No. 17-55565

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC.,

Plaintiff-Appellant,

– v. –

CITY OF ANAHEIM ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 16-cv-01703-JLS (BGS)
The Honorable Josephine L. Staton

APPELLANT'S OPENING BRIEF

Jarod M. Bona
Aaron R. Gott
Christopher E. Stiner
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
858-964-4589

Counsel for Appellant
AmeriCare MedServices, Inc.

CORPORATE DISCLOSURE STATEMENT

Appellant states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

Date: November 1, 2017

BONA LAW PC

/s/ *Aaron R. Gott*
AARON R. GOTT

Attorneys for Appellant
AmeriCare MedServices, Inc.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

INTRODUCTION 1

JURISDICTIONAL STATEMENT 3

STATUTORY AUTHORITIES 3

ISSUES PRESENTED...3

STATEMENT OF THE CASE..4

SUMMARY OF THE ARGUMENT 11

STANDARD OF REVIEW 13

ARGUMENT 14

I. APPELLANTS DID NOT ACT PURsUANT TO A CLEARLY ARTICULATED STATE POLICY TO DISPLACE COMPETITION 14

A. The EMS Act Favors Competition and Its Limited Exceptions Do Not Apply to Appellees...16

B. The Conduct Alleged in the Complaint Was Not Taken Pursuant to a Clearly Articulated Policy to Displace Competition...22

i. The cities were not eligible for the EMS Act exception allowing displacement of competition...........................22

ii. An entity with no role in the anticompetitive policy cannot be declared immune 24

iii. Section .201 gives authority to play in the market, not authority to displace competition 25

iv. State policy is more than the statutory scheme 28

II. ACTIVE SUPERVISION SHOULD BE REQUIRED 30

A. The Cities Are Market Participants and Thus Active Supervision Is Required 30

B. CARE Is a Private Commercial Actor that Must Always Show Active Supervision 31

III. THIS COURT SHOULD RECOGNIZE AND APPLY THE MARKET-PARTICIPANT EXCEPTION TO THE STATE-ACTION IMMUNITY 32

IV. AMERICARE PLEADS INTERSTATE COMMERCE AND THE REQUIREMENT IS NOT JURISDICTIONAL.................................35

A. Pleading an Effect on Interstate Commerce Is Not Jurisdictional Requirement 36

B. AmeriCare Pleads an Effect on Interstate Commerce 37

V. *NOERR-PENNINGTON* DOES NOT APPLY TO MARKET CONDUCT...39

CONCLUSION 42

STATEMENT OF RELATED CASES 43

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

A.D. Bedell Wholesale Co. v. Philip Morris Inc.,
263 F.3d 239 (3d Cir. 2001) 32

Allied Tube & Conduit Corp. v. Indian Head, Inc.,
486 U.S. 492 (1988)..39

Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,
155 F.3d 59 (2d Cir. 1998) 33

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..37

Burford v. Sun Oil Company,
319 U.S. 315 (1943)..11

Cal. Motor Transp. Co. v. Trucking Unlimited,
404 U.S. 508 (1972)..39

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980)...14, 15

City of Columbia v. Omni Outdoor Adver., Inc.,
499 U.S. 365 (1991)..22, 23, 34, 40, 41

City of Lafayette v. La. Power & Light Co.,
435 U.S. 389 (1978)..34

Cnty. of San Bernardino v. City of San Bernardino,
15 Cal. 4th 909 (1997) 18, 21, 26, 27, 28, 41

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961)..39

Federal Trade Commission v. Phoebe Putney Health System, Inc.,
133 S. Ct. 1003 (2013)...2, 14, 24, 25, 26, 33

FTC v. Ticor Title Ins. Co.,
504 U.S. 621 (1992)..14

G.L. Mezzetta, Inc. v. City of Am. Canyon,
78 Cal. App. 4th 1087 (2000) 20

Genentech, Inc. v. Eli Lilly & Co.,
998 F.2d 931 (Fed. Cir. 1993) 33

Golden State Transit Corp. v. City of Los Angeles,
726 F.2d 1430 (9th Cir. 1984) 13

Goldfarb v. Va. State Bar,
421 U.S. 773 (1975)...15

Grason Elec. Co. v. Sacramento Mun. Util. Dist.,
770 F.2d 833 (9th Cir. 1985) 13

Gulf Oil Corp. v. Copp Paving Co.,
419 U.S. 186 (1974)...38

Hallie v. Eau Claire,
471 U.S. 34 (1985)..12, 30, 31

AE ex rel. Hernandez v. Cnty. of Tulare,
666 F.3d 631 (9th Cir. 2012) 38

Holloway v. Pagan River Dockside Seafood, Inc.,
669 F.3d 448 (4th Cir. 2012) 36

Hosp. Bldg. Co. v. Trustees of Rex Hosp.,
425 U.S. 738 (1976)...38

Jefferson Cnty. Pharm. Ass'n, v. Abbott Labs.,
460 U.S. 150 (1983)...34, 35

Kay Elec. Coop. v. City of Newkirk,
647 F.3d 1039 (10th Cir. 2011) (Gorsuch, J.) 15, 25, 27

Kottle v. Nw. Kidney Centers,
146 F.3d 1056 (9th Cir. 1998) 40

In re McLinn,
739 F.2d 1395 (9th Cir. 1984) (en banc) 13

Med. Air Corp. v. Air Ambulance Auth.,
843 F.2d 1187 (9th Cir. 1988) 26, 32

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012)...37

North Carolina State Board of Dental Examiners v. Federal Trade Commission,
35 S. Ct. 1101 (2015)... 2, 3, 12, 15, 25, 30, 31

Oneida Indian Nation v. Cnty. of Oneida,
414 U.S. 661 (1974)..37

Paragould Cablevision, Inc. v. City of Paragould,
930 F.2d 1310 (8th Cir. 1991) 33

Parker v. Brown,
317 U.S. 341 (1943)..1, 14, 15, 25, 40, 41

Shames v. Cal. Travel & Tourism Comm'n,
626 F.3d 1079 (9th Cir. 2010) 13, 14, 20, 25, 26

