No. 12-56809

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED NATIONAL MAINTENANCE, INC.
Plaintiff-Appellant,

v.

SAN DIEGO CONVENTION CENTER CORPORATION, INC.
Defendant-Appellee,

Appeal from the United States District Court
for the Southern District of California,
Civil Case No. 07-cv-02172-AJB-JMA

BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF VENUE MANAGERS, INC. IN SUPPORT OF APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae International Association of Venue Managers, Inc. is a non-profit tax-exempt organization qualified under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, and no publicly-held company owns ten percent or more of it.

Dated: August 2, 2013

By: */s/ Cortlin H. Lannin*
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STATEMENT OF INTEREST OF AMICUS AND SOURCE OF AUTHORITY TO FILE

This brief is submitted by the International Association of Venue Managers, Inc. ("IAVM"), an organization committed to the professional operation of convention centers, arenas, stadiums, auditoriums, and similar venues. Over 4,100 venues around the world, including approximately 990 venues in the United States, are members of the IAVM. The IAVM submits this brief to present to the Court the perspective of venue operators on certain issues raised in this case. The IAVM has extensive experience with the subjects addressed in this brief, including the climate in which public venues operate, the policy objectives that inform a city's decision to build and operate a public venue, and the nature and sources of a public venue's inherent authority to structure and manage its own internal operations.

This brief is filed with the consent of the parties to this appeal. *See* Fed. R. App. P. 29(a).[1]

[1] No counsel for a party has authored this brief in whole or in part, and no such counsel or party contributed money that was intended to fund the preparation or submission of this brief. Funds to prepare and submit this brief were contributed by the IAVM Foundation, a non-profit organization that supports professional development, research, and educational initiatives related to the public assembly venue industry. *See* Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY OF ARGUMENT

Publicly owned convention centers operate in a vigorously competitive market that generates tremendous benefits both for the exhibitors and others who use the facilities and for the taxpayers who fund convention centers for the benefit of their communities. In making the decision to invest millions (or even billions) of dollars in a convention center, a local government expects the facility to be managed in a manner that will be economically self-sufficient, protective of public safety, and calculated to maximize the facility's ability to compete effectively in the nationwide market for events that bring tourist and exhibitor dollars to the local community. Inherent in these expectations, which are set forth in the authorizing legislation for such public facilities, are special requirements affecting the facilities' internal operations that anticipate limitations on competition to perform those operations.

The San Diego Convention Center Corporation, Inc. ("SDC") is a typical example of these dynamics. Pursuant to statute, the SDC has delegated to it broad authority to manage and maintain the San Diego Convention Center ("Convention Center"). This delegation carries with it an understanding and expectation that the SDC will run the Convention Center in accordance with San Diego's policy objectives. That delegation necessarily contemplates that the SDC has flexibility to structure and manage its internal operations, even if competition

to perform those operations is displaced. Requiring the SDC to compete against third parties for the right to perform basic internal functions (such as cleaning) in the operation of the SDC's own facility is irreconcilable with the state's and city's intention that the Convention Center be self-sustaining, secure, and an effective competitor against other venues in a challenging business climate. As the district court correctly determined, the SDC's adoption of a cleaning policy was an inherent and foreseeable result of its authority to manage the venue. That policy is accordingly immune from antitrust scrutiny under the state action doctrine.

The district court's decision, although rendered before the Supreme Court's recent decision in *FTC v. Phoebe Putney Health Sys.*, 568 U.S. __, 133 S. Ct. 1003 (2013), is fully consistent with that decision. Appellant argues otherwise, advocating a suffocating interpretation of the state action doctrine that would strip the SDC and other operators of public venues of immunity for any conduct that is not explicitly authorized by legislation. But appellant's proposed rule, which would have disastrous consequences for public venues that rely upon legislative authority to manage their internal operations, is flatly inconsistent with *Phoebe Putney*, which confirms the vitality of the state action doctrine's foreseeability inquiry. Under this doctrine, the SDC's adoption of a cleaning policy is immune from antitrust scrutiny as a plainly foreseeable result of its authorizing legislation.

