No. 12-56809

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED NATIONAL MAINTENANCE, INC.,

Plaintiff-Appellant,

v.

SAN DIEGO CONVENTION CENTER CORPORATION, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California,
District Court No. 3:07-cv-02172-AJB-JMA

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org.[1] Pursuant to Fed. R. App. P. 29(a), amicus states that all parties have consented to the filing of this brief. The goals of U.S. competition policy could be seriously undermined if the Ninth Circuit does not impose the *Midcal* active supervision requirement on hybrid public/private entities susceptible to influence and control by private parties, or entities which participate commercially in markets.

SUMMARY OF ARGUMENT

Although amicus agrees with Plaintiff that the Supreme Court's recent opinion in *Phoebe Putney* requires reversal of the district court on other grounds, *see FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013) (holding that a state's grant of general corporate powers does not constitute a clearly articulated

[1] No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. The AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

and affirmatively expressed state policy to use those powers anticompetitively), amicus writes to address a second error in the district court's opinion that is inimical to effective protection of the public interest in robust competition. The district court erred when it conferred state action immunity on the San Diego Convention Center Corporation (SDC) without imposing the active supervision requirement under *Midcal*. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

This aspect of the district court's opinion should be reversed on two independent grounds. First, the district court contravened Ninth Circuit and Supreme Court state action jurisprudence when it relieved the SDC of the active supervision requirement without inquiring into the SDC's susceptibility to influence and control by private interests rather than state interests. The SDC is what the Fourth Circuit recently described as a "public/private hybrid entit[y]." *See North Carolina State Bd. Of Dental Exam'rs v. FTC*, No. 12-1172, slip op. at 14 (4th Cir. May 31, 2013) (quoting *Interlocutory Order In re North Carolina State Bd. Of Dental Exam'rs v. FTC*, 151 F.T.C. 607 (2011)). It has some characteristics of a public agency, such as its stated mission to generate region-wide economic benefits by attracting conventions and trade shows to the City of San Diego. *See* Pl.'s Req. for Judicial Notice, Ex. G, Mar. 1, 2010, ECF No. 95-1 at 89. Its leadership, however, is in the hands of a board of directors that, while

appointed by the mayor and city council, is made up of individuals who may have distinct private interests. *See id*. at 96.

The decision whether to treat a hybrid entity like a public entity or a private entity for state action purposes may determine whether active supervision by the state is necessary to establish state action immunity. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985); *but see City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 374-75 (1991) (acknowledging a market participant exception). When courts resolve this question to determine whether active supervision is necessary to obtain state action immunity, Ninth Circuit law requires a functional examination into the management structure and private incentives of hybrid entities acting under delegated state powers. This inquiry prevents the conferral of antitrust immunity that would shield anticompetitive conduct furthering private interests rather than state interests. *See Hass v. Oregon State Bar*, 883 F.2d 1453, 1459 (9th Cir. 1989); *Washington State Electrical Contractors Ass'n, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991). The district court here applied a formalistic test that fails to account for this concern.

This Court should clarify Ninth Circuit law to require courts to consider "the danger that the party engaging in alleged anticompetitive activity is pursuing interests other than those of the state," *Hass* 883 F.2d at 1459, in deciding whether hybrid entities must demonstrate active supervision under *Midcal*. The Supreme

Court has emphasized "the close relation between *Midcal's* two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). In particular, "[t]he [active supervision] requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988). Consistent with this limited goal of the state action doctrine, as well as precedent in this Circuit, this Court should mandate a functional inquiry into whether private rather than public motivations account for a hybrid entity's decision-making.

Second, even if the SDC were deemed a public entity, and not a private entity, after the more searching inquiry required by the Ninth Circuit and the Supreme Court, it should be subject to the active supervision requirement under a market participant exception to state action immunity. When any non-sovereign entity participates commercially in a market, the assumption that its motives are consistent with the public interest, unlike those of a private actor, does not survive empirical scrutiny or sound public policy analysis.[2] A concern about motives may

[2] *See, e.g.*, James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L. Rev. 1783, 1787 (1995) (demonstrating that municipalities participating in markets have used anticompetitive methods to increase their earnings).

arise whenever a non-sovereign entity participates commercially in a market, but the concern is heightened when the entity also regulates the market in which it participates. It is especially heightened when the entity uses its regulatory authority to achieve a commercial advantage in that market.

