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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[*]

Amici, the Chamber of Commerce of the United States of America ("Chamber") and the National Industrial Transportation League ("NIT League"), file this brief to address a mistaken trend in Ninth Circuit case law. Contrary to this Court's precedent and the opinions of sister circuits, the Ninth Circuit engrafted into the express-preemption provisions of the Federal Aviation Administration Authorization Act ("FAAAA") a broad "market participant" exception that Congress did not see fit to create. Countering this development is the focus of this *amicus* brief, but both the Chamber and the NIT League also endorse the position of Petitioner the American Trucking Associations ("ATA") that (i) the Port of Los Angeles's "Concession Plans" at issue in this case impose requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1); and that (ii) the Port may not block federally licensed motor carriers from accessing the Port without violating *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (1954). *Amici* also agree with Petitioners' analysis as to why the safety exception in the FAAAA is inapplicable. See Pet. 27-28.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three

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[*] After timely notification, the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business. More specifically, the Chamber has filed briefs in several of this Court's key market participant doctrine cases, including *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"); and *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986).

Founded in 1907, the NIT League is a national association that represents approximately 600 member companies that tender goods to carriers for transportation in interstate and international commerce, or that arrange or perform transportation services. The NIT League's membership includes large multinational and national corporations as well as small and medium-sized companies. The NIT League's shipper members span a multitude of industries, such as retailing, automotive, chemicals, computers, and electronics and use all modes of transportation including trucking. Many NIT League members are importers or exporters that depend on our Nation's seaports, including Los Angeles, for efficient and timely shipping. The NIT League has previously participated as an *amicus* in significant port and maritime litigation. See *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14 (2004); *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998).

In this case, by decreeing the terms for contracts between private shippers and truck operators and ostracizing dissenting truckers from the Port, the Port of Los Angeles has engaged in regulation of significant concern to *amici* and the members they represent — regulation that the FAAAA preempts for the reasons explained below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves "Concession Plans" that the Port of Los Angeles has adopted to limit the ability of shippers to contract with truckers transporting ("draying") shipping containers to or from the Port. The Port insists that the Plans establish voluntary contracts despite the fact that the Plans (1) are incorporated into a municipal ordinance backed by criminal sanction; (2) form part of a published tariff enforceable under the federal Shipping Act of 1984; and (3) have the primary purpose of "ameliorat[ing] adverse environmental effects" by "creating incentives for concessionaires to use clean and efficient trucks." Pet. App. 226a.

The Concession Plans have the force of law and are thus preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The plain text of the FAAAA preempts contrary state provisions that have the "force and effect of law." 49 U.S.C. §§ 14501(c)(1), 14506(a). And this Court has

established that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995) (some internal quotation marks and modifications omitted).

The Ninth Circuit opinion below disregarded these bedrock propositions (and the plain text of the statute) to hold that the Port's adoption of the Concession Plans was not subject to preemption under the FAAAA because the Port was supposedly acting as a market participant in implementing the Plans. Drawing on cases from the dormant Commerce Clause context, the Ninth Circuit held in relevant respect that (i) the Port could mandate that trucks have a plan for using off-street parking facilities *outside of the Port*, see Pet. App. 38a, and (ii) mandate the use of placards on trucks, see *id.* at 44a, because the Port was acting in a proprietary, not regulatory capacity. Specifically, the Ninth Circuit determined that, "[p]rior to the enactment of concession agreements, community members complained that drayage trucks regularly parked in surrounding neighborhoods, posing safety and health risks. The Port believed that off-street parking would mitigate drayage trucks' negative impacts and increase the community goodwill necessary to facilitate Port expansion." *Id.* at 40a. And the Ninth Circuit further reasoned that the "placard provision is proprietary in nature" and therefore not preempted, because it was adopted "in response to community concerns" and "invites community participation and increases goodwill." *Id.* at 46a. In the Ninth Circuit's words, "[e]nhancing goodwill in the community surrounding the Port is an im-

portant and, indeed, objectively reasonable business interest." *Id.* at 40a.

Amici respectfully submit that this brand of analysis cannot be the touchstone of FAAAA preemption. To the contrary, it is often the case that disregarding a federal statute's preemptive scope will promote local goodwill. Yet the whole point of preemption doctrine is to ensure that the Nation's public policy goals prevail over local concerns when Congress has explicitly spoken on a subject within its authority.

