No. _____

In The Supreme Court of the United States

VAN SANT & CO.,

Petitioner,

v.

TOWN OF CALHAN, COLORADO;
CAMERON CHAUSSEE;
TYLER CHAUSSEE;
BRENT CHAUSSEE;
ANNETTE CHAUSSEE;
CALVIN CHAUSSEE, II;
BLAKE CHAUSSEE;
CONTINENTAL PROPERTIES, INC.;
VIDEO PRODUCTIONS INC.;
DOMINION DEVELOPMENT, INC.;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS P. MCMAHON
Counsel of Record
BENJAMIN P. WIECK
JONES & KELLER, P.C.
1675 Broadway, 26th Floor
Denver, Colorado 80202
(303) 573-1600
tmcmahon@joneskeller.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The questions presented include the following:

1. Does the LGAA entitle local government officials to immunity from antitrust damages when they act unlawfully?

2. Does a Court of Appeals impermissibly depart from long-established legal teachings of this Court when it:

a. Fails to believe a summary judgment non-movant's evidence on disputed issues of material fact and fails to presume the non-movant's version of such disputed factual issues is correct?

b. Fails to place on the parties asserting antitrust immunity the burden of establishing their entitlement to it but, rather, imposes on their opponent the burden of disproving such entitlement?

c. Finds *Noerr-Pennington* antitrust immunity to exist based simply on an assumption which conflicts with the facts that the parties asserting the defense presented no evidence of engaging in government petitioning activity and expressly denied ever having done so?

This Petition principally concerns the recent decision of the United States Court of Appeals for the Tenth Circuit regarding immunity of local government officials from damages under the Local Government Antitrust Act ("LGAA"). In pertinent part, it establishes

QUESTIONS PRESENTED – Continued

that they are not deprived of LGAA protection from antitrust damages when they act unlawfully by violating an express prohibition against engaging in the very conduct being challenged as anticompetitive. That conflicts with the landmark decision of the United States Court of Appeals for the Fourth Circuit 36 years ago in *Sandcrest Outpatient Servs., P.A. v. Cumberland Cnty. Hosp. Sys.*, 853 F.2d 1139, 1145 & n. 7, 1148 (4th Cir. 1988), holding – based on Congressional intent derived from the act's legislative history – that local officials' actions must be lawful in order to qualify for LGAA immunity.[1] It thus creates a split between the circuits on an exceptionally important question of antitrust immunity under the LGAA which this Court has not previously addressed but should now resolve. This Petition also concerns the Tenth Circuit decision's several radical deviations from long-standing precedents of this Court relating to antitrust immunity and summary judgment evidentiary standards. It so far departs from those teachings as to necessitate this Court's exercise of its supervisory power to secure and maintain the uniformity of its decisions and the clarity of long-established law.

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[1] It also conflicts with the Tenth Circuit=s own prior decision 19 years ago in *GF Gaming Corp. v. City of Blackhawk*, 405 F.3d 876, 885 (10th Cir. 2005), in the same respect.

PARTIES TO THE PROCEEDINGS

Petitioner Van Sant & Company was the Plaintiff in the proceedings before the United States District Court for the District of Colorado and the Appellant in the United States Court of Appeals for the Tenth Circuit.

Respondents are the Town of Calhan, Colorado; Cameron Chaussee; Tyler Chaussee; Brent Chaussee; Annette Chaussee; Calvin Chaussee, II; Blake Chaussee; Continental Properties, Inc.; Video Productions, Inc.; and Dominion Development, Inc. Collectively, these ten Respondents were the Defendants in the proceedings before the United States District Court for the District of Colorado and the Appellees in the United States Court of Appeals for the Tenth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Van Sant & Co. is a nongovernmental corporation. It is solely owned by one individual, Thomas D. Brierton, and no parent corporation or publicly held company owns 10% or more of its stock.