Under the circumstances, this Court should affirmatively adopt a market participant exception to impose the active supervision requirement on the SDC. The Plaintiff has alleged that the SDC competed in the market for trade show cleaning services and subsequently used its regulatory power to eliminate competition and enhance SDC's commercial position in that market. *See generally* Pl.'s V. Compl. for Inj.'ve Relief and Damages, Nov. 13, 2007, ECF No. 1. If the SDC did so, it may be able to establish a clearly articulated state policy but may not be effectuating that policy in its market conduct.

Amicus takes no position on whether the SDC has violated the antitrust laws, which has no bearing on the separate question whether it is immune from liability. *See e.g., Royal Drug Co. v. Group Life & Health Ins. Co*., 737 F.2d 1433 (5th Cir. 1984) (upholding grant of summary judgment to defendants on remand after Supreme Court held that defendants were not exempt from antitrust liability under the McCarran Ferguson Act, *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979)). Active supervision should be found, however,

before the Court is satisfied that antitrust liability would be improper on the basis that SDC's conduct properly effectuates a state policy.

The Supreme Court and multiple appellate courts, including this Court, have all recognized a possible market participant exception. *Omni*, 499 U.S. at 374-75; *Hedgecock v. Blackwell Land Co.*, No. 93-16604, 1995 U.S. App. LEXIS 8027, at *7 (9th Cir. Apr. 7, 1995); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001); *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993). In addition, the Federal Trade Commission's State Action Task Force and the Antitrust Modernization Commission have urged courts to adopt this exception explicitly. Federal Trade Commission, Office of Policy Planning, Report of the State Action Task Force 57 (2003) *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf [hereinafter "Report of the State Action Task Force"]; Antitrust Modernization Comm'n, Report and Recommendations 24, 347 (2007), *available at* http://govinfo.library.unt.edu/amc/.

Policy considerations also support the formal adoption of a market participant exception. Non-sovereign entities that participate in commercial markets are more demanding of active supervision than non-sovereign entities that merely regulate. This is particularly true when the entity regulates the very market in which it participates commercially. Hybrid and public non-sovereign entities that participate commercially in markets can engage and have engaged in

anticompetitive conduct to the detriment of consumers, just like private entities. When market participants are immune from antitrust liability merely by establishing a clearly articulated and affirmatively expressed state policy, they are free to deviate from and thwart state policy in their market conduct and, ironically, undermine federalism.

By formally recognizing a market participant exception, this Court would promote both the national commitment to competitive markets and federalism. Non-sovereign hybrid and public entities that compete commercially would be subject either to the antitrust laws or to active state supervision, but never neither. At the same time, they would not be able to obtain state action immunity and displace competition, contrary to state policy, merely by "casting [] a gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106. A market participant exception, by requiring a showing of active supervision of the state, would ensure that non-sovereign entities act in a manner consistent with state policy.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED RELEVANT CASE LAW IN CONFERRING STATE ACTION IMMUNITY ON THE SDC

In holding that the SDC is a state agency for state action immunity purposes, the district court relieved the SDC of having to establish active state supervision as a precondition for obtaining the immunity. While this determination might be less objectionable if the SDC were a purely public agency not susceptible to private

interests or control,[3] the district court failed to consider the essential inquiry recognized by this Court: whether there is any danger that immunity would be conferred to protect anticompetitive conduct in pursuit of private interests rather than the state's interests. If this court reaches the question whether the SDC is a state actor exempt from the active supervision prong of the state-action test, it should reject the lower court's misapplication of relevant case law and require the essential inquiry recognized by this Court.

A. The District Court Ignored a Key Inquiry Under Ninth Circuit Law

The Supreme Court has explained that the state action doctrine arises from principles of federalism to protect a state's sovereign authority to act in its own interests. *See Parker v. Brown*, 317 U.S. 341 (1943). When a state acts as sovereign in service of state interests, including through its legislature or the courts, the Supreme Court has held that it is immune from liability under the federal antitrust laws *ipso facto*. *See Hoover v. Ronwin*, 466 U.S. 558, 569 (1984). Non-sovereign entities, including public, private, and hybrid entities, sometimes work in service of these same sovereign state interests,[4] and those entities too may

[3] *But see infra* Section II (*Town of Hallie* does not control the distinct situation where an otherwise public agency acts as a market participant, which raises distinct concerns).

