Case No. 10-56465

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN TRUCKING ASSOCIATIONS, INC.
Plaintiff-Appellant,

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,
Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
The Honorable Christina A. Snyder, District Judge
Case No. CV 08-04920 CAS (CTx)

AMICUS BRIEF OF RAYMOND PORRAS, PILAR ORELLANA AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL OF THE DISTRICT COURT

William L. Messenger
c/o National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

CORPORATE DISCLOSURE STATEMENT

Raymond Porras and Pilar Orellana are not corporations. The National Right to Work Legal Defense Foundation has no parent corporation and no publicly held company owns 10% or more of the Foundation's stock.

/s/ William L. Messenger
William L. Messenger
c/o National Right to Work Foundation
8001 Braddock Rd., Suite 600
Springfield, VA 22160
703.321.8510
703.321.9319 (fax)
wlm@nrtw.org

Counsel for the Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

INTEREST OF THE AMICI

This case concerns whether a Concession Agreement imposed on those who perform drayage trucking services at the Port of Los Angeles is preempted by federal law. Raymond Porras and Pilar Orellana have an interest in the outcome of this case because they, like the vast majority of drivers at the port, are independent owner-operators. If upheld, the Concession Agreement will compel them, as condition of working at the port, to forfeit their independence as owner-operators and become employees of a trucking service.

The Foundation has an interest in this case because the Port is attempting to force owner-operators to sacrifice their right to work as independent contractors as a condition of operating at the Port. The Foundation is a nonprofit, charitable organization that provides free legal aid to individuals whose right to work is infringed upon. Foundation attorneys have represented the interests of individuals before the Supreme Court and the Ninth Circuit in numerous cases.

The amici have moved for leave to file an amicus brief in this case in support of the Appellant.

STATEMENT PURSUANT TO LOCAL RULE 29(c)(5)

The amici hereby state that (1) no party's counsel authored this brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person other than an amicus curiae contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The amici support the brief of Appellant American Trucking Associations, and submit this brief to expound upon two points: (I) the practical effect of excluding thousands of independent-owner operators from the Port; and (II) the ramifications of the District Court's expansive interpretation of the market participant doctrine.

I. The Concession Agreement Will Economically Dislocate Thousands of Independent Owner-Operators Who Perform Drayage Services at The Port

The challenged provisions of the Port's Drayage Services Concession Agreement are intended to drive independent owner-operators from the Port of Los Angeles. The" Employee Driver" provision flatly that mandates that all drivers performing drayage

services at the Port must become employees of licensed motor carriers by December 2013, and provisions relating to off-street parking, maintenance, and financial capability make it exceedingly difficult for owner-operators to operate at the Port even absent the mandate of the Employee Driver provision.[1]

If the Port's scheme is upheld, the victims will be individuals like amici Raymond Porras and Pilar Orellana. They are owner-operators, meaning that they own their trucks and work for themselves. As their own bosses, they enjoy the independence of setting their own schedules and operating their trucking businesses as they see fit. The Concession Agreement will force them to forfeit this independence, sell their trucks, and become employees of larger companies to continue operating at the Port. Declarations from Porras and Orellana that describe how they will be personally harmed by the Concession Agreement are included in an

---

[1] The provision of the Concession Agreement requiring that drayage trucks have off-the-street parking alone will result in "significant increased costs to motor carriers," with the estimated cost to motor carriers averaging $21,237 per truck. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 2010 WL 3386436, at * 32 (C.D. Cal. Aug. 26, 2010) ("*ATA-V*").

addendum to this brief.[2]

Of course, Porras and Orellana will not be the only individuals suffering these harms. Approximately 16,000 trucks perform drayage services at the port annually. *ATA-V*, 2010 WL 3386436, at * 16. " One Port study estimated that 85% of drayage drivers are independent contractors, rather than employees, and ATA estimates that number as closer to 98%." *Am. Trucking Ass' ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009) (" *ATA-II*"). The Concession Agreement thus threatens thousands of independent owner-operators with economic dislocation.

