No. 11-798

In the
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,
v.
CITY OF LOS ANGELES, et al.,
Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND HARBOR TRUCKING ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Amici Center for Constitutional Jurisprudence and Harbor Trucking Association have received consent to file this amicus brief from Petitioner American Trucking Association and Respondents Port of Los Angeles, *et al.* but Respondent Natural Resources Defense Council has declined to respond to several requests for consent thus necessitating this motion. Letters of consent from Petitioner and the Port of Los Angeles have been lodged with the Clerk of this Court.

Amicus Harbor Transportation Association is vitally interested in the regulations at issue in this case. Members of the association own drayage trucking companies that provide drayage services that dock at the Port of Los Angeles. These are the companies that, though they do no business with the Port are the target of the regulations at issue.

Amicus Center for Constitutional Jurisprudence is also keenly interested in this matter. The Center seeks to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Among other things, the Center is vitally interested in the constitutional structure 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 the bounds of its role, federalist structure also requires that state and local governments be prohibited from exceeding their power under the federal structure.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae in support of petitioner.

DATED: February, 2013.

Respectfully submitted,

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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 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 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

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[1] 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.

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 intermodal 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

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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.

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 leases dock and storage space to 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 could regulate trucking companies in a manner prohibited by 49 U.S.C. §14501, a federal statute that expressly preempts the Port's regulations on the theory that the Port is a mere market participant. The Port, however, regulates as a government agency and does not buy, sell, or even use drayage services provided by the trucking companies that are subject to the regulations at issue. In no sense of the term is the Port a "market participant."

In any event, the market participant doctrine is a creature of this Court's "Dormant Commerce Clause" jurisprudence, meant to counteract some of unforeseen impacts of that judicially created rule. It has no place in cases where preemption is based on the Supremacy Clause of Article VI.

ARGUMENT

I. THE PORT OF LOS ANGELES IS NOT A MARKET PARTICIPANT

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 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.

The challenge in this case is to a regulatory program adopted by the Port of Los Angeles that regulates routes and services of motor carriers and admittedly will have a drastic affect on the prices those

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

carriers charge. A significant purpose behind the regulatory program is to *decrease competition*, create barriers to entry in the drayage industry, and *increase costs*. Husing at 79. As this Ninth Circuit characterized it, the regulations "denigrate small businesses and insist that individuals should work for large employers or not at all." *ATA I*, 559 F.3d at 1056 .

The Husing report commissioned by the Ports of Los Angeles and Long Beach specifically identifies competition in the drayage industry as a problem. Husing at 22. That competition leads to lower drayage trucking fees—something the Port study identifies as a problem. Husing at 24. Indeed, this situation is, according the Husing Report, the result of deregulation. Husing at 24. The Port is concerned that Congress got it wrong. Through the regulations challenged in this case, the Port has set about to reverse the national policy set forth in the Federal Aviation Authorization Act and reinstate the patchwork of regulation that Congress sought to eliminate. These regulations seek to re-regulate the trucking industry—especially with regard to prices, services, and routes.

As noted in the Husing report, the licensed motor carriers are "highly entrepreneurial" companies. Husing at 77. Because of the efficiencies achieved by this model, there are few barriers to entry leading to intense price competition. Husing at 24. The elimination of such barriers to entry is another goal of deregulation. *See Tocher*, 219 F.3d at 1047. The realization of decreased cost through competition was also a goal of Congress in deregulating the industry.

Rowe, 552 U.S. at 371; *Californians*, 152 F.3d at 1187.

For all of the Husing Report's recognition of entrepreneurial competition present at the Port, this small business success is seen by the Port as a problem. Because of this competition and the low barriers to entry into this sector of the industry, large trucking firms are unlikely to attempt to compete for drayage contracts at the port. Husing at 80. Thus a feature of the regulations that Husing views as beneficial is the reduction in competition, putting many of the current licensed carriers and independent owner operators out of business, so that large trucking firms can come in and negotiate for increased drayage fees. *Id.*.

Husing sees the reduction in competition as an additional benefit that results from the increased costs for drayage that a smaller, less competitive drayage industry could command. Husing does not, however, compare these local purposes of regulation with the purpose of Congress in deregulating the trucking industry.

