No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,
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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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 subject to the Port's Concession Agreement that is 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 Ninth Circuit.

OOIDA submits this brief as *amicus curiae* to describe how the issues before the Court affect long-haul interstate truck operators, and how the Court's decision could affect interstate trucking in the future. While the Port of Los Angeles' Concession Agreement appears focused on local drayage truck operators who

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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 *amici curiae* – contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this *amicus* brief.

require daily entry into the port, thousands of long-haul interstate truck operators who haul the occasional load to the Port are also subject to the Concession Agreement.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

On a broad scale, the NFIB Legal Center is concerned that an expansive interpretation of the market participant doctrine will increase the number of state and local rules in regulated areas that its

members now rely upon as the subject of federal preemption. On a practical scale, NFIB members who are shippers are concerned that the marketplace of truck transportation to the Port of L.A. is now smaller, and that they are not able to choose the most cost effective or efficient truck transportation. They are concerned that these restrictions on interstate commerce may increase their costs of shippings goods through the Port of Los Angeles and through other ports that adopt similar rules.

SUMMARY OF THE ARGUMENT

By imposing rules and conditions upon trucks entering the Port of Los Angeles, the Port erected the type of obstacles to interstate truck transportation that Congress explicitly prohibited under the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA"). To enforce the Concession Agreement, the Port denies non-compliant carriers access to Port property. This is an exercise of authority over motor carrier operations that Congress exclusively granted to the Secretary of the United States Department of Transportation.

These rules reduce the business opportunities of motor carriers, including OOIDA members, who take occasional loads to the Port. They also reduce the transportation options of shippers, such as members of NFIB, who face a smaller marketplace of motor carriers from which to acquire the most efficient or cost effective transportation to the Port. OOIDA and NFIB are concerned that precedent favorable to the Port will predictably lead to a proliferation of non-uniform rules and restrictions on motor carriers in different regions and localities. This would only compound the burdens on interstate commerce. An expansive interpretation of the marketplace partici-

pant doctrine may also give state and local governments a new opportunity to enact rules affecting interstate commerce beyond the issues raised by the ports and beyond the area of motor carrier federal preemption found in the Federal Aviation Administration Authorization Act.

Finally, for decades the U.S. Department of Transportation ("DOT") has been the sole authority to grant motor carriers the authority to operate in interstate commerce. DOT has only permitted states to affect that authority in very specific and limited ways. The principles that underlie the court's decision in *Castle v. Hayes Freight Line, Inc*., 348 U.S. 61 (1954), remain a consistent and reliable component of the federal regulation of the motor carrier industry. Both OOIDA and NFIB urge the court to overturn the Ninth Circuit's decision.

ARGUMENT

I. THE MARKET PARTICIPANT DOCTRINE IS INAPPLICABLE IN THIS CASE.

A. The Port Does Not Contract With Motor Carriers or Participate in the Motor Carrier Marketplace.

The Ninth Circuit decided that the Port's off-street parking and placard requirements are proprietary in nature and fall into the market participant exception to the FAAAA preemption provision because they are intended to generate good will within the community surrounding the Port – good will that is necessary for the Port to gain local support for its expansion plans. *ATA v. City of Los Angeles*, 660 F.3d 384, 406-7, 409 (9th Cir 2011). In analyzing the market participant doctrine, 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 Const. Employers, Inc.*, 460 U.S. 204 (1983), *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). The Court has limited the application of this doctrine to instances of state action "directly related to the procurement of goods and services." *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008). At no point, however, has the Port entered into or participated in the trucking marketplace. The Port is not in privity of contract with the motor carriers regulated by the Concession Agreement. Motor carrier serve either the tenants of the Port or the tenants' customers, not the Port.

The provisions of the Concession Agreement being challenged do not concern any decision regarding the Port's spending of money for goods and services from the motor carriers regulated by the Concession Agreement.

The Port's stated goal for the Concession Agreement – to generate good will among its neighboring community – is more akin to regulation to serve the public interest than it is to participate in a marketplace. The good will sought by the Port is not the good will that a marketplace participant nurtures among its customers to increase loyalty and sales for economic gain. It is the good will that it believes it needs from its neighbors for political gain – to obtain local governmental approval for Port expansion. The Concession Agreement has only a remote and secondary connection to the Port's economic interests.

B. The Challenged Rules Regulate Motor Carriers.

The Ninth Circuit was also incorrect to hold that, because the Port's *goals* were economic in nature, the

Concession Agreement's rules were proprietary decisions falling into the market participant exception. *ATA v. City of Los Angeles*, 660 F.3d 384, 406-7, 409 (9th Cir. 2011). 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).

In this case, the Ninth Circuit's analysis rests entirely on the Port's goal to achieve good will among its neighbors, not on its actions. While the Port's goals may have some economic aspiration, the Concession Agreement rules do not constitute marketplace decision-making. The Ninth Circuit's expansive interpretation of the marketplace participant doctrine would place no boundary on a local government action and would leave little, if anything, supporting the principle of federal preemption, including explicit statutory preemption such as provided in the FAAAA.

II. THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY TO REGULATE MOTOR CARRIER OPERATING AUTHORITY UNDERLYING THE SUPREME COURT'S DECISION IN *CASTLE* REMAINS UNCHANGED.

