No. 23-754

# 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; 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**

## BRIEF IN OPPOSITION FOR TOWN OF CALHAN, CO, CAMERON CHAUSSEE, TYLER CHAUSSEE, AND BRENT CHAUSSEE

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## QUESTION PRESENTED

The plain language of the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 ("LGAA") confers immunity on government officials for antitrust damages whenever they act in an "official capacity." Although the statute makes no reference to it, Van Sant & Co. ("Van Sant") argues there is a "separate illegality" element, which defeats immunity if a plaintiff merely alleges a potential violation of state law by a government official. Can Van Sant add an element to LGAA immunity not found in the statute?

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## INTRODUCTION

Van Sant's petition for a writ of certiorari ("petition") to this Court should be denied because it seeks review of a question not actually decided by the court below. It claims this Court should determine whether government officials are stripped of LGAA immunity based on alleged "unlawful conduct," arguing that the "Tenth Circuit's decision essentially enables such officials to enact self-serving laws with impunity." But the Tenth Circuit Court of Appeals expressly declined to rule on the scope of LGAA immunity in this case – finding it unnecessary to uphold the district court's order on summary judgment.

Instead, the Tenth Circuit based its decision as it relates to LGAA immunity largely on the fact that Van Sant failed to present sufficient evidence demonstrating a violation of the Colorado Ethics Code by any government official in the Town of Calhan. In the absence of a violation of state law, there was no need for the Tenth Circuit to reach the larger question on the scope of LGAA immunity.

But even if the Tenth Circuit had offered an opinion on the scope of immunity, this case presents a poor vehicle to interpret the LGAA. The Colorado Ethics Code, which is the only state law Van Sant relied upon in the courts below, is ill-defined and lacks sufficient precedent to guide even Colorado state courts on what conduct is prohibited. But in order to answer the question Van Sant poses in its petition, this Court would first have to apply the Colorado Ethics Code to the

conduct of Town officials – an exercise that both the district court and the Tenth Circuit declined to perform in their respective opinions.

Finally, certiorari review is unnecessary because LGAA immunity is infrequently litigated and the circuit courts are aligned in their interpretation of the statute.

Thus, Van Sant's assertion that the ruling below will lead to "self-aggrandizing public officials" is overstated, especially given the infrequency in which LGAA immunity is asserted and litigated. The Court should therefore deny Van Sant's petition.

## STATEMENT OF THE CASE

1. The Town of Calhan is a small statutory town northeast of Colorado Springs, with a population of approximately 700 residents. [App. 3]. It is governed by a seven-member Board of Trustees ("Board"). [*Id*.]. Relevant here, it also has a Planning and Development Committee ("PAD") that is tasked with providing the Board suggestions on planning and land use issues. [*Id*.]. Both Cameron and Tyler Chaussee served as Trustees on the Board for a period of time, with Cameron serving as Mayor. [*Id*.]. Brent Chaussee was only a member of the PAD. [*Id*.].

Beginning in 2015, the Board had discussed "concerns about the appearance of the town" and possible ways to remedy perceived blight. [App. 6]. Some of the

suggestions offered were to revise the Town's code and re-vamp its code enforcement process. [*Id*.]. Consistent with these goals, the PAD discussed possible updates to the Town's land use code in 2015 and 2016. [App. 6-7]. Related thereto, in April 2016, the Board passed an ordinance that prohibited the presence of RVs in mobile home parks. [App. 8].

