

**In The
Supreme Court of the United States**

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF FOR RESPONDENTS
NATURAL RESOURCES
DEFENSE COUNCIL, et al.**

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QUESTIONS PRESENTED

Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. join the “Restatement of Questions Presented” submitted by Respondents City of Los Angeles et al.

CORPORATE DISCLOSURE STATEMENT

Natural Resources Defense Council, Inc., Sierra Club, and Coalition for Clean Air, Inc. are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

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INTRODUCTION

Respondents Natural Resources Defense Council, Inc. (“NRDC”), Sierra Club, and Coalition for Clean Air, Inc. submit this brief to advance one point: the Port of Los Angeles’ (the “Port”) concession agreement falls within the market participant exception to the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), 49 U.S.C. § 14501 *et seq.*

The undisputed facts show that the Port adopted its Clean Truck Program – of which the concession agreement is a critical component – in response to community and environmental challenges that threatened the Port’s vitality as a commercial enterprise. Further, while the Port’s challenges were extraordinary, its response was not; private companies in analogous situations would take and have taken similar actions. For these reasons, and those provided by Respondents City of Los Angeles et al. (the “City” or “City of Los Angeles”), the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.



STATEMENT

Corporate America looks different today than it did 30 years ago. Today, a company’s customers, insurers, shareholders, and risk consultants ask about a company’s “environmental footprint” domestically and abroad. Consumers care about corporate

sustainability initiatives and are willing to pay a premium for products that are made, shipped, and sold in a way that protects the environment. Every boardroom has at least one executive who is charged with “greening” the company’s operations. And leading business journals fill their pages with talk of “conscious capitalism.”

The environment matters. It’s not just on the minds of treehuggers and altruistic businessmen. It matters to every CEO who works to manage risk, protect a corporate brand, and remain competitive. It matters to a company’s survival.

For the Port, the link between protecting the environment and remaining competitive became clear in 2001 when the Port was enjoined from completing a lucrative terminal expansion project. The injunction issued after a state appellate court held that the Port had violated environmental laws by failing to analyze how its expansion plans would pollute the air and threaten the health and well-being of local communities. In 2008, harbor-area communities suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the region. Air pollution from port-serving trucks is a major contributor to this problem. For the *seven years* following 2001, community opposition to the Port’s polluting operations continued, effectively forestalling all major infrastructure development at the Port at a time when cargo shipments from Asia – the Port’s primary customer base – were steadily increasing.

The Port then responded, as any business owner would, to relieve the chokehold on its development. The Port adopted a new “green” business model to manage risk, build community goodwill, and, on the most fundamental bottom-line level, to grow. We discuss these facts below, and join the Statement provided by the City of Los Angeles.

A. Port Operations Generate Significant Air Pollution And Threaten The Well-Being Of Local Communities

The Port is an independent, self-funding department of the City of Los Angeles. Pet. App. 68a.¹ It is the leading container port in the United States in terms of shipping container volume. Pet. App. 69a. In 2008, the Port handled more than \$240 billion in cargo. *Id.*

The Port operates as a landlord; it develops terminal facilities and then leases those facilities to shipping lines and stevedoring companies. Pet. App. 71a. It is located along 43 miles of the coast of San Pedro Bay, approximately 20 miles south of downtown Los Angeles and adjacent to the Port of Long Beach. Pet. App. 69a. Several residential areas adjoin the Port, including the neighborhoods of San Pedro and Wilmington. *Id.* Over two million people reside in

¹ “Pet. App. XX” refers to the appendix attached to Petitioner American Trucking Associations, Inc.’s (“ATA”) Petition for a Writ of Certiorari.

these and other communities surrounding the two ports. *Id.*

Approximately 16,000 trucks driven by thousands of drivers serve the Port. Pet. App. 8a; JA118.² These “drayage” trucks haul cargo between the Port and off-port rail yards, warehouses, and businesses, and are integral to the Port’s operations. *See* Pet. App. 71a-72a. The Port’s revenue is directly tied to the volume of containers moved through the terminals. Pet. App. 72a. The greater the volume of containers handled at the Port, the greater are the Port’s revenues. *Id.* Hence, the Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port terminals. *Id.* If the drayage system breaks down, cargo will back up at the Port, shippers will go elsewhere, and the Port will lose money and market share.

The Port expects its cargo volumes to at least double the demand for cargo-handling capacity over the next decade. *Id.* The Port faces competition from other U.S. ports, including its neighbor, the Port of Long Beach, and foreign ports in Mexico and Canada. Pet. App. 73a, 78a. The Port also faces additional competition because of the upcoming expansion of the Panama Canal, which will provide a new direct shipping route from Asia to East Coast ports.

² “JAXXX” refers to the Joint Appendix submitted with ATA’s Brief for Petitioner.

Pet. App. 73a.³ As a result, the Port needs to continually upgrade and renovate its facility and improve the efficiency of cargo operations to maintain its competitive position and capture additional business. *Id.*

The Port is located in California's South Coast Air Basin (the "Basin"), which is in violation of federal air quality standards for ozone and fine particulate matter. Pet. App. 73a-74a. In 2008, the Basin had the worst air quality in the nation for these pollutants. Pet. App. 74a. Emissions data from 2002 indicates that activities at the Ports of Los Angeles and Long Beach greatly contributed to the Basin's air pollution problem – producing, for example, almost one-quarter of the total diesel particulate matter emitted in the Basin. *Id.* In 2008, the South Coast Air Quality Management District ("SCAQMD") discovered that communities around the Port suffered an average cancer risk from air pollution that was more than 60 percent higher than the average in the Basin. *Id.*

Air pollution from drayage trucks greatly contributes to this problem. Pet. App. 75a. Drayage

³ See also Brad Racino, *Canal expansion sets up battle of the ports*, NBCNews.com, <http://www.nbcnews.com/business/canal-expansion-sets-battle-ports-877649> (last visited March 13, 2013) (discussing the intense competition between west coast ports and east coast and gulf ports in light of the Panama Canal expansion). Completion of the canal expansion is now expected in 2015. *See id.*

trucks serving the Port have historically tended to be older and more polluting than those used by national long-haul truck fleets. *Id.* Drayage trucks typically start out as long-haul trucks, that are later sold to smaller, lower-cost carriers who use them to the end of their useful long-haul lives before selling the trucks to drayage carriers for Port use. *Id.* Prior to the implementation of the Clean Truck Program, drayage trucks accounted for between 10 and 24 percent of the total emissions of diesel particulate matter and nitrogen-oxides from all Port sources. *Id.*

In addition, the practice of drayage trucks parking in neighborhoods near the Port has contributed to heavy truck traffic in residential areas, resulting in increased safety and security risks for local communities, and noise. Pet. App. 40a-41a; Trial Ex. 185 at LAD001213;⁴ Trial Tr. at 79:3-23 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011.⁵ Trucks account for a disproportionate amount of the accidents, traffic violations, and citations for improper vehicle maintenance in the harbor area. Pet. App. 88a.

⁴ “Trial Ex. XX” refers to the trial exhibits admitted during the District Court trial in this case (*Am. Trucking Ass’ns v. City of Los Angeles, et al.*, Case No. 08-4920-CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010)).

⁵ “Trial Tr. at XX:XX” refers to the transcript of trial proceedings before the District Court (*Am. Trucking Ass’ns v. City of Los Angeles, et al.*, Case No. 08-4920-CAS, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010)).

Further, there are risks of hazardous materials discharging from leaking containers, container theft, stolen trucks, and the risk that someone can take over a truck, or even use the vehicle as a weapon. Trial Tr. at 67:6-19, 69:15-25 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. The Port has identified trucks being driven in and out of the Port by unknown and unidentified drivers as a key security vulnerability. Pet. App. 94a. In one instance, the Port learned that a particular driver's license number was reported 46 times through a terminal gate in a single day, representing 23 trips to and from the Port. Pet. App. 94a-95a. The Port estimated that this number was about five times the number of trips that a single driver could perform on a typical day, and that several drivers had likely used the same false identification. Pet. App. 95a. There have also been reported incidences of drivers carrying unauthorized passengers into Port terminals. JA119. These facts are particularly concerning because the Port has been identified by the Department of Homeland Security as one of seven port areas considered to be "Group I" port areas at the highest risk of terrorist attack. Pet. App. 93a.

