IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Plaintiff-Appellant,

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, and THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES

Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California

No. CV 08-4920
The Honorable Christina A. Snyder, Judge

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF THE STATE OF CALIFORNIA

The State of California, acting through its Attorney General Kamala D. Harris, respectfully submits this brief as amicus curiae, pursuant to Federal Rule of Appellate Procedure 29(a).

This case presents serious issues of harm to the environment, and of harm to the health of hundreds of thousands of people who live and work in and around the Port of Los Angeles (Port). The Port is a massive commercial operation; it serves as the point of entry and the conduit for the movement into this country of millions of tons of goods of all kinds each year. FF, ¶¶ 7-9.[1] An inescapable result of the shipping, loading and unloading, and transport of these goods is the emission of air pollutants, including diesel particulate matter, from ships, cargo-handling equipment, railroads, and trucks. FF, ¶ 31. Diesel engine exhaust has been listed as a chemical known to the State of California to cause cancer since 1990, Cal. Code of Regs., tit. 22, § 12000, and has been declared by the California Air Resources Board to be a toxic air contaminant. Cal. Code of Regs., tit. 17, § 93000. The regional air pollution control agency, the South Coast Air Quality Management District (SCAQMD) estimated in 2008 that the people living

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[1] The State adopts the numbering systems used by the parties for references to the record (ER___) and the district court's findings of fact (FF___). ATA's opening brief is referred to as "AOB __"; the City of Los Angeles' answering brief as "City Brf __."

and working in and around the Port were exposed to an average cancer risk that was more than 60 percent higher than the already high average cancer risk from all forms of air pollution in the South Coast Air Basin as a whole. SCAQMD estimated the risk to the neighborhoods surrounding the Port at approximately 1415 persons per million persons exposed developing cancer.[2] *ATA v. City of Los Angeles,* 2010 WL 3386436, p. 7, FF ¶ 32, ER 17.

California submits this brief in support of the significant efforts by one of the state's largest and busiest ports[3] to curb carcinogenic pollutants.

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[2] As a point of reference, California law requires a public warning from a covered business that exposes the public to a cancer risk of ten in one million persons exposed. Cal. Health and Safety Code, §25249.5; Cal. Code of Regs., tit. 22, § 12703(b).

[3] The Port of Los Angeles is one the largest ports in the nation. In combination with the Port of Long Beach, it is the fifth largest port in the world – handling about $240 billion worth of cargo a year. FF at ¶¶ 7-8.

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STATEMENT OF ISSUES

The State will address Appellee City of Los Angeles' Statement of Issues 1 and 4:

1. Whether the District Court correctly concluded that the five provisions of the concession contract challenged by Appellant American Trucking Associations, Inc. ("ATA") at trial fall within the market participant doctrine and hence are not preempted by 49 U.S.C. § 14501(c);

4. Whether the District Court correctly concluded that the maintenance and placard provisions of the concession contract fall within the "safety" exception contained in section 14501(c)(2)(A) and thus are not preempted[.]

INTRODUCTION

Appellant ATA argues that because the Port of Los Angeles is owned by the City of Los Angeles, a municipal government, therefore the Port must itself be acting as a government regulator in carrying out its Clean Trucks program. ATA argues that because the Port is, in its view, acting as a government regulator, then the undisputed fact that the Clean Trucks program may peripherally affect the routes, services, and prices of trucking companies means that the program is necessarily preempted by Congress's partial deregulation of the trucking industry in the Federal Aviation Administration Authorization Act of 1994 (FAAAA).

ATA is incorrect. The facts of this case present a particularly strong instance of a public agency that is acting as a *market participant*, and that is therefore exempt from preemption under the FAAAA. As the district court found, the Port of Los Angeles is a separate entity under the charter of the City of Los Angeles, directed by its own board of commissioners, and receiving no taxpayer support from the City's general fund. FF, ¶¶ 5, 13. And as the district court also found, the Port made a hard-headed business decision that it could not expand its cargo terminal facilities to meet expanding trade opportunities unless it expanded in a way that reduced or minimized air pollution in and around the Port facilities. FF at ¶¶ 50, 51; ER 20. The Port decided to set up a concession structure that restricts access to the Port to only low-polluting trucks-- properly equipped, properly maintained, and driven by truckers who are employed and properly overseen by the concessionaire. The Port made this business decision in response to years of delays in its ability to expand the cargo terminal facilities that it leases to tenants, delays caused by litigation against the Port seeking enforcement of environmental laws. FF 37; s*ee*, e.g., *Natural Res. Def. Council v. City of Los Angeles*, 103 Cal.App.4th 268 (2002). This marketplace decision also protects the Port's investment of over $56 million of Port funds, spent purchasing or subsidizing the purchase of the clean trucks that the Port considers a business necessity. FF, ¶¶ 73, 84, 85, 86.

Under the market-participation doctrine, the Port has the right to choose the parties with whom it contracts for services, and to set terms for those contracts that it judges will best promote its business -- just as other marketplace buyers and sellers do. The Clean Trucks program is a marketplace decision and as such it is not within the scope of FAAAA preemption.