LIST OF RELATED CASES

- *Van Sant & Co. v. Town of Calhan, a Colorado municipality, et al.*, No. 1:20-cv-03035-RBJ, United States District Court for the District of Colorado. Order granting Defendants' Motions for Summary Judgment entered on May 18, 2022, as Amended on May 20, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Van Sant & Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at *Van Sant & Co. v. Town of Calhan*, 83 F.4th 1254 (10th Cir. Oct. 13, 2023), and reproduced at App. 1-57. The Tenth Circuit's dismissal of petitioner's motion for rehearing en banc is reproduced at App. 115-16. The District Court for the District of Colorado's opinion granting summary judgment to all defendants is reported at *Van Sant & Co. v. Town of Calhan*, 2022 WL 1567564 (D. Colo. May 18, 2022), and reproduced at App. 60-86. The District Court's Amended Order on Motions for Summary Judgment, *Van Sant & Co. v. Town of Calhan*, No. 1:20 cv 03035 RBJ (D. Colo. May 20, 2022), is unpublished and reproduced at App. 87-112.

JURISDICTION

The Tenth Circuit entered judgment on October 13, 2023. App. 58-59. It dismissed Van Sant's petition for rehearing en banc on November 21, 2023. App. 115-16. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2; Section 35 of the Local Government Antitrust Act, 15 U.S.C. § 35; and Colorado Ethics Code sections C.R.S. §§ 24-18-103, 109 and 110.

INTRODUCTION

In pertinent part, the LGAA prohibits recovery of antitrust damages from any local government official for actions undertaken "in an official capacity." 15 U.S.C. § 35. Foremost, this case presents a critical opportunity to confirm that immunity conferred by the LGAA is not absolute and does not shield local officials from damages for their own unlawful conduct. This issue is of paramount importance, because the Tenth Circuit's decision essentially enables such officials to enact self-serving laws with impunity.

That is what happened in this situation involving the small (population 700-plus) rural town of Calhan, Colorado. Among its residents are Annette and Calvin Chaussee II, who have controlled and operated Cadillac Jack's RV Park in Calhan since the 1980s. Petitioner Van Sant operated what had been solely a mobile home park there until 2015, when it decided to also start renting space to RVs – which put it in direct competition with Cadillac Jack's. Over the next few years, Calhan's Planning & Development Committee ("PDC") and Board of Trustees ("Board") came to

include the Chaussees' son Brent (PDC) and grandsons Cameron (PDC, Board) and Tyler (Board) – all of whom were downstream beneficiaries in Cadillac Jack's.

With their participation, the PDC recommended and the Board enacted a series of ordinances relating to RVs. The first two outlawed Van Sant's rental of spaces to RVs; the third imposed cost-prohibitive regulations precluding it from converting to an RV park. Yet, in direct violation of the Colorado Ethics Code, neither Cameron nor Tyler Chaussee abstained from voting on the ordinances or disclosed their conflicts of interest. That is particularly problematic regarding the third ordinance, where they provided two of the three enacting votes without which the measure would have failed.

After those ordinances effectively put Van Sant out of business, it brought claims against the town of Calhan and Calhan officials Cameron, Tyler and Brent Chaussee under Sections 1 and 2 of the Sherman Act alleging that passage of the ordinances and related conduct constituted an unreasonable restraint of trade and a conspiracy to monopolize.[2] Van Sant also included the same Sherman Act claims against non-governmental defendants consisting of other Chaussee family members (Annette, Calvin and another son,

[2] Van Sant also asserted claims against the Town defendants under 42 U.S.C. § 1983, alleging they violated its 14th Amendment rights to due process and equal protection. The district court granted summary judgment to defendants on those claims, which the Tenth Circuit affirmed. Although such rulings are likewise flawed, Van Sant does not seek this Court's review of them.

Blake) and certain related corporate defendants with beneficial interests in Cadillac Jack's.

Shortly before trial, the district court granted summary judgment to Calhan and its three local officials on the basis that the LGAA provided them with immunity from the antitrust claims. The Tenth Circuit affirmed, asserting that *Van Sant had failed to prove* their actions failed to qualify for such immunity.

Likewise, the district court granted summary judgment to the non-governmental defendants on the basis that the *Noerr-Pennington* doctrine provided them with immunity from the antitrust claims. Again the Tenth Circuit affirmed, after assuming alternative facts at odds with the evidence (or lack thereof).

