



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	2
I. DEFENDANTS PRESENT AN UNDULY RESTRICTIVE VIEW OF THE RECONSIDERATION STANDARD .....	2
II. THE COURT SHOULD RECONSIDER ITS ASSUMPTION THAT THE TEST FOR STATE ACTION UNDER <i>LEBRON</i> IS SYNONYMOUS WITH THE TEST FOR SOVEREIGN IMMUNITY .....	4
A. Under <i>Lebron</i> , Government-Created Corporations Can Be State Actors for Purposes of Individual Constitutional Rights Without Being Vested with the Government’s Sovereign Immunity .....	4
B. Under <i>Lebron</i> , a Statutory Disavowal of Agency Status Is a Deprivation of Sovereign Immunity, Not a Waiver .....	9
III. THE COURT SHOULD RECONSIDER ITS CONCLUSION THAT UMMS IS ENTITLED TO SOVEREIGN IMMUNITY UNDER THE <i>RAM DITTA</i> FACTORS.....	12
A. The Second <i>Ram Ditta</i> Factor Weighs Strongly Against Sovereign Immunity.....	13
B. The Fourth <i>Ram Ditta</i> Factor Is Neutral .....	15
IV. IF RECONSIDERATION IS DENIED, THE COURT SHOULD CERTIFY COUNTS I AND II FOR INTERLOCUTORY APPEAL .....	17
CONCLUSION.....	18

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Alt v. Nat’l R.R. Passenger Corp.</i> , No. SAG-15-1529, 2015 WL 7294365 (D. Md. Nov. 19, 2015).....	7
<i>Am. Canoe Ass’n v. Murphy Farms, Inc.</i> , 326 F.3d 505 (4th Cir. 2003) .....	2-3
<i>Baptiste v. Nat’l R.R. Passenger Corp.</i> , No. CV CBD-14-3279, 2015 WL 5714103 (D. Md. Sept. 28, 2015).....	7
<i>Berrios v. Green Wireless, LLC</i> , No. GJH-14-3655, 2017 WL 2120038 (D. Md. May 15, 2017).....	3
<i>Brault v. Trans Union, LLC</i> , No. GJH-18-3244, 2019 WL 7293396 (D. Md. Dec. 27, 2019).....	3
<i>Bugoni v. Emp’t Background Investigations, Inc.</i> , No. CV SAG-21-1272, 2021 WL 3510577 (D. Md. Aug. 10, 2021) .....	3
<i>Byrd v. Deveaux</i> , No. CV DKC 17-3251, 2018 WL 305838 (D. Md. Jan. 5, 2018).....	12
<i>Carlson v. Bos. Sci. Corp.</i> , 856 F.3d 320 (4th Cir. 2017) .....	2, 3
<i>Coal. For Equity &amp; Excellence In Md. Higher Educ. V. Md. Higher Educ. Comm’n</i> , No. CIV. CCB-06-2773, 2015 WL 4040425 (D. Md. June 29, 2015) .....	17
<i>Crowe v. Or. State Bar</i> , 989 F.3d 714 (9th Cir. 2021) .....	1, 4
<i>DeSilvis v. Nat’l R.R. Passenger Corp.</i> , 97 F. Supp. 2d 459 (S.D.N.Y. 2000).....	6
<i>Eaton v. Univ. of Del.</i> , No. C.A. 00-709-GMS, 2001 WL 863441 (D. Del. July 31, 2001).....	4
<i>Gibbs v. Bank of Am., N.A.</i> , No. GJH-16-2855, 2017 WL 5495168 (D. Md. Nov. 13, 2017) .....	3
<i>Hammons v. Univ. Md. Med. Sys. Corp.</i> , No. CV DKC-20-2088, 2021 WL 3190492 (D. Md. July 28, 2021).....	<i>passim</i>

**TABLE OF AUTHORITIES**

(continued)

	<b><u>Page(s)</u></b>
<i>Humane Soc’y of the U.S. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA</i> , No. CV DKC 13-1822, 2016 WL 3668028 (D. Md. July 11, 2016) .....	12
<i>Hutto v. S.C. Ret. Sys.</i> , 773 F.3d 536 (4th Cir. 2014) .....	13, 16
<i>J&amp;J Sports Prods., Inc. v. Torres</i> , No. GJH-18-1001, 2020 WL 206664 (D. Md. Jan. 13, 2020).....	3
<i>JTH Tax, Inc. v. Aime</i> , 984 F.3d 284 (4th Cir. 2021) .....	3
<i>In re Kapla</i> , 485 B.R. 136 (Bankr. E.D. Mich. 2012), <i>aff’d</i> , No. ADV 12-4000, 2014 WL 346019 (E.D. Mich. Jan. 30, 2014).....	7
<i>Lebron v. Nat’l R.R. Passenger Corp.</i> , 513 U.S. 374 (1995).....	<i>passim</i>
<i>Manning v. Caldwell for City of Roanoke</i> , 930 F.3d 264 (4th Cir. 2019) .....	8
<i>Miller v. Ill. Cent. R.R. Co.</i> , 474 F.3d 951 (7th Cir. 2007) .....	7
<i>Napata v. Univ. of Md. Med. Sys. Corp.</i> , 417 Md. 724 (2011) .....	16, 17
<i>Parrett v. Se. Boll Weevil Eradication Found., Inc.</i> , 155 F. App’x. 188 (6th Cir. 2005) .....	7
<i>Puerto Rico Ports Auth. v. Fed. Mar. Comm’n</i> , 531 F.3d 868 (D.C. Cir. 2008).....	9
<i>Ram Ditta v. Md. Nat’l Capital Park &amp; Planning Comm’n</i> , 822 F.2d 456 (4th Cir. 1987) .....	<i>passim</i>
<i>Roundtree v. AMTRAK Nat’l R.R. Passenger Corp.</i> , No. CV ELH-16-3418, 2016 WL 7033961 (D. Md. Dec. 1, 2016).....	7
<i>Snodgrass v. Doral Dental of Tenn.</i> , No. 3:08-0107, 2008 WL 2718911 (M.D. Tenn. July 10, 2008).....	4
<i>U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency</i> , 745 F.3d 131 (4th Cir. 2014) .....	12, 13, 14, 15

