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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

AmeriCare MedServices, Inc.,

Plaintiff,

vs.

City of Fullerton et al.,

Defendants.

Case No.: 8:16-cv-01765-JLS (AFM)

Plaintiff's Opposition to Defendant CARE's Motion to Dismiss

Date: April 7, 2017
Time: 2:30 p.m.
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Like the cities, CARE has it upside down: it seeks to take a thirty-year-old transitional exception to a comprehensive state policy that was designed to foster competition in the EMS market and argue that the state clearly articulated a policy that excuses its conduct here. CARE asks this Court to hold that the EMS Act creates a policy that allows the cities to violate federal antitrust laws. But the EMS Act isn't even about cities: it is about improving ambulance service and availability for the people through competition, as implemented by ***county*** EMS authorities. The tail does not wag the dog.

AmeriCare MedServices, Inc. urges this Court to deny CARE's motion to dismiss.

- ***First***, the cities never qualified under Section .201 and thus CARE cannot meet its heavy burden of showing that it is entitled to state-action immunity from the antitrust laws by acting pursuant to a clearly articulated state policy to displace competition.
- ***Second***, CARE is an active market participant and is not even arguably a municipality, so it must also show that it was actively supervised by the state itself. CARE was not in any way supervised by the state, and the state agency charged with supervising the EMS system has stated that cities' exclusive contracts without a competitive process are improper.
- ***Third***, even if this Court finds that the state-action immunity does apply, it should formally recognize that market participants are not immunized. Though the circuits are currently split on this exception and the U.S. Supreme Court has expressly left the question open, this case shows exactly why the market-participant exception must exist.

- ***Fourth,*** *Noerr-Pennington* applies only to petitioning activity and not to market conduct. CARE's argument that *Noerr-Pennington* eclipses the antitrust laws any time a government and a private party are involved proves too much.
- ***Fifth,*** the LGAA does not apply because Congress' intent was to provide immunity to local governments and private actors engaging in ***official acts*** within the governments' grant of authority, not *ultra vires* acts undertaken for proprietary purposes.
- ***Sixth***, AmeriCare pleads sufficient facts to state an antitrust claim. Its antitrust injury is its exclusion flowing from the city's monopolization. Market definition is a factual inquiry reserved for the jury that need not be pled in any detail for these antitrust claims, and market power exists where conspirators have the power to raise prices or exclude competition. AmeriCare pleads detailed facts describing a plausible relevant market and that show CARE and the cities have market power.
- ***Seventh,*** the federal courts' exclusive jurisdiction over the Sherman Act makes any abstention manifestly unwarranted. Federal courts have a virtually unflagging obligation to exercise their jurisdiction. In any case, CARE cannot show any of the three mandatory factors for *Burford* abstention.

STATEMENT OF FACTS

Willfully ignoring state law, eight cities and CARE have excluded all competitors and acted as the sole market participants in the market for prehospital EMS in their respective jurisdictions, imposing supracompetitive prices for inferior services. Appendix A [hereinafter "App'x"], attached to the

Declaration of Aaron Gott in Support of Opposition to Defendant CARE's Motion to Dismiss, filed concurrently ("Gott Decl."). Each of the cities has refused to allow AmeriCare to compete in the market despite its eligibility and requests to do so. *Id.*

The California State Emergency Medical Services Authority and the Orange County EMS Division have determined that none of the eight cities qualifies as an exclusive operating area. The cities and CARE, by contrast, assert that the cities enjoy ".201 rights" that they are plainly ineligible for: not a single one of these eight cities "contracted or provided for" prehospital EMS services as of June 1, 1980. AmeriCare does ***not*** allege, as CARE suggests, that "each City arranged—either by contract or designation—to provide emergency ambulance services . . . ." Rather, AmeriCare alleges that not a single one of these cities had a contract to provide emergency ambulance services, and not a single one of these cities provided emergency ambulance services themselves. Nor did a single one of these eight cities continuously maintain thereafter whatever arrangement it had. And several of these cities repudiated their nonexistent .201 rights when they contracted with Orange County.

Not a single one of these eight cities is one of the three Orange County cities that ***is*** eligible for .201 status, as determined by EMSA. Yet each of these cities continues to assert its authority to disrupt the orderly statewide emergency plan administered by county and state officials. Why do the cities seek this authority? For the lucrative revenues—rents—that they can obtain through their joint monopolies with CARE. Each complaint alleges the following facts specific to each of CARE's arrangements:

1. **Anaheim–Zone AO1.** Contrary to CARE's statement of "facts," the City of Anaheim did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Anaheim Amended Complaint ("AC"), ¶¶ 26–28. EMSA and OCEMS have determined that Zone AO1 is not eligible as an exclusive operating area and that Anaheim is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 29–30. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 32–34.
2. **Buena Park–Zone AO3.** Contrary to CARE's assertion of "facts," the City of Buena Park did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Buena Park AC, ¶¶ 26–27. EMSA and OCEMS have determined that Zone AO3 is not eligible as an exclusive operating area and that Buena Park is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 31–32. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 31–33.
3. **Costa Mesa–Zone AO4.** Contrary to CARE's assertion of "facts," the City of Costa Mesa did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Costa Mesa AC, ¶¶ 26–29. The city entered into an agreement with Orange County repudiating any .201 rights

it may have had in 1981. AC, ¶ 27. EMSA and OCEMS have determined that Zone AO4 is not eligible as an exclusive operating area and that Costa Mesa is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 31–32. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶ 33.

4. **Fountain Valley–Zone AO6.** Contrary to CARE's assertion of "facts," the City of Fountain Valley did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Fountain Valley AC, ¶¶ 26–27. The city entered into an agreement with Orange County repudiating any .201 rights it may have had in 1981. *See* App'x; AC, Ex. B at 29. EMSA and OCEMS have determined that Zone AO6 is not eligible as an exclusive operating area and that Fountain Valley is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 29–30. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 27, 31–32.

5. **Fullerton–Zone AO7.** Contrary to CARE's assertion of "facts," the City of Fullerton did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Fullerton AC, ¶¶ 26–27. EMSA and OCEMS have determined that Zone AO7 is not eligible as an exclusive operating area and that Fullerton is not among the three

Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 28–29. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 30–32.

6. **Garden Grove–Zone AO8.** Contrary to CARE's assertion of "facts," the City of Garden Grove did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; Garden Grove AC, ¶¶ 26–28. The city entered into an agreement with Orange County repudiating any .201 rights it may have had in 1986. *See* App'x; AC, Ex. B at 29. EMSA and OCEMS have determined that Zone AO8 is not eligible as an exclusive operating area and that Garden Grove is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 30–31. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 28, 32.

7. **La Habra–Zone AO12.** Contrary to CARE's assertion of "facts," the City of La Habra did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; La Habra AC, ¶¶ 25–27. EMSA and OCEMS have determined that Zone AO12 is not eligible as an exclusive operating area and that La Habra is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 29–30. The city and CARE have jointly

monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 27, 31–32.