While the regulatory purpose of the challenged program is clear, there is no evidence of "proprietary" or "market participant" purpose. First, the Port does not enter into *any* business arrangements with the drayage trucking companies. As noted above, the drayage companies work directly with the shipping companies.

The closest connection between the drayage trucking companies and the Port is that the Port leases space to the shipping companies for docks. The Port's regulation of the drayage companies is analogous to an

effort by a commercial landlord to regulate the customers of the lessee – imposing restrictions on where they could park *after the leave the property*, etc. This is not a business transaction, but a pure regulation.

The Ninth Circuit's conclusion that the Port was a "market participant" was 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. The Port intended the Clean Truck Program to address some of these concerns and remove political and legal objections to port expansion. It was this connection between the regulation of Licensed Motor Carriers and the economic goals of the Port that the Ninth Circuit ruled rendered the challenged program "essentially proprietary." *Id*. at 399.

This is an argument that knows no limits. Such a rule would allow the port to prohibit importation of goods from foreign countries that were the subject of political objections. So long as the group voicing the objections seeks to block some action of the port, the lower court's rule allows the Port to avoid the rule of the Supremacy Clause. If the concept of "market participant" could be stretched that far, the Court's ruling in *Crosby* could easily be avoided.

The Port is not a market participant in the market for drayage trucking services, however. The Port has no business with the drayage companies. Instead it merely seeks to regulate the drayage trucks both on and off Port property. In any event, there is no market participant exception to the Supremacy Clause.

II. THERE IS NO MARKET PARTICIPANT EXCEPTION TO THE SUPREMACY CLAUSE

The "market participant doctrine" has no place in preemption law under the Supremacy Clause. That doctrine was created to deal with problems arising from the Court's "Dormant Commerce Clause" doctrine. The earliest mention of the Commerce Power in its "dormant" state is found in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 251-52 (1829), where the Court simply upheld a state law allowing the construction of a dam. The Court there rejected the notion that the Commerce Clause withdrew from the state all power to regulate on subjects touching on interstate commerce. *Id.*; *New York v. Miln*, 36 U.S. 102, 132 (1837). Notwithstanding the lack of textual support in the Constitution, this Court has developed a Dormant Commerce Clause jurisprudence that intrudes on the "delicate balance" between state and federal power. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 610-12 (1997) (Thomas, J., *dissenting*).

The "developing Dormant Commerce Clause jurisprudence created the problem of federal courts being asked to forbid state programs that were not in conflict with any federal laws. That result created serious problems for the "delicate balance between state and federal governments. Thus, when the Court was presented challenges to state programs where the state was paying for items in commerce, rather than seeking to regulate broadly against commerce from competing states, this Court developed a "market participant" exception to its Dormant Commerce Clause jurisprudence. *Hughes v. Alexan-*

dria Scrap Corp., 426 U.S. 794, 810 (1976). As the Court noted in *Hughes*, "[n]othing in the purpose animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Id*. (emphasis added).

The "market participant" doctrine, like the Dormant Commerce Clause, works when Congress has not spoken. That is not the case here.

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 the state argues that it was acting in a proprietary role or relying on its spending power has become confused. As the Port does in this case, state and local government now seek exception from the Supremacy

Clause when the state claims to be a "market participant."

The market participant doctrine in Dormant Commerce Clause jurisprudence 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.

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 v. Brown*, 554 U.S. 60, 70 (2008). 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 on facts quite different from those presented in this case. First, Congress did not include an express preemption pro-

vision in the National Labor Relations Act. Thus, the question in *Building & Construction Trades* involved whether a state contract was the equivalent of a state law regulating labor contracts generally – or even regulating all construction contracts with the state. 507 U.S. at 232. Because the NLRA did not prohibit this type of project labor agreement, the state contract was no preempted. *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.

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*.

CONCLUSION

The Port of Los Angeles is not a market participant by any definition of that doctrine. More importantly, however, market participation does not give license to state and local governments to issue general regulations that are expressly preempted by federal law. The Supremacy Clause takes no notice of the financial impact of its command that valid federal laws are the "supreme law of the land." The regulations at issue conflict with the express preemptive command of valid federal law. Article VI of the Constitution commands that those regulations must fall.

DATED: February, 2013.

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