Case No. 17-55565

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC.,
Plaintiff and Appellant,

vs.

CITY OF ANAHEIM, ET AL.,
Defendants and Appellees.

On appeal from the United States District Court for the
Central District of California, Case No. 16-cv-01703-JLS (BGS)
The Honorable Josephine L. Staton, United States District Judge

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MOTION FOR LEAVE TO FILE AMICUS BRIEF OF AMICUS CURIAE EMERGENCY MEDICAL SERVICES ADMINISTRATORS ASSOCIATION OF CALIFORNIA

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Emergency Medical Services Administrators Association of California ("EMSAAC") seeks leave to file the Proposed Amicus Brief that accompanies this Motion.

EMSAAC is a California non-profit corporation. Incorporated in 1992, EMSAAC acts in an advisory capacity to the California Emergency Medical Services Authority ("EMSA") and the State Commission on Emergency Medical Services in establishing goals, priorities, standards, and quality assurance for emergency medical services ("EMS") systems. EMSAAC's Board of Directors is composed of the appointed administrator or director (or officially designated alternate) from each of California's 33 local EMS agencies, or "LEMSAs" as they are commonly called.

EMSAAC's published goals and priorities are to: (1) provide expert advice and consultation to State, local, community and professional organizations involved with EMS systems; (2) serve as a forum for the exchange of information and ideas on the administrative aspects of EMS systems; (3) improve the integrity and validity in local and statewide EMS System design and operation, including all EMS system components; (4) promote the dissemination of knowledge concerning the EMS systems; (5) promote adherence to requirements of statewide EMS statutes, regulations and guidelines, and local EMS System policy and procedures;

(6) foster relationships with other organizations and agencies involved in similar activities to exchange information and to work toward common goals for the delivery of EMS; and (7) recommend qualified candidates to the Governor's office for appointment to the Commission on EMS.

EMSAAC authors the brief to advise this Court of its understanding of the key statute at issue in this case, Cal. Health & Safety Code § 1797.201, often referred to as "Section 201." EMSAAC does not take a position as to the federal claims or defenses at issue in this action. Rather, because of the prominent role Section 201 will have in this appeal, it believes the Court would benefit from EMSAAC's explanation of the legislative history of this statute and, more particularly, how the section is implemented within California's EMS regulatory scheme. EMSAAC notes that the parties in this action inherently have competitive or self-serving interests that may color how they present their respective interpretations of Section 201. As an association that represents the interests of all California's LEMSAs, which regulate EMS at the local level, EMSAAC believes it can offer this Court an objective summary of Section 201's legislative history and some of its key regulatory features.

Moreover, should any published decision of this Court becomes precedential as to any part of Section 201, EMSAAC notes it would be responsible for administering the interpretation of any such decision within local EMS systems.

For this reason, EMSAAC strongly desires to be heard on the statutory interpretation issues that underlie the federal claims and defenses at issue.

EMSAAC sought the consent of the parties to file this brief. The Appellants consented, but the Appellees did not.

No party in this action authored this brief in whole or in part. Nor did any party or person contribute money toward the research, drafting, or preparation of this brief, which was authored entirely by the undersigned counsel.

Respectfully submitted,

Dated: November 8, 2017.

COTA COLE & HUBER LLP

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Emergency Medical Services Administrators Association of California submits the following corporate disclosure statement with respect to those *Amici* that are corporations:

Emergency Medical Services Administrators Association of California states that is has no parent corporation, nor does it have any publicly held corporations, that own 10% or of more of its stock.

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I. INTRODUCTION

In this action, Appellant AmeriCare MedServices, Inc. ("AmeriCare") asserts antitrust claims under the Sherman Act against twelve Orange County cities. It claims these cities have, for many years, granted monopolies to ambulance providers to provide exclusive emergency ambulance services within their municipal territories. AmeriCare acknowledges a provision of California law, Health & Safety Code § 1797.201, or "Section 201," allows cities that contracted for the provision of ambulance service as of 1980 to continue contracting for such service. But it asserts these cities do not meet threshold Section 201 requirements and, accordingly, cannot assert state authorization for the exclusive, non-competitive ambulance service they sanction within their municipal territories.

