No. 25-1130

IN THE

Supreme Court of the United States

CHERRY GROVE BEACH GEAR, LLC, *et al.*,

Petitioners,

v.

CITY OF NORTH MYRTLE BEACH, SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Petitioners Cherry Grove Beach Gear, LLC, Derek Calhoun, and Jacqueline Calhoun were the plaintiffs in the district court and the appellants in the court of appeals. Respondent the City of North Myrtle Beach was the defendant in the district court and the appellee in the court of appeals.

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INTRODUCTION

The Petition brought by Cherry Grove Beach Gear, LLC, Derek Calhoun, and Jacqueline Calhoun (collectively, "CGBG") is entirely unworthy of review. The Fourth Circuit unanimously held that Respondent the City of North Myrtle Beach (the "City") is entitled to immunity from CGBG's federal antitrust claims under the state-action doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943). In reaching its decision, the Fourth Circuit applied settled principles of law to statutory language (which CGBG never discloses or discusses) explicitly authorizing the City to act anticompetitively by granting an exclusive franchise for on-beach rentals of umbrellas and beach chairs. By CGBG's own admission, the three questions presented (plus a fourth issue appearing only in the body of the Petition) turn on the application of settled law to the specific "facts of this case" and involve no split of lower-court authority for which this Court's intervention might be required. In any event, this case would be an exceedingly poor vehicle for consideration of any of the questions CGBG seeks to raise. CGBG provides no meaningful analysis of any of the issues—one of which was never presented to the lower courts and is raised for the first time here—and cites no authority remotely suggesting that the Fourth Circuit's unanimous application of the law to "the facts of this case" was incorrect.

This Court should deny the Petition.

STATUTES INVOLVED

S.C. Code Ann. § 5-7-30 provides in relevant part:

> **§ 5-7-30. Powers Conferred upon Municipalities . . .**
>
> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to . . . *grant franchises and make charges for the use of public beaches*; . . . (emphasis added)

S.C. Code Ann. § 5-7-145 provides in relevant part:

> **§ 5-7-145. Lifeguard and safety services provided by coastal municipalities.**
>
> (A) Each municipality bordering on the Atlantic Ocean is authorized to provide lifeguard and other safety related services on and along the public beaches within its corporate limits. A coastal municipality may enact and enforce regulations it determines

necessary for the safety of all persons on the beach.

(B) Lifeguard services may be provided using municipal employees or by service agreement with a private beach safety company.

If the municipality elects to provide the services by an agreement with a private beach safety company, the following conditions apply:

. . . .

> (3) the municipality may grant the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality on the effective date of this section; . . .

STATEMENT OF THE CASE

1. Under the state-action doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943), the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker*, 317 U.S. at 352). *Parker* immunity reflects "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982).

"Because municipalities and other political subdivisions are not themselves sovereign," the *Parker* doctrine "does not apply to them directly." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). Nevertheless, this Court has recognized that "a municipality's restriction of competition may sometimes be an authorized implementation of state policy" and has "accorded *Parker* immunity where that is the case." *City of Columbia*, 499 U.S. at 370; *see City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (1978) (plurality opinion). A municipality is entitled to *Parker* immunity when it acts "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *City of Boulder*, 455 U.S. at 52; *see Phoebe Putney*, 568 U.S. at 228 (holding that a municipality must "show that it has been delegated authority to *act or regulate* anticompetitively" (emphasis added)).

Satisfying the clear-articulation test does not require a showing that the state has authorized the precise anticompetitive conduct at issue. Rather, it is sufficient that anticompetitive activity is the "foreseeable result" of state policy, *i.e.*, "it is clear that anticompetitive effects logically would result" from the authority conferred because it displaces unfettered business freedom. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42-43 (1985); *see id.* at 42 (holding statute "clearly contemplat[ed] . . . anticompetitive conduct" where it "empower[ed] the City to refuse to serve unannexed areas"). As this Court made clear in *Phoebe Putney*, however, anticompetitive municipal action is not foreseeable merely because it lies somewhere within the realm of imagination. For purposes of *Parker* immunity, a state has clearly articulated and affirmatively expressed a policy authorizing anticompetitive municipal conduct when such conduct is "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature," such that the state "must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U.S. at 229.

