UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-56654

ENGINE MANUFACTURERS ASSOCIATION,
Plaintiff and Appellant,

and

WESTERN STATES PETROLEUM ASSOCIATION,
Plaintiff-in-Intervention and Appellant,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.,*
Defendants and Appellees,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.,*
Defendants-in-Intervention and Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION,
CIV. NO. 00-09065 FMC (BQRX)

[REPLACEMENT] *AMICI CURIAE* BRIEF OF THE LOS ANGELES TAXI INDUSTRY IN SUPPORT OF REVERSAL

LAWRENCE J. JOSEPH
(Cal. S.B. No. 154908)
2121 K Street, NW, Suite 800
Washington, DC 20037
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL CONSTITUTION AND STATUTES

LEGISLATIVE HISTORY

FEDERAL REGULATIONS

CALIFORNIA CONSTITUTION AND STATUTES

CALIFORNIA REGULATIONS

OTHER STATES' STATUTES

LOCAL REGULATIONS, ORDINANCES AND CODES

LOCAL REGULATORY HISTORY (ADMINISTRATIVE RECORD)

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae file this brief with the consent of all parties. *Amici* are franchised by Los Angeles and Long Beach to offer taxi service. Long Beach authorizes *amicus* Long Beach Yellow Cab to operate throughout that City, implicitly including its airport. Long Beach Municipal Code §§5.80.020(B), 16.44.041(A). The other nine *amici* hold franchises under the Los Angeles Municipal Code ("LAMC"), and their service areas expressly include Los Angeles International Airport ("LAX"). *E.g.*, Los Angeles Ordinance No. 173651, §2.3(b) (2000). Taxi franchisees must pay Los Angeles certain sums annually and monthly. *Id.*, §5.2(a); LAMC §71.05(b). After notice and a pre-suspension hearing, the City's taxi board may suspend LAX pick-up rights for illegally conducted taxi service, LAMC §71.02.1(a)(2), but suspensions aggregating 30 or more days in twelve months may be appealed to the City Council, LAMC §71.02.1(b).

Although it exempts taxis' towncar competitors, SCAQMD Rule 1194(d)(4) compels taxi owner-drivers (who typically own a single taxicab) to purchase vehicles ill suited for taxi service. Compared with conventional taxis, alternately fueled taxis: have longer, costlier, and more frequent downtime; have less passenger and/or trunk capacity; have a shorter range per fueling; with inadequate alternate-fuel infrastructure, require disproportionate amounts of "deadheading" (traveling without passengers) to and from fueling stations; and, consequently, are

avoided by lessee-drivers, whose lease payments provide owner-drivers with critical additional income. These burdens financially ruined many owner-drivers after severely reducing both their income and devaluing their taxi-share asset from between $40,000 and $65,000 to below $12,000. Moreover, taxis have borne these significant burdens for little, if any, environmental benefit. Unlike other targeted fleets, taxis are not a source of diesel emissions.

Through their national trade association, several *amici* participated in *Engine Mfrs. Ass'n v. SCAQMD*, 541 U.S. 246 (2004) ("*EMA*"), and the Los Angeles *amici* participated in the post-*EMA* California Air Resources Board ("CARB") proceedings on whether to seek a waiver of federal preemption for taxi standards. Although both proceedings rejected SCAQMD standards for taxi fleets, the district court's subsequent "market-participant" decision prompted SCAQMD on July 20, 2005, to issue an "Advisory" that re-asserts authority over private fleets "under contract to" public, non-federal entities. By letter dated July 29, 2005 (which SCAQMD has deferred answering substantively pending this litigation), *amici* asked SCAQMD whether its "under-contract" test covers private taxis.

ISSUE PRESENTED

For *amici*, this appeal presents the purely legal question whether the Clean Air Act, 42 U.S.C. §§7401-7671q ("CAA"), preempts Rule 1194(d)(4)'s standard for private taxis.

SUMMARY OF ARGUMENTS

As threshold matters, California's municipal-affairs doctrine requires the very case-specific inquiries that the district court sidestepped (Section I.A), the "presumption against preemption" does not apply where the federal government entered the field of vehicular-emission standards before state and local governments other than California and consistently preempted other states and local government from that field (Sections I.B-I.C), the market-participant theory is inapposite to express-preemption statutes generally and Rule 1194(d)(4) particularly (Sections I.D-I.F), CAA's fleet provisions protect public fleets (Section I.G), and CAA's general savings clause does not "save" proprietary purchase mandates (Section I.H). On the merits, the very statute that the district court cited to *uphold* the fleet rules actually *preempts* Rule 1194(d)(4) under state law, vitiating SCAQMD's theory that state-delegated purchase authority exempts it from federal preemption (Section II.A), and the CAA preempts Rule 1194(d)(4) as an impermissible standard and fleet rule (Sections II.B-II.C).

LEGAL BACKGROUND

Federal law preempts state law when they conflict. U.S. CONST. art. VI, cl. 2. "State action may be foreclosed by express [statutory] language…, by implication from the depth and breadth of a [statute] that occupies the legislative field, or by implication because of a conflict with a [statute]." *Lorillard Tobacco Co. v. Reilly*,

533 U.S. 525, 541 (2001) (citations omitted).

To determine a statute's preemptive scope, congressional intent controls, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992), and may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). If Congress states its preemptive intent explicitly, a court's only task is to determine the statute's preemptive scope. *Cipollone*, 505 U.S. at 517. The statutory text is "the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), and its plain meaning presumptively expresses that intent. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

In 1963, Congress entered the vehicular-emission field by requiring the Department of Health, Education & Welfare ("HEW") to "encourage" industry's "continued efforts" to develop devices and fuels to limit vehicular emissions. Pub. L. No. 88-206, §6, 77 Stat. 392, 399 (1963). Congress also found that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." *Id.*, §1(a)(3), 77 Stat. at 393 (*codified at* 42 U.S.C. §7401(a)(3)). In 1965, Congress expanded the federal role to require federal new-motor-vehicle emission standards. Pub. L. No. 89-272, §202, 79 Stat. 992 (1965). In 1967, Congress expressly preempted "any [state or local] standard relating to the control of emissions" from new vehicles and engines. Pub. L. No. 90-148, §208(a),

81 Stat. 485, 501 (1967) (*codified at* 42 U.S.C. §7543(a)).[1]

Like the statute, the legislative history clearly and manifestly indicates congressional intent to preempt state and local vehicular-emission standards:

> The Congress is therefore presented directly with the question of the extent to which the Federal standards should supersede State and local laws on emissions from motor vehicles…. Rather than leave this question to the uncertainties involved in litigation, the committee has agreed… that State laws applicable to the control of emissions from new motor vehicles or new motor vehicle engines are superseded.