ARGUMENT

I. Convention Centers and Other Public Venues Must Serve Their Host Cities' Policy Objectives In A Challenging Climate.

These are tumultuous times for the nation's public convention centers and venues. These facilities are often the heart of their communities and are expected to foster local economic growth, but taxpayer enthusiasm for subsidizing these venues has waned. The resulting pressure on these venues to be self-sufficient has increased even amidst a challenging economic climate, with convention centers competing fiercely to win the business that remains after a bruising recession slashed demand. All of these dynamics are vividly illustrated by the recent experiences of the San Diego Convention Center.

IAVM begins this brief by describing in more detail why cities build public venues and the policy climate in which these venues are authorized and operated. This context helps explain why legislative delegations of authority to manage these facilities must include inherent authority to structure and manage the venues' internal operations.

A. Convention Centers Are Expected to Provide A Public Good for Their Communities.

Convention centers and similar public venues provide an important good for their communities. Such a facility is often built with the assistance of millions or even billions of taxpayer dollars, in the expectation that the venue will generate even greater long-term economic benefits for the community. These

venues' mission to promote local economic growth and create jobs are often written directly into their charters.[2]

Convention centers generate economic growth both directly and indirectly. Building a convention center is typically a multi-year project that generates hundreds of new construction jobs and injects millions of dollars into the local economy. After the venue is completed, members of the community are employed in management and support capacities. Most importantly, the venue (and the events it hosts) draws visitors and tourists to the area, who spend substantial sums at local hotels, restaurants, and stores. These visitors are also an important source of direct revenue for the host city, as they typically pay hotel occupancy and other local taxes that flow directly into the city's coffers.[3]

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[2] In a 2011 survey of 269 venues that belong to IAVM, 68 percent reported their primary mission was to generate economic growth and support jobs in the local community, while 14 percent reported their primary mission was to support business and tourism travel. *See* Dana Glazier, 2011 IAVM Convention Center Survey Report on Exclusives, www.iavm.org/white/11CCSurveyReportonExclusives.pdf (last visited July 31, 2013).

[3] Convention centers generate other benefits that, while less quantifiable, are no less important. For example, when natural or other disasters strike, these venues may serve both as places of shelter and as central locations from which to coordinate relief efforts. *See, e.g.*, The Associated Press, *Softball teams take shelter in Oklahoma storm*, YAHOO! SPORTS (May 31, 2013), http://sports.yahoo.com/news/softball-teams-shelter-oklahoma-storm-010705407--spt.html (describing how college softball teams sheltered at Cox Convention Center during devastating Oklahoma tornados).

The San Diego Convention Center is emblematic of the substantial benefits that a public venue can deliver. The SDC's primary mission is to "generate significant regional economic benefits," and by almost any measure it is delivering those benefits. ER 1066.[4] Constructed with a substantial investment of taxpayer dollars, the Convention Center has generated at least $18 billion in local economic impact and $360 million in tax revenues since it opened in 1989. *Id.* at 1069, 1077, 1093. In its 2010 fiscal year, the venue hosted 165 events that drew over 786,600 visitors to San Diego, generating $1.27 billion in local economic impact and $20.2 million in hotel room and sales tax revenue. *Id.* at 1070. The SDC employs over 500 people and is estimated to support 12,500 jobs in the San Diego region alone. *Id.* at 1069, 1081. As San Diego's local newspaper has observed, the Convention Center is an "engine of economic growth … without equal." *See* Op-ed, *Buckets of cash*, SAN DIEGO UNION TRIBUNE (Sep. 25, 2008), *available at* http://www.utsandiego.com/uniontrib/20080925/news_lz1ed25top.html.

[4] Citations to "ER" refer to Appellant's Excerpts of Record. Citations to "SER" refer to Appellee's Supplemental Excerpts of Record. Citations to "Dkt." refer to items filed on the docket for this matter in the district court below.

B. States and Cities Expect Their Public Venues To Be Prudently Managed and Self-Sufficient.

In authorizing the construction and operation of publicly-funded and managed convention centers, states and municipalities require the internal operations of those facilities to be managed in a prudent and, where possible, self-sufficient manner that serves their public functions.