With respect to LGAA immunity from damages, this Court should adopt the Fourth Circuit's ruling in *Sandcrest* and the Tenth Circuit's prior ruling in *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 885 (10th Cir. 2005), to both of which the Tenth Circuit paid lip service but did not adhere. The Court should make crystal clear that the LGAA does not immunize local government officials from antitrust damages flowing from their own unlawful actions. The perils of allowing the LGAA ruling to stand are manifest. It would signal to self-aggrandizing public officials that the LGAA will provide them with blanket immunity from antitrust damages for unlawful conduct. That, in turn, would encourage them to perpetuate their self-serving anti-competitive behavior. Neither the express language of the LGAA nor the legislative history supporting it

afford such unqualified immunity, and this Court should not provide it tacitly through inaction.

Further, this Court should reaffirm its long-standing precedents – from which the Tenth Circuit egregiously deviated – that: (i) in the summary judgment context a non-movant's evidence is to be believed, all justifiable inferences are to be drawn in its favor and its version of any disputed factual issues is presumed correct; (ii) parties asserting antitrust immunity themselves bear the burden of establishing their entitlement to it; and (iii) *Noerr-Pennington* antitrust immunity cannot exist where the parties asserting it present no evidence of having engaged in government petitioning activity.

This Petition should be granted and the Tenth Circuit's decision overturned.

STATEMENT OF THE CASE

Calhan, Colorado, is a statutory town that is governed by its Board consisting of a Mayor and six other Trustees.[3] Van Sant Opening Appellate Brief ("Op. Br.") at 4-5. As such, it is restricted to the powers expressly delegated to it by the legislature. *See* C.R.S. § 31-15-101(2).[4] Thus, while Calhan's Board has the

[3] Calhan is a "local government" as defined by the LGAA, *see* 15 U.S.C. § 34(1)(a), thus rendering its Trustees and PDC members government officials as referenced in 15 U.S.C. § 35(a).

[4] Conversely, Colorado "home rule" municipalities are granted by Colo. Const., art. XX, § 6, extensive powers of self-government in local and municipal matters. They are "entitled to

"power to make and publish ordinances," it must do so in a manner that is not "inconsistent with the laws of the state." C.R.S. § 31-15-103. That includes adhering to the provisions of Colorado's Ethics Code. Among other things, that Code requires local officials to abstain from voting on, and from influencing other such officials regarding, any matters before the governing body in which they have a personal or private interest; and to disclose such interest to that body. C.R.S. § 24-18-109(3)(a).

There are now and have been only two RV parks in Calhan. One, which has been in operation just since 2015, is Jolly's RV & Tiny Home Park ("Jolly's"), with 15 long-term RV rental spaces. The other, which has existed since the 1980s, is the aforementioned Cadillac Jack's, with 37 long-term RV rental spaces. Op. Br. at 6. During its existence Cadillac Jack's has been controlled, in some form or other, by Annette Chaussee and managed by her husband Calvin. *Id*. The ownership structure governing it and the property on which it sits is a quagmire involving three corporate entities owned, in turn, by three separate trusts. However, all of those trusts specify Annette and Calvin's descendants – including the three Chaussee town defendants (Cameron, Tyler and Brent) – as beneficiaries. *Id*. Accordingly, the latter each enjoy a downstream financial interest in Cadillac Jack's. *Id*.

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exercise 'the full right of self-government in both local and municipal matters,' and with respect to such matters the[ir] City Charter[s] and ordinances supersede the laws of the State." *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 43 (1982).

As noted above, during the period when the RV ordinances were recommended and adopted, Annette and Calvin's grandsons (Cameron [PDC Chair 2015–; Board 2014-18, Mayor 2017-18]; Tyler [Board 2017-20]) and son (Brent [PDC 2015-17]) gained, and played, significant roles in Calhan's government. *Id*. at 5.

Van Sant's Mobile Home Park Begins Competing For Long-Term RV Rental Business; Calhan's Board Then Enacts Ordinance 2016-09.