Amicus Curiae Emergency Medical Services Administrators Association of California ("EMSAAC") does not advocate any position as to the merits of the parties' federal claims or defenses. But as the association representing the interests of California's 33 local emergency medical services agencies ("LEMSAs"),[1] which regulate all EMS providers at the local level, EMSAAC believes it can provide this Court with a helpful understanding of how Section 201 actually functions within

[1] EMSAAC's Board of Directors duly approved the filing of this brief on November 6, 2017. No party authored this brief in whole or in part. Nor did any party contribute funding for this brief's drafting.

the overall framework for California EMS. To that end, EMSAAC below provides a summary of the EMS Act's legislative history and a discusses how Section 201 has been implemented over the nearly four decades since the enactment of the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act (Cal. Health & Safety Code § 1797 *et seq*.), or "EMS Act."

As EMSAAC makes clear within, Section 201—despite having originally been intended as a transitionary provision of the EMS Act—is now very much a fixture within the state's EMS regulatory framework. At the same time, it is undisputed the EMS Act gives LEMSA broad regulatory authority over Section 201 providers concerning the quality and effectiveness of medical care they provide. For this reason, while EMSAAC does not advocate any position regarding the federal issues raised in this appeal, it does ask that should this Court decide it must interpret Section 201 as a means for addressing the federal issues raised, the Court do so in a manner that recognizes the broad scope of LEMSA authority over Section 201 providers. Such an interpretation would be consistent with the authoritative construction the California Supreme Court has previously given to Section 201.

Overall, LEMSAs have ample experience in regulating Section 201 providers. So long as the courts continue to recognize the breadth of LEMSA authority, the continued recognition of Section 201 providers within EMS systems

would not be contrary to the quality or effectiveness of emergency medical care provided within the state.

II. THE FUNCTION OF SECTION 201 WITHIN THE EMS ACT

A. The Enactment of the EMS Act in 1980

The EMS Act comprehensively regulates emergency medical care in California. Enacted in 1980, the Act provides for the creation of emergency medical procedures and protocols, certification of emergency medical personnel, and coordination of emergency responses by fire departments, ambulance transporters, hospitals, and other providers within the EMS system.

The passage of the EMS Act was the culmination of a multi-year effort to regulate the then emerging field of emergency medicine. With EMS being popularized by television shows like M*A*S*H and Emergency!, the demand for government to provide EMS grew significantly in the late 1960s and especially in the 1970s. By the late 1970s, however, regulation of EMS in California remained "haphazard." *Cty. of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 914, 938 P.2d 876 (1997). At the time, state law authorized public agencies to provide ambulance services. *See* Cal. Gov. Code § 54980(b)-(c). But nothing in the law required EMS providers to coordinate or integrate their activities.

The Legislature began to seriously consider EMS regulation in late 1978, when Senator John Garamendi introduced SB 125. Initially, Garamendi's bill was

modest, addressing training and certification for EMS programs. But the bill underwent a "two-year odyssey," during which its scope was greatly broadened. *County of San Bernardino*, *supra*, at 915. In late 1980, when finally enacted, the EMS Act contained 100 provisions in nine separate chapters.

The new EMS Act created a two-tiered system of regulation. At the state level, it created the Emergency Medical Services Authority ("EMSA"), charged with setting standards for and coordinating EMS activities throughout the state. Cal. Health & Safety Code § 1797.101-1797.105. At the local level, the act created LEMSAs (Cal. Health & Safety Code § 1797.200), which serve either a single county or multiple counties. LEMSAs are required to "plan, implement, and evaluate an [EMS] system" for the territories they cover. *Id*. § 1797.204. Importantly, no party is permitted to provide advanced life support ("ALS") or limited ALS services unless it is an "authorized part" of a local system. *Id*. § 1797.178.

With its dual layers of regulation, the EMS Act replaced the disjointed system that had previously existed with one that emphasized cooperation at all levels, and between all EMS providers. The Act sought to achieve integration and coordination of EMS throughout the state within an overall system by creating a comprehensive system governing virtually every aspect of prehospital emergency

medical services. *See County of San Bernardino*, *supra*, 15 Cal.4th at p. 915 ("The Legislature's desire to achieve coordination and integration is evident throughout").

B. Grandfathering under Section 201 of the EMS Act

One section of the EMS Act that has taken on great significance since the Act's adoption is Section 201. This section is one of two "grandfather" statutes in the EMS Act.[2] Section 201 gives certain cities and fire districts the ability to continue the administration of EMS they provided or contracted for when the Act was first adopted. The section states in full:

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

[2] The other grandfathering provision in the EMS Act is Cal. Health & Safety Code § 1797.224, or as it is commonly known "Section 224." This section allows local EMS agencies to create "exclusive operating areas" for EMS providers that have provided services continuously, and in the same manner and scope, as they had provided on January 1, 1981. Unlike Section 201, Section 224 is not confined to municipal EMS providers; it authorizes private ambulance companies to provide exclusive ambulance service.