8. **San Clemente–Zone AO18.** Contrary to CARE's assertion of "facts," the City of San Clemente did not contract or provide for prehospital EMS as of June 1, 1980, and did not continuously do so without interruption. *See* App'x; San Clemente AC, ¶¶ 26–28. EMSA and OCEMS have determined that Zone AO18 is not eligible as an exclusive operating area and that San Clemente is not among the three Orange County cities eligible to administer prehospital EMS under Section .201. AC, ¶¶ 30–31. The city and CARE have jointly monopolized the market, with both acting as market participants and both sharing in the monopoly rents. AC, ¶¶ 28, 32–34.

CARE IS NOT ENTITLED TO STATE-ACTION IMMUNITY

The federal antitrust laws are the "Magna Carta of free enterprise." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Congress has consistently reaffirmed the "national policy in favor of competition" embodied in the Sherman Act for more than a century. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). This policy is so important to our nation's interests that Congress has entrusted its adjudication to the federal courts alone.

Because of our dual federalist system, the Sherman Act does not "bar States from imposing market restraints 'as an act of government.' " *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)). But the state-action immunity is a cost of federalism that is ***narrowly*** circumscribed; like all antitrust exemptions,

it is strictly limited and "disfavored." *Id.* (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). And it functions ***only*** to prevent the antitrust laws from imposing an "impermissible burden on the States' power to ***regulate***." *N.C. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (emphasis added).

Municipalities are not sovereign,[1] and they do not independently qualify for any immunity from the antitrust laws. *See id.* at 1110–11 ("For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself."); *see also Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) (U.S. Supreme Court Nominee Gorsuch, J.) ("When a city acts as a market participant it generally has to play by the same rules as everyone else. It can't abuse its monopoly power or conspire to suppress competition."). Nor can a state simply grant them a free pass to commit antitrust violations—the states' "power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act." *N.C. Dental*, 135 S. Ct. at 1111; *see also Parker*, 317 U.S. at 351 (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it").

Courts must apply exacting scrutiny to ensure that nonstate actors are faithfully acting pursuant to a "clearly articulated and affirmatively expressed state policy" and "actively supervised by the state itself." *Midcal*, 445 U.S. at 105; *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive conduct is 'prompted' by state

1. CARE argues that the EMS Act allows cities "to retain their sovereign right." Mot. at 14. The only "sovereigns" in the United States are the federal government and the states themselves. The Constitution and its amendments do not recognize municipalities.

action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). The Supreme Court has excused municipalities acting in a purely regulatory capacity from the active-supervision requirement, but has limited this narrow exception in requiring active supervision of all market participants. *See N.C. Dental*, 135 S. Ct. at 1112–13 (*Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), creates a "narrow exception"), 1114 (analysis not "derive[d] from nomenclature alone" and "the need for supervision is manifest" where states empower active market participants).

CARE asks the Court to ignore this backdrop by arguing that the State of California granted the cities it contracts with a free pass to exclusively contract with and jointly monopolize the market for prehospital EMS with a preferred private provider. CARE's argument glosses over a clear and unambiguous statutory scheme that (a) favors competition and allows ***only*** county EMS agencies, with oversight and approval from California's Emergency Medical Services Authority, to designate exclusive, noncompetitive service areas in exceptional circumstances, and (b) disfavors municipal meddling with the state EMS system except under ***limited circumstances*** not applicable here. It requests that this Court sweepingly defer to the cities' misplaced desires and grant a strictly limited and disfavored immunity that neither Congress, the State of California, or county EMS authorities intended under these circumstances. And it argues that even if the cities don't technically have .201 rights, the Court should grant them—and CARE—immunity anyway.

CARE ignores the posture of this case and the nature of the state-action immunity: this is a motion to dismiss and the state-action immunity (which

is technically an exemption) is an affirmative defense that it has the heavy burden to prove. It cannot prove it on the facts alleged in the complaints; facts from which the Court must draw all reasonable inferences in favor of AmeriCare. CARE seeks to create factual contest by asserting its own "facts" and drawing inferences to suit its arguments. This only underscores why this Court should deny its motion.

California's EMS Policy Favors Competition

California enacted the relevant provisions of the EMS Act in 1984 as part of a comprehensive statutory scheme that is supposed to regulate and supervise the provision of prehospital EMS throughout the state to ensure all California citizens receive the prehospital EMS to which they are entitled. Prior to the EMS Act, there was no comprehensive state plan for emergency services—"the 'patchwork' city-by-city dispatch of ambulances frequently failed to supply patients with the closest available ambulance [and made] coordination of medical response difficult." Bryan K. Toma, *The Decline of Emergency Medical Services Coordination in California: Why Cities are at War with Counties over Illusory Ambulance Monopolies*, 23 Sw. U. L. Rev. 285, 285–296 (1994). The autonomy allowed cities "to seek to optimize themselves" while "harm[ing] efforts to optimize the whole system." Richard Narad, *Coordination of the EMS System: An Organizational Theory Approach*, Prehospital Emergency Care 2:145–152, at 152 (1998). With the EMS Act, the State of California rejected the scattered municipal-based policy that CARE and the cities urge this Court to create.

Under the act, local EMS authorities in ***county*** government develop a plan for submission to the California Emergency Medical Services Authority for approval or disapproval. ***County*** EMS authorities delineate functional

zones for ambulance services and determine whether each zone should be either a non-exclusive operating area, which is always open to competing providers or exclusive operating areas subject to competitive bidding. *See* Cal. Health & Safety Code § 1797.224. OCEMS designated, and EMSA approved, each of the eight relevant operating area zones as nonexclusive. *See* App'x.

The legislature recognized two limited sets of circumstances where reliance interests justified forestalling its comprehensive scheme on a case-by-case, temporary basis. The first exception applies where the local EMS agency "develops or implements a local plan that continues the use of existing providers operating within [the] area in the manner and scope in which the services have been provided without interruption since January 1, 1981." Cal. Health & Safety Code § 1797.224. The second exception applies to municipalities who were "contracting or providing for" prehospital EMS as of June 1, 1980. Cal. Health & Safety Code § 1797.201. In those circumstances, a city could continue its contract with its provider or, if it provided EMS itself, it could continue to provide it. *See id.* Like grandfathering, this exception is expressly contemplated in Section 1797.224. For both exceptions, the intent of the legislature was to not completely ***upset the apple cart*** by voiding contracts and suddenly jeopardizing existing municipal programs with its ambitious new coordinated, statewide plan in ***one fell swoop***. Its intent was ***not***, as CARE repeatedly suggests, to broadly grant municipalities a home-rule authority or a presumption of local control to perpetually disrupt an otherwise coordinated statewide plan managed at the county and state level; it merely allowed a city to continue what it was doing to allow it to preserve the status quo, and even then, it only intended the exception to be

"transitional." *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 944 (1997).[2] Contrary to CARE's assertion, there are only two tiers—county and state—with a limited number of qualified grandfathered cities able to opt out of the scheme. California Emergency Medical Services Authority, *EMS Sys. Coordination and HS 1797.201 in 2010*, EMSA Pub. 310-01 at 3 (2010) ("The EMS Act accomplishes this integration through what is essentially a 'two-tiered system of regulation.' ") (quoting *Valley Med. Transp., Inc. v. Apple Valley Fire Prot. Dist.*, 17 Cal. 4th 747, 754 (1998)) (Gott Decl., Exhibit 1, hereinafter "EMSA Pub.").

