No. 11-798

In the

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

v.

CITY OF LOS ANGELES, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND HARBOR TRUCKING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Is there a generalized "market participant" exception to the Supremacy Clause of the United States Constitution?

2. Is a municipal government a "market participant" when it purchases no goods or services and otherwise has no participation other than the management of public property?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of significance addressing constitutional structure, including *American Electric Power Co. v. Connecticut*, __ U.S. __, 131 S.Ct. 2527 (2011); *Bond v. United States*, __ U.S. __, 131 S.Ct. 2355 (2011); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in the constitutional structure of government that defines a specific role for the federal government. Although the Center is most often active in those cases where the federal government has overstepped

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

the bounds of its role, federalist structure also requires that state and local governments be prohibited from exceeding their power under the federal structure. The Constitution unquestionably assigns regulation of commerce between states and with foreign nations to Congress and establishes that congressional enactments under that power are the "supreme law of the land."

Harbor Trucking Association is a nonprofit 501(c)(6) organization that focuses on best practices in the drayage industry. Its members include Licensed Motor Carriers that move cargo from the ports, including the Port of Los Angeles, as well as cargo owners that use the drayage system. The HTA is one of the leading industry groups in the inter-modal transportation business. Its members are directly impacted by any and all tariff changes, policy decisions, and rate increases that take place at both the Port of Los Angeles and Port of Long Beach.

Many of the Licensed Motor Carriers that belong to HTA work with independent contractor truckers to move the cargo from the port. These Licensed Motor Carriers take on the obligation of obtaining the necessary regulatory permits from the United States Department of Transportation for a truck to operate. The Licensed Carriers will also take responsibility for the administrative requirements of working with the Port, the Department of Transportation, the California Highway Patrol, and other regulators. The Licensed Carriers may purchase the trucks to move the cargo and lease them to the independent contractors. This allows the owner-operators to continue to work in a legal environment of increasing regulation including rules

that require ever more expensive pollution control technology.

Neither the Licensed Motor Carriers nor the owner-operator truckers that work with them do business with the Port of Los Angeles. Instead, the Carriers contract directly with shipping companies (or the purchasers of the cargo) to move cargo from the port to customers or to the next point of transportation in the cargo's journey. The Port has no need to hire the members of HTA because the Port has no cargo to transport.

HTA members generally work with owner-operators — truck drivers that own their own equipment. The vast majority of drayage companies working at the Port use this business model in which low barriers to entry create intense competition among the carriers for business. Small businesses are allowed to flourish in this environment. It is an environment where, until the regulations at issue were enacted, competitive market forces could be counted on to produce lower rates and better service. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371 (2008).

In HTA's experience, the truck owner-operators favor this arrangement over an employer-employee model. The owner-operator model allows the truckers more freedom to set their own schedule and also allows them to make more money than employee-drivers. Bill Sharpsteen, *The Docks* 179 (University of California Press, 2011). Without the owner-operator model, most of the smaller Licensed Carriers would not be able to compete in this market.

As set forth in John E. Husing, et al., *San Pedro Bay Ports Clean Air Action Plan*, *Economic Analysis*, *Proposed Clean Truck Program* (Sept. 7, 2007) (Husing)[2], a purpose of the regulations at issue is to put the members of HTA out of business in order to attract national trucking lines to take over drayage services at the port. To accomplish this purpose, the port is working to end the entrepreneurial competition that is the hallmark of the drayage industry at the port.

SUMMARY OF ARGUMENT

The Port of Los Angeles is a local government agency that manages the public trust for navigation over tidelands in Los Angeles. The Port is financed by leasing space shipping companies bringing goods to the United States from around the world. The Port has no business relationships, however, with the trucking companies providing drayage services to the shippers. Nonetheless, the court below ruled that the Port was a mere market participant, and thus regulations imposed on these trucking companies in order to advance environmental and social goals were not subject to the express preemption provisions of a Congressional enactment. Review is necessary in this case to examine this radical expansion of the "market participant" doctrine and to examine whether the doctrine yields a general exception to the Supremacy Clause of the United States Constitution.

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[2] The Husing Report was commissioned by the Ports of Los Angeles and Long Beach to study the impact of the Ports' Clean Truck Program. The report is posted on the Port of Los Angeles' web site at http://www.portoflosangeles.org/ctp/CTP_Full_Report_Sept72007.pdf.

REASONS FOR GRANTING REVIEW

I. REVIEW IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER A STATE MAY AVOID THE PREEMPTIVE EFFECT OF A CONGRESSIONAL ENACTMENT WHEN IT SEEKS TO IMPROVE ITS OWN ECONOMIC POSITION

The Port of Los Angeles is on tidelands of the State of California. *American Trucking Associations. Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009) (*ATA I*). These tidelands have been granted to the City of Los Angeles, but the city only holds the property in trust for the benefit of the people of the State of California. *Id.* California gained title to its tidelands at statehood, "not in its proprietary capacity but as trustee for the public." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (Cal. 1980). Under the public trust doctrine, tidelands are held in trust for the public for navigation, commerce, and other public purposes. *Id.*; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892). The grant of the tidelands to the City of Los Angeles for the port was subject to this trust. *See Zack's, Inc. v. Sausalito*, 165 Cal. App. 4th 1163, 1176-77 (2008); *Illinois Cent. R.R.*, 146 U.S. at 453-54. Indeed, the State of California has no power to alienate the tidelands of the state free of the public trust for navigation and commerce. *See Ward v. Mulford*, 32 Cal. 365, 372 (Cal. 1867)*; People v. California Fish Co.*, 166 Cal. 576, 588 (Cal. 1913); *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 484 (Cal. 1970).

