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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AMERICARE MEDSERVICES, INC.,

Plaintiff,

vs.

CITY OF ANAHEIM and CARE
AMBULANCE SERVICE, INC.,

Defendants.

Lead Case No. 8:16-cv-1703-JLS-AFMx

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

AMERICARE MEDSERVICES, INC.,

Plaintiff,

vs.

CITY OF HUNTINGTON BEACH,

Defendant.

Consolidated With
Case No. 8:16-cv-1596-JLS-AFMx

1 AMERICARE MEDSERVICES, INC.,
2
3 Plaintiff,
4
5 vs.
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7 CITY OF ORANGE,
8
9 Defendant.

Consolidated With
Case No. 8:16-cv-1680-JLS-AFMx

8 AMERICARE MEDSERVICES, INC.,
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10 Plaintiff,
11
12 vs.
13
14 CITY OF NEWPORT BEACH,
15
16 Defendant.

Consolidated With
Case No. 8:16-cv-1724-JLS-AFMx

15 AMERICARE MEDSERVICES, INC.,
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17 Plaintiff,
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19 vs.
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21 CITY OF LA HABRA and CARE
22 AMBULANCE SERVICE, INC.,
23
24 Defendants.

Consolidated With
Case No. 8:16-cv-1759-JLS-AFMx

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1 AMERICARE MEDSERVICES, INC.,
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3 Plaintiff,
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5 vs.
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7 CITY OF FULLERTON and CARE
8 AMBULANCE SERVICE, INC.,
9
10 Defendants.

Consolidated With
Case No. 8:16-cv-1765-JLS-AFMx

9 AMERICARE MEDSERVICES, INC.,
10
11 Plaintiff,
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13 vs.
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15 CITY OF FOUNTAIN VALLEY and
16 CARE AMBULANCE SERVICE, INC.,
17
18 Defendants.

Consolidated With
Case No. 8:16-cv-1795-JLS-AFMx

17 AMERICARE MEDSERVICES, INC.,
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19 Plaintiff,
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21 vs.
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23 CITY OF COSTA MESA and CARE
24 AMBULANCE SERVICE, INC.,
25
26 Defendants.

Consolidated With
Case No. 8:16-cv-1804-JLS-AFMx

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1 AMERICARE MEDSERVICES, INC.,
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3 Plaintiff,
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5 vs.
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7 CITY OF GARDEN GROVE and CARE
8 AMBULANCE SERVICE, INC.,
9
10 Defendants.

Consolidated With
Case No. 8:16-cv-1806-JLS-AFMx

9 AMERICARE MEDSERVICES, INC.,
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11 Plaintiff,
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13 vs.
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15 CITY OF LAGUNA BEACH,
16
17 Defendant.

Consolidated With
Case No. 8:16-cv-1817-JLS-AFMx

16 AMERICARE MEDSERVICES, INC.,
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18 Plaintiff,
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20 vs.
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22 CITY OF BUENA PARK and CARE
23 AMBULANCE SERVICE, INC.,
24
25 Defendants.

Consolidated With
Case No. 8:16-cv-1832-JLS-AFMx

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1 AMERICARE MEDSERVICES, INC.,
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 3 Plaintiff,
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 5 vs.
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 7 CITY OF SAN CLEMENTE, and CARE
 8 AMBULANCE SERVICE, INC.,
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 10 Defendants.

Consolidated With
 Case No. 8:16-cv-1852-JLS-AFMx

11 **I. INTRODUCTION**

12 Before the Court are twelve separate actions filed by Plaintiff AmeriCare
 13 MedServices, Inc. against twelve Orange County cities.¹ In each action, the City
 14 Defendant filed a Motion to Dismiss.² Plaintiff AmeriCare MedServices, Inc. opposed
 15 each Motion,³ and each of the City Defendants replied. Having taken the matter under
 16 submission and considered the parties’ briefs and oral arguments, the Court GRANTS the
 17 City Defendants’ Motions.

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 20 ¹ In some of these actions, AmeriCare also included CARE Ambulance Service, Inc. as a
 Defendant.

21 ² The City Defendants are the Cities of Huntington Beach, Orange, Anaheim, Newport
 22 Beach, La Habra, Fullerton, Fountain Valley, Costa Mesa, Garden Grove, Laguna Beach, Buena
 Park, and San Clemente.

23 ³ To support AmeriCare’s Oppositions, Richard A. Narad, a professor of Health Services
 24 Administration at California State University Chico, has filed motions for leave to file amicus
 25 briefing in this matter. An amicus brief is normally allowed only when (1) “a party is not
 26 represented competently or is not represented at all,” (2) “the amicus has an interest in another
 27 case that may be affected by the holding in the present case,” or (3) “the amicus can present
 28 unique information that can help the court in a way that is beyond the abilities the lawyers for the
 parties are able to provide.” *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08CV1992 AJB (MDD),
 2012 WL 849167, at *4 (S.D. Cal. Mar. 13, 2012) (citing *Ryan v. Commodity Futures Trading
 Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). Because the Court finds that Professor Narad fails
 to establish any of these bases, the Court DENIES his motions for leave to file amicus briefing.

1 **II. BACKGROUND**

2 The nature of AmeriCare’s action against each City Defendant is substantively the
3 same. AmeriCare seeks relief from the City Defendants under the Sherman Act for each
4 City’s alleged abuse of its police and regulatory powers in designating a single provider of
5 emergency ambulance service in its geographical area. Because the history of each City’s
6 provision of emergency ambulance service is relevant to this case, the Court relates that
7 history for each City as alleged in AmeriCare’s amended complaints.

