No. 11-798

In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

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

Respondents.

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, COALITION FOR CLEAN AIR, INC.,

Respondents.

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

BRIEF OF THE NATIONAL ORGANIZATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the Nation's 3,068 counties through advocacy, education, and research.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation (Rule 37.6).

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3,500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

These organizations (collectively, "Local Government *amici*") have an interest in the Court's proper recognition of the market participant exception to express preemption provisions in federal legislation, including the Federal Aviation Administration Authorization Act. The approach to market participant exception analysis advanced by Petitioner threatens to intrude upon the rights and authority that, in our federal system, inure to state and local governments when acting in their proprietary capacity as purchasers, sellers, landlords, and business managers. The interpretation advanced by Petitioner also puts at

risk many programs that state and local governments have designed and implemented in their proprietary capacity and as participants in the free market, yet nonetheless promote important environmental policies and provide other community benefits.

SUMMARY OF ARGUMENT

It is well established that a State or local government acting as a market participant, rather than as a market regulator, is unencumbered by the prohibitions imposed by both the dormant Commerce Clause and implied federal preemption. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) ("*Boston Harbor*"); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984); *White v. Massachusetts Council of Construction Workers*, 460 U.S. 204, 206-08 (1982); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap*, 426 U.S. 794, 810 (1976). This case, however, presents an issue the Court has not previously addressed at length: how the market participant exception applies where Congress has expressly preempted state and local regulation in a given area of economic activity. All of the Circuit Courts of Appeals that have addressed the issue have found that the market participant exception applies to express preemption, though they have at times emphasized different facets of the doctrine.

Local Government *amici* fully endorse the detailed and persuasive arguments set forth by Respondents City of Los Angeles, et al., and Natural Resources Defense Council, et al. The off-street parking and placard provisions of the concession contract entered into by the Port of Los Angeles (the "Port") and licensed motor carriers (LMCs) providing drayage services at the Port are not preempted by Section 14501(c) or Section 14506(a) of the Federal Aviation Administration Authorization Act (FAAAA). This is so for either one of the following reasons: As contractual terms between a municipal entity acting as a proprietary landlord and service providers seeking access to municipal property the provisions do not have "the force and effect of law" and are therefore outside the scope of the preemption provisions. Alternatively, even if the two provisions of the concession contract do, in some respect, have "the force and effect of law" the market participant exception nonetheless exempts them from preemption under the FAAAA.

Local Government *amici* submit this brief for several reasons: to underscore the market participant exception's core federalism values; to advance a principled analytic approach to applying the exception in the context of express preemption; to synthesize courts' various approaches to determining when state and local government action constitutes market participation so as to respect the diversity of interests involved; and to argue that state and local governments acting in their proprietary capacity as landlords and

property managers – as the Port of Los Angeles did here – may properly be considered market participants when dealing with those that use their property for business purposes.

ARGUMENT

I. THE PRINCIPLES OF FEDERALISM AND EVENHANDEDNESS SUPPORT THE PRESUMPTION AGAINST STATUTORY PREEMPTION OF MARKET PARTICIPANT BEHAVIOR IN THE FAAAA

The market participant exception has its origins in an old common law distinction that held local governments liable in tort when the action that gave rise to the damage was "proprietary," and immune from such liability when the action was "governmental." *See* Chester James Antieau, *Antieau on Local Government Law* § 2-35 (2d ed. 2004). The distinction at the core of the modern market participant exception – between participation in the free market and regulation of it – stands apart from the proprietary-governmental distinction, and is unquestionably vital. Indeed, the Court continues to recognize in a number of areas the difference between a government's attempt to "regulate an entire trade or profession, or to control an entire branch of private business" and an attempt to manage internal operations and property held in a proprietary capacity. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896

(1961); *cf. Engquist v. Oregon Dept. of Agric.*, 553 U.S. 591, 598 (2008).

