No. _____

In The
Supreme Court of the United States

AMERICARE MEDSERVICES, INC.,

Petitioner,

vs.

CITY OF ANAHEIM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A state statute governing ambulance services allows one type of competition displacement. Is a municipality that is not authorized by that statute or any other displacement under state law nevertheless exempt from federal antitrust liability in the ambulance services market?

2. Can a government entity in its capacity as a commercial market participant rather than its regulatory capacity invoke state action immunity from federal antitrust law?

3. Is a municipality that is acting in its capacity as a commercial market participant rather than its regulatory capacity subject to the active-supervision requirement to invoke state action immunity from federal antitrust law?

PARTIES TO THE PROCEEDING

The Petitioner is AmeriCare MedServices, Inc.

The Respondents are City of Anaheim, Care Ambulance Service, Inc., City of Laguna Beach, City of La Habra, City of Garden Grove, City of Fullerton, City of Buena Park, City of Costa Mesa, City of Orange, City of Fountain Valley, City of Huntington Beach, City of Newport Beach, and City of San Clemente.

RULE 29.6 STATEMENT

Petitioner AmeriCare MedServices, Inc. states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

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AmeriCare MedServices, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. 1–4) is unreported. The orders of the district court (App. 5–49) are unreported, but one order (App. 17–49) is available at 2017 WL 1836354.

JURISDICTION

The Ninth Circuit entered judgment on August 27, 2018 and denied timely rehearing en banc on October 10, 2018. App. 50. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant provisions of the Sherman Act 15 U.S.C. §§ 1, 2, and Cal. Health & Safety Code § 1797.1 *et seq*.

STATEMENT

This case presents the remarkable scenario in which the court of appeals granted state action immunity from antitrust liability to municipalities despite the fact that the State of California expressly explained—as *amicus curiae*—that it did not authorize any municipal anticompetitive conduct. The state not only declined to accept the anticompetitive conduct as its own, but warned about its disastrous consequences to its comprehensive policy that, by contrast, relies on market competition.

More specifically:

- Both courts below held that respondents' conduct was exempt from antitrust liability, concluding it was not the federal courts' place to determine whether respondents were authorized to exclude their competitors under state law.
- Both courts also expressly declined to apply the market participant exception, which was previewed by the Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991), left open in *FTC v. Phoebe Putney Health System, Inc.*, 588 U.S. 216, 226 n.4 (2013), and is the subject of a split of authority among the courts of appeals.
- Both courts also applied the "narrow exception" of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), to relieve the respondents of the active supervision

> requirement despite this Court's more recent holding that active supervision "is an essential condition of state-action immunity when a nonsovereign actor has 'an incentive to pursue [its] own self-interest under the guise of implementing state policies,'" *see N.C. State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1113 (2015) (citations omitted).

1. The federal antitrust laws are the "central safeguard for the Nation's free market structures" and have been for more than a century. *N.C. Dental*, 135 S. Ct. at 1109. They "guarantee[ ] each and every business, no matter how small, [the] freedom to compete." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). This "national policy in favor of competition" has existed and been reaffirmed consistently for more than a century. *California. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). It is so important to the national interest that Congress trusts its adjudication to the federal courts alone.

States do not have the power to set aside the well-settled judgment of Congress, but they do have the residual power to regulate under the Tenth Amendment. So the Court carved out a narrow exemption for state action: the Sherman Act does not "bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 224–25 (quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943)).

Like all antitrust exemptions, the state action immunity is strictly limited, narrowly circumscribed, and

"disfavored." *Id.* at 225 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)); *see also Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079, 1084 (9th Cir. 2010) ("The state-action immunity doctrine is 'disfavored,' and is to be interpreted narrowly, as 'a broad interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction.' ") (citations omitted). In fact, it is not an immunity at all. Its ***sole*** purpose is to protect the sovereign states' interests to regulate. *Ticor Title*, 504 U.S. at 636. Indeed, a state may not simply declare that its political subdivisions or residents are exempt from federal antitrust liability. *Hallie*, 471 U.S. at 39 (citing *Parker*, 317 U.S. at 351).