As indicated above, Van Sant had historically operated a mobile home park on its property in Calhan. *Id*. at 7. In mid-2015, for economic reasons Van Sant began renting certain of its spaces to RVs on a long-term basis and, in so doing, became a competitor of Cadillac Jack's and Jolly's. *Id*. At the time, Calhan had no regulations governing RVs nor prohibiting Van Sant from renting to them. *Id*. Significantly, however, in October 2015 Cameron Chaussee became Chair of the PDC (which advises the Board on issues related to urban planning and land use, *id*. at 5) and his father Brent became a member. *Id*. at 8.

Six months later, in April 2016, the PDC (including Cameron and Brent) recommended to Calhan's Board that it adopt a wide-ranging "Land Development Code," which the Board (including Cameron) unanimously enacted as Ordinance 2016-09. In violation of Colorado's Ethics Code § 24-18-109(3)(a), Cameron seconded the motion to bring the ordinance to a vote and then voted for its approval as a member of the

Board; he did not disclose to the Board his beneficial interest in Cadillac Jack's. Among other things, the Ordinance instituted separate definitions for a "Mobile Home," "Manufactured Home," "Recreational Vehicle (RV)," and "Manufactured Home Park." It also decreed for the first time that "RVs are not permitted within manufactured home parks." A provision that would have excused Van Sant from that provision was rejected. As a result, it was suddenly precluded from renting space to RVs. *Id.* at 8-9.

Shortly after Ordinance 2016-09 was enacted, Calhan began citing Van Sant repeatedly for alleged violations and ultimately initiated criminal enforcement action against it. Meanwhile, Van Sant began the expensive and time-consuming process of removing all "Manufactured Homes" from its property so it could again rent space to RVs. *Id.* at 9-10.

Van Sant Informs Calhan's Board It Intends to Completely Convert to An RV Park; Calhan's Board Then Enacts Ordinance 2018-05.

At a Calhan town meeting in March 2018 attended by Cameron and Tyler Chaussee, Van Sant announced its intention to fully convert to an RV park with 34 spaces for rent. Two weeks later, the Board held a "Special Meeting," where the only agenda item was consideration of a new ordinance to expand the definition of "Manufactured Home Park" to also encompass "Mobile Homes." The expressly stated purpose of the new ordinance was to "prohibit recreational vehicles . . . on such

parcels. . . ." Tyler seconded the motion to enact the new ordinance, which passed unanimously with his and Cameron's consent. Again, both Cameron and Tyler Chaussee violated Colorado's Ethics Code when they failed to abstain from voting on the proposal and disclose to the Board their conflict of interest. *Id*. at 10-11; C.R.S. § 24-18-109(3)(a). The effect was to increase the burden on Van Sant to remove both manufactured and mobile homes before it could rent spaces to RVs or operate as an RV park. *Id.* at 11.

Van Sant Continues Its Plans to Convert to an RV Park; Meanwhile Calhan's Board Passes Ordinance 2018-13.

In August 2018, Calhan's attorney responded to an email from Van Sant's counsel to confirm that the town did not have formal zoning districts, such that Van Sant was "currently able to establish an RV Park on its property . . . without specific approval from [Calhan]." *Id*.

At a meeting on October 3, 2018, the PDC noted Van Sant was proceeding with its conversion plans and discussed how to pass regulations requiring Van Sant to make improvements to its property before it could operate as an RV park. *Id*. Six days later, the PDC (including Cameron and Brent Chaussee) recommended that Calhan's Board enact an ordinance subjecting new RV parks in the town to eight pages of costly and onerous regulations. *Id*. at 11-12. In that ordinance, Calhan asserted that "such regulations have become

necessary due to the influx of recreational (RV) parks within the town limits of Calhan," even though there were no properties other than Van Sant's seeking to become an RV park there. *Id.* at 12.

