No. 21-271

In the
Supreme Court of the United States

RAYMOND BENITEZ,

Petitioner,

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In 1984, and in response to a series of decisions by this Court that excluded cities, towns, and their enterprises from the scope of State action immunity under *Parker v. Brown*, Congress enacted the Local Government Antitrust Immunity Act ("LGAA"). 15 U.S.C. §§ 34-36. The LGAA did not restore immunity: cities, towns, and their enterprises remain subject to the federal antitrust laws. Rather, it exempted these entities from monetary and treble damages. The LGAA provided this exemption in two ways. It first protected traditional governmental entities, termed "general function governmental units, from antitrust damages." But then it also extended this protection beyond these traditional governments, explicitly protecting those entities that were classified as "special function governmental units." Instead of crafting a definition in federal law for such special function governmental units, Congress chose to incorporate State law. In language that lower courts have consistently said is "broad language" that is "explicitly inclusive, not exclusive," Congress paired the determination of whether an entity was a special function governmental unit with whether it was "established by State law in one or more States."[1]

The Charlotte-Mecklenburg Hospital Authority ("the Hospital Authority") was created by an Act of the

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[1] *See, e.g.*, *Zapata Gulf Marine Corp. v. Puerto Rico Mar. Shipping Auth.*, 682 F. Supp. 1345, 1351 (E.D. La. 1988) ("Congress did not define the characteristics of local government," but instead included the broad language covering all "special function governmental units").

North Carolina General Assembly and a Resolution of the City of Charlotte in 1943. In December 2020, the Supreme Court of North Carolina held that, as a quasi-municipal corporation and body "politic and corporate" under North Carolina law, the Hospital Authority's "essential function is, at its core, the governmental provision of services." *DiCesare v. The Charlotte-Mecklenburg Hospital Authority,* 376 N.C. 63, 86, 852 S.E.2d 146, 162 (2020).[2] By providing healthcare, the Hospital Authority is "acting in its delegated legislative function and not in a private fashion of any sort." 376 N.C. at 83. Indeed, the Hospital Authority's status as a quasi-municipal corporation under North Carolina law means that North Carolina has "delegate[d] portions of its sovereignty, to be exercised . . . for certain well-defined public purposes." 376 N.C. at 84. The Hospital Authority's Board is appointed (and can be removed) by the Mecklenburg County Commission, it is subject to audit by the State Auditor; it is required to seek approval from the Local Government Commission before borrowing money; it must comply with North Carolina's public records and open meetings laws; and it must comply with North Carolina's Local Government and Fiscal Control Act. It may issue (on approval by the North Carolina Local

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[2] The central issue in *DiCesare* was whether the Hospital Authority was entitled to the same protections as cities, towns, and the State from treble damages and other relief under North Carolina's antitrust laws. Thus, the Hospital Authority's legal status and whether it is a quasi-municipal form of government, and thus a specialized extension of government was the crucial question. The Supreme Court of North Carolina held that the Hospital Authority, like the State, cities, and towns, was exempt from claims arising under North Carolina's antitrust laws.

Government Commission) tax-exempt municipal revenue bonds; it has the power of eminent domain as a "public condemnor;" and its pension plan is exempt from ERISA as a "governmental plan." The Hospital Authority, as the designated "safety-net" provider for a metropolitan area and region of several million people, provides $1.87 Billion per year in uncompensated care. (JA 125).

These undisputed facts, among others, led the Fourth Circuit to conclude that the Hospital Authority was a special function governmental unit established by North Carolina law, and thus within the scope of the LGAA: "There is no magic combination of powers that a governmental body must have to be classified as a 'special function governmental unit.' However, those of the Hospital Authority, as outlined by the Supreme Court of North Carolina, readily qualify." (App. 22a-23a).

In light of a definitive decision by the Supreme Court of North Carolina declaring that under North Carolina law the Hospital Authority provides a governmental service as a quasi-municipal corporation, and the extensive statutory framework that treats the Hospital Authority as a specialized arm of government and a political subdivision under North Carolina law, the Fourth Circuit's holding should not be controversial. Yet Petitioner claims that the Fourth Circuit's decision violates the basic precepts of the LGAA. Citing no statutory or case authority, Petitioner contends that because the Hospital Authority is large and has a small number of operations that cross State boundaries, it cannot

possibly be the type of "local" government contemplated by the LGAA. He further claims that the Fourth Circuit's conclusion is squarely in conflict with a 1991 decision of the Tenth Circuit, which found that a public trust hospital was not a special function governmental unit based on Oklahoma law. The Petitioner, and Amici, further argue that the Fourth Circuit's decision necessarily means that the Hospital Authority would be exempt from money damages under the LGAA anywhere it operates. From this, Petitioner and Amici create a parade of horribles in which State legislatures or cities could confer this type of nationwide exemption on any entity they choose, simply by declaring it to be a "political subdivision." This parade culminates in a hypothetical situation in which the City of Charlotte declares Bank of America to be a political subdivision, thereby exempting it from money damages under the LGAA. Petitioner asks this Court to impose specific uniform traits or characteristics, such as the power to tax or to hold elections, that special function governmental units must possess to qualify for immunity, traits that reflect traditional notions of government. These traits would exclude the Hospital Authority (and almost all other public hospitals) from the scope of the LGAA.

Petitioner's arguments are misplaced. First, there is no split in circuits. Both the Fourth Circuit here and the Tenth Circuit in *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558 (10th Cir. 1991) followed Congress' explicit directive to examine State law to determine how a particular entity is established. Any perceived difference in the outcomes of these cases is driven by the difference between the laws of Oklahoma

and North Carolina addressing different hospital structures, not by a doctrinally different approach between the circuits. Second, the Fourth Circuit's conclusion that the Hospital Authority was established by North Carolina law as a quasi-municipal corporation and political subdivision, and thus qualified as a special function governmental unit, is substantively correct. Indeed, Petitioner makes little effort to discuss or distinguish the raft of State laws under which the Hospital Authority is supervised and from which it derives powers that are traditionally exercised by local governments, such as the power of eminent domain and the authority to issue municipal revenue bonds. And, where he does do so, he simply gets North Carolina law wrong.