**TABLE OF AUTHORITIES**

(continued)

	<b><u>Page(s)</u></b>
<i>U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency</i> , 804 F.3d 646 (4th Cir. 2015) .....	12, 14, 15, 16
<i>Wade v. Corr. Ofc. Christopher Cavins</i> , No. CV PWG-17-3693, 2019 WL 2410969 (D. Md. June 7, 2019).....	5
<i>Wagner v. Warden</i> , No. ELH-14-791, 2016 WL 1169937 (D. Md. Mar. 24, 2016) .....	3
<i>Wake v. Nat’l R.R. Passenger, Corp.</i> , No. CIV. PWG-12-1510, 2013 WL 5423978 (D. Md. Sept. 26, 2013).....	7
<i>Wards Corner Beauty Acad. v. Nat’l Accrediting Comm’n of Career Arts &amp; Scis.</i> , 922 F.3d 568 (4th Cir. 2019) .....	12
<i>In re Wood</i> , 993 F.3d 245 (4th Cir. 2021) .....	10
<i>Wynne v. Shippensburg Univ. of Pa.</i> , 639 F. Supp. 76 (M.D. Pa. 1985).....	4-5
 <b>Statutes</b>	
28 U.S.C. § 1292.....	17, 18
45 U.S.C. § 541 .....	7
Md. Code Ann., Educ. § 13-303 .....	14
Md. Code Ann., Educ. § 13-308 .....	10
Md. Code Ann., State Gov’t § 12-103 .....	10
 <b>Other Authorities</b>	
Fed. R. Civ. P. Rule 54 .....	2, 3, 18
Fed. R. Civ. P. Rule 59 .....	3
Merriam-Webster Online Dictionary, <a href="https://www.merriam-webster.com/dictionary/deprive">https://www.merriam-webster.com/dictionary/deprive</a> .....	11

Plaintiff Jesse Hammons (“Plaintiff” or “Mr. Hammons”) respectfully submits this Reply Memorandum in support of his motion for reconsideration, or, in the alternative, certification of an interlocutory appeal (ECF No. 56).

### PRELIMINARY STATEMENT

As explained in Mr. Hammons’s memorandum of law (ECF No. 56-1, “Motion”), the Court should reconsider its decision that UMMS enjoys sovereign immunity. *See Hammons v. Univ. Md. Med. Sys. Corp.*, No. CV DKC-20-2088, 2021 WL 3190492, at \*12-15 (D. Md. July 28, 2021) (“Opinion”). Reconsideration is warranted because the Court improperly assumed that the state actor and sovereign immunity inquiries are synonymous (Motion at 5-9), misapprehended Mr. Hammons to make a waiver argument (*id.* at 9-13), and rendered a decision on the *Ram Ditta* factors outside the adversarial issues presented by the parties (*id.* at 13-21).

In their response (ECF No. 60, “Response”), Defendants University of Maryland Medical System Corporation (“UMMS”), UMSJ Health System, LLC, and University of Maryland St. Joseph Medical Center, LLC (collectively, “Defendants”), attempt to minimize and evade the applicable law, while painting the applicable standards in the narrowest possible light. They continue to insist that Mr. Hammons cannot “have it both ways,” with UMMS qualifying as a state actor for purposes of individual rights, while lacking sovereign immunity. Response at 5. But they have no answer to the simple fact that *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995)—in unmistakably clear terms—set out precisely this distinction. Defendants fail to offer any case supporting the Court’s assumption that the “state actor” and “sovereign immunity” inquiries are synonymous, and they fail to respond to the basic—and well-settled proposition—that “[f]inding that an entity is the ‘state’ for purposes of the First Amendment . . . is not the same as concluding that the entity is the ‘state’ for purposes of the Eleventh Amendment.” *Crowe v. Or. State Bar*, 989 F.3d 714, 730 (9th Cir. 2021).

Beyond their attempts to flee *Lebron*'s clear mandates, Defendants largely fail to contest Mr. Hammons's arguments. Defendants do not dispute that the Court understood Mr. Hammons to be advancing a waiver argument—when, in fact, Mr. Hammons argues that, under *Lebron*, a statutory disclaimer of agency status deprived UMMS of sovereign immunity in the first instance. Nor do Defendants dispute that the Court lacked full briefing on the factors articulated in *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456 (4th Cir. 1987), and thus decided that test's application outside the adversarial issues presented by the parties. In purporting to march through Mr. Hammons's Motion, Defendants also fail to respond to numerous subsidiary points, leaving the majority of Mr. Hammons's arguments unanswered.