8 *Huntington Beach.* Starting in the 1960s, the City of Huntington Beach had a de
9 facto, unwritten agreement with Seals Ambulance Services, Inc. to provide emergency
10 ambulance service within Huntington Beach city limits. (Huntington Beach FAC ¶ 23,
11 8:16-cv-1596-JLS-AFMx, Doc. 14.)⁴ In 1986, Huntington Beach entered into a contract
12 with Orange County in which the County would provide for the licensing and regulation of
13 ambulance service within Huntington Beach. (Huntington Beach FAC, Ex. A, 8:16-cv-
14 1596-JLS-AFMx, Doc. 14-1.) Seals continued to operate exclusively within Huntington
15 Beach until 1993. (Huntington Beach FAC ¶ 27.) In 1993, Huntington Beach ceased
16 using its existing provider and began providing emergency ambulance service itself. (*Id.* ¶
17 29.)

18 *Orange.* In 1972, the City of Orange had a de facto, unwritten agreement with
19 Morgan Ambulance Service, Inc. to provide emergency ambulance service within Orange
20 city limits. (Orange FAC ¶ 23, 8:16-cv-1680-JLS-AFM, Doc. 18.) In 1979, Orange
21 entered into a contract with Orange County in which the County would provide for the
22 licensing and regulation of ambulance and convalescent transport services within Orange.
23 (Orange FAC, Ex. A, 8:16-cv-1680-JLS-AFM, Doc. 18-1.) That contract was renewed in
24 1980, and then amended in 1986. (*Id.*) Morgan (which later became Medix Ambulance
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26 ⁴ For ease of reference, citations to the parties’ filings will identify the City Defendant
27 involved in the action. Thus, “Huntington Beach FAC” refers to AmeriCare’s First Amended
28 Complaint against Huntington Beach. Here, the relevant filing can be found on the docket for the
Huntington Beach Action, Case No. 8:16-cv-1596-JLS-AFM, at ECF No. 14.

1 Service) continued to operate exclusively within Orange until 1995. (Orange FAC ¶¶ 23,
2 27.) In 1995, Orange ceased using its existing provider and began providing emergency
3 ambulance service itself. (*Id.* ¶ 29.)

4 *Anaheim.* As of June 1, 1980, the City of Anaheim had a de facto, unwritten
5 agreement with Southland Ambulance to provide emergency ambulance service within
6 Anaheim city limits. (Anaheim FAC ¶ 26, 8:16-cv-1703-JLS-AFM, Doc. 19.) Southland
7 was purchased in 1993 and subsequently passed through several corporate owners before
8 merging with its successor, American Medical Response, Inc. (“AMR”). (*Id.* ¶ 27.) AMR
9 served as the ambulance service provider within Anaheim until 1998. (*Id.*) In 1998,
10 Anaheim ceased using its existing provider and granted an exclusive contract to CARE
11 Ambulance Service, Inc. (*Id.* ¶ 28.)

12 *Newport Beach.* From the 1960s into the early 1990s, the City of Newport Beach
13 had a de facto, unwritten agreement with Schaefer Ambulance Service, Inc. and Seals to
14 provide emergency ambulance service within Newport Beach city limits. (Newport Beach
15 FAC ¶ 23, 8:16-cv-1724-JLS-AFM, Doc. 14.) In 1994, Newport Beach entered into an
16 exclusive contract with MedTrans to provide emergency ambulance service in Newport
17 Beach. (*Id.* ¶ 25.) MedTrans did so until 1996, when Newport Beach ceased their
18 relationship and began providing emergency ambulance service itself. (*Id.* ¶¶ 25, 27.)

19 *La Habra.* From 1979 until 1995, the City of La Habra had a de facto, unwritten
20 agreement with Emergency Ambulance Service, Inc. to provide emergency ambulance
21 service within La Habra city limits. (La Habra FAC ¶¶ 25–26, 8:16-cv-1759-JLS-AFM,
22 Doc. 19.) In 1995, La Habra initiated a city-operated emergency ambulance service
23 program which was operated by its municipal fire department. (*Id.* ¶ 26.) On June 27,
24 2005, La Habra disbanded its fire department and transferred its ambulance service to its
25 municipal police department. (*Id.*) In 2008, La Habra granted an exclusive contract for
26 emergency ambulance service to CARE. (*Id.* ¶ 27.)

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1 *Fullerton.* As of June 1, 1980, the City of Fullerton had a de facto, unwritten
2 agreement with Southland to provide emergency ambulance service within Fullerton city
3 limits. (Fullerton FAC ¶ 26, 8:16-cv-1765-JLS-AFM, Doc. 19.) Southland eventually
4 merged with AMR, which continued to provide emergency ambulance service in Fullerton
5 until 2003. (*Id.*) In November 2003, Fullerton ceased using its existing provider and
6 granted an exclusive contract to CARE for the provision of emergency ambulance service.
7 (*Id.* ¶ 27.)

8 *Fountain Valley.* As of June 1, 1980, the City of Fountain Valley had a de facto,
9 unwritten agreement with Seals to provide emergency ambulance service within Fountain
10 Valley city limits. (Fountain Valley FAC ¶ 26, 8:16-cv-1795-JLS-AFM, Doc. 16.) In
11 1998, Fountain Valley granted an exclusive contract to CARE, which it has renewed every
12 year since. (*Id.* ¶ 27.)

13 *Costa Mesa.* As of June 1, 1980, the City of Costa Mesa had a de facto, unwritten
14 agreement with Schaefer and Seals to provide emergency ambulance services within Costa
15 Mesa city limits. (Costa Mesa FAC ¶ 26, 8:16-cv-1804-JLS-AFM, Doc. 16.) On August
16 1, 1981, Costa Mesa entered into a contract with Orange County to administer emergency
17 response ambulance service within Costa Mesa. (*Id.* ¶ 27.) Schaefer and Seals continued
18 to operate in Costa Mesa without a contract until the mid-1990s. (*Id.* ¶ 28.) In October
19 2000, Costa Mesa awarded an exclusive agreement for all emergency ambulance service
20 within city limits to Schaefer. (*Id.*) That agreement was extended until September 2008.
21 (*Id.*) In 2008, Costa Mesa granted an exclusive contract to CARE. (*Id.* ¶ 29.)

