IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
CHESAPEAKE REGIONAL MEDICAL CENTER,	)	
	)	NO. 2:25-CR-00001-EWH-RJK
a/k/a CHESAPEAKE GENERAL HOSPITAL,	)	
	)	
a/k/a CHESAPEAKE REGIONAL HEALTHCARE	)	
	)	
Defendant.		

CHESAPEAKE REGIONAL MEDICAL CENTER'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE

Pursuant to Fed. R. Crim. P. 12(b) and Local Rule 47(F), defendant Chesapeake Hospital Authority ("CHA") submits this reply brief in support of its motion to dismiss the indictment with prejudice (ECF Nos. 12 & 13) and in opposition to the government's response to that motion (ECF No. 23).

Rather than clearly responding to each of the three independent reasons for dismissal raised by CHA, the government's opposition starts by expending pages salaciously detailing the actions of Dr. Perwaiz, who is neither a defendant here nor at any time an agent or employee of CHA. [1] The government then conflates CHA's statutory argument with its constitutional one and

[1] CHA set forth in its opening brief the basic facts surrounding Dr. Perwaiz's criminal case. Those facts are largely undisputed, and this Court need not consider those allegations in resolving this motion. The government also asserts a variety of facts not alleged in the indictment relating to

dismisses them both, failing to address the basic problem that CHA is not a "person" under the plain text of the law and relying on a few out-of-context statements and a misinterpretation of the applicable law as to sovereign immunity to do so. The government concludes by relying on <u>civil</u> RICO cases to support its argument that CHA has the capacity to form a <u>criminal</u> intent to defraud.

Because the government's opposition fails to support its bewildering insistence that CHA – a governmental entity – has committed multiple felonies for which it can and should be punished by this Court, the indictment should be dismissed with prejudice in its entirety.

I. CHA Is Not a Person Within the Meaning of the Two Statutes at Issue.

The government rolls CHA's statutory argument into its constitutional argument and concludes that, if CHA is not an arm of the state, it is not immune and the statutes in question must apply to it. In other words, the government assumes that CHA must be either an arm of the state or a "person" within the meaning of sections 371 and 1347. But whether CHA is such a "person" is a separate question from whether it is immune from prosecution, and it is well-settled that when questions of both statutory intent and immunity are presented in the same case, the statutory question must be decided first. *See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 779 (2000). Examining the relevant criminal statutes here makes clear that Congress never intended them to apply to governmental entities like CHA.

Both statutes under which CHA has been indicted apply to "persons" who commit certain wrongful acts. *See* 18 U.S.C. §371 ("If two or more **persons** conspire"); §1347 ("such **person** shall be fined under this title or imprisoned"). As set forth in CHA's opening brief, ECF No. 13 at 7, the Supreme Court has recognized a "longstanding interpretive presumption that 'person' does not

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CHA's knowledge and actions that CHA highly disputes and that are the basis for CHA's request for an evidentiary hearing.

include sovereign entities absent an express statutory directive." *Stevens*, 529 U.S. at 780. It is undisputed that CHA was created by the Virginia General Assembly, which explicitly designated it as a "public instrumentality" performing essential governmental functions. See 1966 Acts of Assembly chapter 271 (the "Enabling Statute"). Therefore, it is also undisputed that CRMC is a governmental entity. Whether CHA is an arm of the state, as it contends, or a "municipal entity," as the government contends, does not matter to this statutory analysis, because no governmental entities are "persons" within the meaning of these criminal statutes.

The very first section of the United States Code states that, unless otherwise specified, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. But although municipalities are often incorporated, a "municipal corporation" is quite different from a non-governmental "corporation" in one important way – municipal corporations are immune from suit when they perform governmental functions. *See Massey v. Va. Polytechnic Inst. & State Univ.*, 75 F.4th 407, 415 (4th Cir. 2023). Municipal entities performing such functions are acting as sovereigns, not as "persons." *See United States v. United Mine Workers*, 330 U.S. 258, 275 (1947) ("In common usage, the term 'persons' does not include the sovereign, and statutes employing it will ordinarily not be construed to do so.").

