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. 8:16-cv-01703-JLS (AFMx) (Lead Case)
Hon. Josephine L. Staton, Judge

BRIEF OF THE CALIFORNIA EMERGENCY MEDICAL SERVICES AUTHORITY AS *AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

///

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT OF THE IDENTITY OF THE AMICUS

Amicus curiae California Emergency Medical Services Authority (State Authority) is the state agency designated by the California Legislature "for the coordination and integration of all state activities concerning emergency medical services." Cal. Health & Safety Code § 1797.1. Ensuring the best quality of emergency services is of paramount importance to the State Authority. The State Authority must assess service areas to "determin[e] the need for additional emergency medical services, coordination of emergency medical services, and the effectiveness of emergency medical services." *Id.* at §§ 1797.102; 1797.103.

Given these responsibilities, the State Authority has multiple interests in the proper enforcement of the Emergency Medical Services (EMS) Act, including ensuring that the EMS Act promotes a competitive marketplace in in what may be the most important public services that Californians will ever use. Fed. R. of App. P. 29(a)(4)(D). The State Authority also has particular familiarity with the EMS Act that it can share with the Court. Cal. Health & Safety Code §§ 1797.1, 1797.100-1797.197a (outlining role and oversight responsibilities of State Authority); 1797.107 (designating the State Authority as the entity responsible for adopting rules and regulations as necessary to carry out the purpose and intent of the EMS Act). The district

court's decision, if affirmed, would potentially throw California's complex EMS system into chaos by essentially allowing cities and fire districts to self-designate themselves as the "sole deciders" of EMS services, outside of the statutory scheme and outside of State oversight and regional coordination.

This brief is the sole product of the State Authority and its counsel. No party's counsel authored the brief in whole or in part. Fed. R. App. P. 29(a)(4)(E)(i). No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E)(ii). No other person contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E)(iii).

INTRODUCTION

The issue presented in this appeal concerns whether, and under what circumstances, California's Emergency Medical Services (EMS) Act permits local government entities to self-designate as the exclusive providers of emergency medical services. Although the Sherman Act generally prohibits anticompetitive actions, *Parker* immunity—*see Parker v. Brown*, 317 U.S. 341, 350-51 (1943)—provides that the Sherman Act does not apply to the actions of local entities when those entities undertake activities pursuant to a "clearly articulated and affirmatively expressed state policy to displace competition." *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226 (2013) (quotation marks and citation omitted).

Because *Parker* immunity turns on this question of state law and policy, the State Authority respectfully requests this issue be certified to the California Supreme Court. Cal. R. Court 3.548(a)(2) (2017). Specifically, the State Authority requests that the Court certify the following issue:

> Does California Health and Safety Code section 1797.201 grant cities and fire districts the authority to designate themselves as exclusive providers of EMS services, or must cities and fire districts go through the process in section 1797.224 to be designated as exclusive providers of EMS services?

Allowing the California Supreme Court to outline the contours of the EMS Act, an important, complex statutory scheme, will help determine the final outcome of this case.

In the event that this Court elects not to certify the issue to the California Supreme Court, this Court should conclude that the district court improperly interpreted California's EMS Act. The EMS Act—and specifically, section 1797.201—grants cities and fire districts, in narrow factual circumstances, the ability "to retain" their EMS services; however, section 1797.201 does not provide cities or fire districts with the authority to create or operate exclusive operating areas (EOAs). The EMS Act only provides, under section 1797.224, that an oversight body may create EOAs under prescribed circumstances. No provision of the EMS Act allows local cities or fire districts to self-designate as exclusive providers of EMS services.

The district court also erred in failing to undertake the statutorily-required factual inquiry regarding whether these twelve City Defendants-Appellees actually qualify for section 1797.201's protections.

STATEMENT OF ISSUES

1. Whether this Court should certify the following issue of state law to the California Supreme Court: Does California Health and Safety Code

section 1797.201 grant cities and fire districts the authority to designate themselves as exclusive providers of EMS services, or must cities and fire districts go through the process in section 1797.224 to be designated as exclusive providers of EMS services?