B. Environmental And Community Groups Stymie All Major Port Expansion Projects For Seven Years

As a result of the health risks caused by Port operations, environmental and community groups mobilized to oppose Port expansion projects and

blocked a series of projects from 2001 to 2008. Pet. App. 75a.

In 2001, NRDC and three other environmental and community groups filed a lawsuit in state court against the Port alleging that it had violated the California Environmental Quality Act (“CEQA”) with respect to an agreement it entered with the China Shipping Line Company for the construction and lease of a new container terminal facility at the Port. Pet. App. 76a; *Natural Res. Def. Council, et al. v. City of Los Angeles, et al.*, 103 Cal. App. 4th 268 (2002). In 2002, the California Second District Court of Appeal ruled in favor of NRDC et al. and enjoined further construction at the terminal. *Id.* The following year, the Port and NRDC et al. reached a settlement that enabled the Port to proceed with the China Shipping expansion project subject to a number of mitigation measures. Pet. App. 76a. The settlement required the Port to establish a fund for mitigation of air quality and aesthetic impacts in the community due to the new terminal. Pet. App. 76a-77a. The Port also committed to extensive equipment modifications in the terminal as well as requiring ships to turn off their engines and switch to shore-side electrical power when docked, a process called “cold ironing.” Pet. App. 77a. The settlement cost the Port more than \$80 million. *Id.* Funds for the settlement came entirely from Port revenue, without contributions from either the City of Los Angeles or China Shipping. *Id.*

After the China Shipping settlement, the Port continued to face pressure from the surrounding community and environmental groups such as NRDC in connection with proposed development projects that were anticipated to result in more air pollution. *Id.* For example, in 2007, NRDC opposed the Port's proposal to expand the "TraPac" terminal to 243 acres from 176, to add on-dock rail facilities, and to reconfigure area roadways to better accommodate additional traffic. *Id.* NRDC filed an appeal with the Los Angeles City Council seeking to reverse the Port's approval of the project and indicated a willingness to initiate a lawsuit to prevent the expansion. Pet. App. 78a. The Port considered the TraPac expansion project critical because TraPac's customers, Asian shipping lines, had begun using a new generation of larger container ships which could not be accommodated at TraPac's facilities as configured. *Id.* In the summer of 2007, three Asian shipping lines that regularly sent approximately 12,000 cargo containers per month through the TraPac terminal announced plans to take their business to the Port of Long Beach. *Id.* This decision represented a significant revenue loss for both TraPac and the Port. *Id.* Ultimately, litigation over the TraPac expansion project was averted through an agreement that permitted the project to proceed on the condition that the Port fund a study of off-port impacts on health and land use in the communities of San Pedro and Wilmington, and establish a five-year mitigation fund valued at over \$12 million to offset the environmental impact of the expansion. *Id.*

C. The Port Adopts A “Green Growth” Strategy To Remain Competitive

At trial, then-President of the Port’s Board of Harbor Commissioners (“BHC”), S. David Freeman,⁶ testified that when he was appointed to the BHC in 2005, his “management objectives” were to:

[D]eal with the twin problems of growth and pollution. And we quickly realized that in order to grow the port, we had to abate the pollution because the people in San Pedro and Wilmington were not only angry and not only suffering from terrible air pollution, but they had learned that the law was there to protect them, and the NRDC and others had filed lawsuits, and they had stopped the port from growing. So green growth which is what we called it was an absolute business necessity for us to grow. . . . [T]he concerns we had [were] how we were going to continue to be Number 1 and have the jobs that came with that when we had a situation where the consumers nearby were, in effect, subsidizing the goods movements with their lungs, and

⁶ Mr. Freeman served as President of the Port Board of Harbor Commissioners from September 2005 until May 2009. Trial Tr. at 36:24-37:4 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011. Mr. Freeman’s prior work experience includes running the Tennessee Valley Authority, Lower Colorado River Authority, New York Power Authority, Los Angeles Department of Water and Power, and Sacramento Municipal Utility District. *Id.* at 38:1-16.

everybody knew it, and they had legal power to stop us from going forward. . . .

Trial Tr. at 46:11-20, 47:22-48:2 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011; *see also* Pet. App. 122a (quoting Mr. Freeman’s trial testimony).

Consistent with these objectives, and in response to the environmental concerns that had halted Port expansion projects, the Port, jointly with the Port of Long Beach,⁷ adopted a Clean Air Action Plan (“CAAP”) in November 2006. Pet. App. 79a. The CAAP states:

The Ports recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts (and, in particular, air quality impacts) that result from such trade. The [CAAP] is designed to develop mitigation measures and incentive programs necessary to reduce health risks while allowing port development to continue.

Id. The CAAP identified trucks as a significant source of air pollution and called for the rapid replacement or retrofitting of the entire 16,000 drayage truck fleet serving the Port within a five-year period. Pet. App. 80a.

From November 2006 through February 2008, the two ports worked together to develop the Clean

⁷ The Port of Long Beach was also a defendant in this case until it settled with ATA in 2009. Pet. App. 61a n.2.

Truck Program, and held numerous meetings and workshops to gather different ideas for possible implementation. *Id.* Ultimately, the Clean Truck Program embodied several components: a progressive ban on older, more polluting trucks; a fee charged on older trucks that enter the Port; grants and subsidies funded by the Port to encourage motor carriers to replace or retrofit their older trucks; and a concession agreement that created a direct contractual relationship between the Port and motor carriers performing drayage services. Pet. App. 83a-84a. The concession agreement contains the parking and placard provisions that are at issue before this Court. The parking provision states:

Concessionaire shall submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks. Concessionaire shall ensure that all Permitted trucks are in compliance with on-street parking restrictions by local municipalities. Permitted Trucks not in service shall be staged off public streets and away from residential districts. . . .

JA49.⁸ The placard provision states:

⁸ The same provision of the concession agreement that includes the challenged “parking” requirements also requires concessionaires to ensure that their trucks comply with state and local truck routes. JA49. The “routing” requirements of the concession agreement, however, are not before this Court.

When entering and leaving Port Property and while on Port Property, Concessionaire shall post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and compliance to the Concession Administrator and/or authorities.

JA51-52.

The Port determined that requiring drayage trucks serving the Port to register under a concession agreement would best serve the Port's proprietary objectives, including cleaner air, and enhanced safety and security. Pet. App. 85a. The Port also determined that the parking and placard provisions would garner community goodwill and reduce safety and security hazards caused by trucks in nearby neighborhoods. Pet. App. 87a-89a; Trial Tr. at 108:6-109:4 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011; Tr. Ex. 224 at LA000319. In connection with its decision to move forward with a concession agreement, the Port reiterated that a failure to significantly reduce the health and traffic impacts of Port operations on the millions of residents in neighboring communities would impede the Port's ability to handle increased volumes of trade in the future. Pet. App. 86a.

The Port made a substantial financial investment in its Clean Truck Program. At the time of the District Court trial in August 2010, the Port had spent nearly \$60 million to incentivize, subsidize, and purchase cleaner trucks for concessionaires. Pet. App. 90a-92a. This amounts to the Port funding approximately

35 percent of the drayage fleet that served the Port in 2010. Pet. App. 91a.

After a seven day trial, which included a tour of the Port and testimony from 17 witnesses, the District Court rendered 105 findings of fact (many of which are detailed above) and concluded the concession agreement was a “business necessity.” Pet. App. 122a. These facts were never challenged by ATA, and are the basis of the Court of Appeals’ decision. See Pet. App. 5a-13a.⁹

D. Opposition To Port Generated Air Pollution Continues Today

Despite progress at the Port to reduce air pollution, opposition to Port growth absent meaningful mitigation for local communities remains strong. On March 7, 2013, the Port approved a \$500 million rail yard project that will be sited on 153-acres of Port-owned land four miles from the harbor and in close proximity to schools, parks, transitional housing for homeless veterans, and residential neighborhoods.¹⁰

⁹ The District Court’s findings may not be reversed absent a finding of “clear error.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-76 (1985).