CARE argues the EMS Act itself is an affirmatively expressed policy to displace competition. To be sure, the statute does allow ***certain*** entities to restrain competition in ***limited*** ways under ***certain limited*** circumstances, as explained above. But the EMS Act is a policy that favors and mandates competition under ***all other*** circumstances. It is a pro-competitive policy: prehospital EMS services are to be provided on an open, nonexclusive basis except where, through an EMSA approved plan, the county EMS agency creates exclusive operating areas. *See* Cal. Health & Safety Code § 1797.224; *see also Kay Elec.*, 647 F.3d at 1044 (Gorsuch, J.) ("The Oklahoma legislature has spoken with specificity to the question whether there should be competition for electricity services in annexed areas. And it has expressed a

2. Since the state, as sovereign, has itself indicated that Section .201 was supposed to be transitional, any technical compliance with Section .201 is irrelevant over thirty years later in 2017. The state-action immunity is not for the benefit of the city; it is for the benefit of the state and its regulatory programs alone. The state has spoken to its intent. And the state's intent is the only federalism concern animating the state-action immunity exception to the antitrust laws, which are otherwise entitled to supremacy under the Constitution.

clear preference for, not against, competition."). And the local EMS can ***only*** designate an exclusive operating area where "a ***competitive*** process is utilized to select the provider or providers," or where an existing provider has provided the services "without interruption since January 1, 1981" or Section .201 applies. Cal. Health & Safety Code § 1797.224 (emphasis added). None of the eight cities qualifies for these exceptions.

The EMS Act intends to provide antitrust immunity for local governments where they carry out their prescribed functions in accordance with the EMS Act. But the cities CARE contracted with disregarded and flouted the strictures of the EMS Act; they were not carrying out any prescribed function when they excluded competition in violation of the Sherman Act.

The State of California ***itself*** flatly disagrees with CARE's and each of the cities' position. The California Supreme Court has expressly dispelled any notion "that cities . . . are to be allowed to expand their services, or to create their own exclusive operating areas." *San Bernardino*, 15 Cal. 4th at 932; *see also* EMSA Pub. at 23 ("a city or fire district may not avail itself of the use of 1797.201 after an agreement has been reached, if there is an interruption of service, or upon the termination of an existing agreement."). And the State of California ***itself*** has determined that the zone encompassing each city is nonexclusive and therefore must be open to competing providers as it stated in its plans year after year through the disinterested state agency entrusted to oversee prehospital EMS throughout the state. *See* App'x.

The Eight Cities Never Qualified Under Section .201

The cities—or by proxy, CARE—cannot claim Section 1797.201 as a basis for its assertion of the state-action immunity because not a single one

of them was eligible in the first place. A city is eligible only if it meets each of the following criteria:

- Be a City or Fire District that existed on June 1, 1980.
- Be the same entity that existed on the date of the "1797.201" eligibility evaluation.
- Provided service on June 1, 1980, at one of these types: ALS, LALS, or emergency ambulance services.
- Operated, or directly contracted for the same type of service ***continuously*** since June 1, 1980.
- Has never entered into a written agreement with LEMSA for the type of service they were providing in 1980, including ALS, LALS, or emergency ambulance services.
- An eligible 1797.201 agency is entitled to retain, but not change (diminish or expand), its type of service.

EMSA Pub. at 11. Section .201 "does not grant exclusivity for ALS, LALS, or ambulance services." *Id.* at 10. So even where a city has the power to retain administrative control over ambulance service under Section .201, it has no power to exclude competition. It simply allows it to continue service.

AmeriCare alleges that none of the eight cities provided or contracted for prehospital EMS services as of June 1, 1980. *See* App'x. It also alleges that each of the cities contracted with CARE at some later date (mostly in the 2000s)—an act that was a change from the previous services provided in the city. *See id.* Based on these facts alone, the Court should conclude that the cities are ineligible under Section 1797.201 and therefore cannot be entitled to the state-action immunity.

CARE asserts each of the cities is entitled to .201 "rights," arguing that it retains those rights even though they did not contract or themselves provide ambulance services as of June 1, 1980. It argues that these cities "arranged" for ambulance services and therefore they must meet the exception. There are several problems with this argument. First, this limited and disfavored exemption must be strictly construed—CARE must show that the legislature must have actually contemplated that ***all*** cities who "arranged" for ambulance services should qualify for the exception. It cannot. This would—absurdly—exempt virtually every city in the State of California from the statewide emergency plan that the legislature enacted to ***replace*** the patchwork city-by-city approach.

Second, the word "contract" is not superfluous and it is logically required by the legislature's intent: to provide a temporary grandfathering where reliance interests justified it—no such reliance interests exist where a city simply "arranges" for ambulance services because they can change that arrangement at any time. *See G.L. Mezzetta, Inc. v. City of Am. Canyon*, 78 Cal. App. 4th 1087, 1093 (2000) (California law requires "contracts with the City be in writing, approved by the city council, approved as to form by the city attorney, and signed by either the mayor or the city manager.").

Third, the legislature intended the statute to be transitional, and even if the Court generously determined that the cities met the requirements, technical compliance with a thirty-year-old statute the state itself has stated was only intended to be transitional is not enough to invoke the state-action immunity. *See San Bernardino*, 15 Cal. 4th at 921 ("1797.201 is 'transitional' in the sense that there is a ***manifest legislative expectation*** that cities and

counties will eventually come to an agreement with regard to the provision of emergency medical services.") (emphasis added).

In any event, it doesn't matter whether the cities qualify under Section .201 because the first question of state-action immunity is whether the state clearly articulated and affirmatively expressed a policy to displace competition and, procedurally, the state left it up to the counties—and not the cities—to implement any displacement. The state did not entrust the municipalities with that determination—only OCEMS and EMSA, under state policy, can displace competition. *See* EMSA Pub. at 21 ("1797.201 does not grant any rights for a city or fire district to ambulance zone exclusivity without a competitive process. 1797.201 only provides for the right to service the boundaries of that city or fire district."). OCEMS and EMSA determined that competition is required in each of the relevant markets in dispute.

CARE Cannot Show that Its or the Cities' Anticompetitive Conduct Is Sanctioned by State Law

CARE makes it sound as though the EMS Act—a vitally important statewide scheme—is entirely elective for every California municipality, as if municipalities are somehow on equal footing with the state itself. This argument betrays any reasonable interpretation of the statutory scheme.