To be sure, courts have held that local governments are "persons" within the meaning of <u>some</u> statutes, such as the False Claims Act and 42 U.S.C. § 1983. [2] In each case, courts did so by analyzing the legislative history of the statute in question and finding a clear intent to have that

[2] Regardless of the term used, an entity like CHA is obviously not a local government or municipality in the same way that a city or county is. Rather, it is a state-created entity formed to provide state services. Nothing in this brief should be construed as an admission by CHA that it would be amenable to a False Claims Act or §1983 suit. Because it is a state-created entity, not a "local government," it would not be.

law apply to a municipality. *See, e.g., Cook Cty. v. U.S. ex rel. Chandler*, 538 U.S. 119, 126 (2003) (noting that "person," at time False Claims Act was passed, was understood to "extend to persons politic and incorporate, as to natural persons"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (examining history of Civil Rights Act to conclude that Congress did not intend municipalities to be liable as "persons" under 42 U.S.C. § 1983 unless an action pursuant to an official policy caused a constitutional tort). But neither the United States nor the defense has identified a single decision holding that a governmental entity of any type is a "person" in the context of a criminal statute under which the federal government seeks to prosecute and punish that governmental entity.

In fact, bringing criminal charges against any sovereign governmental unit – whether federal, state, or local – is so contrary to legal history, tradition, and logic that two federal appeals courts have deemed the argument "patently absurd." *Al-Haramain Islamic Found, Inc. v. Obama*, 705 F.3d 845, 854-55 (9th Cir. 2012) ("To accept this argument, we must also suppose that a criminal prosecution may be maintained against an office, rather than an individual. This is unprecedented. Such an approach is patently absurd.") (cleaned up). *citing United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) ("in common usage, the term 'person' does not include the sovereign"); *United States v. Singleton*, 165 F.3d 1297, 1300 (10th Cir. 1999) ("Put into proper context, then, the defendant's argument is: in a criminal prosecution, the word 'whoever' in the statute includes within its scope the United States acting in its sovereign capacity. Reduced to this logical conclusion, the basic argument of the defendant is patently absurd.").

As noted, Defendant has identified no cases in which the federal government has attempted to impose criminal liability on another governmental entity, although courts have repeatedly opined that governmental entities cannot be criminal defendants in other contexts. *See, e.g., In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002) ("A state agency, however, cannot be held criminally liable by either the state itself or the federal government."), *citing United States v. Price*, 38 U.S. 787, appendix at 810 (1966) (remarks of Senator Pool in support of Enforcement Act of 1870, "we cannot pass a criminal law as applicable to a State."); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997) (finding *Upjohn* inapplicable to governmental entities, noting, "the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability. A corporation, in contrast, may be subject to both civil and criminal liability for the actions of its agents.").

Whether CHA is an arm of the state or a municipal corporation does not matter for purposes of this statutory analysis. As a governmental entity, it simply is not a person within the meaning of the criminal statutes under which it has been charged. For this reason alone, the indictment should be dismissed in its entirety with prejudice.

II. CHA Is Immune from Federal Criminal Prosecution as an Arm of the State.

A. <u>The Commonwealth is Functionally Liable for CHA in this Action</u>

The government's opposition focuses on legal liability but ignores functional liability. *See* ECF No. 23 at 10-12. The State of Virginia's functionally liability for CHA's debts weighs in favor of immunity here.

Functional liability exists when, "as a practical matter, a judgment against a state-created entity puts state funds at risk, <u>despite the fact that the state is not legally liable for the judgment.</u>" *United States ex rel. Oberg v. Pa. Higher Ed. Assistance Agency,* 804 F.3d 646, 658 (4th Cir. 2015) ("*Oberg II*") (emphasis added); *see also Ristow v. South Carolina Ports Auth.,* 58 F.3d 1051, 1054 (4th Cir. 1995) (finding Commonwealth Port Authority to be an arm of the Commonwealth despite absence of legal liability because, among other reasons, South Carolina "provides whatever economic support is necessary over and above the Port Authority's net revenues to insure its continued vitality").