An antitrust defendant "may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power." *N.C. Dental*, 135 S. Ct. at 1110. Thus, the defendant invoking immunity has the burden to show that it (1) acted pursuant to a clearly articulated state policy to displace competition, and (2) was actively supervised by the state itself. *Midcal*, 445 U.S. at 105. Municipal actors are exempt from the latter requirement, at least where they perform traditional regulatory functions on behalf of the state. *See Hallie*, 471 U.S. at 46.

* * *

2. In 1981, California enacted the EMS Act, Cal. Health & Safety Code § 1797.1 *et seq.*, which established a comprehensive regulatory policy that places the coordination of EMS services in the hands of the

California Emergency Medical Services Authority (EMSA) and county EMS agencies to ensure that California citizens receive prompt prehospital emergency transport. The EMS Act was enacted because the last municipal-based system failed that objective.

California's EMS policy is a carefully crafted scheme that expressly mandates and relies upon competition. The EMS Act requires that EMSA approve an annual statewide EMS plan that delineates functional zones for ambulance services (or "operating areas") and determines whether each such zone (1) should be a non-exclusive operating area subject to open competition (the default rule under the EMS Act) (2) should be an exclusive operating area subject to competitive bidding, or (3) meets the requirements of the exception, which "continues the use of existing providers operating within [the] area in the manner and scope in which the services have been provided without interruption since January 1, 1981." Cal. Health & Safety Code § 1797.224.

The EMS Act also allows certain municipalities and fire districts to continue providing services as they did at the time it was enacted if the municipality was "contracting or providing for" prehospital EMS as of June 1, 1980. Cal. Health & Safety Code § 1797.201. The provision, which was designed to be transitional, allowed existing municipal programs to continue to operate until it reached an agreement with the county EMS agency. Importantly, the EMS Act does not give municipalities any regulatory powers. It simply allows those municipalities who had been playing in the

market to continue to do so as a reliance accommodation (and only a transitional one) under the new, state-administered EMS scheme.

Instead, EMSA is "responsible for the coordination and integration of all state activities concerning emergency medical services." Cal. Health & Safety Code § 1797.1. It administers the EMS Act: it has the power to enact rules and regulations, issue guidance, and make determinations that impact the statewide EMS plan. Indeed, each year, it must assess each EMS operating area to determine its need of additional emergency medical services, coordination of those services, and the effectiveness of those services. Cal. Health & Safety Code § 1797.102. And it must ultimately approve a statewide EMS plan. For purposes of the state action immunity, EMSA's determinations are controlling because it is the state agency delegated the power to implement, direct, and supervise state EMS policy and has the specific responsibility of making determinations under Sections 1797.201 and 1797.224 in approving the statewide EMS plan.

EMSA issued interpretative guidance and created an administrative process through which municipalities and fire districts can seek eligibility determinations under Section 1797.201. An entity only qualifies if it:

- Is a city or fire district that existed on June 1, 1980.

- Is the same entity that existed on the date of the 1797.201 eligibility evaluation.
- Provided service on June 1, 1980, at one of these types: ALS, LALS, or emergency ambulance services.
- Operated or directly contracted for the same type of service continuously since June 1, 1980.
- Never entered into a written agreement with the county EMS agency for the type of service that was provided in 1980, including ALS, LALS, or emergency ambulance services.

EMS System Coordination and HS 1797.201 in 2010, C.A. Dkt. 51-6, ER912.

Under the EMS Act, EMSA has the obligation to approve a detailed plan every year that determines whether each individual zone is subject to open competition or whether it should be deemed exclusive (based on specific statutory preconditions). EMSA specifically determined that each of the zones in which these cities are located do not meet the requirements for exclusivity each year when it reviewed and approved the statewide plan. (*See* ER88–89 ¶ 34; ER112–113 ¶ 33; ER136 ¶ 30; ER165 ¶ 30; ER189 ¶ 30; ER218 ¶ 29; ER247 ¶ 30; ER275–276 ¶ 32; ER 303 ¶ 31; ER331 ¶ 29; ER358 ¶ 30; ER386 ¶ 31) [C.A. Dkts. 51-2, 51-3]; *see also* Brief of the California Emergency Medical Services Authorities as *Amicus Curiae* ("EMSA Br.") at 15–16,

C.A. Dkt. 53-2 ("Consistent with AmeriCare's allegations, the State Authority has determined that all twelve City Appellees are to be operating 'non-exclusive zones.' "). Moreover, it established a process by which cities can seek an eligibility determination under Section 1797.201. None of the appellee cities has been deemed eligible. The complaints alleged detailed facts showing that none of the twelve municipal respondents met those requirements.