This Court noted in 1873 that the state's sovereignty over this land was subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States." *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873). This public trust ownership of tidelands has existed since the founding of this nation.

> [W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government.

Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842).

This Court emphasized these restrictions on public trust properties in *Illinois Cent. R.R.*. At issue in that case was the ownership of land beneath Lake Michigan that the railway contended it owned by reason of a grant from the state. The Court conceded that, under the equal footing doctrine, Illinois gained title to the lands under navigable waters in the state upon admission to the state. 146 U.S. at 434-35. That title, however, was not the same as title to upland property. "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 452. Even if the state transfers title, it still has a trust responsibility. "The trust devolving upon the state

for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." *Id*. at 453.

There is no dispute that when Los Angeles was granted this property for construction of the port, it was a grant that was subject to the public trust. Los Angeles is required to hold this property for the benefit of the public for navigation and commerce, among other purposes. These public trust purposes are at the heart of the use of the tidelands for a commercial port. That fact establishes not only that the port is complying with its duties under the public trust, but also that when the City of Los Angeles uses the granted tidelands for a port—for navigation and commerce—it is engaged in a quintessential government function dating from the time of the revolution.

In this case, the city, as well as the state, stands as the trustee for the public to ensure that these tidelands are used in a manner consistent with the public trust. While the city can allow private parties to undertake activities consistent with the trust, there can be no doubt that when government does so it acts in the role of government. Indeed, it cannot act otherwise under the public trust doctrine. The state and the city hold this property for the public purposes of navigation and commerce. In this role, this city is no more a private actor than when it assesses private property for taxes, hires police and firefighters, or takes any other action pursuant to police power to act for the public safety, health, or welfare. *See Golden State Transit Corp. v. City of Los*

Angeles, 475 U.S. 608, 617-18 (1986); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95-96 (1984).

Amici do not dispute that the Port collects revenue from the shipping companies that use its facilities. As the court below noted, the Port is not supported by tax revenue. Instead it relies on fees and leases to finance its activities. *American Trucking Associations, Inc. v. City of Los Angeles*, 660 F.3d 384, 391 (9th Cir. 2011) (*ATA II*). At the same time, however, there is no doubt that the Port is a governmental entity. As noted above, the Port manages the tidelands as part of California's public trust for navigation and commerce. The Port is run by a Harbor Commission that is appointed by the Mayor of Los Angeles and confirmed by the Los Angeles City Council. The Port maintains its own police department and port police officers are "peace officers" with the same powers and duties as any other law enforcement peace officer in the State of California. Cal. Penal Code §830.1. The port issues bonds, the interest on which is exempt from state and federal income tax - the same as other public entities.

The regulations at issue in this case are targeted at the Licensed Motor Carriers providing drayage services to the shipping companies. The Port does not use the services of these companies and indeed concedes that it has "no direct hand in the daily movement of cargo." Financial Polices for the Harbor Department of the City of Los Angeles, April 2011, at 11.[3] None of the regulations at issue concern

[3] The document is posted on the Port's web site at http://www.portoflosangeles.org/pdf/POLA_Financial_Policies.pdf

the procurement of goods or services for the Port. Indeed, the "'principal motivating factor'" for these regulations was to achieve specific environmental goals. *ATA I*, 559 F.3d at 1049.

Notwithstanding the clear lack of interest by the Port of Los Angeles of entering into any type of business arrangements with the drayage trucking companies, the Ninth Circuit found that the Port's regulation of these companies falls within the "market participant doctrine," thus shielding the regulations from federal preemption. The Ninth Circuit reached this conclusion based on its finding that expansion of Port facilities was "stymied by legal opposition from community and environmental groups." *ATA II*, 660 F.3d at 390. Thus, the Port's Clean Truck Program was meant to address some of these concerns and remove political objections to port expansion. Because this regulation of Licensed Motor Carriers served the economic goals of the Port, the Ninth Circuit ruled that those regulations were "essentially proprietary." *Id*. at 399.

The lower court ruled that "the Port directly participates in the market as manager of Port facilities." *Id*. at 400. The court then sought to limit this sweeping proclamation to only those situations where the government agency is "self-sustaining" by reason of the fees charged to other businesses for use of the property. *Id*. at 401. This distinction means that management of city streets may not qualify as a market participant activity in the Ninth Circuit, but management of a toll road, government-owned parking structure, fee-support rapid transit system, or even a fee-supported public park.