For example, by statute, California has authorized its cities and municipalities to build public convention centers and similar venues and to appoint commissions to manage the venues. *See* Cal. Gov. Code §§ 37501, 37506. Any revenues generated by such a convention center must be used exclusively for "maintaining, insuring, and making improvements and repairs" to the venue and for "[p]ayment of interest and principal on the bonds," in that order. *Id.* § 37505. Only after those obligations are satisfied may surplus revenues be used for "general municipal purposes." *Id.*

Pursuant to this authority, the San Diego City Council approved the creation of the SDC, a non-profit public benefit corporation, to provide "operating and maintenance services" for the Convention Center. SER 348. The SDC's sole purpose is to operate the Convention Center on the City's behalf, and it has "exclusive authority" to set usage and operating policies for the venue, to raise

money by charging for services inside the venue, and to clean and maintain the facility. ER 24; SER 331-33.[5]

With authority to run the venue comes acute pressure to watch the bottom line. Convention centers are not immune to the economic turbulence that has lately buffeted cities and businesses alike. Cash-strapped municipalities have sharply reduced or eliminated altogether the public subsidies they once provided to their public venues. As a result, exclusivity policies for internal functions such as the cleaning services at issue have become increasingly important, as venues can no longer rely on the public fisc to subsidize their operations. In analyzing the movement by many public venues to greater reliance on exclusivity policies for internal operations like the one at issue here, the IAVM has recognized that "many local, state and provincial governments no longer support the open-ended public funding of convention centers operations and there is an increased emphasis towards requiring self-sufficient operations."[6] A recent IAVM survey bears this

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[5] Many of the country's best known convention centers, such as the Javits Center in New York City, are managed by public benefit corporations with responsibilities similar to those of the SDC. The district court found that the SDC was a government entity. This brief does not address appellant's challenge to this finding. However, given the city's direct involvement in and supervision of the SDC, the analysis of the immunity issue leads to the same outcome either way.

[6] IAVM Exclusive Services Convention Centers/Exhibit Halls White Paper (December 2011),
(continued…)

out, as more than a quarter of the 269 venues that responded reported that they are expected to break even on their own (28 percent). Nearly half reported they must reduce their reliance on a subsidy (25 percent) or make do with the subsidy they receive now (21 percent). None reported any increase in public subsidies.[7]

It is important to recognize that in this context the recapture of revenues for routine internal facility operations through exclusivity policies is inherently interrelated with the facility's fiscal relationship with the state and municipal entities that authorize and govern its operations. A state actor may permit private commercial interests to compete with the venue to perform certain of the venue's own internal operations, understanding that public funds may be required to make up revenues diverted from the venue. Or the state actor may choose instead to limit public funding of the facility by requiring it to maximize the efficiency and revenue-generating potential of its own operations so as to enhance self-sufficiency. Either way, the choice is inherently one about the investment of public funds and is inextricably bound up with the underlying legislative mandate under which the facility operates.

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http://www.iavm.org/white/11WhitePaperonExclusiveServices.pdf (last visited July 31, 2013).

[7] *See* IAVM Convention Center Survey Report, *supra* note 2.

The Convention Center is among the many public venues that can no longer rely on an ongoing public subsidy to fund its operations. Prior to 2005, San Diego was obligated to provide the SDC with an annual "operational subsidy." ER 1080. The City Council eliminated this guarantee as of July 1, 2005. *Id.* Exercising its discretion, the city has elected to provide the SDC with a small public investment in the years since – but the amount of that investment has declined over time. *See* Dkt. 212 at 34-36.[8] Thus, like many public venues today, the SDC was required to adapt its internal operations to become more self-sufficient, while still providing the important public benefits that are its prime mandate.

C. Convention Centers Must Ensure the Security of Their Facilities.

Convention centers represent compelling targets for potential terrorists and have an especially weighty obligation to ensure the security of their many thousands of guests. The IAVM has been deeply involved in assisting its member facilities to identify security threats and to formulate policies and measures to address them.

A venue's ability to control who has access to the facility and its infrastructure is a critical component of ensuring security. This requires

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[8] *See also* SDC Annual Reports, 2005-2012, *available at* http://www.sdccc.org/aboutus/annualreports.cfm (last visited July 31, 2013) (listing amount of City's annual public investment each year).

appropriate measures to screen and supervise service providers who work within the venue, including food and beverage suppliers, telecommunications and data service providers, cleaners, and temporary utility providers.[9] IAVM's warnings about securing access to public venues were borne out by exercises the organization sponsored in 2005 and 2006 to examine the areas of greatest security risks for a convention center. Those exercises concluded that co-opting outside service providers, including cleaning vendors, would be a highly effective way for terrorists to gain access to a venue. *See* Dkt. No. 286 at 29-42. Common sense confirms this conclusion, as cleaning personnel have access to portions of the facility not open to the general public and are present outside ordinary operating hours.