These small businessmen are to be excluded from the drayage business under the flimsiest of pretexts: that it will reduce the Port' s administrative costs of ensuring compliance with its Clean Truck Program. *ATA-V*, 2010 WL 3386436, at * 48. This is akin to professing it necessary to strike someone in the head with a sledgehammer to kill a fly, as the harm that will be inflicted upon owner-operators far exceeds

---

[2] These declarations are part of the record in this case because Porras and Orellana submitted the declarations to the District Court in support of the American Trucking Associations' Motion for Injunction Pending Appeal (Docket No. 313).

any minor ministerial benefit gained by the Port. The claim also rings false, as the District Court itself found that the " employee driver provision would significantly affect costs of drayage services." *Id.* at * 31. Estimates ranges from a 167% price increase to a " $500 million [increase] to the annual operating costs of Port drayage." *Id.* Any administrative savings ostensibly reaped from forcing independent contractors to become employees will not come close to the significant economic and social costs that the action will incur.[3]

II. The District Court Dramatically and Erroneously Expanded The Scope of The " Market Participant" Exemption to the Preemptive Effects of Federal Law

The District Court' s legal conclusion in this case borders on the incredible: that an across-the-board environmental rule imposed on over 16,000 trucks that annually operate at the busiest port in the nation is not a regulatory action, but an act of market participation wholly exempt from the preemptive effects of a federal law that expressly

[3] The District Court claims that the benefits outweighing the costs " is irrelevant to whether the provision addresses a valid proprietary interest." *Id.* at * 49. While the Court is not required to closely weigh the costs versus the benefits of an action, the vast disparity in cost versus benefit indicates that the Port is not pursuing the administrative objective claimed, but rather an ulterior regulatory objective.

forbids local regulation of the trucking industry. *ATA-V*, 2010 WL 3386436, at ** 45-50. If adopted by this Court, the District Court's decision will result in the market participant exemption swallowing the rule " that the Laws of the United States . . . shall be the supreme law of the land." Supremacy Clause to the U.S. Constitution, art. VI, cl. 2.

1. The District Court states that " the Concession Agreement as a whole is an essentially propriety action . . . because the Port took the action in order to sustain and promote Port operations." *ATA-V*, 2010 WL 3386436, at * 45. Under this rationale, everything that the Port of Los Angeles does is an act of market participation, as all of its actions are presumably motivated by a desire to " sustain and promote Port operations." *Id*. If the District Court's rationale were adopted by this Court, every seaport on the West Coast would be transformed into an independent fiefdom wholly exempt from the strictures of federal law. Each port could establish its own separate system for regulating transportation, the environment, labor relations, and other matters without regard to federal policy. The result will be the Balkanization of national regulatory policies along the nation's entire western seaboard.

The District Court's reasoning is even more far reaching than its ultimate conclusion. The court reasoned that: (1) the Port earns revenue by charging fees to those doing business at the Port; (2) environmental lawsuits threaten to impede the growth of business at the Port; and, thus (3) the Concession Agreement is propriety because it resolves the environmental lawsuits that threaten the business from which the Port earns revenue. *Id*. at ** 45-47. The notion that a government's interest in deriving revenue from economic activity makes government policies intended to facilitate economic activity acts of market participation will practically eliminate the rule of federal preemption as it applies to economic regulations. The Third Circuit recognized as much in *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206 (3d Cir. 2004):

> If we treated a public agency's bare interest in maximizing tax revenue as a proprietary interest, then preemption analysis would not apply to any state rule arguably designed to curtail labor strife that threatens to reduce corporate profits and, therefore, tax receipts. Expanding the concept of market participation to embrace so broad a concept of proprietary interest would render preemption law in this area a nullity.

Id. at 216.

A public entities' interest in collecting fees or taxes from private businesses within its jurisdiction is not a proprietary interest, but a governmental interest. *See id.* (an " interest . . . in the projected stream of increased tax revenue which the City hopes to receive if the project is successful" is " governmental, not proprietary," and " simply the traditional government interest in enhanced revenue that applies anytime the City seeks to increase its tax base").[4] Thus, contrary to the District Court, the Port's Concession Agreement is not an act of a market participation merely because it will (supposedly) increase Port fee revenues by (somehow) facilitating economic growth at the Port.

2. Turning to the individual provisions of the Concession Agreement, the District Court found them to be acts of market participation by re-casting two traditional regulatory objectives as proprietary objectives, namely the Port's ostensible: (1) *administrative*

---

[4] The *Sage* court ultimately held that the city action at issue in the case constituted market participation because it " was not designed simply to protect the City's interest in tax revenues." *Id.* at 216. Unlike here, the city was indirectly providing bond financing to the project at issue (a hotel) and thus had a propriety interest in the project. *Id.* at 216-17. By contrast, the Port does not finance drayage trucking or otherwise participate directly in the drayage market.

interest in reducing its administrative cost of enforcing its clean-truck environmental regulation, *ATA-V*, 2010 WL 3386436, at ** 48-49; and (2) *political* interest in generating good-will amongst local citizens and avoiding lawsuits and pressures from environmental groups, *id*. at * 50.