¹⁰ Dan Weikel, *L.A. harbor commissioners OK rail yard near port*, LOS ANGELES TIMES, March 7, 2013, available at <http://www.latimes.com/news/local/la-me-gateway-20130308,0,3292721.story>; see also Sean Belk, *Opposition Builds Over Port of L.A.’s Rail Yard Analysis*, LONG BEACH BUSINESS JOURNAL, Jan. 31, 2012, available at <http://lbbusinessjournal.com/long-beach-business-journal-photos-in-the-news/83-january-31st/326--opposition->

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These neighborhoods are primarily low-income and working-class, and are considered part of the “diesel death zone” because of port-related air pollution.¹¹ The facility will handle up to 2.8 million 20-foot shipping containers a year by 2035, and will be visited by up to 8,200 trucks a day.¹²

The project aims to increase Port cargo capacity and efficiency by enhancing rail operations, but has pitted environmental groups, community residents, the Mayor of Long Beach, the Long Beach Unified School District, and air quality regulators against the Port.¹³ Project opponents believe the rail yard will exacerbate already unacceptable levels of air pollution for local communities that have disproportionately high rates of asthma and respiratory illness related to emissions from port operations, especially among children.¹⁴ The controversy over this rail yard project represents the business challenge the Port faces due to the health risks its operations impose on local communities. It also illustrates how any attempt by the Port to retreat from its green growth strategy would severely threaten the vitality of its operations.



[builds-over-port-of-las-rail-yard-analysis-long-beach-city-officials-school-district-others-say-eir-on-bnsf-project-flawed.html](#).

¹¹ Weikel, *supra* note 10.

¹² *Id.*

¹³ *Id.*; Belk, *supra* note 10.

¹⁴ Weikel, *supra* note 10.

SUMMARY OF ARGUMENT

The undisputed facts show that the Port adopted the concession agreement, which includes the two provisions challenged by ATA, as a business necessity. As such, the concession agreement is protected by the market participant exception.

Based on the scope of the City of Los Angeles' brief and the arguments contained therein, we start from the proposition that the market participant exception exists under the FAAAA's preemption provisions that relate to drayage trucking. Application of that exception poses a single inquiry: whether the challenged action constitutes direct government participation in the market. Whether private businesses engage in analogous conduct is relevant to that inquiry.

The concession agreement was adopted in response to costly environmental litigation and ongoing community opposition that thwarted Port growth for nearly a decade. Today – as was the case when the Port adopted its concession agreement – private businesses are pursuing sustainability initiatives with a sense of urgency in order to manage similar risks and remain competitive. This includes obtaining a “social license to operate” to minimize opposition to local projects, and reducing a company's environmental footprint throughout its extended supply chain. These actions affirm that the Port's adoption of the concession agreement was entirely appropriate and, moreover, typical.

The fact that the government can pursue environmental and public health objectives as a market participant was confirmed by this Court and the Courts of Appeals in cases decided starting well over three decades ago. Further, the holdings of this Court do not suggest – let alone require – that the market participant exception be interpreted to solely apply to instances of government procurement or where the “relevant market” has been narrowly defined, as ATA advocates. For these reasons, the judgment of the Court of Appeals should be affirmed.



ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE MARKET PARTICIPANT DOCTRINE TO UPHOLD THE PARKING AND PLACARD PROVISIONS

The market participant doctrine distinguishes between the State’s role as a regulator and as a market participant. *See Reeves v. Stake*, 447 U.S. 429, 436-37 (1980).¹⁵ Application of the market participant doctrine requires “a single inquiry: whether the

¹⁵ The City of Los Angeles’ brief details why a market participant exception exists under FAAAA sections 14501(c) and 14506(a), and explains why the concession agreement’s provisions fall within that exception. We do not repeat that discussion here. Instead, NRDC joins the City of Los Angeles’ arguments and makes additional arguments as to why the exception applies.

challenged program constitute[s] direct state participation in the market.” *Reeves*, 447 U.S. at 435 n.7 (internal quotation omitted); Pet. App. 21a. This inquiry includes consideration of whether private actors in the marketplace engage in activities comparable to the challenged action. *Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors* (“*Boston Harbor*”), 507 U.S. 218, 231-32 (1993) (“In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.”); Pet. App. 29a.

Below we describe how private companies are increasingly implementing environmentally-friendly sustainability initiatives to reduce risk and remain competitive. We outline how the Court of Appeals’ decision follows leading market participant cases that have protected environmental programs under the market participant exception. And we submit that, considering the conduct of corporate America today, this Court should not define the market participant exception so narrowly that the Port is precluded from placing requirements on the Port’s “interrelated service of drayage trucking.” Pet. App. 27a.

A. To Remain Competitive, Private Companies Are Increasingly Responding To The Environmental Challenges Created By Their Operations

Whether you are convinced or skeptical of the merits of sustainability,^[16] a paradigm shift addressing the financial impacts of resource scarcity, population growth, carbon intensity, ecosystem services and potential climate change is underway. This momentum has proven neither fragile nor fleeting, with fully 75 percent of large businesses maintaining or increasing their investments in sustainability despite a severe economic downturn and an ever-broader swath of markets regulating greenhouse gas emissions and providing incentives for corporate greening. Aligning strategies, business practices,

¹⁶ Many businesses define “sustainability” as the concept of the “triple bottom line – pursuing performance in economic, social, and environmental spheres.” Deloitte, *Sustainability in business today: A cross-industry view 3* (2010), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/IMOs/Corporate%20Responsibility%20and%20Sustainability/us_es_sustainability_exec_survey_060110.pdf. Most companies’ sustainability programs primarily include investments in environmental initiatives. *Id.* Corporate sustainability programs also derive their roots from the concept of “sustainable development,” which has been defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” *Id.* at 7 (citing United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, ch. 2, ¶ 1 (1987), *available at* http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf) (often referred to as the Brundtland Report)).

systems and public image has emerged as a business necessity. Proactively embracing sustainability and carbon management is no longer a philosophical or political debate. It is a strategic decision.

– Deloitte University Press, *A Profitable Shade of Green*¹⁷

Multinational firms faced with negative press about their environmental record used to be able to plead ignorance and suffer few adverse consequences.¹⁸ Those days are over. Today, images of polluting power plants and toxic oil spills stream live on our smart phones and computer screens, and are shared around the globe in seconds – setting off a firestorm of Twitter feeds, instant messages, and blogs.¹⁹ Companies that do not successfully manage their social and environmental footprint – that is, insist on an acute awareness of potential environmental or social breaches deep in their supply chain – risk losing their corporate reputation with a few clicks of a mouse.²⁰

¹⁷ Deloitte University Press, *A Profitable Shade of Green* (July 1, 2010), <http://dupress.com/articles/a-profitable-shade-of-green-compounding-the-benefits-of-sustainability/?top=6> (last visited March 13, 2013).

¹⁸ Deloitte University Press, *Sustainability 2011* (Jan. 1, 2012), <http://dupress.com/articles/sustainability-2011-a-difficult-coming-of-age/?top=6> (last visited March 13, 2013).

¹⁹ *See id.*

²⁰ *Id.*; Knut Haanses et al., *Establishing a License to Operate*, *bcg.perspectives*, Nov. 15, 2011, https://www.bcgperspectives.com/content/articles/sustainability_energy_environment_establishing_license_to_operate/ (last visited March 13, 2013).