22 *Garden Grove.* As of June 1, 1980, the City of Garden Grove had de facto,
23 unwritten agreements with several ambulance services, including Schaefer, Southland
24 (later acquired by AMR), and Medix, to provide emergency ambulance services within its
25 city limits. (Garden Grove FAC ¶ 26, 8:16-cv-1806-JLS-AFM, Doc. 18.) In 1994,
26 CareLine, a successor to Southland, was awarded an exclusive contract to provide
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1 emergency ambulance service in Garden Grove. (*Id.* ¶ 27.) In 2000, Garden Grove
2 granted an exclusive contract to CARE. (*Id.* ¶ 28.)

3 *Laguna Beach.* As of June 1, 1980, the City of Laguna Beach had de facto,
4 unwritten agreements with several ambulance services, including Wind Ambulance, Inc.,
5 Scudders Ambulance Service, Inc., and Life Care Ambulance (later acquired by AMR), to
6 provide emergency ambulance services within its city limits. (Laguna Beach FAC ¶¶ 24–
7 25, 8:16-cv-1817-JLS-AFM, Doc. 15.) In 1996, Laguna Beach granted an exclusive
8 contract to Doctor’s Ambulance Service for emergency ambulance service. (*Id.* ¶ 26.)

9 *Buena Park.* As of June 1, 1980, the City of Buena Park did not have a written
10 agreement in effect with its designated private emergency ambulance service provider.
11 (Buena Park FAC ¶ 26, 8:16-cv-1832-JLS-AFM, Doc. 18.) In 1999, Buena Park granted
12 an exclusive contract to CARE, which it has regularly extended to the present. (*Id.* ¶ 27.)

13 *San Clemente.* As of June 1, 1980, the City of San Clemente utilized multiple
14 private ambulance services such as Doctor’s, Life Care, Medix, and Scudders, to provide
15 emergency ambulance services within its city limits. (San Clemente FAC ¶¶ 26–27, 8:16-
16 cv-1852-JLS-AFM, Doc. 17.) At the time, San Clemente did not have a written agreement
17 in effect with its providers. (*Id.* ¶ 26.) In 2015, San Clemente granted an exclusive
18 contract to CARE for the provision of emergency ambulance service. (*Id.* ¶ 28.)

19 On February 25, 2015, AmeriCare submitted a written request to the Orange County
20 Emergency Medical Services Authority (“OCEMS”) to be placed on rotation for
21 emergency ambulance services within the geographical area of each of the City
22 Defendants. (City Defendants FACs.)⁵ OCEMS replied on March 18, 2015, directing
23 AmeriCare to contact the city manager for each City Defendant. (*Id.*) AmeriCare
24 submitted its written request to each City Defendant on March 19, 2015, explaining its
25 correspondence with OCEMS and requesting that either the City Defendant arrange for

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27 ⁵ To avoid citing to each FAC every time a fact common to each action is recited by the
28 Court, the Court cites generally to all the FACs. Pincites are omitted because the relevant
information is not necessarily alleged on the same page or paragraph of each FAC.

1 AmeriCare to be placed into the emergency ambulance service rotation or state a position
2 that it does not have responsibility for the administration of prehospital emergency medical
3 services. (*Id.*) The City Defendants refused AmeriCare’s request. (*Id.*)

4 AmeriCare then filed the instant actions against the City Defendants. AmeriCare
5 asserts the following claims against all City Defendants: (1) monopolization and attempted
6 monopolization under Section 2 of the Sherman Act; (2) declaration of rights under
7 Section 1060 of the California Code of Civil Procedure; and (3) declaratory judgment
8 under 28 U.S.C. § 2201. (City Defendants FACs.) In nine of the twelve actions,
9 AmeriCare asserts the following additional claims: (1) conspiracy to monopolize under
10 Section 2 of the Sherman Act; and (2) conspiracy to restrain trade under Section 1 of the
11 Sherman Act. (Anaheim FAC ¶¶ 71–91; La Habra FAC ¶¶ 68–88; Fullerton FAC ¶¶ 69–
12 89; Fountain Valley FAC ¶¶ 68–88; Costa Mesa FAC ¶¶ 69–89; Garden Grove FAC ¶¶
13 69–89; Laguna Beach FAC ¶¶ 63–81; Buena Park FAC ¶¶ 69–89; San Clemente FAC ¶¶
14 70–90.)

15 The City Defendants now move to dismiss AmeriCare’s claims against them.

17 **III. LEGAL STANDARD**

18 **A. Rule 12(b)(1)**

19 “A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of
20 the pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*,
21 328 F.3d 1136, 1139 (9th Cir. 2003). In other words, a motion to dismiss for lack of
22 subject matter jurisdiction pursuant to Rule 12(b)(1) can be facial or factual. *Safe Air for*
23 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger
24 asserts that the allegations contained in a complaint are insufficient on their face to invoke
25 federal jurisdiction.” *Id.* “Dismissal for lack of subject matter jurisdiction is appropriate if
26 the complaint, considered in its entirety, on its face fails to allege facts sufficient to
27 establish subject matter jurisdiction.” *In re Dynamic Random Access Memory (DRAM)*
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1 *Antitrust Litig.*, 546 F.3d 981, 984-985 (9th Cir. 2008). “By contrast, in a factual attack,
2 the challenger disputes the truth of the allegations that, by themselves, would otherwise
3 invoke federal jurisdiction.” *Meyer*, 373 F.3d at 1039. “In resolving a factual attack on
4 jurisdiction, the district court may review evidence beyond the complaint without
5 converting the motion to dismiss into a motion for summary judgment.” *Id.* When a
6 motion is made pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the
7 burden of proving that the court has subject matter jurisdiction. *Tosco Corp. v. Cmty. for*
8 *a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) *overruled on other grounds by Hertz*
9 *Corp. v. Friend*, 559 U.S. 77 (2010).