More specifically, CARE argues that Sections 1797.6 and 1797.201, the cities' general grants of authority under the state constitution, and Cal. Gov't Code § 38794 provide the cities with a state-sanctioned, *carte blanche* pass to exclude competition from the market for prehospital services. CARE takes great pains to avoid modern U.S. Supreme Court cases that have strictly limited the application of this disfavored immunity. Instead, CARE cites decades' old case law applying an outdated and overruled standard.

Moreover, CARE reads too much into each of these statutory provisions; none contains a "clearly articulated and affirmatively expressed policy" to exclude competition. But even if they provided such a free pass, the state cannot simply authorize immunity from the antitrust laws; it must be part and parcel to a regulatory scheme. *Parker*, 317 U.S. at 351.

Section 38794 authorizes cities to "contract for ambulance services to serve . . . residents." Section 38794 itself was enacted by the State of California before the much more specific EMS Act—which rejected that statute's city-by-city approach. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (in statutory construction, a specific statute controls over the general); *State Dep't of Health v. Superior Court*, 60 Cal. 4th 940, 960–61 (2015) ("If conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones.").

These statutes are not a clearly articulated policy to displace competition under the U.S. Supreme Court's more recent pronouncements of the state-action immunity test—including a "new, higher bar for the clear articulation prong under *Midcal*." Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387, 1390 (2016).

In *Phoebe Putney*, the U.S. Supreme Court considered a state law authorizing political subdivisions to provide healthcare services and to create public "hospital authorities" through which to provide those services. 133 S. Ct. at 1007. It declared hospital authorities provided "essential government functions" and were granted "all the powers necessary or convenient to carry out and effectuate" the law's purpose, including to establish rates, construct for-profit projects and, most importantly, to acquire hospitals. *Id.* A county

and city jointly established such a hospital authority and acquired a hospital. When the hospital authority later sought to acquire the ***only*** other hospital in the local market, the FTC intervened. The Court held that the hospital authority was ***not*** entitled to state-action immunity because a general grant of authority is not sufficient; it "must also show that it has been delegated authority to act or regulate anticompetitively." *Id.* at 1012. Moreover, the entity must show that the displacement of competition is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* In short, *Phoebe Putney* reigned in the broad ***foreseeability*** standard of *Hallie*. *See* Allensworth, *supra*, at 1406. In *Phoebe Putney*, the Supreme Court rejected the lower court's holding that anticompetitive effects need only be "reasonably anticipated" by a state statute, a now-overruled holding that was consistent with the Court's previous rule that state authorizing language needed merely to "contemplate[]" anticompetitive regulation. 133 S. Ct. at 1009. All the state-action immunity cases cited by CARE apply this overruled standard.

Like the hospital authority's general statutory authority to play in the market, neither Section 38794 nor 1797.201 contemplates the displacement of competition. *See id.* at 1012; *see also Kay Elec.*, 647 F.3d at 1044 (Gorsuch, J.). Section 38794 allows municipalities to "contract" for ambulance services, and Section .201 allows certain eligible municipalities to "administer" prehospital EMS. There is nothing inherently anticompetitive about operating or contracting for an ambulance service, or even administering prehospital EMS. Monopolization of the market is thus neither the "inherent, logical, or ordinary result" of either of these two provisions. *Phoebe Putney*, 133 S. Ct. at 101; *see also San Bernardino*, 15 Cal. 4th at 932 ("Nothing in

this reference to section 1797.201 suggests that cities or fire districts are to be allowed to expand their services, or to create their own exclusive operating areas."); EMSA Pub. at 21 ("1797.201 does not grant any rights for a city . . . to ambulance zone exclusivity without a competitive process.").

CARE's citations to Ninth Circuit and other cases[3] that liberally applied this disfavored immunity without the rigorous analysis required by *Phoebe Putney* are thus entirely misplaced. But even without *Phoebe Putney*, it would be unable to meet the broader foreseeability standard of *Hallie* because the California legislature has "actually contemplated" what types of anticompetitive conduct it is willing to endorse through the EMS Act. It chose to place the authority to exclude competition in the hands of the county EMS agencies rather than in the hands of the cities.

The Statutory Scheme Is Only One Piece of the State Policy

CARE, like the cities, focuses solely on self-serving interpretations of state statutes to suggest its exemption from the antitrust laws. But the U.S.

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3. *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1502 (10th Cir. 1997) ("reasonably foreseeable" that city and county would enact anticompetitive legislation from general grant of authority) (overruled by *Phoebe Putney*); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875–76 (9th Cir. 1987) (*Hallie* "clearly contemplated" standard not applicable to state agencies) (inapplicable here; overruled by implication in *NC Dental*); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986) (city need not meet *Hallie* standard where they are acting in concert with a state agency that is *ipso facto* protected by state-action immunity) (inapplicable here because no allegation that city is working in concert with a state agency; overruled by *Phoebe Putney* and *N.C. Dental*, depending on nature of state agency); *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005, 1013 (8th Cir. 1983)(citing *City of Lafayette v. La. Power & Light Co.,* 435 U.S. 389 (1978) (courts should draw inferences from state policies to find state-action immunity) (overruled by *Phoebe Putney*).

Supreme Court has consistently required "a clear articulated ***policy***" to displace competition—not only a statutory scheme. A statutory scheme could be the full extent of state policy under different circumstances. But that is not the case here, where the State of California has charged statewide oversight and implementation of the EMS Act to EMSA, a disinterested administrative agency that is itself fully capable of refining policy (as administrative agencies are invariably tasked to do).

EMSA has spoken clearly to resolve the ambiguities that CARE attempts to exploit within the statutory scheme:

> It is important to clarify that 1797.201 does not grant any rights for a city or fire district to ambulance zone exclusivity without a competitive process. 1797.201 only provides for the right to service the boundaries of that city or fire district.

EMSA Pub. at 21.

Moreover, EMSA's guidance states that "a city or fire district may not avail itself of the use of 1797.201 after an agreement has been reached, if there is an interruption of service, or upon the termination of an existing agreement." *Id.* at 23. Some of the cities have reached an agreement with the county. Each of the cities has had interruptions of service and, although none of the cities contracted for EMS as of June 1, 1980, whatever unwritten "agreements" they may have had were all terminated long before they contracted with CARE.

Immunity Does Not Apply

Even if CARE Were Correct on State Policy

CARE asserts that if a city is eligible under .201, then it is entitled to the immunity. But this argument ignores the fundamental precept of *Parker*

that states cannot simply "give immunity to those who violate the Sherman Act by authorizing them to violate it." 317 U.S. at 351. The immunity limits the reach of the antitrust laws only insofar as they might infringe upon the States' power to ***regulate*** as sovereign. But the States' prerogative is limited to ***regulation***—it is not for the State of California to decide that it disagrees with Congress' frequent admonishments that competition is the national policy. *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . [This] statutory policy precludes inquiry into the question whether competition is good or bad.").