Even if the respondents would have passed EMSA's qualification process, Section 1797.201 does not authorize them to act anticompetitively. EMSA's official agency guidance states that Section 1797.201 "does not grant exclusivity for ALS, LALS, or ambulance services." EMS System Coordination and HS 1797.201 in 2010, C.A. Dkt. 51-6, ER911. The California Supreme Court has also held that Section 1797.201 does not allow "cities or fire districts . . . to expand their services, or to create their own exclusive operating areas." *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 932 (1997).

* * *

3. In 2015, petitioner, an eligible and licensed EMS provider, sought to operate in each of the twelve subject zones consistent with the statewide EMS plan. Petitioner sought authorization from the county EMS agency, which directed it to make a request to each of the municipal respondents because they had each asserted the authority to control prehospital EMS within their boundaries. Each of the twelve municipalities

denied petitioner's requests, asserting that they are exclusive providers, or have contracted with exclusive providers, under Section 1797.201.

* * *

4. Petitioner filed its complaints against each of the municipal respondents between August 29, 2016 and October 6, 2016 for monopolization under Section 2 of the Sherman Act. In eight cases, it also named Care Ambulance, Inc. as a defendant and made claims for conspiracy to restrain trade under Section 1 of the Sherman Act. All twelve cases were consolidated. The respondents each moved to dismiss invoking, *inter alia*, the state action immunity.

* * *

5. The district court dismissed the complaint with prejudice for failure to state a claim. App. 17. It concluded the municipal respondents were entitled to the state action immunity because "the EMS Act (1) contemplates the provision of prehospital emergency medical services by cities; and (2) contains a clear and express intention by the state to immunize from anti-trust liability local government conduct in furtherance of the EMS Act. . . ." App. 42. It further held that it was irrelevant whether the respondent cities were actually eligible under Section 1797.201, stating it was enough that "the state intended the authorizing statute to have anticompetitive effects" and reasoning that *Omni* "reject[ed] the contention that a municipality needs to be in compliance with the state law authorizing anti-competitive conduct for *Parker* immunity to apply."

App. 44. It also declined to apply a market participant exception to the state action immunity or to consider whether the active supervision requirement applies to municipalities acting as commercial market participants rather than as regulators. App. 45.

In a separate order, the district court also granted Care's motion to dismiss. App. 5. The order held that the active supervision requirement did not apply to Care, despite being a private party, because "it is the [municipal respondents] who are empowered to act anti-competitively under the California EMS Act, and CARE's monopoly is simply a byproduct of the [municipal respondents'] actions pursuant to this power." App. 11. It also held that Care's monopoly was the result of protected petitioning activity under *Noerr-Pennington* immunity. App. 13.

* * *

6. On appeal, EMSA and the California Attorney General's Office filed an *amicus curiae* brief supporting reversal, stating unequivocally that the municipal respondents were not acting pursuant to the state policy; that the municipal respondents were not among those entities eligible under Section 1797.201; that regardless, Section 1797.201 provides permission to play in the market, not to act anticompetitively; and that if the decision stands, it "will throw California's complex EMS system into chaos." EMSA Br. at 2 (C.A. Dkt. 53-2).

* * *

7. Nevertheless, the court of appeals affirmed. App. 1–4. The memorandum opinion rejected any inquiry into whether the state intended to authorize the respondents to act anticompetitively or that it intended to displace competition in the particular markets at issue, stating that "[w]hether § 1797.201 properly applies to each city appellee is a question for California courts—not us." App. 2 n.2. It further held that because the municipal respondents are immune, Care is as well. App. 3. It also affirmed the district court's application of *Noerr-Pennington* immunity. *Id*.

REASONS FOR GRANTING THE WRIT

The court of appeals found California's grant of authority for certain eligible municipalities to play in the market sufficient to shield ***all*** California municipalities and their private contractors from antitrust liability regardless of whether the challenged conduct was actually authorized by the state. In fact, it held respondents are entitled to state action immunity over the objection of the ***state itself***. This was error.