Furthermore, this case is a poor vehicle in which to undertake what the Fourth Circuit termed as a "re-write [of] the Act to impose a limitation that it does not currently contain." (App. 26a). There is no evidence, and in the pleadings no allegation, that the Hospital Authority claims to act or acts as a quasi-municipal corporation outside of North Carolina. The Plaintiff's Complaint alleges that his injury resulted from billings for care rendered by a Charlotte hospital, that the relevant geographic market was "no larger" than the Charlotte area, and that in that "market" the Hospital Authority improperly exercised market power. The Fourth Circuit, pointedly, made clear that it was not deciding whether, in a different case and under different facts, the Hospital Authority would be exempt from antitrust damages as a special function governmental unit when operating outside of North Carolina. (App. 27a). Nor do Petitioner or Amici cite

decisions indicating that this question appears to be arising with any frequency; the only "conflict" which Petitioner can muster involves a decision rendered thirty years ago. The concern that State legislatures or municipal governments could effectively "hand out" exemptions under the LGAA is not indicative of reality and amounts to a *reductio ad absurdum* in speculating that this would occur with for-profit stock-issuing companies, such as Bank of America.

The Fourth Circuit did not rule, and the Hospital Authority does not contend, that State legislatures are free to do as they please to confer an exemption under the LGAA. The meaning of a special function governmental unit under the LGAA remains a matter of federal law, informed by how an entity is established under State law. But a hallmark of such an entity is that it must provide governmental services. Healthcare is just such a service. For-profit banking or the other examples conjured by the Petitioner and Amici plainly are not.

Fundamentally, Petitioner and Amici offer this Court a solution in search of a problem, a purely hypothetical problem that the Fourth Circuit explicitly declined to address. Yet Petitioner and Amici ask this Court to grant its Writ for the purpose of imposing standards to prevent a problem that is not present here, as the Hospital Authority, under these facts and for this claim arising in North Carolina, is a special function governmental unit under North Carolina law.

STATEMENT OF THE CASE

The Petitioner and His Claims

Raymond Benitez was seriously injured in a motor vehicle accident in July 2016 and taken to the Hospital Authority's Carolinas Medical Center in Charlotte, a quaternary care center with the only Level I trauma unit within 100 miles of Charlotte. (JA 29 ¶4). His treatment was covered and paid for under a health insurance policy between Tyson Foods and Blue Advantage Administrators of Arkansas. (JA 26, 28-29, 44-49). In a separate contract between the Hospital Authority and Blue Cross Blue Shield of North Carolina, Benitez was treated as a "Blue Card" holder and thus received significantly discounted pricing. (JA 46). For his week in the hospital, Benitez ultimately paid $3,440.36 - - the amount of his deductible and the percentage of his co-payment as determined by Tyson Foods' insurance agreement with another Blues' plan, Blue Advantage. (JA 45-46).

Nearly two years later, Benitez brought this lawsuit. (JA 10-25). Benitez's central allegation is that provisions in the Hospital Authority's agreements with commercial health insurance companies prevented those companies from directing or "steering" patients to other healthcare providers. Benitez claimed that by restricting the ability of health insurance companies to direct their members to another hospital that could be less expensive, these provisions lead to higher prices and reduced competition. As a result, Benitez claimed that his co-payment and deductible were higher than they should have been because these provisions enabled the Hospital Authority's prices to be higher

than those in a competitive market. He sought to represent a class of all persons in the Charlotte area who paid a deductible or co-payment for inpatient treatment at the Hospital Authority's facilities in the Charlotte market.

The Hospital Authority

The Hospital Authority was established in 1943, pursuant to what is now known as the North Carolina Hospital Authorities Act, N.C. Gen. Stat. §§ 131E-15, *et seq*. (JA 29). In that Act, the General Assembly of North Carolina found that the establishment of hospital authorities was "in the interest of the public health and welfare" and necessary "to protect the public health, safety, and welfare, including that of low income persons," and further that the provision of health care "is a public purpose." *Id.* §§ 131E-15(b), 131E-7. The Act provides that an authority established under its provisions "shall be public body and a body corporate and politic," which under North Carolina law means that it is "a body acting as a government, *i.e.*, exercising powers which pertain exclusively to a government." *Student Bar Ass'n Bd. of Governors, of Sch. of Law, Univ. of N. Carolina at Chapel Hill v. Byrd*, 293 N.C. 594, 601, 239 S.E.2d 415, 420 (1977). The Chair of the Mecklenburg County Board of County Commissioners appoints, and has the power to remove, the members of the Hospital Authority's board. N.C. Gen. Stat. §§ 131E-18(a)(d), 131E-22(a). (JA 42-44). Although the Hospital Authority currently operates on a self-funded basis, the Act authorizes the City and the County to appropriate general revenues to fund the Hospital Authority. *Id.* § 131E-30. (JA 42-44). The