Despite the number of years since the Court decided *Castle v. Hayes Freight Lines, Inc.*, *supra*., and the changes to the regulation of the trucking industry in the interim, the federal government has rigorously maintained and controlled its sole auth-

ority to grant, deny, revoke, or suspend a motor carrier's authority to operate in interstate commerce. States have been given contractual authority to enforce motor carrier laws under the various provisions of the Motor Carrier Safety Assistance Program (49 U.S.C. 31100-31104, 31108, 31136, 31140-31141, 31161, 31310-31311, 31502), but never have states been authorized to create or institute penalties affecting a motor carrier's authority to operate in interstate commerce. Only in the rarest of limited, specifically defined circumstances has the federal government given the states the ability to affect 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), the Secretary is required to issue motor carrier operating authority 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, the safety fitness requirements established by FMCSA under Section 31144, the minimum financial responsibility requirements established under Sections 13906 and 31139, and the duties of employers and employees under Section 31135.[2] 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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[2] 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), the Court addressed the Secretary's authority under Section 13902(a)(1) holding that he 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)." The Court's decision affirms the narrowness of the Secretary's discretion to grant or to deny motor carrier operating authority.

Consistent with this narrow statutory authority, 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 administrative process pursuant to which the agency determines whether the carrier has committed a pattern of non-compliance with the rules described in Section 13902(a). *See* 49 C.F.R. Part 386.

Outside of the administrative process, FMCSA has promulgated specific rules for the partial and temporary revocation of that authority to operate – in the limited circumstances when a driver or equipment may be placed out of service on the roadside until specific unsafe 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)); alcohol use (49 C.F.R. § 392.5(c)), and operating without or beyond federal operating authority (49 C.F.R. § 392.9a). Here the Secretary has carefully chosen specific

violations of the rules that states may use to temporarily limit a motor carrier's operation.

The Port's Concession Agreement restrictions on motor carrier operations are not authorized by federal law. They extend far beyond the bases for denying operating authority described in 49 U.S.C. § 13902 or temporarily suspending a motor carrier's operation under the rules listed above. No other federal statute or rule defines any other circumstance or gives authority to any party to revoke, suspend, or deny a properly qualified motor carrier from operating in interstate commerce. OOIDA urges the Court to affirm *Castle* and maintain this consistent and reliable regulatory scheme by recognizing the federal government's ongoing exclusive authority to grant or revoke interstate motor carrier operating authority under the narrow circumstances described in Section 13902.

III. THE BREADTH OF INTERSTATE COMMERCE AFFECTED BY THE CONCESSION AGREEMENT

The principle behind the FAAAA's preemption provision, the principle behind the historically limited reach of the market participant doctrine, and the principle behind the federal government's ability to maintain sole authority to control a motor carrier's operating authority, are the same: to limit restrictions on the free flow of interstate commerce. While the Port may have only intended to regulate local drayage carriers serving the Port, the impact that the Port's Concession Agreement has on members of OOIDA and NFIB illustrate the breadth of the negative impact that the Port's rules will have on interstate commerce.

A. The Impact of the Concession Program on the Long-Haul Motor Carrier Industry

The Port of Los Angeles Concession Agreement affects many segments of the motor carrier industry. Typically, motor carriers 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 Port's Concession Agreement.

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.[3]

This definition embraces many interstate truck operators, including OOIDA members, who haul goods intended for export into the Port that originate from locations throughout North America (outside of the L.A. Basin and outside of California). For exam-

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[3] *See* http://www.portoflosangeles.org/Tariff/SEC20.pdf (last accessed February 19, 2013).

ple, 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 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; owner-operators who operate dump-trucks hauling various bulk commodities (asphalt or fill); owner-operators who haul fuel or chemicals in tankers; and owner-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 Concession Program has an adverse impact on OOIDA members for each of these types of non-drayage, 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 create their own rules and ordinances affecting interstate truck operators. The creation of a patchwork quilt of different rules on interstate carriers would create enormous burdens on interstate truck transportation.

Currently, properly authorized and licensed motor carriers can accept a load going anywhere in the country without having to worry about the vagaries of state and local control over their freedom of movement. This marketplace condition maximizes efficiency and competition in the trucking marketplace.

Were additional ports given license to use their market participant discretion to create similar concession agreements, motor carriers would either have to keep up with different local port rules and the costs associated with compliance, or they would face lost business opportunities and reduced geographic areas in which to operate. These are the burdens and restrictions on interstate truck transportation that the preemption provision in the FAAAA at 49 U.S.C. § 14105(c)(1) and the anti-placarding provision at 49 U.S.C. § 14506 were intended to abolish.

B. The Impact on Shippers and Other Parties

Not only do the Port's rules affect long-haul motor carriers, they affect the transportation options of shippers doing business in interstate and international commerce through the Port, including members of NFIB. Under the Concession Agreement, shippers now face a shrinking marketplace of motor carriers qualified to take their goods to the Port. Shippers must either find and pay the higher rates of motor carriers qualified under the Concession Agreement, or they must pay additional fees to have their loads hauled to Los Angeles and then transferred near the Port to a qualified motor carrier to complete the haul into the Port.

NFIB members are also concerned that if the Port of Los Angeles was permitted to maintain its Concession Agreement, then other ports around the country would follow suit, further increasing the burdens, costs, and barriers to shipping and hauling goods in interstate and international commerce.

C. The Precedential Impact in Other Marketplaces

Finally, both OOIDA and NFIB are concerned that were the Court to adopt the expansive "good will" interpretation of the market participant doctrine permitted by the Ninth Circuit, then state and local governments beyond port authorities would seize the opportunity to enact new rules and ordinances affecting industries other than truck transportation – in marketplaces that are now reliably and predictably preempted by federal law.

CONCLUSION

The amici urge the court to reverse the Ninth Circuits' decision and bring clarity to the laws that apply to interstate truck operators and the port authorities who seek to exert greater control over them.

Respectfully submitted,

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