Indeed, the FAAAA's preemption provisions were enacted to deregulate an encrusted federal regulatory regime as well as to eliminate the patchwork of burdensome state trucking regulations that had grown up alongside that now-defunct body of federal regulation. Congress's purpose was to ensure that state governments would not undo federal deregulation with re-regulation of their own. See *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Thus, the FAAAA expressly provides that the critical inquiry is whether the state rules have the "force and effect of law." The Concession Plans at stake here undoubtedly do. The Plans are an out-and-out sovereign licensing scheme for regulating trucking markets weakly masquerading as mutual contracts. Such a licensing scheme with the "force and effect of law" does not comport with the text of the FAAAA. To the extent, moreover, that there was any doubt about the Plans' regulatory nature, those doubts are dispelled by the sheer fact that the Plans are embodied in the Port's Tariff 4, which gives it the force and effect of law. See 46 U.S.C. § 40501(f).

The implications of this case are deep and cut across the entire field of federal regulation of both in-

ternational and interstate commerce. Even if this case did not involve specific facts that are themselves remarkable — the imposition of a licensing regime by the municipal government that hosts the largest port in the Nation denying access to truck operators unless they submit to regulations establishing how drayage trucks can operate — this case would still be of immense significance. The off-street parking and placard requirements, seen in the narrowest light, "may be . . . the obnoxious thing in its mildest and least repulsive form," but as this Court has elsewhere remarked, such "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2620 (2011) (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886)).

If the court below is allowed to declare as market participation general categories of regulation in the environmental and safety areas — and if the Port is allowed to issue edicts vaguely designed to ensure good relations with its private neighbors — then not only will the express-preemption provisions in the FAAAA (and other federal statutes) fall prey to ready circumvention, but all boundaries confining the market participant doctrine to rational limits will be erased.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Erroneously Held That The FAAAA Does Not Preempt The Concession Plans Because They Are Saved By A Judicially Created Market Participant Exception.

It is well-settled that, when a federal law contains an express preemption clause, this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Easterwood*, 507 U.S. at 664. The panel opinion departs from that teaching and engrafts upon the FAAAA a market-participant exception absent from the plain language of the statute.

A. The FAAAA Expressly Preempts State Provisions That Have The Force And Effect Of Law.

Both of the provisions of the FAAAA that are relevant here expressly preempt contrary provisions that have the "force and effect of law." The FAAAA unambiguously provides that "a State [or] political subdivision of a State . . . may not enact or enforce a 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). Relatedly, the FAAAA also prevents States and their political subdivisions from enacting or enforcing any "provision having the force and effect of law that requires a motor carrier . . . to display any form of identification on or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation." *Id.* § 14506(a).

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), this Court interpreted the meaning of the phrase "force and effect of law" in the context of a similar preemption provision contained in the Airline Deregulation Act of 1978 (ADA). In *Wolens*, this Court explained that "the phrase 'having the force and effect of law' is most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement." *Id.* at 229 n.5 (some internal quotation marks and modifications omitted; see also *id.* at 240 (O'Connor, J., dissenting in part) ("action to invoke the State's coercive power . . . by means of a generally applicable law" is action "having the force and effect of law").

As a result, under *Wolens*, "privately ordered obligations . . . do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law'" within the meaning of the ADA. *Id.* at 228-229. By contrast, where a state enacts "binding standards of conduct that operate irrespective of any private agreement," such provisions clearly have the "force and effect of law" and are accordingly preempted.

There can be little dispute that the Concession Plans have the "force and effect of law." While nominally described as calling for "contracts" or "agreements," the Concession Plans are essentially a state licensing scheme restricting access to the Port in furtherance of regulatory-style goals. Several aspects of the Plans demonstrate their regulatory nature.

First, as part of its approval of the Concession Plans, the Port issued a broad prohibition providing that, effective October 1, 2008, "no Terminal Operator shall permit access into Terminal in the Port of Los

Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day pass from the Port of Los Angeles." Pet. App. 12a. The Port thus set as a background rule a prohibition on access to the Port, with a requirement that drayers receive permits to obtain such access.

Second, it is undisputed that the Port does not, pre- or post-Concession Plan, participate in transactions between shippers and drayers carrying container traffic into and out of the Port. See, *e.g.*, Pet. App. 6a, 43a (Ninth Circuit decision after trial), 221a-222a (initial Ninth Circuit interlocutory appeal) 255a, 257a, 259a (initial District Court preliminary injunction decision).