H.R. REP. NO. 90-728 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1956. Congress intended §209's broad preemption to protect not only manufacturers, but also users and consumers. *Id.* (preemption protects "manufacturers… and users"); S. REP. NO. 90-403, at 33 (1967) (preemption protects "general consumer").

---

[1] In 1970, Congress recodified §208 as §209. Pub. L. No. 91-604, §8(a), 84 Stat. 1676, 1976-77 (1970). For consistency, *amici* refer to this section as "§209."

California's unique air-quality problem and pioneering vehicular-emission standards led Congress to authorize the *State* of California to impose its own standards after obtaining a waiver of federal preemption. Pub. L. No. 90-148, §208(b), 81 Stat. at 501. Although that provision applies to any state that adopted new-vehicle, non-crankcase emission standards prior to March 30, 1966, only California had done so. S. REP. NO. 90-403, at 6, 33.

Since 1967, Congress amended relevant CAA provisions in 1970, 1977, and 1990. *See* Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2520 (1990). In *each* post-1967 amendment, Congress reinforced its clear distinction between federal preemption, waivers for California *state* standards, limited authorization for *other states* to adopt standards *identical* to California's, and *total preemption of local standards. See, e.g.*, 42 U.S.C. §§7416, 7543(c), (e), 7573, 7586.

In the Supreme Court, SCAQMD indirectly cited various state laws *circa* 1963 and 1967 to dispute that the federal government entered a field previously occupied only by California. Brief of Respondent SCAQMD *et al.*, No. 02-1343 (U.S.), at 17 n.2, 21-22 n.7, 2003 WL 22766722 (2003) (*citing* HEW, *Digest of State Air Pollution Laws* (1963 & 1967 eds.)). Of SCAQMD's cited authorities, only New York's 1963 crankcase emission standard demonstrates prior non-California state regulation of vehicles. Colorado *intended* to adopt vehicle

standards, 1963 Colo. Sess. Laws 150, but repealed that general regulatory authority, 1966 Colo. Sess. Laws 45, §19, after enacting a crankcase standard. 1965 Colo. Sess. Laws. 87; *cf.* H.R.J. Res. 1022, 44th Gen. Assem. (Colo. 1965) (all domestic and many foreign gasoline-powered vehicles had crankcase systems by the 1963 model year). New Jersey, New York, and Connecticut sought to enter *after the federal cutoff,* 1966 N.J. Laws 16 (dated Apr. 7, 1966); 1966 N.Y. Laws 856, 902 (dated July 28, and Aug. 1, 1966); 1967 Conn. Pub. Acts 676. The District of Columbia is a *federal* preserve. U.S. CONST. art. I, §8, cl. 17.

Four states (Indiana, Kansas, Michigan, and New Hampshire) acted between 1961 and 1963 to require equipment to prevent "annoying smoke" and/or "excessive fumes or smoke," *Digest,* at 92, 94, 115, 124 (1963 ed.), which Michigan expressly defined to exclude "normal operations," *id.* at 115. Variants of the other three "gross-emitter" statutes remain in force, IND. CODE §9-19-8-5, KAN. STAT. ANN. §8-1739, N.H. REV. STAT. ANN. §266:59, but no-one contends that they apply to properly functioning vehicles. *People v. Madearos,* 230 Cal.App.2d 642, 645 (1964) ("vehicle… in normal operation necessarily… emits some smoke [and] ordinary… person would have no difficulty in determining whether… excessive exhaust fumes accompanied… operation of… vehicle").

FACTS

Rule 1194(d)(4) requires taxis that meet or exceed California's extra-

stringent Ultra-Low Emission Vehicle ("ULEV") standard (0.040 grams/mile of nonmethane organic gas), notwithstanding that other Californians may purchase otherwise-comparable vehicles or engines that emit three times that amount (0.125 grams/mile). 13 Cal. Code Regs. §1960.1(g)(1). SCAQMD applies its "ULEV-or-better" standard to purchases or leases by taxis that provide pickup service from commercial airports. Rule 1194(c)(1), (d)(4). Rule 1194 applies only to entities that own, lease, or operate 15 or more vehicles. Rule 1194(b), (c)(5).

During SCAQMD's rulemaking, the taxi industry commented that taxi associations and cooperatives do not own the taxis that they dispatch, but instead consist of small-business owner-drivers who form associations or cooperatives to share overhead. *Staff Report: Proposed Rule 1194 – Commercial Airport Ground Access*, at 10 (2000) ("*Staff Report*") ("most do not own more than one vehicle"). In response, SCAQMD adopted Rule 1194(d)(4) pursuant to Health & Safety Code §40919(a)(4), which applies to fleet *operators*, rather than §40447.5(a), which applies to fleets with 15 or more vehicles under common ownership or lease. *Staff Report*, at 10-11, 38-39; *Staff Proposal: Amend Rule 1194 – Commercial Airport Ground Access*, at 3-4 (2000) ("*Amendment Proposal*").

The administrative record makes clear that SCAQMD viewed §209 to allow purchase restrictions. *Staff Report*, at 38. Indeed, SCAQMD argued that position all the way to the Supreme Court. *EMA*, 541 U.S. at 249. Only after losing there

did SCAQMD raise its market-participant argument.

I. THRESHOLD ARGUMENTS

A. ***Big Country Foods*** **Does Not Apply**

The district court relied on *Big Country Foods* for two propositions: (1) political subdivisions exist at their state's will, and (2) considering subdivisions separately from their state would necessitate "difficult case-specific inquiries into the degree of subdivision autonomy." Appellants' Excerpts of Record ("E.R.") 19 (*quoting Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1179 (9th Cir. 1992)). Whatever the law in Alaska, California's constitution authorizes cities to conduct municipal affairs independent from the Legislature (and thus from SCAQMD). CAL. CONST. art. 11 §5(a). Contrary to the decision below, this "municipal-affairs" doctrine requires courts to engage in "ad hoc inquiries," *California Fed. Sav. & Loan Assn. v. City of Los Angeles*, 54 Cal.3d 1, 16 (1991), raising two relevant issues.