City and County are also authorized to issue general obligation bonds, secured by their taxing powers, to finance the construction of the Hospital Authority's facilities. *Id.* § 159-48(b)(7). The Hospital Authority must comply with North Carolina's Local Government and Fiscal Control Act, *id.* § 159-39, and is required to submit regular reports and audits to the North Carolina Local Government Commission ("LGC"), to the Chair of the County Commission, and to the Charlotte Mayor. *Id.* §§ 159-33, 159-39(j); 159-39(f). (JA 42-44). It is subject to audit by the State Auditor. *Id.* at § 147-65(c)(16). (JA 42-44). The Hospital Authority issues tax-exempt, municipal revenue bonds under the Local Government Revenue Bond Act backed by the full faith and credit of North Carolina and must seek the approval of the LGC before borrowing money. *Id.* §§ 131E-26, 131E-32, and *id.* §§ 159-81, 159-160, 131E-26(a). (JA 42-44). As a "public body," the Hospital Authority must comply with North Carolina's Open Meetings Law, *id.* §§ 143-318.10(b), 159-39, and the Public Records Act. *Knight Pub. Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 486-87, 616 S.E.2d 602, 603 (2005). (JA 42-44). It also has the power of eminent domain, which it exercises as a "public condemnor." *Id.* §§ 131E-24(a); 40A-3(c). (JA 42-44). The Hospital Authority's pension plan is considered a "governmental plan" exempt from regulation under ERISA. *Shore v. Charlotte-Mecklenburg Hosp. Auth.*, No. 1:18-cv-961, 2019 WL 4141059, at *3 (M.D.N.C. Aug. 30, 2019) (Schroeder, J.), *appeal dismissed*, Dkt. No. 47, Dec. 16, 2019. The Hospital Authority is also exempt from property and sales taxes. N.C. Gen. Stat. §§ 105-278.1(c)(3)(c), 105-449.88(10). It is registered as a "municipality" with the

Secretary of State for North Carolina. https://www.sosnc.gov/search/index/corp.

The Hospital Authority contends that the clauses at issue—which prevent health insurance companies from discriminating against the Hospital Authority once it contracts to be "in-network"—promote competition. It is undisputed that health insurance companies demand that hospitals offer substantial discounts on pricing in order to be "in-network." The Complaint concedes that providers have a "powerful incentive" to offer such discounts. A health insurance company's members will then be steered by the insurance companies to "in-network" providers through a variety of economic incentives. The "steering restrictions" prevent a health insurance company from discriminating against the Hospital Authority once it has secured "in-network" status by discounting its pricing. That is, these clauses require the insurance company to treat the Hospital Authority in the same manner as other "in-network" providers. As such, these clauses prevent post-contractual opportunism - - that is, they prevent an insurance company that has secured discounted pricing from the Hospital Authority from later providing economic incentives for its members to use other providers.

The Proceedings Below

In response to Benitez's Complaint, the Hospital Authority filed an Answer and moved for Judgment on the Pleadings under Rule 12(c) on two grounds. (JA 26-55). First, the Hospital Authority sought dismissal of the claims for monetary damages under the LGAA because it is a "special function governmental unit

established by State law in one or more states." *See* 15 U.S.C. §§ 34, 35. (JA 42-44, 52-53). Second, because Petitioner was simply the beneficiary of pricing that was negotiated and purchased by his insurance carrier from the Hospital Authority, he was an "indirect purchaser" and lacked antitrust standing under *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). (JA 44-48, 52-53).

The District Court granted the Hospital Authority's motion under the LGAA, holding that the Hospital Authority was a "special function governmental unit." (JA 187-200). It held in abeyance the Hospital Authority's motion under *Illinois Brick*.

The Petitioner then appealed to the U.S. Court of Appeals for the Fourth Circuit.

A panel of the Fourth Circuit unanimously affirmed the District Court on March 23, 2021. In doing so, the Fourth Circuit expressly rejected Benitez's request to impose a uniform set of characteristics that would be required for any special function governmental unit. It did so because the text of the LGAA:

> [i]ncludes none of the limitations on a "special function governmental unit" that Benitez advances. Congress could have defined "special function governmental unit" to only include those entities that have the powers and characteristics Benitez describes. But it did not do so - - not originally nor in the thirty-seven years since its passage.

(App 15a). The court then addressed the question of whether the Hospital Authority had sufficient

governmental authority under North Carolina law to qualify as a special function governmental unit. Relying heavily on *DiCesare*, the court found that the Hospital Authority met that criteria. In so concluding, the court also found that its analysis created no conflict with *Tarabishi*; indeed, its analysis was identical to the analysis used in *Tarabishi*. The difference in outcome stemmed not from any disparate analytical framework or policy, but because Oklahoma law treated a "public trust" hospital in a different manner than the Hospital Authority was treated under North Carolina law. Finally, and pointedly, the Fourth Circuit found no reason to address Petitioner's argument that the decision would grant the Hospital Authority nationwide immunity as it is clear that in North Carolina - - where Benitez's claim arose and where he suffered his injury - - the Hospital Authority is a special function governmental unit.

ARGUMENT

Congress enacted the LGAA in 1984 "in order to broaden the scope of antitrust immunity applicable to local governments." *Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1142 (4th Cir. 1988) (Powell, J.). This was a "response to the filing of an 'increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest,'" in the wake of Supreme Court decisions limiting the applicability of the state action immunity doctrine for local governments and their enterprises. 853 F.2d at 1142 (quoting H. Rep. No. 98-965 at 2 (1984)).

The LGAA provides that "no damages, interest on damages, costs, or attorney's fees may be recovered under [the federal antitrust laws] from any local government, or official, or employee thereof." 15 U.S.C. § 35(a). This provision advances a number of public interests. First, the Act reflects Congress's determination that "taxpayers should not be forced to bear the treble damage remedies recoverable from local governments under the antitrust laws" and that "local governments should not be forced to spend public funds in defending baseless antitrust suits." *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 462 (C.D. Cal. 1986) (citing H. Rep. No. 98-965 at 6, 8 (1984)). In addition, Congress "concluded that it was necessary to enact a statute that would allow local governments to go about their daily functions without paralyzing fear of antitrust suits." *Sandcrest*, 853 F.2d at 1139 (quoting S. Rep. No. 98-593 at 3 (1984)); *see also* S. Rep. 98-593 at 2 (adopting Professor Areeda's testimony that subjecting State agencies or officials to punitive sanctions could impair their ability and willingness to perform their duties *as well as* further overburden[ ] tax payers." (emphasis added)).