2. Whether the district court properly concluded that California Health and Safety Code section 1797.201 permits cities or fire districts to self-designate as excusive providers of EMS services, outside State and regional coordination.

3. Whether the district court properly concluded that it need not conduct a factual inquiry to determine whether the City Appellees meet the requirements of California Health and Safety Code section 1797.201.

STATUTORY BACKGROUND

A. The Emergency Medical Services Act

The EMS Act, enacted in 1980, created a comprehensive system governing prehospital emergency medical services. Cal. Health & Saf. Code § 1797 *et seq.*[1] Prior to the EMS Act, "the law governing prehospital emergency medical services was haphazard." *See County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909, 914 (1997). The EMS Act was

[1] All further references are to the California Health and Safety Code unless otherwise noted.

enacted to "provide the state with a statewide system for emergency medical services" and to "ensure the provision of effective and efficient emergency medical care" to the people of California. Stats. 1980, ch. 1260, § 7, at 4261-4277; §§ 1797.1, 1797.6(a).

1. State and Local Responsibilities

The EMS Act created a two-tiered system of regulation for emergency medical services.[2] *County of Butte v. Cal. Emergency Medical Services*, 187 Cal.App.4th 1175, 1190-1192 (2010). The first tier is *amicus curiae* State Authority which "is responsible for the coordination and integration of all state activities concerning emergency medical services." § 1797.1. The State Authority must "assess each [Emergency Medical Services (EMS)] area[3] or the system's service area for the purpose of determining the need for additional emergency medical services, coordination of emergency medical services, and the effectiveness of emergency medical services." §§ 1797.102; 1797.103.

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[2] "Emergency medical services" is defined as "the services utilized in responding to a medical emergency" and includes the provision of ambulance transportation services, advanced life support by paramedics, or limited advanced life support by advanced emergency medical technicians. § 1797.72.

[3] An "EMS area" is "the geographic area within the jurisdiction of the designated local EMS agency." § 1797.74.

At the second-tier of EMS regulation, "[e]ach county may develop an emergency medical services program." § 1797.200. If a county elects to establish an emergency medical services program, it must designate a local Emergency Medical Services Agency (Local EMS Agency) to oversee and operate the program. § 1797.200; *Schaefer's Ambulance Service v. Cnty. of San Bernardino*, 68 Cal.App.4th 581, 584-585 (1998). The Local EMS Agency must submit its EMS plan to the State Authority for review. §§ 1797.254 & 1797.105(a). The State Authority examines the EMS plan to determine whether it "effectively meet[s] the needs of the persons served," is "consistent with coordinating in the geographical area served," and is "concordant and consistent with applicable guidelines . . . established by the authority." § 1797.105(b); *See, e.g.*, Amicus' Request for Judicial Notice (RJN) Exh. 5 (State approval of the Orange County EMS Agency Plan). If the State Authority finds a plan deficient in one of these areas, the Local EMS Agency may not implement its EMS plan. *Id*.

2. Section 201

At the heart of this litigation lies the interpretation and application of a provision within the EMS Act, section 1797.201 (section 201), which allows municipalities and fire districts that provided emergency medical services as

of June 1, 1980, to continue to provide those services until they transfer EMS administration to the Local EMS Agency:

> [u]pon 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**.

§ 1797.201 (emphasis added). Essentially, section 201 grants a limited safe harbor to eligible cities and fire districts ("201 entities") to continue providing services as a stop-gap measure until a local agency is established. *See County of San Bernardino*, 15 Cal.4th at 929-30; *Valley Medical Transport, Inc. v. Apple Valley Fire Protection Dist.*, 17 Cal.4th 747, 756 (1998).

As recognized by the California Supreme Court, section 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." *County of San Bernardino*, 15 Cal.4th at 922. As such, the California Supreme Court has found that there are limits to section 201's protection, such that eligible 201 entities cannot

expand into new types of services they did not provide as of June 1, 1980, or resume administration of emergency medical services that have been abandoned by the 201 entity. *Id.* at 932; *Valley Medical Transport,* 17 Cal.4th at 751.