[4] The Court has made clear that immunity flows from the state's interests, rather than any parochial interests of sub-state entities. *See Community Communications*

enjoy state action immunity from the federal antitrust laws when they do so. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). But non-sovereign entities often may have incentives to promote private, non-state interests as well. The Supreme Court has devised a two-part test to ensure that non-sovereign actors are accorded immunity only when they are furthering state interests rather than just their own. *Id*. at 105. To receive immunity from the federal antitrust laws, non-sovereign entities ordinarily must persuade a court (1) they are acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and (2) they are actively supervised by the state.[5] *Id*.

Of the two requirements, "the requirement of active state supervision serves essentially an evidentiary function." *Town of Hallie*, 471 U.S. at 46. It is designed to prevent the conferral of antitrust immunity that would shield anticompetitive conduct furthering private interests rather than state interests. *See id*. at 47. The

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Co. v. City of Boulder, 455 U.S. 40, 53-54 (1982) ("Ours is a *dual* system of government, which has no place for sovereign cities. As this Court stated long ago, all sovereign authority within the geographical limits of the United States resides either with the Government of the United States, or with the States of the Union. There exist within the broad domain of sovereignty but these two.") (emphasis in original) (citations omitted).

[5] As Justice Stevens noted in his concurrence in *Community Communications Co. v. City of Boulder*, "the violation issue is separate and distinct from the exemption issue." 455 U.S. 40, 58 1982. In other words, if a court denies a defendant state action immunity, it may still subsequently find that the defendant did not violate the antitrust laws. *See e.g., Royal Drug*, 737 F.2d 1433.

requirement "stems from the recognition that 'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state.'" *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie*, 471 U.S at 47). When the state actively supervises the conduct in question, it assures a court that "the State has exercised sufficient independent judgment and control so that the details of the [restraint on competition] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634.

The Supreme Court has varied the evidentiary showing necessary to address this concern according to the non-sovereign entity's susceptibility to private influence and control. The Court has suggested, for example, that when a public municipality does not act as a commercial market participant and is not subject to influence or control by private parties, "[t]he only real danger is that the municipality will seek to further purely parochial public interests at the expense of more overriding state goals." *Town of Hallie*, 471 U.S. at 39; *see Omni*, 499 U.S. at 379. Under those circumstances, the Court will confer state action immunity without any showing of active supervision because of assurances provided by *Midcal's* clear articulation requirement. *Town of Hallie*, 471 U.S. at 39, 47.

In other circumstances, however, the danger is more apparent. Some non-sovereign entities must meet more stringent evidentiary requirements to guard

against inappropriate conferrals of state action immunity. As the Fourth Circuit recently explained, "[t]he Court's rationale [in *Town of Hallie*] stemmed from the fact that a municipality's conduct is 'likely to be exposed to public scrutiny' and 'checked to some degree through the electoral process.'" *North Carolina State Bd. Of Dental Exam'rs*, No. 12-1172, slip op. at 12 (quoting *Town of Hallie*, 471 U.S. at 45 n.9). On the other hand, "allowing the antitrust laws to apply to the *unsupervised* decisions of *self-interested* regulators acts as a check to prevent conduct that is not in the public interest." *Id*. at 14 (emphasis added). Accordingly, the Court has indicated that *Town of Hallie* does not control when a non-sovereign entity acts as a market participant. *See Omni*, 499 U.S. at 379; *see infra* Part II. Likewise, any purely private non-sovereign entity entrusted with effectuating state policy unequivocally must meet both the clear articulation requirement and the active supervision requirement to establish state action immunity, without exception. *Midcal*, 445 U.S. at 106 ("[T]he national policy in favor of competition cannot be thwarted by casting [] a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement.")