The LGAA accordingly defines a "local government" in broad terms:

> (1) the term "local government" means—
>
> > (A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or

> (B) a ***school district, sanitary district, or any other special function governmental unit established by State law in one or more States***
> . . .

15 U.S.C. § 34 (emphasis added). Lower courts have consistently understood that this "broad language" is "explicitly inclusive, not exclusive" and the examples listed in the statute are "only representative" of the types of entities covered by the LGAA. *Zapata Gulf Marine Corp. v. Puerto Rico Mar. Shipping Auth.*, 682 F. Supp. 1345, 1351 (E.D. La. 1988) ("Congress did not define the characteristics of local government," but instead included the broad language covering all special function governmental units); *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. at 458–59; *Capital Freight Servs., Inc. v. Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1198 (S.D.N.Y. 1988) (examples set out in the statute and legislative history are "only representative" and "the language and legislative history of the LGAA is explicitly inclusive, not exclusive"). The House Judiciary Committee explained that "[e]xamples of special purpose political subdivisions included within the definition are planning districts, water districts, sewer districts, irrigation districts, drainage districts, road districts, and mosquito control districts" as well as "special purpose governmental units that operate in more than one State, such as regional planning boards, environmental organizations, or airport or port authorities . . . ." H. Rep. No. 98-965 at 19 (1984). The Senate Judiciary Committee report also provided an example explaining that immunity would extend even

to a municipal "ambulance service [operated] on a commercial basis." S. Rep. No. 98-593 at 8.

Congress considered, but rejected, a regime under which immunity would turn on whether a local government's actions were "sovereign or commercial in character" out of concern that it would result in a "quagmire." H. Rep. No. 98-965 at 14-15 and n. 23 (1984). The LGAA accordingly makes no distinction between a local government's "proprietary" or "governmental" activities. *United Nat'l Maint., Inc. v. San Diego Convention Ctr. Corp., Inc.*, No. 07-CV-2172-AJB, 2012 WL 12845620, at *4 (S.D. Cal. Sept. 5, 2012), *aff'd, United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002 (9th Cir. 2014). And the act applies even when a local government is a "market participant." *Id.* (citing *Capital Freight Services, Inc. v. Trailer Marine Transport Corp.*, 704 F. Supp. 1190, 1200-01 (S.D.N.Y. 1989)).

I. THE FOURTH CIRCUIT'S DECISION DOES NOT CREATE A "SQUARE SPLIT" WITH THE TENTH CIRCUIT.

The Petitioner contends that the Fourth Circuit's decision here creates a "square split" with the Tenth Circuit's decision in *Tarabishi.* This is not correct. In fact, the analytical framework used by both courts is identical and dictated by the plain words of the LGAA.

Tarabishi involved antitrust claims brought by a physician who practiced in McAlester, Oklahoma against the McAlester Regional Hospital. Dr. Taribishi claimed that in 1984 and 1985, the hospital opposed his request for a Certificate of Need to open an outpatient

surgical facility, opened its own, and then revoked his privileges to practice. McAlester Hospital was a "public trust hospital," a structure unique to Oklahoma law. Given the Petitioner's heavy reliance on *Tarabishi* and his insistence here that State law should not determine whether an entity qualifies a special function governmental unit, it is ironic that in *Tarabishi* the plaintiff argued just the opposite: "Plaintiffs respond that Oklahoma law controls the question here, and thus the interpretation of the status of a hospital under the laws of other states is immaterial." 951 F.2d at 1564. The Tenth Circuit agreed, reasoning that decisions finding publicly-formed hospitals exempt from antitrust damages under the LGAA in other federal jurisdictions, do not "directly answer[ ] the question of whether a hospital operated as a public trust for furtherance of public functions with a city as its beneficiary should be considered a special function governmental unit." 951 F.2d at 1566. In concluding that the McAlestar Hospital had no such exemption, the Tenth Circuit cited Oklahoma law. The court found it "persuasive that around the time of the challenged conduct, the Oklahoma legislature clearly viewed public trust hospitals as entities different from political subdivisions." *Id.* In particular, the Tenth Circuit noted that Oklahoma law expressly excluded public trust hospitals from the definition of "political subdivision" under the Oklahoma Tort Claims Act.

Tarabishi turned on the structure of a public trust hospital under Oklahoma law. Indeed, the *Tarabishi* court noted that Oklahoma law had subsequently changed after the events in the Complaint to include public trust hospitals as political subdivisions, a

change which "might suggest a different result today." 951 F.2d at 1566. In the same way, the Fourth Circuit's decision here is anchored in North Carolina law as articulated by the Supreme Court of North Carolina in *DiCesare*. In particular, the Fourth Circuit pointed to *DiCesare*'s holding that "[a]lthough quasi-municipal corporations are not subject to all of the requirements applicable to other governmental entities, it is clear that their essential function is, at its core, the governmental provision of services." (App. 22a). The Fourth Circuit had little difficulty in concluding that the Hospital Authority's powers, "as outlined by the Supreme Court of North Carolina, readily qualify" it as a special function governmental unit. Consequently, the Fourth Circuit found no conflict with the *Tarabishi* court because "[i]mportantly, *Tarabishi* recognized that how an entity is classified under state law is critical . . . . and . . . emphasized that the structure of a public trust hospital was unique and distinguishable." *Id*.