3. Exclusive Operating Areas

In 1984, the EMS Act was amended to authorize Local Agencies to grant exclusive operating areas (EOAs) to emergency ambulance services, and providers of advanced life support and limited advanced life support. An EOA "restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support" in a certain EMS area or subarea. § 1797.85. This arrangement ensures EMS coverage in remote areas: "an [exclusive operation area] permits local EMS agencies to offer private emergency service providers protection from competition in profitable, populous areas in exchange for the obligation to serve unprofitable, more sparsely populated areas." *Valley Medical Transport*, 17 Cal.4th at 759.

Ordinarily, a Local EMS Agency must assign EOAs to providers by means of a "competitive process." § 1797.224; Amicus' RJN, Exh. 6. However, if it assigns an EOA to a provider which is already operating in that area "in the manner and scope in which the services have been provided

without interruption since January 1, 1981," it need not use a competitive process. § 1797.224. That practice is commonly referred to as "grandfathering" existing providers into EOAs. In order to grant operating rights within an EOA via grandfathering, there cannot have been a change in manner and scope of services within that EOA. § 1797.224; *Valley Medical Transport*, 17 Cal.4th at 759. In sum, EOAs are authorized by only processes: (1) through a competitive process or (2) via "grandfathering." Importantly, under the plain language of section 224, only the Local EMS Agency may make this determination. A city or fire district cannot unilaterally claim that they have been grandfathered into an EOA. *See County of San Bernardino,* 15 Cal.4th at 931 (section 224 "speaks only of local EMS agencies, not cities and fire districts, creating an EOA").

4. The Complex Nature of How Local Governments Provide Individualized Emergency Medical Services

How individual local governments provide emergency medical services is complex. For example, there are 317 ground ambulance response zones in California. These ambulance response zones are overseen by thirty-three (33) Local Agencies. Amicus' RJN, Exh. 1. Of these 317 ambulance zones (areas or subareas), some EOAs are determined through grandfathering (i.e., a "non-competitive process"), while other EOAs are determined through a

competitive process. These different zones are proposed as part of the EMS plan submitted by a Local EMS Agency, and may be approved by State Authority based upon documentary evidence to establish the factual basis for their determination. §§ 1797.105; 1797.224; *County of Butte*, 187 Cal.App.4th at 1199 (concluding the State Authority has the statutory authority to review a Local EMS Agency's creation of an EOA as part of their local plan regardless of whether the EOA was created through a competitive process or grandfathering). A Local EMS Agency can represent a single county, as is the case in Los Angeles county; or several counties that have joined together, such as the Inland Counties EMS Agency (ICEMA), which represents San Bernardino, Inyo, and Mono counties. *See County of San Bernardino,* 15 Cal.4th at 919; Amicus' RJN, Exh. 1 at 3-17.

Each Local EMS Agency, comprised of one or sometimes more counties, can differ in the number of ambulance response zones within its jurisdiction. For instance, Orange County has twenty designated ambulance response zones, while Merced, San Francisco, and Sacramento counties have one each. Amicus' RJN, Exh. 1 at 19-22, 18, 24, 23. Further, each ambulance response zone differs as to whether it is exclusive or non-exclusive for ambulance transportation, or level of EMS service, or both. Some zones may be completely non-exclusive for all transport types and

levels of service (Sacramento County). Amicus' RJN, Exh. 1 at 23. Some may be exclusive for 911 emergency transport only (Alameda County). Amicus' RJN, Exh. 1 at 1. Others may be exclusive for all transport types and levels of service, including non-emergency inter-facility transport (Merced County). Amicus' RJN, Exh. 1 at 18. Still others may have a mix of exclusive and non-exclusive zones, and exclusivity may be dependent of the type of service (Orange County). Amicus' RJN, Exh. 1 at 19-22. Each ambulance zone is unique, with the parameters of transportation and service determined by the Local EMS Agency, and approved by State Authority as part of the EMS plan approval process.

Furthermore, each of these subareas may have entities that claim section 201 status and that also provide either or both ambulance transportation and advance life support services. As such, each particular area overseen by a Local EMS Agency, and each particular ambulance response zone within it, is highly individualized to the particular composition of how prehospital emergency services are provided in the area, including geographic size, population density, patient insurance and payer mix, and mechanism for emergency call distribution.