The functional impact of CHA's conviction on the treasury of the Commonwealth cannot fairly be disputed. Under *Ristow*, a case notably absent from discussion in the government's brief, courts in this circuit must "employ not only a legal test, but a practical analysis." 58 F.3d at 1053; *see also Oberg II,* 804 F.3d at 658. It is true that, like the Port Authority in *Ristow*, a judgment against CHA "cannot be legally enforced against the state." *Id.* at 54. But the "practical effect" of a conviction in this action would "definitively implicate[] the state treasury." *Id.* The government's emphasis on the Commonwealth's legal liability, as opposed to the impact a conviction will have in the functional sense, shows a fundamental misapprehension of the test set forth by the Fourth Circuit in *Ram Ditta* and its progeny. The government's unwillingness to engage with the issue of functional liability is perhaps unsurprising, given the obvious impact that a criminal conviction of CHA in this case will have on the treasury of the Commonwealth.

As explained in *Ristow*, an entity is an arm-of-the-state for purposes of federal sovereign immunity if, as a practical matter, a judgment against the entity puts state funds at risk even though the state is not legally liable for judgments against the entity. 58 F.3d at 1054. And, although CHA's enabling statute provides that the Commonwealth is not liable for CHA's financial obligations, this is hardly the end of the inquiry. This question turns on how the General Assembly would have to respond, as a practical matter, to a calamitous federal criminal judgment that would result in the hospital's demise.

Although the government argues that it is a "highly speculative conclusion that Virginia would in fact step in to pay for any of defendant's debts, especially when the Enabling Statute provides that it will not," this argument, premised on the assumption that the only result of this prosecution would be a monetary judgment, completely fails to address the question of functional liability.

CHA is a public instrumentality that fulfills "essential government functions to provide for the public health, welfare, convenience, and prosperity" of its service area. *See* 1966 Acts of Assembly, chapter 271, §§ 3, 16. The establishment and maintenance of adequate hospital and medical facilities is undoubtedly both a traditional exercise of state power and a particular priority of the Commonwealth. *See New York State Health Maint. Org. Conference v. Curiale*, 64 F.3d 794, 803 n.25 (2d Cir. 1995) (referring to state action involving health care as a "traditional exercise[] of state power"); Va. Code § 15.2-5300 ("The providing of adequate hospital and medical care are public uses and purposes for which public money may be spent and private property acquired. It is in the public interest that adequate hospital and medical facilities and care be provided in such concentrated centers of population in order to care for and protect the health and public welfare."). The Commonwealth of Virginia has a clear priority to ensure that adequate medical facilities are available to its citizens and residents, particularly in population centers like the City of Chesapeake and the greater Hampton Roads area. Even if this prosecution resulted "only" in a monetary judgment against CHA that endangered its ability to continue providing medical care, there are no alternatives to the Commonwealth stepping in with additional funding to fulfill its statutorily expressed governmental mission of providing adequate healthcare services and facilities within the region.

The government also ignores the fact that a monetary judgment is not the only possible outcome in a criminal conviction. If a jury ultimately convicts CHA of violating 18 U.S.C. § 1347 as charged, CHA must be excluded from participation in any federal healthcare benefit programs. *See* 42 U.S.C. § 1320a-7 (providing for mandatory exclusion from all federal healthcare programs of any entity criminally convicted of Medicare or Medicaid fraud). Put simply, if CHA is convicted in this action, it will be legally barred from serving any federal-healthcare-program beneficiaries, including patients covered by Medicare, Medicaid, or TRICARE. Consequently, with at least 64% of its patients covered by Medicare, Medicaid, and Tricare, the practical effect of a criminal conviction against CHA in this matter would be the complete elimination of CHA's ability to provide any healthcare services whatsoever. This would leave tens of thousands of people without ready access to healthcare. Moreover, although not mandated by federal law, CHA's conviction and exclusion from participation in federal healthcare programs would also jeopardize its participation in other healthcare benefit programs. *See* ECF No. 1 at ¶ 17 (listing the health care benefit programs with whom CHA contracts). It is unrealistic to suggest that the Commonwealth will allow CHA's patients to go unserved when the General Assembly's very purpose in creating CHA was to ensure the provision of healthcare services to the ever-increasing community of patients that it currently serves.