As a result, Defendants have failed to rebut Mr. Hammons's showing that reconsideration is warranted. Throughout their briefing in support of their motion to dismiss and in opposition to Mr. Hammons's motion for reconsideration, Defendants have failed to cite a single case to support their assertion that Mr. Hammons "cannot have it both ways," and by accepting Defendants' argument, the Court committed clear error causing manifest injustice. Mr. Hammons's motion for reconsideration should be granted.

## ARGUMENT

### I. DEFENDANTS PRESENT AN UNDULY RESTRICTIVE VIEW OF THE RECONSIDERATION STANDARD

Though Defendants attempt to cast reconsideration motions in the narrowest terms possible, the Fourth Circuit has repeatedly explained that Fed. R. Civ. P. 54(b) confers "flexibility" upon district courts to reconsider interlocutory orders. *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017). "This is because a district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted." *Am. Canoe Ass'n v. Murphy Farms, Inc.*,

326 F.3d 505, 514-15 (4th Cir. 2003). Thus, the standards governing Rule 54(b) motions for reconsideration of interlocutory orders are “significantly” less strict than those governing Rule 59(e) motions for reconsideration after the entry of final judgment. *JTH Tax, Inc. v. Aime*, 984 F.3d 284, 289 n.2 (4th Cir. 2021).

Under either Rule 54(b) or Rule 59(e), reconsideration is warranted where a court has committed “clear error causing manifest injustice.” *Carlson*, 856 F.3d at 325 (quoting *Am. Canoe*, 326 F.3d at 515). Courts within this District consistently hold that, even in the more rigorous context of a Rule 59(e) motion, “[c]lear error or manifest injustice occurs where a court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.” *Wagner v. Warden*, No. ELH-14-791, 2016 WL 1169937, at \*3 (D. Md. Mar. 24, 2016) (internal quotation marks omitted); *see also Bugoni v. Emp’t Background Investigations, Inc.*, No. CV SAG-21-1272, 2021 WL 3510577, at \*1 (D. Md. Aug. 10, 2021); *J&J Sports Prods., Inc. v. Torres*, No. GJH-18-1001, 2020 WL 206664, at \*2 (D. Md. Jan. 13, 2020); *Brault v. Trans Union, LLC*, No. GJH-18-3244, 2019 WL 7293396, at \*2 (D. Md. Dec. 27, 2019); *Berrios v. Green Wireless, LLC*, No. GJH-14-3655, 2017 WL 2120038, at \*2 (D. Md. May 15, 2017); *Gibbs v. Bank of Am., N.A.*, No. GJH-16-2855, 2017 WL 5495168, at \*3 (D. Md. Nov. 13, 2017).

Here, Mr. Hammons argues that the Court committed clear error causing manifest injustice by incorrectly equating the state actor and sovereign immunity inquiries, contrary to *Lebron* and numerous other authorities; by misapprehending Mr. Hammons as advancing a waiver argument regarding the statutory disclaimer of UMMS’s agency status; and by rendering a decision on the *Ram Ditta* factors outside the adversarial issues presented. Any of these



grounds is sufficient to warrant reconsideration under the standards employed by the cases cited above.

**II. THE COURT SHOULD RECONSIDER ITS ASSUMPTION THAT THE TEST FOR STATE ACTION UNDER *LEBRON* IS SYNONYMOUS WITH THE TEST FOR SOVEREIGN IMMUNITY**

**A. Under *Lebron*, Government-Created Corporations Can Be State Actors for Purposes of Individual Constitutional Rights Without Being Vested with the Government’s Sovereign Immunity**

Defendants continue to errantly insist that Mr. Hammons cannot “have it both ways” and advances a “contradictory position” that UMMS is a state actor liable for constitutional violations that lacks sovereign immunity. Response at 5. But, as Mr. Hammons explained, contrary to Defendants’ assertions—and contrary to the Court’s reasoning—both *Lebron* and other well-established case law demonstrate that it is entirely routine for a government-created entity to be a state actor that does not enjoy sovereign immunity. *See* Motion at 7-8. Defendants have no response to this rudimentary point, instead clinging to the fiction that UMMS’s sovereign immunity is the “obvious consequence” of its state actor status. Response at 12. This understanding is patently incorrect, and should be rejected. *See Crowe*, 989 F.3d at 730 (“Finding that an entity is the ‘state’ for purposes of the First Amendment . . . is not the same as concluding that the entity is the ‘state’ for purposes of the Eleventh Amendment.”); *Snodgrass v. Doral Dental of Tenn.*, No. 3:08-0107, 2008 WL 2718911, at \*6-7 (M.D. Tenn. July 10, 2008) (rejecting argument that it is “irreconcilably inconsistent” for entity to be state actor not entitled to sovereign immunity, because “the state action requirement and Eleventh Amendment immunity are analytically separate”); *Eaton v. Univ. of Del.*, No. C.A. 00-709-GMS, 2001 WL 863441, at \*3 (D. Del. July 31, 2001) (“A determination that the University is not immune from suit under the Eleventh Amendment is entirely separate from whether it is a ‘state actor’ for purposes of the Fourteenth Amendment.”); *Wynne v. Shippensburg Univ. of Pa.*, 639 F. Supp.