Accordingly, sustainability initiatives are about managing risk in addition to reducing operational cost and enhancing competitiveness.²¹

In 2010, MIT Sloan Management Review reported that 88 percent of business executives believe that “sustainability-driven strategies will be necessary to be competitive – if not right now, then soon.”²²

Consider the following:

- “[T]he total spent on sustainable business programs by large companies (revenues of more than \$1 billion) in Australia,

²¹ More than 70 percent of 200 chief financial officers of companies with average annual revenues of \$17 billion surveyed reported that they “expect sustainability to have an impact on compliance and risk management” and “more than 60 percent foresee changes to functions like financial auditing and reporting.” Deloitte University Press, *Sustainable Finance* (Jan. 1, 2012), <http://dupress.com/articles/sustainable-finance-the-risks-and-opportunities-that-some-cfos-are-overlooking/?top=6> (last visited March 13, 2013).

²² MIT Sloan Management Review & BCG: The Boston Consulting Group, *Sustainability: The ‘Embracers’ Seize Advantage* 18 (Winter 2011), available at <http://www.bcg.com/documents/file71538.pdf>. The authors of this study surveyed “more than 3,000 business executives and managers from organizations located around the world,” and included responses from “individuals in organizations in every major industry, ranging from those with fewer than 500 employees to those with more than 500,000 employees.” *Id.* at 23; see also NRDC Opp. to Cert. at 19-20 & n.12-15 (listing examples of American corporations that have sustainability programs).

Canada, the UK, and the US will reach \$60 billion in 2013.”²³

- The growth rates of investment in sustainable business programs are forecasted to be 50 percent to 100 percent higher in 2013 than in 2011.²⁴
- “Fully 95% of the world’s 250 largest firms regularly report on their environmental performance, highlighting their commitment to sustainability as a tool for reducing risk, improving efficiency, driving innovation, and building intangible value.”²⁵
- Companies that adhere to principles of “conscious capitalism”²⁶ outperformed the

²³ Deloitte University Press, *supra* note 21.

²⁴ *Id.*

²⁵ Daniel C. Esty & Steve Charnovitz, *Green Rules to Drive Innovation*, HARVARD BUSINESS REVIEW, March 2012, at 120, 122, available at <http://hbr.org/2012/03/green-rules-to-drive-innovation/ar/1>.

²⁶ “Conscious capitalism” is a business philosophy that embraces four key principles: having a “higher purpose” besides maximizing profits (e.g., providing service to others, furthering knowledge); optimizing the value of six “interdependent stakeholders” (customers, employees, suppliers, investors, society, and the environment); promoting “conscious leadership” by senior executives that embody the higher purpose of the organization; and creating a “conscious culture” in the workplace that reflects a community of people who are flourishing and self-actualizing. John Mackey, *What Conscious Capitalism Really Is*, CALIFORNIA MANAGEMENT REVIEW, v. 53, no. 3, 83, 83-85 (Spring 2011), available at <http://www.jstor.org/discover/10.1525/cm.2011.53.3.83?>

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market by a 9:1 ratio over a 10 year period.²⁷

- Socially responsible investment funds now attract about \$1 out of every \$9 invested.²⁸
- “According to a 2008 Gallup environmental poll, 83 percent of respondents said that they had changed their shopping and living habits over the last

searchUrl=%2Faction%2FdoAdvancedSearch%3Fjo%3DCalifornia%2BManagement%2BReview%26q0%3Dwhat%2Bconscious%2Bcapitalism%2Breally%2Bis%26f0%3Dti%26Search%3DSearch%26wc%3Don&Search=yes&uid=3739560&uid=2134&uid=2&uid=70&uid=4&uid=3739256&sid=21101823707521.

²⁷ Rajendra S. Sisodia, *Conscious Capitalism: A Better Way to Win*, CALIFORNIA MANAGEMENT REVIEW, v. 53, no. 3 at 98, 99 (Spring 2011), available at <http://www.jstor.org/discover/10.1525/cm.2011.53.3.98?uid=3739560&uid=2134&uid=2&uid=70&uid=4&uid=3739256&sid=21101823707521>.

²⁸ Steve Wagner, Eric Hespenheide & Kate Pavlovsky, *The Responsible and Sustainable Board*, DELOITTE REVIEW, Issue 4, 59, 63 (2009), available at http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/US_deloitte_review_ResponsibleSustainableBoard_Jan09.pdf; see also Deloitte University Press, *supra* note 18 (“About \$3 trillion in the U.S. alone – roughly 12.2% of the \$25.2 trillion in total assets under professional management – is committed to some form of socially responsible and sustainable investing, according to the Forum for Sustainable and Responsible Investment”; “[t]he Dow Jones Sustainability Index has outperformed the MSCI World Index, a common measure of developed-country stock performance, in three of the last four years, and outpaced the Dow Jones Global Large-Cap Index in 2009.”).

five years to help protect the environment.”²⁹

The environment matters. Recent literature stressing this point reveals two relevant trends. First, some industry sectors, especially mining and oil and gas, must garner community goodwill to obtain a “social license to operate.” Second, to remain competitive, companies are advised to implement sustainability initiatives deep within their extended supply chains, that is, *beyond* internal operations, direct customers, and suppliers. These trends underscore the proprietary nature of the Port’s concession agreement.

1. Industries – Like The Port – Need A “Social License To Operate”

A “social license to operate” is not a formal agreement but an ongoing acceptance that a community grants to a business to operate in that community.³⁰ Obtaining a social license requires building trust, providing transparency, creating opportunities for public participation, and responding to community

²⁹ Wagner et al., *supra* note 28 at 63.

³⁰ Jason Prno & D. Scott Slocombe, *Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories*, RESOURCES POLICY 346 (May 28, 2012), available at <http://www.sciencedirect.com/science/article/pii/S0301420712000311>; Haanses et al., *supra* note 20.

concerns.³¹ It requires building community goodwill in order to avoid costly conflict.

Deloitte advises that it is “becoming an imperative for companies to consider broadening their sustainability efforts in the communities in which they operate as well as to the physical environment” in order to “gain the support of the people who live and work in these communities.”³² Obtaining a social license to operate can improve access to capital, bolster a company’s reputation, and enhance government relationships.³³ More fundamentally however, it minimizes local community opposition and is “essential . . . to access[ing] the next project.”³⁴

By way of analogy, the pressure to obtain a license to operate is particularly intense in the mining and oil and gas sector, for reasons that also apply to the Port. For instance, the mining and oil and gas industries, and the Port, leave profound environmental marks on the regions in which they do business,

³¹ Prno & Slocombe, *supra* note 30 at 347-48; Ernst & Young, Business risks facing mining and metals 2012-2013, 26-27, available at [http://www.ey.com/Publication/vwLUAssets/Business-risk-facing-mining-and-metals-2012-2013/\\$FILE/Business-risk-facing-mining-and-metals-2012-2013.pdf](http://www.ey.com/Publication/vwLUAssets/Business-risk-facing-mining-and-metals-2012-2013/$FILE/Business-risk-facing-mining-and-metals-2012-2013.pdf).

³² Deloitte, *supra* note 16 at 3.

³³ See Ernst & Young, *supra* note 31 at 26.

³⁴ Ernst & Young, Maintaining a social license to operate, <http://www.ey.com/GL/en/Industries/Mining---Metals/Business-risks-facing-mining-and-metals-2012---2013-6-Social-license-to-operate> (last visited March 13, 2013).

have substantial investments in their operations,³⁵ and, unlike other industries, “cannot pick up and move elsewhere” even if community opposition to their presence is strong.³⁶ Each industry has also suffered from significant delays in getting projects on-line.³⁷ For the oil and gas industry, conflicts with local communities was a substantial factor contributing to these delays;³⁸ for the Port, environmental and community opposition was *the* factor. Pet. App. 4a, 121a-122a.

Thus, it is no surprise that over the last five years, Ernst and Young has consistently ranked “maintaining a social license to operate” within the top six risks faced by the metals and mining industry.³⁹ It is also no surprise that “[m]ore than 80

³⁵ Haanses et al., *supra* note 20; Pet. App. 68a-75a.

³⁶ MIT Sloan Management Review & BCG: The Boston Consulting Group, *supra* note 22 at 11.