2. The City is a municipality on the Atlantic coast of South Carolina. App. 18a. In 1999, the South Carolina General Assembly explicitly conferred on the City and other coastal municipalities extensive authority and control over the public beaches in their respective jurisdictions. *See* Act No. 113, 1999 S.C. Acts 1154 ("1999 Act"). It did this in two ways. First, the 1999 Act amended S.C. Code Ann. § 5-7-30[1] to empower the City to "grant franchises and make charges for the use of public beaches." Second,

1. Section 5-7-30, which is part of South Carolina's Home Rule Act, S.C. Code Ann. Title 5, confers on municipalities broad authority to legislate on matters within their jurisdictions. There is no dispute, however, that the City's entitlement to *Parker* immunity rests not on these general powers but rather on the specific statutory authority conferred by the 1999 Act.

the 1999 Act adopted a new statute, S.C. Code Ann. § 5-7-145, delegating to each coastal municipality the authority "to provide lifeguard and other safety related services on and along the public beaches" and to "enact and enforce regulations it determines necessary for the safety of all persons on the beach." S.C. Code Ann. § 5-7-145(A). This statute authorizes each city to provide lifeguard services in one of two ways: by "using municipal employees," or "by service agreement with a private beach safety company." *Id.* § 5-7-145(B). The statute further specifies that "the municipality may grant the exclusive right to the beach safety company to rent . . . beach equipment . . . on the beach." *Id.* § 5-7-145(B)(3).

The City has elected to provide lifeguard services through its own employees and has reserved to itself the exclusive right to provide on-beach rentals of umbrellas and chairs. App. 3a. Revenues from the City's on-beach chair and umbrella rentals are used first to fund lifeguards and beach patrol officers, and then for other beach-related purposes. App. 20a. As the district court explained in detail, the City's certified lifeguards and its Beach Services employees "work in tandem to promote safety on the beach." App. 20a.[2]

The City has adopted a number of ordinances regulating conduct on the public beach, including a

2. Among other things, Beach Services employees are trained to securely anchor the City's umbrellas and remain on hand to remove them in the event of windy conditions. App. 20a; *see* Consumer Products Safety Commission, *Beware! Airborne Beach Umbrellas Can Kill!*, available at https://www.cpsc.gov/Safety-Education/Safety-Guides/Outdoors/Beware-Airborne-Beach-Umbrellas-Can-Kill (last visited July 1, 2026).

prohibition of virtually all commercial activity. App. 21a. Since well before the events relevant to this litigation, the City has interpreted its ordinances as prohibiting on-beach delivery and set up of rented beach equipment and has enforced them accordingly. App. 21a-22a.

CGBG offers rentals of beach equipment, including umbrellas and chairs. App. 2a. In April 2021, the City became aware that CGBG was offering the option, for an additional fee, of on-beach delivery and set up of rented items. *Id.* When the City sought to enforce its ban on commercial activities on the beach, CGBG took the position that existing ordinances did not prohibit on-beach delivery and set up of rented beach equipment. App. 2a-3a. In June 2022, the City amended its Code of Ordinances to explicitly prohibit on-beach delivery and set up of beach equipment rented from anyone other than the City. App. 3a.

3. CGBG then filed this action. Among other constitutional and state-law claims, CGBG alleges that the City violated the Sherman Act, 15 U.S.C. § 2, by attempting to monopolize on-beach rentals of beach equipment. App. 3a. Following discovery, the district court granted summary judgment to the City. App. 15a-57a. With respect to the antitrust claim, the district court carefully examined "[t]he text and structure of Sections 5-7-145 and 5-7-30," App. 37a, in light of this Court's clear articulation precedents, including particularly *Phoebe Putney's* admonition that anticompetitive activity is the foreseeable result of statutory authority when it is "the inherent, logical, or ordinary result of the exercise of [that] authority." App. 32a (quoting *Phoebe Putney*, 568 U.S. at 229). Based on its extensive analysis, the district court

ruled that the City was immune from federal antitrust liability under *Parker*. App. 39a-43a.