This is not a case, in other words, of the Port establishing the contract terms for an agreement between itself and the providers of drayage services. Instead, the Port here requires that drayers accept certain provisions for the right to do business with shippers that use the Port to import and export cargo.

Third, reinforcing that they have the "force and effect of law" under the FAAAA, the Concession Plans are expressly incorporated into statutory law in two significant ways. As an initial matter, they are embodied in a local municipal ordinance backed by the threat of criminal prosecution. See Pet. 31; see also Pet. App. 83a n.5.

No less importantly, the Concession Plans are incorporated into the federal Shipping Act of 1984, and are therefore "enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions," 46 U.S.C. § 40501(f).

Here, the Concession Plans are part of the Port's "Tariff No. 4." Pet. App. 83a (trial findings); see *id.* at 183a, 203a, 212a, 241a. Tariff No. 4 plainly provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Temporary Access Permit" and that the "terms and conditions for the Concession are set forth in the Port of Los Angeles Concession Agreement between the Port of Los Angeles and the Licensed Motor Carrier." Port of Los Angeles, Tariff 4, Section 20, Clean Air Action Plan — General Rules and Regulations, Item No. 2040, *available at* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last visited Jan. 23, 2012). Tariff 4 was made publicly available via posting on the Internet. *Ibid.*

As part of the Port's tariff, the Concession Plans are subject to review by the Federal Maritime Commission (FMC). See, *e.g., New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (affirming Federal Maritime Commission assertion of jurisdiction over tariffs); *Plaquemines Port, Harbor & Terminal Dist.* v. *FMC*, 838 F.2d 536 (D.C. Cir. 1988) (holding that the FMC had jurisdiction over port offering essential services and controlling access to private facilities). Indeed, the Plan was in fact voluntarily submitted by the Port to the FMC for review. See Agreement 201196 (submitted Sept. 30, 2008), *available at* www2.fmc.gov/agreement_lib/201196-000.pdf (last visited Jan. 23, 2012).

Hence, pursuant to the Shipping Act, marine terminal operator agreements like the Concession Plans unavoidably carry the force of law, because they are

"enforceable by an appropriate court as an implied contract *without proof of actual knowledge of its provisions*." 46 U.S.C. § 40501(f) (emphasis added). Such provisions are deemed "contracts" only by operation of a legal fiction, but in actuality are fully enforceable under federal law once adopted by a port and made publicly available. Hence, the Port's submission to the FMC of the Concession Plans, along with the Port's deliberate decision to make the tariff publicly available and consequently trigger Section 40501(f), are actions flat-out inconsistent with the Port's litigating position that it is acting as a market participant.

Fourth, it is undisputed that: (i) the Port earns all or much of its revenue based on the amount of container traffic transiting the Port; (ii) the Concession Plans will drive up drayage contract pricing, increasing shipping costs; and (iii) the Plans will cause at least a three percent diversion of container traffic to other ports. See Pet. App. 29a (Ninth Circuit appeal after trial); 89a (Finding of Fact ¶ 80); 216a ("'additional components of the Concession agreements,' [include] 'creating a 'market characterized by the presence of fewer, generally larger and more stable' licensed motor carriers. Los Angeles Board Resolution 6522."); see also *id.* at 89a (Finding of Fact ¶ 79). The whole point of the Concession Plans was to drive up the costs for drayage services, thereby reducing demand and/or incentivizing a shift to more environmentally friendly, newer-generation heavy-duty diesel trucks. It is axiomatic that reducing supply leads to higher prices. See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 777 (1999) ("price will … rise in order to limit demand to the reduced supply"). It follows that the Port's purpose was not to promote

business development at the Port, but rather to further the City's environmental policies.

Taken together, such legal sanctions and requirements demonstrate that the Concession Plans have the "force and effect of law." Indeed, the Ninth Circuit did not seriously suggest to the contrary. As a result, the "scheme is tantamount to regulation." *Gould*, 475 U.S. at 287 (emphasis added). At the end of the day, just as this Court explained in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008):

> It is beyond dispute that California enacted AB 1889 in its capacity as a regulator rather than a market participant. AB 1889 is neither "*specifically tailored* to one particular job" nor a "legitimate response to state procurement constraints or to local economic needs." *Gould*, 475 U.S., at 291. As the statute's preamble candidly acknowledges, the legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy. See 2000 Cal. Stats. ch. 872, § 1.