The modern market participant exception is grounded in the deep-rooted principles of our federalism. As the Court noted in *White v. Mass. Council of Constr. Workers*, "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 460 U.S. 204, 207 (1983) (citation omitted). The Court's recognition of this constitutional constraint on federal power protects state and local governments' ability to structure their business relations and reflects the Court's desire to allow for "effective and creative programs for solving local problems." *Reeves*, 447 U.S. at 441. In a similar vein, the modern market participant exception also reflects a principle of "evenhandedness" that grants state and local governments acting in their proprietary capacity the same freedom possessed by private market actors to choose among trading partners. *Reeves* 447 U.S. at 438-39 (recognizing "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"). This principle recognizes the limited impact most state and local proprietary action has on the national market that the dormant Commerce Clause and federal preemption are designed to protect, and allows governments to act in the market without raising additional concerns about the myriad ways in which governments' proprietary actions may touch on issues of public policy otherwise covered by federal legislation.

Respect for the principles of federalism and "evenhandedness" has informed the Court's decisions in all of its market participant cases. *See generally*, Dan T. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989). Although the Court has previously applied the exception only to cases alleging implied preemption under the NLRA and to cases alleging violations of the dormant Commerce Clause, there is absolutely no reason that the doctrine should not also apply where Congress has included an express preemption provision in a statute. Accordingly, all of the Circuit Courts of Appeals that have confronted this question have applied the doctrine in cases involving express preemption. *See Johnson v. Rancho Santiago Comty. College Dist.*, 623 F.3d 1011, 1024 (9th Cir. 2010) (applying market participant exception in preemption provisions of the Employee Retirement Income Security Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1043 (9th Cir. 2007) (applying exception to preemption provisions of the Clean Air Act); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-18 (2d Cir. 2002) (applying exception to preemption provisions of the Telecommunication Act); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 694 (5th Cir. 1999) (applying exception to preemption provisions of FAAAA).

As with any preemption analysis, the central question in determining whether the market participant exception applies to an express preemption

provision is one of congressional intent. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) ("The purpose of Congress is the ultimate touch-stone in every preemption case"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 n.27 (1992) (explaining an understanding of the scope of a preemption provision turns on "a fair understanding of congressional purpose"); *Sprint Spectrum*, 283 F.3d at 419-20 (interpreting preemption provisions of Federal Communications Act to determine whether proprietary action was intended to be preempted). Congress, of course, has the power to limit state and local governments' proprietary discretion through statutory preemption provisions. However, "In 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." *Boston Harbor*, 507 U.S. at 231-32. Thus, the market participant exception's grounding in core federalism principles, together with the Court's decision in *Boston Harbor*, have created a presumption against the preemption of proprietary action. Analysis of the doctrine's applicability in a given statutory context, then, properly presumes that it applies, and may involve the search for evidence of congressional intent to preempt market participant behavior. *See id.*; *Engine Mfrs.*, 498 F.3d at 1042; *Sprint Spectrum*, 283 F.3d at 420.

Petitioner proposes the opposite analytic approach, arguing that Congress knows how to exempt

market participant behavior from express preemption and therefore the analysis should begin with the search for evidence of congressional intent to *exempt*, rather than to *preempt*. *See* Pet. Br. 27. Petitioner's proposed approach, however, would subvert the principles of federalism and evenhandedness that undergird the market participant doctrine.

What's more, the proposal proves far too much: Every statute with an express preemption provision intended to provide a degree of national uniformity would have to include a separate provision specifically exempting state and local governments' proprietary actions from preemption. Congress would have to continually reiterate that it does not intend to tell state and local governments what they can and cannot buy, sell, demand of contractors, or demand of people making use of those governments' facilities. Existing statutes with preemption provisions but without specific exemption clauses – including the Clean Air Act and the Toxic Substances Control Act, among others – could now prevent state and local governments from, for instance, buying and selling low emissions vehicles for municipal fleets or low toxicity products for municipal buildings, and from otherwise arranging for contractual relationships as they see fit. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 259 (raising question "whether some of the Fleet Rules . . . can be characterized as internal state purchase decisions (and, if so, whether a different standard for preemption applies)"); *Engine Mfrs. Ass'n,* 498 F.3d at 1043

(applying exception to state and local government purchase of low emissions vehicles). Such an approach would, without any evidence of congressional intent, deny state and local governments the flexibility to serve as "laboratories" for democracy and experimentation, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting), or to exercise their proprietary prerogatives.[2]