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998)..36

United States v. ORS, Inc.,
997 F.2d 628 (9th Cir. 1993) 36

United States v. South-Eastern Underwriters Ass'n,
322 U.S. 533 (1944)..38

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972)..14

VIBO Corp. v. Conway,
669 F.3d 675 (6th Cir. 2012) 32

Statutes

15 U.S.C. § 1 5

15 U.S.C. § 2 5

15 U.S.C. § 15 2

15 U.S.C. § 26 2

28 U.S.C. § 1291 3

28 U.S.C. § 1331 2

28 U.S.C. § 1337(a) 2

Cal. Health & Safety Code § 1797.6 .... 22, 25

Cal. Health & Safety Code § 1797.224 .... 17, 27

California Health & Safety Code § 1797.201 .... 5–7, 12, 16, 18–21, 23–28, 41

Rules

Fed. R. Civ. P. 12(b)(1) 2, 35, 36

Other Authorities

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 (2014). 34, 35

Richard Narad, *Coordination of the EMS System: An Organizational Theory Approach*, Prehospital Emergency Care, 2:145–152 (1998) 17

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 (1994) 17, 35

INTRODUCTION

AmeriCare MedServices, Inc. brought antitrust lawsuits against twelve Orange County municipalities and a private ambulance provider for restraints of trade in the prehosital EMS market. The cases turn on a thirty-year-old transitional exception to a comprehensive State of California policy designed to foster competition in the prehospital EMS market. Even though none of the city appellees were eligible for that limited exception, the district court dismissed AmeriCare's claims on state-action immunity grounds, finding that the State of California clearly articulated a policy to displace competition. But the relevant policy isn't even about cities: it is about improving ambulance service and availability for the people of California through competition, as implemented by ***county and state*** EMS authorities. The tail does not wag the dog.

The district court's analysis bypassed the relevant questions under the clear-articulation requirement for state-action immunity; instead of asking (1) *whether the state intends for this specific displacement to occur*, and (2) *whether the specific displacement was an inherent result of the regulatory scheme*, the district court only asked *whether the state intended for the federal antitrust laws to apply*—an inquiry foreclosed by *Parker v. Brown* itself. 317 U.S. 341, 351 (1943) (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it").

Indeed, the district court said it didn't matter whether appellees were eligible under the statute.

This Court should reverse the district court's order granting dismissal because appellees did not meet their burden to show they were acting pursuant to a clearly articulated state policy to displace competition. Even if the Court finds that this requirement was satisfied, it should reverse the dismissals by recognizing either (1) the implicit holding of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 35 S. Ct. 1101 (2015), requiring active supervision where the defendants' commercial interests conflict with state regulatory goals or (2) the market-participant exception expressly left unresolved by *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013).

The Court should also hold that CARE, Inc. was required to show active supervision because it is a private market participant, and that the *Noerr-Pennington* doctrine does not apply to CARE's market conduct. The Court should also reverse the district court's dismissal under Rule 12(b)(1), Federal Rules of Civil Procedure, because AmeriCare's requirement to plead a "substantial effect" on interstate commerce is no longer a jurisdictional requirement and, in any event, AmeriCare pled sufficient facts from which that substantial effect can be inferred.

JURISDICTIONAL STATEMENT

The district court had primary subject-matter jurisdiction over these actions under 28 U.S.C. §§ 1331 and 1337(a), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 because they arose under the antitrust laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final orders on March 28, 2017 and April 21, 2017. (ER12–44.) Appellant AmeriCare MedServices, Inc. timely filed its notice of appeal on April 24, 2017. (ER1–8.).

STATUTORY AUTHORITIES

All relevant statutory authorities appear in the addendum to this brief.

ISSUES PRESENTED

1. Can a defendant who is not authorized to displace competition under a state regulatory scheme nonetheless do so with immunity where the state policy only contemplates a limited displacement of competition by specific other parties?

2. Does the active-supervision requirement apply to municipalities who are not regulating but instead acting as commercial market participants after *North Carolina State Board of Dental Examiners*, 35 S. Ct. 1101? Are private parties who restrain trade alongside a municipality required to meet the active-supervision requirement?

3. Should this Court expressly adopt the market-participant exception to the state-action immunity and hold that the immunity does not apply to governmental

actors when they are not regulating but instead acting as commercial market participants?

4. Is the requirement to plead a substantial effect on interstate commerce jurisdictional or a matter of substantive antitrust law? Does pleading foreclosure of specific healthcare markets warrant an inference of substantial effects?

5. Does the *Noerr-Pennington* immunity apply to market conduct, such as monopolizing a market through an exclusive contract, or to strictly political conduct?

STATEMENT OF THE CASE

In a series of bills from 1981 to 1984, the California legislature enacted the EMS Act to create a comprehensive plan to regulate and supervise the provision of prehospital EMS. This was intended to replace a “patchwork” of city-by-city EMS dispatching that failed to supply patients with the closest available ambulances and made coordinated medical response difficult. The act placed all authority for prehospital EMS services in the hands of the California Emergency Medical Services Agency (“EMSA”) and county EMS agencies (each a “LEMSA”), requiring the use of competitive processes to ensure the best possible care for California citizens. The act required the county LEMSA to set functional “zones” for ambulance services. For each zone, a LEMSA was required to use of one of two competitive processes: (1) it could create a nonexclusive zone that allowed for open competition among competing providers, or (2) it could create an exclusive zone that

required a periodic competitive bidding process unless one of two exceptions applied.

The only exception relevant here, Section 1797.201, California Health & Safety Code, applies to municipalities that were "contracting or providing for" prehospital EMS as of June 1, 1980. The state has since issued interpretive guidance and created a qualification process for cities claiming these ".201 rights." A city is only eligible under Section 1797.201 if it (among other requirements): (1) provided or contracted for prehospital EMS service on June 1, 1980, (2) operated or directly contracted for the same type of service ***continuously*** since June 1, 1980, (3) has never entered into a written agreement with LEMSA regarding prehospital EMS, and (4) can retain, but not change (diminish or expand) its type of service. California Emergency Medical Services Authority, *EMS Sys. Coordination and HS 1797.201 in 2010*, EMSA Pub. 310-01, at 11 (2010). (ER912.)

Appellant AmeriCare MedServices, Inc. brought claims against twelve Orange County municipalities under the Sherman Act for monopolizing twelve geographic areas in the market for prehospital EMS services. AmeriCare alleged claims for monopolization and attempted monopolization and claims seeking declaratory relief, and in nine cases also alleged claims for conspiracy to monopolize under Sherman Act Section 2 and conspiracy to restrain trade under Sherman Act Section 1. In eight cases, it also brought claims against CARE Ambulance Service,

Inc. for its role in monopolizing those markets. Appellees moved to dismiss, arguing, among other things, that California's EMS Act immunized their conduct from antitrust liability and, in particular, that their exclusion of competition was authorized under Section 1797.201, California Health & Safety Code, which provided for a limited exception to a general state policy in favor of competition. The complaints alleged facts establishing that none of the municipal appellees were eligible under this limited exception.