A unanimous panel of the Fourth Circuit affirmed. App. 2a-11a. The court concluded that "S.C. Code §§ 5-7-30 and 5-7-145 leave no doubt as to the City's prerogative to exclusively provide on-beach setup and rentals to support lifeguard services and displace competition." App. 8a (internal quotation marks omitted). The court held that the statutory authorization to provide lifeguard and other safety related services clearly included the City's right to "provide or contract out" the exclusive right to provide on-beach rentals of beach equipment. *Id.* (internal quotation marks omitted); *see* App. 38a (district court opinion, explaining that under accepted canons of statutory construction the City's authority to grant the exclusive right to perform on-beach equipment rentals necessarily implied the predicate of that act, namely, "the City's authority to possess that power itself").

In light of its construction of the statutory language, the Fourth Circuit rejected CGBG's argument that § 5-7-145 did not "permit the City to effectively grant *itself* the exclusive franchise." App. 9a (emphasis in original). The court compared the present case to its recent decision holding the clear articulation standard satisfied where the legislature granted authority "to play a role in ambulance services and to implement anticompetitive regulations, but it did not explicitly grant the right to monopolize the market." App. 9a (citing *W. Star Hosp. Auth. v. City of Richmond*, 986 F.3d 354, 356-57 (4th Cir. 2021)). The Fourth Circuit reasoned that in this case, as in *Western Star*, state policy was sufficiently articulated because the statutory language "plainly anticipated" municipal action that would "necessarily supplant unrestrained market competition." *Id.* (quoting *W. Star*, 986 F.3d at 359 (alteration omitted)). The Fourth Circuit concluded that this result "follow[ed] from" this Court's opinions in *Town of Hallie* and *Omni Outdoor Advertising*, "in which state statutes did not expressly authorize the action taken, but made sufficiently clear that the state anticipated the municipality would play an anticompetitive role in the market." *Id.* The Fourth Circuit also noted that under this Court's decision in *Phoebe Putney*, "[t]he state must have 'affirmatively contemplated the displacement of competition,' but it is not 'expected to catalog all of the anticipated effects of a statute." *Id.* (citing *Phoebe Putney*, 568 U.S. at 229; *Town of Hallie*, 471 U.S. at 43).

The Fourth Circuit also rejected CGBG's argument that it should recognize a so-called "market participant" exception to *Parker* immunity. App. 10a. The court again pointed to its prior decision in *Western Star*, which noted that this Court "'has never recognized such an exception; in fact, it has suggested only that it might possibly exist'" and which "emphasized" that this Court "permitted state action immunity in *Hallie* even though the municipality was acting as a market participant." App. 10a (quoting *W. Star*, 986 F.3d at 360). The Fourth Circuit found that CGBG had offered no argument why it should reconsider *Western Star's* refusal "to steer federal antitrust law into uncharted waters" by recognizing the exception. *Id.* (quoting *W. Star*, 986 F.3d at 360).

CGBG did not seek rehearing or rehearing en banc of the Fourth Circuit's decision.

REASONS TO DENY THE PETITION

Nothing about this case warrants this Court's attention. None of the three questions presented (plus a fourth issue appearing only in the Reasons for Granting the Petition) identifies any conflict with a decision of another United States court of appeals or a state court of last resort, much less a mature circuit split, or any important and unsettled question requiring this Court's immediate attention. To the contrary, CGBG's own arguments indicate that what it seeks, above all, is fact-bound error correction. Even if this Court were in the business of correcting errors, certiorari is manifestly inappropriate here. CGBG's arguments are developed poorly or not at all, providing no foothold for a reasoned development of the Court's *Parker* jurisprudence. In the absence of any dispute concerning the meaning and application of this Court's precedents, the Court is left with nothing but CGBG's desire for a different outcome. But CGBG fails utterly to justify a grant of certiorari even for the limited and inappropriate (not to mention unnecessary) purpose of error correction. CGBG never provides the Court with the relevant statutory language, and it certainly never explains why it believes the Fourth Circuit erred in finding that South Carolina clearly articulated and affirmatively expressed a state policy for the displacement of competition.