First, the mode in which cities choose to regulate, franchise, or contract with taxi companies to authorize private business on city property does not elevate the cities to market participants in the taxi companies' private business. Accordingly, the district court's analysis of the Legislature's (and thus SCAQMD's) authority over *local* purchase decisions does not apply to charter cities like Los Angeles and Long Beach. CAL. CONST. art. 11, §5(a); *City of Grass Valley v. Walkinshaw*, 34

Cal.2d 595, 598-99 (1949) ("[for] municipal affairs the city is not subject to general law except as the charter may provide"); *Simons v. City of Los Angeles*, 63 Cal.App.3d 455, 468 (1976) ("power of a charter city over exclusively municipal affairs is all embracing… and free from any interference by the state through the general laws"); *Fisher v. City of Berkeley*, 37 Cal.3d 644, 704 (1984) ("charter cities… have exclusive power to legislate over 'municipal affairs'"); Sho Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055, 1057-58 & n.10 (1972). Of course, SCAQMD's administrative record does not indicate any *state*-licensed taxi fleets or any *state*-owned commercial airports because there are none.

Even if cities regulate, franchise, or contract with taxis in a manner that SCAQMD considers market participation, that purely local, purely voluntary decision cannot elevate cities' purported market participation to a matter of statewide (or SCAQMD) concern. *Smith v. City of Riverside*, 34 Cal.App.3d 529, 534-35 (1973) ("mode of contracting for city improvements is a municipal affair"); *Piledrivers' Local Union v. City of Santa Monica*, 151 Cal.App.3d 509, 511-12 (1984) (same). As relevant here, cities' modes of franchising taxis are purely local concerns. *Compare* Pub. Util. Code §5353(g) (taxicabs not state-regulated public utilities) *and* Gov't Code §53075.5(a)-(c) (requiring local regulation of certain unrelated aspects of taxi service) *with* Veh. Code §§16501, 21100(b) (authorizing local vehicle-for-hire regulation) *and* Gov't Code §53075.5(d) (saving local

authority to regulate aspects of taxi service outside §53075.5(a)-(c)).

Second, administrative agencies like SCAQMD cannot rely on a *post hoc* market-participant litigation position in 2005 to justify regulations adopted in 2000 under the misperception that §209 allows purchaser-based restrictions. In areas that are both municipal affairs and statewide concerns, the municipal-affairs doctrine nonetheless requires state statutes to be "reasonably related" and "narrowly tailored" to a statewide concern. *Johnson v. Bradley*, 4 Cal.4th 389, 399 (1992). SCAQMD's post-*EMA*, *post hoc* market-participation theory provides no basis for a reviewing court to uphold SCAQMD's rules as "reasonably related" and "narrowly tailored" to a statewide concern. *Pomona Valley Hosp. Med. Ctr. v. Superior Court*, 55 Cal.App.4th 93, 101 (1997) (absent Code Civ. Proc. §1094.5(e)'s exceptions, courts confine review to administrative record); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) ("focal point for judicial review" on which agency action must "stand or fall" is "administrative record already in existence, not [one] made initially in the reviewing court"). Here, the record fails to consider conflict preemption and the resulting emission credits that SCAQMD owes to covered fleets, *including public fleets*. Sections I.G, II.C, *infra*. Similarly, under California's regulations, each ULEV sold enables manufacturers to sell more higher-emitting LEVs. 13 Cal. Code Regs. §1960.1(g). With double- or even triple-counted emission reductions, Rule 1194(d)(4)'s emissions-based rationale

vanishes. Further, Los Angeles' charter-city status alone removes 85% of taxi emissions from SCAQMD's jurisdiction. *Staff Report,* at 11.

B. Presumption against Preemption Does Not Apply

When Congress legislates in a field traditionally occupied by the states, courts will not assume preemption "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The district court's reliance on *Santa Fe Elevator* is misplaced for two reasons.

First, CAA's plain language and legislative history express a clear, manifest intent to preempt vehicle standards generally and fleet standards particularly, rendering the presumption inapposite. Although the Supreme Court did not resolve the *Santa Fe Elevator* presumption in finding §209 to preempt purchaser-based standards, *EMA*, 541 U.S. at 256, this Court should resolve the issue in finding §209 and §246 to preempt purchase-mandate regulations imposed on third parties generally and fleets particularly. As demonstrated throughout this brief, traditional tools of statutory construction reveal unambiguous congressional intent to preempt any standard (including purchase mandates on public fleets) unless federally approved pursuant to §177, §209(b), or §246.

Second, as the Supreme Court recently recognized, *Santa Fe Elevator* applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and not if there is a history of significant

federal presence. *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (*quoting Rath Packing,* 430 U.S. at 525); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). In 1967, Congress entered a field (namely, vehicular-emission standards) without a history of state or local involvement and carved out a special role for the one state that recently had pioneered in that field. Put simply, SCAQMD entered the field too late: *Santa Fe Elevator* protects longstanding state and local laws, not dormant state or local police power.

By backdating its 1967 preemption provision to the promulgation of federal standards in 1966,[2] Congress further undercut SCAQMD's latter-day claim to prior entry into the field. *Landsgraf v. USI Film Prod.*, 511 US 244, 267-68 (1994)

---

[2] March 30, 1966, was the promulgation date of the first federal motor-vehicle standards. 31 Fed. Reg. 5,170 (1966). In addition to setting exhaust-emission standards, the federal standards prohibited crankcase emissions entirely, *id.* at 5,171, rendering state crankcase standards prospectively irrelevant.

("Retroactivity… often serve[s] entirely… legitimate purposes, [*e.g.*,] to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary"); *Motor & Equip. Mfrs. Ass'n, Inc., v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("states acting after 1965 were Johnnies-come-lately to the field"). As explained in the Legal Background, *supra,* other than the areas that Congress expressly carved out (*i.e.,* crankcase-emission standards, post-March 30, 1966 standards), SCAQMD's proffered state entry consists of three 1960s-era "gross-emitter" provisions for "excessive fumes or smoke," which is not *traditional* state regulation of new-vehicle emission standards. *Madearos,* 230 Cal.App.2d at 644-45 (excessive-fume prohibition does not restrict normal operations).

