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

BRIEF OF CALIFORNIA AND WASHINGTON AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici, the States of California and Washington, own and operate, together with their political subdivisions, a wide variety of property-based facilities, such as hospitals, schools, airports, maritime ports, and state-owned office buildings, including the port at issue here. Many of these facilities contract for services that involve motor carriers, such as procurement services, refuse services, transport services, courier services, and the like.

Amici have a compelling interest in ensuring that states and their subdivisions have the flexibility and discretion they need to operate their facilities efficiently, and to implement measures to improve, expand, and modernize their facilities as needed. With respect to the issues in this case, Amici have a compelling interest in ensuring that their ports remain competitive and are able to expand and adopt new technologies to meet changing circumstances.

SUMMARY OF ARGUMENT

1. State and local governmental entities routinely enter into agreements for motor carrier services that, while impacting the "price, route, or service" of such carriers, do not have the "force and effect of law." Such agreements are not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), which textually excludes nonregulatory governmental conduct from the reach of its preemption provision. This Court's analysis of an analogous provision in the Airline Deregulation Act (ADA), upon which the FAAAA was modeled, supports this understanding of the FAAAA's scope, as does the relevant legislative

history. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Under Petitioner's view of the FAAAA, even when a state is acting in a purely proprietary capacity, as states often do with respect to their massive property-based holdings, it may be subject to restrictions that would not be imposed on a private commercial actor. This view is unworkable for the States and finds no support in the text of the FAAAA or the relevant case law.

2. The Port of Los Angeles's conduct in this case, *i.e.*, its insistence that motor carriers that perform drayage services on its property agree contractually to certain signage and parking requirements, does not have the "force and effect of law" and therefore is not preempted by the FAAAA. It is true that, in some circumstances, contractually imposed requirements may have a regulatory character. That is not the case here, as confirmed by several factors that this Court, in analogous circumstances, has previously recognized indicate proprietary or commercial (as opposed to regulatory) conduct. These include: the commercial character of the Port's business; the business interests that motivated the challenged signage and parking restrictions; and the business (rather than regulatory) methods employed by the Port to accomplish its purposes. The contrary analysis offered by Petitioner and the United States in this respect is flawed and incomplete.

ARGUMENT

I. THE FAAAA'S PREEMPTION PROVISION DOES NOT REACH PURELY PROPRIETARY OR COMMERCIAL CONDUCT THAT LACKS THE FORCE AND EFFECT OF LAW

Conduct by a state or its subdivisions that is proprietary in nature and that lacks the force and effect of law is exempt from the reach of the FAAAA's preemption provision. This conclusion follows from the text of the FAAAA itself, from this Court's precedent, and from the relevant legislative history. Petitioner's suggestion that the FAAAA preempts any conduct by a state, or its subdivisions, that relates to the "price, route, or service" of motor carriers is both textually unsupported and entirely impractical.

By its text, the FAAAA's preemption provision applies only to state or local conduct having the force and effect of law:

> [A] State, political subdivision of a State, or political authority of 2 or more States 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 . . . .

49 U.S.C. § 14501(c)(1) (emphasis added). A state hospital, for example, may contract for trucking services, and negotiate the time, price, and location of any pickups or deliveries to be performed under the contract, without running afoul of the FAAAA. Even though such contractual terms indisputably impact the "price, route, or service" of a motor carrier, they lack the force and effect of law, and therefore are not preempted.

Put another way, so long as a state or local entity is acting as a market "participant," rather

than a market "regulator," in its dealings for motor carrier services, its conduct is not preempted under the FAAAA. This distinction, known as the "market participation" doctrine, serves an important function under the FAAAA just as it does with respect to any other exercise of Congress's power under the Commerce Clause. It respects the need to protect federal lawmaking from impermissible state or local encroachment, while recognizing that states and their subdivisions often act in nonlawmaking capacities much as private entities do. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) ("The basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law."); *see also White v. Mass. Council of Constr. Emp'rs*, 460 U.S. 204, 206-08, 214-15 (1983); *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 810 (1976).

American Airlines Inc. v. Wolens, 513 U.S. 219 (1995) confirms this understanding of the FAAAA's preemption provision, as exempting state or local functions that are proprietary rather than regulatory in nature. At issue in *Wolens* was the scope of the preemption provision in the ADA upon which the FAAAA's preemption provision was modeled. Much like the FAAAA's preemption provision, the ADA's preemption provision "prohibits States from 'enacting or enforcing any law . . . relating to [air carrier] rates, routes, or services.'" 513 U.S. at 222 (quoting former 49 U.S.C. App. 1305(a)(1), codified as amended at 49 U.S.C. § 41713(b)). In *Wolens*, the Court held that this provision "bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves." *Id.* For this reason, the ADA did not preempt breach-of-contract claims brought by airline customers against

American Airlines based on changes to the airline's frequent flyer program. *Id.* at 228-33.