Apart from the lack of substance, the issues are muddled because CGBG's first Question Presented concerns the putative market participant *exception* to *Parker* immunity, *see* Pet. at i, but the discussion of this issue is in Part III of the Reasons for Granting the Petition, after its discussion of whether the Fourth Circuit correctly applied the clear articulation standard, *see* Pet. at 8. The City will address each Question Presented in the order in which CGBG actually argues it: the second question (whether the Fourth Circuit correctly applied the clear-articulation test), then the third question (whether the Court should adopt a "heightened rigor" modification of the clear-articulation test), then the first question (whether the Court should recognize a "market participant" exception to *Parker* immunity), concluding with CGBG's fourth argued issue, which does not correspond to any Question Presented.

I. The Court Should Deny Certiorari on the Question of Whether the Fourth Circuit's Opinion Erodes the Clear Articulation Test (Second Question Presented)

CGBG first argues, Pet. at 4-6, that certiorari should be granted to correct the Fourth Circuit's supposed "dilut[ion]" of the clear articulation standard. Pet. at 4. The Court should reject this argument.

First, CGBG does not contend that the lower courts are split on this issue and does not identify any conflict between the Fourth Circuit's decision and that of any other United States court of appeals or any state court of last resort. CGBG does not even cite *Western Star*, the reasoning of which informed the Fourth Circuit's application of the clear articulation test. Nor does CGBG contend there is any error in the Fourth Circuit's statement of the law of *Parker* immunity generally, or in its explanation of the clear-articulation test specifically.

Second, CGBG is plainly seeking mere error correction here, but it never seriously attempts to explain how the Fourth Circuit erred. CGBG makes vaguely ominous claims that the Fourth Circuit's reasoning "effectively collapses" the clear articulation analysis, Pet. at 4, "stretches foreseeability beyond Phoebe Putney's boundary," Pet. at 5, and makes an unwarranted "leap" from "conditional exclusivity in one structured setting to municipal self-exclusivity in another," Pet. at 6. CGBG also contends that the consequence of the Fourth Circuit's reasoning is that "you can essentially infer a monopolistic structure for any municipal enterprise by using numerous statutes and piecemealing them together." Pet. at 5. But CGBG never supports any of these contentions by explaining, with reference to this Court's precedents and analysis of the statutory text, where the Fourth Circuit supposedly went wrong. The only thing that is clear is that CGBG's argument is limited to the facts and circumstances of this particular case.

Third, there is no error. The Fourth Circuit correctly stated and faithfully applied the clear-articulation test. As explained above, in 1999 the South Carolina General Assembly conferred on the City the statutory authority to "grant franchises and make charges for the use of public beaches." S.C. Code Ann. § 5-7-30. This statutory language plainly contemplates anticompetitive regulation. A municipal franchise grants "one company the exclusive right to charge the public for a vendor's services." *Quality Towing, Inc. v. City of Myrtle Beach*, 547 S.E.2d 862, 867 (S.C. 2001). The authority to grant a franchise, therefore, is inherently the power to displace competition.

Moreover, S.C. Code Ann. § 5-7-145, adopted simultaneously with the amendment of § 5-7-30, explicitly links the provision of lifeguard services to the exclusive right to conduct on-beach rentals of beach equipment. *See* S.C. Code Ann. § 5-7-145(B) (authorizing a municipality that contracts with a beach safety company for lifeguard services to grant that company "the exclusive right" to conduct on-beach rentals of beach equipment). Under South Carolina's statutory scheme, therefore, displacement of competition is not merely foreseeable, it is expected and intended.

Contrary to CGBG's contention, *see* Pet. at 5, the statutory language here is not the kind of "broad home-rule authority or general municipal powers" that this Court found insufficient in *City of Boulder* and *Phoebe Putney*. Like this case, *City of Boulder* involved a home-rule provision, but the similarity ends there. Unlike the "mere neutrality" of Colorado's Home Rule Amendment, *see City of Boulder*, 455 U.S. at 55 (emphasis omitted), § 5-7-30 specifically empowers the City to "grant franchises . . . for the use of public beaches," and § 5-7-145(B) even more plainly provides for an exclusive franchise to rent out beach equipment. *Cf. Town of Hallie*, 471 U.S. at 43 (describing the Home Rule Amendment at issue in *City of Boulder* as "allocat[ing] only the most general authority to municipalities to govern local affairs"). This case is also wholly unlike *Phoebe Putney*, where a statutory grant of "simple permission to play in the market" conferred by general corporate powers did not amount to "an affirmative state policy to displace competition." *Phoebe Putney*, 568 U.S. at 231. Rather—as the Fourth Circuit correctly concluded—in light of the statutory authorization to restrict competition by granting of an exclusive franchise, the City's reservation of exclusivity to itself "does not constitute unexpected anticompetitive behavior." App. 10a. In fact, it is precisely the same anticompetitive behavior, just with a different beneficiary (the City rather than a private company).[3] Thus, the Fourth Circuit correctly ruled that the City is entitled to *Parker* immunity.