1. The court of appeals refused to engage in any inquiry to determine whether the challenged conduct could fairly be attributed to the state as sovereign. Erring on the side of "recognizing immunity . . . is inconsistent with the principle that 'state-action immunity is disfavored.'" *Phoebe Putney*, 568 U.S. at 235–36. That is doubly true here, where the court found immunity over the objection of the state itself.

2. The Court should formally adopt the market participant exception to state action immunity, a question it previewed in *Omni* and expressly left open in *Phoebe Putney*, which has resulted in a split of authority among the courts of appeal.

3. The court of appeals erred in applying *Hallie*'s "narrow exception" to active supervision based on "nomenclature alone." *N.C. Dental*, 135 S. Ct. at 1114. Active supervision is "essential" any time "a nonsovereign actor has 'an incentive to pursue [its] own self-interest under the guise of implementing state policies[,]' " *id.* at 1113 (citations omitted) because the "first requirement—clear articulation—rarely will achieve that goal by itself." *Id.* at 1112.

I. THE NINTH CIRCUIT ERRED IN TREATING CALIFORNIA'S EMS POLICY AS CLEARLY ARTICULATING A STATE POLICY TO DISPLACE COMPETITION

In holding that the California legislature clearly articulated a state policy to displace competition, the Ninth Circuit relied exclusively on a grant of permission to play in the market for which the respondents were not even eligible. It misapplied this Court's precedents to reach this result. First, it found that a 35-year-old transitional statute allowing some local government entities to continue to operate their EMS programs provided authorization for municipalities to exclude other EMS providers that compete with their programs, contrary to this Court's holding in *Phoebe*

Putney. Second, it refused to determine whether the respondents met the prerequisites of that statute, citing *Hallie* for the proposition that it is up to state courts to determine whether the respondents met the eligibility requirements of the statute. If the policy is so unclear as to require state court intervention, it cannot be a clearly articulated policy to displace competition. The Ninth Circuit's decision brushes state and federal interests aside in deference to the proprietary interests of nonsovereign actors.

The state action immunity is the exception, not the rule. It overcomes "the fundamental national values of free enterprise and economic competition . . . embodied in the federal antitrust laws" only where they would otherwise "bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 225 (quoting *Parker*, 317 U.S. at 352). This Court applies exacting scrutiny to ensure that the challenged conduct can fairly be attributed to the state itself, as sovereign.

Municipalities are not sovereign, and thus cannot invoke immunity unless they meet their burden to show they were acting pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. *Midcal*, 445 U.S. at 105; *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). Clear articulation is satisfied only where the proponent of immunity shows "that it has

been delegated authority to act or regulate anticompetitively" and that the particular challenged conduct is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 548 U.S. at 228–29.

In *Phoebe Putney*, the Court reversed a decision granting immunity to a local government hospital authority that was authorized by state law to participate in the market and, more specifically, to acquire hospitals. *Id.* at 220–21. It rejected arguments that where there is "any doubt about whether the clear-articulation test is satisfied . . . federal courts should err on the side of recognizing immunity to avoid improper interference with state policy choices" because the state action immunity is disfavored. *Id.* at 235–36. "[F]ederalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'" *Id.* at 236 (quoting *Ticor Title*, 504 U.S. at 636).

In accepting clear articulation here, the court of appeals erred in two respects. First, it found that Section 1797.201 delegated authority to act anticompetitively where it only provided permission to play in the market. Second, it found that Section 1797.201 authorized all municipal respondents to act anticompetitively where the statute clearly "'intended to achieve more limited ends.'" *Id.* (quoting *Ticor Title*, 504 U.S. at 636).

A. The State Policy Merely Grants Permission to Play in the Market

Like the hospital authority's general statutory authority to play in the market, Section 1797.201 does not contemplate the displacement of competition. There is nothing inherently anticompetitive about operating or contracting for an ambulance service, or even administering prehospital EMS. Monopolization of the market is thus neither the "inherent, logical, or ordinary result" of the provision. *Phoebe Putney*, 548 U.S. at 229.