Id. at 70 (emphasis added).

B. The Ninth Circuit's Importation Of The Dormant Commerce Clause's Market Participant Doctrine Into The FAAAA Cannot Be Reconciled With The Statute's Plain Text and Exceeds the Doctrine's Boundaries In Any Event.

Rather than relying on the FAAAA's plain text and this Court's precedents construing comparable language, the Ninth Circuit read into the FAAAA a "market participant" doctrine based on jurisprudence

under the dormant Commerce Clause. That conclusion is incorrect for several reasons.

First, and as explained above, any importation of market participant doctrine into the FAAAA cannot be reconciled with the statute's text. Under the relevant FAAAA provisions, *all* provisions that have the "force and effect of law" are preempted regardless of whether the State purports to act in its regulatory or proprietary capacity. There is no warrant in the statute for drawing a distinction based on the intentions behind the enactment of a particular law.

The pivot point for determining the extent of preemption in a statute with an express-preemption provision is the intent of Congress, not the constitutional objectives of dormant Commerce Clause doctrine. The dormant Commerce Clause establishes background rules of constitutional protection for our "national 'common market.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). Once Congress acts, however, the default rules of the dormant Commerce Clause, which includes a narrowly tailored market participant doctrine, are subject to change. "[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*, 475 U.S. at 289 (emphasis added).

That distinction is particularly important here because the objective of the FAAAA is not simply to prevent States and localities from fracturing the national common market in the transportation of goods — a concern that overlaps with the dormant Commerce Clause — but *to deregulate* that market. See

Rowe, 552 U.S. at 368 (describing deregulatory and preemptive purposes of the Motor Carrier Act of 1980 and the FAAAA); see also *id.* at 370-71 (observing that the Court determined in *Morales* v. *TWA, Inc.*, 504 U.S. 374, 390 (1992), that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives"). The scope of preemption under the FAAAA, in other words, is not the same as the scope of unconstitutional state/local government conduct under the dormant Commerce Clause.

In this regard, this case differs from this Court's holding in *Boston Harbor*. In *Boston Harbor*, this Court recognized a market-participant exception under the judicially created doctrines of implied preemption under the National Labor Relations Act (NLRA). See 507 U.S. at 231 (State can manage its "own property [by] pursu[ing] its purely proprietary interest . . . where analogous private conduct would be permitted."). The Court upheld the City of Boston's contractual requirements from challenge because it was designed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and for that reason, the City was "acting as [a] proprietor rather than regulator." *Id.* at 228. Critically, the NLRA contains no express-preemption provision like that in FAAAA Section 14501(c)(1). Where an act contains an express preemption provision, as here, the scope of preemption must mirror the scope of the provision. See *Easterwood*, 507 U.S. at 664.

Second, the structure of the FAAAA supports this interpretation. The FAAAA's preemption provisions themselves contain a series of exceptions to their

scope. For example, section 14501(c)(2) lists a series of "matters not covered" by the preemptive scope of section 14501(c)(1), including "the safety regulatory authority of a State with respect to motor vehicles [etc.]" 49 U.S.C. § 14501(c)(2). The same is true of section 14506. Under that provision, several express "[e]xception[s]" to the prohibition against requiring display of identification are listed, including exceptions permitting a State to continue to require a display of credentials under the International Registration Plan, the International Fuel Tax Agreement, or a "State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate." *Id.* § 14506(b)(1)-(3). Where such exceptions are expressly provided, it is particularly inappropriate to imply others. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, the straightforward reading of the FAAAA's express-preemption provision is bolstered by the fact that other statutes contain explicit "market participant"-style language. For example, in enacting the materially identical preemption provision in the ADA, Congress provided expressly for a proprietary exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3). See also 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use" under certain circumstances); cf. 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local governments to "prescribe a standard for a motor vehicle or motor equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"). The existence of these provisions amply demonstrates

that, where Congress wants to include a market participant exception in a statute, it knows how to do it. It did not do so here.

Fourth, the market participant doctrine — as conceived by the Ninth Circuit — is extraordinarily malleable. Indeed, the very facts of this case demonstrate how a State could mask its public-policy-driven actions as actions taken in its "proprietary capacity."