10 **B. Rule 12(b)(6)**

11 In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all
12 “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679
13 (2009). Furthermore, courts must draw all reasonable inferences in the light most
14 favorable to the non-moving party. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992,
15 998 (9th Cir. 2010). However, “courts ‘are not bound to accept as true a legal conclusion
16 couched as a factual allegation.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
17 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The complaint must contain
18 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
19 face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
20 plausibility when the pleaded factual content allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550
22 U.S. at 556).

23
24 **IV. DISCUSSION**

25 **A. Interstate Commerce Requirement**

26 Three of the City Defendants raise the argument that AmeriCare’s Sherman Act
27 claims must be dismissed for lack of subject matter jurisdiction because AmeriCare fails to
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1 plead that City Defendants’ conduct has any effect on interstate commerce. (Orange Mem.
2 at 3, Doc. 24; Buena Park Mem. at 4, Doc. 24; San Clemente Mem. at 2, Doc. 23.) Section
3 1 of the Sherman Act makes unlawful “[e]very contract, combination . . . or conspiracy, in
4 restraint of trade or commerce among the several States.” 15 U.S.C. § 1. Section 2 of the
5 Sherman Act makes it unlawful for any person to “monopolize, or attempt to monopolize,
6 or combine or conspire . . . to monopolize any part of the trade or commerce among the
7 several States.” 15 U.S.C. § 2. In *McLain v. Real Estate Board of New Orleans, Inc.*, the
8 Supreme Court declared that “jurisdiction may not be invoked under [the Sherman Act]
9 unless the relevant aspect of interstate commerce is identified.” 444 U.S. 232, 242 (1980).
10 Therefore, a plaintiff must allege a relationship between the defendant’s conduct and
11 interstate commerce in the pleadings. *McLain*, 444 U.S. at 242. The Ninth Circuit has
12 interpreted *McLain* to mean that the relationship to interstate commerce “is not only an
13 element of the alleged antitrust offense, but also a necessary jurisdictional requirement.”
14 *U.S. v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993).

15 To meet this requirement, the Ninth Circuit initially stated that a plaintiff must
16 identify a relevant aspect of interstate commerce and show “as a matter of practical
17 economics” that the defendant’s activities have a “not insubstantial effect on the interstate
18 commerce involved.” *Palmer v. Roosevelt Lake Log Owners Ass’n, Inc.*, 651 F.2d 1289,
19 1291 (9th Cir. 1981) (quoting *McLain*, 444 U.S. at 246) (internal quotation marks omitted).
20 The Ninth Circuit has more recently stated, however, that a plaintiff must show that the
21 defendant’s conduct has a “substantial effect on interstate commerce.” *Freeman v. San*
22 *Diego Ass’n of Realtors*, 322 F.3d 1133, 1143 (9th Cir. 2003) (quoting *McLain*, 444 U.S.
23 at 242) (internal quotation marks omitted); *see also Cherrone v. Florsheim Development*,
24 No. CIV. 2:12-02069 WBS CKD, 2012 WL 4891743, at *2 (E.D. Cal. Oct. 12, 2012)
25 (applying the “substantial effect” standard).

26 AmeriCare’s pleadings fail under either standard. AmeriCare pleads only that the
27 City Defendants have “attempted and succeeded at maintaining an illegal monopoly in
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1 restraint of interstate commerce.” (City Defendants FACs.) There is no allegation of a
2 substantial effect on interstate commerce.⁶ (*See id.*) There is no identification of any
3 aspect of interstate commerce that was affected by the City Defendants’ conduct, nor any
4 allegations from which the Court can reasonably infer that, “as a matter of practical
5 economics,” the City Defendants’ conduct had a substantial (or not insubstantial) effect on
6 interstate commerce.

7 Accordingly, the Court concludes that dismissal of AmeriCare’s Sherman Act
8 claims against the City Defendants is appropriate on this basis. Typically, when a
9 deficiency in the plaintiff’s complaint is of a type that can be cured by amendment, the
10 Court will dismiss the complaint with leave to amend. *See Doe v. U.S.*, 58 F.3d 494, 497
11 (“[A] district court should grant leave to amend even if no request to amend the pleading
12 was made, unless it determines that the pleading could not possibly be cured by the
13 allegation of other facts.”) However, for reasons stated below, the Court finds that
14 granting leave to amend would be futile and inappropriate because even if AmeriCare were
15 to adequately plead substantial effects on interstate commerce, its Sherman Act claims
16 would incurably fail on other grounds.

17 **B. Burford Abstention**

18 Seven of the City Defendants urge the Court to invoke *Burford* abstention and
19 decline to hear this case. (Orange Mem. at 9–11; La Habra Mem. at 19–20, Doc. 28;
20 Fullerton Mem. at 18–19, Doc. 28; Costa Mesa Mem. at 19–20, Doc. 25; Garden Grove
21 Mem. at 15–16, Doc. 25; Buena Park Mem. at 15–17; San Clemente Mem. at 10–12.)
22 *Burford* abstention allows a court to “decline to rule on an essentially local issue arising
23 out of a complicated state regulatory scheme.” *U.S. v. Morros*, 268 F.3d 695, 705 (9th Cir.

24
25 ⁶ Even if AmeriCare included such an allegation, the bare allegation alone would not be
26 enough. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (noting that “a formulaic
27 recitation of the elements of a cause of action will not do” and that “[f]actual allegations must be
28 enough to raise a right to relief above the speculative level”); *see also McLain*, 444 U.S. at 242
29 (“[I]t is not sufficient merely to rely on identification of a relevant local activity and to presume an
interrelationship with some unspecified aspect of interstate commerce.”)