As alleged, none of the twelve municipal appellants qualify under Section .201. (ER88–89 ¶ 33; ER112 ¶32; ER136 ¶ 29; ER165 ¶ 29; ER189 ¶ 29; ER218 ¶ 28; ER247 ¶ 29; ER275 ¶ 31; ER303 ¶ 30; ER331 ¶ 28; ER358 ¶ 29; ER386 ¶ 30.) EMSA only qualified three Orange County municipalities eligible under Section .201 (none of which concern this litigation). (*Id.*) As a result, the Orange County EMS Agency ("OCEMS") has submitted, and EMSA has approved, emergency plans for Orange County that classify each of the zones of these municipalities as "nonexclusive." (ER 88–89 ¶ 34; ER112–13 ¶33; ER136 ¶30; ER165 ¶ 30; ER189 ¶ 30; ER218 ¶ 29; ER247 ¶ 30; ER275–276 ¶ 32; ER303 ¶ 31; ER331 ¶ 29; ER358 ¶ 30; ER386 ¶ 31.) Despite this regulatory designation, each of these municipalities has since entered the prehospital EMS business to either contract for or provide exclusive prehospital EMS:

Huntington Beach. Until 1993, Huntington Beach did not contract for or provide prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, Seals Ambulance Services, Inc. (ER88 ¶ 29.) In 1986, Huntington Beach made an agreement with OCEMS for prehospital EMS. (ER87 ¶ 24.) In 1993, Huntington Beach ceased using Seals and, for the first time, entered the market for prehospital EMS itself. (ER88 ¶ 29.)

Orange. On June 1, 1980, Orange did not contract for or provide prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, Morgan Ambulance Service, Inc. (ER111 ¶¶ 23–24.) In 1979, 1981, and 1986 Orange made agreements with the OCEMS for prehospital EMS. *Id.* In 1995, Orange stopped using its existing provider and, for the first time, entered the market for prehospital EMS itself. (ER112 ¶ 29.)

Anaheim. On June 1, 1980, Anaheim did not contract for or provide prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, a series of private ambulance companies until 1998. (ER135 ¶¶ 26–27.) In 1998, Anaheim contracted for EMS for the first time, granting an exclusive contract to CARE Ambulance Service. (ER136 ¶ 28.) Anaheim jointly participates in the market with CARE. (ER136–137 ¶¶ 31–36.)

Newport Beach. On June 1, 1980, Newport Beach did not contract for or provide prehospital EMS service, but it utilized, through a *de facto*, nonbinding

unwritten agreement, Schaefer Ambulance Services, Inc. and Seals Ambulance. (ER164 ¶ 23.) In 1994, Newport Beach granted an exclusive contract to MedTrans. (*Id.* ¶ 25.) In 1996, Newport Beach ended its contract with MedTrans and, for the first time, entered the market for prehospital EMS itself. (ER165 ¶ 27.)

La Habra. On June 1, 1980, La Habra did not contract or provide for prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, Emergency Ambulance Services, Inc. (ER188 ¶ 25.) In 1995, La Habra ceased using EAS and, for the first time, entered the market for prehospital EMS itself. (*Id.* ¶ 26.) In 2008, La Habra granted an exclusive contract to CARE. (ER188–189 ¶ 27.) La Habra jointly participates in the market with CARE. (ER189–190 ¶¶ 27, 31–32.)

Fullerton. On June 1, 1980, Fullerton did not contract or provide for prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, Southland Ambulance and later AMR. (ER217 ¶ 26.) In 2003, Fullerton stopped using AMR and granted an exclusive contract to CARE. (*Id.* ¶ 27.) Fullerton jointly participates in the market with CARE. (ER218–219 ¶¶ 30–32.)

Fountain Valley. On June 1, 1980, Fountain Valley did not contract or provide for prehospital EMS service, but it utilized, through a *de facto*, nonbinding unwritten agreement, Seals Ambulance. (ER246 ¶ 26.) In 1998, Fountain Valley granted an exclusive contract to CARE, which it has renewed every year since. (*Id.* ¶27.)

Fountain Valley jointly participates in the market with CARE. (ER246–248 ¶¶ 27, 31–32.)

Costa Mesa. On June 1, 1980, Costa Mesa did not contract or provide for prehospital EMS service, but it utilized Schaefer and Seals through a *de facto*, nonbinding unwritten agreement. (ER274 ¶ 26.) In 1981, Costa Mesa made an agreement with OCEMS for prehospital EMS. (*Id.* ¶ 27.) In 2000, Costa Mesa awarded an exclusive contract to Schaefer until 2008, when it granted an exclusive contract to CARE. (ER274–275 ¶¶ 28–29.) Costa Mesa jointly participates in the market with CARE. (ER276 ¶ 33.)

Garden Grove. On June 1, 1980, Garden Grove did not contract or provide for prehospital EMS service, but it used several ambulance companies through *de facto*, nonbinding unwritten agreements. (ER302 ¶ 26.) In 1994, Garden Grove awarded an exclusive contract to CareLine until 2000, when it granted an exclusive contract to CARE. (ER302–303 ¶¶ 27–28.) Garden Grove jointly participates in the market with CARE. (ER302–304 ¶¶ 28, 32.)

Laguna Beach. On June 1, 1980, Laguna Beach did not contract or provide for prehospital EMS service, but it used several ambulance companies through *de facto*, nonbinding unwritten agreements. (ER330 ¶¶ 24–25.) In 1996, Laguna Beach granted an exclusive contract to Doctor's Ambulance Service. (*Id.* ¶ 26.)

Buena Park. On June 1, 1980, Buena Park did not contract or provide for prehospital EMS service, but utilized at least one private ambulance provider through a *de facto*, nonbinding unwritten agreement. (ER357 ¶ 26.) In 1999, Buena Park granted an exclusive contract to CARE, which it extended to the present. (ER357–358 ¶ 27.) Buena Park jointly participates in the market with CARE. (ER358–359 ¶¶ 31–33.)