These concerns were further substantiated by government assessments of the SDC's security protocols. In 2005, the California Office of Homeland Security ("CalOHS") determined that the Convention Center was a primary target for potential terrorist attacks in Southern California. Dkt. 208 at 84. As a result, CalOHS funded security assessments to evaluate potential vulnerabilities at the Convention Center. *Id.* at 33, 81-86. These assessments, like the IAVM simulation exercise, resulted in urgent recommendations that the SDC heighten its

[9] *See* IAVM Exclusive Services White Paper, *supra* note 6.

control over who had access to the venue and its internal infrastructure, as well as the surrounding areas. Dkt. 286 at 20-26; Dkt. 239-4 at 227-32, 306-11.

With these concerns in mind, many IAVM members have adopted policies, like the policy at issue in this case, that require critical internal functions within a facility to be performed by employees of the venue, who are known to facility's management and more easily supervised by them. Such policies are a natural outgrowth of legislative authorization to operate these facilities as *public* venues, with all of the special security considerations that such operation entails.

D. There Is Vigorous Competition Among Public Venues To Attract Convention Business.

Public convention centers like San Diego's compete vigorously in a nationwide market for conventions, exhibitions, and other events that bring visitors to the community. And even as convention centers are under increasing pressure to operate securely and self-sufficiently, there is fierce competition among venues for a shrinking pool of customers. Exhibiters can choose among multiple venues when deciding where to host events and are often able to extract substantial concessions from the facilities that wish to host them.

The district court correctly observed that exhibiters look to a wide range of factors when deciding among venues. *See* ER 28 ("Trade show producers choose between convention centers offering suitable space based on a range of factors that include cost, location, availability, and size."). In addition to the

factors specifically listed by the district court, potential customers evaluate the maintenance and appearance of a venue, the amenities the facility offers, and – more and more in recent years – the extent to which the facility offers a secure environment. Public venues must invest in these aspects of their operation if they are to compete effectively for events, but they cannot rely on any increase in tax dollars to support such investment. Convention centers that cannot or will not invest in their facilities attract less business, creating less revenue to invest back in the venues. Venues that fall into this trap cannot be successful at accomplishing their public mandates to attract visitor dollars.

The SDC is subject to these competitive forces. For example, one of the Convention Center's highest-profile events is the annual Comic-Con convention, which this year drew approximately 130,000 visitors to San Diego, "from comic book geeks to Hollywood studio executives." Jonathan Horn and Lori Weisberg, *Comic-Con's Big Break on Rent*, SAN DIEGO UNION TRIBUNE (July 18, 2013), *available at* http://www.utsandiego.com/news/2013/Jul/17/comic-con-rent-discount-convention-center. When Comic-Con's contract with the SDC was up for negotiation three years ago, the event was "courted by larger venues in Los Angeles and Anaheim, some offering free rent." *Id.*

At the trial in this case, the parties' experts agreed that the SDC is but one player in a large, fragmented market to host trade shows. UNM's expert

estimated that the SDC controlled between 3 and 8 percent of this nationwide market; the SDC's expert pegged that statistic at 3 to 5 percent. SER 131 (UNM expert), 274-81 (SDC expert). Far from being insulated from competition, therefore, the SDC is subject to vigorous competition in the primary market in which it participates. By pursuing policies for the internal management of the facility that supports the facility's economic self-sufficiency and ability to make ongoing investments, the SDC ultimately promotes competition in the broader market.

E. Due to the Special Mandates Imposed on Public Venues, Internal Operations Such As Cleaning Services Are Inherently Subject to Limitations on Competition.

This case was specifically about the competitive impacts of a policy addressing trade show cleaning services. Whether and to what extent this is a "relevant market" for antitrust purposes, or whether "competition" for cleaning operations within the SDC's own facility would be a legitimate source of antitrust concern even in the absence of state action immunity, is beyond the purview of this brief. However, as the district court recognized in its definition of the relevant geographic market for purposes of the antitrust analysis in this case, there is nothing inherently special about such cleaning services in and of themselves. Essentially identical services can be and are performed at hotels and other private venues that provide meeting space. *See* ER 28-29 & 29 n.14 (defining geographic

market as entire San Diego region and listing multiple hotels that were part of that market).