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B. The Sherman Act and *Parker* Immunity

The Sherman Act seeks "'to protect trade and commerce against unlawful restraints and monopolies.'" *Miranda, et al. v. Selig, et al.*, 860 F.3d 1237, 1240 (9th Cir. 2017) (quoting Sherman Act, ch. 647, 26 Stat. 209 (1890)). Under the Sherman Act, "[e]very contract . . . in restraint of trade or commerce among the several States, . . . is declared to be illegal." 15 U.S.C. § 1.

Parker immunity provides that the Sherman Act does not apply to the actions of local governmental entities if their activities "are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Phoebe Putney*, 568 U.S. at 226 (quoting *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). A state policy has been "clearly articulated and affirmatively expressed" "if the anticompetitive effect was the foreseeable result of what the State authorized." *Id.* at 226-27 (quoting *Town of Hallie v. Eau Claire*, 471 U.S. 34, 42 (1985)). However, foreseeability requires something more than, for example, the permission to provide a service in a market or some sort of general grant of the power to act. *Id.* at 230-31. Rather, it requires that a law authorize an act that is inherently anti-competitive, that the very nature of a law is to displace competition—as with authorized zoning restrictions, for example—or that it

expressly set out a quid pro quo that would, as a logical result, limit competition. *Id*. at 228-30.

To the extent that a state law may be ambiguous as to whether it expresses a clearly articulated and affirmatively expressed policy of displacing competition, it cannot receive the benefit of the doubt. *Phoebe Putney*, 568 U.S. at 235-36 (rejecting argument that federal courts should "err on the side of recognizing immunity").

Although ultimately the question of whether a state law contains a clearly articulated and affirmatively expressed policy of displacing competition is a federal question, the construction of that state law (e.g., what activities it covers) is a state law question, not a federal one. *See First Am. Title Co. v. Devaugh*, 480 F.3d 438, 451-53, 455 (6th Cir. 2007); *Kern-Tulare Water Co. v. City of Bakersfield*, 828 F.2d 514, 517-19 (9th Cir. 1987); *Kartell v. Blue Shield of Mass, Inc.*, 592 F.2d 1191, 1193-94 (1st Cir. 1979). A state law may be subject to unsettled or novel interpretations, for example, or state agencies may need state court guidance to address important policy issues involved in complex regulatory schemes governed by state law. *See Kern-Tulare*, 828 F.2d at 517-19; *Kartell*, 592 F.2d at 1193-95. In such circumstances federal courts addressing *Parker* immunity

may allow state courts to weigh in first as to the interpretation or construction of state law. *See Kartell*, 592 F.2d at 1193-95.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

AmeriCare, a private company that provides ambulance services, brought suit against twelve Orange County cities (City Appellees)[4] and CARE Ambulance Service, Inc. (CARE), a private company providing services to several of the City Appellees. Excerpts of Record (ER) at 81-82. AmeriCare alleges that the City Appellees abused their police and regulatory powers in designating a single provider of ambulance services. *See, e.g.*, ER at 91-94. Among other claims, AmeriCare asserts that City Appellees engaged in monopolization and attempted monopolization in violation of the Sherman Act. *See, e.g.*, ER at 91-94.

As outlined in AmeriCare's amended complaints, these City Appellees have essentially declared themselves to be "grandfathered" into EOAs, despite the fact that the Local EMS Agency has determined that they are not EOAs. *See, e.g.*, ER at 127. Consistent with AmeriCare's allegations, the State Authority has determined that all twelve City

[4] The City Appellees are the Cities of Huntington Beach, Orange, Anaheim, Newport Beach, La Habra, Fullerton, Fountain Valley, Costa Mesa, Garden Grove, Laguna Beach, Buena Park, and San Clemente. ER at 12-16.