Nevertheless, the court of appeals found, over the strenuous objection of the state itself, that Section 1797.201's authorization to "maintain control of the [emergency medical] services they operated or contracted for" and "make decisions as to the appropriate manner of providing those services" was sufficient authority to displace competition. App. 2. But the California Supreme Court has interpreted the statute and determined that Section 1797.201 does not allow "cities or fire districts . . . to create their own exclusive operating areas." *San Bernardino*, 15 Cal. 4th at 932; *see also* EMSA Br. at 18 ("[N]othing in the statutory scheme supports the conclusion that Section 201 cities or fire districts can self-designate as the 'sole deciders' of EMS services.").

"A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct. . . ." *Ticor Title*, 504 U.S. at 631. Immunity is

only "conferred out of respect for ongoing regulation by the State." *See id.* at 633. In other words, the question is "whether an anticompetitive policy is indeed the policy of a State." *N.C. Dental*, 135 S. Ct. at 1112.

The EMS Act articulated a policy that requires—in fact, relies on—competition except in certain limited circumstances. The state has consistently reaffirmed, through its ongoing regulation, that its policy with respect to the geographic markets in question is one requiring competition. Even if it authorizes some anticompetitive conduct in some markets by certain eligible entities, that authorization is not imputed to other anticompetitive conduct in other markets by other entities. *Phoebe Putney*, 568 U.S. at 235 ("[R]egulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related.").

B. The State Policy Did Not Apply to Respondents by Its Terms

The court of appeals ended its inquiry without looking to whether the authorization extended to the municipal respondents and the particular restraints at issue. In the court of appeals' view, it was enough that the statute allowed some municipalities to administer prehospital EMS for any of California's nearly 500 municipalities to invoke the state action immunity

regardless of whether they meet the criteria established under the statute or EMSA's ongoing regulation because that "is a question for California courts—not us." App. 2 n.2. That is clearly not what the state intended when it replaced the municipal-based system with a statewide scheme that relies upon competition.

To the contrary, the question of whether the state action immunity applies is exclusively reserved for the federal courts. If a state policy is so unclear that a question requires resolution in state court, it cannot serve as a clearly articulated policy to displace competition. Moreover, the complaint pleaded facts showing that none of the municipal respondents could have been eligible under Section 1797.201 (App. 22–27), which the court was required to accept as true in deciding a motion to dismiss—that is, in deciding whether the respondents were among those the state intended to displace competition. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (factual allegations must be accepted as true on a motion to dismiss).

The state already answered the question with respect to each municipal respondent: First, EMSA created a process through which municipalities and fire districts can seek an eligibility determination, and none of the municipal respondents have been deemed eligible. Second, each year it has also exercised its authority to designate each zone in the state as exclusive or non-exclusive, and it has determined that each such zone is non-exclusive subject to open competition under the standards set forth in the EMS Act. *See* EMSA

Br. at 15–16 ("Consistent with AmeriCare's allegations, the State Authority has determined that all twelve [municipal respondents] are to be operating 'non-exclusive zones.'"). By ignoring these facts, the court of appeals served neither federalism nor state sovereignty. *Phoebe Putney*, 568 U.S. at 236 ("[F]ederalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'" (citations omitted)); *Ticor Title*, 504 U.S. at 633 ("Immunity is conferred out of respect for ongoing regulation by the State. . . .").

C. The Decision Imperils the Fundamental Values the State Action Immunity Is Designed to Protect

The court of appeals' decision turns the fundamental principles underlying the state action immunity on their head. It fails to accommodate either of the two values it was tasked to balance—supremacy of the antitrust laws and a state's interest in its regulatory policy—and instead defers to the private interests of nonsovereign actors who flouted state policy for their own self-interest.

The decision harms the state interest by ignoring what the California legislature intended when it passed the EMS Act—it returns the state policy to the patchwork city-by-city approach to EMS coverage. This is not conjecture: EMSA and the California Attorney

General's Office cautioned the court of appeals that if state action immunity is granted to the respondents, it would "throw the carefully crafted EMS statutory scheme into disorder." EMSA Br. at 21.

If left uncorrected, the court of appeals' decision will also encourage other nonsovereign municipal actors to engage in anticompetitive conduct that diverges from the state's intent—which is exactly what the state action immunity test is supposed to prevent. *N.C. Dental*, 135 S. Ct. at 1112 (purpose is to "determin[e] whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity").