To establish a "square split," the Petitioner cherry-picks snippets from non-contiguous sentences in the Fourth Circuit's decision. For example, the Petitioner asserts that the Fourth Circuit "noted that its decision 'is seemingly at odds' with the Tenth Circuit's," and then claims that the court engaged in "little explanation . . . likely to protect its published and thus binding opinion from review in this Court." (Pet. at 19). But what the court wrote in full was that "[a]t first blush, *Tarabishi* is seemingly at odds with our holding." (App. 23a). It then noted that "[i]mportantly, however, *Tarabishi* recognized that how an entity is classified under state law is critical and cited to a

variety of cases where hospitals were held to be 'local governments.'" (*Id.*) Thus, in context the court was not conceding that its analysis was different than that used in *Tarabishi*, as implied by Petitioner. Rather, the court was responding directly to the Petitioner's argument that the result in *Tarabishi* controlled without regard to its reasoning, and pointing out that both courts used the same reasoning - - the difference in outcome was the consequence of the different manner in which these entities were treated under each State's law. Indeed, the Fourth Circuit flatly stated that "while we reach a different result than *Tarabishi*, our holding is not inconsistent with its reasoning." (App. 24a).[3]

The Fourth Circuit's decision was heavily influenced by the decision of the Supreme Court of North Carolina in *DiCesare*. *DiCesare* involved antitrust claims concerning the same anti-steering clauses, but brought under North Carolina's antitrust laws (which largely replicate the Sherman and Clayton Acts). Thus, and unlike *Tarabishi*, the Fourth Circuit had the benefit of a definitive analysis of the Hospital Authority's status under North Carolina law. Indeed, the central issue in *DiCesare* was the legal status of the Hospital Authority - - that is, if it exists as a political subdivision under North Carolina law (like a city, town, or sanitary district), then it is exempt from claims under North Carolina's antitrust statutes. *DiCesare* held that the

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[3] And had the Fourth Circuit wished to "protect" its decision from review by this Court, as Petitioner suggests, it simply could have issued it in an unpublished format, or just affirmed the District Court in an unpublished *per curiam*.

Hospital Authority was established and operates as a quasi-municipal corporation; its "essential function is, at its core, the governmental provision of services." Moreover, as a body politic and corporate - - a status that the McAlester Hospital did not have under Oklahoma law - - the Hospital Authority is "a body acting as a government, *i.e.,* exercising powers which pertain exclusively to a government." *Student Bar Ass'n Bd. of Governors, of Sch. of Law, Univ. of N. Carolina at Chapel Hill v. Byrd*, 293 N.C. 594, 601, 239 S.E.2d 415, 420 (1977).

While the Petition spends several pages arguing about the similarities between McAlester Hospital and the Hospital Authority, there is no discussion whatsoever of *DiCesare* and its implications under the LGAA. The Fourth Circuit's decision, by contrast, devotes 4 pages to analyzing the holding and findings in *DiCesare.* The Fourth Circuit held that the findings in *DiCesare*, combined with the statutes regulating the Hospital Authority as a local government and providing it with governmental powers including eminent domain and the authority to issue tax-free municipal bonds, were dispositive. These did not exist in *Tarabishi.*

The Petitioner claims that "it is hard to imagine two cases where the facts are so similar, and the two holdings thus so at odds." (Pet. at 19). But while the Petitioner makes much of the appointment of the hospital boards by public officials and the lack of tort immunity as "similar facts," he ignores other facts that distinguish the Hospital Authority from McAlester Hospital. The Tenth Circuit did not find that the McAlester Hospital was subject to supervision by a

local government commission, or that it had the power to issue municipal revenue bonds, or that it is was subject to a local government revenue act. There is no evidence that the McAlester Hospital could "act as an agent for the federal, State or local government in connection with the acquisition, construction, operation or management of a hospital facility," (App. 38a), as does the Hospital Authority. There was also no indication that the McAlester Hospital possessed the power of eminent domain as a public condemnor. Moreover, and unlike the McAlester Hospital, the Hospital Authority is indistinguishable from county and municipal hospitals under North Carolina law, hospitals that also fall within the LGAA. (App. 39a).

While the Petitioner argues that the lack of tort immunity for the McAlester Hospital under Oklahoma law drove that result, he fails to recognize that under Oklahoma law only political subdivisions enjoyed such immunity and "public trust" hospitals were expressly excluded as political subdivisions. In North Carolina, however, whether an entity is immune from tort claims has no bearing on whether it is a political subdivision, as political subdivisions such as sanitary districts, airport authorities, and the University of North Carolina system, are not immune from tort claims.

There is no analytical approach or organizing principle in *Tarabishi* that is contrary to or in conflict with the approach by the Fourth Circuit here. Both courts conclude that how State law defines an organization is "critical," and both courts used State law to reach their decision. And this is so because, as the Fourth Circuit observed, "Congress' pairing of the

term 'special function governmental unit' with the phrase 'established by law in one or more States' requires that we also consider state law." (App. 18a).

Finally, the Petitioner fails to explain the significance of any split between these cases, even assuming one were to exist. These cases are separated by thirty years. Petitioner cites to no appellate decisions of significance dealing with hospital authorities specifically, or special function governmental units generally, as evidence of a significant policy dispute or difference in analytical approach among the circuits. The Petitioner suggests only that the "meaning of this important statute" is implicated by his purported split. But he fails to describe how the purported split actually makes a difference in the meaning of the LGAA as both courts, plainly and explicitly, looked to State law and employed the same analysis. He points to no emerging doctrinal or policy dispute among the circuits arising from this purported split. Indeed, aside from these cases decided three decades apart, he fails to identify any significant issue among the circuits in interpreting the LGAA. To the contrary, hospital authority statutes similar to North Carolina's were enacted in Georgia and Alabama, Ga. Code Ann. § 31-7-72(a) and Ala. Code § 22-21-311(a)(1), and the Fifth Circuit and its District Courts have repeatedly found those authorities to be covered by the LGAA. *See, e.g., Crosby v. Hosp. Auth. of Valdosta & Lowndes County,* 93 F.3d 1515 (11th Cir. 1996) (hospital authority is a "governmental entity" even though it is not entitled to sovereign immunity under Georgia law); *Griffith v. Health Care Authority of City of Huntsville,* 705 F. Supp. 1489, 1501

(N.D. Ala. 1989) ("Huntsville Hospital is a 'local government' within the definitions of that term stated in [the LGAA]."). And the fact that the Fourth Circuit found no difference between the approach used by the Tenth Circuit and its own underscores that there is no ideological or policy divide as to the scope of LGAA immunity.