Appellees are to be operating "non-exclusive zones." Amicus' RJN Exh. 1 at 19-22; *See also, e.g.*, Amicus' RJN Exhs. 2-5 (explaining the City of Garden Grove failed to provide documentation demonstrating that it was an "exclusive" provider of services and explaining that if the City wished the ambulance zone to be exclusive, the Local EMS Agency (the Orange County EMS Agency) must directly complete a competitive process for that area as indicated in Health and Safety Code § 1797.224).

The district court dismissed AmeriCare's complaints, in part, because it determined that *Parker* immunity applied and operated to bar AmeriCare's consolidated action. The court concluded that the EMS Act "contemplates the provision of prehospital emergency medical services by cities" under section 201 and also "contains a clear and express intention by the state to immunize from antitrust liability local government conduct in furtherance of the EMS Act" under section 1797.6. ER at 31. Without further analysis, the court then summarily concluded that *Parker* immunity applies to the City Appellees in this action pursuant to section 201. *Id*. Thus, the district court extended the antitrust immunity for EOAs (contained in section 224) to municipal activity under section 201, and concluded that "*Parker* immunity extends to the City [Appellees] in this action." *Id*.

Specifically, the district court rejected AmeriCare's arguments that (1) pursuant to section 224, only Local Agencies (not the cities themselves) may create EOAs and; (2) section 201 is only applicable in limited, specific factual circumstances, i.e., only to the extent the cities and fire districts provided those services as of June 1, 1980. ER at 31-32. First, the court concluded that section 224 did not preclude anticompetitive actions by cities undertaken pursuant to section 201. Second, the court held that "[a]s for the City [Appellees'] actual compliance with Section 1797.201 that issue is irrelevant to determining whether *Parker* immunity applies to their actions." ER at 32. The court explained that "[f]or purposes of determining whether *Parker* immunity applies to a city government, it is sufficient that the state law authorizes the city to act anti-competitively." *Id.*

In a subsequent order, the court concluded that CARE was granted exclusive contracts with the City Appellees pursuant to the City Appellees' legislative authorization to engage in anticompetitive conduct, and therefore AmeriCare's complaints were barred as to CARE as well pursuant to the *Parker* immunity doctrine. ER at 39-41.

SUMMARY OF ARGUMENT

This Court should certify the important state law issue presented in this appeal to the California Supreme Court because there is no controlling

precedent resolving the question presented and the answer from the California Supreme Court will determine the outcome of the appeal. The question raised—whether California Health and Safety Code section 1797.201 grant cities and fire districts the authority to designate themselves as exclusive providers of EMS services, or must cities go through the process in section 1797.224 to be designated as exclusive providers of EMS services—implicates strong state interests regarding ensuring emergency medical services are available to all Californians and the outcome of this case could have wide-reaching effects in the state of California.

Alternatively, this Court should conclude that the district court improperly interpreted section 201 of the EMS Act. Section 201 only allows, under specific factual circumstances, a city or fire district to "retain" its EMS services; nothing in the statutory scheme supports the conclusion that section 201 cities or fire districts can self-designate as the "sole deciders" of EMS services.

Furthermore, this Court should conclude that the district court prematurely and improperly applied *Parker* immunity by not determining whether the City Appellees were providing the same services in June 1, 1980, and thus, were within the terms of Section 201. This is particularly problematic because—as the documents attached to *Amicus'* request for

judicial notice demonstrate—City Appellees have *not* been providing the same services since June 1, 1980 and therefore would not be entitled to section 201 rights.

ARGUMENT

I. THIS COURT SHOULD CERTIFY THIS VITAL STATE LAW ISSUE TO THE CALIFORNIA SUPREME COURT

The State Authority requests that this Court certify the important question of state law raised in this appeal to the California Supreme Court. Cal. R. Court 8.548; *See, e.g., Robinson v. Lewis*, 795 F.3d 926 (9th Cir. 2015); *Verdugo v. Target Corp.*, 704 F.3d 1044, 1046-1050 (9th Cir. 2012). Specifically, the State Authority requests that this Court certify the following issue: Whether California Health and Safety Code section 1797.201 grant cities and fire districts the authority to designate themselves as exclusive providers of EMS services, or must cities and fire districts go through the process in section 1797.224 to be designated as exclusive providers of EMS services.