1 2001). Its purpose is to protect complex state administrative processes from undue federal
2 interference. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491
3 U.S. 350, 362 (1989). In the Ninth Circuit, invocation of *Burford* abstention requires (1)
4 “that the state has chosen to concentrate suits challenging the actions of the agency
5 involved in a particular court”; (2) “that federal issues could not be separated easily from
6 complex state law issues with respect to which state courts might have special
7 competence”; and (3) “that federal review might disrupt state efforts to establish a coherent
8 policy.” *Id.* (quoting *Knudsen Corp. v. Nevada State Dairy Comm’n*, 676 F.2d 374, 377
9 (9th Cir. 1982)).

10 None of these requirements are met here. There is no showing that California has
11 chosen to concentrate suits challenging municipal actions in a particular court. At least
12 one of the City Defendants outright admits that the first factor is not met. (Buena Park
13 Mem. at 15–16 (“[T]he first *Morros* factor is apparently absent (there seems to be no
14 special tribunal for claims relating to EMS exclusion)”).) Nor is this a case in which
15 the federal issues cannot easily be separated from state law issues or in which federal
16 review might disrupt state efforts to establish a coherent policy. The mere possibility that
17 exercise of federal jurisdiction over federal antitrust claims might lead to a conflict with a
18 state court decision is not enough to require abstention. *See Turf Paradise, Inc. v. Arizona*
19 *Downs*, 670 F.2d 813, 820 (9th Cir. 1982). As the Supreme Court has stated, *Burford*
20 abstention represents an “extraordinary and narrow exception to the duty of the District
21 Court to adjudicate a controversy properly before it.” *Quackenbush v. Allstate Ins. Co.*,
22 517 U.S. 706, 728 (1996) (citation and internal quotation marks omitted). Exercise of
23 jurisdiction is particularly important here because “federal courts have exclusive
24 jurisdiction over federal antitrust claims.” *Turf Paradise*, 670 F.2d at 821.

25 The Court therefore declines to apply *Burford* abstention to this case.
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1 **C. Parker Immunity**

2 All City Defendants raise the defense of *Parker* immunity to AmeriCare’s Sherman
3 Act claims. (*See* City Defendants Memos.) In *Parker v. Brown*, the Supreme Court held
4 that the Sherman Act does not apply to the actions of a state or the actions of its officers or
5 agents as directed by its legislature. 317 U.S. 341, 350–51 (1943). However, state
6 agencies or subdivisions of a state are not exempt from the Sherman Act “simply by reason
7 of their status as such.” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389,
8 408 (1978). Rather, *Parker* immunity exempts anticompetitive conduct “engaged in as an
9 act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy
10 to displace competition with regulation or monopoly public service.” *Id.* at 413. With
11 respect to local governmental entities, their activities are protected by *Parker* immunity “if
12 they are undertaken pursuant to a ‘clearly articulated and affirmatively expressed’ state
13 policy to displace competition.”⁷ *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct.
14 1003, 1011 (2013) (quoting *Cnty. Commc’ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). It
15 is unnecessary for a state legislature to “expressly state in a statute or its legislative history
16 that the legislature intends for the delegated action to have anticompetitive effects.” *Id.*
17 (quoting *Town of Hallie v. Eau Claire*, 471 U.S. 34, 43 (1985)). A state policy has been
18 clearly articulated and affirmatively expressed “if the anticompetitive effect was the
19 ‘foreseeable result’ of what the State authorized.” *Id.* (quoting *Hallie*, 471 U.S. at 42). An
20 anticompetitive effect is foreseeable if it is “the inherent, logical, or ordinary result of the
21 exercise of authority delegated by the state legislature.” *Id.* at 1012–13.

22 With these principles in mind, the Court analyzes whether a state policy of
23 anticompetitive conduct exists here.

24
25 _____
26 ⁷ “[U]nlike private parties, such entities are not subject to the ‘active state supervision
27 requirement’ because they have less of an incentive to pursue their own self-interest under the
28 guise of implementing state policies.” *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct.
1003, 1011 (2013) (quoting *Town of Hallie v. Eau Claire*, 471 U.S. 34, 46–47 (1985)).

1 **1. California Government Code § 38794**

2 Section 38794 of the California Government Code states that “[t]he legislative body
3 of a city may contract for ambulance service to serve the residents of the city as
4 convenience requires.” Cal. Gov’t Code § 38794. Over thirty years ago, the Ninth Circuit
5 relied on Section 38794 to hold that cities providing or contracting for ambulance service
6 were entitled to *Parker* immunity. In *Springs Ambulance Service, Inc. v. City of Rancho*
7 *Mirage*, a private ambulance company brought suit under the Sherman Act after three
8 California cities decided to provide free municipal ambulance services through Riverside
9 County (which in turn engaged the California Department of Forestry to provide the
10 ambulance service). 745 F.2d 1270, 1271 (9th Cir. 1984). In concluding that the
11 exclusion of the private ambulance company did not run afoul of the Sherman Act, the
12 court referred to Section 38794 of the California Government Code. *Springs Ambulance*,
13 745 F.2d at 1273 (citing Cal. Gov’t Code § 38794). Even though the statute does not
14 explicitly authorize cities to abolish competition from private ambulance companies, the
15 court concluded that “the exclusion of private ambulance companies is a necessary or
16 reasonable consequence of providing subsidized municipal ambulance service, and was
17 surely within the contemplation of the legislature when it enacted Gov’t Code § 38794.”
18 *Id.* In doing so, the court noted that “[w]here the residents of a city pay taxes to make
19 emergency ambulance service available, it would be anomalous to require that the city also
20 dispatch a private for-hire service with, or in alternation with, its own.” *Id.* “To do so
21 would, in effect, force citizen users to pay twice for the same service.” *Id.*

