No. 21-271

IN THE

Supreme Court of the United States

RAYMOND BENITEZ, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, d/b/a Carolinas HealthCare System, d/b/a Atrium Health,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Fourth Circuit adopted an interpretation of the phrase "local government" that includes Atrium Health, an entity that operates in multiple States and expands to new ones at will, generating $11 billion in revenue. Atrium cannot pledge the credit of the State or a political subdivision, levy taxes, exercise eminent domain on its own say-so, or avoid tort liability as other local governmental units do. In sum, it looks nothing like a local government. But under the Fourth Circuit's rule, Atrium is completely immune from damages claims for its antitrust violations.

The petition explains that this holding squarely conflicts with an indistinguishable decision of the Tenth Circuit, as well as with this Court's precedents and foundational rules of statutory interpretation. A prestigious group of thirty-three antitrust and health policy scholars, together with the American Antitrust Institute, has submitted an amicus brief explaining that the misconduct at issue in this case is rampant, and that the Fourth Circuit's reading of the Local Government Antitrust Act (LGAA) threatens substantial harm to competition in healthcare markets—which ultimately means higher prices for patients, many of whom can scarcely afford the increase. This case is the ideal vehicle to address this important issue. The Court should grant certiorari and reverse.

ARGUMENT

I. The Circuit Split Is Square.

The Fourth Circuit below and the Tenth Circuit in *Tarabishi* came to precisely opposite conclusions while looking to the *very same* characteristics of the public hospitals at issue in each case. The hospital in *Tarabishi* was equally a public body (its board was "appointed by the mayor" and "subject to the open meeting laws like other public boards and commissions"); created by a local government pursuant to state law; and it was equally formed "for furtherance of public functions"—indeed, it was "created for the benefit of the city of McAlester … to provide hospital and public health services to the residents." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1565 n.6 (10th Cir. 1991). Thus, the same facts the Fourth Circuit found dispositive in Atrium's favor were explicitly considered and rejected by the Tenth Circuit. And the Fourth Circuit expressly rejected the reasons *Tarabishi* relied on to find that the hospital authority there was not a local government: There, as here, the local taxpayers were not liable for any of the hospital's debts, and the hospital was not immune from tort liability. *Compare id.* at 1566-67, *with* Pet. App. 15a-17a, 23a. As the court below acknowledged, *Tarabishi* "is seemingly at odds with" the Fourth Circuit's decision, Pet. App. 23a; that's because it is—from "first blush" to final read.

Atrium's effort to defeat this obvious circuit disagreement essentially denies that this Court could *ever* confront a genuine split with respect to the LGAA. On Atrium's view, because the lower courts (necessarily) consider different state-law regimes in evaluating the

governmental character of the defendant in every LGAA case, there can be no guarantee that lower courts would have treated seemingly identical public hospitals differently. Opp.15-20.

But important federal statutes often incorporate state law in their definitions, and that has never stymied this Court's review of how the lower courts have implemented them. Indeed, this Court has frequently granted certiorari in recent Terms in cases involving varying state-law regimes (*e.g.*, the Armed Career Criminal Act (ACCA) and the Immigration and Nationality Act (INA)). *See, e.g.*, *Borden v. United States*, 141 S. Ct. 1817 (2021) (whether state crimes satisfied ACCA's federal definition of "violent felony"); *Quarles v. United States*, 139 S. Ct. 1872 (2019) (same); *Stokeling v. United States*, 139 S. Ct. 544 (2019) (same); *United States v. Stitt*, 139 S. Ct. 399 (2018) (same); *see also Shular v. United States*, 140 S. Ct. 779 (2020) (same for ACCA's federal definition of "serious drug offense"); *Torres v. Lynch*, 578 U.S. 452 (2016) (same for INA's federal definition of "aggravated felony"); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (same).