Certification is appropriate because the construction of the EMS Act is a vital issue of state law involving an intricate regulatory environment, which is unsettled. Cal. R. Court 8.548(a)(2); *Verdugo*, 704 F.3d at 1046 ("As a matter of comity, [the Ninth Circuit] consider[s] the California

Supreme Court better positioned to address these major questions of California [] law than this court"). Though there are state decisions touching on various aspects of this question, there is no definitive answer from California's highest court regarding this issue.

Finally, certification is appropriate because an answer to this question will help to determine the outcome of this case. Cal. R. Court 8.548(a)(1); *Robinson*, 795 F.3d at 935. In *Kartell*, the First Circuit was similarly faced with a *Parker* immunity issue that required "[r]esolution of [] complex questions of state law" which "present[ed] serious difficulties." 592 F.2d at 1193. The First Circuit contemplated certifying the state law issue to the Massachusetts Supreme Court; however, the issue was coincidentally already pending before the Massachusetts Supreme Court in another case. *Id*. Thus, in the interest of saving time and procedures, the Court exercised its discretion to abstain from ruling on the *Parker* immunity issue until Massachusetts reached a resolution. *Id*. In so abstaining, the First Circuit acknowledged that Massachusetts' opinion would "substantially, perhaps even fully, answer certain questions of state law in a way that [would] permit easy answers, relatively speaking, to the federal ones." *Id*. at 1193-94 (the proper interpretation of state law regarding a "comprehensive health scheme affecting a majority of the public" would be better rendered by the

state court). Like *Katnell*, while the question of whether the EMS Act sets out a clearly articulated and affirmatively expressed state policy to displace competition is ultimately a federal one, the California Supreme Court's answer on the state law question will establish if and when local governments can designate exclusive providers of EMS services, which will inform this Court's decision.

II. IN THE EVENT THAT THIS COURT DOES NOT CERTIFY THE STATE LAW ISSUE, THE DISTRICT COURT ERRED IN CONSTRUING SECTION 201 AS A GRANT OF IMMUNITY

The EMS Act does not permit city or fire districts to self-designate as exclusive providers of EMS services. The district court erroneously interpreted the EMS Act and inappropriately granted city and fire districts' authorization to establish and operate EOAs. The district court's conclusion that section 201 provides City Appellees with this broad power is incorrect for a number of reasons, including that (a) it is contrary to the express intent of the California legislature; (b) it is inconsistent with a plain reading of section 201; (c) it fails to take into account the entire EMS statutory scheme and is contrary to California case law; and (d) it would potentially throw the carefully crafted EMS statutory scheme into disorder.

In sum, section 201 does not give cities and fire districts, such as the City Appellees, broad authority to deem themselves to be an EOA. Rather,

only under section 224 can they operate as EOAs and only the Local EMS Agency may determine exclusivity—not the City Appellees themselves—and then only through a competitive process, absent a "grandfathered" entity providing those services without interruption since January 1, 1981.

A. The Legislative Grant of Immunity Does Not Apply to Section 201

The district court relied on the expression of anticompetitive intent at section 1797.6. But, this section is specifically addressed to the two code sections discussing EOAs (§§ 1797.85 and 1797.224), and does not reach municipal activity under section 201. Specifically, the Legislature stated, "[i]t is the intent of the Legislature in enacting this section and Section 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 government entities . . . ." § 1797.6(b). Conspicuously, the Legislature did not include section 201 as part of its express intent.

B. Section 201 Contains No Immunity Language

By its terms, section 201 does not grant City Appellees exclusive rights to provide EMS in a particular area. *See U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (the "plain meaning of legislation should be

conclusive"). Rather, section 201 states that, "[u]ntil 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." Section 201 is silent on granting broad power to cities or fire districts to self-designate and create their own EOAs. It simply states that until such time as they enter into an agreement with the Local EMS Agency, cities or fire districts cannot be displaced by a Local EMS Agency. Stated differently, a Local EMS Agency cannot prohibit a section 201 city or fire district from continuing to provide EMS service. But this does not mean that the Local EMS Agency cannot let other providers into that same zone. For example, *assuming arguendo*, that the City of Anaheim is entitled to section 201 rights such that it can "retain" its EMS services that it provided in its zone prior to June 1, 1980, the Local EMS Agency (Orange County Emergency Medical Services Authority) could, nevertheless, allow private EMS providers to provide emergency medical services, such as ambulance transportation services, in that zone also. The Local EMS Agency may decide to allow private EMS providers in that same zone in order to ensure that the entire population's needs are met.

