No. 11-798

IN THE
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

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

BRIEF OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF AMERICAN TRUCKING ASSOCIATIONS, INC.'S, PETITION FOR A WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF *AMICUS CURIAE* OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a trade association made up of independent, small business, and professional truck operators, many of whom serve the Port of Los Angeles (the "Port"), and are, therefore, subject to the Port's Concession Agreement at issue in this litigation.[1] OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers and professional drivers. The 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. OOIDA filed a brief as *amicus curiae* in support of Petitioner American Trucking Associations, Inc., ("ATA") in this action before the U.S. Court of Appeals for the 9th Circuit.

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[1] Under Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than the *amicus curiae* – contributed money intended to fund preparing or submitting this brief. The parties received notice of *amicus curiae* intent at least ten days in advance of filing, and all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

OOIDA submits this brief as *amicus curiae* to describe how long-haul interstate truck operators are affected by the Port of Los Angeles' Concession Agreement. The ATA's petition describes the local drayage truck operators who require daily entry into the port – the segment of the motor carrier industry targeted by the Concession Agreement. By contrast, many OOIDA members are from a different segment of the trucking industry: long-haul interstate truck operators who require less frequent or occasional access to the Port.

The Port of L.A.'s Concession Agreement imposes a greater burden on long-haul interstate drivers than it does upon local drayage operators in proportion to the frequency each type of carrier requires access to the Port (local drayage companies can amortize the costs of the Concession Agreement over more entries to the Port). Additionally, the application of the Port's Concession Agreement to long-haul truckers demonstrates the breadth of the marketplace the Port claims to be operating in and the extent to which the Ports' requirements affect the prices, routes and services of motor carriers operating in interstate commerce in violation of 49 U.S.C. §14501(c)(1). Furthermore, despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), the federal government has continuously maintained exclusive authority to revoke or suspend an interstate motor carrier's federal operating authority. The effect of the Concession Agreement's requirements on interstate long-haul truck operators underscores the importance of the issues raised in the ATA's Petition for a Writ of Certiorari.

ARGUMENT

I. THE BREADTH OF THE MOTOR CARRIER INDUSTRY AFFECTED BY THE CONCESSION AGREEMENT

The Port of Los Angeles Concession Agreement affects many segments of the motor carrier industry. OOIDA members serve the Port of L.A. in a variety of ways. Some OOIDA members perform the traditional drayage of containers to and from the Port and warehouses and rail heads located within 100 miles of the Port in the Los Angeles basin. This is the type of operation that is the focus of the ATA's Petition.

But the Concession Agreement is not limited in its application to these local short-haul container movements. The Port's definition of "drayage truck" under the Concession Agreement is a class 7 (or larger) vehicle that transgresses port property:

> "Drayage Truck" means any in-use On-Road Vehicle with a Gross Vehicle Weight Rating greater than 26,000 that pulls a trailer or chassis used for transporting cargo[...]operating on or transgressing through Port Property for the purpose of loading, unloading or transporting cargo, empty containers or chassis that originated from or is destined for Port Property.

PORT OF LOS ANGELES – TARIFF NO. 4, Item No. 2000.[2]

This definition embraces many interstate truck operators, including OOIDA members, who haul goods into the Port that originate from locations

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[2] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

throughout North America (outside of the L.A. Basin and outside of California). For example, an owner-operator may haul fresh or frozen meat on refrigerated trailers from the beef producing regions in the U.S. to the Port. The reverse is also true: OOIDA members may also be sent into the Port to pick-up goods destined for locations throughout North America.

Other non-drayage truck operators, that nonetheless fall under the Port's definition of a "Drayage Truck," include those who enter the port to deliver and pick-up general freight; truck operators who operate dump-trucks hauling various bulk commodities (asphalt or fill); truck operators who haul fuel or chemicals in tankers; and truck operators who operate flat-bed trucks or specialized equipment hauling containers loaded on their own conveyances (as opposed to an intermodal chassis) or haul heavy-construction equipment being imported or exported. OOIDA members also deliver goods intended to aid port infrastructure projects.

The Port of Los Angeles Concession Program has an adverse impact on OOIDA members for each of these types of non-drayage and long-haul interstate operations. Were the Court to permit the Port to maintain these Concession Agreement requirements, it would be an invitation for other Ports and other localities to begin creating a patchwork quilt of rules and ordinances imposed upon interstate truck operators. Such a development would defeat the explicit purpose of the preemption provision in 49 U.S.C. §14501(c)(1).