Some non-sovereign entities defy easy public/private classification. Hybrid entities, which exhibit some of the characteristics of a public entity but are susceptible to influence or control by interested private parties, call for careful analysis by the court. As Professors Areeda and Hovenkamp have noted,

"distinguishing private from public actors and actions has proved to be a vexatious question." 1A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 227A (3d ed. 2006-2013). Consistent with a long line of Supreme Court precedent, the Ninth Circuit answers this question by examining "the danger that the party engaging in alleged anticompetitive activity is pursuing interests other than those of the state." *Hass v. Oregon State Bar*, 883 F.2d 1453, 1459 (9th Cir. 1989) (declining to apply the active supervision requirement to an "instrumentality of the state judiciary" where the agency under review was "akin to a municipality" under *Town of Hallie*.)[6] The Fourth Circuit recently agreed. *North Carolina State Bd. Of Dental Exam'rs*, No. 12-1172, slip op. at 16 ("[W]hen a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership—as in *Goldfarb* [*v. Virginia State Bar*, 421 U.S. 773 (1975)]—both parts of *Midcal* must be satisfied.")

[6] The district court gave short shrift to this Court's extensive discussion of the active supervision requirement in *Hass*. For a fuller discussion, *see North Carolina State Bd. Of Dental Exam'rs v. FTC*, No. 12-1172, slip op. at 18 n.6 (4th Cir. May 31, 2013) (distinguishing opinions that decline to apply the active supervision requirement based on an entity's resemblance to the municipality in *Town of Hallie* from opinions that look to the control of a state regulatory body by private market participants) (quoting *Interlocutory Order In re North Carolina State Bd. Of Dental Exam'rs v. FTC*, 151 F.T.C. 607 (2011)). Amicus suggests that the Ninth Circuit would do well to comprehensively adopt Commissioner Kovacic's nuanced and scholarly treatment of this issue in the FTC's interlocutory order. *See Interlocutory Order*, 151 F.T.C. at 623-24.

In *Washington State Electrical Contractors Ass'n, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991), this danger that immunity would be used in pursuit of private rather than state interests formed the basis for this Court's determination that the Washington Apprenticeship and Training Council "may not qualify as a state agency" for state action immunity purposes. This Court reversed the lower court in *Forrest* and refused to absolve the Council of the active supervision requirement because it "has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Id*. at 737. The Fourth Circuit recently cited approvingly to *Forrest* in adopting a similar analysis. *See North Carolina State Bd. Of Dental Exam'rs*, No. 12-1172, slip op. at 14-15, 17 (agreeing with FTC that a "public/private hybrid entit[y]" like the dental board defendant, "in which a decisive coalition (usually a majority) is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants," should be treated as private and subjected to the active supervision requirement); *accord Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) ("The fact that the state Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

B. The District Court's Analysis Contravenes the Functional Inquiry Required by This Court and the Federalism Jurisprudence of the Supreme Court

The district court committed clear error in holding that the SDC is a state actor exempt from the active supervision requirement of the state action test without examining whether the SDC's decision-making reflects private rather than public interests. Specifically, the district court ignored the structure, make-up and private incentives of SDC management, which this Court has found dispositive in analogous circumstances. *Forrest*, 930 F.2d at 737. In place of this functional inquiry, the district court substituted a superficial analysis that fundamentally contradicts the competition and federalism principles informing the state action doctrine and the Supreme Court's consistent pronouncements concerning its limited scope.

In fiscal year 2008, at the time of the Complaint, the SDC's management apparently was in the hands of three Board Officers, four Board Members, two Ex-Officio Board Members, and a President and CEO. Pl.'s Req. for Judicial Notice, Ex. G, Mar. 1, 2010, ECF No. 95-1 at 96. In both its Order Granting In Part and Denying in Part Defendant's Motion for Summary Judgment [hereinafter "Summary Judgment Order"] and its Order Granting Defendant's Motion for Judgment as a Matter of Law [hereinafter "JMOL Order"], the district court failed to determine whether management would have personal financial incentives or other private motivations, unrelated to state interests, to eliminate competition for trade show cleaning services.