C. Section 201 Must Be Interpreted in Conjunction with the Entire EMS Statutory Scheme

The district court's conclusion is also at odds with the overall statutory scheme. *See I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015) (when interpreting a statute, the court "must read the words [of a statute] in their context and with a view to their place in the overall statutory scheme"). In contrast to section 201, section 224 is the statute that deals with EOA creation, and it states that EOAs may *only* be created under the auspices of a Local EMS Agency as part of a local EMS plan, which is approved by the State Authority. *See* § 1797.224 ("A local EMS agency may create one or more exclusive operating areas . . . ."). Further, an EOA may only be created in one of two ways: (1) through a competitive bidding process, or (2) through the "grandfathering" process whereby the scope in which the services have been provided haven't been interrupted since January 1, 1981. § 1797.224.

In fact, consistent with the plain language of the EMS Act and its overall structure, California courts have indicated that the ability to create EOAs is limited and that cities and/or fire districts cannot independently create their own EOA. Cities and fire districts "may only continue to provide emergency medical services if they have done so as of June 1,

1980." *County of San Bernardino*, 15 Cal.4th at 929. But those cities and fire districts are limited inasmuch as they can "'retain' only those administrative powers that they already possessed." *Id*. (quoting section 201). Thus, cities and fire districts cannot expand into new types of service they did not provide as of June 1, 1980. In discussing the "overall purpose" of section 201, the California Supreme Court concluded that this statute "appears to be a preservation of the status quo rather [than] a broad authorization of municipal autonomy." *Id*. at 929-930; *see also id.* at 930 (construing section 201 to permit cities and fire districts to expand their autonomy is "contrary to the legislative intent implicit" in section 201); *id*. at 932 (concluding that cities and fire districts cannot "create their own EOAs"); *see also Valley Medical Transport, Inc.*, 17 Cal.4th at 760.

Similarly, in *City of Petaluma v. County of Sonoma*, the California appellate court found that section 201 "says nothing at all about exclusivity" and section 201 rights do not constitute an EOA as described within section 224. 12 Cal.App.4th 1239, 1244 (1993). Building on these principles, another California appellate court affirmed that the State Authority must review and approve an EOA, whether it was created by the Local EMS Agency through a competitive process or through grandfathering. *County of Butte*, 187 Cal.App.4th at 1199. Implicit in this conclusion is the

recognition that a city or fire district cannot create its own EOA and certainly cannot do so outside the regulatory oversight of the Local EMS Agency or the State Authority.

D. The District Court's Interpretation of Section 201 Would Have a Substantial Negative Impact on Ensuring Access to EMS

Lastly, the district court's interpretation of section 201 could lead to chaos in this vital area of health care access. *See Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (cautioning against an interpretation of a statute that would lead to an absurd result). The district court's decision essentially permits cities and fire districts to designate themselves as exclusive operators of EMS, without any coordination and potentially in contravention to the conclusions rendered by the Local EMS Agency and the State Authority. The Legislature carefully constructed the EMS Act to ensure a comprehensive coordination of care and to correct the prior "haphazard" system. §§ 1797.1, 1707.102, 1797.103; *County of San Bernardino,* 15 Cal.4th at 914. The district court's interpretation threatens this.