Significantly, the Court in *Wolens* 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." 513 U.S. at 229 n.5 (internal quotes and citation omitted). Likewise, the identical phrase in the FAAAA should "naturally" be read to mean that agreements between public entities acting as market participants and private parties do not have the force and effect of law, and are therefore not preempted.

The relevant legislative history confirms that Congress sought specifically to target regulatory rather than proprietary conduct through enactment of the FAAAA's preemption provision. Congress found and declared, when it enacted this provision, that it was seeking to preempt "certain aspects of the State *regulatory* process" because "the *regulation* of intrastate transportation of property by the States" had created potentially conflicting requirements. FAAAA, Pub. L. No. 103-305, § 601(a), 108 Stat. 1569, 1605 (1994) (emphasis added). As a House Conference Report explained, the problem Congress faced was that "[c]urrently 41 jurisdictions *regulate* . . . intrastate prices, routes and services of motor carriers . . . . Typical forms of *regulation* include entry controls, tariff filing and price *regulation* . . . ." H. Conf. Rep. 103-677, at 86 (1994) (emphasis added). Thus, Congress sought to preempt "State *regulation* of prices, routes, and services of motor carriers." *Id.* at 85 (emphasis added).

The alternative view – that state and local governments' contractual agreements are preempted whenever they affect any "price, route, or service" of a trucking company – would be both textually

unsupported and harmful to the efficient, day-to-day operations of government. The State of California alone owns or manages hundreds of facilities, including office buildings, colleges, universities, laboratories, research centers, prisons, and hospitals.[1] Each of these facilities is serviced by numerous motor carriers transporting a variety of goods, including documents, office supplies, furniture, books, appliances, equipment, linens, medicine, and food. It would not be unreasonable for a state, in an effort to save costs, to impose measures that could affect carriers' "price, route, or service" statewide, such as requiring major deliveries in all of its facilities to be made only by appointment, or, as part of statewide furloughs, to close state office buildings, including their loading docks, one day per week or month. Yet Petitioner effectively invites the

[1] For example, the California Department of General Services operates more than fifty office buildings. *See* List of DGS Buildings, http://www.dgs.ca.gov/resd/BuildingList.aspx (last visited Mar. 24, 2013). The California State University and University of California systems together encompass thirty-three campuses, each of which has numerous attendant facilities, including labs and research centers. *See* Cal. State Univ., Campus Websites, http://www.calstate.edu/search_find/campus.shtml (last visited Mar. 24, 2013); Univ. of Cal., UC Campuses, http://www.universityofcalifornia.edu/campuses/welcome.html (last visited Mar. 24, 2013). The California Department of Corrections and Rehabilitation operates more than thirty state prisons housing adult inmates, and additional facilities housing juveniles. *See* Cal. Dep't of Corr. & Rehab., Prison Facilities, http://www.cdcr.ca.gov/Facilities_Locator/index.html (last visited Mar. 24, 2013). The California Department of Mental Health operates five state hospitals throughout California. Cal. Dep't of Mental Health, State Hospitals: Home, http://www.dmh.ca.gov/services_and_programs/state_hospitals/Default.asp (last visited Mar. 24, 2013).

Court to construe the FAAAA's preemption provision in a manner that could reach such conduct, by focusing its analysis largely on the massive size of the facility (*i.e.*, the Port) and on the potential impact on "price, route, or service," while downplaying the express statutory requirement that preempted conduct have the force of law.

Petitioner's remaining arguments fail on their merits. Petitioner emphasizes, for example, that the FAAAA includes several express exceptions to preemption, but market participation is not among them. Pet. Br., at 25-26. However, there was no need for Congress to expressly carve out a market participation exception because the States' proprietary conduct does not fall within the FAAAA's preemption provision in the first place. Petitioners also point out that the ADA, upon which the FAAAA was modeled, was amended to include an express exception relating to the exercise of "proprietary powers" by state- or municipality-owned airports, which is absent from the FAAAA. Pet. Br., at 26-27 (citing 49 U.S.C. § 41713(b)(3)). But, as the United States explains, the new language was intended only to carry forward, "without substantive change," an earlier version of the statute that was merely clarifying in nature: "'Nothing in [the preemption provision] *shall be construed* to limit the authority of any State or political subdivision therefore . . . as the owner or operator of an airport . . . to exercise its proprietary powers and rights.'" Br. for U.S., at 18 (quoting ADA § 4, 92 Stat. 1707-1708 (49 U.S.C. App. 1305(b)(1) (1992))). That Congress took the step of making this clarifying point in one statute, but not the other, signifies no more than that the statutes involve different industries with different litigation histories. *See* Br. for L.A. Resp., at 25-26.