Instead, the state-action immunity extends to respect only the State of California's power to ***regulate***. To be sure, the EMS Act regulates—but Section .201 goes a step too far under CARE's interpretation: it gives cities the power to exclude all competition except for themselves and their preferred providers from the market for prehospital EMS within their boundaries, and for no good reason. Section .201 was not a necessary statute within the comprehensive EMS scheme. In contrast, the legislature had good reason for allowing county EMS agencies to create exclusive operating areas:

> As the Legislature recognized, creating an EOA is an important administrative tool for designing an EMS system, for it allows these agencies to plan and implement EMS systems that will meet the needs of their constituencies and at the same time ensure that the EMS providers with which they contract have a territory sufficiently populated to make the provision of these services economically viable.

San Bernardino, 15 Cal. 4th at 931.

The same cannot be said for Section .201 if it means what CARE and the cities argue it means: its only purpose is to allow a city to monopolize and/or confer a monopoly. In other words, it would be an impermissible free pass to violate the antitrust laws.

A City's Eligibility Under Section .201 Does Not Depend on that City's Interpretation or Application of the EMS Act

CARE argues that the cities need not actually qualify under Section .201 to be entitled to immunity, citing the federal courts' desire to not get into the business of state administrative review. But CARE fatally confuses two very distinct questions: whether an entity is eligible for the state-action immunity through a clearly articulated state policy, and whether an immune entity technically complies with substantive state law while acting anticompetitively.

The clear articulation requirement means exactly that: it must be a clearly articulated policy of the state to exempt a particular entity from antitrust scrutiny because that entity is acting within a particular regulatory scheme. The disfavored and strictly limited state-action immunity would not truly be disfavored and strictly limited if an ineligible entity were given immunity because perhaps they are "close enough" and were bold enough to take the gamble.

The city in *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991), was already deemed immune—the question was whether a federal court should question whether an entity, "though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law" to determine whether it should still

be entitled to the immunity. *Id.* at 372. In that case, the Court had already determined (through a now-overruled standard) that the city was, in fact, entitled to state action immunity. In contrast, this Court is asked on this motion only to determine whether the cities are entitled to the immunity in the first place—not whether they violated some other state law in its implementation.

It therefore does not matter how cities interpret or apply Section .201. This Court alone decides whether the legislature intended—as the "inherent, logical, or ordinary result" of Section .201, *Phoebe Putney*, 133 S. Ct. at 101—for each of these particular cities to engage in the conduct alleged in the complaint, and only after each such city meets its burden of showing it. As explained above, the State of California did not intend for these ineligible cities to engage in the anticompetitive conduct that they did—rather, the legislature set a stringent test with the necessary implication that only those cities that actually qualified under the terms of the statute would be entitled to continue administering ambulance services. CARE asks this Court to endorse a ***new*** rule completely out of step with state-action immunity doctrine—one that requires federal courts to defer to self-serving interpretations of state law made by nonstate actors seeking to avoid antitrust liability through the state-action immunity.

Active Supervision Is Required

Active supervision "is an essential condition of state-action immunity when a nonsovereign actor has an incentive to pursue [its] own self-interest under the guise of implementing state policies," *see N.C. Dental*, 135 S. Ct. at 1113, because the "first requirement—clear articulation—rarely will achieve that goal by itself." *Id.* at 1112. Active supervision avoids "resulting

asymmetry . . . by requiring the State to review and approve interstitial policies made by the entity claiming immunity." *Id.* No longer can a municipality rely on "nomenclature alone" to qualify for *Hallie*'s "narrow exception." *Id.* at 1113–14. CARE's arguments that it is entitled to a derivative state-action immunity under which it must only show clear articulation are misplaced because the cities must also show active supervision.

But even if the cities were only required to satisfy the clear-articulation prong of the state-action immunity, CARE is a private party, not a municipality. The U.S. Supreme Court has made abundantly clear that active supervision "is manifest" where active market participants are concerned. *Id.* at 1114. It thus cannot possibly qualify for the "narrow exception" from active supervision under any circumstances—even if this Court determines the cities themselves qualify for that exception. And since the state itself is not supervising CARE, it cannot establish its entitlement to state-action immunity.

Market Participants Are Not Immunized

This case presents an opportunity for this Court, the Ninth Circuit, and the U.S. Supreme Court to vindicate, once and for all, the true values of federalism that underpin the state-action immunity, and to solidify existing case law by formally recognizing a market-participant exception to the state-action immunity on which other circuits are currently split.[4] The market-

4. Contrary to CARE's assertion, the Sixth, Third, and Federal Circuits have recognized the market-participant exception. *See, e.g.*, *VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) (state acting as "commercial participant in a given market" is not protected); *A.D. Bedell Wholesale Co. v.*

participant exception would apply where an entity that would otherwise be exempt from the antitrust laws under state-action immunity by acting as a regulator pursuant to a clearly articulated policy to displace competition is not exempt because the entity is also itself a commercial market participant.[5]

The U.S. Supreme Court's state-action immunity cases have long recognized the fundamental difference between "States in their governmental capacities as sovereign regulators" from their capacity "as a commercial participant in a given market." *Omni*, 499 U.S. at 374–75; *see also Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 154 n.6 (1983) (distinguishing traditional state-as-sovereign activity from state commercial activity and holding that the antitrust laws apply with full force against states when "they are engaged in proprietary activities" that are "not 'indisputably' an attribute of state sovereignty"). The former is the only purpose for which the state-action doctrine was designed and, indeed, the Court never contemplated that states and municipalities could use state-

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Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001) (declining to apply market-participant exception because state was not acting as buyer or seller); *Genentech, Inc. v. Eli Lilly Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (*Parker* extends only to "sovereign capacity" and not market participant conduct). The Eighth and Second Circuits have decided not to extend current law. *See, e.g.*, *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312–13 (8th Cir. 1991) ("[T]he market participant exception is merely a suggestion and not a rule of law."); *Automated Salvage Trans., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit).

5. The exception is conceptually different than the Court's analysis under *N.C. Dental*, which looks at the composition of a state entity to determine whether the ***influence*** of active market participants suggest it must be actively supervised. For the market-participant exception to apply, the entity itself must be a commercial participant.

action immunity as a shield for their anticompetitive conduct when they are active market participants. Jarod M. Bona & Luke A. Wake, *The Market Participant Exception to State-Action Immunity from Antitrust Liability*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 156, 163 (2014).

Municipalities often pose danger in this regard because they tend to act "as owners and providers of services" while also possessing the power to exclude or punish competitors. This creates a "serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." *City of Lafayette*, 435 U.S. at 408. More than that, they already enjoy certain advantages in commercial markets—they are subsidized. So even where they provide services that appear to benefit consumers through lower prices, they are merely "redistributing the burden of costs from the actual consumers to the citizens at large" through "lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation." *Jefferson Cnty.*, 460 U.S. at 158 n.17. To give them "a significant ***additional*** advantage" in commercial markets through exemption from the antitrust laws could even "eliminate marginal or small private competitors." *Id.*

Immunizing market-participant conduct from antitrust scrutiny negatively affects federal antitrust policy. First, state and local entities with a free pass to violate the antitrust laws have a financial incentive to participate in commercial markets in anticompetitive ways—and that conduct is often very profitable. *See Bona & Wake, supra at 163*. Indeed, profit is exactly why California municipalities have become commercial participants in the market for prehospital EMS services. *See Toma, supra at*

289 ("Unfortunately, this revenue-enhancing agenda pits cities and fire districts in direct competition with private ambulance companies.").