These interests are purely governmental interests that bear no relation to the interest in " efficient procurement of goods and services" required for market participation. *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008). Accepting these regulatory interests as being propriety would exempt vast swaths of state and local law from the preemptive effects of federal law. Indeed, the passage of most laws is motivated, at least in part, by a desire to generate political goodwill amongst citizens and appease special interest groups.

The District Court attempts to justify its conclusion that administrative and political interests are propriety in nature by asserting that private companies can be motivated by such concerns.[5]

---

[5] *See ATA-V*, 2010 WL 3386436, at ** 48 (finding that " transfer[ing] the financial burden of administration and record-keeping onto the trucking companies" is an action " that a private company with substantial market power—such as the oligopoly power of the Port—would take when possible in pursuit of maximizing

(continued...)

But this does not make the *government's* pursuit of these interests propriety, as private actors can be motivated by regulatory interests without fear of federal preemption. The Supreme Court recognized this in *Gould* when rejecting Wisconsin's claim that it acted as a market participant when refusing to do business with companies that violate the National Labor Relations Act ("NLRA"):

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 290 (1986) (internal case citations omitted). The Supreme Court reiterated this point in *Boston Harbor*:

---

[5](...continued)
profit"); *id*. at * 50 (off-street parking, placard, financial capability, and maintenance provisions are "actions would also be pursued by a profit-maximizing private company in the same circumstances").

> The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. [*Gould*, 475 U.S at 290]. The private actor under such circumstances would be attempting to " regulate" the suppliers and would not be acting as a typical proprietor. The fact that a private actor may " regulate" does not mean, of course, that the private actor may be " pre-empted" by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may " regulate" as they please, as long as their conduct does not violate the law. As the above passage in *Gould* makes clear, however, States have a qualitatively different role to play from private parties. *Ibid*. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties.

Building and Construction Trades Council v. Associated Builders & Contractors ("Boston Harbor"), 507 U.S. 218, 229 (1993).

Here, the Port is an independent department of the City of Los Angeles with the authority to issue rules and regulations governing Port operations. *ATA-V*, 2010 WL 3386436, at * 8. Irrespective of whether private actors might sometimes be motivated by administrative or political concerns, when a public entity such as the Port issues rules predicated upon such concerns (such as the Concession Agreement), it is acting as governmental body and not as a market participant.

CONCLUSION

The District Court's decision upholding the Concession Agreement will result in severe and unwarranted economic and social harm to thousands of independent owner-operators and expand the breadth of the market participant doctrine far beyond its logical rationale. The amici urge that the District Court's opinion be reversed and that the Concession Agreement be found preempted by federal law.

/s/ William L. Messenger
William L. Messenger
c/o National Right to Work Foundation
8001 Braddock Rd., Suite 600
Springfield, VA 22160
703.321.8510
703.321.9319 (fax)
wlm@nrtw.org

Counsel for Amici Raymond Porras, Pillar Orellana, and the National Right to Work Legal Defense Foundation

STATEMENT OF RELATED CASES

There are no related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation of Fed. R. App. P. 29(d) because it contains 2,489 words, and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Wordperfect v.11.0 in a 14 point New Century Schoolbook typeface.

Respectfully submitted this 4th day of January 2011

/s/ William L. Messenger
William L. Messenger

CERTIFICATE OF SERVICE

I hereby certify that on 4 January 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, on 4 January 2011, I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, to the following who may be non-CM/ECF participants:

Steven S. Rosenthal
Alan K. Palmer
Tiffany R. Moseley
David L. Cousineau
Susanna Y. Chu
Kaye Scholer, LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC 20005-2327

Thomas A. Russell
General Counsel
Joy M. Crose
Assistant General Counsel
Simon M. Kann
Deputy City Attorney
LA City Attorney's Office
425 South Palos Verdes Street
San Pedro, California 90731

Bryant Delgadillo
Kaye Scholer, LLP
1999 Avenue of the Stars
Suite 1700
Los Angeles, CA 90067

David Pettit
Melissa Lin Perrella
Adriano Martinez
Natural Resources Defense Council, Inc.
1314 Second Street
Santa Monica, California 90401

/s/ William L. Messenger
William L. Messenger