San Clemente. On June 1, 1980, San Clemente did not contract or provide for prehospital EMS service, but utilized several private ambulance companies through *de facto*, nonbinding unwritten agreements. (ER385 ¶¶ 26–27.) In 2015, San Clemente granted an exclusive contract to CARE. ER386, ¶ 28. San Clemente jointly participates in the market with CARE. (ER386–387 ¶¶ 32–34.)

Appellant AmeriCare MedServices, Inc. made a request to operate in each of the zones of these municipalities to OCEMS February 25, 2015. (ER89 ¶ 36; ER113 ¶ 35; ER 138 ¶ 37; ER165 ¶ 32; ER190 ¶ 35; ER220 ¶ 36; ER248 ¶ 35; ER276 ¶ 36; ER304 ¶ 36; ER332 ¶ 32; ER359 ¶ 36; ER387 ¶ 37.) OCEMS directed it to make its requests to the cities. (*Id.*) AmeriCare made its request of the cities March 19, 2015. (ER90 ¶ 38; ER113–114 ¶ 37; ER 138 ¶ 39; ER166–167 ¶ 34; ER191 ¶37; ER220 ¶ 38; ER249 ¶ 37; ER277 ¶ 38; ER305 ¶ 38; ER332 ¶ 34; ER360 ¶ 38; ER388 ¶39.) Each city that responded asserted that it had “201 rights” and refused to place AmeriCare in the call rotation. ER90 ¶ 40; ER114 ¶38; ER138–139 ¶ 40; ER167

¶ 35 (no response from Newport Beach); ER191 ¶38; ER220–221¶ 39; ER249 ¶ 38 (request denied by Fountain Valley); ER277 ¶ 39; ER305 ¶ 39; ER332–333 ¶ 35; ER360 ¶ 39 (no response from Buena Park); ER388 ¶ 40 (no response from San Clemente).

The municipal appellees moved to dismiss, arguing, among other things, that the court should abstain under *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), that the court did not have jurisdiction because AmeriCare failed to plead a substantial effect on interstate commerce, and that the defendants were exempt from the Sherman Act under the state-action immunity doctrine. CARE moved to dismiss on those grounds and also argued that its conduct was protected under the *Noerr-Pennington* doctrine. The district court denied the cities' requests for abstention but granted their motions on jurisdictional and state action immunity grounds March 3, 2017. (ER12–36.) On April 21, 2017, the district court granted CARE's motion on the same grounds, and also agreed with CARE that its conduct was protected under *Noerr-Pennington*. (ER37–44.) AmeriCare timely filed its notice of appeal April 24, 2017. (ER1–8.)

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's orders granting appellees' motions to dismiss for the following reasons:

I. The municipal appellees never qualified under Cal. Health & Safety Code Section 1797.201 and thus cannot meet their heavy burden to show that they are entitled to the state-action immunity from the antitrust laws by faithfully acting pursuant to a clearly articulated state policy to displace competition. An entity that is not authorized to displace competition cannot claim the immunity. Moreover, even if the municipal appellees were eligible under Section 1797.201, the provision only gives them permission to play in the market, not to displace competition.

II. This Court should recognize the implicit narrowing of the *Hallie v. Eau Claire*, 471 U.S. 34 (1985), municipality exception to the "active supervision" requirement in *North Carolina State Board of Dental Examiners*, 35 S. Ct. 1101, and hold that the city appellees, who compete in the same market they purport to regulate, must show that they are actively supervised by the state itself. Moreover, CARE should be required to show active supervision regardless of the municipal exception because there is no "derivative immunity."

III. Even if the Court finds that the state-action immunity would otherwise apply, it should formally recognize the market-participant exception to the immunity. 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.

IV. AmeriCare's complaints pleaded sufficient facts showing foreclosure of specific markets to create an inference that the restraints alleged substantially affected interstate commerce. The "substantial effects" requirement is not jurisdictional, but even if the appellees had moved to dismiss under 12(b)(6) instead of 12(b)(1) for these grounds, AmeriCare would have satisfied its burden.

V. *Noerr-Pennington* immunity does not apply to CARE's market conduct. The district court's decision holds that any monopolist who attains its position by an exclusive contract with a government entity is protected by *Noerr-Pennington*. This expands the doctrine well beyond its sole purpose of separating business from politics.

STANDARD OF REVIEW

In an appeal from an order granting a motion to dismiss, this Court assumes the truth of all factual allegations of the complaint. *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079, 1082 (9th Cir. 2010). The Court reviews a district court's determination of the applicability of state action immunity *de novo*. *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 835 (9th Cir. 1985) (citing *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1432 (9th Cir. 1984). A district court's interpretation of state law is also reviewed *de novo. Id.* (citing *In re McLinn*, 739 F.2d 1395, 1397–1403 (9th Cir. 1984) (en banc)).

ARGUMENT

I. APPELLEES DID NOT ACT PURSUANT TO A CLEARLY ARTICULATED STATE POLICY TO DISPLACE COMPETITION

The federal antitrust laws are the "Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). This "national policy in favor of competition" has existed and been reaffirmed consistently for more than a century, *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). It is so important to the national interest that Congress trusts its adjudication to the federal courts alone. Our dual federalist system requires the Sherman Act to yield only where it would "bar States from imposing market restraints 'as an act of government.' " *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)).[1] 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)); *Shames*, 626 F.3d at 1084 ("The state-action immunity doctrine is 'disfavored,' and is to be interpreted narrowly, as 'a broad interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction.' "). It functions ***only*** to prevent the antitrust laws

---

1. Internal quotations and citations are omitted and emphasis is added unless otherwise noted.

from imposing an "impermissible burden on the States' power to ***regulate***." *N.C. Dental*, 135 S. Ct. at 1109.

Municipalities are not sovereign, 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) (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"). They qualify only where they can show, at the least, that they are faithfully acting pursuant to a "clearly articulated and affirmatively expressed as state policy" to displace competition. *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 action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.").

The district court ignored these principles in holding that the state-action immunity applied to the conduct of appellees. (ER35.) Instead, while the EMS Act granted ***some*** specific types of local governments the power to displace competition, the district court extended this power to ***all*** local governments. (ER34–35.)