At summary judgment, the district court considered instead: (1) the Defendant's non-profit status, Summary Judgment Order at 3 (SDC's Articles of Incorporation state that it is a "non-profit public benefit corporation"); (2) the SDC's establishment to serve a governmental purpose, *id*. at 4 (Articles of Incorporation state that it was created "for the sole purpose of managing and operating the San Diego Convention Center"); (3) the SDC's power to control City property, *id*.; (4) the SDC's receipt of funding from the City, along with its susceptibility to independent audits and public notice requirements to hold meetings, *id*.; and (5) that the City is the only member of the SDC ownership corporation and appoints the Defendant's board of directors, *id*. On Defendant's motion for Judgment as a Matter of Law, the court repeated this analysis and noted further that the SDC's management agreement, adopted by resolution of the City Council, vests the SDC with the exclusive rights to set usage and operating policies, to raise money by charging for services, and to clean and maintain the Convention Center. JMOL Order at 9-10.

This analysis, which the district court substituted for this Court's functional inquiry in *Hass* and *Forrest,* is fundamentally flawed. "[T]he inquiry into the public/private character of the governmental entity's challenged conduct should focus not on the formalities of state law, but rather on the realities of the decision-maker's independent judgment." *Interlocutory Order In re North Carolina State*

Bd. Of Dental Exam'rs, 151 F.T.C. at 621; *see also* Report of the State Action Task Force at 38 ("The governmental attributes of a hybrid entity—such as its establishment to serve a governmental purpose, bond authority, power of eminent domain, or tax status—are not necessarily probative of whether there is a danger that private actors/members will pursue their own economic interests rather than the state's policies."); Areeda & Hovenkamp, *supra* ¶ 227a (the question whether to impose the active supervision requirement "can seldom be resolved through state legislative declarations that the body is a 'public' corporation, or by discovering state mandates that the organization serve the 'public interest.' Much more important are the body's structure, membership, decision-making apparatus, and openness to the public").

The court also relied on several criteria that an expert task force of the Federal Trade Commission (FTC) expressly criticized in a 73-page report on state action immunity. For example, the district court relied on the SDC's non-profit tax status. As the task force noted in its report, however, "many antitrust defendants have been nonprofit corporations that acted anticompetitively on behalf of themselves or their members. Indeed, the typical trade or professional association is *itself* a nonprofit organization dedicated to improving the welfare of its members." Report of the State Action Task Force at 39 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 224 (2d ed. 2000-2006)). "The key is not

the profit or nonprofit status of the organization, but the identity of its decision-making personnel." *Id*. (quoting same at ¶ 227A).

The district court also stressed that the City Council appointed the SDC's board of directors and adopted the SDC's management agreement by resolution. The task force expressly criticized *Crosby v. Hospital Auth. of Valdosta*, 93 F.3d 1515 (11th Cir. 1996), because the court in that case "did not discuss the composition of either the board or the executive committee." Report of the State Action Task Force at 39. The district court, in addition, emphasized that the Defendant was vested with ultimate authority to set usage and operating policies. The task force characterized this type of analysis in *Bankers Ins. Co v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293 (11th Cir. 1998), as "problematic" because the court "failed to distinguish between legislative intent and incentives/opportunity to engage in private anticompetitive conduct." Report of the State Action Task Force at 40. In its recommendations, the task force questioned the probative value of these factors and encouraged a more rigorous analysis "[t]o protect against 'capture' or conspiratorial involvement of governmental representatives within the entity." *Id*. at 55-56.[7]

[7] At Summary Judgment, the district court found support for its conferral of state actor status in repeatedly citing to *Shames v. Calif. Travel and Tourism Comm'n*, 607 F.3d 611 (9th Cir. 2010). *See* Summary Judgment Order at 3,4. The cited opinion in *Shames*, which similarly failed to make a functional inquiry into the managerial make-up and private economic incentives of a similar entity, has since

The district court's reliance on formalistic indicators rather than functional indicators to conclude that the SDC acts in service of state interests conflicts with the federalism principles underlying the state action doctrine. The Supreme Court has continually maintained that "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Phoebe Putney Health Sys*., 133 S. Ct. 1003, 1010 (2013) (quoting *Ticor,* 504 U.S. at 636). The Court has made clear that immunity "is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Ticor,* 504 U.S. at 633. And "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. *Id.* at 632; *accord Phoebe Putney*, 133 S. Ct. at 1016 ("federalism and state sovereignty are poorly served by a rule of construction that would allow essential national policies embodied in the antitrust laws to be displaced by state delegations of authority intended to achieve more limited ends").