³⁷ Rachel Davis & Daniel M. Franks, *The Costs of Conflict with Local Communities in the Extractive Industry*, SRMining2011, 2 (Oct. 19-21, 2011), available at http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf (reporting that “[a] 2008 study of 190 projects operated by the major international oil companies shows that the time taken for projects to come on-line has nearly doubled in the last decade, causing significant increase in costs”); Pet. App. 75a-79a.

³⁸ Davis & Franks, *supra* note 37 at 2.

³⁹ Ernst & Young, *supra* note 34; see also Haanses et al., *supra* note 20 (“a company that successfully manages its social and environmental footprint can gain a competitive edge, helping it secure contracts, become a preferred partner, and build long-term relationships with the communities and governments on whose favor it depends. Savvy companies in the mining and [oil and gas] industries recognize that sustainability

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percent of companies in the mining sector reported that concerns about sustainability were changing their business model,” and that 71 percent attribute “maintaining a license to operate” as a key driver for these changes.⁴⁰ And lastly, it is not surprising that given the environmental, safety, and security concerns created by drayage trucks, the Port adopted the parking and placard provisions to minimize community resistance to its expansion plans. *See* Pet. App. 40a-41a, 46a.

To be clear, communities are emerging as influential stakeholders, and private companies are increasingly responding to community demands to reduce risk and remain competitive. For example, Teck Resources, which has mines and mineral development activities in the U.S., Canada, Chile, Peru, Asia, Europe, and Africa, has changed the way it enters a new region by ensuring that it does not have any pre-existing plans there before talking to the local community and other stakeholders.⁴¹ And Barrick Gold, one of the world’s largest gold producers, employs local community members to monitor water discharged from one of its mines.⁴²

In our view, the Port needs a social license to operate from the communities of San Pedro and

is not just about doing the right thing. It is critical to their very survival.”).

⁴⁰ Haanses et al., *supra* note 20.

⁴¹ Ernst & Young, *supra* note 31 at 27.

⁴² *Id.*

Wilmington. With that said, this case is not about resolving whether that belief is accurate. What this case is about – and what the above discussion validates – is that the Port’s adoption of the parking and placard provisions to build community goodwill is neither surprising nor extraordinary in today’s marketplace given the undisputed facts of this case.

2. Private Companies Are Implementing Sustainability Programs Throughout Their Extended Supply Chains

Even if a company does not need a social license to operate, they are still advised to tackle sustainability “as aggressively as they do cost, quality, speed and dependability” in order to spur innovation and minimize risks.⁴³ Companies are broadly defining the markets in which they do business to identify sustainability impacts “not only within their own enterprises but across the value chain, both among their suppliers and customers.”⁴⁴ Of the 2,600 commercial

⁴³ See Hau L. Lee, *Don’t Tweak Your Supply Chain – Rethink It End to End*, HARVARD BUSINESS REVIEW, Oct. 2010, at 62, 69, available at <http://hbr.org/2010/10/dont-tweak-your-supply-chain-rethink-it-end-to-end/ar/1>.

⁴⁴ Deloitte, *supra* note 16 at 3; David Kiron et al., *The Innovation Bottom Line*, MIT SLOAN MANAGEMENT REVIEW, Feb. 5, 2013, at 12, available at <http://aca3318ae75562500643-ca1b2d270cca3d1f89a77092d5cd33a3.r63.cf2.rackcdn.com/MITS-MR-BCG-Sustainability-Report-2013.pdf> (advising companies to “[c]ollaborate with individuals, customers, businesses and groups beyond the boundaries of the organization.”).

enterprises surveyed who reported a change in their business model as a result of sustainability (i.e., environmental, social, and economic issues), an average of 64 percent had changed their product or service offering, and 56 percent had changed their value chain processes.⁴⁵

Leading business consultants have even developed tools to help companies “map” the sustainability impacts of their products during, for example, the design, sourcing, manufacture, delivery, and end of life phases.⁴⁶ Through this mapping exercise, a company can identify opportunities and risks “throughout its extended supply chain,” and use that information to drive sustainability strategies.⁴⁷ Identifying a company’s sustainability impacts, however, is just the beginning. Adequately addressing those impacts can require structural changes and managing new relationships, far beyond the traditional buyer/seller relationship.

Nestlé, whose origins date back to 1866, is the largest food and beverage company in the world.⁴⁸

⁴⁵ Kiron et al., *supra* note 44 at 14-15 (noting that the survey analysis was based on responses from 2,600 executives and managers from commercial enterprises, with a wide variety of industries represented).

⁴⁶ Deloitte, Sustainability 2.0, <http://dupress.com/articles/sustainability-2-0-innovation-and-growth-through-sustainability/?top=6> (last visited March 13, 2013).

⁴⁷ *Id.*

⁴⁸ Nestlé, History, <http://www.nestle.com/aboutus/history> (last visited March 13, 2013); Nestlé, Sourcing overview, <http://>

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Nestlé's portfolio includes brands such as Gerber, Stouffer's, Dryers, Purina, and Power Bar.⁴⁹ The company prides itself on "creating shared value" for its shareholders, in which it seeks to encourage "economic and social value simultaneously by focusing on the social issues that [it is] uniquely capable of addressing."⁵⁰ Nestlé sources materials from more than 5 million farms, many of which are run by small farmers in poor rural regions of the world.⁵¹ The company's supplier base has approximately 165,000 direct suppliers and 680,000 individual farmers, who deliver materials to Nestlé buying stations.⁵²

To ensure that its suppliers develop sustainable and ethical practices, Nestlé established "non-negotiable minimum standards" that its suppliers

www.nestle.com/csv/ruraldevelopment/sourcingoverview (last visited March 13, 2013).

⁴⁹ Nestlé, Our Brands, <http://www.nestle.com/aboutus/ourbrands> (last visited March 13, 2013).

⁵⁰ Nestlé, Nestlé Creating Shared Value Report 2011 at 4, *available at* http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Social_Responsibility/2011-CSV-report.pdf. Nestlé has a 12 member Creating Shared Value ("CSV") Advisory Board and has endless information on its website about its CSV platform. Nestlé, CSV Advisory Board, <http://www.nestle.com/csv/nestle/csvadvisoryboard> (last visited March 13, 2013); Nestlé, Creating Shared Value at Nestlé, <http://www.nestle.com/csv/nestle> (last visited March 13, 2013).

⁵¹ Nestlé, Sourcing overview, <http://www.nestle.com/csv/ruraldevelopment/sourcingoverview> (last visited March 13, 2013).

⁵² Nestlé, Responsible sourcing and the Nestlé Supplier Code, <http://nestle.com/aboutus/suppliers> (last visited March 13, 2013).

and its suppliers' employees, agents, and subcontractors must adhere to when conducting business.⁵³ These standards are embodied in Nestlé's Supplier Code, and require the company's suppliers (and their employees, agents and subcontractors) to, for example,

- Provide, "as a minimum, potable drinking water, adequate sanitation, fire exits and essential safety equipment, access to emergency medical care, appropriately lit and equipped work stations"⁵⁴;
- Limit the use of child labor and factories or production facilities that have an unpaid workforce⁵⁵; and
- Ensure compliance with all applicable environmental laws and regulations "in the country where products or services are manufactured or delivered."⁵⁶

If Nestlé becomes aware of a breach in its Supplier Code, it "reserves the right to demand corrective measures," and "to terminate an agreement with any supplier who does not comply with the Code."⁵⁷

⁵³ Nestlé, The Nestlé Supplier Code 1 (Aug. 2010), *available at* <http://www.nestle.com/asset-library/Documents/Library/Documents/Suppliers/Supplier-Code-English.pdf>.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

Nestlé's Supplier Code is written in 19 languages, including Uzbek, Thai, and Croatian, demonstrating the global influence Nestlé is exerting within its extended supply chain.⁵⁸

Starbucks is the world's "premier roaster and retailer of specialty coffee" with more than 17,000 stores in 55 countries.⁵⁹ It is "dedicated . . . to striking a balance between profitability and social conscience," and commits "to buying and serving high quality, responsibly grown, ethically traded coffee."⁶⁰ Starbucks believes that its "long-term success is linked to the success of the hundreds of thousands of farmers who grow [its] coffee. . . . [and that] [b]y helping to sustain coffee farmers and strengthen their communities, [it] [will] ensure an abundant supply of high-quality coffee for the future."⁶¹

In 2010, the Harvard Business Review featured a profile on Starbucks and explained how the company has made its coffee "greener" by changing how it is

⁵⁸ See Nestlé, Responsible sourcing and the Nestlé Supplier Code, <http://www.nestle.com/aboutus/suppliers> (last visited March 14, 2013).