Immediately following the PDC meeting, the Board enacted Ordinance 2018-13. Tyler Chaussee advanced the motion, and he and Cameron provided two of the three votes in favor of its adoption. Yet again, they violated the Colorado Ethics Code by doing so and failing to disclose to the Board their conflict of interest. *Id.*[5]

Ordinance 2018-13's new requirements made it prohibitively expensive for Van Sant to continue converting its property to an RV park. To this day, the site sits empty and unused. *Id*. Yet, that ordinance also conveniently included a "grandfathering" clause, which exempted Cadillac Jack's and Jolly's from ever having to comply with those regulations unless they make the unlikely decision to expand or renovate their existing facilities. *Id.* at 13.

* * * *

As explained above, following all of the preceding Van Sant ultimately initiated this lawsuit; the district court granted summary judgment in favor of defendants; and the Tenth Circuit affirmed.

[5] Had they made such disclosure, which they did not, they could have so voted to provide a quorum and enable the Board to act. C.R.S. 24-18-109(3)(b).

REASONS FOR GRANTING THE PETITION

I. The Scope of LGAA Immunity Affects Local Government Officials in Every Municipality Nationwide; This Court Should Confirm That They Must Act Lawfully for Their Actions to be Protected.

The LGAA prohibits recovery of antitrust damages, interest, costs or attorney's fees against "any local government . . . official . . . ***acting in an official capacity***." 15 U.S.C. § 35(a) (emphasis added). The act does not define "official capacity," nor has this Court ever interpreted that term in the 40 years since the LGAA was enacted.

Yet, basic principles of statutory construction based on the act's legislative history make clear that Congress did not intend to bestow absolute, unqualified immunity from antitrust liability on local government officials. If it did, Section 35 would not include the "acting in an official capacity" limitation. That is why both the Fourth and Tenth Circuits long ago concluded that a public official must act lawfully before LGAA immunity may attach. This Court should now enshrine that interpretation in bedrock to remove any doubt.

A. The Legislative History Establishes Congress's Intent That Local Officials' Actions Must Be Lawful in Order to Qualify For LGAA Immunity.

Thirty-six years ago, the Fourth Circuit addressed the scope of LGAA immunity in *Sandcrest Outpatient*

Servs., P.A. v. Cumberland Cnty. Hosp. Sys., 853 F.2d 1139 (4th Cir. 1988). There, an association of physicians asserted Sherman Act claims against a hospital and its board of trustees after its contract to provide emergency room services was not renewed. *Id*. at 1141. Specifically, the physicians argued that the board's creation of an *ad hoc* committee to review bids for the emergency room contract violated the Sherman Act because certain members of the board and the *ad hoc* committee engaged in a boycott of, and refused to deal with, their group. *Id*.

> Sitting by designation, Justice Powell explained
>
> > that, on its face, the phrase "acting in an official capacity" includes ***those lawful actions***, undertaken in the course of a defendant's performance of his duties, that reasonably can be construed to be within the scope of his duties and consistent with the general responsibilities and objectives of his position. This interpretation is also supported by the legislative history.

Id. at 1145 (emphasis added). He then embarked on a review of that legislative history, *id.* n.7, emphasizing "[t]he intent of [this] provision is to insure that local government officials performing their ***normal, lawful functions*** will not be personally responsible for damages when the local government itself is not." *Id.* (emphasis added) (quoting S.Rep. No. 593, 98th Cong., 2d Sess. 8 (1984)).

Justice Powell concluded by noting "[t]his definition is broad and consistent with the House legislative history" as well. *Id.* He then drove the point home once and for all by reiterating that the test for LGAA immunity was a two-pronged objective one: whether the challenged actions of local officials "were lawful ***and*** taken within the scope of their authority." *Id.* at 1148 (emphasis added, citing *id.* at 1145).