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been withdrawn. *See Shames v. Calif. Travel and Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010). The revised opinion expressly did not reach the question whether the California Travel and Tourism Commission was a state actor. *See id*. at note 3. Amicus chronicled a range of similar problems with the original opinion. *See* Brief for Amicus Curiae American Antitrust Institute Supporting Plaintiffs-Appellants' Petition for Rehearing and Rehearing En Banc, Shames v. Calif. Travel and Tourism Comm'n, 607 F.3d 611 (9th Cir. July 9, 2010) (No. 08-56750).

In *Ticor*, the Court also emphasized "the close relation between *Midcal's* two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." 504 U.S. at 636. In particular, "[t]he [active supervision] requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, *actually further state regulatory policies*." *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988) (emphasis added). Consistent with this limited goal of the state action doctrine, as well as precedent in this Circuit, this Court should demand a functional inquiry into whether private, as opposed to public, motivations account for a hybrid entity's decision-making.

II. THIS COURT SHOULD FORMALLY ADOPT A MARKET PARTICIPANT EXCEPTION IN STATE ACTION CASES

This Court should recognize a market participant exception for public and hybrid non-sovereign entities. Under this exception, a non-sovereign entity that participates commercially in a market—as opposed to merely regulating the rules of a market—would have to satisfy both prongs of the *Midcal* test. The exception is especially appropriate when such an entity participates in the market it regulates and uses its regulatory authority to achieve a commercial advantage in that market. Even if this Court finds that the SDC is a public entity, and not a private entity, and that it acted pursuant to a clearly articulated and affirmatively expressed state

policy to displace competition, the SDC should be required to show that it was actively supervised by the state to receive state action immunity.

The Supreme Court and several appellate courts, including this Court, have recognized a possible market participant exception for municipal entities. Both the Federal Trade Commission's State Action Task Force and the bipartisan Antitrust Modernization Commission have called on courts to adopt this exception. Report of the State Action Task Force at 57; Antitrust Modernization Comm'n, Report and Recommendations 24, 347 (2007). The market participant exception would protect consumers and the states' regulatory autonomy, "consonant with the [state action doctrine's] original purposes and goals." *Id.* at 347.

When it first articulated the state action doctrine in *Parker v. Brown*, the Supreme Court acknowledged a possible market participant exception. The Court in *Parker* limited the application of the state action immunity to when the state acts in a regulatory capacity. It stated, "we have no question of *the state or its municipality becoming a participant* in a private agreement or combination by others for restraint of trade." *Parker*, 317 U.S. at 351-52 (emphasis added). In cabining the scope of the state action immunity, the Court cited its decision in *Union Pacific Railroad Co. v. United States*, 313 U.S. 450 (1941), in which it found a municipally-owned produce market liable for price discrimination under the Elkins Act. *Parker*, 317 U.S. at 352.

The Supreme Court has continued to recognize a possible market participant exception after *Parker*. Without officially adopting a market participant exception, the plurality in *City of Lafayette v. Louisiana Power & Light Co.* held that municipal corporations are exempt from the antitrust laws only when they act as "instrumentalities of the State *for the convenient administration of government*." 435 U.S. 389, 413 (1978) (emphasis added). Chief Justice Burger in his concurrence urged the Court to hold explicitly that the state action doctrine has a market participant exception for municipal *businesses*. He wrote that Congress, in enacting the Sherman Act, sought to "deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade" and did not intend to exclude municipalities from its coverage. *Id.* at 419. In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, the Court held that a state could be sued under the Robinson-Patman Act where it "has chosen to compete in the private retail market." 460 U.S. 150, 154 (1983). In *City of Columbia v. Omni Outdoor Advertising, Inc*., the Court distinguished state action in a regulatory capacity from state action in a commercial capacity and acknowledged a "possible market participation exception," although it ultimately held that the municipal defendants qualified for state action immunity. 499 U.S. 365, 379 (1991).

