws is that they "insulate wholesalers from the downward pricing pressure that comes with competition."[212] The results of Cooper and Wright's study are consistent with this view.[213] The authors go on to argue that proposed legislation that would make it more difficult to challenge these and similar state regulations is likely to result in reduced consumer welfare with no offsetting decrease in social harms.[214]

Taking the analysis a step further, permitting the state action doctrine to readily immunize anticompetitive conduct purportedly authorized by the state is likely to reduce consumer welfare.[215] It also risks vesting

205. Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. HEALTH POL. POL'Y & L. 587, 593 (2006).
206. ANTITRUST MODERNIZATION COMMISSION, *supra* note 175, at 335.
207. *Id.*
208. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 97–99 (1980).
209. Cooper & Wright, *supra* note 3, at 3.
210. *Id.*
211. *Id.* at 27.
212. *Id.* at 26.
213. *Id.*
214. *Id.* at 27.
215. Cooper & Wright, *supra* note 3, at 27.

anticompetitive decisions in private parties whose actions are directed by the state.[216] For this reason, it is important that the state action doctrine be applied to preserve policymaking authority in the state. To ensure the states only permit anticompetitive conduct when they intend to do so, courts should carefully apply the state action doctrine.[217] In the absence of clarification of the doctrine by the U.S. Supreme Court, there are a number of ways in which courts can cabin its application.

The most obvious solution is for courts to apply a clear articulation standard requiring more than mere foreseeability that authorization to engage in conduct could result in anticompetitive effects.[218] That is, a distinction should be made between authorization to participate in commercial activity and authorization to displace competition. The commentary on this standard is voluminous, including input from Areeda and Hovenkamp, Carstensen, Havighurst, the FTC, and the Antitrust Modernization Commission.[219] A stricter clear articulation standard would ensure preservation of federalism principles because it would more adequately discern whether a state actually contemplated engagement in anticompetitive conduct as part of a given regulatory scheme.

Another option is to glean a market-participant exception from dicta in *Omni* that stated, "immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[220] This exception would apply where political subdivisions engage in commercial, nongovernmental functions unless the state has explicitly vested the authority to displace competition in the political subdivision.[221]

Courts can also use the active supervision prong to narrow application of the state action doctrine. In doing so, they can differentiate hospital authorities and similar entities from municipalities when determining whether they must be actively supervised by the state. Professor Clark Havighurst contends that a distinguishing factor exists between municipalities and state licensing boards is direct political accountability.[222] The reasoning applies to entities like the Authority in *Phoebe Putney*. The Georgia Hospital Authorities Law requires that a county's governing body

216. *Id.* at 27–28.

217. ANTITRUST MODERNIZATION COMMISSION, *supra* note 175, at 334.

218. *Id.* at 336.

219. *Id.* at 343–47, 368–69, 371–72.

220. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 374–75 (1991); *see* Havighurst, *supra* note 205, at 603 (discussing the benefits of the exception).

221. Havighurst, *supra* note 205, at 604.

222. *Id.* at 598.

or municipal authority provide the sitting authority's board with a list of nominees; the board must then choose an individual from the list to be appointed as a new board member.[223] This structure leaves the board only indirectly accountable to the public for its activity. Furthermore, boards are often comprised of professionals in the relevant fields who believe themselves capable of self-regulation.[224] Carstensen explains that the more local the level of governments, the less informed scrutiny there is and the greater the risk there is "that public intervention in the market will be excessive, misguided, and unquestioned."[225] It is therefore unclear, if not unlikely, that a hospital authority has the incentive to pursue public-interested goals. As discussed above, the FTC's State Action Report finds that political subdivisions other than municipalities often possess both public and private characteristics.[226] The FTC recommends consideration on a case-by-case basis whether a political subdivision whose actions are being challenged must satisfy the active supervision prong of *Midcal*.[227]

The Antitrust Modernization Commission suggests a tiered approach to active supervision of political subdivisions.[228] Under this approach, the amount of supervision required depends upon "the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors."[229] Care should be taken in implementing this approach, as the potential exists for courts to overreach in determining the intent and subjective beliefs of the public officials who are charged with supervising the conduct at issue. It is possible to separate tiers according to the type of oversight required (e.g., rate setting versus approval of proposed rates) without inquiring into officials' intent.

Carstensen suggests there is a place for more active involvement in protecting competition by state attorneys general.[230] For example, state attorney general offices can create competition advocacy components within them.[231] The competition advocacy units would be responsible for overseeing legislation, regulations, and local ordinances likely to impact competition.[232] They would then be able to provide analysis of the

223. GA. ANN. CODE § 31-7-72 (2012).
224. Havighurst, *supra* note 205, at 598.
225. Carstensen, *supra* note 157, at 779.
226. FTC STATE ACTION REPORT, *supra* note 77, at 37.
227. *Id.*
228. ANTITRUST MODERNIZATION COMMISSION, *supra* note 175, at 373.
229. *Id.*
230. *See generally* Carstensen, *supra* note 157 (discussing the history of the relationship between state attorneys general and state and federal antitrust laws).
231. *Id.* at 817.
232. *Id.*

competitive effects of those laws and advocate on behalf of competition when they identify unnecessarily anticompetitive methods of implementing state policies.[233] Carstensen also suggests that attorney generals become more actively involved in litigation challenging anticompetitive government conduct.[234] They can either initiate the litigation or stand on the side of private parties challenging unreasonable regulation.[235]