The Fourth Circuit ultimately determined that the hospital board was entitled to LGAA immunity because it was authorized to create the *ad hoc* committee and none of its conduct was unlawful (in the sense of being prohibited by the hospital system's or medical staff's bylaws). *Id.* at 1143, 1144-45, 1146. Seventeen years later, in *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876 (10th Cir. 2005). The Tenth Circuit adopted *Sandcrest*'s analysis and recognized that LGAA immunity for local officials is limited to lawful conduct by them. The *GF* plaintiffs had brought Sherman Act claims against *Black Hawk* and certain of its officials alleging they conspired to restrain and monopolize trade in the limited gaming industry. *Id*. at 879. In reaching its result, the Tenth Circuit emphasized "[t]he legislative history of the LGAA . . . demonstrates that Congress intended the phrase 'acting in an official capacity' to be given broad meaning encompassing ***all 'lawful actions*** . . .'" of local government officials. *Id.* at 885 (emphasis added, quoting *Sandcrest*, 853 F.2d at 1145). In the latter regard, the Tenth Circuit mirrored the Fourth Circuit's approach, specifically noting

that "the [challenged] practices were not specifically prohibited by state law. . . ." *Id.* at 881.

The *Sandcrest* and *GF Gaming* decisions also accord with this Court's antitrust jurisprudence, which have consistently recognized the paramount importance of the Sherman Act. As this Court noted 46 years ago:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 n.16 (1978) (quoting *U.S. v. Topco Assocs.*, 405 U.S. 596, 610 (1972)). As the Court went on to explain, "the antitrust laws establish overarching and fundamental policies. . . ." *Id*. at 399. It further emphasized that:

> [i]n enacting the Sherman Act . . . Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts. . . .

Id. at 406. This Court subsequently underscored that "[a]lthough this federal interest [in enforcing the national policy in favor of competition] is expressed through a statute rather than a constitutional

provision, Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." *Calif. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 110-11 (1980).

Given this Court's deference to the sanctity of the Sherman Act, it is no surprise that Congress limited the protection of the LGAA to local officials only when "acting in their official capacity." Nor is it surprising that the Fourth and Tenth Circuits, relying on the act's legislative history, have interpreted Congress to intend that such officials must be acting lawfully in order to be afforded immunity from antitrust damages. This Court should now provide its imprimatur.

B. Conversely, The Tenth Circuit Decreed Here that Unlawful Non-Criminal Activity Does Not Deprive Local Officials of LGAA Protection.

The Colorado Ethics Code prohibits local government officials from voting on – or attempting to influence other such officials regarding – matters in which they have a personal or private interest, and requires them to disclose such interest to the governing body. C.R.S. § 24-18-109(3)(a). Here, the three Chaussee town defendants (Cameron, Tyler and Brent) each had such an interest in the three Calhan RV ordinances because of their beneficial interests in Cadillac Jack's RV Park. Their actions in voting on the ordinances and not disclosing their interests were unlawful; they were expressly prohibited by that very statute.

The Tenth Circuit did not accept that the three had disqualifying personal interests. It nevertheless concluded that even if they did and still voted while failing to disclose those interests, that did not deprive them of LGAA protection. *See Van Sant & Co. v. Town of Calhan*, 83 F.4th 1254, 1274 (10th Cir. 2023).[6] That is the crux of the problem.

To reach its result, the Tenth Circuit invoked a slight-of-hand ploy – focusing on whether the Chaussees' actions were "official," to the virtual exclusion of whether they were ***also*** "lawful" as required by *Sandcrest* and *GF Gaming*. First, it asserted nothing in the Ethics Code provides that a violation renders a local government official's actions' unofficial. *Id.* Then it went on to reason that "[n]othing in the . . . Code provides that when a local government official violates [it], such violation operates to . . . render[ ] the[m] . . . 'unofficial.'" *Id.* Further, it conceded that a government official could be subject to potential civil liability and criminal action under C.R.S. § 24-18-103(2), but backtracked that "nothing in the Code purports to directly classify such conduct as criminal or unlawful" nor render it unofficial. *Id.* In view of the foregoing tortured analysis, the appellate court upheld the district court's

[6] As addressed below, the Tenth Circuit placed on Van Sant the burden of presenting evidence that the Chaussees had such personal or private interests, 83 F.4th 1274, rather than accepting its evidence in that regard as true, drawing all justifiable inferences in its favor and presuming its version of any disputed fact issues to be correct.

determination that the three Chaussee town defendants were entitled to LGAA immunity.