Moreover, the FAAAA itself contains an exemption from preemption for safety matters, 49 U.S.C. § 14501(c)(2)(A), which is a subject of traditional state concern. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). At stake here is the safe operation of one the largest ports in the nation. The Port has included in the Clean Trucks program Concession Agreements that include new controls over the approximately 16,000 trucks that go in and out of the Port to transport cargo, FF, ¶ 52, and over the truckers that drive those many thousands of trucks. The Port's board of commissioners made specific findings, based on substantial record evidence, that centralizing and regularizing truck access and trucker vetting and oversight would not only reduce environmental harms, but would also boost security at the huge, hectic port facilities. FF, ¶¶ 67-69. These well-supported concerns place the safety components of the Clean Trucks program within the FAAAA's safety exemption to preemption.

ARGUMENT

I. THE CLEAN TRUCKS PROGRAM, INCLUDING THE CONCESSION AGREEMENTS, IS THE MARKETPLACE ACTIVITY OF A MARKET PARTICIPANT. AS SUCH, IT IS NOT PREEMPTED BY THE FAAAA

Not every action taken by a government agency that influences the marketplace is a regulatory action. Case law that originally developed under the Commerce Clause has long recognized that governments can and do take part in the marketplace as market participants, spending the public's money for the goods and services they need to be able to do the public's business. The market-participant doctrine has developed to recognize this fact of governmental economic life, and to allow state and local governments to act as consumers of goods and services without violating the Commerce Clause's federal primacy in regulation of interstate trade, and without suffering preemption under many federal statutes.

Under the market-participation doctrine, governments may buy and sell in the marketplace without suffering Commerce Clause preemption of their actions, so long as the governmental sales and purchases really are necessary and efficient sales and purchases, and are not regulations in disguise that are intended primarily to govern the behavior of other marketplace actors. *South-Central Timber Development, Inc. v. Wunnike*, 467 U.S. 82, 93 (1984) ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities."); cf. *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002*), cert. den.*, 537 U.S. 1171 (National Labor Relations Act did not preempt presidential executive order addressing project labor agreements, because the order applied only to projects in which federal government had a proprietary interest; the order was therefore market action and not regulation).

Particularly relevant is *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage*, 536 U.S. 424 (2002), wherein this Court held that the same statute at issue here, the FAAAA, did not preempt a local ordinance that set up a rotational list of companies eligible to tow abandoned vehicles. *Tocher* held that the City of Santa Ana presented "the classic example of a municipality acting as a market participant" because it entered contracts with towing companies to establish the ground rules for towing services to be provided exclusively to the City. 219 F.3d at 1049. Analogously, through the Clean

Trucks program's Concession Agreements at issue here, the Port set up the ground rules for entry into contracts for the provision of drayage services provided to and at the Port. While the Port has decided to contract with the concessionaires rather than directly with the truckers, it has nevertheless unquestionably entered the marketplace to contract for services, and has therefore acted as a market participant. See also, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

Similarly, in *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231-232 (1993), the Court upheld the action of the Massachusetts Water Resources Authority in enforcing a pre-hire collective bargaining agreement that the project manager entered into with labor unions to avoid any labor-related construction delays in a state-sponsored project in Boston Harbor. The Court held that the state was not preempted by the National Labor Relations Act from acting to protect its proprietary interests in the harbor project, and that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." Here, by analogy, the Port has set up the Concession Agreements to ensure that the Port may continue to grow and expand without the litigation delays of the past that were, in part, caused by pollution and safety problems resulting from the trucks servicing the Port. *See, also, Babler Brothers, Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993) (National Labor Relations Act did not preempt state statute requiring contractors to pay overtime on public projects, because Oregon was acting to ensure timely completion of publicly funded work.)

Within the broad limits of acting in the marketplace to further their own business interests, governments may act, and act aggressively, as market buyers and sellers. And, indeed, the Port's Concession Agreements constitute the action of a market participant under the test articulated in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006). In *Lockyer*, this Court set out a two-part test for determining whether the market-participant exception applies. A government's action will be considered proprietary and not preempted when: (1) the action "essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances"; and (2) "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address[ing] a specific proprietary problem." *Id.* at 1084. This test is an alternative one, and the Clean Trucks program need meet only one prong to be considered market-participant action. However, the State believes that the Concession Agreements meet both parts of the *Lockyer* test.

The Concession Agreements meet the first prong of the test because they were specifically designed to address and remedy the Port's persistent difficulties with air pollution and safety problems connected in part with drayage trucks serving the Port's cargo terminals, and with litigation being brought by neighborhood and environmental groups concerning these problems. The district court so found, FF ¶¶ 32-35, 37-49, 58-60, 64. This was a business decision. Moreover, it is evident that "private parties in similar circumstances" make similar business decisions. See *Engine Manufacturers Ass'n*, 498 F.3d 1031,1047 ("FedEx and UPS, have, for their own purposes, adopted programs to introduce less-polluting vehicles into their fleets. There is therefore no basis for concluding that purchasing less-polluting vehicles is not a purpose that a state may pursue as a market participant.") Here, the Port has purchased, subsidized, or leveraged approximately 35 percent of the drayage truck fleet that served the Port in 2010, to increase the use of low-polluting trucks. FF, ¶ 84-86.

