CASE NO. 17-55565

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC.,

Plaintiff and Appellant,

v.

CITY OF ANAHEIM, ET AL.

Defendants and Appellees.

From a Decision of the United States District Court
for the Central District of California,
Case No. 16-cv-01703-JLS (BGS), Hon. Josephine L. Staton

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The League of California Cities has no parent corporation, nor is it owned in any part by any publicly held corporation.

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CONSENT OF THE PARTIES

The parties to this matter have consented to the filing of this brief through emails from their respective counsels of record.

INTEREST OF AMICI

Amicus curiae the League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance.

Amicus curiae the International Municipal Lawyers Association (IMLA) is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law. IMLA is advised by its Legal Advocacy Committee, comprised of eight local government attorneys from different regions of the country that represent both small and large and rural and urban local governments. IMLA staff monitors litigation of concern to local governments, identifies those cases that have nationwide significance, and the Committee ultimately determines whether IMLA will participate as an amicus in each case.

The respective Committees of the League and IMLA have determined that this case raises important issues that affect all California cities and, potentially, cities throughout the country. Specifically, appellant AmeriCare MedServices, Inc. asks this Court to expose local governments for the first time to private antitrust liability stemming from cities' implementation of public policy, even when the cities act in a manner expressly authorized by their state legislatures. The expansive, new "market-participant exception" AmeriCare proposes would impede the ability of cities and other municipal agencies to fulfill their statutory missions, paralyze their decision-making, increase their legal and other operating costs, and increase the legal exposure for conduct that cities have undertaken in good-faith compliance with state laws. The interest of the League and IMLA's members in this case is thus plain and sharp.

STATEMENT REGARDING FED. R. APP. P. 29(a)(4)(E)

This brief has been authored solely by counsel for amici curiae the League of California Cities and IMLA. No counsel for any party authored the brief in whole or in part. Neither the parties nor their counsel nor any other person, besides the Amici and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT AND ARGUMENT

Appellant AmeriCare MedServices, Inc. asks this Court to adopt a new rule eliminating the immunity from antitrust liability that municipalities currently receive under Supreme Court precedent, *Parker v. Brown*, 317 U.S. 341, 351 (1943), any time a

municipality is said to be participating in a commercial market. AOB 32-35. The California Attorney General joins AmeriCare's argument and suggests that existing immunity should be eliminated when a municipality is alleged to be out of compliance with the state law that would otherwise confer immunity upon it. Cal. Emergency Med. Servs. Auth. ("CEMSA") ACB, 9th Cir. Dkt. No. 53-2.

But the new rules AmeriCare and CEMSA advocate are fundamentally inconsistent with the policies that underlie the existing rule of immunity. That immunity is founded on policy concerns that the threat of antitrust litigation and liability will chill effective local governance and will impinge on the policy determinations of state governments, violating principles of both federalism and separation of powers. The Court should decline their invitation. Provision of ambulance services is central to the public missions of local governments in California, and must accordingly be immune from antitrust suits.

I. *Parker* immunity protects local government decision-making from the paralyzing effects of threatened antitrust liability.

In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. 341, 351 (1943). "States receive immunity from potential antitrust liability as nothing in the language of the Sherman Act or its history suggested that Congress intended to restrict the sovereign capacity of the States to regulate their

economies." *United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1009 (9th Cir. 2014) (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013)) (cleaned up). The "fundamental" objective of this immunity is to protect state action from federal antitrust scrutiny. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 n.7 (1985).

> The basis of the state action exception is that the free market principles embodied by the Sherman Antitrust Act must give way to the countervailing principles rooted in federalism and state sovereignty that states must be free to act upon local concerns, even if these actions have anticompetitive results.

Boone v. Redev. Agency of City of San Jose, 841 F.2d 886, 890 (9th Cir. 1988). Although addressed originally to states, consistent with its central policy concern, the doctrine has been extended expressly to municipal action as well. *E.g.*, *Hallie*, 471 U.S. at 44 n.7.

Congress has similarly recognized the need to exempt municipalities from antitrust liability. In 1984, it enacted 15 U.S.C. § 35,[1] which immunizes local governments against antitrust damages suits brought under the Clayton Act.[2] In so doing, the House Judiciary Committee identified a concern that, without immunity, "antitrust suits, and threatened suits . . . could undermine a local government's ability

[1] Pub. L. 98-544, § 3, Oct. 24, 1984, 98 Stat. 2750.