The decision is at odds with the longstanding policy of robust antitrust enforcement and the values underpinning the state action immunity. The "public interest in vigilant enforcement of the antitrust laws" is fundamentally important to the national economy. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). The state action immunity, on the other hand is "disfavored." *Phoebe Putney*, 568 U.S. at 225. The court of appeals' decision creates a presumption of municipal immunity in cases where state policy is anything but plain and clear and will serve to disincentivize private litigants—who are often small businesses—from suing to enforce antitrust violations as Congress intended. *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) (explaining congressional policy that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"). This will only further embolden municipal actors like the respondents,

who flouted state law and profited at the expense of the statewide EMS system and the patients it serves.

II. THE COURT SHOULD ADOPT THE MARKET PARTICIPANT EXCEPTION TO STATE ACTION IMMUNITY

This case presents a clean opportunity for the Court to decide whether it should adopt the market participant exception to state action immunity that it left open in *Phoebe Putney*.

This Court's holdings have consistently suggested that the state action immunity does not apply to market conduct. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 391 (1978), the Court rejected an argument that the antitrust laws are intended to protect the public from only private abuses and not local government activity. "Every business enterprise public or private, operates its business in furtherance of its own goals." *Id.* at 403.

In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 460 U.S. 150, 156–57 (1983), the Court again applied this reasoning in rejecting an argument that "state purchases for the purpose of competing with private enterprise" were exempt from the Sherman Act. In separating commercial activity from traditional government functions, the Court explained it "is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities." *Id.* at

154 n.6. In *Omni*, the Court reaffirmed that the federal antitrust laws apply "where the State acts not in a regulatory capacity but as a commercial participant in a given market." 499 U.S. at 374–75.

The Supremacy Clause demands this limitation on the state action immunity because the Commerce Clause assigns the power to regulate interstate commerce to Congress. *See United States v. State of California*, 297 U.S. 175, 184 (1936) ("The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985).

Nevertheless, the Court has yet to formally recognized a categorical market participant exception to the state action immunity. *Phoebe Putney*, 568 U.S. at 226 n.4 (declining to consider market participant exception argument because it was not raised by the parties). It should do so now: the issue has been fully briefed and argued by the parties to these proceedings at each level of review, and a number of circuits have had an opportunity to address the matter: the Third, Fourth, Sixth and Federal Circuits have recognized or favorably endorsed a market participant exception. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 754 (4th Cir. 2018) (endorsing market participant exception in federal preemption analysis); *VIBO Corp. v. Conway*, 669 F.3d 675, 687 (6th Cir. 2012) (state acting as "commercial participant in a given market" is not protected); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d

239, 265 n.55 (3d Cir. 2001) (recognizing market participant exception but declining to apply it because state was not acting as buyer or seller); *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (*Parker* extends only to "sovereign capacity" and not market participant conduct), *abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995). The Second and Eighth Circuits have decided against it. *See*, *e.g.*, *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312–13 (8th Cir. 1991) ("[T]he market participant exception is merely a suggestion and is not a rule of law."); *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 81 (2d Cir. 1998) (concurring with Eighth Circuit). The Ninth Circuit here expressly "decline[d] to adopt . . . a market-participant exception" to the state action immunity. App. 2 n.1.

The municipal respondents act as service providers (joint service providers with a private partner in some cases) rather than as regulators. (ER89 ¶ 35; ER166 ¶ 31; ER189 ¶ 34; ER219 ¶ 35; ER248 ¶ 34; ER276 ¶ 35; ER304 ¶ 35; ER331 ¶ 31; ER359 ¶ 35; ER 387 ¶ 36.) [C.A. Dkts. 51-2, 51-3]. They have no regulatory role under California's EMS scheme, and thus there is no regulatory interest that would otherwise implicate the state action immunity. As market participants, they are inherently self-interested such that their "private anticompetitive motives [blend] in a way difficult even for [them] to discern." *N.C. Dental*, 135 S. Ct. at 1111. Under the functional analysis that features in this Court's recent state action immunity

jurisprudence (and in its antitrust jurisprudence more generally), their conduct should not be so lightly attributed to that of the state, as sovereign.