II. THE EFFECT OF THE CONCESSION AGREEMENT ON MOTOR CARRIER PRICES, ROUTES, AND SERVICES UNDER 49 U.S.C. §14501(c)(1)

The Concession Agreement clearly affects the prices, routes and services of interstate long-haul motor carriers as prohibited under Section 14501(c)(1). Long-haul motor carriers who wish to make themselves available to take the occasional load to the Port of L.A. must weigh the cost of complying with the Concession Agreement against the potential economic benefit of taking on such business. To most interstate motor carriers, the Concession Agreement is a heavy financial burden that outweighs the benefits of accepting freight bound to or from the Port. It would be virtually impossible for such motor carriers to justify creating dedicated fleets of trucks and employee drivers to comply with the Concession Agreement in order to specifically attract occasional business to the Port of L.A.

The only alternative under the Concession Agreement is the Port's Temporary Access Permit – an amendment to the Port's Tariffs that the Port established as part of its Clean Air Action Plan. For motor carriers who serve the port less frequently, the Temporary Access Permit allows Port access without the need to enter the Concession Agreement. To obtain a Temporary Access Permit a driver must purchase a $100 RFID device and pay $30 per "Temporary Access Permit trip." *See* Port of Los Angeles web-page entitled "Temporary Access (Daily)

Permits"[3] and Port of Los Angeles Tariff No. 4, Section 2040.[4]

An operator is limited to purchasing 24 Temporary Access Permits in a year. The Temporary Access Permit is only available to trucks registered in the California Air Resources Board Drayage Truck Registry (ARB DTR). PORT OF LOS ANGELES – TARIFF NO. 4, Section 2041.[5]

In reaction to the burdens of the Concession Agreement, interstate motor carriers who did not qualified as concessionaires, but who wished to keep their business bringing freight to the Port, began to bring their loads to a point outside of the port facilities to transfer their load to a qualified truck operator who would then drag the trailer onto the port facility at a cost of $150 per transaction. This "dray-off" transaction clearly affected the price and routes of such carriers who attempted to maintain the same service to the Port for their customers. But now the Port of Los Angeles has even foreclosed the dray-off option to interstate carriers with an amendment to their regulations in mid December 2010.[6]

For an interstate motor carrier to maintain its occasional service to the ports it would have to raise the price of that service to account for the burdens of the Concession Agreement. For carriers who are

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[3] *See* http://www.portoflosangeles.org/ctp/ctp_temp.asp (Last accessed January 19, 2012).

[4] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

[5] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (Last accessed January 19, 2012).

[6] *Id.*

unable to raise the price of that service, they would be forced to cease providing that service. Under either scenario, the Concession Agreement violates the preemption requirement of Section 14501(c)(1) and raises the cost of shipping goods through the Port of L.A. It is important for the Supreme Court to take this issue and clarify the meaning and reach of the terms "price, routes, and services" under the statute to ensure its uniform application across the country.

III. THE MARKET PARTICIPANT DOCTRINE

A. The Finding of a Market Participant Doctrine Exception Requires More Than Just an Analysis of the State's Motivations

The Port's Market Participant argument is largely limited to a review of the Ports' motives and purposes for implementing the Concession Agreement – not the function of its requirements in the marketplace. Several Circuits have held, however, that "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." *Engine Manufacturers Assoc. v. South Coast Air Quality District*, 498 F.3d 1031, 1046 (9th Cir. 2007); *quoting N. Ill. Chapter of Assoc. Builders & Contractors, Inc., v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (emphasis in original). As this Court stated, "In this kind of case there is 'a single inquiry: whether the challenged 'program constituted direct state participation in the market.'" *White v. Massachusetts Council of Consl. Employers, Inc.*, 460 U.S. 204 (1983) *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980).

The Courts have traditionally viewed the Market Participant Doctrine by reviewing whether the action impedes free private trade in the marketplace or whether the state is acting within the marketplace. To the extent that the Concession Agreement impedes the marketplace of interstate long-haul truck operators, the Port's definition of the marketplace in which it participates is boundless. Should the court find that a market participation exemption exists, it would be important for the Court to clarify how the relevant marketplace should be defined and how a state's permissible participation in that marketplace should be defined, evaluated, and limited.

B. The Port Clearly Involves Itself in Areas Occupied by Federal Regulation

At a minimum, it would be important for the Court to make clear that a state may not claim a marketplace exemption for ordinances it imposes that are already the subject of federal regulation, and therefore, clearly not within the realm of proprietary marketplace decisions.

For example, one requirement of the Concession Agreement pertains to the maintenance of equipment brought into the Port. However, the equipment used by motor carriers in interstate commerce is already subject to extensive rules mandated by Congress and implemented by FMCSA. *See* 49 C.F.R. Part 393. Federal statutes and rules also cover drayage equipment typically used in local port areas. Section 4118 of SAFETEA-LU; Pub. L. 109-59, 119 Stat. 1144, at 1729, August 10, 2005, codified at 49 U.S.C. §31151. Those rules place primary responsibility for maintenance and upkeep on its owners, the intermodal equipment providers (typically ocean carriers). *See* 73

F.R. 76793, "Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment; Final Rule," published December 17, 2008.