[2] Congress presumably did not need to include the Sherman Act within Section 35's protection because the Supreme Court had already recognized *Parker* immunity with respect to the Sherman Act.

to govern in the public interest." H.R. Rep. 98-965, § I, at 2 (1984); P.L. 98-544 LH, H.R. 6027, 1984 U.S.C.C.A.N. 4602, 4603, 1984 WL 37492 (1984). The Senate Judiciary Committee was similarly troubled that imposing antitrust liability on municipalities would "paralyze the decision-making functions of local government." *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 460 n.4 (C.D. Cal. 1986) (quoting S. Rep. No. 98-593, at 3 (1984)). As the Committee explained:

> The threat of antitrust treble damage actions has caused local officials to avoid decisions that may touch on the antitrust laws even when such decisions have involved critical public services. Furthermore, it would also appear that uncertainty of whether particular actions may be anticompetitive might have led to the making of no decision at all, resulting in, for example, the inclusion of all bidders in a franchise, rather than choosing the most economical and efficient bidder. In either case, where a local government has avoided the issue or where it has simply allowed all comers to participate, the public interest may not have been well-served. In addition the Committee is concerned by delays in the decisionmaking process during the pendency of time-consuming and costly antitrust damage litigation.

Id. Congress thus approved and adopted the same policy considerations the Supreme Court first identified in *Parker*.

II. The Court should not adopt a "market-participant exception" to *Parker* immunity.

A. The expansive exception AmeriCare seeks would undermine the essential policies Parker promotes.

The foregoing policy background admits of no exception to *Parker* immunity that touches in any way on municipal efforts to provide "critical public services" or

"govern in the public interest." Ensuring the availability of local emergency medical response falls squarely in that category.

> Along with fire suppression and crime prevention, the provision of emergency medical assistance to persons faced with imminent life-threatening conditions joins with them to form a triage of public services considered at the core of vital civic functions.

Ma v. City & Cty. of S.F., 95 Cal. App. 4th 488, 508 (2002), *disapproved on other grounds by Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal. 4th 1175 (2003). Nor is the nature of ambulance services as a core municipal function altered, as AmeriCare suggests, by the mere fact that such services may generate positive revenue for local governments. *See* AOB 35 (arguing that Appellees "profit" from ambulance services); *cf. United National Maint., Inc.*, 766 F.3d at 1010 (holding city-created public benefit corporation was entitled to immunity even though it was participating profitably in cleaning market).

Likewise, federal courts have repeatedly recognized the legitimacy and importance of state laws extending immunity to local governments with regard to ambulance services. *See Redwood Empire Life Support v. Cty. of Sonoma*, 190 F.3d 949, 953–55 (9th Cir. 1999); *A-1 Ambulance Serv., Inc. v. Cty. of Monterey*, 90 F.3d 333, 336–37 (9th Cir. 1996), *as amended on denial of reh'g and reh'g en banc*, (July 31, 1996); *Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty.*, 791 F.2d 755 (9th Cir. 1986); *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984); *Ambulance Serv. of Reno, Inc. v. Nev. Ambulance Serv., Inc.*, 819 F.2d 910, 911 (9th Cir. 1987); *Gold*

Cross Ambulance & Transfer v. City of Kan. City, 705 F.2d 1005 (8th Cir. 1983); *see also, e.g.*, McQuillin, 18 The Law of Municipal Corporations § 53:77.15, Emergency Medical Services (3d ed.).[3]

Tracking this widespread recognition that ambulance services are at the core of municipal purview, the district court correctly denied AmeriCare's attempt to eliminate *Parker* immunity in this case. As it found in its thorough review of state law, "the California legislature has expressly declared that the local provision of emergency medical services, including ambulance services, is 'critical to the public peace, health, and safety of the state.'" Doc. 47, at 19 (quoting Cal. Health & Safety Code § 13801). "In enacting the EMS Act, the legislature declared its intent 'to promote the development, accessibility, and provision of emergency medical services to the people

[3] The same is true of many other traditional municipal functions. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987) (water service); *Cmty. Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (water service); *Mobile Cty. Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc.*, 564 F.3d 1290 (11th Cir. 2009) (sewage); *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961 (10th Cir. 1987) (gas service); *Grason Elec. Co. v. Sacramento Muni. Util. Dist.,* 770 F.2d 833 (9th Cir. 1985) (electric service); *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984) (waste collection and disposal); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984) (taxicabs); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, Inc., 810 F.2d 869 (9th Cir. 1987) (taxicabs); *United Nat. Maint., Inc.*, 766 F.3d at 1010 (public facility cleaning services); *Cal. Aviation, Inc. v. City of Santa Monica*, 806 F.2d 905 (9th Cir. 1986) (municipal airport services); *Catalina Cablevision Assocs. v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (cable providers); *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567 (3d Cir. 2017) (student housing). There is no principled reason to distinguish these immune services from the emergency medical services at issue here.

of the State of California.'" *Id.* (quoting Cal. Health & Safety Code § 1797.5). "The Act reflects the recognition that 'one of the preeminent functions of government in an organized society is the protection of the life and health of its citizens.'" *Id.* (quoting *Ma*, 95 Cal. App. 4th at 508).