⁵⁹ Starbucks, Our Heritage, <http://www.starbucks.com/about-us/our-heritage> (last visited March 14, 2013).

⁶⁰ Starbucks, Being a Responsible Company, <http://www.starbucks.com/responsibility> (last visited March 14, 2013); Starbucks, Ethical Coffee Sourcing and Farmer Support 1, available at http://www.conservation.org/global/celb/Documents/Starbucks_Ethical_Sourcing_Factsheet_2008_2010.pdf.

⁶¹ *Id.*

grown.⁶² Historically, Starbucks “had no direct interactions with farmers; it had traditionally purchased coffee from intermediaries such as farm cooperatives, food processors, exporters, and importers.”⁶³ Thus, Starbucks had to find a way to influence its “extended supply chain,” which included coffee farmers. In response, Starbucks created Coffee and Farmer Equity (“C.A.F.E.”) Practices.⁶⁴

The C.A.F.E. Practices are guidelines that contain more than 200 indicators that aim to improve the social, economic, and environmental performance of coffee farms and mills through, for example, farming and processing practices that protect soil and conserve water and energy, fair labor standards, and health and safety requirements.⁶⁵ The guidelines state a “zero tolerance” for the violation of standards that, for example, require wages to be “paid directly and regularly to all workers in cash or cash equivalent . . . and not through labor intermediaries,” and that

⁶² Lee, *supra* note 43 at 68.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*; Starbucks Coffee Company, C.A.F.E. Practices: Generic Scorecard (Jan. 2013), *available at* http://www.scsglobal.com/files/CAFE_SCR_Genericv3.1_012513_0.pdf; Starbucks Coffee Company, C.A.F.E. Practices: Smallholder Scorecard (Jan. 2013), *available at* http://www.scsglobalservices.com/files/CAFE_SCR_Smallholderv3.1_012513_0.pdf; Starbucks, C.A.F.E. Practices – Terms & Conditions – Version 3.0, *available at* http://www.scsglobalservices.com/files/C%20A%20F%20E%20%20Practices%20Terms%20and%20Conditions_V3%200_english.pdf.

prohibit further “conversion of natural forest to agricultural production.”⁶⁶ Starbucks also requires suppliers to document how much of the money Starbucks pays for coffee actually goes to the grower, which is often a small family in Latin America, Africa, or Asia.⁶⁷ Suppliers are graded by independent certifiers based on the guidelines, and must score above a certain threshold to be “C.A.F.E. certified.”⁶⁸ Starbucks buys first from certified farmers and suppliers, and pays premium prices to top scorers and those who show continual improvement.⁶⁹

The geographic reach of Starbucks’ C.A.F.E. Practices is vast, effectively influencing how coffee is farmed and milled in 20 countries across four continents.⁷⁰ These countries “significantly overlap with eight of the world’s most biologically rich but most

⁶⁶ Starbucks Coffee Company, C.A.F.E. Practices: Generic Scorecard, *supra* note 65 at 3 & 11.

⁶⁷ Lee, *supra* note 43 at 68.

⁶⁸ *Id.*

⁶⁹ *Id.* In 2011, 86 percent of Starbucks coffee was “C.A.F.E. Practices” verified. Starbucks, Starbucks Global Responsibility Report – Goals and Progress 2011, Year in Review: Fiscal 2011 at 5, *available at* <http://globalassets.starbucks.com/assets/19c68ea6c48a473d865c7327c08d817f.pdf>. By 2015, all of Starbucks’ coffee will be third-party verified or certified, either through C.A.F.E. Practices or another externally audited system. Starbucks, Ethical Coffee Sourcing and Farmer Support, *supra* note 60 at 1.

⁷⁰ Starbucks, Ethical Coffee Sourcing and Farmer Support, *supra* note 60 at 4.

threatened regions,” and “[a]ll of the countries supplying coffee via the C.A.F.E. Practices program are developing countries, with over 20% falling in the low income category.”⁷¹ Accordingly, positively influencing this aspect of Starbucks’s supply chain ensures a long-term supply of coffee in the future while also enhancing its corporate brand, building community goodwill, and minimizing risk.

The fact that corporate America must address the social and environmental consequences of its operations is a marketplace reality. We do not contend, however, that the Port can do everything that a private company can do. The Court of Appeals articulated the limits of State proprietary conduct in this case when it invalidated the concession agreement’s employee driver provision. Pet. App. 41a-44a. But the examples of Nestlé and Starbucks are nonetheless useful because they illustrate the breadth of actions private companies are taking to comprehensively manage their social and environmental footprint. Moreover, they illustrate that the parking and placard provisions – by only binding the behavior of those who desire to do business on Port property – fall well within the limits of how private companies act in the marketplace.

⁷¹ *Id.*

**B. The Environmental Underpinnings Of
The Concession Agreement Explain
The Agreement’s Proprietary Nature,
Not Detract From It**

Notwithstanding the discussion above, the record in this case establishes – by itself – that while the Clean Truck Program was understood to have major environmental benefits, it was adopted as a business necessity. Pet. App. 3a-9a, 73a-95a. As a result, the District Court concluded that the concession agreement was “essentially proprietary.” Pet. App. 120a-124a.⁷² The Court of Appeals adopted the undisputed

⁷² The District Court held:

The Concession Agreement helps the Port manage its property and facilities as any private landlord and facilities operator would. . . . Indeed, through the Concession Agreement, [the Port] aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations. . . . As cargo volumes rise, Port revenues increase, and thus to remain competitive the Port has a strong interest in upgrading and expanding its facilities to increase cargo volumes. . . . [T]he evidence demonstrates that Port-generated air pollution interfered with Port growth and has jeopardized the Port’s continued viability as a commercial enterprise. . . . [Environmental and community opposition] effectively stalled all major Port expansion projects for seven years. . . . In response, in order to be able to grow, the Port enacted the Clean Air Action Plan, which spawned the Clean Truck Program and the Concession Agreement, to mitigate Port-generated air pollution from Port-serving vehicles and equipment. . . . [T]he Port adopted the Clean Truck Program, which included the Concession Agreement as a

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findings of the District Court, including the fact that the Port's commercial interests in expansion had been successfully thwarted by environmental litigation and community opposition to Port operations, and relied on such facts to uphold the parking and placard provisions under the market participant doctrine. Pet. App. 6a-8a, 40a-41a, 46a.

ATA asserts that the market participant exception cannot apply to the concession agreement because it "promote[s] specific environmental policies" and is thus "tantamount to regulation or policy making." ATA Br. at 32. ATA also asserts that this Court should limit the market participant exception to government procurement decisions or courts will have difficulty deciphering when States are acting for policy versus proprietary reasons. *Id.* at 31. ATA's arguments are without merit for several reasons.

First, the environmental underpinnings of the concession agreement do not preclude application of the market participant exception. This Court and the Ninth and Second Circuit Courts of Appeals have upheld – under the market participant exception –

"business necessity," in order to eliminate evident obstacles to its growth. . . . While the Port had not previously required drayage services providers to contract with it to access Port property, it made an economically driven decision to do so via the Concession Agreement in its capacity as a landlord and facilities operator.