II. THE OBLIGATIONS IMPOSED BY THE PORT'S CONCESSION AGREEMENTS ARE COMMERCIAL AND PROPRIETARY IN NATURE AND LACK THE FORCE AND EFFECT OF LAW, AND THEREFORE ARE NOT PREEMPTED

Because the challenged obligations are commercially driven and contractually imposed, through concession agreements entered into by trucking companies seeking to do business on the premises of the Port of Los Angeles, they lack the force and effect of law and are not preempted. Bolstering this conclusion is the presence of several factors that this Court has identified in different, but analogous, contexts as indicating the commercial character of governmental operations. In arguing otherwise, Petitioner and the United States rely on an overly narrow description and incorrect application of the pertinent law.

As the United States explains, contractually imposed obligations may sometimes have a regulatory character and therefore be barred under the Commerce Clause and in other contexts. Br. for U.S., at 20. That is, not all contracts into which governmental entities enter constitute market participation, as distinct from market regulation. However, market participation will be found when an agency has "'act[ed] just like a private [entity] would act.'" *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass.,* 507 U.S. 218, 233 (1993) (*Boston Harbor*).

The proprietary-versus-regulatory analysis will differ based on the context in which the case arises. In the present case, the key considerations are: (1) character of the business: whether the character of the governmental entity resembles a private business, *see Reeves,* 447 U.S. at 440, 442

(government-run cement plant); (2) purpose: whether the governmental entity is pursuing a business goal rather than a policy objective, *see Boston Harbor,* 507 U.S. at 228-29 (discussing *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986)); and (3) methods: whether the government "employs tools . . . that no private actor could wield" or instead uses methods resembling those of private businesses. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), *aff'd*, 550 U.S. 330 (2007)). All point toward the same result here: that the parking and signage provisions are proprietary, not regulatory, in nature.

Character of the business. The structure and function of the Port more resemble a business entity than a governmental regulatory agency, which supports a conclusion that its actions are proprietary. The Port is an independent entity that must balance its own budget through commercial revenues rather than through taxes. Accordingly, its decisions must, like those of any other business, make business sense for it to prosper.

It is undisputed that the Port is structured and operates more like a private business than like a traditional governmental entity. It has autonomy over its business operations, and neither receives nor contributes to City tax revenues. Pet. App. 70a. Under the City Charter, the Port is a "Proprietary Department," and has separate "possession, management and control of all property and rights of every kind." L.A., Cal., City Charter §§ 600, 602. It may set its own fees and manage its own advertising and business development. Cal. Harb. & Nav. Code §§ 6305, 6308, 6370. Its revenues are segregated from other municipal funds and only may be used for Port purposes. L.A., Cal., City Charter § 656. Access

to the Port is controlled and not open to the public. *See* Br. for L.A. Resp., at 2, 60.

As an entity that must rely on its own business revenue, the Port is "'burdened with the same restrictions imposed on private market participants.'" Br. for U.S., at 20 (quoting *Reeves*, 447 U.S. at 439). The Port exists exclusively to provide a platform for commercial transactions, specifically, international, interstate, and intrastate trade, and it competes with other ports for that business. Thus, the Port is different in kind from governmental agencies that may engage in some market activity in order to further certain projects, but whose overall goals are regulatory. While much is made in the papers regarding the size of the Port, its size is necessary for the Port to conduct its specialized business. Here, the Port's size reflects, rather than belies, its essential commercial nature.

Commercial objective rather than regulatory purpose. The challenged conduct is driven by commercial considerations, rather than to achieve regulatory objectives, which also indicates that the Port's conduct is proprietary rather than regulatory. The Port entered into the agreements with drayage truck operators as part of its effort to modernize and expand its operations, and thereby remain competitive. The Port advertises the quality of the "drayage trucks" at its facility and its "[c]apacity to grow as needs require," along with its deep draft berths that can accommodate "the world's largest cargo vessels," its storage space, and other facilities. [2] It advertises these features in order to persuade businesses to use the Port for their shipping needs.

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[2] Port of L.A., The LA Advantage, http://www.portoflosangeles.org/pdf/LA_Advantage_Brochure.pdf (last visited Mar. 21, 2013).