Several lower courts, including this Court, have recognized an actual or possible market participant exception. This Court in *Hedgecock v. Blackwell Land Co.* stated that "a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors." No. 93-16604, 1995 U.S. App. LEXIS 8027, at *7 (9th Cir. Apr. 7, 1995) (finding exception inapplicable on the facts). In *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, the Third Circuit acknowledged that "[t]here is also a market participant exception to actions which might otherwise be entitled to *Parker* immunity." 263 F.3d 239, 265 n.55 (3d Cir. 2001) (exception was inapposite). The Federal Circuit noted a similar limitation to the state action doctrine and stated the immunity applies only when the state acts in its "sovereign capacity, and *not as a market participant in competition with commercial enterprise*." *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (emphasis added). The Eighth Circuit commented that the market participant exception is "a suggestion and is not a rule of law" but proceeded to apply the heightened standard of *City of Lafayette* in deciding whether municipal market conduct is immune from antitrust liability. *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991).

A line of cases, however, has brought into question the vitality of a market participant exception. The Supreme Court in *Town of Hallie* held that municipalities have to satisfy only the first prong of the *Midcal* test to receive state

action immunity when the only danger they pose is the furtherance of parochial public interests at the expense of statewide public interests. 471 U.S. at 46-47. Multiple appellate courts have also declined to recognize a market participation exception. *See Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984); *Allright Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir. 1991); *McCallum v. City of Athens*, 976 F.2d 649 (11th Cir. 1992).

This Court should discount the line of cases that seem to question or reject a market participant exception. First, the Supreme Court in *Town of Hallie*, in holding that the municipality-defendant was entitled to state action immunity, cited the regulatory powers, not the market participation authority, granted by the State of Wisconsin. *See* 471 U.S. at 42. ("We think it is clear that anticompetitive effects logically would result from this *broad authority to regulate*.") (emphasis added). The Court in *Town of Hallie* also cited approvingly to the Court's prior decision in *Goldfarb*, 471 U.S. at 45, in which it denied state action immunity to the State Bar, "a state agency by law," *Goldfarb*, 421 U.S. at 789-90. The *Goldfarb* Court had held "[t]he fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." 421 U.S. at 791-92. Second, regardless of how *Town of Hallie* is read, the Supreme Court's decision in *Omni*, which recognized a possible market participant exception, was issued *six*

years after *Town of Hallie*. In its recent decision in *Phoebe Putney*, the Court affirmed that *Omni* left open the possibility of a market participant exception but found the state action immunity unavailable to the defendant without addressing the exception. *Phoebe Putney*, 133 S. Ct. at 1010 n.4. Third, this Court, like the Third and Federal Circuits, has recognized a potential market participant exception in *Hedgecock*.

This Court should formally adopt a market participant exception based on important policy considerations. A market participant exception, by requiring non-sovereign entities to satisfy both the clear articulation and active supervision prongs of the *Midcal* test, would promote market competition and federalism. In other words, the exception would protect consumers from anticompetitive behavior and preserve the states' regulatory flexibility. Such an exception need not preclude "more quintessential state agencies from arguing that they need not satisfy the active supervision requirement." *North Carolina State Bd. Of Dental Exam'rs*, No. 12-1172, slip op. at 12 n.4.

Like private actors, non-sovereign hybrid and public entities can engage in anticompetitive behavior that injures consumers. While there may be less danger when such entities act strictly in a *regulatory* capacity, *Town of Hallie*, 471 U.S. at 46-47, the Supreme Court in *City of Lafayette* observed that "[e]very business enterprise, public or private, operates its *business* in furtherance of its own goals."

City of Lafayette, 435 U.S. at 403 (emphasis added). Chief Justice Burger in his concurrence in *City of Lafayette* explained that although municipalities "are ordinarily constrained from applying their net earnings as a private corporation would, this does not detract from their competitive posture and resulting incentive to engage in anticompetitive practices." *Id.* at 418 n.1; *see also* Report of the State Action Task Force at 57 (the assumption that "a municipality's motives and incentives are consonant with the public interest, and are not like those of a private actor, does not necessarily hold true when the municipality enters a market in a proprietary capacity as a competitor"). Municipal businesses should not be entrusted to advance either articulated state policy interests or national economic goals *in their business behavior* any more than private businesses. *City of Lafayette*, 435 U.S. at 403. "[A]llowing the antitrust laws to apply to the unsupervised decisions of self-interested regulators acts as a check to prevent conduct that is not in the public interest." *North Carolina State Bd. Of Dental Exam'rs*, No. 12-1172, slip op. at 14.