In this section, AmeriCare explains that the EMS Act is generally a policy in favor of competition, and that the limited exceptions allowing certain entities to displace competition do not apply to appellees. It then argues that the district court used the wrong standard in applying the state-action immunity. Under the correct standard, appellees cannot satisfy the clear-articulation requirement because the city appellees had no role in a policy to displace competition. Even if the cities were eligible under Section 1797.201, the statute only gives them authority to play in the market and not to act anticompetitively. Moreover, the statute is not the complete state policy, and subsequent decisions and interpretive guidance by EMSA foreclose the possibility that the city appellees were authorized to exclude competition.

A. The EMS Act Favors Competition and Its Limited Exceptions Do Not Apply to Appellees

California enacted the EMS Act in a series of bills from 1981 to 1984 as a comprehensive statutory scheme to regulate and supervise prehospital EMS throughout the state to ensure all California citizens receive the prehospital EMS to which they are entitled. Before the EMS Act, there was no comprehensive state plan for emergency services. Instead, "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). This "patchwork" 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 appellees urged the district court to recreate.

Under the act, local EMS authorities in ***county*** government develop a plan and submit it to the California Emergency Medical Services Authority for approval or disapproval. (ER131 ¶¶ 11–25.) ***County*** EMS authorities design 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 periodic competitive bidding. *See* Cal. Health & Safety Code § 1797.224. OCEMS designated, and EMSA approved, each zone relevant to this litigation as non-exclusive. (ER742–743, 813, 877, 943, 976, 1045, 1075, 1143, 1177, 1243, 1315, 1347.)

The legislature recognized an exception (that does not apply here): 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.* The intent of the legislature was clear: it didn't want to 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***. As the California Supreme Court explained, Section 1797.201 was "transitional." *Cnty. of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 944 (1997). The language of the act contains absolutely no authority for municipalities to perpetually disrupt an otherwise coordinated statewide plan managed at the county and state level. That would undermine its purpose of fixing a broken "patchwork" system. (*See, e.g.*, ER134–135 ¶ 25.)

Appellees cannot rely on Section 1797.201 as a clearly articulated state policy to displace competition because none of the municipal appellees were eligible in the first place. To qualify under Section 1797.201, the State of California required that a municipality must satisfy all of the following conditions:

- 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 contract 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. . . .

(ER912.) Section 1797.201 "does not grant exclusivity for ALS, LALS, or ambulance services." (ER911.) So even if a city has the power to retain administrative control over ambulance service under Section 1797.201, it has no power to exclude competition. The law simply allows it to continue service.

AmeriCare alleges that none of the appellee cities provided or contracted for prehospital EMS services as of June 1, 1980. (ER88 ¶ 29; ER111 ¶¶ 23–24; ER135 ¶¶ 26–27; ER164 ¶ 23; ER188 ¶ 25; ER217 ¶ 26; ER246 ¶ 26; ER274 ¶ 26; ER 302 ¶ 26; ER330 ¶¶ 24–25; ER357 ¶ 26; ER385 ¶¶ 26–27.) It alleges that some of these cities entered into a LEMSA agreement with OCEMS. (ER87 ¶ 24; ER111 ¶¶ 23–24; ER274 ¶ 27.) It also alleges that eight of the cities later contracted with CARE (mostly in the 2000s)—an act that was a change from the previous services provided in the city. (ER136 ¶ 28; ER188–189 ¶ 27; ER217 ¶ 27; ER246 ¶ 27; ER274–275 ¶¶ 28–29; ER302–303 ¶¶ 27–28; ER357–58 ¶ 27; ER386 ¶ 28.) Based on these facts alone, the Court should rule that the cities are ineligible under Section 1797.201 and therefore could not have been acting pursuant to a clearly articulated policy to displace competition.

In contrast to state EMSA determinations, appellees asserted in the district court that each of the cities is entitled to 1797.201 "rights," arguing that they retain those rights even though they did not contract or themselves provide ambulance services as of June 1, 1980. (ER423–424, 443–444, 456, 473, 493–494; 527–528, 552, 570–571, 605, 625–626, 649–650, 674–675.) They asserted that these cities "arranged" for ambulance services and therefore meet the exception. *Id.* There are several problems with this argument:

First, the state-action immunity is a limited and disfavored exemption to the antitrust laws and therefore must be strictly construed. *Shames*, 626 F.3d at 1084. Appellees must show that the legislature must have actually contemplated that ***all*** cities who "arranged" for ambulance services should qualify for the exception. 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. It is there to provide a temporary grandfathering where reliance interests justified it. But no such reliance interests exist where a city simply "arranges" for ambulance services because they can change that arrangement at any time. California law specifies that municipal contracts must be written. *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. The district court did not actually determine whether the cities met the requirements of Section 1797.201. But even if this Court determined that they did meet those requirements, technical compliance with a thirty-year-old transitional statute 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.”). In other words, the antitrust laws do not perpetually yield to a state’s regulatory purpose that has long since expired.

In any event, it doesn’t matter whether the cities qualify under Section 1797.201 because the first question for state-action immunity is whether the state clearly articulated and affirmatively expressed a policy to displace competition. The state did not grant this power to municipalities. *See* ER922 (“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.”). Section 1797.201 only gave the cities authority to participate in the market (or continue a contract that did so). (ER911.) Only EMSA and OCEMS have the power to displace competition. (ER922.) EMSA and OCEMS

dictated that competition is, in fact, required in each of the relevant markets in dispute—that is, they designated each of the zones as nonexclusive. (ER 88–89 ¶ 34; ER112–113 ¶33; ER136 ¶30; ER165 ¶ 30; ER189 ¶ 30; ER218 ¶ 29; ER247 ¶ 30; ER275–276 ¶ 32; ER 303 ¶ 31; ER331 ¶ 29; ER358 ¶ 30; ER386 ¶ 31.)

B. The Conduct Alleged in the Complaint Was Not Taken Pursuant to a Clearly Articulated Policy to Displace Competition

The district court's decision essentially holds that the EMS Act is entirely elective for every California municipality. (ER32.) Under the district court's reasoning, it doesn't matter whether the state actually intended for these particular entities to displace competition, relying in part on another EMS Act provision that purports to declare local governments immune from the antitrust laws when "carrying out their prescribed functions" under the Act. *See* ER32; Cal. Health & Safety Code § 1797.6. But even if the state could immunize the city appellees, it didn't: the city appellees didn't qualify for the only exception under which they could have any function to carry out under the regulatory scheme. *Id.*

i. The cities were not eligible for the EMS Act exception allowing displacement of competition

The district court's analysis relied heavily on *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), a case about a city's exclusion of competition in billboard advertising. (ER28, 32–34.) The question in that case 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. *Omni*, 499 U.S. at 372. In that case, the Court had already determined (through a now-overruled standard) that the city was, in fact, statutorily authorized to exercise zoning power even though it did not follow state procedures in enacting that particular zoning ordinance—in other words, it exercised its substantive power in a procedurally improper way. This case, in contrast, concerns a statute—Section 1797.201—that did not grant the city appellees any authority because they were—by its terms—ineligible. In other words, they do not fall within a class of entities granted the substantive power to displace competition. It is not, as in *Omni*, a question of whether they complied with state law in exercising that power.