Van Sant owns a parcel of land within the Town and had rented lots to mobile homes since approximately 1974, operating as the Prairie View Mobile Home Park ("Prairie View"). [App. 3]. In late 2015, Van Sant's owner began renting certain lots to recreational vehicles ("RVs"). [App. 4]. Around the same time as the PAD was discussing updates to the Town's land use code, the Town conducted an inspection of Prairie View, in part to determine compliance with the Town's water and sanitation standards. [App. 8]. That inspection revealed a number of concerning violations, including improper water connections that lacked required backflow prevention devices, nearly a dozen improper connections to the Town's wastewater system, the accumulation of waste materials and inoperable vehicles on certain lots, and several RV's discharging wastewater directly onto the surface of the property. [App. 8-9]. Van Sant was issued formal notice of these violations in August 2016. [App. 9]. Van Sant was also cited for violations of the Town's ordinance prohibiting RVs in mobile home parks, with the most recent violation occurring in April 2018. [App. 9-10]. In August 2018, the Town and Van Sant entered into a settlement

agreement regarding those violations, whereby Van Sant pled guilty to the April 2018 violation. [App. 10].

Throughout 2018, the Town continued its efforts to update its municipal code, which included revised standards for dwellings within Town limits. [App. 11]. Because of recent inquiries about new RV parks, the Town clerk brought to the Board's attention the possibility of considering the inclusion of a separate section pertaining to standards on properties housing RVs. [App. 12]. The clerk also began gathering from other Colorado counties and municipalities common regulations for RV parks. [*Id*.].

In August and September 2018, Van Sant's attorney corresponded with the Town's attorney, inquiring about Van Sant's interest in converting Prairie View from a mobile home park to an RV park. [App. 13]. In his response, the Town attorney noted that while no current Town regulations prevented Van Sant from converting to an RV park, any transition would require Van Sant to comply with existing development standards, including drainage and utility requirements. [*Id*.]. The Town attorney also expressly advised Van Sant's counsel that due to recent inquiries, "The Board of Trustees may be considering some specific RV Park regulations in the future. So, your client may want to stay aware of the potential for future regulations that could apply to its planned park." [App. 13-14].

The PAD met on October 3, 2018 to discuss the RV park regulations assembled by the clerk. [App. 14]. It ultimately suggested that the Board adopt standards

that were similar to those enacted by a county in Colorado. [*Id*.]. The Board then reviewed the matter and agreed with the PAD's recommendation, which led to the adoption of Ordinance 2018-13 on October 9, 2018. [*Id*.]. The ordinance set forth basic health and safety standards, including minimum requirements for water distribution, fire protection, and supervision for all new RV parks. [App. 15]. Ordinance 2018-13 had a grandfathering clause, which did not apply to new RV parks and any existing RV parks that chose to renovate or update their property after November 30, 2018. [*Id*.]. Because Van Sant had not transitioned to be an RV park under the code by November 30 – largely because it still contained mobile homes with tenants – it was not eligible for grandfathering under the ordinance. [App. 15-16].

According to a letter sent by Van Sant's counsel in October 2019, Van Sant unilaterally claimed it had reclassified itself as an RV Park back in October 2018. [App. 16]. It also advised it began the process of terminating its leases with mobile home tenants and evicting them from the property. [App. 17]. The Town responded to Van Sant's correspondence by noting, among other issues, that the mere *intent* to classify as an RV park was insufficient to trigger the grandfathering clause. [*Id*.]. And, in any event, Van Sant was greatly expanding and improving Prairie View, which would trigger the duty to conform to the ordinance's standards regardless. [*Id*.].

Eighteen months later, in April 2020, Van Sant sent the Town another correspondence indicating that

it was rebranding itself as the Hawk Ridge RV Park. [App. 17-18]. To avoid compliance with Ordinance 2018-13's requirements, Van Sant argued that resolution of the 2018 municipal court case had somehow resulted in recognition that Van Sant's had undergone "reclassification" as an RV Park. [App. 18]. In addition to other issues, the Town informed Van Sant that it disagreed with its interpretation and explained that the settlement concerned only then-existing municipal code violations. [*Id*.]. Since its correspondence in April 2020, Van Sant has not developed the property and it currently sits idle. [App. 19].

At the time the Town was considering changes to its land use code in 2018, two RV parks were already operating within Town limits: Jolly's RV Park and Cadillac Jack's RV Park. [App. 4-6]. Jolly's, which is not a party to this litigation, is operated solely by Calvin Jolly. [App. 6]. Mr. Jolly has no familial connections to the Chaussee family and holds no interest in any business run by any member of the Chaussee family. [*Id*.].