In a case briefed before *Locke* but decided afterward without reference to *Locke,* this Court erroneously applied *Santa Fe Elevator* to the entire Clean Air Act, based on states' historic regulation of public health. *Exxon Mobil Corp. v. EPA,* 217 F.3d 1246, 1255 (9th Cir. 2000). Because *Exxon* reviewed an Environmental Protection Agency ("EPA") rule approving Nevada's state implementation plan, that court lacked jurisdiction to address preemption. 42 U.S.C. §7607(b) (authorizing review of *EPA* action); 64 Fed. Reg. 29,573, 29,576 (1999) ("EPA need not address [preemption] because EPA believes that [§211(m)] authorizes the [Nevada rule] and overrides any potential preemption under section

211(c)(4)"). Because *Exxon* upheld EPA's interpretation that §211(m) authorized the Nevada rule, *Exxon*, 217 F.3d at 1250, preemption and *Santa Fe Elevator* were unnecessary to the result (*i.e.*, *dicta*). This Court first should recognize that the contemporaneously decided *Locke* (which concerned "*public health*" in the form of water quality, but analyzed the narrow *maritime-commerce* field) undermines the *Exxon dicta* and then must analyze preemption using the narrow field at issue (namely, vehicular-emission standards). *Accord Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds).

The district court also emphasized §101(a)(3)'s recognizing air pollution as primarily a state and local responsibility. E.R. 10 (*citing* 42 U.S.C. §7401(a)(3)). After recognizing that state-local responsibility *in 1963*, Pub. L. No. 88-206, §1(a)(3), 77 Stat. at 393, Congress expressly preempted state and local vehicular-emission standards *in 1967*. Pub. L. No. 90-148, §208(a), 81 Stat. at 501. In the field of vehicular-emissions standards, the specific 1967 statute clearly departs from – and *supplants* – the general 1963 statute. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment").

Where the specific statute *postdates* the general one, this carries even more force. *Morales*, 504 U.S. at 384-85 (canon is "particularly pertinent" if specific preemption provision post-dates a general provision that is a "relic of the… no pre-emption regime"). For vehicular-emission standards, §101(a)(3) is a "relic" of the "no pre-emption regime."[3]

C. Presumption against Repeal by Implication Does Apply

Nowhere in its post-1967 amendments or their legislative histories did Congress evince any intent to weaken §209's protection of automobile consumers and users or to authorize *local* imposition of vehicular-emission standards. To the

---

[3] The fact that Congress later recodified §101 and §209 does not alter the unchanged text's meaning. *Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed"); *Waterman S.S. Corp. v. U.S.*, 381 U.S. 252, 269 (1965) ("action of the subsequent Congress would not supplant the contemporaneous intent of the Congress which enacted the... Act").

contrary, all post-1967 CAA amendments draw the same deliberate distinctions between broadly preempting *both state and local authority* and – when making *any* exceptions – making limited exceptions only for *states. See* Legal Background, *supra.* Absent an affirmative intent to repeal the express preemption Congress created in 1967, SCAQMD's fleet rules can survive only if the original preemption is "*irreconcilable"* with the CAA as amended. *Mancari,* 417 U.S. at 550. Far from irreconcilable, the post-1967 amendments *reinforce* the clear and manifest preemption enacted in 1967.

D. Market-Participant Theory Does Not Apply to §209

In reflexively applying the market-participant exception, the district court failed its duty to consider the source of federal preemption. *Crosby,* 530 U.S. at 373-74. Preemption under the dormant Commerce Clause *always* includes a market-participant exception. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 685 (1999). Preemption under the Supremacy Clause does not: "What the Commerce Clause would permit States to do in the absence of the [Act] is… an entirely different question from what States may do with the Act in place." *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould,* 475 U.S. 282, 290 (1986).

In essence, the dormant Commerce Clause cases represent the Supreme Court's statutory construction of the Commerce Clause. *Florida Prepaid,* 527 U.S.

at 685. By contrast, for *conflict preemption,* federalism requires that courts apply "conflict-pre-emption analysis… *sensitively*… to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n,* 489 U.S. 493, 515 (1989) (emphasis added). For *express preemption,* this Court has found the case for a market-participant exception to range from weak to insupportable, and certainly incapable of displacing all other canons of statutory construction. Specifically, *Hydrostorage, Inc. v. N. California Boilermakers Local Joint Apprenticeship Comm.,* 891 F.2d 719 (9th Cir. 1989), found the market-participant exception inapposite to statutory preemption. *Id.* at 730 ("'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted") (*quoting Gould*, 475 U.S. at 289); *accord Dillingham Constr. N.A., Inc., v. County of Sonoma*, 57 F.3d 712, 721-22 (1995), *rev'd on other grounds*, 519 U.S. 316 (1997).

Because *Hydrostorage* held the challenged action to constitute regulation, rather than market participation, this Court later treated the *Hydrostorage* statement as *dicta*. *Associated Gen. Contractors v. Metro. Water Dist.,* 159 F.3d 1178, 1184 (9th Cir. 1998) ("*MWD*"). But the *MWD* statement falls to the same analysis that *MWD* applied to *Hydrostorage*. Specifically, because *MWD* held that

the challenged project labor agreements ("PLAs") did not constitute a "rule[], regulation[], or other... action having the effect of law" expressly preempted by the statute at issue, the *MWD* analysis of the market-participant issue is *dicta* every bit as much as the *Hydrostorage* analysis. *Id.* With PLAs held outside the express preemption, anything else was unnecessary to the result (*i.e.*, *dicta*).

Contrary to the *MWD dicta*, *Bldg. & Constr. Trades Council v. Associated Builders & Contractors,* 507 U.S. 218 (1993) ("*Boston Harbor*"), did not undermine *Hydrostorage: Boston Harbor* did not involve express preemption. *See* 507 U.S. at 230-31; *accord Dillingham,* 57 F.3d at 721-22. In any event, and in marked contrast to proprietor-like, one-time action to ensure a quick, efficient, and low-cost project in *Boston Harbor*, SCAQMD seeks to regulate taxis purchased by private owner-drivers, taxi service purchased by the general public, and franchises issued by independent cities, which all constitute *regulation* of third parties, not market participation by California or SCAQMD.