Fourth, regardless of whether the Fourth Circuit erred, this case is a poor vehicle for certiorari. Any ruling by this Court would have little or no impact beyond the parties themselves. CGBG's clear articulation argument, being one of mere error correction, presents no broadly relevant question of law or policy. Although CGBG never discusses the actual statutory text, the clear articulation analysis here turns on the specific—and as far as the City has been able to discern, unique—statutory language linking the provision of lifeguard services to the grant of an exclusive right to perform on-beach rentals of beach

3. Section 5-7-145's explicit grant of authority to act anticompetitively, in contrast to the general corporate authority at issue in *Phoebe Putney*, is alone sufficient to distinguish that case from this one. But there is also a key factual difference. The transaction in *Phoebe Putney* resulted in the exercise of monopoly power by a private entity motivated to pursue its own interests. *See Phoebe Putney*, 568 U.S. at 224; *see also FTC v. Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d 1356, 1378 (M.D. Ga. 2011) (noting allegation that "the subject transaction was effectively motivated and controlled by" a private entity acting in "its own independent private and pecuniary interests), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 568 U.S. 216 (2013). Here, in contrast, the only entity involved is the City, a political subdivision obligated to act in the public interest and subject to public scrutiny and the electoral process to ensure it does so. *See Town of Hallie*, 471 U.S. at 45 & n.9.

equipment. Thus, any decision by this Court would have little impact beyond the highly specific context presented here.

Further demonstrating this case's lack of suitability for certiorari review, reversal by this Court would be of limited practical utility to CGBG. Even if CGBG were to prevail on its Sherman Act claim, the Local Government Antitrust Act of 1984, 15 U.S.C. § 35(a), bars it from recovering monetary damages, and CGBG waived appellate review of its other claims. App. 11a; *see infra*.

II. The Court Should Deny Certiorari on the Question of Whether the Clear Articulation Test Should Be Applied with "Heightened Rigor" When a Municipality Is a "Commercial Provider" (Third Question Presented)

As an alternative to its argument that the Fourth Circuit erred in its application of the clear-articulation test, CGBG proposes adoption of a "heightened rigor" gloss on the clear-articulation test, Pet. at *i*, when applied to municipalities that are "providing the contested service," Pet. at 7. The Court should decline this invitation.

First, CGBG's proposed "heightened rigor" standard appears to be a solution in search of a problem. CGBG points to nothing whatsoever suggesting any need for this Court to revisit the clear-articulation test. It contends that a "heightened rigor" standard is needed to address an "increasingly common problem" where a municipality participates in a market and "uses ordinance power to exclude private rivals," Pet. at 7, but it provides no evidence that any such problem exists. Well over a decade has passed since this Court clarified in *Phoebe Putney* that "a state policy to displace federal antitrust law" is clearly articulated and affirmatively expressed when "the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. Not only does CGBG fail to show any circuit split regarding the meaning and application of this standard, it also offers no evidence that any lower court (including the Fourth Circuit in this case) has found it unclear or unworkable in any respect.

The lack of any practical need or theoretical justification for revisiting *Phoebe Putney* is not remedied by CGBG's attempt to contrast its proposed "heightened rigor" standard to the active supervision required when state policy is implemented by private actors. *See* Pet. at 9 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)). According to CGBG, review by this Court is needed "to ensure municipalities cannot evade meaningful scrutiny" of their implementation of state policy. Pet. at 9. But as this Court held in *Town of Hallie*, it may be presumed, "absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, 471 U.S. at 45. Consequently, "[w]here the actor is a municipality, there is little or no danger that it is involved in" anticompetitive activity for private ends. *Id.* at 47; *see also North Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 508 (2015) ("*Hallie* . . . observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.").