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[2] By way of example: The City of Portland, Oregon's Sustainable Procurement Policy requires that the city consider a number of environmental factors when procuring materials, products, or services, including toxicity level, greenhouse gas emissions, and energy consumption. *See* City of Portland, City of Portland Sustainable Procurement Policy, Sept. 2010 Update 1 (2010), *available at* http://www.portlandoregon.gov/shared/cfm/image.cfm?id=204110. The City of Austin, Texas has required that the entire City fleet of vehicles be carbon neutral by 2020. Austin, Tx., Resolution No. 20070215-023 (Feb. 15, 2007). The City of Minneapolis, Minnesota has adopted a Green Fleet Policy that requires the purchase of low emissions fuels when feasible. City of Minneapolis, City of Minneapolis Green Fleet Policy 4 (2010), *available at* http://www.minneapolismn.gov/www/groups/public/@citycoordinator/documents/webcontent/convert_253782.pdf. The Montgomery County, Maryland Division of Solid Waste Services requires all County collection contractors to purchase and use collection vehicles fueled by compressed natural gas (CNG) when collecting solid waste. *See* Press Release, Montgomery County, Maryland, Montgomery County Announces First "Green" Refuse and Recycling Trucks in Mid-Atlantic Region (June 10, 2010), http://www6.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=6670. And the City of Kansas City, Missouri posts signs notifying vehicles with environmental problems, such as heavy exhaust or leaking fluids, that they are prohibited from entering the City Hall basement garage and other city-owned and -operated garages. Although a close analysis of each of these provisions might yet

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In support of this reversal of the presumption against preemption of market participant behavior, Petitioner notes that Congress has, in two clustered circumstances, specifically exempted states' and localities' internal purchase decisions from preemption. Pet. Br. 27-28, citing 15 U.S.C. §§ 1203(b), 1476(b), 2075(b) (fabric and product flammability standards, special packaging for household products standards, and consumer product safety standards); 49 U.S.C. §§ 30103(b)(1), 32919(c), 32304(i)(2) (automobile safety standards, fuel economy standards, and motor vehicle country-of-origin labeling requirements). This small constellation of "for its own use" protection provisions is far too limited to reverse the presumption against preemption of state and local governments' authority to buy and sell goods and services, and to manage property as a private actor would. *See also*, U.S. Br. 15-19.

Petitioner also compares FAAAA's preemption provision to that in several other statutes. None of these comparisons supports Petitioner's novel proposal.

First, Petitioner overstates the similarities between Section 14501(c) and the preemption provision in the Airline Deregulation Act (ADA), 49 U.S.C.

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find them not preempted by the Clean Air Act, the Toxic Substances Control Act, the Energy Policy Conservation Act, or the FAAAA, under Petitioner's proposed analysis, each one would be presumed to be preempted unless the relevant statute expressly reserved the local governments' proprietary rights.

§ 41713(b)(3). Pet. Br., 26-27. It is true that the ADA broadly deregulated the airline industry, and that the FAAAA's deregulation of the trucking industry was generally based on that statute. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367-68 (2008). As Respondent City points out, however, the proprietary language in the ADA derived from prior case law addressing airport liability for noise and air pollution, and may, in any event, signal a second form of proprietary exception under that act – one that adds to the exception implied by the statute's "force and effect of law" language – rather than an exclusive one. *See* Resp. City Br., 25-26. Moreover, as the Solicitor General explains, the legislative history indicates that the ADA provision was not intended to alter existing proprietary authority exercised by airports that might affect airlines in such a way as to otherwise be construed as regulatory. *See* U.S. Br., 17-19. Ultimately, both of these points reflect a practical difference between airlines and trucking companies: Airlines *necessarily* and *only* use airports, which tend to be publicly owned. Congress therefore properly carved out airports' ability to exercise proprietary powers in relation to airlines in order to avoid the potential implication of total preemption. In contrast, there was no reason whatsoever for Congress to specify state- or city-owned facilities (such as ports, arenas, and parking garages), or state- or city-owned construction projects, or any of the numerous other possible markets in which state and local governments might participate in relation to trucks. After all, there are an estimated 15.5 million trucks on the

roads of the United States.[3] It would be difficult to guess how many of those will typically interact with a state or local government acting in a proprietary capacity; and there is no question that many of them will never drive onto a port at all.[4]