If the City of Columbia in *Omni* were, for example, a general law city that had claimed immunity based on authority to displace competition under a statute that granted zoning power only to charter cities, then the facts in *Omni* would be analogous to this case and the result in the Supreme Court would have been different. The difference is key: *Omni* did not concern a statute for which the defendant was not eligible: there was no dispute that the City of Columbia had zoning power, and thus no dispute whether the City of Columbia was acting pursuant to a clearly articulated state policy to displace competition.

The district court did not ask a critical question: whether the appellees' displacement of competition was the "inherent, logical, or ordinary result" of the state policy. *Phoebe Putney*, 133 S. Ct. at 1013. As explained above, the State of California did not intend for these ineligible cities to engage in the anticompetitive conduct that they did. Rather, it set a stringent test with the necessary implication that only those cities actually qualified under the statute would be entitled to continue administering ambulance services. And, in any event, the legislation certainly did not contemplate municipal anticompetitive activity. By labeling it a matter of compliance, the district court replaces the stringent analysis of *Phoebe Putney* with one that requires federal courts to give immunity to broad classes of actors even though they do not play any part in a state regulatory scheme. (ER29–30.)

ii. An entity with no role in the anticompetitive policy cannot be declared immune

The appellees were not carrying out functions prescribed by the EMS Act. They did not have any functions because they did not qualify under Section 1797.201. What is left, under the district court's analysis, is a state doing what it cannot do: granting immunity from antitrust liability in the absence of a clear articulated policy authorizing appellees to act anticompetitively as part of a regulatory scheme.

The district court relied on another provision of the EMS Act to reach this conclusion: "the California legislature broadly declared its intention to extend state

action immunity to 'local government entities' carrying out their prescribed functions under the EMS Act." *See* ER32 (quoting Cal. Health & Safety Code § 1797.6(b)). But that is not the test. The two questions under the test are: (1) *did the state intend for this specific displacement to occur?* and (2) *was this displacement an inherent result of the regulatory scheme? See Phoebe Putney*, 133 S. Ct. at 1013 (requiring displacement to be inherent, logical, or ordinary result of policy); *Shames*, 626 F.3d at 1083–84 (requiring both foreseeability and a clearly articulated "intention to displace competition" through the underlying regulatory scheme).

The question is never *did the state intend to immunize the appellees from federal antitrust law?* The "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. States cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker*, 317 U.S. at 351.

iii. Section .201 gives authority to play in the market, not authority to displace competition

The district court recognized that *Phoebe Putney* overruled prior Ninth Circuit case law as to appellees' Section 38794 argument. ER29. But it did not apply *Phoebe Putney*'s rigorous analysis to the EMS Act. Like the statute in *Phoebe Putney* granting authority to play in the market, section 1797.201 does not contemplate the displacement of competition. *See Phoebe Putney*, 133 S. Ct. at 1012; *see also Kay*

Elec., 647 F.3d at 1044 (Gorsuch, J.). Section 1797.201 allows specific eligible municipalities to "administer" prehospital EMS.

Just like in *Phoebe Putney*, where the Supreme Court held that there is nothing inherently anticompetitive about operating or acquiring hospitals, there is nothing inherently anticompetitive about operating or contracting for an ambulance service, or even administering prehospital EMS. Indeed, other provisions of the EMS Act—and subsequent interpretations in state court—make clear that Section 1797.201 does not give municipalities any authority to create new ambulance monopolies like appellees did here. *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.").

Under the EMS Act, only county LEMSAs can create, and only EMSA can approve, exclusive operating areas. Section .201 merely prevents LEMSAs from displacing city-administered programs existing on June 1, 1980. (ER131–134 ¶¶ 11–23 (OCEMS stating ".201 rights and exclusivity are two different things"); ER879–881.)

Monopolization of the market by these entities is thus not the "inherent, logical, or ordinary result" of the EMS Act. *Phoebe Putney*, 133 S. Ct. at 1013; *Shames*, 626 F.3d at 1083–84 (requiring both foreseeability and a clearly articulated "intention to displace competition" through the underlying regulatory scheme); *Med.*

Air Corp. v. Air Ambulance Auth., 843 F.2d 1187, 1189 (9th Cir. 1988) ("The designation of Air Ambulance diminished competition, it did not eliminate it. Air Ambulance is not free to run the system to exclude or destroy Medic Air. The state and its agencies have not granted Air Ambulance an exclusive franchise."); *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.").

The statute does allow ***certain*** entities to restrain competition in ***limited*** ways under ***certain limited*** circumstances. But the EMS Act is a policy that requires competition under ***all other*** circumstances. It is a procompetitive 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 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. None of the city appellees qualifies for these exceptions.

The State of California ***itself*** flatly disagrees with the appellees' 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* ER924 ("[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* ER 88–89 ¶ 34; ER112–113 ¶33; ER136 ¶30; ER165 ¶ 30; ER189 ¶ 30; ER218 ¶ 29; ER247 ¶ 30; ER275–276 ¶ 32; ER 303 ¶ 31; ER331 ¶ 29; ER358 ¶ 30; ER386 ¶ 31.)

iv. State policy is more than the statutory scheme

Appellees attempted to justify their conduct through self-servingly broad interpretations of Section 1797.201. But Section 1797.201 is not the totality of the state policy regarding the provision of prehospital EMS services. The state-action immunity test has long required "a clear articulated ***policy***" to displace competition—and not necessarily a statutory scheme. A statutory scheme could be

the full extent of state policy under different circumstances. But not here, where the State of California charged statewide oversight and implementation of the EMS Act to EMSA, a disinterested administrative agency that is itself fully capable of implementing and enforcing state policy (as administrative agencies are invariably tasked to do). The state policy must—for state action immunity purposes—comport with the interpretive decisions and guidance of the state agency delegated authority to implement the statutory scheme.