The pre-contract drayage services, by contrast, posed safety, security and reliability concerns, and ultimately halted the Port's expansion due to litigation, in part, over drayage pollution. *See* Pet. App. 85a-88a, 94a-95a. The Port therefore either had to improve the situation or risk the loss of future clients and business. Indeed, the Port has acted no differently from other ports, which also have taken steps to reduce pollution in drayage services as part of their business strategies, and to deny access to non-complying trucks.[3]

That the Port considered the concerns of its neighbors in connection with the concession agreements also represents good business practices. *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. Ct. App. 1968) (directors of baseball stadium acted in corporation's "best interests" when considering the impact of proposed investment on the quality-of-life in the surrounding neighborhood); *see* Br. for U.S., at 24 (acknowledging that the concession agreements "were designed specifically to generate goodwill among local residents" which may be "an objectively reasonable business interest" (citations omitted)). In this case, the Port's approach is commercially strategic because neighborhood opposition previously had stymied the Port's expansion plans. Pet. App. 75a-79a.

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[3] *See, e.g.,* Port Auth. of N.Y. & N.J. Drayage Truck Registry Program, http://www.panynj.gov/truckers-resources/dtr.html (last visited Mar. 14, 2013); Port of San Diego Green Port Clean Air Program, http://www.portofsandiego.org/environment/green-port.html (last visited Mar. 14, 2013); Port of Long Beach Clean Trucks Program, http://www.polb.com/environment/cleantrucks/default.asp (last visited Mar. 10, 2013); Port of Seattle Green Gateway Program, http://www.portseattle.org/Environmental/Air/Pages/default.aspx (last visited Mar. 14, 2013).

Business methods rather than regulatory methods. The methods by which the Port seeks to achieve its purposes – concession agreements with drayage truck operators that are limited in scope, and strategic expenditures of revenue – are characteristic of business conduct rather than of governmental regulation.

The concession agreements are tailored, both temporally and geographically, to serve the Port's business interests, and are characteristic of those that a private business may employ. They apply only to truck operations in the Port and in its immediate vicinity. They therefore cover the drayage submarket within "a discrete, identifiable class of economic activity" – port operations – in which the Port is a participant on an ongoing basis, and do not improperly seek to impact, through a ripple effect or otherwise, the conduct of nonsignatory entities, such as downstream purchasers of products that move through the Port. *White,* 460 U.S. at 211 n.7; *see South-Central Timber Dev't, Inc. v. Wunnicke,* 467 U.S. 82, 96-99 (1984) (plurality opinion).

Next, the Port has "expend[ed] only its own funds" on the Port's drayage operations, which is characteristic more of market participation than regulation. *White*, 460 U.S. at 214. Accompanying the concession agreements at issue were Port expenditures of more than $56 million to subsidize the private purchase of newer, safer, and cleaner drayage trucks. Pet. App. 90a-91a. Much like the state subsidies providing for clearing automobile hulks upheld in *Hughes*, 426 U.S. at 809, these subsidies ensure that drayage services at the Port serve the Port's commercial interests.

Finally, the concession agreements are enforceable only by traditional contract remedies for breach, rather than by criminal penalties. *See* JA 73-

83. Petitioner and the United States, in arguing to the contrary, emphasize that the Harbor Tariffs, to which Port tenants – the cargo terminal operators – must agree, do carry criminal penalties for noncompliance. JA 84-86, 105-06. But the motor carriers conducting drayage are not bound by the Harbor Tariffs, and therefore are not subject to their penalties. And, in any event, the Harbor Tariffs can achieve no more than any private business entity could: they require all invitees to commit to certain conditions as a condition of entering and doing business on Port property. Like any private business, the Port may seek criminal prosecution of those who enter on its property without authorization. *See* Br. for L.A. Resp., at 60. Indeed, the penalties the Tariffs impose for unauthorized use of Port facilities are identical to those imposed for trespass on private property. *Compare* JA 84 *with* Cal. Penal Code §§ 19.2, 602.

In arguing that the methods the Port has employed are characteristic of regulation, the United States emphasizes the temporal scope of the concession provisions, *i.e.*, that they "permanently cover all drayage-service providers that wish to gain access to the Port." Br. for U.S., at 23-24. But the fact that a contractual requirement, which is appropriately tailored to a governmental agency's "ongoing" commercial interests, happens itself to be ongoing does not somehow render it regulatory. *See Wunnicke,* 467 U.S. at 99. Many commercial agreements for ongoing services are open ended, including contracts for refuse hauling, landscaping, equipment repair, and building maintenance and cleaning. The United States also points out that the Port does not itself consume drayage services. However, the Port need not directly consume drayage for the concession agreements to be valid; the

agreements do not reach beyond the market in which the Port engages in economic activity.

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In short, the Port of Los Angeles imposed signage and parking requirements through concession agreements with motor carriers for drayage services because it made good business sense to do so. As the concession agreements are individually contracted, tailored to the Port's business, and lack the force or effect of law, they do not fall within the FAAAA's preemption provision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: March 25, 2013

Respectfully submitted

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