The second RV park, Cadillac Jack's, is managed solely by Calvin Chaussee. [App. 4]. Calvin and his wife, Annette Chaussee, are the parents of Brent Chaussee and the grandparents of Tyler and Cameron Chaussee. [*Id*.]. Cadillac Jack's is owned by a Missouri corporation, Video Productions, Inc., which was originally owned by Annette Chaussee. [*Id*.]. In 1990, Annette Chaussee established a separate trust, the AMC Video Trust, and transferred all of her interest in Video Productions to that trust. [App. 4-5]. The record contains conflicting statements on who is the beneficiary

of the AMC Video Trust. [App. 5]. Some documents indicate that the principal beneficiary is a non-profit organization. [*Id*.]. Other documents identify Calvin Chaussee as the principal beneficiary, as well as all of Annette's descendants at the time of her death. [*Id*.]. Other documents direct that all interest in Video Productions shall go to Blake Chaussee, another member of the Chaussee family. [*Id*.]. The land where Cadillac Jack's operates is owned by a separate business, which is similarly controlled by Annette Chaussee. [*Id*.]. In 1990, she transferred her interest in that business to a second trust, with direction to use the funds for educational programs. [*Id*.].

There is no evidence in the record that either Annette or Calvin held discussions with Cameron, Tyler, or Brent about the RV regulations the Town was considering in 2018. [App. 16]. There is also no evidence that the Town clerk, who helped compile and draft the RV regulations based on examples from other Colorado counties and municipalities, ever spoke with Annette or Calvin about the Town's proposed updates to its land use code. [*Id*.].

Although Van Sant persistently refers to the "unlawful conduct" of Cameron, Tyler, and Brent Chaussee in its petition, none of the Town's representatives have ever been found civilly or criminally liable for any conduct related to Van Sant or the passage of Ordinance 2018-13. [App. 33 (noting Van Sant failed to establish that the actions of Cameron, Tyler, and Brent Chaussee were unlawful)]. Instead, Van Sant has simply declared, without sufficient evidence or a prior

adjudication by any court or the district attorney, that they violated the Colorado Ethics Code. [App. 35].

2. In October 2020, Van Sant filed a complaint against the Town in the United States District Court for the District of Colorado. [App. 19]. Van Sant amended its complaint twice, adding Cameron, Tyler, and Brent Chaussee as defendants (individuals referred to as "individual Town Defendants" and when combined with the Town, these defendants are collectively referred to as the "Town Defendants"). [App. 19-21]. Van Sant also sued Annette, Calvin, and Blake Chaussee, as well as several entities related to Annette and Calvin Chaussee (referred to as the "Added Defendants"). [App. 21].

Van Sant asserted two causes of action under the Sherman Act against all of the defendants, claiming a "Conspiracy in Restraint of Trade, Sherman Act Sec. 1, 15 U.S.C. § 1" and "Conspiracy to Monopolize, Sherman Act Sec. 2, 15 U.S.C. § 2." [App. 21-22]. Van Sant also asserted two claims against the Town Defendants under 42 U.S.C. § 1983, alleging violations of its right to substantive due process and equal protection. [App. 22].

The Town Defendants moved for summary judgment on all claims, arguing that they were entitled to immunity from antitrust damages, costs, and attorney's fees under the LGAA, 15 U.S.C. § 35. [App. 22-23]. The Town Defendants also argued that the Board of Trustees' passage of Ordinance 2018-13 did not rise to the level of a substantive due process violation, nor

did the ordinance violate Van Sant's right to equal protection. [App. 23]. Finally, Cameron, Tyler, and Brent Chaussee asserted absolute and qualified immunity over Van Sant's § 1983 claims. [*Id*.]. The Added Defendants also moved for summary judgment, asserting *Noerr-Pennington* immunity, among other antitrust defenses. [App. 23-24].[1]