CARE creates its own set of "facts" by arguing that the cities were ***not*** acting as market participants, which it is not entitled to do on a motion to dismiss. Each of the cities does, indeed, act as a market participant—in each case, the city and CARE have jointly monopolized the market for prehospital EMS, each taking a cut of the profits. And in most cases, the cities go even further—they participate in the market directly by owning the ambulances, providing medical supplies, staffing them with EMTs, responding separately to prehospital EMS calls through the fire department, or otherwise providing ancillary services such as EMS "subscription" services.

CARE also argues that Section 1797.6 uses the phrase "local government entities" instead of "local EMS agencies" and therefore represents an intent to immunize all California municipalities. This argument is misplaced for three reasons. First, this intent is limited to Sections 1797.85 and 1797.22: Not other statutes that might be referenced within them. Second, CARE seizes on "local governments" but ignores the expressed problem the legislature was attempting to address. *See* Cal. Health & Safety Code § 1797.6(a) ("[A]chieving this policy has been hindered by the confusion and concern in the 58 ***counties*** resulting from the United States Supreme Court's holding in *Community Communications Company, Inc. v. City of Boulder* . . . ." (emphasis added)). Third, the State of California cannot simply authorize an actor—municipalities or otherwise—to violate the antitrust laws. They must be acting pursuant to a clearly articulated regulatory policy, as determined by the federal courts—not simply enjoying a monopoly concession from the state.

CARE tacks on one final, nonsensical argument that has nothing to do with the applicability of the market-participant exception: if the cities are market participants, they have no duty to deal with AmeriCare. This is an irrelevant proposition because cities have no duty, no right, and no authority to administer prehospital EMS; that is Orange County's role, and Orange County has fully qualified and licensed AmeriCare to provide service in nonexclusive zones throughout the county.

***NOERR-PENNINGTON* DOES NOT APPLY TO MARKET CONDUCT**

Noerr-Pennington is limited solely to the clause which animates it—it applies only to ***petitioning*** activity under the First Amendment; it does not apply to ***market*** conduct. Simply put, if CARE's market conduct—its joint monopolization and behavior as a monopolist in each of the relevant markets—were automatically immunized because it sought and obtained a contract with the city, the *Noerr-Pennington* doctrine would eclipse the antitrust laws any time a government and private party are involved. Given the existence of the state-action immunity, this proposition couldn't be further from correct.

As the U.S. Supreme Court explained in *Noerr*, "no violation of the [Sherman] Act can be predicated upon ***mere attempts*** to influence the passage or enforcement of laws." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) (emphasis added). This is because the Sherman Act does not concern itself with petitioning, or "valid government action," but rather market conduct. *Id.* at 136. The Court later expanded the doctrine beyond lobbying efforts in congress and at the state legislatures to all petition activity. *See, e.g.*, *Cal. Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–13 (1972 (extending *Noerr-Pennington* to judicial branch

and state administrative agencies). Nevertheless, the scope of the immunity "depends . . . on the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). In "less political" arenas, unlawful or unethical practices can still result in antitrust violations. *Id.* The scope of the immunity also "depends on the degree of political discretion exercised by the government agency." *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1062 (9th Cir. 1998).

In *Omni*, for example, the *Noerr-Pennington* immunity applied where a billboard company lobbied a city council to pass a zoning ordinance restricting new billboard construction. *Omni*, 499 U.S. at 368. The billboard company was engaged in classic political behavior in petitioning a city council to legislate in a way that the city had authority to do. *Id.* at 381. The Court in *Omni* distinguished market activity from political activity, noting that "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics." *Id.* at 383.

Providing ambulance services, or even seeking a contract to jointly monopolize them in a given market, is not ***political*** conduct at all—it is ***market*** conduct. Unlike the billboard company in *Omni*, CARE did nothing more than contract with another party to provide services—it did not lobby for legislative output. In each case, CARE simply jointly monopolized the market with another market participant. What CARE and the cities did was beyond any discretion afforded the cities as explained above. *Omni* explained that *Parker* and *Noerr* "present two faces of the same coin." 499 U.S. at 383. Just as the state-action immunity does not apply to CARE and the city's conduct, neither can the *Noerr-Pennington* immunity apply to CARE here.

THE LGAA IMMUNIZES ONLY OFFICIAL CONDUCT

The LGAA limits liability for municipalities acting in their "official capacity." 15 U.S.C. § 35. It also limits liability for private actors where they act based on "official action directed by a local government." 15 U.S.C. § 36. The word "official" is not superfluous. And since an *ultra vires* act is a prohibited one, it can't be official action.

California law makes clear that the cities did not have the power to do what they did here. The cities and CARE profited from the havoc they wreaked in the market. Without the threat of damages, there will be few consequences to incent municipalities or those that make the business decision to contract with them not to violate the antitrust laws with impunity.

AmeriCare does not argue there is an *ultra vires* exception to the LGAA as CARE suggests, but rather that the activity must be lawful to qualify in the first place. CARE cites *GF Gaming Corporation v. City of Black Hawk*, 405 F.3d 876 (10th Cir. 2005) in support of the proposition that the LGAA covers activity "beyond the powers of the local government." Mot. at 29. But as the court in *GF Gaming* explained, the LGAA's use of the phrase "acting in an official capacity" encompasses "all 'lawful actions undertaken . . . .' " 405 F.3d at 885. The plaintiffs in that case did "not allege that the city officials lacked the authority" to do what they did, as "[t]heir only contention [was] that in exercising these legitimate powers the city officials acted pursuant to an illegitimate motive." *Id.*

The cities here acted outside their lawful scope of authority by availing themselves to privileges under Section .201 for which they were plainly ineligible—their actions were *ultra vires*. While the cities certainly had an

improper motive (monopoly rents), it is not this improper motive that makes the cities ineligible for immunity from damages under the LGAA—it was their illegal conduct. This disqualification imputes to CARE because the LGAA only exempts ***it*** when it acts pursuant to "official action" by a local government.

Moreover, the LGAA does not apply to AmeriCare's costs and attorneys' fees because it seeks injunctive relief under 15 U.S.C. § 26. *Redwood Empire Life Support v. County of Sonoma*, 190 F.3d 949, 953 (9th Cir. 1999) (upholding award of attorneys' fees and costs against local government under 15 U.S.C. § 26); *R. Ernest Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154, 158 (4th Cir. 1991) ("The LGAA does not extend its immunity to injunctive relief. Both the House and the Senate were careful to observe that the immunity being provided to local government was immunity from suits for damages, and not immunity from suits seeking injunctive relief."). If AmeriCare is successful, CARE will, at a minimum, be liable for all costs and attorneys' fees as provided in 15 U.S.C. § 26.