Therefore, if CHA ultimately were to be excluded from federal programs, the Commonwealth would have to allocate funding and resources to establish and maintain an alternative healthcare system to serve CHA's current federal beneficiaries or, at the very least, shift the burden of serving those patients to other healthcare systems or providers. Doing so would both directly and indirectly affect the Commonwealth's treasury. For these reasons, the first factor strongly supports the finding that CHA is an arm of the Commonwealth.

B. <u>The Limitations on CHA's Autonomy Show It is an Arm of the State</u>

It is undisputed that CHA was created by an act of the General Assembly of the Commonwealth of Virginia. It was not created by any municipality, town, county, city, or any other political subdivision of the Commonwealth. Although the Commonwealth provided a degree of autonomy to CHA in the Enabling Statute, including the ability to sue and be sued, to purchase and sell property, and to represent itself in legal matters, these characteristics do not determine whether CHA is an arm of the state. *Oberg II*, 804 F.3d at 668 (noting that these characteristics are "relevant" to the autonomy inquiry). In its opposition, the Government focuses entirely on the autonomy that the General Assembly has granted to CHA, such as its ability to receive revenue, its ability to contract, its ability to sue and be sued, and its ability to represent itself in legal proceedings.

More important to this inquiry, though, are the limitations that the Enabling Statute and subsequent legislative acts have imposed on CHA. CHA's activities are strictly curtailed by the General Assembly, which limits the scope of CHA's operations to providing medical care and developing and operating medical facilities. *See* 1966 Acts of Assembly, chapter 271, §§ 3, 4. The General Assembly also requires CHA to hold all funds in trust and to apply them solely in the manner prescribed in the Enabling Statute. A truly independent entity would not have these limitations. The government, notably, does not discuss any of the limitations imposed on CHA's autonomy and instead focuses on its basic legal independence, a fact which is undisputed and simply not determinative.

Similarly, the government's observations about CHA's private legal counsel and past litigation with the state do not support the claim that CHA is not an arm of the state. First, courts have recognized that arms of the state can have private counsel. *See, e.g., Denkins v. State Operated Sch. Dist. of Camden,* 2016 U.S. Dist. LEXIS 157149, *12 (D.N.J. Nov. 10, 2016) (holding school board represented by private counsel to be an arm of the state); *Camden County Recovery Coalition v. Camden City Bd. of Educ.,* 262 F. Supp. 2d 446, 450 (D.N.J. 2003) (same); *Corona v. N. Cent. Narcotics Task Force,* 2025 U.S. Dist. LEXIS 23313, *10 (N.D. Ill. Feb. 10,

2025) (holding law enforcement units represented by private counsel to be arms of the state). Second, CHA and the State of Virginia have not been adversaries in traditional litigation but instead have appeared as adversaries only in internal administrative matters. The government cites, for example, *Chesapeake Hosp. Auth. v. Commonwealth, Dep't of Med. Assistance Servs.,* 85 Va. Cir. 387 (2012) as an example of CHA "su[ing]" the Commonwealth. ECF No. 23 at 14 n.7. This matter was the final appeal in an administrative proceeding under the state Administrative Process Act, following an audit by the Virginia Department of Medical Assistance Services in which that entity had determined that the hospital had received an overpayment. That process was the only way for CHA to dispute the overpayment finding, which the court ultimately reversed. These references to complex legal disputes, without necessary explanation or context, do not support the government's claim that CHA is not an arm of the state.

C. <u>CHA Provides a State-Government Function</u>

As the Fourth Circuit acknowledged in *Oberg II*, the nature of the entity's work is the most important consideration when determining whether the entity is involved with "state" concerns, as opposed to local or out-of-state matters. 804 F.3d at 674. The government does not dispute that the provision of medical care is a legitimate government interest that is traditionally within the purview of state governments.