As the first Ninth Circuit panel explained, the Concession Plans were trying to solve a perceived market failure — classic regulatory action. The record in the case readily demonstrates that a "significant purpose behind the Concession agreements was purely environmental." Pet. App. 226a. The Plans "sought to ameliorate [ ] adverse environmental effects by forcing a direct contractual relationship upon the motor carriers, by mandating vehicle maintenance requirements, and by enhancing motor carrier efficiency while creating incentives for concessionaires to use clean and efficient trucks." *Id.* And "[a] mere reading of some of the stated purposes of the Los Angeles Board, for example, underscores an extensive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." *Id.* at 225a-226a; see also *id.* at 153a n.2 (district court opinion agreeing that "enjoining the implementation of the Concession agreements will stop cold the clean up of port trucks") (internal quotation marks omitted).

The Port's principal defense at the outset of these proceedings was that it had "plenary" sovereign power over tidelands and hence its actions were immune from preemption. See Pet. App. 250a. The district court repeatedly rejected this argument, including

after a full trial. See *id.* at 105a, 112a-13a. But the key point is that the Port's theory that it could exercise exclusive sovereignty over port lands is quite different from the Ninth Circuit's theory that the Port was simply wielding power over property in the same way an ordinary private citizen or corporation would.

Indeed, the Port's intent was clearly to tame the market. The Port even commissioned "expert testimony" that "confirmed that the economics of an independent owner-operator based drayage system creates perverse incentives for independent owner-operators to skimp on maintenance." *Id.* at 126a. That expert conclusion, however, is directly contrary to the conclusion that Congress reached in enacting the FAAAA as a deregulatory statute designed to preserve the ordinary functioning of the private market. See *Rowe*, 552 U.S. at 368.

Interference with private transactions in this fashion is a kind of genetic marker for sovereign conduct and not mere market participation. Here, "the State interfered with the *natural functioning* of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (emphasis added). Simply put, there is no reason to graft into the FAAAA an atextual market participant exception that permits a State to regulate transportation in the guise of acting in its proprietary capacity.

Fifth and finally, the Ninth Circuit's opinion not only incorporated dormant Commerce Clause jurisprudence into the FAAAA, but expanded on that jurisprudence. "The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in 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." *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 97 (1984) (plurality). This Court has repeatedly held that to claim the protections of the doctrine, the governmental unit in question must not be pursuing policy aims but instead must be engaging in unalloyed proprietary activity. Under the doctrine, a government is "managing its own property [by] pursu[ing] its *purely* proprietary interest . . . where analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231 (emphasis added). The analysis reduces to "a single inquiry: whether the challenged program constitute[s] *direct* [S]tate participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (internal quotation marks omitted). See also generally *Boston Harbor*, 507 at 227-32.

Applying these principles, the Fifth Circuit has held that mere ownership of a facility does not make a government entity a participant in a market operating on that facility's premises. See *Smith* v. *Dep't of Agric.*, 630 F.2d 1081 (5th Cir. 1980). In *Smith*, the Fifth Circuit invalidated rules adopted by Georgia's Department of Agriculture that gave non-residents inferior sales locations in a farmers' market owned and operated by the State. *Id.* at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that no arm of the State "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those goods." *Id.* at 1083. Instead, the State had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.*

Here, the Port's regulations have the same effect as the invalidated regulation in *Smith*, and in fact go further by interposing a state-established and state-run licensing regime on the private agreements of shippers and drayers at the largest Port in the Nation.

The Ninth Circuit sought to get around these limitations on the market participant doctrine by relying on this Court's decision in *Alexandria Scrap*. See Pet. App. 24a ("The Supreme Court has applied the market participant doctrine to a case *not* involving 'procurement' of goods . . . [i]n *Hughes* v. *Alexandria Scrap Corp.*") (emphasis added). The Ninth Circuit appeared to suggest that the State of Maryland was not acting in a purchasing capacity in *Alexandria Scrap*. But this is directly contrary to how the Court described Maryland's program, which resulted in the purchase of wrecked hulks, albeit for the purpose of ridding the State of such inoperable vehicles. "[U]ntil today the Court has not been asked to hold that the *entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce* creates a burden upon that commerce if the State restricts *its trade* to its own citizens or businesses within the State." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). It was the dissent in *Alexandria Scrap* that argued that it could not "agree with the Court that this case is solely to be analyzed in terms of Maryland's 'purchase' of items of interstate commerce . . . ." *Id.* at 819 (Brennan, J., dissenting). *Alexandria Scrap* cannot support the Ninth Circuit's expansion of the market participant doctrine.