AMERICARE PLEADS SUFFICIENT FACTS TO STATE AN ANTITRUST CLAIM

CARE also argues that AmeriCare fails to plead sufficient facts under substantive antitrust law. These arguments fail because (a) AmeriCare ***does*** plead a plausible market definition even though detailed facts regarding market definition are not required here, and (b) market power is the power to control prices or exclude competition, both of which are evident in each complaint, and (c) AmeriCare suffered an injury flowing from harm to competition.

Market Definition Is Based on Market Realities

Defining the market is a means—not an end—of antitrust law; "it merely aids the search for competitive injury." *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1441, 1448 (9th Cir. 1988). Market definition, especially at the pleading stage, need not "pinpoint precisely the relevant market." *See id.* (citing *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 460 (1986)); *see also id.* at 1446 ("Defining the relevant market is a factual inquiry ordinarily reserved for the jury."); *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002) (same). All a plaintiff is required to do is allege that the relevant market is "the area of effective competition" with reference to reasonable interchangeability and cross-elasticity of demand. *Oltz*, 861 F.2d at 1446. AmeriCare has done so here.[6] The requirement is even further relaxed where, as here, the plaintiff pleads actual detrimental effects. *See Ind. Fed'n*, 476 U.S. at 460 (elaborate market analysis unnecessary where actual detrimental effects shown). And there isn't any question that AmeriCare pled that defendants (in every case) actually excluded AmeriCare and any other competitors except for CARE from each market.

The area of effective competition is the area comprising each operating area. It is the area that each city and CARE have jointly monopolized—and the only area the city could exercise market power. An individual operating area is also not interchangeable with other zones—that is, if AmeriCare were allowed to compete in one particular zone area, it would not follow that it would also *a fortiori* be allowed to compete in an adjacent zone, such as one

6. Anaheim: AC, ¶¶ 46, 49, 51–52; Buena Park: AC, ¶¶ 45, 48, 50–51; Costa Mesa: AC, ¶¶ 45, 48, 50–51; Fountain Valley: AC, ¶¶ 44, 47, 49–50; Fullerton: AC, ¶¶ 45, 48, 50–51; Garden Grove: AC, ¶¶ 45, 48, 50–51; La Habra: AC, ¶¶ 44, 47, 49–50; San Clemente: AC, ¶¶ 46, 49, 51–52.

determined by OCEMS to be an exclusive operating area subject to competitive bidding. AmeriCare's market definition is appropriate. Markets are defined by which sellers a buyer can choose from. From the perspective of the end consumer—a patient who needs an ambulance—the only choice is a provider that is permitted by the county and state system to compete in that particular operating area.

Market power is "the power to control prices or exclude competition" and its existence "ordinarily may be inferred from the predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). The cities and CARE have absolute power to control prices and exclude competition, as is evident throughout the operative complaints. Their market power can also be inferred from their existence as the sole providers in the market.

AmeriCare Easily Establishes Antitrust Standing

To establish standing, an antitrust complaint must allege "injury to competition, beyond the impact on the plaintiff." *Kumar v. Nat'l Med. Enters., Inc.*, 42 F.3d 1400 (9th Cir. 1994) (quoting *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992)). That is, AmeriCare must plead both antitrust injury (injury to the market) and injury to itself flowing from it to establish antitrust standing. Where an exclusion "manipulat[es] markets to the detriment of consumers" in terms of price, quality, or availability, injury to competition occurs. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015); *see Kumar*, 42 F.3d at 1400. AmeriCare alleges both of these requirements in detail: the cities and CARE jointly monopolized the market comprising each operating area zone to the exclusion of all

competitors;[7] and AmeriCare was one of the excluded competitors fully qualified and entitled to compete in each zone.[8]

CARE seems to misunderstand or misconstrue AmeriCare's allegations. AmeriCare ***does not*** seek to compel "each [c]ity to . . . dispatch some number of calls to AmeriCare." Mot. at 32. Only OCEMS can administer prehospital EMS in the relevant operating areas and, in any case, dispatch is a function of medical control. EMSA Pub. at 17 (citing *San Bernardino*, 15 Cal. 4th at 927). OCEMS has determined, and EMSA has confirmed, that each relevant operating area is to be operated on a non-exclusive basis. If AmeriCare is successful, OCEMS will place it in rotation and dispatch it accordingly because AmeriCare has been qualified and licensed by OCEMS to do so. *See* AC [all cases] ¶ 17 ("AmeriCare is fully licensed and qualified by OCEMS.").

The Court might note that AmeriCare seeks injunctive relief against the city to place it into rotation—but only to the extent the Court determines the city can administer prehospital EMS but nonetheless cannot exclude AmeriCare. This, of course, would be improper anyway because "dispatch . . . is a 'coordination function' under medical control." EMSA Pub. at 17 (citing *San Bernardino*, 15 Cal. 4th at 927).

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7. Anaheim: AC, ¶¶ 28, 31–34, 46, 55–56; Buena Park: AC, ¶¶ 27, 31–33, 45, 53–54; Costa Mesa: AC, ¶¶ 29, 33, 45, 53–54; Fountain Valley: AC, ¶¶ 27, 31–32, 44, 52–53; Fullerton: AC, ¶¶ 27, 30–33, 45, 53–54; Garden Grove: AC, ¶¶ 28, 32–33, 45, 53–54; La Habra: AC, ¶¶ 27, 31–32, 44, 52–53; San Clemente: AC, ¶¶ 28, 32–33, 45, 53–54.

8. Anaheim: AC, ¶¶ 37, 39–42, 57; Buena Park: AC, ¶¶ 36, 38–41, 55; Costa Mesa: AC, ¶¶ 36, 38–41, 55; Fountain Valley: AC, ¶¶ 35, 37–40, 54; Fullerton: AC, ¶¶ 36, 38–41, 55; Garden Grove: AC, ¶¶ 36, 38–41, 55; La Habra: AC, ¶¶ 35, 37–40, 54; San Clemente: AC, ¶¶ 36, 38–41, 55.

THE COURT HAS JURISDICTION AND AN UNFLAGGING OBLIGATION TO EXERCISE IT

Federal Courts Have *Exclusive* Subject-Matter Jurisdiction Over the Sherman Act

This Court need ask only one question to determine whether it has subject-matter jurisdiction: does a federal question appear on the face of a well-pleaded complaint? *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Here the answer is simple: yes. AmeriCare pleads federal claims under the Sherman Act, 15 U.S.C. §§ 1–2, which is all that is required to establish jurisdiction. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (federal jurisdiction established where federal law creates cause of action). But Congress was even more clear that the federal courts have jurisdiction under the Sherman Act; it determined the federal antitrust laws—the national policy in favor of competition—are so vital to the nation's interests that it took the rare step of establishing ***exclusive*** federal subject-matter jurisdiction for antitrust claims. *Turf Paradise, Inc. v. Ariz. Downs*, 670 F.2d 813, 821 (9th Cir. 1982).