But, in determining lawfulness in *Sandcrest*, it was only necessary that the challenged actions did not violate either the hospital system's or the medical staff's *administrative bylaws*. In determining lawfulness in *GF Gaming*, it was noted that the challenged actions did not violate state *statutory provisions*. Here, however, the Tenth Circuit has indicated that to qualify as unlawful so as to defeat LGAA protection the challenged conduct must violate state criminal law. It cited no basis for such an assertion, and none exists. The appellate court's precedent in this regard cannot be allowed to stand.

II. This Court Should Exercise its Supervisory Power to Correct the Tenth Circuit's Radical Departures from Long-standing Supreme Court Precedents.

A. The Tenth Circuit Failed to Adhere to Bedrock Summary Judgment Principles.

It is well-established Supreme Court teaching that summary judgment evidentiary standards favor non-movants, such as Van Sant here. On summary judgment, a non-movant=s evidence is to be believed and all justifiable inferences are to be drawn in its favor. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Its

version of any disputed issue of fact is presumed correct. *Id*. (citing *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 339 (1982)).[7]

These are critically important evidentiary standards in determining whether Cameron, Tyler and Brent Chaussee had beneficial interests in Cadillac Jack's RV Park which, under the Colorado Ethics Code, would constitute "personal or private interest" prohibiting them from voting on the RV ordinances and requiring disclosure to the Calhan Board and PDC. Van Sant's evidence was that all three are beneficiaries of the Video Trust, which is the ultimate owner of Cadillac Jack's. Op. Br. at 6. The Tenth Circuit acknowledged that evidence. *See Van Sant*, 83 F.4th at 1261 (certain documents list as Video Trust beneficiaries all of Annette Chaussee's descendants).

But, instead of accepting Van Sant's evidence to that effect at face value, the appellate court pointed to certain other documents containing conflicting statements about the trust beneficiary status. *Id.* It then extrapolated that evidentiary dispute into "an alleged speculative and exceedingly remote contention" not necessarily constituting a "personal or private interest" such that they were not necessarily prohibited from voting nor required to make disclosure. *Id.* at 1273.

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[7] Even the Tenth Circuit has previously recognized that it "examine[s] the factual record in the light most favorable to the party opposing summary judgment." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1168 (10th Cir. 2010).

Under this Court's summary judgment evidentiary standards referenced above, the Tenth Circuit was required to take as true that the three Chaussee town defendants had beneficial interests in Cadillac Jack's. From there, it would have been virtually impossible for the appellate court to contend – as it did, *see id.* – that such status as beneficiaries did not constitute personal or private interests under the Ethics Code. Logic and common sense alone would suggest the contrary, to say nothing of the Code itself. *See*, *e.g.*, C.R.S. § 24-18-105(2) (a "local government official . . . should not . . . hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority"); C.R.S. § 24-18-109(5)(b)(I) (requiring compliance with voting abstention and disclosure requirements regarding a nonprofit entity in which an official has a financial interest or from which he or an immediate family member receives services). Those interests, in turn, disqualified them from voting on the RV ordinances. *Id.* § 109(3)(a).

For purposes of ongoing future clarity, this Court should correct the Tenth Circuit's failure to adhere to long-entrenched summary judgment standards.

B. The Tenth Circuit Misplaced the Burden of Proof Regarding LGAA Immunity On Van Sant.

For at least 46 years now, it has been clear that parties claiming antitrust immunity bear the burden of proof in establishing such a defense. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 400 (1978) ("[Claimants'] arguments therefore cannot prevail unless they demonstrate. . . . We now turn to a consideration of whether . . . [they] have made that showing."). Thus, it was up to the three Chaussee town defendants to prove their entitlement to LGAA protection by establishing that when recommending and voting to enact the RV ordinances they were acting both lawfully and in an official capacity.