22 Although *Springs Ambulance* has not been expressly overruled, the validity of its
23 reasoning is in question following the Supreme Court’s decision in *Phoebe Putney*. In
24 *Phoebe Putney*, the FTC filed an antitrust suit against the Hospital Authority of Albany-
25 Dougherty County to enjoin the hospital authority from acquiring a second hospital in
26 Dougherty County. 133 S. Ct. at 1008. Acquisition of the hospital would have resulted in
27 the hospital authority owning the only two hospitals in Dougherty County. *Id.* The
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1 question before the Court was “whether a Georgia law that creates special-purpose public
2 entities called hospital authorities and gives those entities general corporate powers,
3 including the power to acquire hospitals, clearly articulates and affirmatively expresses a
4 state policy to permit acquisitions that substantially lessen competition.” *Id.* at 1007. In
5 holding that the Georgia law did not express such a policy, the Court rejected the Eleventh
6 Circuit’s application of a “reasonably anticipated” test for determining whether an
7 anticompetitive effect was foreseeable. *Id.* at 1009. Rather, the anticompetitive effect had
8 to be “the inherent, logical, or ordinary result of the exercise of authority delegated by the
9 state legislature.” *Id.* at 1012–13.

10 In applying that standard to the facts before it, the Supreme Court concluded that
11 the Georgia law empowering hospital authorities to acquire hospitals did not clearly
12 articulate and affirmatively express a state policy for hospital authorities to make
13 acquisitions that would substantially reduce competition. *Id.* at 1012. The Court
14 distinguished the Georgia law from previous decisions finding an anticompetitive policy in
15 other contexts. “For example, in *Hallie [v. Eau Claire]*, the Wisconsin statutory law
16 regulating the municipal provision of sewage services expressly permitted cities to limit
17 their service to surrounding unincorporated areas.” *Id.* at 1013 (citing *Hallie*, 471 U.S. at
18 41). In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the clear articulation test was
19 “easily satisfied” because “[t]he very purpose of zoning regulation is to displace unfettered
20 business freedom in a manner that regularly has the effect of preventing normal acts of
21 competition.” *Id.* (quoting *Omni*, 499 U.S. 365, 373 (1991)).

22 “By contrast, ‘simple permission to play in a market’ does not ‘foreseeably entail
23 permission to roughhouse in that market unlawfully.’” *Id.* (citation omitted). “[T]he
24 power to acquire hospitals . . . does not ordinarily produce anticompetitive effects.” *Id.* at
25 1014. The fact that a reasonable legislature could anticipate the possibility of
26 anticompetitive conduct fell “well short of clearly articulating an affirmative state policy to
27 displace competition with a regulatory alternative.” *Id.* Moreover, the fact that the state
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1 legislature intended to improve access to affordable health care to all Georgia residents did
2 not “logically suggest” that the legislature intended the hospital authorities to create
3 hospital monopolies. *Id.* at 1015.

4 In light of the Court’s reasoning in *Phoebe Putney*, the Ninth Circuit’s analysis of
5 Government Code Section 38794 no longer appears valid.⁸ Nothing in Section 38794
6 explicitly confers on city governments the authority to act anti-competitively. Nor does
7 the power to enter into contracts with ambulance service providers inherently restrict
8 competition between those providers. A city could, after all, engage in a competitive
9 bidding process to choose an ambulance service provider and regularly open bids for better
10 contracts. As the Supreme Court noted, “[w]hen a State grants some entity general power
11 to act . . . it does so against the backdrop of federal antitrust law.” *Phoebe Putney*, 133 S.
12 Ct. at 1013 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992)). Just because the
13 California legislature could reasonably anticipate that a city government could use its
14 Section 38794 powers in anticompetitive ways does not mean that the California
15 legislature expressed an affirmative state policy that cities do so. *See id.* at 1014. Finally,
16 to the extent Section 38794 furthers critical state interests in the public peace, health, and
17 safety, *see* Cal. Health & Safety Code §13801, these interests do not logically suggest a

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19 ⁸ The City Defendants point to *United National Maintenance, Inc. v. San Diego*
20 *Convention Center, Inc.*, 766 F.3d 1002 (9th Cir. 2014), to argue that *Springs Ambulance’s*
21 interpretation of Section 38794 is still valid. *United National* addressed whether the San Diego
22 Convention Center was empowered to hire cleaning staff internally to the exclusion of outside
23 cleaning companies. The Ninth Circuit held that Sections 37506 and 37505 of the Government
24 Code granted San Diego the authority to not just “play in the market,” but to act anti-competitively
25 with respect to its convention center. *United Nat’l*, 766 F.3d at 1010–11. In doing so, the court
26 relied on the words “manage its use” in Section 37506 and Section 37505’s requirement that funds
27 from the convention center first pay for the center before being applied to the benefit of the
28 municipality. *Id.* The court considered “managerial authorization” to be distinct from a general
grant of corporate authority. *Id.* at 1010.

The Court does not find that *United National* conclusively affirms the holding in *Springs Ambulance*. The two cases examine different sections of the Government Code that prescribe different powers to municipalities. Moreover, Section 38794 does not address managerial authorization or any other factors that the Ninth Circuit relied on in *United National* to find state authorization of anti-competitive conduct.

1 state policy permitting anticompetitive conduct in furtherance of those interests. *See*
2 *Phoebe Putney*, 133 S. Ct. at 1015. Accordingly, Government Code Section 38794 by
3 itself does not appear to clearly articulate and affirmatively express a state policy to
4 displace competition in the emergency ambulance services market.