In response to the Town Defendants' motion for summary judgment, specifically their invocation of immunity under the LGAA, Van Sant argued that the individual defendants were not entitled to immunity because they had acted unlawfully in passing Ordinance 2018-13. [App. 96]. Van Sant alleged that the individual Town Defendants had violated the Colorado Ethics Code, which states, in part, that "a member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon. . . ." [App. 96]. With respect to its constitutional claims, Van Sant focused largely on the Town's liability and asserted that Ordinance 2018-13 infringed upon its fundamental right to property in violation of substantive due process. [App. 104]. On equal protection, Van Sant argued that the ordinance's grandfathering clause resulted in similarly situated

[1] The Added Defendants were represented by separate counsel below. The current brief in opposition does not address any arguments raised by Van Sant in support of its petition to review the Added Defendants' entitlement to *Noerr-Pennington* immunity – which the district court granted and the Tenth Circuit affirmed.

RV parks, namely Jolly's and Cadillac Jack's, being treated differently without rational basis. [App. 26-27].

In reply, the Town Defendants noted that the plain language of the LGAA does not require consideration of whether the government official's conduct is "unlawful" before immunity can be granted. [App. 71]. Rather, the statute offers that immunity shall be granted so long as the individual is "acting in an official capacity." [App. 71-72]. Thus, the only relevant question to determining immunity under the LGAA is whether the action taken by the government official is "within the scope of his duties and consistent with the general responsibilities and objectives of his position." [App. 71 (quoting *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 885 (10th Cir. 2005)].

The Town Defendants also noted that even if LGAA immunity incorporated some analysis of lawful activity, Van Sant had failed to set forth sufficient evidence demonstrating a violation of the Colorado Ethics Code. [App. 97]. The code directs that all potential violations shall be investigated and prosecuted by the district attorney for the county in which the municipality exists – a process that was not exercised in this case. [App. 97, 119 (C.R.S. § 24-18-103(2)]. Also, while the Colorado Ethics Code prohibits elected officials from voting on matters for which they have a "personal or private" interest, the statute does not actually define the terms "personal" or "private." [App. 36]. The code also states that it is *not* a violation for an elected official to hold an interest in a business that "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." [*Id*. (citing Colo. Rev. Stat. § 24-18-105(2))].

The district court granted summary judgment to the defendants. [App. 87-114].[2] With respect to LGAA immunity, the district court agreed that the statute did not require an analysis of whether a government official's conduct was "unlawful." [App. 98]. Rather, the district court accepted that the only question presented under the statute was whether the action was one that the "defendants had the legal authority to take." [*Id*.]. Because passage of Ordinance 2018-13 was easily within the legislative authority of the Town Defendants, LGAA immunity barred Van Sant's antitrust damages. [App. 99-100].

With respect to Van Sant's constitutional claims, the district court dismissed the claims against Brent Chaussee on causation grounds, finding that his limited role on the PAD was not sufficient to demonstrate a link between the passage of Ordinance 2018-13 and Van Sant's alleged injury. [App. 100-01]. Tyler and Cameron Chaussee were granted absolute legislative immunity for their passage of Ordinance 2018-13. [App. 102]. With respect to the Town, the district court held that Ordinance 2018-13 was subject to rational basis review because it did not impair any of Van Sant's fundamental rights. [App. 107]. The district

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[2] Owing to a typo regarding which parties were entitled to costs, the district court issued an amended order on summary judgment correcting that error only.

court then held Ordinance 2018-13 was rationally related to a legitimate government interest, namely the promotion of health and safety in RV parks. [App. 109]. The district court rejected Van Sant's arguments about the underinclusive nature of the ordinance, noting this Court's decision in *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976). [App. 108-09]. Finally, relying on the same rational basis review, the district court dismissed Van Sant's equal protection claim. [App. 111-12].[3]

Van Sant appealed only portions of its case to the Tenth Circuit. With respect to its antitrust claims, it appealed only the district court's decision to grant LGAA immunity to the individual Town Defendants (but not the grant of immunity to the Town itself). [App. 30]. With respect to its constitutional claims, it appealed only the district court's ruling dismissing its substantive due process and equal protection claims against the Town (conceding that the individuals were entitled to immunity). [App. 42, 53]. Van Sant also appealed the district court's decision to grant *Noerr Pennington* immunity to the Added Defendants. [App. 37].