What *is* special about cleaning services at the Convention Center is that they occur in a *public* venue that is subject to special requirements and limitations established by legislation. By mandating that the SDC perform a public function in operating a public facility, that it ensure the safety and security of the facility, and that it perform these functions in a fiscally responsible manner, the state and the city inherently granted to the SDC the flexibility to make internal operating decisions – such as the decision about who will be permitted to provide cleaning services within the facility – that serve those *public* goals.

II. Legislative Delegations of Authority to Manage A Public Venue Inherently and Foreseeably Displace Competition to Perform the Venue's Internal Operations.

The Supreme Court has established that substate government entities like the SDC are immune from antitrust scrutiny when they act "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *FTC v. Phoebe Putney Health Sys.*, 568 U.S. __, 133 S. Ct. 1003, 1007 (2013). In applying this "clear articulation" requirement, the Court has recognized that "no legislature can be expected to catalog all the expected effects of a statute," including effects that serve to displace competition and would thus be entitled to immunity. *Id.* at 1006 (citing *Town of Hallie v. City of Eau Claire*, 471

U.S. 34, 43 (1985)). Accordingly, a state need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Hallie*, 471 U.S. at 43.

Instead, the Supreme Court has held that immunity applies "if the anticompetitive effect was the 'foreseeable result' of what the State authorized." *Phoebe Putney*, 133 S. Ct. at 1011 (citing *Hallie*, 471 U.S. at 42). As the Court recently clarified, where the displacement of competition is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature," immunity will attach. *Id.* at 1006; *see, e.g., Grason Electric Co. v. Sacramento Muni. Utility Dist.*, 770 F.2d 833, 837-38 (9th Cir. 1985) (displacement of competition foreseeable result of statutes authorizing municipal electrical utilities).

A. The SDC's Adoption of A Cleaning Policy Was Within the Scope Of Its Management Authority And Served the State's And the City's Policy Objectives.

The California statutes at issue in this case are typical of those that clearly articulate and affirmatively express a state policy permitting cities to build, manage, and maintain public convention centers. *See Phoebe Putney*, 133 S. Ct. at 1003. California authorizes cities to acquire the land to build a public venue through condemnation, to "construct and maintain" convention spaces, and to delegate to a commission responsibility for "manag[ing]" the venue's use. Cal. Gov. Code §§ 37501, 37506. Any revenues generated by the convention center

must be used exclusively for "maintaining, insuring, and making improvements and repairs" to the venue and for "[p]ayment of interest and principal on the bonds," in that order. *Id.* § 37505. Only after those obligations are satisfied may surplus revenues be used for "general municipal purposes." *Id.*

The foreseeable result of legislation that authorizes cities to build and manage convention centers for the public good is that any competition to perform the facility's internal operations may be displaced. When a city makes the decision to invest many millions of taxpayer dollars in a new public venue, it expects the facility to pursue self-sufficiency, to protect visitors and others within the facility, and to benefit the community and its economy by competing effectively to attract events and visitors. If management is to achieve these ends, its authorization to manage and maintain the facility must be understood as carrying with it flexibility to structure the venue's internal operations in ways that best accomplish those public goals. That flexibility permits the possibility that competition to perform the venue's internal operations will be displaced – as was allegedly the result in this case.

Thus, the "inherent, logical, or ordinary result" of California's authorizing statutes is that a public venue is permitted to structure its internal operations in service of its broader mandate, even if doing so requires the displacement of competition. *Phoebe Putney*, 133 S. Ct. at 1006; *cf. Helen Brett*

Enters. v. New Orleans Metro. Convention & Visitors Bureau, Inc., 1996 WL 346314, at *3 (E.D. La. June 25, 1996) (Louisiana statutes authorizing construction and management of public venue evince a state policy favoring economic development, and as such "it was foreseeable" that venue's management would adopt exclusionary booking policy that "generate[d] the most revenue for itself and the local area").