5 **2. The California EMS Act**

6 However, Section 38794 is not the only California statute relevant to this issue. In
7 1980, the California legislature enacted the Emergency Medical Services System and the
8 Prehospital Emergency Medical Care Personnel Act (the “EMS Act”). *County of San*
9 *Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 913, 915 (1997). The EMS Act
10 created a comprehensive system governing virtually every aspect of prehospital emergency
11 medical services in California. *Id.* at 915. The Act created a two-tiered system of
12 regulation consisting of the Emergency Medical Services Authority at the state level and
13 local EMS agencies at the county level. *Id.* at 915–16. The original draft of the EMS Act
14 afforded no particular role for cities, but the version that was ultimately enacted included a
15 provision allowing cities that already provided prehospital emergency medical services to
16 continue doing so. *Id.* at 916. That provision stated, in relevant part, as follows:

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18 Upon the request of a city . . . that contracted for or provided, as of June 1,
19 1980, prehospital emergency medical services, a county shall enter into a
20 written agreement with the city . . . regarding the provision of prehospital
21 emergency medical services for that city Until such time that an
22 agreement is reached, prehospital emergency medical services shall be
23 continued at not less than the existing level, and the administration of
24 prehospital EMS by cities . . . presently providing such services shall be
25 retained by those cities

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29 Cal. Health and Safety Code §1797.201. The California Supreme Court later interpreted
30 Section 1797.201 as permitting eligible cities to continue administering prehospital

1 emergency medical services⁹ indefinitely. *See County of San Bernardino*, 15 Cal. 4th at
2 922–24.

3 In 1982, the Supreme Court issued its opinion in *Community Communications Co.,*
4 *Inc. v. City of Boulder*, where for the first time a majority of the Court adopted the clear
5 articulation test for extending *Parker* immunity to municipal activities.¹⁰ 455 U.S. 40, 51
6 (1982). In response, the California legislature amended the EMS Act in 1984, declaring
7 that California’s policy of “ensur[ing] the provision of effective and efficient emergency
8 medical care” had been hindered by the Supreme Court’s holding. *See* Cal. Health and
9 Safety Code § 1797.6(a). Accordingly, the legislature explicitly stated its intention “to
10 prescribe and exercise the degree of state direction and supervision over emergency
11 medical services as will provide for state action immunity under federal antitrust laws for
12 activities undertaken by local governmental entities carrying out their prescribed functions
13 under this division.” Cal. Health and Safety Code § 1797.6(b). “[T]his division” includes
14 Section 1797.201. Given that the EMS Act (1) contemplates the provision of prehospital
15 emergency medical services by cities; and (2) contains a clear and express intention by the
16 state to immunize from antitrust liability local government conduct in furtherance of the
17 EMS Act, the Court concludes that *Parker* immunity extends to the City Defendants in this
18 action.

19 3. The City Defendants’ Compliance with the EMS Act

20 Americare raises a number of arguments against this conclusion. First, AmeriCare
21 contends that the EMS Act contemplates anticompetitive conduct only in limited
22 circumstances, none of which apply here. (*See* AmeriCare Opps.) Specifically,
23 AmeriCare argues that (1) pursuant to Section 1797.224, only county EMS agencies can
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26 ⁹ “Emergency medical services” are defined as “the services utilized in responding to a
27 medical emergency.” Cal. Health and Safety Code § 1797.72. Emergency ambulance service
28 plainly falls within that definition.

¹⁰ The clear articulation test first appeared in *City of Lafayette*, but only a plurality of the
Court joined that portion of Justice Brennan’s opinion. *See* 435 U.S. 389.

1 create “exclusive operating areas” for emergency ambulance services; and (2) pursuant to
2 Section 1797.201, cities can exclusively contract for or provide emergency ambulance
3 services only to the extent they contracted for or provided those services as of June 1,
4 1980. (*Id.*) AmeriCare asserts that none of the City Defendants meet this requirement
5 under Section 1797.201. (*Id.*)

6 The Court does not find that Section 1797.224 precludes anticompetitive actions by
7 cities in furtherance of the EMS Act. Section 1797.224 explicitly states that “[n]othing in
8 this section supersedes Section 1797.201.” Therefore, Section 1797.224 does not limit in
9 any way a city’s authority to maintain a monopoly emergency ambulance service under
10 Section 1797.201 if that was the city’s arrangement as of June 1, 1980. Moreover, the
11 California legislature broadly declared its intention to extend state action immunity to
12 “local governmental entities” carrying out their prescribed functions under the EMS Act.
13 Cal. Health & Safety Code § 1797.6(b). Had the California legislature intended to limit
14 state action immunity to only county EMS agencies, or to exclude city governments from
15 state action immunity, it could easily have drafted Section 1797.6 to reflect that intention.

16 As for the City Defendants’ actual compliance with Section 1797.201, that issue is
17 irrelevant to determining whether *Parker* immunity applies to their actions. “The relevant
18 question is whether the *state* intended the authorizing statute to have anticompetitive
19 effects. Thus, what the *city* does to implement that statute, rightly or wrongly, reveals
20 nothing about the state’s intent.” *Traweek v. City and County of San Francisco*, 920 F.2d
21 589, 593 (9th Cir. 1990). For purposes of determining whether *Parker* immunity applies
22 to a city government, it is sufficient that the state law authorizes the city to act anti-
23 competitively. *See Omni*, 499 U.S. at 371–72 (rejecting the contention that a municipality
24 needs to be in compliance with the state law authorizing anticompetitive conduct for
25 *Parker* immunity to apply).

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1 **4. Market Participant Exception**

2 Next, AmeriCare urges the Court to recognize a market participant exception to
3 *Parker* immunity. (AmeriCare Opps.) The Supreme Court has indicated that a “possible
4 market participant exception” might exist where state sovereigns act “not in a regulatory
5 capacity but as a commercial participant in a given market.” *Omni*, 499 U.S. at 374–79.
6 *Omni* did not shed much light on when exactly a state acts as a market participant rather
7 than as a regulator. The only example given was *Union Pacific Railroad Co. v. United*
8 *States*, 313 U.S. 450 (1941), in which the Court held unlawful certain rebates and
9 concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a
10 wholesale produce market. *Omni*, 499 U.S. at 375. The Court has not elaborated on the
11 subject since *Omni*, and it has not yet held that a market participant exception to state
12 action immunity exists. *See Phoebe Putney*, 133 S. Ct. at 1010 n.4. Although other
13 circuits have discussed the issue¹¹, the Ninth Circuit has not yet ruled on the matter.