Every case involving the "categorical approach" and other "analytical frameworks" like it raises this issue. And no one would say, for example, that there wasn't a split "among the Courts of Appeals on the question whether state DUI offenses … qualify as a crime of violence" under the federal definition of that term, *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004), merely because the courts "looked to State law" and employed the same "analytical framework," *cf.* Opp.15, 21. Nor would anyone deny the "split of authority among the Courts of Appeals" regarding whether state domestic violence laws meet the federal definition of a

"misdemeanor crime of domestic violence," *United States v. Castleman*, 572 U.S. 157, 162 (2014), despite federal courts looking to state law and "employ[ing] the same analysis" there as well, *cf.* Opp.21.

Atrium admits this is precisely the same kind of case—one where 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." Opp.6 (emphasis added). The review this Court provided in those cases is equally justified here.

II. The Fourth Circuit's Decision Is Wrong.

Atrium cannot be a "local government" under any sensible understanding of that term. And the Fourth Circuit's contrary holding is not supported by (A) the LGAA's text, (B) the case law in North Carolina or the lower courts, or (C) North Carolina statutes.

A. The Fourth Circuit's Decision Contravenes The LGAA's Text.

This Court's cases instruct that phrases like "special function governmental unit" must be read to include only entities that can reasonably be described as a "local government," since that is the term being defined. *See* Pet.21-22.

There is nothing "local" about Atrium's character, and it has made concerted efforts to dispel any such notion. *See* Pet.12. Atrium admits that it operated in South Carolina when petitioner "filed his lawsuit," and has expanded into Georgia since. Opp.30-31. And as of a few months ago, Atrium began operating in Alabama, which does not even border the Carolinas, let alone Charlotte-Mecklenburg. *See* Atrium Health

News, *Atrium Health and Floyd Finalize Strategic Combination* (July 14, 2021), https://bit.ly/3qbAv2B. Sure, Atrium's billions-per-year revenues are smaller than the budgets of municipalities like New York City. *See* Opp.32. But even municipalities with giant budgets are "local," *i.e.*, geographically constrained. Atrium is not.[*]

Thus, Atrium must show that Congress intended to give "local government" an "unorthodox" meaning that departs from common usage. Pet.23-24 (citing this Court's cases). Atrium does not even attempt to do so. Instead, it apparently contests this well-established rule of interpretation, urging that "local government" carries no force on its own, and all that matters is "whatever a 'special function governmental unit' may be." Opp.25. That argument is in the teeth of this Court's decisions in cases like *Leocal*, *see* Pet.21-24, confirming the need for this Court's intervention.

Atrium likewise believes that, despite providing "school district" and "sanitary district" as exemplars before "any *other*" type of "special function governmental unit," 15 U.S.C. §34(1)(B) (emphasis added), "Congress explicitly chose not to define this term but paired it with State law to invest it with meaning," Opp.25-26. Atrium thus refuses to derive any meaningful content for the federal definition from the examples that surround the general term in the federal statute, and instead believes that a State can create a set of "special

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[*] Even if Atrium were correct that its character is "measured at the time of the events in the Complaint," Opp.30-31 n.4, that would make no difference here, because by then Atrium had already been granted the power to expand into any State it wants to, *see* 2015-288 N.C. Sess. Laws 2, http://bit.ly/39UyMTF.

function governmental units" much broader than the exemplars Congress set out. This, again, is precisely the opposite approach from the one this Court has applied to similar statutes. *See Taylor v. United States*, 495 U.S. 575, 599 (1990) (offenses defined as felonies and called "burglary" under state law do not necessarily meet ACCA's federal definition).

Independently, the petition explained (at 25-26) that Atrium cannot qualify as a "special function governmental unit" because it was not established in *each* of the States in which it now has substantial operations, as required by the text's constraint that such units must be "established by State law *in one or more States*." *See* 15 U.S.C. §34(1)(B) (emphasis added).

Atrium believes that "established … in one or more States" means "*in at least* one State." Opp.27. Thus, Atrium argues, petitioner's reading "effectively negat[es] the meaning of this phrase to give it a new and opposite meaning." *Id.* But it is Atrium's reading that "does substantial damage to the actual statutory language," *contra id.*, because it renders the phrase "in one or more States" wholly superfluous. The plain meaning of "established by State law" would of course include any entity established "in at least one State." But "every clause and word of a statute" should be given "effect, if possible," and should not be treated "as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quotation marks omitted).

