No. 05-56654

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENGINE MANUFACTURERS ASSOCIATION,
Plaintiff-Appellant,

and

WESTERN STATES PETROLEUM ASSOCIATION,
Plaintiff-Intervenor-Appellant,

v.

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

and

NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-Intervenors-Appellees.

Appeal from the U. S. District Court for the Central District of California at Los Angeles
District Court Case No. 00-09065 FMC
Honorable Florence-Marie Cooper, United States District Judge

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AMICUS CURIAE BRIEF OF NATIONAL LEAGUE OF CITIES, LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF CLEAN AIR AGENCIES IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* National League of Cities, League of California Cities, International Municipal Lawyers Association, and National Association of Clean Air Agencies state that they are non-profit organizations, they have no parent companies, and they have not issued shares of stock.

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STATEMENT OF INTEREST[1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 18,000 cities, villages, and towns it represents. NLC was founded in December 1924 by 10 state municipal leagues that saw the need for a national organization to strengthen local government through research, information sharing, and advocacy on behalf of our nation's cities.

The League of California Cities is an association of 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

[1] This brief is filed with the consent of all the parties.

The International Municipal Lawyers Association (IMLA) is the principal legal voice for our nation's municipalities. As a non-profit organization with members from nearly 1,400 municipalities, IMLA has been an advocate and resource for local government attorneys since 1935. It champions the development of fair and realistic legal solutions and provides its members with information about the many legal issues facing local officials today.

The National Association of Clean Air Agencies (NACAA) represents air pollution control agencies in 53 States and territories and over 165 major metropolitan areas across the United States. State and local air pollution control officials formed the predecessor organizations to NACAA more than 30 years ago to improve their effectiveness as managers of air quality programs. NACAA encourages the exchange of information among these officials, enhances cooperation among federal, State, and local regulatory agencies, and promotes good management of our air resources. Among its many publications is "Don't Take Away a State's Right to Protect Its Citizens from Dirty Air" (2005) (http://www.4cleanair.org/FinalBrochure-April05.pdf).

It might seem unusual for local officials to be arguing in favor of regional fleet purchasing rules that apply to municipalities. People subject

to legal requirements rarely file amicus briefs in support of those requirements. But *amici* do so here for two reasons.

First, the legal issue before the Court -- which concerns the scope of the market participant exception to preemption -- affects not only State governments, but municipalities as well. An undue narrowing of the discretion that State officials have over government funds and property could improperly erode the authority of municipal officials to make their own purchasing decisions.

Second, local officials face the enormous task of complying with the federal air quality standards issued by the U.S. Environmental Protection Agency, as well as many other challenges that result from air pollution. Invalidation of programs such as the fleet rules would harm local economies by shifting more of the compliance burden to small businesses and other stationary sources of pollution. Local officials also recognize that fleet purchase requirements and similar rules create economies of scale that redound to everyone's benefit. Officials at all levels of government -- State, regional, and local -- realize that by working together, we can promote public health and economic growth at the same time through common-sense programs such as public fleet purchasing requirements.

Accordingly, *amici* have a strong interest in ensuring that the Court gives full and appropriate scope to the market participant exception, in order to promote State sovereignty, cooperative federalism, and "the historic primacy" of the States over matters affecting public health and safety. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

ARGUMENT

There is no need for *amici* to repeat the comprehensive and scholarly analysis of the market participant exception presented by the South Coast Air Quality Management District and the other Appellees. Instead, we hope to assist the Court by demonstrating the importance of State and local environmental protections such as the fleet rules at issue. These protections promote the federal-State partnership established by the Clean Air Act, respect the role of the States as laboratories of experimentation in our federal system, and allow for the protection of critical State and local interests.

DISREGARD OF STATE SOVEREIGNTY OVER STATE AND LOCAL PURCHASING DECISIONS WOULD UNDERMINE ENVIRONMENTAL FEDERALISM AND JEOPARDIZE VITAL STATE AND LOCAL INTERESTS.

A. The Fleet Rules Constitute a Reasonable and Efficient Exercise of State Control over State and Local Funds.

One key to resolving this case may be found in the very first sentence of this Court's en banc opinion in *Chamber of Commerce v. Lockyer*, 463

F.3d 1076 (9th Cir. 2006), which framed the question presented there as whether federal law preempts "a state's exercise of its *sovereign power* to control the use of its funds." *Id.* at 1080 (emphasis added). Control over government funds and property is indeed a sovereign power, one that demands respect in our federal system of dual sovereignty. As the U.S. Supreme Court has emphasized, "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231-32 (1993) (unanimous). The federal government itself suggested as much when the case at bar was argued before the U.S. Supreme Court. *See* U.S. Br. *Am. Cur.* at 29 n.4, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ("[T]he State of California may be entitled to place restrictions on the types of new public vehicles that the State and its instrumentalities purchase for their own use.") (citing *Associated Builders*).

If a single California procurement official were to purchase alternative fuel vehicles for a single State-owned fleet, no one could plausibly contend that the federal Clean Air Act preempts this exercise of the State's sovereign authority over State property and public funds. Nothing in the Act

constitutes a clear and unambiguous directive to preempt a State's sovereign authority over such traditional State functions. Likewise, it should make no difference where, as here, a State delegates this authority to a regional district, which then requires similar purchasing decisions for the municipal subdivisions within that district. After all, municipalities "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)).