Similarly, Petitioner compares the present case to the exemption from FAAAA preemption claimed in *Rowe* and to the exemption from preemption under the Magnuson-Stevens Fishery Conservation and Management Act claimed in *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002). These cases are either off-point or of dubious value. *Rowe* did not involve state or local proprietary action, but an attempt to protect the public health, and so is of no relevance here. *City of Charleston* did involve a local government's failed claim to the market participant exception, but it was an implied preemption case in an entirely different statutory setting involving entirely different statutory language with a far broader preemptive reach than in the FAAAA. In that case, the majority opined that the market participant exception would not apply to a local resolution banning certain long-line vessels from a municipal dock because nothing in the Magnuson-Stevens Act saved proprietary action from the broad

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[3] *See* TruckInfo.net, http://www.truckinfo.net/trucking/stats.htm (last visited Mar. 17, 2013).

[4] The Port of Los Angeles, the largest port in the U.S. by volume, receives visits from only 16,000 trucks per year. Pet. App. 6a, 69a.

scope of implied preemption the majority discerned in the statute's language and purposes. *City of Charleston*, 310 F.3d at 179; *but see id.* at 182-83 (Luttig., J., dissenting) (finding action was proprietary in nature and exempt from preemption). It is unclear from the decision, however, whether the majority improperly, without explanation, and in conflict with *Boston Harbor* and every other circuit that has reached this issue ignored the presumption against preemption of the market participant exception, or else, and perhaps more likely, in light of its implied preemption analysis found the presumption overcome and therefore shifted the burden of persuasion onto the city.[5]

The FAAAA provides a limited express preemption provision, which only preempts a "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c); *see also*, U.S. Br., 5 (discussing legislative history and congressional purposes behind preemption provision). Market participation,

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[5] The Magnuson-Stevens Act authorizes a federal over-ride of state fisheries management where "any State has taken *any action*, or omitted to take *any action*, the results of which will substantially and adversely affect the carrying out of" an approved Fishery Management Plan. 16 U.S.C. § 1856(b) (emphasis added). The Fourth Circuit majority concluded that this language – which covers not only "law[s], regulation[s], and other action[s] having the force and effect of law" but "any action" that will disrupt implementation of a Fishery Management Plan – together with the purposes and structure of the statute impliedly preempted the resolution. *City of Charleston*, 310 F.3d at 179. The majority also found that the local resolution was regulatory in nature, rather than proprietary. *Id.* at 173-79.

by definition, does not possess the "force and effect of law." *Cardinal Towing*, 180 F.3d at 691; *cf.*, U.S. Br., 15 ("Section 14501(c) is not naturally read to preempt contractual arrangements between government entities and motor carriers that do not differ from what private parties might agree to in the free market"). Thus, the off-street parking and placard provisions, as contractual arrangements that precisely resemble what a private landlord in the Port's position and private motor carriers in the same position as the LMCs would do, do not fall within the scope of FAAAA preemption. Moreover, Section 14501(c) offers a clear statement of congressional intent *not* to preempt market participant behavior, leaving the presumption against preemption firmly in place.

II. THE PORT ACTED AS A MARKET PARTICIPANT IN REQUIRING THE OFF-STREET PARKING AND PLACARD PROVISIONS OF THE CONCESSION CONTRACT

Application of the market participant exception to any factual circumstance involves "a single inquiry: whether the challenged program constitute[s] direct state participation in the market." *White*, 460 U.S. at 208 (quoting *Reeves*, 447 U.S. at 435 n.7) (internal quotations omitted). The Court and the Circuit Courts of Appeals have approached this "single inquiry" by emphasizing a number of different factors in what is, inevitably, a case-by-case, fact-specific analysis. *Selevan v N.Y. Thruway Auth.*, 584 F.3d 82,

93 (2d Cir. 2009). Application of these factors to the present case demonstrates that the concession contract's off-street parking and placard provisions constitute market participation. In addition, although the Court has never fully embraced the necessity of narrowly defining the "relevant market" as an applicable factor in market participant analysis, here the concession contract provisions pertain to the Port's participation, as the landlord of a container port, in the market for drayage.