76, 78 n.3 (M.D. Pa. 1985) (“[Eleventh Amendment immunity is a] question is to be resolved under a very different standard from that used in deciding whether an entity is a ‘person’ or ‘state actor’ under § 1983. ... It is a far more substantial relationship that is required to support a finding that an entity is a ‘state agency’ for 11th Amendment purposes.”). With respect, this Court’s assumption to the contrary was “dead wrong.” Response at 4 (quoting *Wade v. Corr. Ofc. Christopher Cavins*, No. CV PWG-17-3693, 2019 WL 2410969, at \*2 (D. Md. June 7, 2019)).<sup>1</sup>

Further, as Mr. Hammons set out, *Lebron* itself makes plain that an entity’s state actor status is a separate inquiry from sovereign immunity. In *Lebron*, the Supreme Court explained—in stark terms—that the differing treatment flows from the fact that there are certain “inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate”; with regard to those matters, a statutory disavowal of state agency status “is assuredly dispositive ... We have no doubt, for example, that the statutory disavowal of [an entity]’s agency status deprives [the entity] of sovereign immunity from suit.” 513 U.S. at 392 (emphasis added).<sup>2</sup> The *Lebron* Court further explained that a separate inquiry for individual

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<sup>1</sup> To be sure, Mr. Hammons’s briefing in opposition to Defendants’ motion to dismiss cited to *Lebron* without canvassing other case law recognizing the proposition that the inquiries into sovereign immunity and state action are distinct. But, as explained in Mr. Hammons’s opening memorandum in support of reconsideration, Defendants’ motion to dismiss included only cursory treatment of sovereign immunity, and cited no authority in support of its assertion that UMMS would automatically have sovereign immunity if it were recognized as a state actor under *Lebron*. Under these circumstances, in the context of a motion to dismiss raising numerous other issues, it was reasonable for Mr. Hammons to respond to Defendants’ argument with the Supreme Court authority directly on point.

<sup>2</sup> Defendants contend that the “assuredly dispositive” language “has nothing to do with sovereign immunity.” Response at 6 n.2. Yet the *Lebron* Court found that the statutory disavowal was “assuredly dispositive of Amtrak’s status as a Government entity for purposes of matters that are within Congress’s control,” and further explained that it had “no doubt” that the disavowal

rights purposes is essential to maintain the constitutional order: “it is not for Congress to make the final determination of [the entity]’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions,” *id.* at 375, because “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form,” *id.* at 397. Thus, *Lebron* makes plain that Defendants—and ultimately the Court—are incorrect: there is no contradiction in finding that a government-created entity is a state actor for purposes of individual rights, but lacks sovereign immunity.

Defendants make no attempt to engage with the substance of *Lebron*. Rather, they attempt to minimize *Lebron*’s sovereign immunity discussion as a “stray line of dicta” and assert that the “*Lebron* Court did not decide whether Amtrak was entitled to sovereign immunity.” Response at 5.<sup>3</sup> But since the case was decided, courts have consistently recognized that, under *Lebron*, Amtrak does not possess sovereign immunity. *See, e.g., DeSilvis v. Nat’l R.R. Passenger Corp.*, 97 F. Supp. 2d 459, 460 n.2 (S.D.N.Y. 2000) (“Amtrak enjoys a unique status in the American legal framework. In addition to being a federal instrumentality for the purpose of individual rights ... since Amtrak is a corporation and not an agency or establishment of the United States Government, it is also deprived of sovereign immunity from suit.”) (citing *Lebron*,

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deprived Amtrak of sovereign immunity, because sovereign immunity is “within the power of Congress to eliminate.” 513 U.S. at 392. Thus, the *Lebron* Court plainly understood the statutory disavowal to be “assuredly dispositive” of sovereign immunity, since whether or not to confer sovereign immunity on a government corporation was within Congress’s power to control.

<sup>3</sup> Strangely, Defendants also contend that Mr. Hammons “admits [that] *Lebron* only addressed the state actor issue.” Response at 8 n.6. Mr. Hammons has not made any such admission. And *Lebron* explicitly addresses sovereign immunity.

513 U.S. at 392; 45 U.S.C. § 541) (internal quotation marks omitted).<sup>4</sup> Amtrak is now routinely sued for damages. *See, e.g., Roundtree v. AMTRAK Nat'l R.R. Passenger Corp.*, No. CV ELH-16-3418, 2016 WL 7033961 (D. Md. Dec. 1, 2016); *Alt v. Nat'l R.R. Passenger Corp.*, No. SAG-15-1529, 2015 WL 7294365, (D. Md. Nov. 19, 2015); *Baptiste v. Nat'l R.R. Passenger Corp.*, No. CV CBD-14-3279, 2015 WL 5714103 (D. Md. Sept. 28, 2015); *Wake v. Nat'l R.R. Passenger, Corp.*, No. CIV. PWG-12-1510, 2013 WL 5423978, at \*5 (D. Md. Sept. 26, 2013). Such suits would not be permissible if Amtrak enjoyed sovereign immunity.

Moreover, *Lebron's* discussion on this point was hardly a stray line: the driving focus of the opinion is on segregating governmental obligations mandated by the Constitution from other matters within the government's power to control and eliminate. 513 U.S. at 392, 397. And the *Lebron* Court returned to this distinction in analyzing prior cases holding that state-created corporations did not enjoy Eleventh Amendment sovereign immunity, explaining that those precedents were easily squared because "it does not contradict those [prior cases] to hold that a corporation is an agency of the Government, for purposes of the constitutional obligations of Government rather than the 'privileges of the government.'" *Id.* at 398-99. Thus, *Lebron's* distinction between sovereign immunity and state status for individual rights purposes was an integral part of the Court's analysis.