II. THE FOURTH CIRCUIT REACHED THE CORRECT DECISION.

A. There Is No Serious Dispute That the Hospital Authority Is a Public Body, Political Subdivision, and Quasi-Municipal Corporation Under North Carolina Law.

The Petitioner does not substantively address the extensive statutory authority that make the Hospital Authority a public body, political subdivision, and quasi-municipal corporation, and that regulate its operations under North Carolina law. He further makes only a passing reference to *DiCesare*, notwithstanding the extensive use of and reliance on that decision by the Fourth Circuit. Rather, the Petitioner attempts to undermine the Hospital Authority's status as a quasi-municipal corporation by baldly claiming that even though North Carolina law established and continues to govern the Hospital Authority, it operates in a way that is "indistinguishable from private hospitals." (Pet. at i). But this is simply not true. There is no private hospital in North Carolina subject to the public records act, to the open meetings laws, or to the Local Government Revenue Act. No private hospital in

North Carolina issues municipal revenue bonds, or is subject to regulation and oversight by the Local Government Commission, or has the power of eminent domain as a public condemnor. There is no private hospital in North Carolina that is subject to audit by the State Auditor, or whose Board is directly accountable to a county body, or is designated as a "body politic" and a quasi-municipal corporation. Hence the Petitioner cites to none.

Petitioner suggests that the Hospital Authority's power of eminent domain is not a power at all, but simply a right to "request" condemnation and implies that private hospitals have a similar right. (Pet. at 29-30). He is, again, wrong. No private hospital in North Carolina has any power of eminent domain. The "public" condemnors' portion of the North Carolina eminent domain statute explicitly applies only to specified governmental entities, including a "hospital authority" established under the Hospital Authorities Act, N.C. Gen. Stat. § 40A-3(c)(3). While a small number of private entities do have the power of eminent domain - - utility companies, railroads, pipelines - - they are given that power under a separate portion of the statute which applies to "private," rather than public, condemnors. N.C. Gen. Stat. § 40A-3(a). Even then, the power of eminent domain for private condemnors is far more limited than that available to public condemnors. Significantly, sanitary districts - - which Petitioner concedes Congress intended to be squarely within the protections of the LGAA - - hold exactly the same power of eminent domain as does the Hospital Authority under a common statutory provision. N.C. Gen. Stat. § 40A-3(c)(1). Thus, this

"uniquely governmental power," (App. 22a), is granted, held, and exercised by an entity that Petitioner concedes is covered by the LGAA in exactly the same way as by one that he wishes to exclude.

B. Congress Did Not Impose Uniform Standards on Governmental Entities to Qualify for Immunity.

The crux of the Fourth Circuit's decision focused on Congress' "pairing of the term 'special function governmental unit' with the phrase 'established by State law in one or more States'" in the LGAA, a pairing that "requires that we also consider state law." (App. 18a). As recognized both here and in *Tarabishi,* the status of an entity under state law is the critical inquiry under the plain language of the LGAA. The core of Petitioner's argument, however, seeks to sever the LGAA from state law and render North Carolina law largely irrelevant, at least as he applies it to the legal status of the Hospital Authority. He contends that the Hospital Authority cannot possibly be a "local government" as that term is traditionally used. He further claims there must be uniform standards applicable across the country that will override what State law may or may not establish - - and those standards must exclude the Hospital Authority.

But the LGAA plainly seeks to protect more than simply traditional "general function" units of government, and says so specifically. Congress recognized that local governments often establish public bodies to participate in markets in order to provide governmental services. It plainly sought to protect these enterprises, even though an electric

company, or a telephone company, or an airport authority, or a hospital, may not be considered a "government" under the traditional understanding of that term. And, Congress recognized that antitrust cases were being filed against such enterprises as well as municipalities. One of the seminal cases that led to the LGAA was *City of Lafayette v. Louisiana Power & Light Company,* 435 U.S. 389, 98 S. Ct. 1123 (1978), which involved a city owned electrical utility that operated outside a city's territorial limits (as it was permitted to do under Louisiana law). In no way could that electrical utility be called a "government" in the traditional sense; yet it was precisely the type of government-sponsored enterprise that Congress meant to exempt from money damages.

The Petitioner argues that the decision here is an example of a court being "lost in contextless contemplation of the words of a definition" which forgets the "ordinary meaning" of the words themselves. (Pet. at 4). Relying upon this Court's jurisprudence dealing with statutory issues involving the interpretation of State criminal laws for the purpose of federal sentencing, the Petitioner frames the issue as one of the meaning of "local government." But this approach ignores words of the LGAA itself. Congress sought to protect all "special function governmental unit[s] established by State law in one or more States." The only thing that is intuitive or ordinary about this term is that whatever a "special function governmental unit" may be, its definition is derived from State law and is something different from a "general function governmental unit." Congress explicitly chose not to define this term but paired it

with State law to invest it with meaning. Petitioner's argument is thus not with a court's interpretation of a statutory term, but rather with the words of the statute itself.