The legislature delegated EMSA the authority to implement the EMS Act, and it has spoken clearly to resolve the ambiguities that appellees attempt 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.

(ER922.)

EMSA also 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." ER924. Some of the cities have reached an agreement with the county. (ER87¶ 24; ER111 ¶¶ 23–24; ER274 ¶ 27.) Each of the cities has had interruptions of service and, although none of the cities provided or contracted for EMS as of June 1, 1980, whatever unwritten "agreements" they may have had were all terminated long before they entered the

market for themselves or as part of a contract with CARE. (ER88 ¶ 29; ER111 ¶¶ 23–24; ER135 ¶¶ 26–27; ER164 ¶ 23; ER188 ¶ 25; ER217 ¶ 26; ER246 ¶ 26; ER274 ¶ 26; ER 302 ¶ 26; ER330 ¶¶ 24–25; ER357 ¶ 26; ER385 ¶¶ 26–27.) In light of the policy set forth by the state itself, none of the cities could possibly qualify under Section 17.97.201.

II. ACTIVE SUPERVISION SHOULD BE REQUIRED

The district court held that active supervision was not required of the municipal appellees because they are exempt from active supervision under *Hallie v. Eau Claire*, 471 U.S. 34. (ER26.) The district court further held that CARE is, by derivative of the cities, also exempt from the active supervision requirement. (ER40–41.) The scope of the exception to the active-supervision requirement for municipal actors is in doubt after *North Carolina State Board of Dental Examiners*. This Court should consider whether it applies to municipalities acting as market participants with pecuniary interests rather than as governments merely regulating the market. Regardless, this Court should reverse the district court's holding that CARE need not show active supervision as directly contrary to binding Ninth Circuit authority.

A. The Cities Are Market Participants and Thus 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.

The city appellees' briefing in the district court underscores the "high level of generality" they exploited to rationalize and excuse their monopolization of the market: they rely on a more than thirty-year-old transitional statute that doesn't apply to them to enter a commercial market and obtain monopoly rents. (ER423–424, 443–444, 456, 473, 493–494, 527–528, 552, 570–571, 605, 625–626, 649–650, 674–675.) EMSA has indicated that it flatly disagrees with the city appellees' reading of the statute, and they have avoided all supervision by exempting themselves from the statewide EMS planning scheme. (ER88–89 ¶ 33; ER112 ¶32; ER136 ¶ 29; ER165 ¶ 29; ER189 ¶ 29; ER218 ¶ 28; ER247 ¶ 29; ER275 ¶ 31; ER303 ¶ 30; ER331 ¶ 28; ER358 ¶ 29; ER386 ¶ 30.) The "resulting asymmetry" between their conduct and the intentions of the state's EMS policies demonstrate that active supervision should apply under these circumstances.

B. CARE Is a Private Commercial Actor that Must Always Show Active Supervision

Even if the cities are 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. *N.C. Dental*, 135 S. Ct. at 1114. CARE 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.

The Ninth Circuit addressed a similar situation in *Medic Air Corporation*, 843 F.2d 1187. In that case, a private company was designated an exclusive dispatcher by a county district board, which had state authority to grant such exclusive franchises. *Id.* at 1189. Nevertheless, this Court held that the private dispatcher was required to show "that it was 'actively supervised' by the state itself." *Id.*

III. THIS COURT SHOULD RECOGNIZE AND APPLY THE MARKET-PARTICIPANT EXCEPTION TO THE STATE-ACTION IMMUNITY

This case presents an opportunity for this 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 and applying a market-participant exception to the state-action immunity that the Supreme Court has declined to decide and on which other circuits are currently split.[2] The market-participant exception

2. *See Phoebe Putney*, 133 St. Ct. at 226 n.4 (declining to consider market participant exception argument because it was not raised by the parties). The Sixth, Third, and Federal Circuits have recognized the market-participant exception. *See,*

would apply where an entity claiming state-action immunity is also a commercial market participant.[3] Each municipal defendant in this litigation is acting as a joint service provider rather than as a regulator.[4] (ER89 ¶ 35; ER166 ¶31; ER189 ¶ 34; ER219 ¶ 35; ER248 ¶ 34; ER276 ¶ 35; ER304 ¶ 35; ER331 ¶ 31; ER359 ¶ 35; ER 387 ¶ 36.)

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

---

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. 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 Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit).

3. 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 claiming immunity must itself be a commercial participant.

4. All of the city appellees participate in the market directly in one way or another. Even those who contract with CARE split profits with it, own ambulances, provide medical supplies, have EMTs on staff, provide ancillary services such as EMS "subscription" services, and respond to prehospital EMS calls separately from CARE (often resulting in the double-billing of patients). (*See, e.g.*, ER136–137 ¶¶ 31–36.)

market." *Omni*, 499 U.S. at 374–75; *see also Jefferson Cnty. Pharm. Ass'n, 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"). Actions taken as a sovereign are the only purpose for which the state-action doctrine was designed and, indeed, the Court never contemplated that states and municipalities could use state-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 a danger to competition when they 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 v. La. Power & Light Co.*, 435 U.S. 389, 408 (1978). 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 merely "redistribute 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 undermines federal antitrust policy. 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."). Applying the market participant exception under these circumstances would ensure that a limited and disfavored doctrine remain true to its purpose of balancing Congress' plenary power to regulate commerce with the states' remedial power to regulate.

IV. AMERICARE PLEADS INTERSTATE COMMERCE AND THE REQUIREMENT IS NOT JURISDICTIONAL

The district court held that AmeriCare's complaint failed to establish subject-matter jurisdiction because it did not plead a "substantial effect on interstate commerce." (ER23.) But this is not a Rule 12(b)(1) jurisdictional issue: AmeriCare

invoked federal question jurisdiction by pleading a claim under the Sherman Act. Whether it pled "substantial effects" is a question of whether AmeriCare states a claim under Rule 12(b)(6). Appellees did not raise the "substantial effects" question under Rule 12(b)(6), but in any event, AmeriCare satisfies that requirement with its complaints.