Pet. App. 120a-123a.

government requirements that were adopted to protect the environment and public health against Commerce Clause and federal preemption challenges.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court applied the market participant doctrine to uphold against a Commerce Clause claim a Maryland program aimed at reducing the environmental impacts associated with old abandoned automobiles that littered the State's streets. 426 U.S. at 802-03, 806-09 ("Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment."). The program was upheld even though Maryland was not purchasing vehicles.⁷³

⁷³ It is true that this Court stated that Maryland was a "purchaser, *in effect*, of a potential article of interstate commerce." *Alexandria Scrap*, 426 U.S. at 808 (emphasis added). However, that fact does not render the case helpful for ATA, which argues that the market participant exception should only apply to government procurement in the narrowest sense. ATA Br. at 31-32 (asserting that the exception should be limited to "a narrow range of state actions directly related to the 'efficient procurement of goods and services'" and that the only way the Port could be a market participant is if it provides or procures drayage services). This is so because Maryland was not actually buying junk cars to operate or scrap them itself. Moreover, the market participant exception has been applied in a number of other "nonprocurement" cases. *See, e.g., Reeves*, 447 U.S. at 440 (South Dakota policy upheld that limited the *sale* of cement by a state plant); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1043, 1049 (9th Cir. 2000), overruled in part on other grounds by *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002) (city rotational tow list upheld even though the vehicle

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In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (“EMA”), 498 F.3d 1031 (9th Cir. 2007), the Ninth Circuit applied the market participant doctrine to uphold air district rules that required state and local governments to purchase alternative fuel vehicles in order to reduce air pollution in the Los Angeles region. 498 F.3d at 1045-46 (“That a state or local governmental entity may have policy goals that it seeks to further through its participation in the market does not preclude the doctrine’s application, so long as the action in question is the state’s own market participation.”) (citing *Alexandria Scrap*, 426 U.S. at 809). The industry association in that case argued that the rules were preempted by the federal Clean Air Act. *Id.* at 1035-37.

owner, not the city, paid for the towing services); *Four T's v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913 (8th Cir. 1997) (airport fees on ground transportation services upheld because airport provided facilities to the transportation companies; airport was not a purchaser of the services); *Transport Limousine of Long Island v. Port Auth. of N.Y. & N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (same)). These cases illustrate that the key inquiry under the market participant exception is not whether the government has purchased goods or services, but whether the government has a meaningful commercial interest in the challenged requirement. Further, where private actors would perform conduct analogous to the challenged action, it is likely that the exception applies. *Boston Harbor*, 507 U.S. at 231-32.

And in *Sprint Spectrum v. Mills*, 283 F.3d 404, 410, 421 (2d Cir. 2002), the Second Circuit applied the market participant doctrine to uphold restrictions placed by a school district on a telecommunications company that sought to build a cellular communications tower on a high school roof. The restrictions were necessary to protect the health and safety of school children from radio frequency emissions, and were alleged by the plaintiff to be preempted by the Telecommunications Act. *Id.* at 410.

Second, these cases (*Alexandria Scrap, EMA*, and *Sprint Spectrum*), in addition to others decided by this Court, demonstrate that neither this Court nor the Courts of Appeals have difficulty deciphering when a State is acting as a market participant or for purely policy reasons. For instance, in *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 287 (1986), this Court held that the market participant exception did not apply to a State statute where “[n]o other purpose could credibly be ascribed” to the statute other than to “deter labor law violations and reward ‘fidelity to the law.’” Similarly, in *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008), this Court held that the market participant exception did not apply to a State statute that was expressly intended to further labor policy. Accordingly, market participant jurisprudence provides no indication that this Court must restrict the application of the doctrine, let alone, limit it to government procurement, as ATA suggests. ATA Br. at 31; *see also supra* note 73.

Third, ATA's reliance on the Court of Appeals' preliminary injunction decision from 2009 and *Boston Harbor* to assert that the concession agreement provisions are "tantamount to regulation and policy making," ATA Br. at 32, is misplaced. The Court of Appeals' 2009 ruling was rendered *before* the trial in the District Court, reflected the Court's then-current views about the parties' likelihood of success, and was based on a limited record. Further, nothing in *Boston Harbor* stands for the proposition that State actions that promote the environment are *per se* regulatory. And in fact, the clean-up of Boston Harbor – the project that necessitated the challenged labor agreement – was in response to a successful environmental lawsuit brought against the state of Massachusetts. *Boston Harbor*, 507 U.S. at 220-21.

The record shows that the Port adopted the concession agreement in response to environmental litigation and ongoing community opposition that threatened the Port's competitiveness. Cases decided by this Court and the Courts of Appeals confirm that the Port legitimately entered into the market to remedy those challenges and protect its economic well-being. We now turn to the two contract provisions at issue.

1. The Parking Provision Furthers The Port's Proprietary Interests

The communities of San Pedro and Wilmington are literally across the street from the Port. Tr. Demonstrative Ex. 2.⁷⁴ Drayage trucks frequent these neighborhoods, and the practice of drayage trucks parking in harbor communities has contributed to heavy truck traffic in residential areas, resulting in increased air pollution, noise, and safety hazards for local communities, including hazardous material discharging from leaking containers. Trial Ex. 185 at LAD001213; Pet. App. 40a; Trial Tr. at 79:3-23 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011. Further, drayage trucks account for a disproportionate number of the accidents, traffic violations, and citations for improper vehicle maintenance in the harbor area. Pet. App. 88a. The parking provision sought to deal with some of these problems, but more fundamentally, to reduce community opposition that had precluded infrastructure development for nearly a decade.

As discussed above, in some industry sectors, the failure to build community support for projects is considered one of the sectors' biggest risk factors, and absent such support, projects will not move forward. *Supra* at 24-27. Analogous facts exist here. As a result, the Court of Appeals correctly relied on the District Court's undisputed findings of fact to hold

⁷⁴ This demonstrative exhibit is located in the back cover pocket of the Joint Appendix and consists of a map of the Los Angeles and Long Beach harbors.

that increasing community goodwill was a legitimate business interest given that the community had stymied Port growth through successful environmental litigation. Pet. App. 40a.⁷⁵ The majority's decision should be affirmed.

Separate from engendering goodwill, however, the parking provision is proprietary in nature for a second reason – it serves the Port's commercial interest in port security. Pet. App. 40a-41a, 88a, 93a-95a. Neither ATA nor any of the *amici* mention the “port security” rationale for the parking provision in their respective briefs even though the Court of Appeals listed it as an independent basis for upholding the parking provision. Pet. App. 40a-41a.

The Port is served by some 16,000 trucks and thousands of truck drivers. Pet. App. 80a; JA118. There have been cases of unidentified drivers using false identification to gain access to the Port, and instances when drivers have carried unauthorized passengers into Port terminals. JA118-19; Pet. App. 94a-95a. At trial, Captain John Holmes, Deputy Executive Director at the Port,⁷⁶ testified about the

⁷⁵ Further, testimony presented at trial indicates that private entities, including marine terminal operators, at the Port have adopted congestion-relief programs to simultaneously address local community concerns about traffic and benefit their business. Trial Tr. at 155:3-157:25 (Apr. 27, 2010), ECF No. 337, filed Jan. 14, 2011.

⁷⁶ Capt. Holmes has an extensive background in port safety and security. He served in the U.S. Coast Guard for 27 years, specializing in marine and port safety and security, including
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security risks posed by drayage trucks, including container theft, stolen trucks, and the risk that someone could take over a truck and use the vehicle as a weapon. Trial Tr. at 67:6-19, 69:15-25 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. These risks are particularly troublesome because the Department of Homeland Security considers the Port part of one of seven “Group I” port areas at the highest risk of terrorist attack.” Pet. App. 40a, 93a. Given the Port’s security risks, it is entirely consistent with the Port’s commercial interests to know where trucks that enter its facility daily are parked, and to require drayage trucks to be parked in designated locations. The parking provision is designed to do just that.