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III. IN THE EVENT THAT THIS COURT DOES NOT CERTIFY THE STATE LAW ISSUE, THE DISTRICT COURT ERRED IN CONCLUDING THAT A DEFENDANT-BY-DEFENDANT DETERMINATION WAS NOT REQUIRED AS A PRECURSOR TO A GRANT OF IMMUNITY

A. State Law Does Not Create Categorical Immunity Here

The district court improperly refused to consider whether the City Appellees actually complied with section 201. ER at 32. The district court concluded that "'[t]he relevant question is whether the *state* intended the authorizing statute to have anticompetitive effects. Thus, what the *city* does to implement that statute, rightly or wrongly, reveals nothing about the state's intent.'" *Id*. (emphasis added by district court) (quotation omitted). But here, the California Legislature intended to limit the "anticompetitive effects" of the EMS Act by including certain limiting language. *County of San Bernardino*, 15 Cal.4th at 932 (explaining that section 201 was designed to confine EMS operations to those "historically engaged in" by cities and fire districts). Indeed, the plain language of section 201 requires a case-by-case factual analysis to determine what the city's arrangement was as of June 1, 1980. Then, the court can determine whether City Appellees are entitled to the rights and protections under section 201. Absent such a case-by-case analysis as to whether each City Defendant fits within the narrow

parameters of section 201, the City Appellees' request for *Parker* immunity must be denied.

B. *Phoebe Putnam* Requires an Individualized Assessment of Immunity Where Categorical Immunity is Absent

In a recent unanimous decision, the U.S. Supreme Court held that *Parker* immunity requires specific articulation of state-action immunity. *Phoebe Putnam*, 568 U.S. at 219-236. The Supreme Court cautioned that a "general grant of power" in state statute is insufficient to imply Legislative authority to act in an anticompetitive manner. *Id*. at 228. To permit such anticompetitive behavior by local government entities based on broad and general language would "wholly eviscerate the concept of clear articulation and affirmative expression." *Id.* Citing the *amici* brief filed by 20 states, the Court explained that, "loose application of the clear-articulation test would attach significant unintended consequences to states' frequent delegations of corporate authority to local bodies, effectively requiring states to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct." *Id*. at 236. In short, *Phoebe Putnam* requires courts to look at the precise statutorily language to determine whether the state "affirmatively contemplated the displacement of competition such that

the challenged anticompetitive effects can be attributed to the 'state itself.'" *Id*. at 229 (quoting *Parker*, 317 U.S. at 352).

As outlined above, California affirmatively contemplated that local cities and fire districts could "retain" their EMS services only if those services remained the same since June 1, 1980. Thus, to determine the scope of *Parker* immunity, the district court had to evaluate whether the local entities met those requirements. Here, the district court's sweeping grant of immunity without such a factual determination ran afoul of the instruction of *Phoebe Putnam*.

C. The Ninth Circuit Case of *Traweek* Does Not Hold Otherwise

In concluding that it need not undertake an individualized assessment of each City's actual compliance with Section 201, the district court erroneously relied on *Traweek v. City and County of San Francisco*, 920 F.2d 589, 593 (9th Cir. 1990). ER at 32. In *Traweek*, this Court held that the city was entitled to *Parker* immunity based on a California statute that expressly delegated to the city the power to adopt a comprehensive, long-term general plan for development of the city. 920 F.2d at 593. The Court concluded that the statute there "clearly delegate[d] sufficient regulatory authority to the city." *Id*. Only then—after finding sufficient statutory

authority for the specific anticompetitive action undertaken by the city—did this Court provide that the city was consequently entitled to immunity. *Id.* ("Once the state decides to delegate its regulatory authority to a city, that city enjoys the same immunity from federal antitrust law that the state would have enjoyed.").

In contrast, here, the Legislature only delegated cities and fire districts to "retain" their EMS services if those services are the same as those retained since June 1, 1980. To determine whether a City Appellee is entitled to "retain" its EMS services, availing itself to section 201 protections, requires the district court to undertake a factual review. The court must determine whether each City Appellee meets the specific requirements set forth in section 201, i.e. whether the cities have been providing the same services since June 1, 1980.

CONCLUSION

Amicus curiae the State Authority respectfully requests that this Court certify the issue of the scope of the EMS Act to the California Supreme Court. Alternatively, *amicus* requests that this Court reverse the district court's order to the extent it applies *Parker* immunity to City Appellees.

Dated: November 7, 2017

Respectfully submitted,

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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.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: November 7, 2017

Respectfully Submitted,

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