Accordingly, the Ninth Circuit erred in two significant respects: by importing the dormant Commerce Clause's market participant doctrine into the FAAA in the first place, and then by giving that doctrine a broader reading than this Court has done in the dormant Commerce Clause context.

II. The Questions Presented Are Significant And Recurring.

The logic and reasoning of the Ninth Circuit's opinion promise to have dramatic consequences for the functioning of the Port of Los Angeles, the interpretation and integrity of the FAAAA, the role of market-participant analysis in preemption doctrine (if any), and the broader jurisprudence regarding federal statutes preempting state provisions that have the "force and effect of law."

First and foremost, this Court's intervention is warranted for the simple reason that this case arises out of a dispute over licensing at the Port of Los Angeles, which "handles more shipping container and cargo volume than any other port in the country." Pet. App. 6a. The Port "generates 919,000 regional jobs and $39.1 billion in annual wages and tax revenues." Port of Los Angeles website, *available at* http://www.portoflosangeles.org/idx_history.asp (last visited Jan. 23, 2012). If earning community good will suffices to place Port actions in the market participant category, it is easy for the Port to shield many forms of intrusive regulation through ostensible "contracts" with those wishing to enter its grounds. Before the Port may impose a licensing regime upon drayers — assertedly in its proprietary capacity — it is appropriate for this Court to determine whether the FAAAA says otherwise.

Second, this Court's intervention is warranted because the Ninth Circuit's opinion dramatically narrows the scope of FAAAA preemption. The Ninth Circuit reasoned that, because the State created the marketplace and owned the Port, it could set restrictions on motor carriers contrary to federal law. That conclusion has broad ramifications. For example, the State of California owns many of its highways and freeways. By logical extension, California could impose a licensing scheme of any dimension on motor carriers or even individual drivers that use those roadways, just as it has for motor carriers in the Port.

The Ninth Circuit recognized this flaw in its reasoning, but struggled to get around it. The court reasoned that, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in transport [of] interstate goods to and from that State' or eliminate connecting links to points in other states." Pet. App. 32a (internal quotation marks omitted). That assertion is doubly mistaken. First, as a factual matter, a restriction on motor carriers' use of the largest port in the Nation and the gateway to Asian trade cannot be swept aside as permissible because it does not injure motor carriers as much as a ban on freeway use. Second, as a legal matter, the Ninth Circuit's opinion converts the FAAAA's simple instruction that state provisions with the "force and effect of law" are preempted into an impossible-to-apply sliding-scale determination of whether any particular intrusion by the State is "too much." Having departed from the statutory text, the opinion below leaves only a free-floating policy inquiry in its place.

Third, this Court's intervention is warranted because the Ninth Circuit's opinion threatens to cause ripple effects in the interpretation of other preemption provisions that contain the same "force and effect of law" language as the FAAAA. Preemption formulations of this nature are especially common in the transportation area. See 49 U.S.C. § 508 ("No State or political subdivision thereof may enact, [etc.] any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using safety performance records in accordance with regulations issued by the Secretary . . . ."); 49 U.S.C. § 13902(b)(4) ("No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, [etc.] having the force and effect of law relating to the provision of pickup and delivery of express packages, newspapers, or mail in a commercial zone if the shipment has and or will have a prior or subsequent movement by bus in intrastate commerce . . ."); 49 U.S.C. § 41713(b)(4) ("a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, [etc.] having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle"); 49 U.S.C. § 44703(j)(2) ("No State or political subdivision thereof may enact, [etc.] any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (h) or (i)."); RESPA Reg. X, 24 C.F.R. § 3500.13 (providing that

"[S]tate laws that are inconsistent with [the Real Estate Settlement Procedures Act] or this part are preempted," and that the term "law" as used in the section "includes regulations and any enactment which has the force and effect of law").

Thus, even leaving to one side the important effects that the Ninth Circuit's holding will have on port commerce, trucking operations, and the FAAAA, the opinion below has the potential to sweep more broadly and affect the interpretation of other statutes that contain comparable text. Even more significantly, to the extent the Ninth Circuit opinion is taken as a valid interpretation of the market participant doctrine generally, it has the prospect to broaden that doctrine past its established constitutional stopping point.

CONCLUSION

For these reasons and those stated in the petition for writ of certiorari, this Court should grant the writ.

Respectfully submitted,

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