Although CHA is located within the City of Chesapeake, its location and focus on the Hampton Roads metropolitan area is consistent with the state concern that it was created to fulfill: the provision of hospital and medical facilities in <u>population centers.</u> *See e.g.* Va. Code § 15.2-5300 ("The providing of adequate hospital and medical care are public uses and purposes for which public money may be spent and private property acquired. It is in the public interest that adequate hospital and medical facilities and care be provided in such concentrated centers of population in order to care for and protect the health and public welfare."). CHA was not created by the City of Chesapeake or any other local government. It was created by the Commonwealth to carry out critical state-government functions within the region of Chesapeake.

The government argues that CHA cannot be an arm of the state because its operations have a regional focus. ECF No. 23 at 15 ("Defendant's own map of its 'service area' is telling for showing its regional geographic concentration."). But CHA does not serve a "local" or "out-of-state" function by fulfilling the relevant state concern within a specific region. The government's argument misapprehends that it is the nature of the work, and not the literal location of an entity, that determines whether the entity is involved with "state" concerns. *Ristow*, for example, involved the South Carolina State Ports Authority's terminal and operations in Charleston, South Carolina. The fact that the Authority operated in the city of Charleston did not detract from its essential governmental function as the ports authority for the State of South Carolina.

D. State Law Treats CHA As an Arm of the State

Finally, the plain language of Virginia law indicates that CHA is an arm of the state. CHA is a "Hospital Authority" created by the Virginia General Assembly in accordance with Va. Code § 15.2-5302. It is a political subdivision of the Commonwealth, and not a subdivision of any city or county. *See id.* The Enabling Statute's language similarly indicates that CHA is a public instrumentality of the Commonwealth, and not the instrumentality of any city or county. The government maintains that this fact is not dispositive because, under Virginia law, the term "political subdivision" includes "local municipal entities like counties and cities."

Furthermore, it is longstanding Virginia law that the General Assembly can create a separate entity as an agency of the Commonwealth to perform a function of state government and that the Commonwealth's immunity will protect it. *See Elizabeth River Tunnel District v.*

Beecher, 202 Va. 452, 456-57 (1961). Virginia courts have also specifically held that CHA enjoys immunity from suit as a Commonwealth entity. *See* Brief in Supp. at 19 (collecting cases). As stated in *Hughes v. Lake Taylor City Hosp.,* a case upon which the government relies:

> A hospital, <u>if it is considered to be an organ of the state</u>, is immune from actions in tort. A "hospital authority," even though a local government subdivision, is considered a municipal corporation and enjoys tort immunity if it possesses six distinct criteria and performs a "governmental" function.

54 Va. Cir. 239, 240 (cleaned up and emphasis added).

Neither of the government's responses to this argument is persuasive. First, the government fixates on the words "municipal corporation" contained in the test set forth in *Hughes* to conclude that CHA must be a municipal corporation under federal law. *See* ECF No. 23 at 18 ("Thus, by holding that CHA is immune because it is a municipal corporation, and not because it is an agency of the state, these cases only reinforce that defendant does not enjoy sovereign immunity under federal law.") But whether an entity is called a "municipal corporation" under Virginia law is not relevant to the arm of the state analysis. As the government acknowledges, the issues of "federal sovereign immunity and Virginia state sovereign immunity require different showings." *Id*. And under settled Virginia law, CHA is immune from liability because it is "considered to be an organ of the state." *Hughes*, 54 Va Cir. At 240.

Second, the government argues, "to enjoy sovereign immunity [CHA] must be a *state* entity and not a *municipal* entity like a city or county." ECF No. 23 at 17. Of course, CHA is neither a city nor a county. It is a Hospital Authority created by the General Assembly. The government puts forward no argument explaining why CHA is more properly classified as a municipal entity, like a city or a county, than as a state agency.