To dispel any potential doubt: The House Committee on the Judiciary explained that this language was intended to cover geographically constrained, special-purpose subdivisions that are "*established* in *two or more States*" simultaneously. H.R. Rep. No. 98-965, at 19-20 (1984) (emphasis added). If "[n]o court has

ever embraced [petitioner's] reading" of "established … in one or more States," Opp.27, it is probably because no court has ever even entertained the argument that a multistate megafirm like Atrium might qualify as a "local government" akin to a "school district" under this provision of the LGAA.

This Court would not need to look any deeper into state statutes or case law to hold that the plain text of the LGAA requires reversal. And such a holding would establish a uniform threshold rule: A multistate megafirm that is not established in each of the States in which it operates is not a "local government" under the Act.

B. The Fourth Circuit's Decision Is Not Supported By Any Of The Cases Atrium Cites.

The primary authority on which both Atrium and the Fourth Circuit rely is the Supreme Court of North Carolina's decision in *DiCesare v. Charlotte-Mecklenburg Hospital Authority*, 852 S.E.2d 146 (N.C. 2020). But that case did not analyze whether Atrium is a "special function governmental unit" under the LGAA. Rather, *DiCesare* addressed whether Atrium is a "person" subject to civil-damages actions pursuant to the State's antitrust law. *Id.* at 160. Ultimately, the court was "persuaded" that North Carolina public corporations are not "person[s]" in this sense because *all* such corporations in the State are founded with the "essential function" of providing "governmental … services." *Id.* at 160-62.

As the case makes clear, North Carolina uses terms like "public purpose," "public body," and "body corporate and politic" in a very broad sense that

includes not only traditional local governmental units but also *all* public corporations that have, as "their essential function," "the governmental provision of services." *See DiCesare*, 852 S.E.2d at 149, 162 (quotation marks omitted). This only demonstrates that North Carolina understands those terms to be much broader than the examples listed in the LGAA. Moreover, the core analysis in *DiCesare* turns on a distinction between "*for profit*" and "*non*-profit" organizations, *id.* at 156-57, 160, a distinction irrelevant to federal antitrust law.

Based on this "governmental services" language from *DiCesare*, *see* Opp.17, Atrium suggests that "an entity seeking to qualify under the LGAA must be delivering governmental services," and that such services must already be recognized as "a legitimate government function," *id.* at 31. And whereas "the provision of healthcare" is "indisputably … a legitimate government function," Atrium apparently believes the provision of "retail or investment banking services" is not, and thus outside "the concept of a special function governmental unit." *Id.* at 31-32.

Scour the LGAA, and you will find no indication of the atextual limiting principle Atrium proposes. And North Dakota, at least, might have something to say about Atrium's characterization of retail banking as an illegitimate government function, given that it operates a state-owned, state-run general service bank. *See* Bank of North Dakota, *History of BND*, https://bnd.nd.gov/history-of-bnd/ (last visited Nov. 15, 2021). As the Bank of North Dakota exemplifies, the government legitimately provides services all the time that private firms do as well, so Atrium's proposed limitation is none at all. Local governments also own and

operate golf courses, sports stadiums, lotteries, and museums, as well as provide and service student loans and mortgages, to name just a few. As Atrium would have it, firms originally founded by local governments that do the same would themselves be "local governments" under the LGAA, and thus exempt from antitrust damages liability, even if they grow into multistate megafirms of their own volition.

None of the other lower court cases Atrium cites (at 21-22) supports its atextual argument either. *See* C.A. Reply 25-27. And these cases were decided before hospital authorities like Atrium became what they are today—hospital authorities were only granted the ability to operate out-of-State in 2015. *See supra* n.*. Accordingly, these cases in no way support the remarkable outcome below, where a multistate megafirm has been allowed to don the sheep's clothing of a "local government."

C. The Fourth Circuit's Decision Is Not Supported By North Carolina Statutes.

Atrium argues that North Carolina has granted hospital authorities governmental powers and obligations that "pertain exclusively to a government," as distinguished from those possessed also by a private individual or a private association. *See* Opp.8 (quotation marks omitted).