A. Application of the Factors Used by Courts to Define Market Participation Supports the Respondents' Argument

Several factors consistently recur in this and the lower courts' consideration of whether state or local action is market participation: 1) the nature of the government's interest in the action; 2) the analogy between the government's action and what a private actor *could* do; 3) the analogy between the government's behavior and what a private actor *would* do; 4) the intended scope of the government's action; 5) the scope of the impacts of the government's action; and 6) whether the government's goals are primarily about public policy. *See, e.g., Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 70 (2008); *Cardinal Towing*, 180 F.3d at 693; *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1023 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2096 (2011); *Sprint Spectrum*, 283 F.3d at 421; *Tri-M Group*, 638 F.3d at 421.

These factors reflect the Court's and the lower courts' appreciation of the principles of federalism and evenhandedness that inform the doctrine, as well as their recognition of appropriate limitations to the exception it affords.[6] Several of these factors analogize government proprietors to private actors, an analogy which affords state and local governments flexibility, promotes experimentation and innovation, and acknowledges the limited impact state and local governments acting independently in the free market can have on national economic and regulatory schemes. *Cf.* Resp. NRDC Br., 40. At the same time, several of the factors also place limits on what the market participant exception can exempt: the government's interest must be proprietary, meaning that it relates *primarily* to government operations or a business-like interest rather than to governance; the government's purposes must not be fundamentally about public policy; and the impact on downstream markets must be constrained.[7]

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[6] The Solicitor General offers a somewhat backwards conception of the market participant exception, and argues that the doctrine was developed to restrain state and local governments "purporting to act as [ ] market participant[s]" but who were instead acting as market regulators. U.S. Br., 16; *see also id.* at 19-21. The case law simply does not support this argument. The doctrine was developed as a defense to challenges to state and local action that can *exempt* such action from constraints imposed by the dormant Commerce Clause and federal preemption, not as a rationale for subjecting action to those constraints.

[7] The Solicitor General offers a similar view of the established principles that guide the market participant-market

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Application of these factors to the present case indicates that the Port acted as a market participant when requiring drayage companies to comply with the off-street parking and placard provisions of the concession contract.

First, as the district court found, the Ninth Circuit affirmed, and the City of Los Angeles has persuasively argued, and has not in fact been challenged by Petitioner, the Port's interest in the two provisions is proprietary, as it relates to generating community goodwill and providing other benefits that will enable the efficient use and ongoing expansion of port facilities and the accommodation of increased shipping. *See, e.g.*, Pet. App. 16a, 25a, 38a-41a; Resp. City Br., 3-5, 11-12, 30.

Second, the provisions would be well within the power of a similarly situated private actor to demand.

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regulator distinction. *See* U.S. Br., 20-21. An important difference, however, lies in the emphasis the Solicitor General places on the availability of government-specific remedies, such as civil and criminal fines and penalties. *See id.* The existence of these types of remedies, however, has never been determinative. For instance, provisions of executive order at issue in *White* included enforcement provisions, and the Equal Employment Opportunity Contract Compliance Office of the City of Boston was charged with monitoring and enforcement of the executive order and the contracts that were made pursuant to it. *Massachusetts Council of Const. Emp., Inc. v. Mayor of Boston*, 425 N.E.2d 346, 348 n.4 (Mass. 1981); *see also*, *Engine Manufacturers*, 498 F.3d at 1048 (rejecting argument that Fleet Rules were not proprietary because they included criminal fines and penalties for noncompliance).

Put simply, a privately-owned port, as with any private landowner, would have the power to require trucks entering its property to provide off-street parking plans and a placard providing identifying information. Petitioner argues that the concession contract is akin to a licensing scheme imposed by a regulator on a particular service sector. Pet. Br. 21. However, the Port did not invoke the regulatory authority conferred upon it by the City Charter to create an exclusive licensing scheme, nor did it grant commercial licenses to LMCs to operate anywhere else in the State of California or the City of Los Angeles. Instead, it created a concession contract, approvable by resolution or order of the Board of Harbor Commissioners and valid for a period of up to five years, with a distinct set of provisions for default and termination. *See* Pet. Br. 20-21; Pet. App., 213a-215a. The better analogy, then, as the Ninth Circuit understood, is to a real property license, in which the Port, as licensor, has granted to amendable LMCs a right of access and use and codified its consent in the concession contract. *See* Pet. App., 25a (describing "contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions"); *see generally*, Powell on Real Property, Sec. 34.24; Restatement of Property Sec. 512.