Empirical evidence supports the Supreme Court's and FTC State Action Task Force's view of municipal market participants. Municipalities participating in a market have used anticompetitive methods to increase their earnings. James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market*

Participant Conduct, 48 SMU L. Rev. 1783, 1787 (1995). The health care sector, in particular, offers many examples of publicly owned providers using anticompetitive methods to enhance their market power at the expense of the public. *See, e.g.*, Dean M. Harris, *State Action Immunity from Antitrust Law for Public Hospitals: The Hidden Time Bomb for Health Care Reform*, 44 Kan. L. Rev. 459, 462 (1996); Robert M. Langer & Peter A. Barile III, *Can the King's Physician (Also) Do No Wrong?: Health Care Providers and a Market Participant Exception to the State Action Immunity Doctrine*, Matthew Bender's Antitrust Report 21-25 (1999); Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol., Pol'y & L. 587, 603-04 (2006).

Broad applications of the state action immunity to municipalities could also frustrate the actual intent of states. As the Supreme Court stated in *Ticor*, "[n]either federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." 504 U.S. at 636. The first prong of *Midcal*, which requires a showing that the State clearly articulated a policy to displace competition, serves to show "little more than that the State has not acted through inadvertence." *Id.* If non-sovereign market participants have to satisfy only this requirement, they, like private actors, may advance their own interests "rather than the governmental

interests of the State." *Patrick*, 496 U.S. at 100. From the perspective of the states, sweeping applications of the state action doctrine may "serve as nothing more than an attractive nuisance in the economic sphere," *Ticor*, 504 U.S. at 637, and ironically undermine federalism.

A market participant exception would advance the federal commitment to competitive markets. Non-sovereign entities seeking state action immunity for their direct marketplace conduct would have to show both clear articulation to displace competition and active supervision by the state. A market participant exception would be consistent with the Supreme Court's reluctance to subvert competitive markets through the state action and other antitrust immunities. *Phoebe Putney*, 133 S. Ct. at 1010; *Ticor*, 504 U.S. at 636; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). The market participant exception would ensure that "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising power must obey the antitrust laws." *City of Lafayette*, 435 U.S. at 416. The active supervision requirement would guarantee that non-sovereign actors are subject to either the antitrust laws or oversight by the state, but never neither. *See* Areeda & Hovenkamp, *supra* ¶ 221E.

At the same time, the market participant exception would bolster the regulatory freedom of the states. Non-sovereign entities would not be able to

obtain antitrust immunity and displace competition, contrary to state policy, by merely "casting [] a gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106. The market participant exception, by requiring a showing of active supervision of the state, would ensure that non-sovereign entities act in a manner consistent with state policy. *Ticor*, 504 U.S. at 636. To paraphrase the FTC's State Action Task Force, "[t]he active supervision test operates by according state action protection *only when the challenged conduct can be said to be that of the state* rather than" non-sovereign actors. Report of the State Action Task Force at 13 (emphasis added). Under the market participant exception, non-sovereign entities would have to show that their allegedly anticompetitive conduct "actually further[s] state regulatory policies." *Patrick*, 486 U.S. at 100-01.

CONCLUSION

For all of these reasons, the decision of the district court should be reversed. This Court should clarify Ninth Circuit law to require courts to consider "the danger that the party engaging in alleged anticompetitive activity is pursuing interests other than those of the state," *Hass* 883 F.2d at 1459, in deciding whether hybrid entities must demonstrate active supervision under *Midcal*. This Court should also affirmatively adopt a market participant exception for hybrid and public non-sovereign entities. The exception is especially appropriate when such

entities participate in the markets they regulate and use regulatory authority to achieve commercial advantages in those markets.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit R. 32-1, this amicus brief is proportionally spaced, has a type face of 14 points or more, and contains 6,839 words.

s/ Randy M. Stutz

Dated: June 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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