In asserting error by the district court, Van Sant argued that the Tenth Circuit should read into the LGAA an "unlawful" conduct requirement and then determine that the individual Town Defendants had engaged in such unlawful conduct under the Colorado

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[3] The district court granted the Added Defendants *Noerr-Pennington* immunity. [App. 94-95].

Ethics Code. [App. 32]. Van Sant's argument was premised on its reading of the Fourth Circuit Court of Appeals' decision in *Sandcrest Outpatient Servs. P.A. v. Cumberland Cnty. Hosp. Sys., Inc.*, where the court held that LGAA immunity extends to "those lawful actions, undertaken in the course of a defendant's performance of his [or her] duties and consistent with the general responsibilities and objectives of his [or her] position." [*Id*. (citing *Sandcrest Outpatient Servs. P.A. v. Cumberland Cnty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1145 (4th Cir. 1988))]. Clinging to the phrase "lawful actions," Van Sant argued the Fourth Circuit adopted a new requirement under the LGAA that requires courts to determine whether a local government official's conduct complies with every applicable state law. [*Id*.].

Critical to the present petition before this Court, the Tenth Circuit expressly declined to rule on the scope of immunity under the LGAA and thus did not have to address whether unlawful actions can strip a local government official of immunity for antitrust damages. [App. 33]. Given the lack of relevant evidence submitted into the record by Van Sant, the court below ruled:

> We find it unnecessary to define in this case the precise scope of the phrase 'lawful actions' because 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.'

[App. 33]. The Tenth Circuit based its decision on ambiguities in the Colorado Ethics Code, namely the lack of a statutory definition for "personal or private interest" and conflicting provisions about whether and how elected officials may vote on matters that may affect a business in which they hold an interest. [App. 33-37]. Compounding this uncertainty was a lack of evidence showing that the individual Town Defendants even held such interests in the relevant businesses, as Van Sant's theory was "premised on an alleged speculative and exceedingly remote contention requiring a certain sequence of deaths in the Chaussee family and a disregard of amendments directing the estate assets to non-profit entities." [App. 35-36]. Thus, the Tenth Circuit did not rule on the issue of what state laws, if any, can deny a local government official immunity under the LGAA for actions that are otherwise within their "official capacity." [App. 33].

The court below also affirmed the district court's grant of summary judgment to the Town on Van Sant's constitutional claims. [App. 42-57]. The Tenth Circuit largely followed the reasoning of the district court below, first holding that Ordinance 2018-13 did not impair a fundamental right, and thus was subject to rational basis review. [App. 48]. From there, the court concluded that the ordinance had a rational basis based on "health, safety and welfare" standards for the community. [App. 50]. While unnecessary, the Tenth Circuit also conducted a separate review of rational basis for Van Sant's equal protection claim, again concluding that it passed constitutional muster. [App. 57].

The Tenth Circuit also affirmed the Added Defendants' entitlement to *Noerr-Pennington* immunity. [App. 37-42].

3. In relevant part, the LGAA states that "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a). As the Tenth Circuit has stated, "Congress passed the LGAA in response to 'an increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern in the public interest.'" *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 885 (10th Cir. 2005).

While the LGAA defines "local government," it does not define the term "official capacity." *See* 15 U.S.C. § 34(1)(A). Notwithstanding the lack of a definition, however, Congress specifically noted "the definition of official local conduct is intended to be as broad as the local government's authority . . . [which] will often stem from broad home rule grants, or from more specific state grants of authority to the local entity." H.R. Rep. No. 98-965, at 20-21 (1984).