E. Market-Participant Theory Does Not Apply to Penalties

Government-imposed penalties must qualify as liquidated damages for the government's action to remain contractual and proprietary. *See Priebe & Sons v. U.S.,* 332 U.S. 407, 411 (1947) (courts consider "enforceability of 'liquidated damages' provisions in government contracts"); *In re Bubble Up Delaware, Inc.,* 684 F.2d 1259, 1262 (9th Cir. 1982) ("[u]nder the principles of general contract law

that apply to the construction of government contracts,… a basic requirement for a valid liquidated damages clause is that the liquidated amount be reasonable"). Otherwise, the penalties becomes sovereign and regulatory. *Washington State Bldg. & Const. Trades Council v. Spellman,* 684 F.2d 627, 631 (9th Cir. 1982) (market-participant exception inapposite where "measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce"); *cf. Olympic Pipe Line Co. v. City of Seattle,* 437 F.3d 872, 881 (9th Cir. 2006) (sovereign action incompatible with market participation). It is "undisputed" that "[the environmental statutes' civil penalty] provisions authorize fines of the punitive sort." *U.S. Dep't of Energy v. Ohio,* 503 U.S. 607, 617 (1992). *A fortiori,* the state cannot *criminally* sanction federally permissible activity and still remain within the market-participant exception. *Spellman,* 684 F.2d at 631.

F. Market-Participant Theory Does Not Apply to Taxis

Even if the market-participant theory applies generally, neither SCAQMD nor the political subdivisions on which SCAQMD bootstraps its jurisdiction actually *participate* in the market of providing taxi service. *White v. Massachusetts Council of Constr. Employers,* 460 U.S. 204, 208 (1983) (market-participant cases present "a single inquiry: whether the challenged program constitute[s] *direct* state participation in the market") (quotations omitted, emphasis added). Far from directly participating, political subdivisions merely authorize private entities to

transact private business at public airports.

Assuming *arguendo* that the market-participant exception protects *other fleet rules* (*e.g.,* Rule 1192's transit buses) or even *other facets of Rule 1194* (*e.g.,* Rule 1194(d)(3)'s airport-run terminal-to-parking shuttles), the market-participant theory simply does not apply to Rule 1194(d)(4) because the cities neither own the vehicles nor contract with taxis to perform a government function. *Golden State Transit Corp. v. City of Los Angeles,* 475 U.S. 608, 617-19 (1986) (municipal function of issuing taxi franchises does not enable Los Angeles to condition franchise renewal on federally preempted criteria); *Frost v. Railroad Comm'n of State of California,* 271 U.S. 583, 593-94 (1926); *cf. Boston Harbor*, 507 U.S. at 227-28 (federal law "*would not necessarily…* pre-empt[]" city that "*purchased taxi services…* in order to transport city employees") (emphasis added).[4]

---

[4] As a corollary to the above-quoted *Boston Harbor* language, purchase-based

(Footnote cont'd on next page)

Unlike the history of public fleets for transit buses and terminal-to-parking airport shuttles (*i.e.*, the subjects of Rules 1192 and 1194(d)(3)), there is no history of government's providing taxi pickup services to the general public (*i.e.*, the subject of Rule 1194(d)(4)). To the contrary, the administrative record reveals no public taxi fleets within SCAQMD's jurisdiction.

G. §246 Applies to Public Fleets

The district court erroneously found §246 not to apply to public purchases. E.R. 23 ("AALA makes no argument that §246 was intended to cover purchases of

---

(Footnote cont'd from previous page.)

restrictions *do not necessarily survive preemption*, either. *Compare Tocher v. City of Santa Ana*, 219 F.3d 1040, 1049 (9th Cir. 2000), *abrogated on other grounds, City of Columbus v. Our Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (preempting regulation notwithstanding city contracts) *and Gould*, 475 U.S. at 289 *with White*, 460 U.S. at 211 n.7 (finding market participation where "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city'"). Absent the dispositive arguments in Section II, contract-based fleet restrictions present difficult questions, likely requiring an analysis of the contracts in question.

fleet vehicles by the government"). By its terms, §246 applies to fleets of ten or more vehicles owned or operated by a *person.* 42 U.S.C. §7581(5). "Person" expressly includes a "municipality [or] political subdivision," which expressly includes a "city, town,… or other public body created… pursuant to State law." *Id.,* §7602(e)-(f). Further, Congress defined "covered fleet" expressly *to exclude* law enforcement vehicles. *Id.,* §7581(5). Unless it contemplated vigilantes, Congress clearly and manifestly intended §246 to cover public fleets.

By contrast, §40447.5 authorizes SCAQMD to set fleet mandates for law enforcement. Health & Safety Code §40447.5(a). If SCAQMD exercised this authority against the Los Angeles Police Department or the California Highway Patrol, those agencies could bring a federal conflict-preemption challenge against SCAQMD. *See, e.g., Bd. of Fish & Game Comm'rs v. Riley*, 194 Cal. 37 (1924) (state agency sues state Controller); *Fullerton v. State Water Res. Control Bd.*, 90 Cal.App.3d 590 (1979) (state agency sues state water-pollution control board).

Just as states can regulate their political subdivisions, *Big Country Foods,* 952 F.2d at 1178-79, Congress can regulate the states, requiring them to provide benefits to political subdivisions. Section 246 is such a federal requirement: "Each State [containing] a covered area… shall submit… [a] plan revision… to establish a clean-fuel vehicle program for fleets under this section." 42 U.S.C. §7586(a)(1). Because it misread §246's applicability to public fleets, the district court

erroneously failed to consider whether §246 conflict preempts SCAQMD's fleet rules. *See* Section II.C, *infra.*

H. §116 Does Not Save Fleet Rules

The district court exaggerates the scope of §116, CAA's savings clause, E.R. 11-12, which applies only to (1) emission standards and limitations not preempted by §209, §211(c)(4), and §233, and (2) certain requirements for controlling or abating air pollution. 42 U.S.C. §7416. In addition to clarifying express preemption in §177 and to adding §246's preemptive fleet provisions, the 101st Congress recognized §116's limited scope:

> [S]ection 116 refers to emissions standards or the abatement or control of air pollution. To assure that a court would not find the accident prevention authorities established here outside the boundaries of the powers specifically enumerated in section 116, subsection (k) of the new section 129 preserves in the broadest way the authority of State and local governments to regulate in the same area.