Other courts have concluded in analogous circumstances that a delegation of authority to manage may inherently displace competition related to internal functions. The Fifth Circuit, for example, has held that a public hospital's delegated authority to manage and operate the facility made it foreseeable the hospital would enter into allegedly exclusionary contracts that displaced internal competition to perform certain services. *See Martin v. Memorial Hosp. At Gulfport*, 86 F.3d 1391, 1400 (5th Cir. 1996) ("The very purpose of the statutory authorization is to enable the hospital to displace unfettered competition among physicians in the performance of critical operations … so as to promote efficiency of health care provision, reduce the hospital's supervisory burden, and control its exposure to liability."). The Second Circuit reached the same conclusion on similar facts. *See LeFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471, 477-78 (2d Cir. 2009) (public hospital's adoption of internal operating

policies that excluded competing physicians was a foreseeable result of its legislative authorization to manage the facility).

Cleaning falls squarely within the category of basic internal functions over which the SDC has been delegated management. The plain language of the authorizing statutes confirms this common-sense conclusion. Those statutes permit cities to "maintain" public venues, *see* Cal. Gov. Code § 37501, which entails providing "care for [the property] for purposes of operational productivity or appearance" and "engag[ing] in general repair and upkeep." *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "maintain"). Cleaning services are at the core of this function.

The City of San Diego itself anticipated and expected that its delegation of management authority to the SDC included control over the operations relating to cleaning. The city's management contract states that San Diego intended the SDC to "assume[] responsibility for the development and formulation of policy for the marketing, operation, and maintenance" of the venue. SER 330-31. The SDC is accordingly granted "exclusive authority" to set the venue's usage and operating policies, to charge for services within the convention center, and to "maintain, *clean*, paint and provide custodial services for the building." *Id.* at 331-33 (emphasis added).

The cleaning policy at issue in this case was an exercise of this authority. As the SDC has explained in its brief to this Court, the SDC evaluated various proposals to address concerns arising from the fiscal constraints imposed by the city and the looming security risks that it faced. After studying various options, management concluded that restricting all cleaning services to in-house personnel would accomplish three primary goals. First, the new policy would generate additional revenue, help to offset increased costs, and serve the venue's drive towards self-sufficiency. ER 30-31, 957; SER 43-47, 66-70, 327-38, 362-65; Dkt. 205 at 70-72. Second, the policy would promote security and better protect both visitors and local residents by restricting access to the venue, including access to non-public portions of the building and off-hours access. ER 961-62; Dkt. 205 at 72-73; Dkt. 214 at 33-36; Dkt. 286 at 42-45; Dkt. 287 at 37-47. Finally, the SDC determined that moving cleaning in-house would provide a more consistent experience for its clients and protect the Convention Center's brand name – both valuable assets in the SDC's ongoing efforts to compete against other venues to attract events. ER 957, 961-62; Dkt. 212 at 43-44; Dkt. 214 at 14, 34-37. All three of these policy goals were consistent with the overall objectives of both the state and the city for the venue as a public facility serving public interests, and were an inherent, logical, and ordinary result of the SDC's authority to manage and maintain the venue.

Appellant's constricted reading of the SDC's authority to manage even the internal operations of its own facility is not only contrary to any common sense reading of the authorizing legislation; it has no limiting principle. If the SDC's decision to move cleaning in-house is not within the foreseeable scope of the SDC's delegated authority to manage and maintain the venue, logic would suggest that virtually every internal operation of the convention center would need to be put up for bidding. This would leave nothing behind but a skeletal shell organization – an organization wholly unequipped to manage the venue in any coherent way, to provide for its security, or to compete for business in a challenging market. This cannot be what the California legislature contemplated when it authorized cities to build and maintain public venues for the benefit of their communities.

Most of IAVM's members have a wide variety of internal operations that are handled in-house, including maintenance services, accounting, and marketing and promotional functions. As with cleaning, appellant would presumably argue that authorizing statutes like those at issue here did not "clearly articulate and affirmatively express" an intention to displace competition to perform those functions. But there is no sensible reading of such statutes that would require a venue to compete against third parties to perform these internal functions. The state action doctrine, which rests on practicality and common

sense, does not permit, much less demand, such a result. *See Phoebe Putney*, 133 S. Ct. at 1012; *FTC v. Hospital Bd. of Directors of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994) (foreseeability element of state action doctrine "should be interpreted in light of its plain meaning and common sense").

B. Appellant's Rationale For A Restrictive Interpretation of the SDC's Delegated Authority Rests On An Inaccurate Interpretation of *Phoebe Putney* and Would Have Severe Detrimental Consequences For Public Venues.