The U.S. Supreme Court's decisions have "firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also id.* at 91 (cautioning against "drive-by jurisdictional rulings"). Dismissals for lack of subject-matter jurisdiction due to the inadequacy of the federal claim are proper only where it is so "completely devoid of merit as not to involve a federal controversy." *Id.* at 89 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)). There is a "fundamental difference between a Rule 12(b)(1) motion

for lack of subject-matter jurisdiction and a Rule 12(b)(6) motion for failure to state a claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). The question under Rule 12(b)(1) is ***only*** whether the claim is determined "by application of a federal law over which Congress has given the federal courts jurisdiction." *Id.*

AmeriCare Pleads an Effect on Interstate Commerce

Although CARE doesn't explicitly make an interstate-commerce argument under Rule 12(b)(6), such that an argument is also misplaced because AmeriCare ***does*** specifically plead that the restraints affect interstate commerce. *See, e.g.*, Anaheim AC, Anaheim Dkt. No. 19, ¶ 103. Regardless, AmeriCare does not need to use magic words or provide a "formulaic recitation of the elements" for its claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Even "[w]holly local business restraints" can be condemned under the Sherman Act, and "it does not matter how local the operation which applies the squeeze." *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)); *see also United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in [the Sherman Act] . . . admits of little, if any doubt.").

Activity in healthcare markets, of course, substantially affects interstate commerce. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2588 (2012) (implying "expansive" authority to regulate "activity" in healthcare markets but not "inactivity"). Here the defendants imposed a restraint that affects the delivery of healthcare services, increases costs in

the healthcare insurance market, and directly concerns the provision of transportation in the "channels of interstate commerce." *Id.* at 2578.

Abstention Is Manifestly Unwarranted

The federal district courts have exclusive jurisdiction over federal antitrust claims, and they do not have discretion to abstain from hearing them. *Turf Paradise*, 670 F.2d at 821 (abstention an "abuse of discretion" in antitrust cases); *see also United States v. Blue Cross Blue Shield of Michigan*, 809 F. Supp. 2d 665, 678 (E.D. Mich. 2011) (*Burford* abstention precluded where federal courts are only forum to hear antitrust claims) (citing *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 63 (2d Cir. 1986)); *Ticket Center, Inc. v. Banco Popular De Puerto Rico*, 399 F. Supp. 2d 79, 85 (D. Puerto Rico 2005) (no discretion to abstain in antitrust case "pending resolution of a state suit between the same parties and involving the same transactions" because "federal district courts have exclusive jurisdiction over private federal antitrust cases").

The federal courts' "obligation to adjudicate claims within their jurisdiction is virtually unflagging," and thus "abstention is permissible only in a few carefully defined situations with set requirements." *United States v. Morros*, 268 F.3d 695, 703 (9th Cir. 2001). For this reason, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), abstention is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727–28 (1996).

"*Burford* abstention is designed to protect 'complex administrative processes' from undue federal interference." *Kirkbride v. Cont'l Cas. Co.*, 933 F.2d 729, 734 (quoting *New Orleans Pub. Serv., Inc. v. Council of New*

Orleans, 491 U.S. 350, 361 (1989)). The Ninth Circuit requires three factors for *Burford* abstention: (1) the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which that court may have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy. *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991) (citing *Knudsen Corp. v. Nev. Dairy Comm'n*, 676 F.2d 374, 37 (9th Cir. 1982)). *Burford* "does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *New Orleans*, 491 U.S. at 362.

Regardless, all three factors are absent here. ***First***, *Burford* abstention is inappropriate where "California has not established a specialized court system." *See Int'l Bhd. Of Elec. Workers v. Public Serv. Comm'r*, 614 F.2d 206, 211 (9th Cir. 1980); *see also Almodovar v. Reiner*, 832 F.2d 1138, 1141 (9th Cir. 1987). Nor does this case present a state administrative agency process—complex or otherwise—concerning Section .201. In fact, OCEMS specifically stated that it "does not currently believe the determination of which cities can legitimately claim .201 rights is one to be made by [it]." Dkt. No. 19, ¶ 36, Ex. A at 1. Therefore, *Burford* is plainly inapposite. *Fragoso v. Lopez*, 991 F.2d 878, 882–83 (1st Cir. 1993) (*Burford* is not "at all relevant" where the action does not seek review of action by a "state administrative agency"); *Nucor Corp. v. Neb. Pub. Power Dist.*, 891 F.2d 1343, 1348 (8th Cir. 1989) (*Burford* inappropriate where "the challenges are not directed at the decisions of an independent regulatory commission, nor is there a centralized state judicial review scheme in place").

Second, federal issues are easily separated from state law issues. While AmeriCare does not dispute that the Court might construe state law in analyzing the affirmative defenses asserted by the cities and CARE, this case is overwhelmingly an antitrust matter over which the federal courts have exclusive jurisdiction. CARE's assertion that "AmeriCare's claims fundamentally turn on the issue whether the [c]ities were empowered to determine that they retained § .201 rights" is spurious. *See* Mot. at 35. Only the affirmative defenses sought by the cities and CARE rest on the interpretation of state law. The existence of a state law issue does not outweigh the federal courts' obligation to provide a complete and prompt resolution of all claims properly before them. *See, e.g.*, *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 915 (9th Cir. 1993) (presence of state law issues not a valid justification for granting a stay under the *Colorado River* doctrine). And, in any case, the state-action immunity is an application of federal antitrust law, not state law.

Third, finding the absence of .201 rights would not hinder EMSA's stated goal of encouraging competition in the EMS market. OCEMS does not believe it has the power to determine which cities are entitled to claim .201 rights; that power rests with the courts. There is no "symbiotic relationship" between the state courts and the OCEMS that a federal court ruling would disrupt. *See Morros*, 268 F.3d at 705. *Burford* abstention is thus manifestly unwarranted in this case.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in oppositions filed by AmeriCare in the related cases, this Court should deny CARE's motion to dismiss.

Respectfully submitted,

DATED: February 17, 2017

Bona Law PC

s/ Jarod Bona

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PROOF OF SERVICE

I am employed in San Diego County. I am over the age of 18 and not a party to the within action. My business address is 4275 Executive Square, Suite 200, La Jolla, California 92037. On February 17, 2017 I caused to be served via CM/ECF a true and correct copy of **Plaintiff's Opposition to CARE's Motion to Dismiss**.

The CM/ECF system will generate a "Notice of Electronic Filing" (NEF) to the filing party, the assigned judge and any registered user in the case. The NEF will constitute service of the document for purposes of the Federal Rules of Civil, Criminal and Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of February 2017 at San Diego, California.

Gabriela Hamilton