S. REP. NO. 101-228, at 250 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3634.

When saving state and local authority outside §116's limited scope, Congress did so expressly. 42 U.S.C. §§7661e(a), 7651c(f)(3), 7412(d)(9), 7412(i)(5)(A), 7412(r)(7)(H)(x), 7412(r)(11), 7429(h)(1), 7511b(f)(4). Under the district court's view, these "mini savings clauses" are mere surplus, which courts should not attribute to Congress. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (cardinal principle to avoid construction that renders clauses, sentences, or even

words superfluous). Assuming *arguendo* that they constitute "proprietary purchase mandates," SCAQMD's fleet rules unambiguously fall outside §116's protection.

II. MERITS ARGUMENTS

A. §40447.5(a) Preempts Rule 1194(d)(4)

The district court premised its entire decision on California's purported delegation to SCAQMD under Health & Safety Code §40447.5(a). E.R. 20. In doing so, that court did not realize that SCAQMD promulgated Rule 1194(d)(4) under Health & Safety Code §40919(a)(4), not §40447.5(a). *Staff Report*, at 10-11, 38-39; *Amendment Proposal*, at 3-4. Because SCAQMD lacks state-law authority for it, Rule 1194(d)(4) cannot stand, even if this Court upholds all other fleet rules.

Section 40447.5(a) authorizes SCAQMD to require the purchase of clean-fuel vehicles by fleets of 15 or more vehicles owned or leased *by a single owner or lessee*, and it applies "notwithstanding any other provision of law." By contrast, by authorizing certain nonattainment air districts to adopt "measures to achieve the use of a significant number of low-emission motor vehicles by operators of motor vehicle fleets," §40919(a)(4) merely removes vehicular sources from CARB's otherwise-exclusive jurisdiction. *See* Health & Safety Code §§39002, 39500, 40000 ("except as otherwise provided," CARB has exclusive jurisdiction over vehicular emissions). Nothing in §40919(a)(4) or its history authorizes purchase mandates: that section merely authorizes certain districts to adopt measures

otherwise within their authority (*e.g.*, voluntary incentives) to encourage the use of low-emission vehicles. *See* 42 U.S.C. §§7408(f)(1)(A), 7511a(g)(4)(A) (transportation controls include voluntary incentives).[5]

When presented with the fact that taxi drivers (like their towncar competitors) typically *own* a single vehicle, *Staff Report*, at 10, SCAQMD opted for §40919(a)(4)'s focus on fleet *operators* to reach the larger associations and cooperatives under which taxi owners share overhead. *See Staff Report*, at 10-11. Because no California law authorizes SCAQMD's issuing purchase mandates to owners or lessees with fewer than 15 vehicles, the very legislation that the district

---

[5] Even if §40919(a)(4) delegates authority *to air districts generally*, the restriction in §40447.5(a) would nonetheless apply *to SCAQMD* because §40447.5(a) applies "notwithstanding any other provision of law." Health & Safety Code §40447.5; *Mancari*, 417 U.S. at 550-551 (presumption against repeals by implication carries special force against general statute's implied repeal of specific statute); *Woods v. Young*, 53 Cal.3d 315, 325 (1991) (same).

court cited *to uphold* the fleet rules actually *preempts* Rule 1194(d)(4)'s regulation of taxi companies that operate, but do not own, 15 or more vehicles. Health & Safety Code §40447.5(a).

Similarly, under the same cases that the district court cited to uphold the fleet rules, state law preempts Rule 1194(d)(4). Legislation "must not enable an administrative agency to exercise greater discretion than that which is necessary for the fulfillment of the Legislature's purposes," and agencies' policy decisions cannot contradict their enabling legislation. *Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal.3d 801, 817-18 (1974); *Kugler v. Yocum*, 69 Cal.2d 371, 375 (1968) ("The power… to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature") (citations omitted). Rule 1194(d)(4) transparently – and unlawfully – seeks to circumvent §40447.5(a)'s 15-vehicle restriction.

Finally, even if §40447.5 did delegate SCAQMD authority over fleets under 15 vehicles, that delegation could not constitutionally save Rule 1194(d)(4)'s application to private taxi fleets. Neither SCAQMD nor California can condition the right to work out of South Coast airports on taxis' surrendering (without compensation) the vehicular autonomy and emission credits protected by §177, §209, §246, and the Takings and Supremacy Clauses. *Frost*, 271 U.S. at 593-94 ("It would be a palpable incongruity to strike down an act of state legislation

which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold").[6] The "incongruity" is all the more "palpable" where SCAQMD relies on LAMC-authorized franchises for jurisdiction, but revokes LAMC §71.02.1(a)-(b)'s pre-suspension procedural protections. SCAQMD cannot materially alter the terms of the very provisions on which it premises its purported jurisdiction. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410-13 (1983) (Contract Clause prohibits government's substantial impairment of government contract without a significant and legitimate public purpose, based upon reasonable

---

[6] *Frost* prohibited states' conditioning use of public roads on private carriers' voluntarily submitting to otherwise-inapplicable regulation. 271 U.S. at 592-94.

conditions appropriate to that purpose); *Riverside Cement Co. v. Thomas*, 843 F.2d 1246, 1248 (9th Cir. 1988) (CAA prohibits amending a state rule by adopting its emission standard without also adopting its ameliorating procedures before the standard takes effect).

In sum, *state law* preempts Rule 1194(d)(4). Further, because state law preempts it, Rule 1194(d)(4) cannot stand as a California-delegated purchasing decision exempt from *federal preemption* as market participation. Even if this Court upholds the balance of the fleet rules, SCAQMD neither *has* nor – without constitutional amendment – *could have* a delegation to impose Rule 1194(d)(4).

B. §209(a) Preempts Fleet Rules

In *EMA*, the Supreme Court confirmed that §209 protects both manufacturers and consumers from state and local standards. 541 U.S. at 255. By selectively adopting the extra-stringent California ULEV standard as the *only SCAQMD standard* applicable to taxis, Rule 1194(d)(4) constitutes an impermissible local standard. Indeed, *EMA* used Rule 1194's "ULEV-or-better" requirement as an example for preemption purposes. 541 U.S. at 258.

Even where it treats vehicles disparately by fuel type without quantitative emission limits, SCAQMD imposes "standards." 42 U.S.C. §7521(a)(3)(ii) (including fuel type as factor defining emission standards for vehicle classes). A reading that preempts only quantitative emission rates "simply reads the words

'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate [emissions],'" *Morales*, 504 U.S. at 385, rather than prohibiting their adopting or enforcing any standard that *relates to* the control of emissions.