## REASONS FOR DENYING THE PETITION

### I. Van Sant seeks review on a question not decided by the Tenth Circuit in this case.

Van Sant seeks review primarily to address whether government officials who engage in alleged unlawful conduct should be afforded immunity under the LGAA. Yet the Tenth Circuit expressly declined to decide that question below, finding that Van Sant had not presented competent evidence of unlawful conduct under the Colorado Ethics Code. Van Sant's petition thus presents an issue of statutory interpretation that the Tenth Circuit found "unnecessary to define in this case." And even if this case had a pending determination as to the scope of LGAA immunity, it is a poor vehicle for review given the factual and legal idiosyncrasies under the Colorado Ethics Code and its application to this case.

#### a. The Tenth Circuit did not issue a ruling on the very issue Van Sant wants this Court to review.

Van Sant claims that review of the Tenth Circuit's decision is necessary to provide a check on local government officials – making it "crystal clear that the LGAA does not immunize local government officials from antitrust damages flowing from their unlawful actions." Van Sant expressed fear that if the Tenth Circuit's decision is not reviewed, it would signal to public officials that they have "blanket immunity from antitrust damages for unlawful conduct." Yet the court

below did not grant local officials such free-wheeling authority, nor did it endorse "blanket immunity" from antitrust damages for any and all forms of unlawful conduct by elected officials.

While the Tenth Circuit did summarize the parties' arguments regarding the scope of immunity under the LGAA, it ultimately held that disposition of that question was unnecessary to affirm judgment in favor of the individual Town Defendants:

> We find it unnecessary to define in this case the precise scope of the phrase 'lawful actions' because 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.'

[App. 33]. The Tenth Circuit's narrower opinion was justified by its review of the Colorado Ethics Code, which states, in part, that it is *not* a violation of the public trust for an official to "acquire or 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" taken by his agency. [App. (citing Colo. Rev. Stat. § 24-18-105(1)-(2))]. Thus, even if the individual Town Defendants held an interest in Cadillac Jack's – a factual burden Van Sant similarly fell short on – voting on legislation that may affect its business operations would not be a violation of the law. [App. 36]. Having no reason to do otherwise, the Tenth Circuit limited its opinion.

Van Sant's speculative fear of local government officials running afoul of antitrust regulations with impunity is thus unsupported and overstated – and certainly not supported by any reading of the Tenth Circuit's decision below. To the contrary, the opinion provides guidance only to the parties in this case, leaving for another day the broader question of how far to extend LGAA immunity.

**b. Based on the Tenth Circuit's ruling, this case would be a poor vehicle for review of LGAA immunity.**

Even if this Court were to ignore the limited scope of the Tenth Circuit's opinion and find it prudent to decide the scope of immunity under the LGAA, it should wait for a case that lacks the factual and legal idiosyncrasies in the present petition.

As already alluded to, and as the Tenth Circuit discussed, Van Sant failed to establish in the record a violation of the Colorado Ethics Code. While section 109 of the code indicates elected officials are to refrain from voting on pending matters for which they have a "personal or private interest," the Colorado General Assembly did not see fit to define either "personal" or "private" for purposes of the statutory scheme. Colo. Rev. Stat. § 24-18-109(3)(a). Muddying the waters further is the provision noted above, namely that it is *not* a violation to acquire or hold an interest in a business that may gain an economic benefit from official action by an elected official. *Id*., § 105(2). And even if a

violation of section 109 was present, the Tenth Circuit correctly observed that nothing within the Colorado Ethics Code would define that violation as criminal activity, or even deem it unlawful. [App. 37]. Indeed, the Code appears to imply otherwise, as the Code states that "judicial proceedings pursuant to this section shall be *in addition to* any criminal action which may be brought against such public officer. . . ." Colo. Rev. Stat. § 24-18-103(2) (emphasis added).