Further, as Mr. Hammons explained in his motion, even if *Lebron's* discussion of

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<sup>4</sup> Defendants also claim that cases cited by Mr. Hammons as recognizing *Lebron's* discussion of sovereign immunity do not actually do so, and attempt to minimize these cases as including only dicta. Response at 6 (citing *Miller v. Ill. Cent. R.R. Co.*, 474 F.3d 951 (7th Cir. 2007); *Parrett v. Se. Boll Weevil Eradication Found., Inc.*, 155 F. App'x. 188 (6th Cir. 2005); *In re Kapla*, 485 B.R. 136 (Bankr. E.D. Mich. 2012), *aff'd*, No. ADV 12-4000, 2014 WL 346019 (E.D. Mich. Jan. 30, 2014)). But Defendants have no answer to the plain fact that these cases establish that many courts applying *Lebron* have read *Lebron* precisely the way Mr. Hammons does: as a clear proclamation that the agency disclaimer deprived Amtrak of sovereign immunity.

sovereign immunity were considered dicta, the Court is not “free to ignore it.” *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 282 (4th Cir. 2019). “To the contrary, we routinely afford substantial, if not controlling deference to dicta from the Supreme Court. Respect for the rule of law demands nothing less: lower courts grappling with complex legal questions of first impression must give due weight to guidance from the Supreme Court, so as to ensure the consistent and uniform development and application of the law.” *Id.* at 281-82. Thus, even if *Lebron*’s discussion were dicta, Defendants’ suggestion that the Court simply cast *Lebron* aside would contravene binding precedent. Further, *Lebron*’s sovereign immunity discussion is extraordinarily clear: the *Lebron* Court did not casually speculate that the disavowal “likely” deprived Amtrak of sovereign immunity, as Defendants incorrectly report. Response at 5. Rather, the *Lebron* Court had “no doubt” that, because of the statutory disavowal, Amtrak did not enjoy sovereign immunity. And, as this Court has recognized, there is very little case law analyzing *Lebron*-compliant entities, much less in the context in the sovereign immunity. As a result, *Lebron*’s straightforward instruction should be given all the more weight here, where a parallel statutory disavowal precisely mimics the statutory regime at issue in *Lebron*.

Perhaps in recognition that their attempts to evade *Lebron* are unavailing, Defendants next suggest that the Court did not equate the state actor and sovereign immunity inquiries, because calling the inquiries “synonymous” merely means that the two are “alike” rather than “identical.” Response at 7 & n3. Yet the Court itself removed any doubt that it viewed the tests as coextensive, writing that “the inquiries are really synonymous and *the arm-of-the-state analysis answers both questions.*” Opinion, 2021 WL 3190492, at \*13 (emphasis added).

Defendants also observe that the Court separately engaged in an analysis of sovereign immunity under the *Ram Ditta* factors. True enough—as Mr. Hammons recognized in his

motion, the Court did indeed review those factors. But, the Court held that Defendants' were "correct" that Mr. Hammons "cannot have it both ways." *Id.* at \*7. And, the Court's discussion established that it viewed sovereign immunity as a forgone conclusion once UMMS's state actor status was established. *Id.* at \*13. The Court also imported case law applicable to sovereign immunity into its state actor analysis, further demonstrating its view that the tests were coextensive. *Id.* at \*11 (state actor analysis, quoting extensively from *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 872 (D.C. Cir. 2008), which analyzed sovereign immunity and does not discuss *Lebron*). And, in proceeding through its sovereign immunity discussion, the Court ignored *Lebron*'s instruction that the statutory disclaimer deprives an entity of sovereign immunity. *Id.* at \*12-15.

Accordingly, Mr. Hammons respectfully submits that the Court improperly equated the state actor and sovereign immunity tests, and thereby committed clear error, warranting reconsideration.

**B. Under *Lebron*, a Statutory Disavowal of Agency Status Is a Deprivation of Sovereign Immunity, Not a Waiver**

In their response brief, Defendants contend that the Court already rejected Mr. Hammons's argument regarding the application of *Lebron* to UMMS's sovereign immunity. But they concede that the Court understood Mr. Hammons's argument as relating to waiver—indeed, they themselves again errantly cast Mr. Hammons's argument as sounding in waiver. Response at 8. As Mr. Hammons set out in his Motion, under *Lebron*, the statutory disclaimer of agency status does not operate as a waiver—it instead deprives the entity of sovereign immunity in the first instance. Motion at 9-12. By failing to respond to this argument, and again mistaking waiver as the appropriate framework, Defendants demonstrate that the Court's decision was premised on a misapprehension of Mr. Hammons's argument, which warrants reconsideration.

Beyond insistence that the Court’s waiver analysis was appropriate, Defendants have no meaningful response to the fact that the plain terms of *Lebron* dictate that, here, UMMS does not enjoy sovereign immunity. Nor could they: the statutory regimes at issue here and in *Lebron* are nearly identical. In both instances, the government created a corporation and simultaneously enacted a statutory disclaimer of the entity’s agency status. Under the plain terms of *Lebron*, “the statutory disavowal of [the entity]’s agency status deprives [it] of sovereign immunity from suit.” 513 U.S. at 392. Thus, here too UMMS lacks sovereign immunity.