To circumvent the application of State law, the Petitioner invokes the doctrine of *noscitur a sociis*, claiming that when Congress wrote that "local government" meant "a school district, sanitary district, or any other special function governmental unit established by State law," the examples of "school district" and "sanitary" districts were exclusive examples representing the powers that a special function governmental unit must have, and thus limited the types of enterprises that qualify regardless of State law. But in so arguing, the Petitioner proves too much. First, and perhaps most importantly, the Supreme Court of North Carolina held in *DiCesare* that under North Carolina law there was no legal difference in the governmental status between a sanitary district and a hospital authority - - indeed, that was one of the central points of *DiCesare,* that all quasi-municipal corporations under North Carolina law had, as "their essential function," the "governmental provision of services" which made them exempt as governmental entities. *DiCesare,* 376 N.C. at 86. Thus, if a sanitary district is explicitly included within the LGAA (as the statute provides by example), then the Hospital Authority is likewise within that same exemption by virtue of North Carolina law. Second, as pointed out by the Fourth Circuit, the examples set forth in the statute do not necessarily have the powers that Benitez claims every special function governmental unit must have. Benitez's own list of characteristics would

exclude North Carolina school districts as a special function governmental unit (despite the words of the statute), for under North Carolina law school districts cannot impose taxes. N.C. Const. Art. IX, § 2; N.C. Gen. Stat. § 115C-511.

Benitez then focuses on a portion of the phrase "special function governmental unit established by State law ***in one or more States***," (emphasis supplied), arguing that an entity must be a special function governmental unit in ***every*** State in which it operates in order to be such a unit in ***any*** State. No court has ever embraced this reading of the statute. *See Capital Freight Services, Inc. v. Trailer Marine Transp. Corp.,* 704 F. Supp. 1190, 1200 (S.D.N.Y. 1988) (applying the LGAA to bar monetary damages against an entity formed in Puerto Rico to provide *international* shipping services to and from Puerto Rico, finding "there is no requirement that the governmental instrumentality have a geographically defined jurisdiction"). Indeed, this argument does substantial damage to the actual statutory language. In crafting the phrase "established by State law in one or more States," Congress used the disjunctive "or" as a plain indication that a special function governmental unit must be established *in at least* one State. Benitez, however, changes "or" into "all," effectively negating the meaning of this phrase to give it a new and opposite meaning.

III. THIS CASE IS A POOR VEHICLE TO USE TO REWRITE THE REQUIREMENTS OF THE LGAA.

Benitez and Amici argue that the Fourth Circuit's decision means that an entity which is a special function governmental unit in one State is exempt from money damages in every State. But that is not what the Fourth Circuit ruled. Indeed, the decision could not be clearer:

> There may be circumstances where a "special function governmental unit" does not enjoy the Act's immunity. For example, if Benitez alleged that the Hospital Authority was operating in contravention of North Carolina law or if the Hospital Authority was sued in Georgia involving alleged anticompetitive conduct in a Georgia geographic market . . . . But since those issues are not presented to us, we express no view on them and leave them for another day.

(App. at 27a). Nonetheless, Petitioner and Amici focus on a small number of operations by the Hospital Authority outside of North Carolina to argue that it cannot be a "local" government protected by the Act. They argue that permitting the Hospital Authority to qualify under the LGAA would allow legislatures and cities to grant immunity from damages simply by declaring them to be political subdivisions. These arguments, however, are completely disconnected from the allegations here and therefore do not warrant consideration.

Benitez's arguments regarding the Hospital Authority's small number of operations outside of North Carolina have nothing to do with the lawsuit that he brought in North Carolina. Benitez's Complaint alleges that the Hospital Authority has market power only in the Charlotte area and that the appropriate geographic market is no larger than the Charlotte area. (JA 15 ¶22). All of the anticompetitive acts he alleges, and the antitrust injury he claims, arose in the Charlotte area. He does not claim that the Hospital Authority has market power over in-patient hospitals in Georgia or South Carolina. He does not claim that the Hospital Authority has engaged in anticompetitive activities in these places. And he does not claim he suffered antitrust injury there. In Charlotte, North Carolina - - where he alleges anticompetitive conduct to his detriment - - the Hospital Authority is a quasi-municipal corporation, body politic, and political subdivision. Petitioner's Complaint thus does not provide the basis for determining whether the Hospital Authority would have immunity for antitrust claims that arose from the provision of care in South Carolina or in Georgia. Moreover, there is no pleading in this case in which the Hospital Authority has claimed that it operates as a special function governmental unit in South Carolina or Georgia, or that it seeks any immunity under the LGAA for its operations in those markets. Put simply, the Hospital Authority's few operations in South Carolina and Georgia are irrelevant to the Complaint that Petitioner filed.

In addition, there is no evidence in Petitioner's Complaint that the Hospital Authority operates as a quasi-municipal corporation outside of North Carolina,

and he cites to none. Rather, his Petition is built on the argument that if the Hospital Authority provides any healthcare outside of North Carolina, then this means it cannot be a special function governmental unit in North Carolina. But this type of formalism is not what was intended by the LGAA. Congress expressly intended that multi-state organizations, such as regional planning boards, airport authorities, and environmental organizations, would be within the Act's protections. H. Rep. No. 98-965 at 19-20 (1984) reprinted in 1984 U.S. Code Cong. & Admin. News 4602, 4620-21. ("The definition, however, would encompass special purpose governmental units that operate in more than one State."). Here, the Charlotte-Mecklenburg region sits on the northwest border of both South Carolina and Georgia - - the Hospital to which Benitez was taken for his injury is less than 10 miles from South Carolina. Consequently, the Hospital Authority necessarily provides healthcare to citizens of South Carolina and Georgia. But at the time of Benitez's injury, every hospital that the Hospital Authority owned was located in North Carolina.