Second, this case would be an especially poor vehicle for resolution of this issue because CGBG's proposal of a new "heightened rigor" standard is appearing for the first time in its Petition to this Court. At no point during the lower court proceedings did CGBG ever contend that the clear articulation standard should be applied with "heightened rigor" or "special care" when a municipality engages in commercial activity. Because CGBG did not assert this argument at any point during lower court proceedings, it was not considered by either the district court or the Fourth Circuit and thus arrives at this Court wholly undeveloped.

III. The Court Should Deny Certiorari on the Question of Whether It Should Recognize a "Market Participant" Exception to *Parker* Immunity (First Question Presented)

CGBG urges the Court to grant certiorari in order to recognize the so-called "market participant" exception to *Parker* immunity, contending that "[t]his case presents a perfect factual pattern" for doing so. Pet. at 8. As the Fourth Circuit noted in its opinion below, this Court has never recognized the supposed market participant exception to *Parker* immunity; "it has suggested only that it might exist." App. 10a (quoting *W. Star*, 986 F.3d at 360); *see Phoebe Putney*, 568 U.S. at 226 n.4 (explicitly declining to consider whether a market participant exception exists). The Court should decline CGBG's invitation to do so in this case.

First, CGBG offers no reason for the Court to take up this issue. It does not claim there is a circuit split on this issue, nor does it identify even a single lower court decision relying on a supposed "market participant" exception to deny a municipality's otherwise-valid claim to *Parker* immunity. And in *Western Star*, which the Fourth Circuit relied on in rejecting CGBG's market participant argument, the court noted that no Court of Appeals had "ever concluded that this proposed exception frustrates the invocation of state action immunity." *W. Star*, 986 F.3d at 360; *see also NFINITYLINK Commc'ns, Inc. v. City of Monticello*, No. 6:20-cv-208-KKC, 2021 WL 2077797, at *6 (E.D. Ky. May 24, 2021) (citing several cases and stating, "This Court is not aware of any federal District Court or Court of Appeals that has applied the market participant exception to nullify *Parker* immunity and reestablish antitrust liability *against a municipality and its agents*." (emphasis added)). And, as the Fourth Circuit also noted, in *Town of Hallie* this Court "permitted state action immunity . . . even though the municipality was acting as a market participant." App. 10a (citing *W. Star*, 986 F.3d at 360).

Second, CGBG offers no analysis or justification for adoption of a market participant exception. It fails, for example, to identify any support for the exception in either the statutory language of the Sherman Act or antitrust policy. Nor does CGBG support its claim that this case "presents a perfect factual pattern" for recognition of a market participant exception. If anything, the facts of this case make it a particularly poor vehicle because the relevant statutory language plainly anticipates only a single market participant, whether that is the City or a private beach safety company.

Third, CGBG makes no attempt to grapple with the implications of a market participant exception for *Parker's* careful balance between state sovereignty and federal policy favoring competition. *See W. Star*, 986 F.3d at 360 (noting that the market participant exception "would, if recognized, introduce considerable tension into federal antitrust law"). *Parker* immunity applies only when a substate political entity implements a policy adopted by a state in its sovereign capacity. Such implementation must occur in a market-related context, or else the Sherman Act would be irrelevant and the need for *Parker* immunity would not arise in the first place. This being so, application of the market participant exception to deny *Parker* immunity would severely undermine the *Parker* doctrine itself.

IV. CGBG's Fourth Issue Does Not Warrant Review

The Fourth Circuit held that CGBG had abandoned its non-antitrust claims by failing to brief them properly. *See* App. 11a (citing Fed. R. App. P. 28). In Part IV of its "Reasons for Granting the Petition" (which does not correspond to any Question Presented), CGBG admits this was a "case-specific" determination "under appellate briefing rules," Pet. at 9, and it does not dispute its correctness. Nevertheless, CGBG asserts that its own procedural default is somehow the consequence of the Fourth Circuit's ruling that the City is entitled to *Parker* immunity. Even if that were true—it manifestly is not—it would not present anything resembling a cert-worthy issue.

CONCLUSION

For the reasons set forth herein, the Court should deny CGBG's Petition.

Respectfully submitted,

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