Defendants’ only point of differentiation between UMMS and *Lebron* is that, here, the government included a statutory reservation of its own sovereign immunity. Md. Code Ann., Educ. § 13-308(f).<sup>5</sup> But Defendants have no answer to Mr. Hammons’s argument that this provision in fact demonstrates that UMMS does not enjoy sovereign immunity, since the statute reserves sovereign immunity only as to “the State” and “the University”—without any reference to UMMS. *Id.* As previously explained, UMMS’s creation statutes differentiate between the three entities, and the very provision that reserves sovereign immunity as to the State and University also discusses UMMS’s specific legal responsibilities. Motion at 12 (citing Md. Code Ann., Educ. § 13-308). Thus, the reservation of sovereign immunity as to entities *other than* UMMS demonstrates that UMMS was not vested with sovereign immunity in the first instance. *See In re Wood*, 993 F.3d 245, 252 (4th Cir. 2021) (under “a straightforward application of the *expressio unius canon*,” a statute’s “narrow, specifically articulated exception” implies that other

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<sup>5</sup> Defendants also cite Md. Code Ann., State Gov’t § 12-103(2), which provides that a separate “subtitle does not ... waive any right or defense of the State or its units, officials, or employees ... including any defense that is available under the 11th Amendment to the United States Constitution.” Defendants do not bother to explain what relevance this provision may have to this instant matter. Nor is any apparent, since this provision states only that a separate subtitle (the Maryland Tort Claims Act) does not waive the State’s Eleventh Amendment sovereign immunity.

exceptions are not permitted). Defendants have no rebuttal to this point.

Rather than confront the obvious parallels between *Lebron* and this case, Defendants retreat to quoting the dictionary definitions of “deprive” and “waive,” arguing that the two words are equivalent. Defendants thus seem to imply that *Lebron*’s discussion of the statutory disavowal should be understood as describing a “waiver” of sovereign immunity. But, to the degree that dictionary definitions are relevant here, Defendants fail to note that “deprive” is in fact meaningfully distinct from “waive”: the secondary definition of “deprive” is “to withhold something from”—reflecting Mr. Hammons’s argument that the Supreme Court understood that Amtrak was never endowed with sovereign immunity in the first instance. “Deprive,” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/deprive>. Further, as the Court recognized, “*Lebron* means what it says,” Opinion, 2021 WL 3190492, at \*11, and *Lebron* did not describe its sovereign immunity analysis as sounding in “waiver,” despite the waiver doctrine’s prominence in sovereign immunity law. Finally, as Mr. Hammons explained in his motion, the statutory disclaimer in Amtrak would not have passed muster under waiver law: it does not “unequivocally express” a waiver. Motion at 10-11. Defendants, of course, have no response to this argument, and do not assert that the disclaimer at issue in *Lebron* could have operated as an effective waiver.

Thus, Defendants fail to meaningfully respond to Mr. Hammons’s argument that the statutory disclaimer of agency status is not a waiver, but instead deprives UMMS of sovereign immunity in the first instance. Because the Court misapprehended Mr. Hammons to advance a waiver argument, and because *Lebron*, properly considered, dictates that UMMS has been deprived of sovereign immunity, reconsideration is warranted.



**III. THE COURT SHOULD RECONSIDER ITS CONCLUSION THAT UMMS IS ENTITLED TO SOVEREIGN IMMUNITY UNDER THE *RAM DITTA* FACTORS<sup>6</sup>**

Defendants once again put forward a paltry presentation regarding the *Ram Ditta* factors. As they must, they concede that they failed to raise those factors in their opening motion. Response at 10 n.7.<sup>7</sup> Defendants also admit that they held the burden both to show that UMMS is entitled to sovereign immunity in the first instance, and specifically to satisfy the *Ram Ditta* factors. Response at 9. Because Defendants failed to raise the *Ram Ditta* factors in their opening motion, the factors were not fully briefed, and the Court's decision on this point was outside the adversarial issues presented. Reconsideration is warranted.

As to the Court's application of the *Ram Ditta* factors, Defendants also concede that the Court did not discuss the specific criteria mandated by the *Oberg* cases. *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) ("*Oberg II*"); *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, 804 F.3d 646, 668 (4th Cir. 2015) ("*Oberg III*"). Instead, they note that the Court was "aware of, analyzed, and cited" those cases.

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<sup>6</sup> Defendants claim that Mr. Hammons contradictorily argues that *Lebron* resolves the sovereign immunity issue, while nonetheless insisting that the Court review the *Ram Ditta* factors. Response at 6 n.2. Not so. Mr. Hammons contends that UMMS's lack of sovereign immunity is established by *Lebron*, and that an analysis of the *Ram Ditta* factors, under the proper criteria mandated by the *Oberg* cases, confirms this conclusion. Thus, while the Court may rely exclusively on *Lebron*, UMMS's lack of sovereign immunity is clear under both *Lebron* and the *Ram Ditta* factors.

<sup>7</sup> In defense of their prior neglect on the *Ram Ditta* factors, Defendants offer only a footnote, claiming that their general invocation of sovereign immunity was sufficient to "preserve" the *Ram Ditta* factors. Response at 10 n.7. But they cite no case law in support of this meritless contention. And, to the contrary, the Fourth Circuit has explained that "a party must do more than raise a non-specific objection or claim to preserve a more specific argument." *Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, 922 F.3d 568, 578 (4th Cir. 2019); see also *Humane Soc'y of the U.S. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. CV DKC 13-1822, 2016 WL 3668028, at \*4 (D. Md. July 11, 2016) (Chasanow, J.) (declining to consider arguments raised for the first time in reply); *Byrd v. Deveaux*, No. CV DKC 17-3251, 2018 WL 305838, at \*2 (D. Md. Jan. 5, 2018) (Chasanow, J.) (same).