The Concession Agreements also pass the second prong of the *Lockyer* test, since they are inherently limited in scope. The agreements apply only to the drayage trucks that call at the Port, and not to the truck population at large, or the trucks in the Los Angeles area, or even the trucks in the area surrounding the Port if those trucks do not call at the Port itself. The Agreements thus address only the Port's specific business problem.

II. THE MAINTENANCE PROVISIONS OF THE CLEAN TRUCKS PROGRAM FALL WITHIN THE SAFETY EXEMPTION TO FAAAA PREEMPTION

When Congress declared that the FAAAA preempts state regulation "related to the price, route, or service of a motor carrier that transports property," 49 U.S.C. § 14501(c)(1), it shielded from preemption local safety regulations of motor vehicles. Section 14501(c)(2)(A) provides that the statute's express preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles. . . ." 49 U.S.C. § 14501(c)(2)(A) (2007). This exception applies to local as well as to state regulation. *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 442 (2002). Even if, as the ATA claims, the Concession Agreements are an exercise of local regulatory authority related to motor carrier prices, routes, or services, they are nevertheless within the safety exception. The agreements respond to risks posed by the huge volume of trucks – some 16,000 – that serviced the Port prior to the agreements, and that operated without any centralized, coordinated oversight to ensure that the trucks were properly maintained and safe to operate.

The Port developed the Concession Agreements to address truck-related safety and security. FF, ¶ 71. Through the Concession Agreements, the Port seeks to phase out older trucks; control which trucks and drivers enter the terminals; protect nearby residents from noise and safety hazards; monitor truck maintenance; and ensure that the carriers are properly insured. Each of these elements is part of the overall objective of improving Port safety and security, as found by the Board of Harbor Commissioners. FF, ¶¶ 68-70, 71 (Board concerned that drivers "would lack the ability to properly maintain their trucks, thereby having a 'negative effect on both the vehicle safety, as well as the air emissions performance of vehicle engines and retrofits.'")

Rowe v. New Hampshire Motor Trans. Ass'n, __ U.S. __, 128 S.Ct. 989 (2008), relied on by ATA, is inapposite. In *Rowe*, the Supreme Court did not apply or interpret the FAAAA safety exception at issue here. Instead, that case involved a Maine statute limiting truck transport of tobacco products as a means to preventing delivery of such products to teens. The Court in *Rowe* rejected Maine's attempt to graft an unwritten public health exception to preemption onto the FAAAA; the Court held that no such exemption existed. It explained that the FAAAA "says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions (governing *motor vehicle safety*, certain local route controls, and the like), but the list says nothing about public health." *Rowe.* 128 S.Ct. at 997, emphasis added.Here, the maintenance provisions of the Concession Agreements specifically target threats to public safety that arise from the operation of inadequately maintained trucks at and around the Port.[4]

In this regard, the regulations are similar to the state of Washington's towing requirements upheld in *Tillison v. Gregoire*, 424 F.3d 1093 (9th Cir. 2005). The Washington legislation at issue there provided that a towing company must obtain written authorization to tow a vehicle from private property without the owner's permission, and that the property owner or agent must be present for the tow. *Id*. at 1096. This Court concluded that the legislation fell under the safety exception because it reduces confrontations over involuntary towing, and it protects the vehicle owner from being stranded at a dangerous time and location. *Id*. at 1104. The

[4] The placarding provisions in the Concession Agreements that require trucks, while in the Port, to display signs asking the public to report unsafe driving, also relate to safety. Such placards are also required by many private companies to promote safety. *See, e.g., Sheppard v. Sears, Roebuck & Co.*, 391 F.Supp.2d 1168, 1173.

safety connection between the statute, the effects on truck operations, and safety is plain: if there were no tow trucks in Washington, there would be no confrontations over involuntary tows or stranded owners. Similarly, if there were no drayage trucks at the Port, there would be no potential maintenance failures resulting in safety threats from the trucks. The nexus between the motor vehicles and the threatened harm to safety is clear, as it was in *Gregoire*.

CONCLUSION

The Port has as much right as UPS and FedEx to "go green" when it feels that such action is in its business interests. It also has as much right as any private market participant to protect its investment in clean and safe trucks, to protect itself from the recurrence of proven and repeated litigation delays over its contribution to the staggering cancer risk facing the Port's adjacent neighborhoods, and to set up a contract system that will ensure that the trucks that call at the Port are and remain clean, well maintained, and safe.

The judgment of the district court should be affirmed

Dated: February 17, 2011 Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

[CHOOSE ONE]

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

The following related case is pending: [name]

The following related cases are pending: [list]

Dated: February 15, 2011

Respectfully Submitted,

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Susan L. Durbin
Deputy Attorney General