14 The Court declines to recognize a market participant exception here. First, as a
15 general matter an inquiry into whether a city is acting as a market participant would be in
16 tension with the Supreme Court’s holding that a city is entitled to *Parker* immunity so long
17 as there is a state law authorizing anticompetitive conduct in furtherance of a state
18 regulatory scheme. *See Omni*, 499 U.S. at 371–72.

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20 ¹¹ Contrary to AmeriCare’s assertions, it is unclear whether any circuit has in fact
21 recognized a market participant exception. The Federal Circuit mentioned the market participant
22 exception once in *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993),
23 *abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), and never
24 discussed the issue again. The Third Circuit once mentioned the exception in a footnote in *A.D.*
25 *Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001), but
26 district courts in the Third Circuit have not construed the footnote as holding that a market
27 participant exception to *Parker* immunity exists in the Third Circuit. *See Edinboro College Park*
28 *Apartments v. Edinboro Univ. Foundation*, No. 15-121 Erie, 2016 WL 6883295, at *4 (W.D. Pa.
Mar. 1, 2016); *Wheeler v. Beard*, No. Civ. A. 03-4826, 2005 WL 1217191, at *6 (E.D. Pa. May
19, 2005). Similarly, the Sixth Circuit suggested in *VIBO Corp., Inc. v. Conway*, 669 F.3d 675,
687 (6th Cir. 2012), that a market participant exception might exist, but a district court that later
considered *VIBO* did not consider it to definitively recognize a market participant exception in the
antitrust context, *Wooster Industrial Park, LLC v. City of Wooster*, 55 F. Supp. 3d 990, 999 (N.D.
Ohio, 2014).

1 Moreover, in the present case, the City Defendants’ provision of emergency
2 ambulance services does not implicate the exception. Emergency ambulance services are
3 far removed from the example given in *Omni* of a city acting in the capacity of an owner
4 and operator of a wholesale produce market. *See* 499 U.S. at 375 (citing *Union Pacific R.
5 Co. v. United States*, 313 U.S. 450, (1941)). Even other courts that have addressed a
6 possible market participant exception have found that the exception does not apply if a
7 state entity is performing its traditional governmental functions. *See, e.g., Wooster*, 55 F.
8 Supp. 3d at 1000 (finding that the city defendant was not a market participant when it
9 contracted to build a new cell tower for use by its safety services); *Edinboro*, 2016 WL
10 6883295, at *4 (finding that a market participant exception would not apply where the
11 alleged injuries stem from a public university’s obligations to provide education and
12 housing); *Wheeler*, 2005 WL 1217191, at *6 (finding that the Pennsylvania Department of
13 Corrections was acting in its governmental capacity in operating prison commissaries).

14 Here, the California legislature has expressly declared that the local provision of
15 emergency medical services, including ambulance services, is “critical to the public peace,
16 health, and safety of the state.” Cal. Health & Safety Code § 13801. In enacting the EMS
17 Act, the legislature declared its intent “to promote the development, accessibility, and
18 provision of emergency medical services to the people of the State of California.” Cal.
19 Health & Safety Code § 1797.5. The Act reflects the recognition that “one of the
20 preeminent functions of government in an organized society is the protection of the life
21 and health of its citizens.” *Ma v. City and County of San Francisco*, 95 Cal. App. 4th 488,
22 508 (2002), *disapproved of on other grounds by Eastburn v. Regional Fire Protection
23 Authority*, 31 Cal. 4th 1175 (2003). “Along with fire suppression and crime prevention,
24 the provision of emergency medical assistance to persons faced with imminent life-
25 threatening conditions joins with them to form a triage of public services considered at the
26 core of vital civic functions.” *Id.* Here, the State of California and the City Defendants are
27 operating emergency ambulance services as a quintessential governmental function.

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1 Therefore, even if there were a market participation exception to *Parker* immunity, it
2 would not apply.

3 Accordingly, the Court concludes that *Parker* immunity applies to the City
4 Defendants in this action and that dismissal of AmeriCare’s Sherman Act claims against
5 the City Defendants is appropriate. Because a finding of *Parker* immunity conclusively
6 decides AmeriCare’s Sherman Act claims, the Court finds it unnecessary to address the
7 City Defendants’ arguments regarding the Local Government Anti-trust Immunity Act or
8 whether AmeriCare suffered an antitrust injury.

9 **D. Other Remaining Claims**

10 Having dismissed AmeriCare’s Sherman Act claims, no federal claims remain to be
11 adjudicated. AmeriCare’s remaining claims are for declaratory judgment under California
12 Code of Civil Procedure Section 1060 and 28 U.S.C. § 2201 declaring that the City
13 Defendants (1) lack authority to create an exclusive operating area under California Health
14 and Safety Code Section 1797.224, and (2) repudiated any rights they once had under
15 California Health and Safety Code Section 1797.201. (*See* AmeriCare FACs.) Both of
16 these claims are state law claims. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S.
17 667, 671–72 (1950) (explaining that Congress did not impliedly repeal or modify the
18 requirements of subject matter jurisdiction when it passed the Declaratory Judgment Act).
19 Given the early stage of litigation, the Court declines to exercise supplemental jurisdiction
20 over these claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)
21 (“[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and
22 only state-law claims remain, the federal court should decline the exercise of jurisdiction
23 by dismissing the case without prejudice.”).

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS the City Defendants’ Motions to Dismiss. Because the Court finds that AmeriCare cannot amend its complaint in a way that would overcome the City Defendants’ *Parker* immunity, AmeriCare’s Sherman Act claims against the City Defendants are DISMISSED WITH PREJUDICE. AmeriCare’s claims for declaratory judgment against the City Defendants are DISMISSED WITHOUT PREJUDICE for AmeriCare to file in state court.

DATED: March 28, 2017



JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE