NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICARE MEDSERVICES, INC., Plaintiff-Appellant, v. CITY OF ANAHEIM; et al., Defendants-Appellees.	No. 17-55565 D.C. No. 8:16-cv-01703-JLS-AFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted August 7, 2018
Pasadena, California

Before: HAWKINS and CHRISTEN, Circuit Judges, and HOYT,** District Judge.

AmeriCare MedServices, Inc. appeals the dismissal of its antitrust and declaratory-relief claims. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1068 n.5 (9th Cir. 2018) (citing

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

City of Los Angeles v. AECOM Servs., Inc., 854 F.3d 1149, 1153 (9th Cir. 2017)), we affirm.

Dismissal was appropriate because appellees are immune from antitrust liability.[1] *See Parker v. Brown*, 317 U.S. 341, 350–51 (1943). Municipalities enjoy state-action antitrust immunity when acting "pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 (2013) (quoting *Community Commc'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). The city appellees did just that; California law specifically authorizes cities "to maintain control of the [emergency medical] services they operated or contracted for in June, 1980" and "make decisions as to the appropriate manner of providing those services."[2] *County of San Bernardino v.*

[1] We decline to adopt either an active-state-supervision requirement or a market-participant exception. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) ("[A]ctive state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party."); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1058 n.5 (9th Cir. 1987) (suggesting that a government entity is not a market participant when performing "integral operations in areas of traditional governmental functions" (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.10 (1980))).

[2] Whether § 1797.201 properly applies to each city appellee is a question for California courts—not us. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) (applying "a concept of authority broader than what is applied to determine the legality of the municipality's action under state law"); *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 522 (9th Cir. 1987) ("Where ordinary errors or abuses in exercise of state law . . . serve[] to strip the city of state authorization, aggrieved parties should not forego customary state corrective processes . . . in favor of federal antitrust remedies." (citations omitted)).

City of San Bernardino, 938 P.2d 876, 890 (Cal. 1997); *see* Cal. Health & Safety Code § 1797.201 (preserving the pre-1980 status quo by allowing cities to continue "providing [emergency medical] services" until reaching an agreement with the county). Further, since many cities had entered into exclusive agreements prior to 1980, an "anticompetitive effect was the 'foreseeable result[.]'"[3] *Phoebe Putney*, 568 U.S. at 227 (quoting *Eau Claire*, 471 U.S. at 42). And because the city appellees are immune from antitrust liability, CARE Ambulance Service, Inc. ("CARE") is as well. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 878 (9th Cir. 1987) (immunizing "state action, not merely state actors").

CARE is also immune under the *Noerr–Pennington*[4] doctrine, which shields private actors "from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive." *Sanders v. Brown*, 504 F.3d 903, 912 (9th Cir. 2007). CARE's efforts to obtain or maintain exclusive contracts with the city appellees falls squarely within the scope of *Noerr–Pennington*. *See id.* ("*Noerr–*

[3] *See also* Cal. Health & Safety Code § 1797.6 (providing "for state action immunity under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions"); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 758 (9th Cir. 1986) (concluding pre-*Phoebe Putney* that California's Emergency Medical Services Act "has a foreseeably anti-competitive effect").

[4] *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Pennington immunity protects private actors when they . . . enter contracts with the government." (citations omitted)).[5]

AFFIRMED.

[5] California Emergency Medical Services Authority's (Doc. 53) and Emergency Medical Services Administrators Association of California's (Doc. 54) motions to become amicus curiae are **GRANTED.** CARE's motion to take judicial notice (Doc. 77) is **DENIED.**