Third, as Respondent Natural Resources Defense Council has elucidated in its brief, Resp. NRDC Br. 24-28, and as the Port's management and private consultants determined, Resp. City Br. 30-31, a

similarly situated private actor *should* and *would* take steps to alleviate community resistance and environmentalist opposition, and to generate community goodwill, by attempting to "grow green" and provide local community benefits. Pet. App., 7a-8a. There is no question that "Corporate America" is developing an environmental ethic and greater commitment to social responsibility, and that private companies, including some of the most powerful companies in the world, are exercising their market power to influence, and even require, improved environmental and social performance from both internal divisions and external partners. The examples of Nestlé and Starbucks, *see* Resp. NRDC Br., 29-35, are just two of many. The Ninth Circuit recognized this more than five years ago, in *Engine Manufacturers*, when, citing to the non-required conversion of truck fleets by FedEx and UPS, it declared that the public purpose of reducing air pollution was reasonably considered the decision of a rational market actor. *See* 498 F. 3d at 1046. In February 2008, Wal-Mart and Toys-R-Us stated that toys shipped to their chains would have to meet safety testing standards and other standards for lead, phthalates and other toxins that exceeded federal standards.[8] BMW, Inc. and its partner Designworks/USA have encouraged

[8] *See* Parija V. Kavilanz, "Wal-Mart, Toys 'R' Us unveil new safety rules," CNN Money, Feb. 15, 2008, available at http://money.cnn.com/2008/02/15/news/companies/toysafety_update/index.htm.

suppliers and dealerships to become certified in international sustainability management systems.[9] Given these new realities of the contemporary business world, the Port's actions are fully consistent with the likely behavior of similarly situated private actors.

Fourth, the intended scope of the two provisions is narrowly tailored to the specific purposes of reducing diesel air pollution and creating community goodwill, thereby forestalling further litigation and facilitating the expansion of the Port. *See* Resp. City Br. 44-48. The provisions apply only to those trucks that access Port property; the placard provision only applies when drayage trucks are in and around the Port, and off-street parking provision impacts trucks that, for the most part if not entirely, park within the vicinity of the Port. *See* Resp. City Br. 4-6. The LMCs need not provide off-street parking plans for their other, non-Port related trucks and operations, nor must they display placards on their non-Port related trucks, or even on their Port trucks should they ever be used elsewhere.

Fifth, the scope of the provisions' impact is minimal. The court below found "downstream" impacts on

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[9] *See* McElhaney, Kellie, Michael W. Toffel, and Natalie Hill. "Designing Sustainability at BMW Group: The Designworks/USA Experience." *Greener Management International: The Journal of Corporate Environmental Strategy and Practice* 46 (summer 2004): 103-116, available at http://www.people.hbs.edu/mtoffel/publications/McElhaney_Toffel_Hill_2006_GMI.pdf.

drayage truck drivers to be outside the scope of the market participant exception, and that finding has not been appealed. *See* Pet. App. 41a-44a. Moreover, the potential impacts of the two provisions on the trucking industry are barely visible, if not non-existent. The provisions only impact drayage trucks that access the Port, which in total represent less than one tenth of one percent of the trucks on the road in the United States. *See* n.3 and n.4, supra, and accompanying text. Petitioner's challenge extends to an even smaller number of trucks, namely those which have not yet benefited from the Port's clean trucks subsidy program. *See* Pet. App., 90a-92a (describing $60 million invested through grants, incentives, and purchases of clean trucks). In addition, the provisions themselves are relatively insignificant, requiring drayage trucks take small measures to produce big results. Indeed, the two provisions at issue here are a far cry from Alaska's outright ban on the post-sale, out-of-state and international export of unprocessed timber by purchasers of timber logged from state lands. *See South-Central Timber*, 467 U.S. at 97 (expressing concern about "substantial regulatory effect" of timber processing requirement).