At the time that Benitez filed his lawsuit, the Hospital Authority operated, but did not own, a small number of hospitals in South Carolina under management contracts. After Benitez filed his lawsuit, and several years after his claimed antitrust injury, the Hospital Authority entered into a "strategic combination" with a single smaller system in Macon Georgia.[4] Nowhere does the Hospital Authority claim

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[4] In *Tarabishi*, the Tenth Circuit held that the McAlester Hospital's status was to be measured at the time of the events in

to operate as a quasi-municipal corporation in Georgia and there is no claim that it has market power there or in South Carolina.

The Petition's argument that State legislatures, or even cities, could grant damages immunity to any entities they choose, even Bank of America, is without merit. First, in order to be "like" the Hospital Authority under North Carolina law, Bank of America would have to not only comply with the public records and open meetings laws, but would have to permit its Board to be appointed by local politicians, would have to convert from a for-profit stock-issuing organization to non-profit status, would have to have its financing regulated under the Local Revenue Act and by the Local Government Commission, and would have to subject its books to audit by the State Auditor, among many other changes. If Bank of America were to do that, it would be a vastly different enterprise, which renders the hypothetical meaningless. But assuming the point of the argument is to suggest there are no limits other than State law for such entities, the argument still fails. The limitation of the LGAA for special function governmental units is contained in the phrase itself - - an entity seeking to qualify under the LGAA must be delivering governmental services. The Hospital Authority indisputably does this, as the provision of healthcare is a legitimate government function. On the other hand, retail or investment banking services have not been recognized as

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the Complaint, not by a later change in circumstances. Similarly, this combination with one smaller hospital system in 2018 should not affect the evaluation of the Hospital Authority's status in 2016.

governmental services, and as such would not be within the concept of a special function governmental unit.

Much of the Petition focuses on the Petitioner's claims that the Hospital Authority is just "too big" and thus this Court must step in to impose limits. Yet, he offers no rational threshold or organizing principle that would trigger a forfeiture of governmental status, and no such principle can be found in the language of the LGAA itself. As pointed out by the Fourth Circuit, the Hospital Authority is dwarfed by other obviously governmental bodies, such as the City of New York, so drawing a universally applicable line at size by revenue is an impossibility. (App 26a). The suggestion that the LGAA does not apply because the Hospital Authority has gross revenues that exceed those of the City of Charlotte is also flawed. The budget of the Charlotte-Mecklenburg Schools also exceeds the operating budget of the City of Charlotte, yet it cannot be argued that such a school district is "too big" to qualify under the LGAA. If the Hospital Authority is large, it is because healthcare is a multi-faceted, complex undertaking and the Hospital Authority serves as the "safety-net" provider for a metropolitan area consisting of several million people. And, in providing for the establishment of hospital authorities, the General Assembly explicitly contemplated that an authority would address health issues across a region that a city, or a county, could not.

Both Petitioner and Amici conflate the concept of state-action antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), with the exemption from money damages under the LGAA, arguing that the

limitations of state-action immunity should circumscribe the exemption from damages under the LGAA. The policies behind *Parker* immunity and the LGAA's money-damages exemption are, however, very different. *Parker* is grounded on the constitutional principle that the States retain limited sovereignty, and is a judicially-crafted immunity that defines when a State (or its agent) can engage in anticompetitive conduct without running afoul of the federal antitrust laws. While the LGAA was created in response to the exclusion of local governments and their enterprises from *Parker,* it does something very different. Unlike *Parker,* the LGAA does not immunize the conduct of local governments and their enterprises from the reach of the antitrust laws. Rather, it simply exempts them from monetary damages. Thus, this statutory damages exemption represents a policy determination by Congress, not the constitutional imperative that drives the judicial immunity created by *Parker*. And that policy was deliberately crafted to extend to both traditional "general" governmental units and to their special function enterprises.

Petitioner and Amici make much of the enforcement role that private lawsuits seeking treble damages have in antitrust law. That role is often an adjunct to enforcement of those laws by the United States. But arguing that the unavailability of treble damages against entities like the Hospital Authority will lessen enforcement is curious, for it wholly ignores the fact that the United States did file a lawsuit here, one that was resolved through a consent agreement that limits

the use of these provisions to specific contexts.[5] Indeed, that lawsuit predated the Petitioner's lawsuit and was the template for Petitioner's Complaint. Thus, here, enforcement by the government did occur and it is not clear how Petitioner's follow-on lawsuit enhances that enforcement. Moreover, LGAA immunity from damages does not bar private enforcement because private parties are still free to seek injunctive relief from special function governmental units for violations of the antitrust laws. Further, they can bring private treble damage lawsuits against non-governmental parties who collude or enter into anticompetitive arrangements with special function governmental units. Price-fixing, non-competition agreements, territorial restrictions, or other anticompetitive activities between market participants may still be challenged with treble damages lawsuits by private parties, notwithstanding that one of the conspirators is exempt from paying those damages.

CONCLUSION

The decision by the Fourth Circuit is consistent in both analysis and outcome with every other federal court that has evaluated the LGAA's exemption for special function governmental units. The decision does not conflict with any decision of this Court. Finally,

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[5] The Settlement Agreement explicitly permits the continued use of these clauses in a number of instances, including co-branded plans or narrow network plans in which the Hospital Authority is the most prominently featured provider. *United States of America, et al. v. The Charlotte-Mecklenburg Hospital Authority,* No. 3:16-cv-00311-RJC-DCK (ECF No. 99 April 24, 2019) (Order and Final Judgment at pp. 9-10).

there is no important issue of federal law to resolve in this matter, and no federal interest or policy that now justifies what the Fourth Circuit believed as a "rewriting" of the LGAA at this time. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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