A. Pleading an Effect on Interstate Commerce Is Not Jurisdictional Requirement

The district court noted that Ninth Circuit cases have established the substantial effects pleading requirement as a jurisdictional question. ER23–24 (quoting *United States v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993)). But subsequent Supreme Court 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. Cnty. of Oneida*, 414 U.S. 661, 666 (1974)). Other circuits have since recognized 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.*

B. AmeriCare Pleads an Effect on Interstate Commerce

A plaintiff 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). But AmeriCare both uses those magic words ***and*** pleads sufficient factual matter throughout its complaint to establish that appellees' conduct substantially affected interstate commerce. (*See* ER95 ¶ 76; ER120 ¶ 77; ER149 ¶ 103; ER173 ¶ 75; ER201 ¶ 100; ER231 ¶ 101; ER259 ¶ 100; ER287 ¶ 101; ER315 ¶ 101; ER341 ¶ 93; ER370 ¶101; ER398 ¶ 102.)

AmeriCare pleads restraints that foreclose entire geographic markets for an integral component of healthcare: ambulance services. (ER85–86 ¶ 22; ER109–110 ¶ 22; ER134–135 ¶ 25; ER163–164 ¶ 22; ER187–188 ¶ 24; 216–217 ¶ 25; 245–246 ¶ 25; 273–274 ¶ 25; 301–302 ¶ 25; 328–329 ¶ 22; 356–357 ¶ 25; 384–385 ¶ 25.) 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 appellees imposed restraints that affect the delivery of healthcare services, increases costs in healthcare delivery and insurance markets, and directly concerns the provision of transportation on roadways—in the "channels

of interstate commerce." *Id.* at 2578. And activity that forecloses an entire geographic market necessarily affects interstate commerce. AmeriCare is entitled to the inference that the restraints substantially affect interstate commerce.

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) (second quotation 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.").

Although AmeriCare submits that it has pled a substantial effect on interstate healthcare markets, a decision affirming the district court on this ground but reversing as to the state-action immunity would require remand with leave to amend. *See AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) (dismissal without leave to amend improper unless clear complaint could not be saved by any amendment upon *de novo* review). The district court noted it would have granted leave to amend on this ground but for its decision holding that the complaints "uncurably fail" due to the state action immunity. (ER24.) AmeriCare can certainly add additional facts to an amended complaint describing how the relevant markets are interconnected with interstate commerce.

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

The district court held that *Noerr-Pennington* immunity applies to CARE's conduct because its efforts to secure an exclusive contract are protected petitioning activity. (ER42–43.) The district court's decision reads too much into the limited immunity provided under *Noerr-Pennington*, which is about politics, not business.

As the U.S. Supreme Court explained in *Noerr-Pennington*, "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). This is because the Sherman Act does not concern itself with petitioning, or "valid governmental 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 Transp. 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.* at 500. 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 state-law 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 provide them is not ***political*** conduct—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 of the eight relevant cases, CARE obtained an exclusive contract with another market participant (a city), and together they excluded competition. What CARE and the cities did was beyond any discretion afforded the cities—the cities had no authority to create exclusive operating areas. Indeed, the district court's reasoning relied on its earlier holding—in error—that the municipal appellees had authority to create exclusive operating areas, despite explicit State of California mandates to the contrary. ER44; *see San Bernardino*, 15 Cal. 4th at 932 (expressly dispelling notion "that cities . . . are to be allowed to expand their services, or to create their own exclusive operating areas"); ER922

("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.").

Even if CARE's contracts with the cities are determined to be protected petitioning activity, CARE's post-contracting conspiracy with each of the eight cities it contracts with is not. Even if the cities had the authority to enter into such contracts under Section 1797.201—though they did not—that authority would only allow them to provide or contract for ambulance services, not to create exclusive operating areas.

Omni explained that *Parker* and *Noerr-Pennington* "present two faces of the same coin." *Omni*, 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.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's orders granting the city appellees' and CARE's motions to dismiss and remand for further proceedings. If the Court affirms on interstate commerce grounds but reverses on any other ground, it should remand with instructions for the district court to grant leave to amend.

Date: November 1, 2017

BONA LAW PC

/s/ Aaron R. Gott
AARON R. GOTT

Attorneys for Appellant
AmeriCare MedServices, Inc.

STATEMENT OF RELATED CASES

Appellant is not aware of any other related case.

Date: November 1, 2017

Bona Law PC

/s/ Aaron R. Gott
AARON R. GOTT

Attorneys for Appellant
AmeriCare MedServices, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2016, Times New Roman 14-point font.

Date: November 1, 2017

BONA LAW PC

/s/ Aaron R. Gott
AARON R. GOTT

Attorneys for Appellant
AmeriCare MedServices, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2017, 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.

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

Date: November 1, 2017

BONA LAW PC

/s/ Aaron R. Gott
AARON R. GOTT

Attorneys for Appellant
AmeriCare MedServices, Inc.

No. 17-55565

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC.,

Plaintiff-Appellant,

– v. –

CITY OF ANAHEIM ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 16-cv-01703-JLS (BGS)
The Honorable Josephine L. Staton

ADDENDUM TO APPELLANT'S OPENING BRIEF

Jarod M. Bona
Aaron R. Gott
Christopher E. Stiner
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
858-964-4589

Counsel for Appellant
AmeriCare MedServices, Inc.

TABLE OF CONTENTS

I. UNITED STATES CODE

A. 15 U.S.C. § 1

B. 15 U.S.C. § 2

II. CALIFORNIA GOVERNMENT CODE

A. Government Code § 38794

B. Health & Safety Code § 1797.201

C. Health & Safety Code § 1797.224

D. Health & Safety Code § 1797.6

I. UNITED STATES CODE

A. 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

B. 15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

II. CALIFORNIA GOVERNMENT CODE

A. Government Code § 38794

The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires.

B. Health & Safety Code § 1797.201

Upon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts, except the level of prehospital EMS may be reduced where the city council, or the governing body of a fire district, pursuant to a public hearing, determines that the reduction is necessary.

C. Health & Safety Code § 1797.224

A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. No competitive process is required if the local EMS agency develops or implements a local plan that continues the use of existing providers operating within a local EMS area in the manner and scope in

which the services have been provided without interruption since January 1, 1981. A local EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. This plan shall include provisions for a competitive process held at periodic intervals. Nothing in this section supersedes Section 1797.201.

D. Health & Safety Code § 1797.6

(a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving 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, Colorado, 455 U.S. 40, 70 L.Ed.2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this section and Sections 1797.85 and 1797.224 to prescribe and exercise the degree of state direction and supervision over emergency medical services as will provide for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under this division.