The Tenth Circuit, however, flipped the script; it improperly reversed the burden of proof: "We are not persuaded that *Van Sant has established* that the actions of the individual Town Defendants in voting in favor of the key ordinances were 'unlawful' and in turn 'unofficial.'" *Van Sant*, 83 F.4th at 1273 (emphasis added). The appellate court attempted to buttress its position by

> conclud[ing] that Van Sant, in responding to the Town Defendants' motion for summary judgment, failed to "bring forward specific facts showing a genuine issue for trial" as to whether the individual Town Defendants in fact violated the Colorado Ethics Code by voting in favor of the challenged ordinances.

Id. (quoting *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010)). But, Van Sant needed only to "bring forward specific facts showing a genuine issue for trial *as to those dispositive matters for which it carrie[d] the burden of proof*." *Kannady*, 590 F.3d at 1169 (emphasis added). As established above, the burden of proof regarding immunity was not on Van Sant.

This Court should correct the Tenth Circuit's misapplication of the burden of proof regarding the defense of antitrust immunity.

C. The Tenth Circuit Employed Pleading Standards, Rather than Summary Judgment Evidentiary Standards, and Found *Noerr-Pennington* Immunity Based on an Assumption at Odds with the Evidence.

This Court's judicially-created *Noerr-Pennington* doctrine exempts from antitrust coverage joint efforts by persons seeking to induce government action even though such efforts may be intended to, and do, have anticompetitive effects. *See*, *e.g.*, *E.R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 660, 670 (1961).

Given the aforementioned "overarching and fundamental policies" embodied in the antitrust laws, however, such implied (non-statutory) repeals of them are disfavored. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). "[T]here is a heavy presumption against implicit exemptions." *Goldfarb v. Va. State Bar*, 421

U.S. 773, 787 (1975). (emphasis added). The burden is on those claiming such immunity to *demonstrate* the presumption is overcome. *See City of Lafayette*, 435 U.S. at 399-400 (regarding *Noerr-Pennington* and *Parker* [*i.e.*, state action] immunity). Here, however, the Tenth Circuit did not require defendants to meet that burden.

The exemption is only available, of course, for actually seeking to influence government. *See*, *e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) ("defendants are immune from antitrust liability for engaging in conduct . . . aimed at influencing decisionmaking by the government"). In that regard, the appellate court confirmed "the fact that the Added Defendants . . . denied Van Sant's factual allegations that they conspired with the Town Defendants. . . ." *Van Sant*, 83 F.4th at 1276. Yet it rationalized that did not "preclude [them] from asserting the alternative *argument* that they are immune from Van Sant's antitrust claims under the *Noerr-Pennington* doctrine [by] simply assum[ing], without conceding, the truth of Van Sant's factual allegations." *Id.* (emphasis added). In other words, they could meet their *evidentiary* burden of proof through an *assumption*.

For that stunning proposition the Tenth Circuit cited no case authority but relied solely on Fed. R. Civ. P. 8(d)(3). Rule 8, of course, deals with general rules of *pleading*. Subsection (d) addresses, among other things, *pleading* alternative statements. Sub-subsection (3) provides that a party may *plead* inconsistent

defenses. Thus, a defense asserted in an answer to a complaint is not subject to being struck from that pleading simply because it is inconsistent with some other defense asserted there. But that was not the issue here; Van Sant never moved to strike the *Noerr* defense from the non-governmental defendants' answer.

The issue here, rather, was that the non-governmental defendants moved for summary judgment on the basis of being exempt from the antitrust laws under the *Noerr-Pennington* doctrine. In doing so, they assumed the burden of proving their entitlement to that exemption. *Lafayette*, 435 U.S. at 400. Yet, as the appellate court found, they denied ever seeking to influence town officials to enact the RV ordinances. The missing proof cannot be supplied by assuming hypothetically that they did conspire with the town defendants as the Tenth Circuit suggested.

This Court should correct both the Tenth Circuit's misconflation of pleading in the alternative with the burden of proving an antitrust immunity defense on summary judgment, and its hypothetical assumption of non-existent evidence.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. MCMAHON
Counsel of Record
BENJAMIN P. WIECK
JONES & KELLER, P.C.
1675 Broadway, 26th Floor
Denver, Colorado 80202
(303) 573-1600
tmcmahon@joneskeller.com