The petition addressed (at 28-33) why these so-called governmental "powers" and obligations do not distinguish hospital authorities from private parties. In response, Atrium makes two particularly egregious misrepresentations that warrant attention.

First, Atrium misstates that the tax-exempt bonds it can issue are "backed by the full faith and

credit of North Carolina." Opp.9. North Carolina expressly provides that the "principal of and interest on revenue bonds" issued by hospital authorities "*shall not* be payable from the general funds of the State or the municipality." N.C. Gen. Stat. §§131E-26(a), 159-94(a) (emphasis added). Second, Atrium misrepresents that hospital authorities "hold exactly the same power of eminent domain" as "sanitary districts." *See* Opp.23. Sanitary districts in North Carolina don't have to first obtain permission from another government agency to exercise eminent domain. N.C. Gen. Stat. §40A-3(c)(1). But a hospital authority like Atrium must. *Id.* §§40A-3(c)(3), 131E-24(c). And Atrium admits that North Carolina grants "the power of eminent domain" to certain *private* condemnors. Opp.23. Just like hospital authorities, private condemnors too must first obtain permission from the *very same agency* that serves as the gatekeeper for Atrium. *See, e.g.*, N.C. Gen. Stat. §62-101.

III. The Question Presented Is Important, And The Court Will Not Confront A Better Vehicle To Address It.

Atrium attempts to downplay the importance of the issue, Opp.6, but amici detail how anticompetitive behavior by dominant hospitals is a national problem that significantly harms competition, driven by the recent, endemic consolidation of the hospital industry by megafirms. *See* Amicus Br.3-6. The data show that such behavior has driven up costs, *id.* at 6-8, and private antitrust suits are an important supplement to government enforcement, *id.* at 9-13. Atrium's anticompetitive behavior and rapid expansion as the second-largest healthcare provider in the United States is a perfect illustration of their concern. Failure to

address the question presented—and answer it in the negative—invites dominant hospitals throughout the country to continue abusing their market power without any real check. *Id.* at 19-24.

Atrium responds that private damages actions are unimportant because the United States also sued Atrium, negotiating "a consent agreement that limits the use of [anti-steering] provisions." Opp.33-34. It "is not clear" to Atrium how a damages action would have "enhance[d] that enforcement." *Id.* at 34. And damages actions, Atrium assures, would not be barred "against non-governmental parties who collude or enter into anticompetitive arrangements with special function governmental units." *Id.*

But the danger is apparent from Atrium's own brief. It continues to argue that the anti-steering clauses the U.S. Department of Justice and North Carolina Attorney General identified as anticompetitive actually "promote competition." Opp.10. And without the threat of damages, what incentive does Atrium have to cease "running the Sherman Act's red lights, confident that the only consequence of being caught will be an order not to do so again"? Pet.13. Atrium acted anticompetitively all on its own, so its assurance that private damages actions can still be had against private co-conspirators provides little comfort.

Atrium also intimates that it would be better to address the question presented in a case where the corporation is founded by a local government in one State, gains monopoly power in another, and then is sued for anticompetitive conduct away from its home jurisdiction. Opp.28. In this circumstance, Atrium suggests, such "'special function governmental unit'

[may] not enjoy the Act's immunity." *Id.* (quoting Pet. App. 27a).

To be sure, that fact pattern would more starkly illustrate the absurdity of the Fourth Circuit's rule—but the rule is wrong as applied to any set of facts. When an entity that is not a local government violates the antitrust laws, everybody—including the residents of that entity's home State—is entitled to a remedy. Moreover, Atrium's suggestion that its rule does not compel immunity for out-of-state conduct is wrong. No matter Atrium's scope, it would still meet its own proposed limitation as a "special function governmental unit" exempt from federal antitrust damages, because it was established "*in at least* one State" for the "indisputably … legitimate government function" of providing healthcare. Opp.27, 31. No one should believe that Atrium—and megafirms like it—will not claim LGAA immunity based on the Fourth Circuit's decision if they face an antitrust action outside their founding State. This Court should grant the petition to settle the question, on which the circuits disagree, before dominant hospitals further harm consumers in the manner Atrium harmed petitioner here.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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