Response at 10. But, by overlooking the specific criteria required by the *Oberg* cases—and issuing a decision that contravenes the holdings of those opinions—the Court committed clear error.

Finally, in their response to the instant Motion, Defendants once again decline to make any presentation that the *Ram Ditta* factors should be resolved in their favor. Defendants again concede that the first and “most important consideration” in the analysis cuts strongly in favor of Mr. Hammons and against sovereign immunity. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014). And Defendants do not specifically argue that *any* of the remaining factors weigh in their favor. Response at 10-13. Thus, despite bearing the burden on sovereign immunity, and despite failing to raise and argue the *Ram Ditta* factors in their opening motion to dismiss, Defendants again fail to make an argument that they should prevail on these factors. Their silence is telling: the *Oberg* cases make plain that, here, UMMS does not satisfy *Ram Ditta*’s requirements to enjoy sovereign immunity.

**A. The Second *Ram Ditta* Factor Weighs Strongly Against Sovereign Immunity**

With specific regard to the second *Ram Ditta* factor—“the degree of autonomy exercised by the entity,” *Oberg II*, 745 F.3d at 136—in their response, Defendants limit themselves to complaining that Mr. Hammons “cherry pick[ed]” the factors that align with the *Oberg* entity and UMMS. Response at 11. But Defendants do not contest that the many factors cited Mr. Hammons each demonstrate clear similarity between the two entities.

Defendants further assert that Mr. Hammons purportedly ignored critical features of the *Oberg* entity. But the features highlighted by Defendants only demonstrate additional similarities between the two entities:

- Defendants observe that the *Oberg* entity generated significant revenue, and

substantively controlled those funds. Yet Defendants themselves have explained that the same is true of UMMS, which “has separate ‘operations, revenues, and obligations’ and does not depend on state funding,” and manages its own “day-to-day affairs.” ECF No. 39-1 at 5.

- Defendants observe that the *Oberg* entity “created a spin-off organization” and that it also independently considered a buyout offer, without interference from the state. Yet two of the Defendants in this very action—UMSJ Health System, LLC, and University of Maryland St. Joseph Medical Center, LLC—are corporate subsidiaries of UMMS, created by UMMS’s general counsel and purchased by authorization of UMMS’s CEO. Complaint ¶¶ 10, 11, 38, 39. And UMMS independently purchased St. Joseph, the hospital where Mr. Hammons was denied medically necessary care, and further agreed to operate that hospital as a Catholic institution. Complaint ¶¶ 26-33.

Thus, the considerations flagged by Defendants only show that the *Oberg* entity is all the more similar to UMMS.

The sole potential point of distinction that Defendants raise is that UMMS’s creation statute requires that UMMS “coordinate ... campaigns and solicitations for private gifts and proposals for private or federal grants.” Md. Code Ann., Educ. § 13-303(j). But Defendants fail to observe that the *Oberg* entity was also constrained in its ability to pursue certain financial streams, since the *Oberg* entity required the approval of the Governor for “all . . . debt issuances.” *Oberg III*, 804 F.3d at 668. In addition, the *Oberg* entity required the approval of the Treasurer for “all expenditures,” and the approval of and the approval of the Attorney General for “all . . . contracts in excess of \$20,000.” *Id.* Thus, the *Oberg* entity faced far greater

financial restrictions than UMMS. Further, discovery is yet to show whether, in practice, UMMS's coordination requirement for gifts and grants has imposed any limitation on its operations, or otherwise meaningfully affected UMMS's budget. As a result, this singular point does not distinguish UMMS and the *Oberg* entity, or override the many other similarities between the two entities—which Defendants do not bother to address or dispute.

Finally, Defendants contend that, “to advance his argument under the second *Ram Ditta* factor, Hammons would have had to ... undermine[] his core ‘state actor’ argument.” Response at 12. This again repeats the fallacy that the state actor and sovereign immunity inquiries are coextensive. It also ignores the fact that, under *Lebron* and the *Oberg* cases, there is no incongruity between the two arguments: while the inquiries overlap to a certain degree, and both consider whether the entity's board is appointed by the government, the remainder of the inquiries are far distinct. Thus, as the Court rightly recognized, UMMS “readily satisfied” *Lebron*'s criteria for state action purposes. Opinion, 2021 WL 3190492, at \*11. But, as the *Oberg* cases explain, the composition of an entity's board is only one of a wealth of considerations that must be analyzed under the second *Ram Ditta* factor. *Oberg II*, 745 F.3d at 139; *Oberg III*, 804 F.3d at 668.

As Mr. Hammons set out in his Motion, weighing all of the considerations mandated by Fourth Circuit precedent demonstrates that the second *Ram Ditta* factor cuts heavily in favor of Mr. Hammons, and against sovereign immunity. Because the Court did not look to the applicable criteria mandated by the *Oberg* cases, and incorrectly determined that this factor cuts in favor of sovereign immunity, reconsideration is warranted.