Some commentators have called for expansion of the FTC's enforcement authority via section five of the Federal Trade Commission Act ("FTCA") to permit the Commission to fulfill its purpose of using superior expertise to guide national competition policy.[236] Susan Creighton and Thomas Krattenmaker have suggested section five enforcement can be expanded to encompass challenges to state-imposed competitive harm.[237] They suggest that the state action doctrine might not apply to the FTCA as it applies to the Sherman Act.[238] Therefore, the FTC may have the ability to pursue anticompetitive state action that private plaintiffs are currently unable to challenge. The D.C. Circuit has rejected the argument, finding no indication in the legislative history of the FTCA that Congress intended to grant the FTC the authority to challenge state laws that conflict with the antitrust laws.[239] The Supreme Court has never made a definitive proclamation on the issue. In *Ticor*, it raised the prospect that the Commission might not be barred by the state action doctrine, but the Court quickly declined to opine on the issue because the FTC did not assert superior preemption authority in the case.[240]

Professors Areeda and Hovenkamp are skeptical of an argument that the FTC is not barred by the state action doctrine.[241] They acknowledge that arguments in favor of expanded section five enforcement exist.[242] The availability of less draconian remedial action in the form of cease-and-

233. *Id.*

234. *Id.* at 821.

235. *Id.*

236. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The Great Doctrinal Debate: Under What Circumstances Is Section 5 Superior to Section 2? (Jan. 27, 2011) (on file with the Federal Trade Commission); Statement of Chairman Leibowitz & Commissioner Rosch, In the Matter of Intel Corporation., Docket No. 9341 (2010) (on file with the Federal Trade Commision), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf.

237. SUSAN A. CREIGHTON & THOMAS G. KRATTENMAKER, APPROPRIATE ROLE(S) FOR SECTION 5, at 1 (2009), *available at* http://www.wsgr.com/PDFSearch/crieghton0209.pdf.

238. *Id.* at 6.

239. Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 980 (D.C. Cir. 1990).

240. FTC v. Ticor Title Ins., Co., 504 U.S. 621, 635 (1992).

241. AREEDA & HOVENKAMP, *supra* note 82, ¶ 231b2 (finding arguments in favor of excepting the FTC from the limitations of the state action doctrine "fail to persuade").

242. *Id.* ¶ 231b1.

desist orders rather than criminal penalties or treble damages is the most obvious benefit.[243] Additionally, the FTC's composition and jurisdiction provide it with the incentives to pursue the public interest rather than private interests.[244] The FTC also has the ability to monitor post-enforcement results.[245] Finally, the FTC possesses rulemaking authority, so it would be permitted to promulgate a rule addressing general policies.[246] However, Professors Areeda and Hovenkamp remain unpersuaded by the benefits accompanying expanded section five authority.[247] They find no statement in the FTCA's legislative history indicating congressional intent to enable the FTC to challenge state-imposed restraints.[248]

Unless Congress amends the FTCA in a way that permits the Commission to challenge state-imposed anticompetitive conduct, it is unlikely the FTC can pursue the option. FTC Chairman Jon Leibowitz has been active in advocating for congressional intervention in areas he has identified as warranting greater antitrust scrutiny.[249] If Congress is receptive to expanding the FTC's authority, Chairman Leibowitz, or others seeking such an expansion, may be able to convince them.

CONCLUSION

State laws that displace competition in favor of alternative regulatory regimes aimed at public-interested goals pose a unique threat to state and national commercial policies of free competition.[250] Additionally, principles of federalism weigh in favor of permitting states to experiment with regulatory regimes without the threat of antitrust challenge. The state action doctrine seeks to address the tension between promoting federalism principles and preserving competition.[251] However, judicial application of the doctrine has become muddled, resulting in the risk that neither goal is pursued. *Phoebe Putney* presents an opportunity for the U.S. Supreme Court to clarify the doctrine.[252] The Court should heighten the standard for

243. *See id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. AREEDA & HOVENKAMP, *supra* note 82, ¶ 231b2.
248. *Id.*
249. *See, e.g.*, Jon Leibowitz, Chairman, Fed. Trade Comm'n, Speech at Center for American Progress: "Pay-for-Delay" Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers' Wallets, and Help Pay for Health Care Reform (The $35 Billion Solution) (June 23, 2009) (on file with the Federal Trade Commission), *available at* www.ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf.
250. *See* Cooper & Kovacic, *supra* note 2, at 1562.
251. *See* FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1375 (11th Cir. 2011).
252. *See* discussion *supra* Part III.A.

determining whether a state policy displacing competition has been clearly articulated. Further, it should clarify that courts determining whether a state actively supervises implementation of its policies should refrain from opining on the appropriateness of public officials' supervision, instead determining whether the state has provided for adequate supervision of private activity taken pursuant to state policy. Options for more adequate application of the state action doctrine are not limited to U.S. Supreme Court intervention. Alternatives exist that allow lower courts and Congress to direct the doctrine's application toward the dual goals of serving principles of federalism and preserving competition.