The government instead refers to a handful of public statements and writings that purportedly prove CHA is "not a state government entity." ECF No. 23 at 17. But these statements are plainly not dispositive of the legal issue at hand. They also miss important context; the government declares that, in these writings, CHA admits that it is a "non-state" entity when, in fact, the writings merely state that CHA is a "non-state-owned" entity. And the term "non-state owned" has a specific meaning under the rules governing Medicaid in Virginia. Virginia Medicaid categorizes Disproportionate Share Hospitals (DSHs) as either "Type I" or "Type II" hospitals. *See* *https://rga.lis.virginia.gov/Published/2024/RD864/PDF* at 10 (last accessed February 26, 2025). Type I hospitals are the two state-owned teaching hospitals, the Virginia Commonwealth University Health System and the University of Virginia Health System. *Id.* All other hospitals, like CHA, are Type II hospitals and are called "non-state owned" to distinguish them. *Id.* The government cites communications using the term, suggesting its use is relevant to the Eleventh Amendment when the intended use concerned Medicaid. In any event, the Court should not rely on out-of-context and irrelevant statements like these when deciding this issue. CHA need not be owned by the state to be an arm of the state.

III. CHA Is Incapable of Forming the Requisite Intent for Either Crime with which It Has Been Charged.

In response to CHA's argument that a municipal corporation cannot form the requisite *mens rea* necessary for a fraud conviction, the government asserts: (1) there is a split of authority on that issue; (2) no cases have yet reached that issue in the criminal context; and (3) the courts that have reached that conclusion in the civil context have been motivated by the well-established principle that a municipal corporation cannot be subject to punitive damages, which, the government claims, are not at issue here.

But the split of authority the government claims does not actually exist. The government points out that in *Genty v. RTC*, 937 F.2d 899, 910 (3d Cir. 1991), the Third Circuit Court of Appeals questioned the reasoning behind cases holding that a municipal corporation cannot form malicious intent. Yet the *Genty* court ultimately ruled that a civil RICO claim could not be maintained against a municipal corporation due to RICO's mandatory award of treble damages, because nothing in the RICO statute evidences Congressional intent to abrogate the "long-established and salutary principle of common law prohibiting punitive damages against municipalities." *Id*. at 914. Because the court resolved the case on that basis, it stated that it did not need to decide whether the *mens rea* of individuals could be imputed to municipal corporations for the purposes of establishing specific intent. *Id*. at 910.

Similarly, in *Gingras v. Think Fin., Inc.,* 922 F.3d 112, 125 (2nd Cir. 2019), although the Second Circuit expressed reservations about exempting governmental entities like the defendant, an online lending operation owned by the Chippewa Cree Tribe, from RICO liability and stated that RICO applied substantively to the tribe, it based that holding on the fact that the plaintiff had merely sought an injunction against the individual tribal officers in charge of the entity. *Id*. The *Gingras* court's discussion about the ability of a municipal entity to form specific intent, therefore, constitutes dicta that does not create a circuit split with *Lancaster* and the other cases cited in CHA's brief. And *Gingras* certainly does not undermine the Supreme Court's statement in *Newport v. Facts Concerts*, 453 U.S. 247, 267 (1981), that "[a] municipality … can have no malice independent of the malice of its officials."[3]

More importantly, none of these cases address the type of heightened *mens rea* necessary for a criminal fraud conviction. Under 18 U.S.C. § 1347, the charged substantive offense in this case, the defendant must have acted knowingly and willfully—that is, with knowledge that the

[3] Courts have refused to impute the intent of individuals to municipal entities in non-RICO contexts as well. For example, in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978), the Court explained that a municipal corporation may be liable under § 1983 for official policies, but that "a municipality cannot be liable *solely* because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."

conduct was unlawful and with specific intent to do something that the law forbids. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980). CHA does not possess the capability to do so, particularly where, as here, the criminal acts committed by Dr. Perwaiz were hidden from CHA – as the government admitted at his criminal trial.

Although the government notes that CHA has cited no cases on this issue that have arisen in the criminal context, that's because we have found no cases in which a municipal entity of any type has ever been charged with, let alone convicted of, a crime requiring a showing of willfulness. Apparently, the government hasn't found such a case either. Although it observes in note 13 of its opposition (ECF No. 23 at 22) that courts in the First and Sixth Circuits have allowed criminal RICO cases involving government entities to proceed, both such cases involved criminal charges and convictions against the <u>individual members</u> of those entities rather than the entities themselves. *See United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004); *United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir. 1982). When the *Cianci* defendant contended that the City of Providence and other municipal entities could not constitute a RICO enterprise because municipal entities cannot form unlawful intent, the *Cianci* court rejected that argument, explaining, "Defendants' argument misses the mark because neither the indictment nor the jury instructions compel the conclusion that the City itself had to have formed an unlawful intent." *Id*. at 83 (emphasis added). The court said further that, because "RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact," "[m]unicipal entities can be part of an unlawful purpose association-in-fact enterprise so long as those who control the entities share the purposes of the enterprise." *Id*.