Indeed, the Court's development of the doctrine never contemplated that states and municipalities could use state action immunity as a shield for their anticompetitive conduct when they are active market participants. Jarod M. Bona & Luke A. Wake, *The Market Participant Exception to State-Action Immunity from Antitrust Liability*, 23 Comp. J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 156, 163 (2014). Rather, the doctrine is intended to discourage market participants from acting in their own interests or freely exercising their discretion. *Ticor Title*, 504 U.S. at 634 ("[W]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." (citations and internal quotations omitted)).

Immunizing market participant conduct from antitrust scrutiny undermines federal antitrust policy. State and local entities with a free pass to violate the antitrust laws have a financial incentive to participate in commercial markets in anticompetitive ways—and that conduct is often very profitable. *See* Bona & Wake, *supra* at 163. Indeed, profit is exactly why California municipalities have become commercial participants in the market for prehospital EMS services. *See* Bryan K. Toma, *The Decline of Emergency Medical Services Coordination in California: Why Cities are at War with Counties over Illusory Ambulance Monopolies*, 23

Sw. U. L. Rev. 285, 289 (1994) ("Unfortunately, this revenue-enhancing agenda pits cities and fire districts in direct competition with private ambulance companies.").

Applying the market participant exception under these circumstances would ensure that a limited and disfavored doctrine remains true to its purpose of balancing Congress' plenary power to regulate commerce with the states' residual power.

III. *HALLIE*'S "NARROW EXCEPTION" TO ACTIVE SUPERVISION SHOULD NOT APPLY TO ACTIVE MARKET PARTICIPANTS

This Court's jurisprudence has increasingly applied a functional approach to state action immunity such that quasi-public market participants are subject to antitrust scrutiny unless they can prove the state, as sovereign, adopted and supervised their anticompetitive conduct. *N.C. Dental*, 135 S. Ct. at 1114. Formalistic designations of an entity as "public" no longer matter. *Id.*; *see also American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 193 (2010) (rejecting formalistic approach because "the [Sherman] Act is aimed at substance rather than form." (citation and internal quotations omitted)); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

Active supervision "is an essential condition of state-action immunity when a nonsovereign actor has 'an incentive to pursue [its] own self-interest under the guise of implementing state policies[,]' " *see N.C. Dental*, 135 S. Ct. at 1113 (citation omitted), because the "first requirement—clear articulation—rarely will achieve that goal by itself." *Id.* at 1112. Active supervision avoids "resulting asymmetry . . . by requiring the State to review and approve interstitial policies made by the entity claiming immunity." *Id.* No longer can a municipality rely on "nomenclature alone" to qualify for *Hallie*'s "narrow exception." *Id.* at 1113–14.

The municipal respondents' briefing in the courts below underscores the "high level of generality" they exploited to rationalize and excuse their monopolization of the market: they rely on their own self-serving interpretations of a 35-year-old transitional statute that doesn't apply to them to enter a commercial market and obtain monopoly rents. (ER423–424, 443–444, 456, 473, 493–494, 527–528, 552, 570–571, 605, 625–626, 649–650, 674–675.) [C.A. Dkts. 51-4, 51-5]. EMSA has indicated that it flatly disagrees with the city appellees' reading of the statute, and they have avoided all supervision by exempting themselves from the statewide EMS planning scheme. (ER88–89 ¶ 33; ER112 ¶ 32; ER136 ¶ 29; ER165 ¶ 29; ER189 ¶ 29; ER218 ¶ 28; ER247 ¶ 29; ER275 ¶ 31; ER303 ¶ 30; ER331 ¶ 28; ER358 ¶ 29; ER386 ¶ 30.) [C.A. Dkts. 51-2, 51-3]. The "resulting asymmetry" between their conduct and the intentions of the state's EMS policies

demonstrate that active supervision should apply under these circumstances.

Regardless of whether this Court revisits *Hallie*'s "narrow exception," the court of appeals erred in holding that Care, a private, nonmunicipal party, does not need to show active supervision by the state itself. Active supervision "is manifest" where active market participants are concerned. *N.C. Dental*, 135 S. Ct. at 1114. Care cannot possibly qualify for the "narrow exception" from active supervision under any set of circumstances—even if this Court determines the cities themselves qualify for that exception. Since the state itself is not supervising Care, Care cannot invoke state action immunity.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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