2. The Placard Provision Furthers The Port’s Proprietary Interests

The placard provision was also enacted to increase community goodwill. The majority held:

The placards help the Port to gather information about the safety of drayage truck operations, both on and off Port property. This information can be communicated to

serving as the Coast Guard Captain for the Port of Los Angeles under the Department of Homeland Security. Trial Tr. at 55:9-62:5 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011. Capt. Holmes also performed risk assessments and supply chain security and technology evaluations in the private sector, and teaches courses on security issues at the University of Southern California and with the Defense Threat Reduction Agency. *Id.* at 62:6-65:23.

motor carriers and informs the Port's operations. . . .

The Port adopted the placard provision in response to community concerns about drayage truck operation. The provision invites community participation and increases goodwill, thus facilitating Port expansion.

Pet. App. 45a-46a; *see also* Trial Tr. at 108:6-109:4 (Apr. 23, 2010), ECF No. 336, filed Jan. 14, 2011 (the placard provision enables the community to report trucks that are operating unsafely or in areas where they should not be); Trial Ex. 224 at LA000319 (the placard requirement enables "community members with concerns about truck emissions, safety and operations" to get "immediate action by the Port"). For the same reasons stated above with respect to the parking provision, *supra* 42-43, the Port's adoption of the placard provision to increase community goodwill falls within the market participant exception.

Further, at trial, the proprietary nature of the placard provision was underscored by expert testimony confirming that private companies often require trucks to display telephone numbers so that the public can report unsafe driving. Trial Tr. at 29:10-30:8 (Apr. 28, 2010), ECF No. 338, filed Jan. 14, 2011); *id.* at 81:4-14. Based on such evidence, the Court of Appeals had no trouble holding that "[a]s a facilities provider, the Port has a proprietary interest in receiving complaints about drayage trucks entering, leaving, and operating on its property. A private

facilities provider would do the same.” Pet. App. 46a (citing *Boston Harbor*, 507 U.S. at 231-32).

ATA belittles the Port’s attempts to build community goodwill, suggesting that catering to such interests would eviscerate FAAAAA preemption. ATA Br. at 34. But the Court need not rule that every action to enhance community goodwill falls within the market participant exception in order to affirm the majority’s decision. Nor do the facts of this case imply that result.

Moreover, the Court of Appeals set limits on the Port’s actions as a market participant when it invalidated the employee-driver provision. Pet. App. 41a-44a (“While the Port may impose conditions on licensed motor carriers seeking to operate on Port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties.”). And the majority found that the parking and placard provisions fell within those limits. Pet. App. 40a-41a (holding that the parking provision does not impact third party behavior because it “binds only those motor carriers operating on Port property, and applies to only those trucks permitted to operate at the Port”), Pet. App. 46a (holding that the placard provision does not impact third party behavior).

Thus, ATA’s concern that affirming the majority’s decision would undermine the deregulatory purpose of the FAAAAA is unfounded. And to the extent currently unidentifiable government actors create a patchwork of requirements in the future that pose a

real-world problem, that is a task for Congress, not the courts, to resolve.

C. *South-Central Timber Development v. Wunnicke* Does Not Preclude Application Of The Market Participant Exception To This Case

The Court of Appeals discussed the environmental and community challenges created for the Port by drayage operations, how those challenges threatened the Port's very existence, and how the parking and placard provisions helped remedy those challenges. Pet. App. 4a, 6a-8a, 40a-41a, 46a. The majority went on to find that the Port could place requirements on motor carriers because the drayage and port markets "are so closely related" – in fact, "interrelated" – "that the Port's interest in managing its facilities can extend to imposing conditions on drayage carriers that operate on Port property." *Id.* at 25a, 27a-28a ("the concession agreements are contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions"). In so doing, the majority affirmed the Port's ability to respond to environmental challenges as a private actor would. Pet. App. 29a (citing *Boston Harbor*, 507 U.S. at 231-32).

Nevertheless, ATA argues that the market participant exception cannot apply to provisions in the concession agreement because the Port is not a participant in the drayage market. ATA Br. at 32. ATA

relies on a plurality decision in *South-Central Timber Development v. Wunnicke*, 467 U.S. 82 (1984), to argue that the relevant “market” must be narrowly defined, and that the off-street parking and placard provisions amount to impermissible downstream regulation. ATA Br. at 33.⁷⁷

The City of Los Angeles’ brief cogently explains that the concession agreement does not affect a “downstream” market since it applies to motor carriers that operate on Port property; it does not restrict third party behavior. We agree with the City’s analysis.⁷⁸ We add, however, that even if port drayage is characterized as a downstream market, analogous conduct by private companies today instructs that the parking and placard provisions are nonetheless permissible. *Wunnicke* was decided in 1984. To the extent that the plurality’s decision may have correctly characterized typical market behavior in the 80’s, it is not consistent with the marketplace realities of today.

⁷⁷ ATA also cites *Florida Transportation Services v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012) and *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980) in support of its assertion. ATA Br. at 33-34. For the reasons cited in the City of Los Angeles’ brief, those cases are distinguishable and unpersuasive. City Br. at 33 *et seq.*

⁷⁸ The City also correctly points out that the plurality opinion in *Wunnicke* applied “more rigorous” Commerce Clause scrutiny than might otherwise have been warranted because the case involved foreign commerce and restrictions on the resale of a natural resource – facts that do not exist here. City Br. at 33.

In *Wunnicke*, the Court considered whether the market participant exception applied to Alaska's requirement that timber purchased from state lands be processed within the state prior to export. 467 U.S. at 84. At "the heart of the dispute" was a "disagreement over the definition of the market," and specifically, if Alaska was a participant in the timber processing market. *Id.* at 98. If it was, then the market participant exception would permit Alaska's in-state processing requirement.

Ultimately, four justices declined to define Alaska as a participant in the timber "processing" market, concluding instead that Alaska was only a participant in the timber "selling" market. The plurality decision turned on the view that Alaska's "downstream" requirements did not reflect the behavior of a typical seller whose proprietary interests cease once its immediate transaction with a buyer ends. *Id.* at 96-99.

[A]s a matter of intuition a state market participant has a greater interest as a "private trader" in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them. . . .

In contrast to the situation in *White* [460 U.S. 204 (1983)], [Alaska's] restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship

in which the city retained a continuing proprietary interest in the subject of the contract.

Id. at 98-99; *see also id.* at 96 (“it is clear that the State is more than merely a seller of timber. In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale . . .”).

As we have discussed, today some private companies are compelled to obtain a social license to operate. *See supra* 24 *et seq.* Companies exert their influence both upstream and downstream because they are held accountable for the social and environmental harms that occur outside of their immediate transactions. *Id.* And leading business consultants agree that in the age of social media, where stories travel fast, minimizing risk has become increasingly difficult and initiatives undertaken to protect one’s brand must be comprehensive enough to meet that challenge. *See supra* 20.

It would be foolish for Starbucks to limit its business interests to the transactions between its baristas and java-seeking customers, and to disassociate itself from coffee farmers. Similarly, Nestlé could commit corporate suicide if it turned a blind eye to how the crops for its baby food were harvested even though Nestlé is not in the farming business. As a matter of survival – not just profitability – corporate America has a “continuing proprietary interest,” *see Wunnicke*, 467 U.S. at 99, in activities

that occur beyond its internal operations, direct customers, and suppliers. As a matter of risk management and to get the next project approved, it has to. The market participant exception is informed by what private parties do. *See Boston Harbor*, 507 U.S. at 231-32. As a result, the exception must recognize shifts in corporate behavior. ATA's reliance on *Wunnicke* ignores these shifts.⁷⁹



⁷⁹ This discussion lends further credibility to the City's argument that application of the market participant doctrine should not turn on a "relevant market" analysis." City Br. at 31-32 ("*Hughes* asked merely whether Maryland was a participant in 'the market,' 426 U.S. at 806, and *Reeves* similarly assessed simply whether South Dakota was an actor in 'the free market.' 447 U.S. at 437. *White*, 460 U.S. at 211 n.7, specifically added, in fact, that application of the doctrine does not turn on whether there is 'privity of contract' among the relevant actors.").

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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March 18, 2013