> to a public hearing, determines that the reduction is necessary.
>
> Notwithstanding any provision of this section the provisions of Chapter 5 (commencing with Section 1798) shall apply." Cal. Health & Safety Code § 1797.201.

Section 201 was a late addition to the EMS Act. Concerned about the impact of comprehensive new EMS regulation, some cities—particularly those that had invested significantly in developing their own EMS programs—expressed reservations about the effect the proposed legislation would have on their administration of EMS. In June 1980, the California League of Cities expressed these concerns to Senator Garamendi, writing that the cities' "primary concern lies with staffing levels, transportation, and system organization and management." *Id.* at p. 917. As the League explained:

> "[W]e think that staffing levels of city paramedic programs, and the transportation and system organization[,] which we would assume means where paramedics are stationed, how they [are] dispatched with engine companies and the utilization of their time, whether or not they are full time firemen or not, etc., are fundamentally management decisions of the city fire department and ultimately the city council." *Ibid.*

The League added:

> "We believe this is because city taxpayers are financially supporting this program and city management is responsible for their efficient utilization. The city council is responsible for the level of service and the cost of the program, wholly unrelated to medical questions." *Ibid.*

The Legislature responded to these concerns by adding Section 201 to the EMS Act. The section was intended to remove any doubt that cities that had established EMS programs could continue the services they had been providing before the Act's passage. As the State Supreme Court has observed, "[t]he apparent purpose of this grandfathering provision was to 'allow such entities to protect the investments they had already made in various assets …,' as well as to ensure against disruption of adequate emergency medical services…." *Valley Med. Transp., Inc. v. Apple Valley Fire Prot. Dist.*, 17 Cal. 4th 747, 758, 952 P.2d 664 (1998).

C. The Duration of Section 201 Grandfathered Rights

The Supreme Court has recognized that Section 201 was intended to be "transitional." *San Bernardino*, *supra*, 15 Cal.4th at 922. Section 201 evinces "a manifest legislative expectation that cities and counties will eventually come to an agreement with regard to the provision of [EMS]…." *Ibid.* The Court has thus construed Section 201 not as "'a broad recognition or authorization of autonomy in the administration of emergency medical services for cities and fire districts' but [as] essentially a grandfathering of *existing* emergency medical service operations until such time as these services are integrated into the larger EMS system.…" *Valley Medical*, *supra*, 17 Cal.4th at 758 (emphasis added).

But despite this expressed intent, Section 201 *on its face* states that a grandfathered provider shall continue to provide EMS "until such time that an agreement is reached" with its LEMSA. Cal. Health & Safety Code § 1797.201. The LEMSA's obligation to enter into this agreement, in turn, does not arise until the grandfathered city or fire district requests an agreement. *Ibid*. The termination of grandfathered status, therefore, depends on the actions of the grandfathered provider. The provider loses such status *only* when it asks to enter into an agreement with its LEMSA concerning the EMS it provides. And if it never does so, it arguably may retain its grandfathered status in perpetuity.

D. The Broad Scope of Medical Control of LEMSAs Retain Over 201 EMS Providers

Despite having a potentially indefinite right to continue providing EMS, grandfathered providers under Section 201 remain "subject to [a] significant constraint placed on [their] administrative discretion." *Valley Medical*, *supra*, 17 Cal.4th at 755. The last sentence of Section 201 states, "[n]otwithstanding any provision of this section the provisions of Chapter 5 (commencing with Section 1798) shall apply." This sentence refers to the portion of the EMS Act that requires LEMSAs, under the direction of a medical director, to assert "medical control" over a local EMS system. *See* Cal. Health & Safety Code § 1798(a) ("The medical direction and management of an emergency medical services system shall be under the medical control of the medical director of the local EMS agency.

This medical control shall be maintained in accordance with standards for medical control established by the authority"); *see also id.* § 1797.220. Thus, even if grandfathered under Section 201, EMS providers still must comply with LEMSA policies that are medical in nature.