Because it did not have to, the Tenth Circuit did not wade into an area of Colorado law that is infrequently litigated and lacks clear definitions for certain conduct. But for this Court to reach the ultimate issue that Van Sant presents in its petition, it would have to interpret the Colorado Ethics Code and determine not only whether it applied to the individual Town Defendants' conduct, but also how any purported violation should be classified under the LGAA. Indeed, if the Court wanted to accept Van Sant's theory that unlawful conduct strips elected officials of immunity in antitrust litigation, it must first decide what "unlawful" means and how it applies under the facts of this specific case. Given the vagaries in the Code and the lack of a sufficient record in this case, any ultimate decision by this Court would be difficult to apply in future cases and would not provide elected officials with the type of "crystal clear" rule that Van Sant claims to want on certiorari review. The Court should thus wait for a case that touches upon a common state statute, such as a criminal statute for bribery, which would provide a

better vehicle given its broad applicability to all fifty states and their political subdivisions.

## II. There is no conflict among the circuits on the question presented, which is infrequently raised in antitrust litigation.

Van Sant posits its petition as a "critical opportunity" for the Court to interpret the scope of LGAA immunity, lest local government officials "enact self-serving laws with impunity." Yet Van Sant does not establish that such political run amok is prevalent enough to warrant this Court's attention. And even if the scope of immunity is important, this is not an issue that has divided the circuit courts such that it merits intervention by this Court.

With respect to the frequency of cases interpreting the scope of LGAA immunity, Van Sant provides no clear picture of how often courts must decide on government officials' entitlement to immunity from antitrust damages. But the Court gets some sense of its infrequency by the cases cited in its petition, as Van Sant relies on two circuit decisions that are, respectively, nineteen and thirty-five years old. *GF Gaming Corp.*, 405 F.3d at 876; *Sandcrest Outpatient Servs., P.A.*, 853 F.2d at 1139. When briefing the issue on the merits, the most recent circuit court decision relied on by either party was from 2012. *See Wee Care Child Center, Inc. v. Lumpkin*, 680 F.3d 841 (6th Cir. 2012). With the exception of the Tenth Circuit, few circuits have encountered the issue more than once and some

have not offered an opinion at all. Having existed for almost forty years, the immunity afforded under the LGAA has thus garnered relatively little attention and has not led to a flood of government officials acting with "impunity," as Van Sant seems to suggest.

But perhaps more fatal to Van Sant's petition, when the circuit courts *have* considered the scope of immunity under the LGAA, they have uniformly adopted the reasoning espoused by the individual Town Defendants in this case. Indeed, not a single circuit court has accepted Van Sant's "separate illegality" requirement.

In offering a competing interpretation of the LGAA, Van Sant clings to one statement from the Fourth Circuit's holding in *Sandcrest Outpatient Servs., P.A.*, namely the court's phrase that "'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." 853 F.2d at 1145. From this single statement, specifically the term "lawful actions," Van Sant concludes that the LGAA has a "separate illegality" requirement that obligates federal courts to evaluate whether a local official has violated *any* state law when passing legislation that may have an anti-competitive effect. But the Fourth Circuit added no such requirement – indeed, the Fourth Circuit did not even consider an allegation of illegal conduct. *Id*. Rather, the issue was whether certain hospital staff had the *authority* to act, namely whether the hospital chief of staff had the authority to

establish certain committees. *Id*. at 1144-45. Having concluded that the chief of staff possessed such authority, he was entitled to LGAA immunity. *Id*. at 1145. The Fourth Circuit's reasoning was not only consistent with the plain language of the LGAA, it was also consistent with existing precedent on how to evaluate immunity. *Id*. ("Our position that an affirmative grant of explicit authority is not required for an employee or government official to be acting in an official capacity under the LGAA is consistent with the position taken by the Second Circuit.") (citing *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 94 (2d Cir. 1986)).