Finally, the off-street parking and placard provisions do not reflect a general policy purpose. Obviously, any state or local government action is likely to reverberate with policy implications. As the Court has noted, "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12; c*f. Dept. of Revenue of*

Kentucky v. Davis, 553 U.S. 328, 345-50 (2008) (Souter, J.) (discussing "dual role" of governments acting as market participants). But this case is clearly distinguishable from earlier cases where the Court found states and localities used their bargaining power primarily as a means to obtain policy ends. For example, in *Wisconsin Dept. of Industry v. Gould Inc.*, the Court held that a state statute barring certain labor law violators from doing business with the state was preempted because the State's legislative rationale was to deter labor law violations, not to obtain some business benefit. 475 U.S. 282, 286-91 (1986). Similarly, in *South-Central Timber* the plurality emphasized that the timber processing requirement was expressly intended to promote industry within the State, derive tax revenue, and achieve other policy ends, and that there was no ostensible proprietary purpose to the sales restriction. 467 U.S. at 85; *see also Chamber of Commerce v. Brown*, 554 U.S. at 70. Here, by contrast, there is a clear business purpose to the challenged provisions, and there is no over-arching law they are meant to enforce or policy they are meant to pursue.

Petitioner selects a few of the above market participant factors and argues that each one is determinative. First, Petitioner argues that the market participant exception is limited to the direct procurement of goods or services or to expenditures of state-allocated funds. Pet. Br., 30-31. This argument, however, flies in the face of *Reeves*, which involved neither procurement nor expenditure but the sale of

State-produced goods. 447 U.S. at 430. Nor does it account for the fact that state and local governments frequently act as landlords who must interact, in a proprietary capacity, with a broad array of business partners.

Second, Petitioner argues that the exception is limited to instances where the state or local government action relates to "'one particular job'." Pet. Br., 30-31 (quoting *Boston Harbor*, 507 U.S. at 232). It is difficult to define what "one particular job" might mean in the context of ongoing state and local government proprietary operations, but it clearly does not mean anything as narrow as Petitioner implies. For instance, the job at issue in *Boston Harbor* was cleaning up the Boston Harbor, a "job" that involved a decade-long scope of work, cost $6.3 billion in 1993 dollars, and necessarily involved numerous constituent elements, each one of which could be considered "one particular job" itself. In *White*, the executive order establishing city-resident hiring requirements applied to all city construction contracts, not just those that pertained to a single job or project. *See* 460 U.S. at 206 n.1. In *Reeves*, the "one particular job" would have to have been the ongoing operation of the state-run cement plant and whatever occasional in-state sales preferences it might enact. *See* 447 U.S. at 430-32. Accordingly, to the extent that the scope of market participation is supposed to pertain to "one particular job," a reasonable definition of that job, in

this case, would be the ongoing operation of the Port of Los Angeles.[10]

B. The Port, as Landlord, is in the Market for Drayage Services

In *South-Central Timber*, a plurality of the Court wrote,

> The limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market to which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.

467 U.S. at 97; *see also id.* at 102-03 (Rehnquist, J., dissenting) (calling plurality approach "unduly formalistic"). Consistent with this language, several lower courts have made defining the "relevant market" a central component to determining whether state or local government action analogous to the Port's action here is market participation exempt from statutory preemption or the dormant Commerce

[10] The Solicitor General also addresses several of these factors in enumerating four "considerations" that office argues indicates market regulation. *See* U.S. Br., 22-25. To the extent not addressed above, the first three "considerations" are refuted by the City of Los Angeles. *See* Resp. City Br., 38-45. The fourth "consideration" is addressed in Section II, infra. *See also* Resp. City Br., 45-48; Resp. NRDC Br., 37-41.

Clause. See *Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997); *Smith v. Dept. of Agric. of State of Georgia*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied,* 452 U.S. 910 (1981); *Florida Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230 (11th Cir. 2012).