The EMS Act defines "medical control" broadly to include policies concerning "dispatch, patient destination policies, patient care guidelines, and quality assurance requirements." Cal. Health & Safety Code § 1797.220. The State Supreme Court has expounded on the definition, observing, "[t]he Legislature conceived of 'medical control' in fairly expansive terms, encompassing matters directly related to regulating the quality of emergency medical services, including policies and procedures governing dispatch and patient care." In *County of San Bernardino*, the Court applied this rationale to uphold a LEMSA policy concerning how ambulance providers were dispatched in response to emergency calls for service. To prevent a city provider from favoring the dispatching of its own resources in response to medical emergencies, one of the policies at issue required that when public and private responders arrived at an emergency scene at the same time, the first responder would be responsible for patient care. The other policy required that public and private providers be dispatched at the same level of response. The Court found these policies encompassed medical control because they "pertain[ed] to the speed with which EMS providers other than the City will

be dispatched to the scene of an emergency, and how the various EMS providers will interact at the emergency scene." *Id.* at 926. Consequently, the policies "[were] highly relevant to the provision of emergency medical care, affecting the speed and effectiveness of the response…." *Id.* at 927.

As the California Supreme Court has thus recognized, the scope of LEMSA medical control over Section 201 providers is intentionally expansive. For this reason, providers grandfathered under Section 201 are, like all other types of EMS providers,[3] subject to an EMS plan each LEMSA must adopt to governing how EMS is provided within a particular EMS system. *See* Cal. Health & Safety Code § 1797.250. The EMS Plan, often referred to as a "transportation plan" is the critical device by which LEMSAs assure medical control over their EMS systems. *See id.* § 1797.252. Importantly, the plan must be approved by EMSA and must be updated annually to ensure compliance with the EMS standards that state agency has promulgated. *See id*. § 1797.254; *see also id*. § 1797.203 (requiring EMSA to establish guidelines for a broad range of subjects affecting the quality and provision of EMS).

[3] Grandfathered providers under Section 201 are one of four types of EMS providers. The other three types of providers are (1) those who provide ambulance service in "open" zones (ones for which no exclusive operating rights have been granted or recognized); (2) grandfathered providers under Section 224; and (3) providers granted the right to serve an EOA following the competitive process required by Section 224.

Effectively, despite the indefinite nature of their grandfathered statutes, Section 201 providers are regulated no differently than any other types of providers when it comes to the quality, effectiveness, and delivery of the services they provide.

III. TO THE EXTENT THIS COURT INTERPRETS SECTION 201 IN DECIDING THE FEDERAL ISSUES PRESENTED, IT SHOULD CONTINUE TO RECOGNIZE THAT SECTION'S BROAD CONFERRAL OF LEMSA MEDICAL-CONTROL AUTHORITY OVER SECTION 201 PROVIDERS

As the above discussion indicates, grandfathered providers under Section 201 retain, despite the ostensibly transitionary nature of Section 201, a potentially indefinite right to provide exclusive ambulance service within their respective municipal limits. While it is unlikely this is what the Legislature intended, the existence of grandfathered providers nearly four decades after the Act's enactment is a function of the plain language of Section 201, which leaves it to providers to decide when and whether to enter into an agreement with their LEMSAs.

Because many grandfather providers have chosen to retain their Section 201 rights for so long, their existence is—and has been since the inception of the EMS Act—well-recognized within the EMS systems they serve. Importantly, grandfathered providers are regulated from a medical-control standpoint just as are all other providers within those systems. Grandfathered providers, like all others,

are subject to the same protocols and procedures established by EMSA at the state level, and implemented by LEMSAs, at the local level.

Although EMSAAC is not taking a position on the federal issues raised in this case, it does ask this Court, in interpreting Section 201, to continue to recognize the broad authority that section gives LEMSAs to assure the medical control of their EMS systems. The California Supreme Court has authoritatively interpreted Section 201 to expound upon the integral role LEMSA medical control plays with the EMS regulatory framework. EMSAAC requests that this Court take these precedents into consideration in deciding the issues presented.

IV. CONCLUSION

EMSAAC appreciates this opportunity to describe how Section 201 functions in practice within California's overall system of EMS regulation. EMSAAC takes no position on the federal issues raised in this appeal. EMSAAC

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instead requests that to the extent this Court interprets Section 201 in deciding the federal issues presented, it do so in a manner that continues to recognize the broad scope of LEMSA authority over Section 201 providers.

Respectfully submitted,

Dated: November 8, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the above brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,751 words, which is within the 7,000-word limitation imposed for amicus briefs per Fed. R. App. P. 29(d).

Dated: November 8, 2017.

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