Although SCAQMD undoubtedly will argue for narrow preemption and broad exceptions, precisely the opposite applies. With the exceptions, Congress narrowly (indeed, *hypertechnically*) defined the *state* programs that fall outside preemption (*i.e.*, new-vehicle emission standards, other than crankcase emission standards, adopted prior to March 30, 1966). Under traditional tools of statutory construction, Congress left courts no room to fashion additional exceptions:

> Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.

TRW, 534 U.S. at 28 (citations omitted).

Further, Congress broadly preempted not emission standards, but "any standard *relating to* the control of emissions." *See* 42 U.S.C. §7543(a) (emphasis added). Acknowledging that "relates to" preemption cannot "extend to the furthest stretch of indeterminacy," *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), courts pragmatically review such cases for state requirements with a "forbidden connection" to federal law,

considering the federal objectives and the state provision's effect on those objectives. *Egelhoff v. Egelhoff,* 532 US 141, 147 (2001); *Tocher,* 219 F.3d at 1047 (regulation impermissibly "relates to" preempted scope if it "has more than an indirect, remote, or tenuous effect" on the federally preempted subject).[7]

Given that the fleet rules and §209 both concern vehicular emissions and that §209 protects users and consumers, Rule 1194(d)(4) clearly has a "forbidden connection" to, and "more than an indirect, remote, or tenuous effect" on, emissions from taxis and taxi fleets (*i.e.*, the subjects of §209 and §246). Moreover,

---

[7] In *Tocher,* this Court held preempted city regulation of towing companies' operations, but upheld a rotating list of city-approved contractors for *city-dispatched* nonconsensual tows. *Id.* at 1047-49. Appellants mischaracterize *Tocher* as upholding a market-participant exception. Appellants' Br., at 22. *Tocher* upheld the city's *rotational-towing list,* but struck down its *towing regulation,* even as applied to city-approved contractors on city-dispatched tows. 219 F.3d at 1047-50. Unlike the preempted regulation, the rotational-towing list fell outside the federal statute's preemption of local provisions *with legal force and effect. Id.* at 1050.

government cannot "use privity of contract to conduct otherwise forbidden regulatory activity." *Tocher,* 219 F.3d at 1049; *cf. Frost,* 271 U.S. at 593-94. Indeed, acting through the state's contracting power is a "distinction without a difference" where the challenged action "serves plainly as a means of enforcing" within the preempted sphere. *Gould,* 475 U.S. at 287-88; *Crosby,* 530 U.S. at 374-76 (preempting state procurement statute that conflicts with federal statute). In sum, Rule 1194(d)(4) falls squarely within §209's preemption.

C. §246 Conflict Preempts Fleet Rules

CAA's Clean-Fuel Fleet Program ("CFFP") requires specified fleet programs in certain ozone nonattainment areas, including Los Angeles. 42 U.S.C. §7586. In applying the market-participant exception to the CFFP, the district court failed to consider that: (1) SCAQMD lacks delegated authority to adopt Rule 1194(d)(4) as a proprietary purchase mandate for fleets with fewer than 15 vehicles under common ownership or lease (Section II.A); (2) CAA's general savings clause does not "save" proprietary purchase mandates (Section I.H); and (3) Congress intended §246 to protect public fleets (Section I.G). Considering these additional arguments, the CFFP unambiguously conflict preempts Rule 1194(d)(4).

As the Supreme Court recognized, SCAQMD's fleet rules conflict with the CFFP. *EMA*, 541 U.S. at 254 & n.6, 259. Specifically, they irreconcilably conflict

with several tenets of that carefully balanced program:

- **Credits for Extra-Stringent Vehicles:** §243(e)(2) defines "clean-fuel vehicle" as meeting the *least-stringent* California standard applicable to that vehicle class, and §246(f) requires states to provide credits to fleet operators that exceed CFFP requirements by purchasing either more clean-fuel vehicles than §246 requires or vehicles certified to standards more stringent than §246 requires. 40 C.F.R. §88.304-94(c)(1)(ii)-(iii) (same). Rule 1194 fails to provide credits to those purchasing extra-stringent ULEVs over otherwise-lawful clean-fuel vehicles (*e.g.*, California-certified LEVs).
- **Indirect Sales Limitations.** Although §177 prohibits *indirect* limits on the sale of clean-fuel vehicles, Rule 1194(d)(4) restricts fleet operators' purchasing clean-fuel vehicles less stringent than a ULEV. Significantly, §177's indirect-sales provision expressly applies to all of Title II (*e.g.*, §209

in Part A and §246 in Part C), whereas §209's preemption and waiver expressly apply only to Part A (*i.e.*, neither §246 nor §177).[8]

- **Fuel Neutrality:** Although §241(2) defines "clean alternative fuel" to include reformulated gasoline ("RFG") and §246(d) leaves fuel choices to fleet operators, Rule 1194 discriminates against RFG-fueled vehicles.

Notwithstanding the Supreme Court's reversal, the district court reiterates the irrationality of reading §246 to allow fleet restrictions if §209(a) preempts them,

---

[8] This relationship between §177, §209, and §246 answers the Supreme Court's search for a missing "notwithstanding" clause. *EMA,* 541 U.S. at 257. By its terms, §209(a) preempts state and local adoption of standards relating to the control of emissions subject to "this part" (*i.e.*, CAA Title II, Part A (§§202-219), 42 U.S.C. §§7521-7554), and §209(b) provides California a waiver of the preemption of "this section" (*i.e.*, §209, 42 U.S.C. §7543). Because the CFFP resides in Part C of Title II (§§241-250), 42 U.S.C. §§7581-7590, states adopting CFFP-compliant fleet regulations do not violate §209(a). *Exxon,* 217 F.3d at 1249-53 (state rule specifically authorized by §211(m) does not violate §211(c)(4)'s general preemption). But state and local fleet regulations *outside §246* necessarily cannot rely on §246, thereby falling under §209(a)'s express preemption.

failing to consider a reading that harmonizes §209(a) and §246 analogously to this Court's *Exxon* holding. *See* note 8, *supra.* Moreover, the district court violates §177's express command against construing Title II to authorize indirect limits on selling new, California-certified vehicles. 42 U.S.C. §7507.

For all these reasons, §246 and §177 conflict preempt Rule 1194(d)(4), notwithstanding §116's general savings clause. *Geier,* 529 U.S. at 873 (neither savings clause nor express-preemption provision bars "conflict preemption"); *Buckman,* 531 U.S. at 352 (same). Any other reading frustrates the intricately balanced CFFP by allowing opt-out states to use §182(c)(4)(B) to circumvent §246 with replacement fleet measures that deny §246's protections.