Should the Court consider such an analysis relevant, the Court should follow the holding of the unanimous Eighth Circuit panel in *Four T's*. There, the court held that a municipal airport commission was, as the airport's landlord, in the market for car rental services, and therefore acted as a market participant with regards to fees it charged car rental companies. 108 F.3d at 912-13; *see also*, *Crescent Towing & Salvage Co., Inc. v. Ormet Corp.*, 720 So. 2d 628, 631-32 (holding Greater Baton Rouge Port Commission a market participant in market for marine terminal facilities); *Salem Transp. Co. of New Jersey, Inc. v. Port Auth. of New York & New Jersey*, 611 F.Supp. 254, 258 (S.D.N.Y. 1985) (holding Port Authority a market participant in the market for ground transportation services); *Transp. Limousine of Long Island, Inc. v. Port Auth. of New York & New Jersey*, 571 F.Supp. 576, 581 (E.D.N.Y. 1983) (same). Here, the Port of Los Angeles, as landlord, is similarly in the market for drayage. *See Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009); *Am. Trucking Ass'ns v. City of Los Angeles*, 2010 U.S. Dist. LEXIS 88134, 17-19 (C.D. Cal. 2010); Resp. City Br., 36-37.

The Eighth Circuit's decision is in conflict with the Fifth Circuit's decision in *Smith v. Department of Agriculture of State of Georgia* and the Eleventh Circuit's recent decision in *Florida Transportation Service*. But any reading of these cases reveals that their holdings were under-justified.[11]

In *Smith*, the two judges in the majority wrote separately, finding that Georgia acted as a market regulator in granting preferences to in-state vendors for more desirable sales spaces at a farmers market that was owned, operated, and partially financed by the State. The majority opinion reached this view in what can only be described as conclusory fashion. *Smith*, 630 F.2d at 1083. The concurrence noted that the case was "close," and that reading either the majority or the dissent "alone, my impulse is to concur." *Id.* at 1085. The concurrence then wondered whether the relevant market was for the space used by sale booths, which would plainly indicate proprietary action, or for vegetables, which would "seem to"

[11] Though the Eleventh Circuit decision is, on the surface, more closely analogous to the present case, the key distinction is between *Four T's* and *Smith*, as the Eleventh Circuit was bound by *Smith*. *See Florida Transportation Service*, 703 F.3d at 1262 n.46. Moreover, the facts pertaining to the stevedoring permit scheme at the Port of Miami, which granted exclusive operating licenses to a limited number of stevedores, *see* 703 F.3d at 1235-37, are distinguishable from the concession contracts, which grant non-exclusive access licenses to LMCs, and the actual involvement of the Port of Los Angeles in the drayage market through the grant of subsidies for and the investment of capital in cleaner drayage trucks. *See* Pet. App. 90a-92a.

indicate regulatory action, *id.* at 1086, before concluding, without explanation, that the relevant market was for vegetables. *Id.*

Judge Randall, writing in dissent, concluded that Georgia's farmer's market "amount to no more than selective dealing by the State in its commercial leasing," *id.* at 1087, and that "the State of Georgia has entered into the economic market for the provision of physical marketplaces." *Id*. at 1088. Pointedly, Judge Randall also noted that the separate opinions of the majority make little sense in comparison with *Alexandria Scrap*, where the Court held that a state subsidy that established a market for the sale of hulks was proprietary action, or *Reeves*, in which defining the "relevant market" was a non-issue. *Id.* In *Four T's*, the Eighth Circuit followed the reasoning of Judge Randall's dissent.

Ultimately, this case should be governed by the Court's decision in *Boston Harbor*. In that case, a public agency entered into project labor agreements that required contractors to sign agreements with third parties, namely labor unions, in order to prevent projects from being disrupted by labor disputes. 507 U.S. at 221-22. The Court held that the state agency could enter into such agreements – even though they may have otherwise been preempted by the NLRA – because it was acting as an owner or manager of property that "must interact with private participants in the marketplace." *Id.* at 227. The Court acknowledged that the agreements could produce economic benefits that a public proprietor,

just like a private proprietor, should be free to seek. *Id.* The case here is similar: the Port, as a public proprietor, entered into contracts with LMCs that will enhance the Port's ability to grow and provide distinct economic benefits to it. The Court should recognize the business necessity of the concession contract – which is limited in scope, impact, and duration – and allow the Port to get on with its business.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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