Another requirement of the Concession Agreement is that the motor carrier must use employee drivers rather than independent contractors. The Port's stated purposed of this requirement is to ensure that equipment used at the port is properly maintained. But all pertinent federal motor carrier safety regulations place the responsibility on motor carriers for the inspection, maintenance and safety of the trucking equipment regardless of their use of employee drivers or independent contractors. 49 C.F.R. §§390-399; *see* §390.5 (Definition of "Employee" includes independent contractor when operating a commercial motor vehicle). Whether or not a motor carrier uses independent contractors or employee drivers, they have the same legal responsibilities for insurance. 49 U.S.C. §13906(a). Likewise, both employee drivers and independent contractors must comply with the same safety rules and regulations. 49 C.F.R. §§390-399; *see also* 49 C.F.R. §390.11 (requiring motor carriers to comply with all driver rules).

These rules demonstrate that several of the Port's requirements under the Concession Agreement regulate areas that are fully occupied by the federal regulation of interstate motor carriers. These motor carriers are concerned about the burden of complying with two authorities on the same regulatory matter. The Court should clarify this issue so that that more states and localities do not take the Port's lead and create their own unique rules in areas already occupied by federal law, under the guise of marketplace participation.

IV. THE FEDERAL REGULATORY SCHEME SUPPORTS AFFIRMATION OF THE SUPREME COURT'S DECISION IN *CASTLE*

Despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) and changes to the regulation of the trucking industry in the interim, the federal government has rigorously maintained and controlled its sole authority to grant, deny, revoke, or suspend a motor carrier's authority to operate in interstate commerce. Only in the most narrow of circumstances has the federal government given the states the ability to temporarily and partially suspend a motor carrier's right to operate in interstate commerce. This conclusion is further bolstered by more recent Supreme Court jurisprudence.

Under 49 U.S.C. §13902(a)(1), FMCSA is authorized to issue motor carrier operating authority only if it finds that the applicant is, *inter alia*, willing and able to comply with motor carrier safety statutes, any safety regulations promulgated by FMCSA, safety fitness requirements established by FMCSA under Section 31144, minimum financial responsibility requirements established under Sections 13906 and 31139, and the duties of employers and employees under Section 31135.[7] Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if he determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements.

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[7] A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006).

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), this Court addressed FMCSA's authority under Section 13902(a)(1) holding that the Agency had "no discretion" under this provision (*Id.* at 770) to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section. *Id.* at 767. By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny registration (operating authority) to a motor carrier who "does not meet, or is unable to meet the requirements in Section 13902(a)(1)." Not only does the federal government have exclusive authority and limited discretion to grant or deny operating authority to a motor carrier, but it has strictly defined when and how such authority may be temporarily or partially revoked.

Once a motor carrier has been granted federal authority to operate in interstate commerce, FMCSA provides for its revocation or temporary suspension only after a thorough federal administrative process by which the agency determines the carrier has committed a pattern of non-compliance with certain critical and acute safety regulations. *See* 49 C.F.R. Part 386.

At the roadside, FMCSA has promulgated specific language for the partial and temporary revocation of that authority – the limited circumstance in which a driver or equipment may be placed out of service on the roadside until specific conditions are remedied. These include equipment defects (49 C.F.R. §396.9), violations of the driver Hours of Service and logbook rules (49 C.F.R. §395.13(b)(1) and (2)); and alcohol use (49 C.F.R. §392.5(c)). The Port's Concession Agreement does not fall under any of this authority. No other federal statute or rule defines any other

circumstance or gives authority to any state or locality to revoke or suspend a properly qualified motor carrier from operating in interstate commerce. OOIDA urges the Court to, affirm *Castle* by recognizing the federal governments' ongoing exclusive authority, and the defined limitations on that authority, to grant or revoke interstate motor carrier operating authority.

CONCLUSION

OOIDA encourages the Court to grant the ATA's Petition for a Writ of Certiorari in order to bring clarity to the laws that apply to interstate truck operators and the port authorities who seek to exert greater control over them. The Port of Los Angeles' actions have affected a greater population of motor carriers than local drayage operations alone. OOIDA's long-haul truck operators are not just concerned that they will be effectively shut out of the Port of L.A., but believe that if the Port's Concession Agreement is permitted to stand, other ports and localities will follow suit, and that a patchwork quilt of rules and regulations will arise in direct conflict with the purpose of the preemption provision under 49 U.S.C. §14501(c)(1).

Respectfully submitted,

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