CONCLUSION

For the foregoing reasons, §177, §209, and §246 preempt Rule 1194(d)(4).

Dated: November 11, 2006

Respectfully submitted,

LAWRENCE J. JOSEPH
(Cal. S.B. No. 154908)
2121 K Street, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 669-5135
Facsimile: (202) 318-2254

Counsel for *Amici Curiae* Bell Cab Company, Inc., San Gabriel Transit, Inc., Independent Taxi Owners Association, Los Angeles Checker Cab Cooperative, Inc., L.A. Taxi Cooperative, Inc. d.b.a. Yellow Cab Co., United Independent Taxi Drivers, Inc., Beverly Hills Transit Cooperative, Inc., United Taxi of San Fernando Valley, South Bay Cooperative, Inc. d.b.a. United Checker Cab, and Long Beach Yellow Cab Cooperative, Inc.

BRIEF FORM CERTIFICATE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE and Circuit Rule 32-1 of the U.S. Court of Appeals for the Ninth Circuit, I certify that the attached *Amici Curiae* Brief of the Los Angeles Taxi Industry in Support of Reversal is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,999 words, including footnotes, but excluding this Brief Form Certificate, the Table of Authorities, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. I have relied on Microsoft Word 2002's word calculation feature for the calculation.

Dated: November 11, 2006

Respectfully submitted,

LAWRENCE J. JOSEPH
(Cal. S.B. No. 154908)
2121 K Street, N.W., Suite 800
Washington, D.C. 20006

Counsel for *Amici Curiae* Bell Cab Company, Inc., San Gabriel Transit, Inc., Independent Taxi Owners Association, Los Angeles Checker Cab Cooperative, Inc., L.A. Taxi Cooperative, Inc. d.b.a. Yellow Cab Co., United Independent Taxi Drivers, Inc., Beverly Hills Transit Cooperative, Inc., United Taxi of San Fernando Valley, South Bay Cooperative, Inc. d.b.a. United Checker Cab, and Long Beach Yellow Cab Cooperative, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *Amici Curiae* Bell Cab Company, Inc., San Gabriel Transit, Inc., Independent Taxi Owners Association, Los Angeles Checker Cab Cooperative, Inc., L.A. Taxi Cooperative, Inc. d.b.a. Yellow Cab Co., United Independent Taxi Drivers, Inc., Beverly Hills Transit Cooperative, Inc., United Taxi of San Fernando Valley, South Bay Cooperative, Inc. d.b.a. United Checker Cab, and Long Beach Yellow Cab Cooperative, Inc. make the following corporate disclosure statement:

1. No publicly held company owns 10% or more of Bell Cab Company, Inc.'s stock, and it has no parent company.

2. No publicly held company owns 10% or more of San Gabriel Transit, Inc.'s stock, and it has no parent company.

3. No publicly held company owns 10% or more of Independent Taxi Owners Association's stock, and it has no parent company.

4. No publicly held company owns 10% or more of Los Angeles Checker Cab Cooperative, Inc.'s stock, and it has no parent company.

5. No publicly held company owns 10% or more of L.A. Taxi Cooperative, Inc. d.b.a. Yellow Cab Co.'s stock, and it has no parent company.

6. No publicly held company owns 10% or more of United Independent Taxi Drivers, Inc.'s stock, and it has no parent company.

7. No publicly held company owns 10% or more of Beverly Hills Transit Cooperative, Inc.'s stock, and it has no parent company.

8. No publicly held company owns 10% or more of United Taxi of San Fernando Valley's stock, and it has no parent company.

9. No publicly held company owns 10% or more of South Bay Cooperative, Inc. d.b.a. United Checker Cab's stock, and it has no parent company.

10. No publicly held company owns 10% or more of Long Beach Yellow Cab Cooperative, Inc.'s stock, and it has no parent company.

Dated: November 11, 2006

Respectfully submitted,

LAWRENCE J. JOSEPH
(Cal. S.B. No. 154908)
2121 K Street, N.W., Suite 800
Washington, D.C. 20006

Counsel for *Amici Curiae* Bell Cab Company, Inc., San Gabriel Transit, Inc., Independent Taxi Owners Association, Los Angeles Checker Cab Cooperative, Inc., L.A. Taxi Cooperative, Inc. d.b.a. Yellow Cab Co., United Independent Taxi Drivers, Inc., Beverly Hills Transit Cooperative, Inc., United Taxi of San Fernando Valley, South Bay Cooperative, Inc. d.b.a. United Checker Cab, and Long Beach Yellow Cab Cooperative, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies on this 11th day of November, 2006, that two true and correct copies of the [Replacement] *Amici Curiae* Brief of the Los Angeles Taxi Industry in Support of Reversal were served by U.S. mail, postage prepaid, with a courtesy copy by electronic mail, on

Western States Petroleum Association
Michael R. Barr
Mark E. Elliott
Kevin M. Fong
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont Street
San Francisco, CA 94105
Email: michael.barr@pillsburylaw.com

Engine Manufacturers Association
Phil C. Neal
Jed R. Mandel
Timothy A. French
Neal, Gerber & Eisenberg
Two North LaSalle Street, Suite 2400
Chicago, IL 60602
Email: tfrench@ngelaw.com

South Coast Air Quality Management District, et al.
Kurt R. Wiese, Sr.
South Coast A.Q.M.D.
21865 E. Copley Drive
Diamond Bar, CA 91765-0940
Email: kwiese@aqmd.gov

Daniel P. Selmi
919 S. Albany Street
Los Angeles, CA 90015
Email: daniel.selmi@lls.edu

Fran M. Layton
Winter King
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Email: layton@smwlaw.com

Natural Res. Defense Council, et al.
Julie I. Masters
Natural Resources Defense Counsel
1314 Second Street
Santa Monica, CA 90401
Email: jmasters@nrdc.org

Amici Curiae
Kipp A. Coddington
Alston & Bird LLP
601 Pennsylvania Avenue, NW
North Building, Tenth Floor
Washington, D.C. 20004-2601
Email: kcoddington@alston.com

Susan L. Durbin
Office of the Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Email: susan.durbin@doj.ca.gov

_____
Lawrence J. Joseph