Such a conclusion stands in contrast to this Court's ruling in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008). In that case this Court rejected the notion that a state's spending power might escape preemption where a direct regulation (what this Court termed exercise of a "police power") would not. 554 U.S. at 70. In *Chamber of Commerce*, California sought to prohibit all employers receiving state funds (or, importantly for this case, using state property) from spending money to influence employee decisions on union organizing. *Id.* at 63. This Court refused to characterize California as a proprietor in this circumstance, even though the law was one that governed the expenditure of state funds. Because the regulation was neither "specially tailored to one specific job" nor related to "efficient procurement of goods or services" the state action was one of general regulation. *Id.* at 70. The fact that California sought to regulate the use of state funds and property in *Chamber of Commerce* did not convert the action from a regulation into a proprietary act. The Ninth Circuit's decision departs from this line of reasoning in a significant fashion. Mere management of public property where some fees are collected is now sufficient to convert any regulation into proprietary action free of the command of the Supremacy Clause that congressional enactments are the supreme law of the land.

This is a breathtaking expansion of the market participant doctrine — all the more so since it offers an exception to preemption without any reference to Congressional intent. This Court should grant review to determine whether the market participant

doctrine should be expanded in such a radical manner.

II. REVIEW IS NECESSARY TO SETTLE THE IMPORTANT QUESTION OF WHETHER THERE IS A GENERAL MARKET PARTICIPANT EXCEPTION TO THE SUPREMACY CLAUSE

Federal preemption of state law proceeds from the power granted in Article VI, Clause 2. Whatever compelling interest a state may have in a particular regulatory scheme, that scheme must give way in the face of a conflicting congressional enactment. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992); *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824).

The question of preemption is one of congressional intent. *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231 (1993); *Metropolitan Life, Ins. Co. v. Massachusett*s, 471 U.S. 724, 738 (1985). Thus, in the face of an express preemption provision, a state's economic interests are not the starting point for the analysis. This Court noted as much in its decision in *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282, 290 (1986). Since *Gould*, however, the question of whether a state regulation escapes the preemptive force of the Supremacy Clause when it involves a "spending" power has become confused.

The market participant doctrine does not exist as a free-standing, all purpose exception to preemption. "[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding

the necessary extent of state power in areas where Congress has acted. *Gould*, 472 U.S. at 289. What types of state regulation the Commerce Clause would permit is "an entirely different question" from what states may do in the face of Congress' decision to preempt state law. *Id*. at 290. Nonetheless, lower court decisions since *Gould* tend to mix market participant cases decided under the Dormant Commerce Clause with cases involving preemption, never mentioning the nature of the "entirely different question" raised by those two concepts.

Since the decision in *Gould* this Court has continued to use the term "market participant," but has focused on whether state action "'was specifically tailored to one particular job'" rather than a more general regulation. *Chamber of Commerce*, 554 U.S. at 70. More importantly, this Court has examined the state action to determine if it was the type of action Congress intended to preempt. *See Building & Construction Trades Council*, 507 U.S. at 231; *Golden State Transit*, 475 U.S. at 618. Thus, in *Golden State Transit*, this Court rejected the notion that a "traditional municipal function" was any more exempt from preemption than the state spending decision in *Gould*. It was not the nature of the municipal regulation, but rather whether it interfered with scheme set in place by Congress.

The state agency contract at issue in *Building & Construction Trades* was upheld – but not simply because it involved economic activity of the state. Instead the state agency was characterized as a "proprietor" – it was a party to the contractual relationships under review. 507 U.S. at 232. The question was whether contract provision was one

that was preempted by the National Labor Relations Act. The mere fact that a state agency was a party to the contract did not convert the contract into a state regulation subject to preemption. In order to uphold "Congress' intended free play of economic forces" state actors need to exercise the same freedom of contract under the federal law as private actors. *Id*. The project labor agreement was upheld because it was the type of agreement permitted under the NLRA. *Id*. at 231-32.

The federal law at issue in this action, the Federal Aviation Authorization Act, expressly preempts any "local law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c)(1). No exception to this command appears in the law for regulations enacted to serve economic or environmental goals of the local entity. Congress did permit states to continue to enact safety regulations and vehicle insurance requirements. 49 U.S.C. §14501(c)(2)(A). No similar exception was granted for economic purposes, however.

This Court has described the "overarching goal" of these provisions as assuring that "transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces.'" *Rowe*, 552 U.S. at 371 (*quoting Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)). The regulations of the Port of Los Angeles have a different goal. Competition is seen as the problem rather than the goal. Husing at 22. The Port regulations seek to increase costs for Licensed Motor Carriers and independent owner-operator truckers in the hopes of

driving these small businesses out of the market. *Id.* at 24. The Port believes that once this occurs, shippers will be forced to pay higher rates for drayage trucking and this will in turn attract national trucking firms with the economic resources necessary to satisfy other goals of the Port. *Id.*

Review is necessary to determine mere management of public property on which it earns a fee is sufficient to permit the Port of Los Angeles to pursue goals for the transportation of goods in international and interstate commerce that are diametrically opposed to the goals set by Congress.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant the petition for writ of certiorari.

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Respectfully submitted,

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