Appellant argues that the SDC is not entitled to state action immunity under *Phoebe Putney* because "neither SDC nor the district court has identified any state or local statute or resolution that articulates and affirmatively expresses a governmental policy authorizing SDC to supervise and manage the San Diego Convention Center anticompetitively." Brief for Appellant at 30. In other words, appellant argues that explicit permission from the legislature is required before the SDC may implement any policy with allegedly anticompetitive effects, including the cleaning policy at issue here. But that is not the law.

The Supreme Court reaffirmed in *Phoebe Putney* that no "explicit statement" of permission is required from the legislature with "authorizations to act or regulate in ways that [are] inherently anticompetitive." *Phoebe Putney*, 133 S. Ct. at 1013; *see also Hallie*, 471 U.S. at 42 ("It is not necessary … for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects."). Rather, a state actor need show only

that displacement of competition is the "inherent, logical, or ordinary" result of legislative authorizations, leading to the reasonable conclusion that the "State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 133 S. Ct. at 1013.

That the Supreme Court found immunity not to exist in *Phoebe Putney* under this test is of no moment, as the situation in that case was very different from that presented here. *Phoebe Putney* involved an allegedly anticompetitive purchase of a hospital by a state-authorized hospital authority, which rested its immunity claim solely on the fact that it had been granted "general corporate power[s]" to "participate in a competitive marketplace," including acquisition and leasing powers. *Phoebe Putney*, 133 S. Ct. at 1012. This type of completely generic authorization, the Court found, did not support the conclusion that the Georgia legislature intended to grant the authority *carte blanche* to restrain competition in that same marketplace. *See id.* at 1013.

This case, in contrast, involves a facility's implementation of its authority to manage its own *internal* operations. There is no suggestion that the challenged policy had any anticompetitive impact in the market for event hosting in which the SDC primarily participates. And the authorization granted by the legislature and the city for the SDC to operate and "maintain" the facility plainly carried with it the inherent and foreseeable authority to determine that cleaning

services within the facility would be performed by the SDC's employees, excluding competition from service providers using different workers.

If appellant's counter-intuitive and impractical interpretation were adopted, it would carry with it severe implications, not just for the SDC itself, but for other public facilities that operate under the same or similar legislative authority. Public venue operators across the country are under the same pressures as the SDC to become self-sufficient, to enhance their security policies so as to protect guests and the public, and to compete effectively for business. These venue operators, like the SDC, have concluded that restructuring aspects of their internal operations and moving certain services in-house is part of their inherent management powers and consistent with their cities' policy objectives.

More than 80 percent of venues that responded to a recent IAVM survey offer at least one exclusive service.[10] As with the SDC, adoption of these exclusive policies was driven by a desire to ensure consistent service quality, to generate revenue, and to protect the venue infrastructure and enhance safety. *See*

[10] IAVM has adopted a policy concerning such exclusive services aimed at ensuring that they are implemented in a responsible manner. The policy requires transparency from venues that offer exclusive services. IAVM encourages these venues to "freely disclose those [exclusive] services early in discussions with clients," and to "clearly include exclusive services information in their written lease agreements and operations policies." *See* IAVM Exclusive Services White Paper, *supra* note 6.

IAVM Convention Center Survey Report, *supra* note 2. These policies have improved facilities' financial health and enhanced their ability to compete in the nationwide market for events, while at the same time improving public security. An interpretation of the state action doctrine that threw the legality of these policies into question would have substantial and potentially perilous effects on the nation's public venues.

CONCLUSION

This Court should affirm the District Court's ruling that the SDC's adoption of the cleaning policy at issue here was immunized conduct under the state action doctrine.

Dated: August 2, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 29(d) and 32(a)(7), the attached brief is proportionally spaced, has a typeface of 14 points and, according to the word-count feature of Microsoft Office Word 2010, contains 6,052 words, including footnotes, but not including parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: August 2, 2013

/s/ Cortlin H. Lannin
Cortlin H. Lannin

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF VENUE MANAGERS, INC. IN SUPPORT OF APPELLEE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused to be mailed the foregoing document by First Class Mail, postage prepaid, to the following non-EM/ECF participants:

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Dated: August 2, 2013

/s/ Cortlin H. Lannin
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