Contrary to Van Sant's assertions, the Tenth Circuit has also analyzed LGAA immunity within the framework of whether a government official has the authority to act. Prior to its decision in *GF Gaming Corp.*, the Tenth Circuit considered a challenge similar to Van Sant's, in which a plaintiff attempted to circumvent LGAA immunity by arguing that certain elected officials had failed to file oaths of office – purportedly in violation of Utah state law. *Thatcher Enterprises v. Cache Cnty. Corp.*, 902 F.2d 1472, 1477-78 (10th Cir. 1990). The Tenth Circuit held that the "statutory immunities at issue here do not hinge upon the filing of a formal, written oath of office" – rejecting any notion that an unrelated state law could impair an official's entitlement to immunity. *Id.* at 1478. The Tenth Circuit reached a similar decision in *GF Gaming Corp*., granting immunity because city officials had "the authority to cause the city of Black Hawk to sell" certain mining interests. 405 F.3d at 885. Again, illegal conduct was

not even incorporated into an analysis of whether LGAA immunity applies. *Id*.

Beyond the Fourth and Tenth Circuits, other circuit courts have similarly cabined their analysis of LGAA immunity to whether the governmental official had the authority to act. The Sixth Circuit Court of Appeals focused on the "general responsibilities and objectives" of a government employee's position when determining entitlement to LGAA immunity, holding that negotiating funding contracts easily fell within the scope of such official's authority. *Wee Care Child Center, Inc.*, 680 F.3d at 849 (internal citations omitted). The Ninth Circuit Court of Appeals upheld LGAA immunity because a municipality "acted in its official capacity under Oregon law which expressly provides that cities may appropriate any private real estate for any public or municipal use." *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir. 1990). The Second Circuit Court of Appeals employed a similar rationale, noting LGAA immunity was proper because New York law authorized local municipalities to operate and regulate local airports. *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95 (2d Cir. 1986).

The uniformity of circuit court precedent not only makes this case unattractive for discretionary review by this Court, but also undercuts one of Van Sant's primary justifications for further appellate review: a fear that government officials will act with "impunity" moving forward. Circuit courts have issued opinions

on LGAA immunity for almost forty years, having not once adopted Van Sant's "separate illegality" requirement. If a flood of bad conduct by elected officials were to occur in response to this interpretation of the LGAA, it surely would have occurred by now. The infrequency in which LGAA immunity is discussed should highlight to the Court that Van Sant's issue lacks a broader importance beyond its own commercial interests.

## III. Certiorari review is unwarranted to analyze settled questions regarding burdens of proof at summary judgment.

In the last section of its petition, Van Sant implores the Court to review basic tenets of law governing summary judgment.

As an initial matter, the court below did not err in granting summary judgment to the individual Town Defendants, as the court correctly held Van Sant had failed to present sufficient evidence demonstrating a violation the Colorado Ethics Code. [App. 36]. As the Tenth Circuit noted, Van Sant failed to even address the individual Town Defendants' arguments concerning the lack of a definition for "personal or private interest" under the relevant statute. [*Id*.]. Nor did Van Sant address the separate provision of the Colorado Ethics Code that allows an elected official to "hold an interest in any business . . . [that] 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." [*Id*. (citing Colo. Rev. Stat. § 24-18-105(2)]. In short, Van Sant's constant assertion that the individual Town Defendants' actions were "unlawful" was not supported by competent evidence, let alone sufficient to defeat summary judgment.

But even if the court below erred in applying an already settled rule of law, the primary concern of this Court is not to correct errors in lower court decisions. Van Sant does not argue that the Tenth Circuit's approach to reviewing summary judgment decisions is consistently flawed or that its process is foreign to that of its fellow circuit courts. To the contrary, Van Sant asserts that the Tenth Circuit strayed from "bedrock" summary judgment principles only within the context of this case. Correcting mistakes in the lower court's analysis of summary judgment – for which there are none – would not meaningfully advance the law, nor would it provide greater guidance to federal courts moving forward. As Van Sant concedes, these principles of summary judgment are already "well established."

## CONCLUSION

For the reasons set forth herein, Van Sant's petition for a writ of certiorari to this Court should be denied.

Respectfully submitted,

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