By noting that the charged individual defendants—"those who wielded influence, exerted pressure, and effectively controlled the City's various components—are the criminals here," the *Cianci* court acknowledged that neither the City nor its "components" would have been appropriate subjects of the RICO claims. In fact, the government itself quotes *Cianci* for the proposition that the "legal impossibility" argument made by the *Cianci* defendants would hold water if the government had sought prosecution of the city itself. (ECF No. 23 at 22). So too here—if, as the government contends, CHA is a municipal corporation under federal law, it is not the proper subject of fraud charges that require a showing of specific intent to do something that the law forbids.

Similarly, the *Thompson* court acknowledged that a government office—there, the Office of the Governor of Tennessee—could constitute a RICO enterprise because, under the broad statutory definition of that term, any association of persons might qualify, regardless of whether the named enterprise itself is lawful or unlawful. *See Thompson*, 685 F.2d at 996–97. But there, as in *Cianci* (and unlike here), the governmental entity was not the charged defendant. And the *Thompson* court questioned the wisdom of even alleging that a legitimate and lawful governmental entity constitutes a RICO enterprise, observing that "description of 'The Office of Governor' of one of the states of the union as the 'enterprise' referred to in RICO is disruptive of comity in federal-state relations," and, "In some cases, such language may also needlessly cast unfair reflection upon innocent individuals." *Id.* at 1000. Surely that's the case here, given that, during the 36 years of Dr. Perwaiz's use of CHA's facilities, the governmental entity that is CHA has been comprised of thousands of blameless individuals who did not know about, much less countenance, the actions of the true criminal—Dr. Perwaiz.

Finally, the government's reliance on cases holding that municipal corporations can form the intent necessary for liability for compensatory damages even though they cannot be subject to punitive damages further highlight the impropriety of the government's efforts to prosecute and punish CHA here. As the Supreme Court said in *Newport*, 453 U.S. at 263, for centuries, "[t]he courts [have] readily distinguished between liability to compensate for injuries inflicted by a municipality's officers and agents, and vindictive damages appropriate as punishment for the bad-faith conduct of those same officers and agents. Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers." This is because, "[u]nder ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct."

The government suggests in its opposition that, because the criminal prosecution here may result in "restitution, forfeiture, fines, and the costs of prosecution," this matter is akin to a civil action for compensatory damages and would therefore be less burdensome on CHA than an action seeking punitive damages would be. Even putting aside the fact that fines, by their very nature, are punitive rather than compensatory, the government's suggestion ignores the elephant in the room. If CHA is convicted of a crime, exclusion from federal healthcare programs such as Medicare and Medicaid is <u>mandatory</u>. *See* 42 U.S.C. § 1320a–7. And an exclusion from these programs would be the death knell for the hospital. If CHA is indeed a municipal corporation, that most punitive of all possible results cannot sensibly be assessed against CHA based on the isolated actions of a rogue doctor over the course of many decades. *See Newport*, 453 U.S. at 267 (because "a municipality can have no malice independent of the malice of its officials, … [d]amages awarded for *punitive* purposes … are not sensibly assessed against the governmental entity itself") (emphasis in original).

Conclusion

For these reasons, CHA moves this Court to dismiss the indictment with prejudice and for all other and further relief to which it may show itself justly entitled. CHA further reiterates its request for an evidentiary hearing to address the questions of fact raised in the briefing on this matter. CHA is prepared to present fact witnesses to testify about CHA's relationship with the Commonwealth and related subjects.

DATED: February 26, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2025, a true and correct copy of the above and foregoing instrument was served on all counsel of record via CM-ECF filing.

/s/ *William H. Newman*
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