**B. The Fourth *Ram Ditta* Factor Is Neutral**

With regard to the fourth arm-of-state factor—“how the entity is treated under state law,” *Oberg II*, 745 F.3d at 138—Defendants do contest that the Court, in its analysis of this factor,

relied exclusively on *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724 (2011), which held that UMMS is a state agency solely for purposes of Maryland’s Public Information Act. Instead, Defendants argue that *Napata* was “relevant,” and observe that the Court also noted the statutory disclaimer, Response at 13—both points that Mr. Hammons fully acknowledges in his Motion. But, as Mr. Hammons explained, and as Defendants here do not refute, the Court erred in treating *Napata* as *conclusive* with regard to this factor, since *Napata* does not concern sovereign immunity, and would not be controlling even if it had. *See Ram Ditta*, 822 F.2d at 460 (finding that entity lacks Eleventh Amendment immunity, despite Maryland Court of Appeals decision holding that entity enjoys state sovereign immunity).

Proper consideration of the fourth *Ram Ditta* factor requires granting due regard to other considerations that cut contrary to *Napata*. *See Hutto*, 773 F.3d at 548 (“This factor requires courts to consider the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question.”) (internal quotation marks omitted); *see also Oberg III*, 804 F.3d at 675-76 (also weighing treatment of entity employees and relationship with government actors). And Defendants make no argument that the numerous elements cited by Mr. Hammons in his Motion—namely, the statutory disclaimer of agency status, the repeated statutory references to UMMS as a “private corporation” with “separate ...operations, revenues, and obligations ... from the State,” and the statutory differentiation of UMMS employees from state personnel—in fact show that state law treats UMMS as distinct from the state. Nor do Defendants have any rejoinder to the fact that UMMS’s own practice of declining to invoke sovereign immunity in malpractice suits reflects the understanding that it lacks such immunity. Thus, Defendants’ response demonstrates that, when all relevant criteria are weighed, the fourth *Ram Ditta* factor is neutral.

The Court’s exclusive reliance on *Napata*, and its conclusion that the fourth *Ram Ditta* factor weighed in favor of sovereign immunity, were clear error, warranting reconsideration.

\* \* \*

Respectfully, the Court’s conclusion that the *Ram Ditta* factors cut in favor of sovereign immunity was rendered outside the adversarial issues presented, and without reference to the proper criteria mandated by Fourth Circuit precedent. Reconsideration is warranted.

**IV. IF RECONSIDERATION IS DENIED, THE COURT SHOULD CERTIFY COUNTS I AND II FOR INTERLOCUTORY APPEAL**

Defendants do not contest that Mr. Hammons satisfies the first prong of 28 U.S.C. § 1292(b)’s certification requirement, and here presents a “controlling question of law.”

Instead, Defendants assert that Mr. Hammons has not satisfied the second element—a “substantial ground for difference of opinion.” Defendants claim that this element is not met because “[Mr.] Hammons identifies no disagreement among any courts—let alone *substantial* disagreement.” Response at 14. But the Court’s Opinion on sovereign immunity is directly contrary to *Lebron*, which instructs that a statutory disclaimer of agency status deprives an entity of sovereign immunity. In addition, the Court’s resolution of the *Ram Ditta* factors contravenes Fourth Circuit precedent. Thus, there is plainly disagreement among courts.

Further, in arguing this point, Defendants again articulate only the narrowest possible standard, which inaccurately conveys the flexibility employed by other courts in examining this second prong of the certification analysis. *See, e.g., Coal. For Equity & Excellence In Md. Higher Educ. V. Md. Higher Educ. Comm’n*, No. CIV. CCB-06-2773, 2015 WL 4040425, at \*6 (D. Md. June 29, 2015) (granting certification on “a case of first impression,” and recounting that “[a] substantial ground for difference of opinion may exist where there is a dearth of precedent within the controlling jurisdiction ...” and that “[t]he level of uncertainty required to find a

substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case.”) (internal quotation marks omitted). Here, Defendants have no rejoinder to the fact—recognized by the Court—that there is little applicable case law, and that the question here—whether a state actor may escape liability for running a religious hospital—presents an issue of particular importance. Thus, the second prong of Section 1292(b) is plainly satisfied on these grounds as well.

Defendants next contend that Mr. Hammons has not shown that an appeal would materially advance the litigation. But they have no answer to his argument that litigating all the claims at once (as would occur if the Court’s decision were reversed on interlocutory appeal) or litigating the statutory claim without the prospect of an appeal on the constitutional claims (as would occur if the Court’s decision were affirmed) would be more efficient and expeditious. Thus an appeal would in fact “eliminate complex issues” to simplify the remaining litigation. *Id.*

Accordingly, Mr. Hammons has plainly satisfied the Section 1292(b) criteria to certify an interlocutory appeal.

### CONCLUSION

For these reasons, Mr. Hammons respectfully requests that the Court grant reconsideration pursuant to Rule 54(b). If reconsideration is denied, Mr. Hammons respectfully requests an immediate appeal pursuant to 28 U.S.C. § 1292(b).

Date: September 8, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Counsel for Plaintiff Jesse Hammons hereby certifies that on this 8th day of September, 2021, that this Reply Memorandum in Support of Plaintiff's Motion for Partial Reconsideration or, in the Alternative, Certification of Interlocutory Appeal were served pursuant to the Court's CM/ECF electronic notification system.

Date: September 8, 2021

*/s/Louis J. Ebert*

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