AmeriCare's attempt to establish antitrust liability for municipal emergency medical services strikes at the very heart of *Parker* and the policies it promotes. The Court should reject its arguments.

B. Recognizing a market-participant exception would also undermine *Parker*'s deference to the policy determinations of state legislatures.

Parker immunity not only seeks to protect local government decisions from the chilling effect of threatened antitrust claims, it also respects federalism and separation of powers. *See Boone*, 841 F.2d at 890 ("[T]he Sherman Antitrust Act must give way to the countervailing principles rooted in federalism and state sovereignty[.]"); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) (noting that *Parker* immunity is "designed to protect . . . interests of federalism"). That concern is reflected in the requirement that "immunity will only attach to the activities of local governmental entities if they 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*, 455 U.S. at 52); *see Parker*, 317 U.S. at 351 (holding

that the Sherman Antitrust Act does not "restrain a state or its officers or agents from activities *directed by its legislature*." (emphasis added)).

AmeriCare's market-participant exception necessarily asks federal courts to second-guess the determinations of state legislatures that the public interest is served by displacing competition in certain municipal activities. The Court should reject such a rule in order to maintain the respect for federalism and separation of powers that *Parker* immunity embodies.

Moreover, the express-policy limit established by *Phoebe Putney* ensures that *Parker* immunity now only applies when municipalities act in a regulatory capacity.[4] This eliminates any hypothetical concern regarding municipalities acting in a purely commercial capacity unrelated to regulatory aims. *See Omni*, 499 U.S. at 374-79 (holding that there is no exception to *Parker* immunity for agencies acting "in a regulatory capacity"). Thus, there can be no market-participant exception consistent with principles of federalism in any case, but especially not this case which relates to core municipal functions as described in Section II.A.

[4] In the absence of a rational connection between the state's authorizing legislation and a legitimate, regulatory aim, a state's statutory scheme might be subject to challenge. This is not a reason to authorize antitrust suits against municipalities.

III. To serve its essential policy goals, *Parker* immunity cannot depend on district courts' retrospective evaluation of agencies' compliance with complex state administrative laws.

CEMSA's Amicus Brief (9th Cir. Dkt. No. 53-2) also asks this Court to erode *Parker* immunity, arguing that federal courts should first assess whether a local government is in compliance with all aspects of state law before it can determine whether *Parker* immunity applies. The Court should decline the invitation.

This very approach was rejected by the *Omni* Court, which held that a municipality need not be in compliance with the state law authorizing anticompetitive conduct for *Parker* immunity to apply, as the district court correctly noted in the case below. 499 U.S. at 371-72; *see* Doc. 47 at 17.

> [S]uch an expansive interpretation of the *Parker*–defense authorization requirement would have unacceptable consequences.
>
> …
>
> If the antitrust court demands unqualified "authority" in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. [This would impermissibly transform] state administrative review into a federal antitrust job.
>
> …
>
> [T]o prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

499 U.S. at 372 (citation omitted). Thus, a federal court need not—indeed, should not—resolve complicated questions of state law before it will afford local governments immunity under *Parker*.[5]

In addition to contradicting Supreme Court precedent, CEMSA's preferred approach would also destroy a purpose of granting immunity in the first place: shielding the government from the trouble and expense of defending against a lawsuit, that is, from the chilling effect of litigation *risk*. CEMSA's argument thus stands in direct opposition to the very foundation of municipal antitrust immunity and should be rejected. *See Hallie*, 471 U.S. at 44 n.7; *Palm Springs Med. Clinic, Inc.*, 628 F. Supp. at 460 n.4.

CONCLUSION

Parker immunity recognizes that free-market principles may not always be appropriate when it comes to essential government services like emergency medical services, fire, water, and waste collection and disposal. State legislatures may accordingly determine that such services are so important that local governments may step in to ensure their quality, consistency, and availability to all residents. Anything that would threaten cities' ability to select providers of these services and to ensure that the services are consistently and properly provided, would lead to inefficiencies

[5] For the same reasons, the Court should decline the CEMSA Amici's request to certify their proposed questions to the California Supreme Court. (*See* CEMSA ACB at 19-21.)

and even life-threatening consequences. AmeriCare's argument for a "market-participant exception," and CEMSA's argument that federal courts should scrutinize local governments' compliance with state law, would do just that. Both arguments should be rejected, and the judgment affirmed.

DATED: January 29, 2018

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 2,802 words.

DATED: January 29, 2018

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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 State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 29, 2018.

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.

Dated: January 29, 2018

/s/*Cindy A. Short*
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