Appellants Engine Manufacturers Association (EMA) and Western States Petroleum Association (WSPA) rely heavily on an unsupported assumption that purchasing clean cars for public fleets is economically "inefficient," perhaps because the initial retail price of those cars might be somewhat higher than for vehicles that pollute more. *See* EMA & WSPA Br. 18-19. But this assumption ignores the cost savings from alternative fuel vehicles generated by greater fuel efficiency, higher resale values, lower maintenance costs, and stronger warranties (due to less engine wear), savings that have prompted many public and private fleets to switch over to alternative fuel vehicles. After assessing the economic life cycle of the Chevy Malibu and Toyota Prius, officials in King County, Washington,

estimated the county would save $2,660 per car by buying the Prius, notwithstanding its higher initial purchase price. *See* National Association of Counties, et al., *Harnessing the Power of Advanced Fleet Vehicles, A Hybrid Electric Vehicle Fact Sheet for Government Officials* (Feb. 2004) (http://www.naco.org/Content/ContentGroups/Programs_and_Projects/Environmental1/Pollution/HEVfactsheet.pdf). The City of Houston, Texas, similarly concluded that it would save approximately $5,900 by replacing its Dodge Neons with Priuses. *Id.* It would be anomalous in the extreme to use the Clean Air Act to prevent States from achieving the same cost savings and air quality benefits enjoyed by private sector fleets. Moreover, as noted by the District Court (May 5, 2005 Order at 13), the market participant exception to preemption does not turn on EMA's narrow conception of "efficiency," but instead on whether the purchasing decisions in question are proprietary. Manufacturers should not be allowed to dictate to a government purchaser what products the government can buy with public funds simply by questioning whether the purchasing decision could be better made.

Government officials also must take into account the substantial costs of real-world "externalities" in structuring their purchasing decisions. It makes perfect sense for government officials to prefer less polluting cars, even where the retail purchase price might be somewhat higher, given that

cleaner vehicles will help avoid premature deaths, lower the number of workdays lost to respiratory illness, reduce emergency room visits by asthma sufferers and others, and mitigate other adverse health effects that impose tremendous costs on State and local governments.

In addition to these serious public health issues, air pollution causes severe economic losses. U.S. EPA estimates, for example, that air pollution is responsible for several billion dollars worth of crop damage each year. *See* Final Rule on Ozone Transport Commission, 60 Fed. Reg. 4712, 4713 (Jan. 24, 1995). The repair and cleaning of buildings and painted surfaces damaged by air pollution reaches tens of millions of dollars annually. *See* Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 68 Fed. Reg. 28,328, 28,351 (May 23, 2003). Decreased visibility from haze degrades the natural beauty of national parks, wilderness areas, and local communities, thereby reducing tourism and associated economic growth. *Id*. at 28,348-51. Air pollution also harms our nation's fisheries and tourism industry by contributing to fish kills from low dissolved oxygen and toxic blooms. *Id.* at 28,352. Without the flexibility needed to reduce motor vehicle emissions through measures such as the South Coast fleet rules, State and local economies will continue to bear these and other substantial economic costs.

If the Court were to disregard the State's sovereign authority over State and local purchasing decisions regarding public fleets, far more of the compliance burden would fall on small businesses and other stationary sources, with serious economic and social consequences.[2] A small dry cleaner or manufacturing plant, for example, might be forced to reduce its hours of operation, or shut down altogether.[3] If an area were to fall out of attainment with federal air quality standards, businesses would be prohibited from locating or expanding in the nonattainment area unless new emissions are offset by reductions elsewhere. *See, e.g.*, 42 U.S.C. § 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1). If a State fails to implement measures required in nonattainment areas, the costs could be even greater because the Act requires U.S. EPA to cut off federal highway funds or impose additional emission offsets. 42 U.S.C. § 7509. One analyst estimates that $80 billion

[2] Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 Minn. L. Rev. 1957, 2006 n.128 (2001) (discussing the economic impacts of the Clean Air Act on small businesses).

[3] Patricia Ross McCubbin, *Michigan v. EPA*: *Interstate Ozone Pollution and EPA's "NOx SIP Call*," 20 St. Louis U. Pub. L. Rev. 47, 61-62 (2001) (describing how state implementation plans must make tradeoffs between sources such as motor vehicles and dry cleaners).

in hidden costs could result from being out of compliance with federal ozone standards. *See* Susan E. Dudley, *Economic Impact Analyses*, 16 Pace Envtl. L. Rev. 81, 83-84 (1998).

In short, fleet purchasing requirements constitute a reasonable and economically efficient response to the harm threatened by air pollution to human health, economic growth, and public welfare, and they rest at the core of the government's responsibility to manage the region's growth.

B. Fleet Purchasing Rules are Commonplace and Promote the Federal-State Partnership Established by the Clean Air Act.

"Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960). And State and local fleet purchasing requirements are precisely the kind of response to environmental issues encouraged by our federal system of dual sovereignty. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Our nation's environmental laws, including the federal Clean Air Act, recognize the primacy of the States in protecting public health and the environment. The Clean Air Act promotes cooperative federalism by making State and local officials hands-on partners with the federal government and by ensuring that State and local governments retain "primary responsibility" for improving air quality. *See* 42 U.S.C. § 7401(a)(3). The U.S. Supreme Court recognizes that "[i]t is to the States that the [Clean Air Act] assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001). The Act's cooperative federalism extends to motor vehicles, with States expressly encouraged to adopt innovative programs to reduce mobile source pollution. *E.g.*, 42 U.S.C. § 7408(f) (requiring EPA to assist the States in adopting a lengthy laundry list of mobile source controls).

The fleet rules at issue are comfortably within the mainstream of measures adopted by the States as part of this cooperative federal-State partnership under the Clean Air Act. Indeed, various laws and policies require government officials to purchase less polluting cars and trucks in more than 100 municipalities and dozens of states. For example, the State of Arizona imposes several fleet purchasing requirements for State and local

fleets, including a mandate that at least 75 percent of fleets in specified municipalities operate on clean burning fuels. *See* Ariz. Rev. Stat. §§ 1-215, 9-500.04, 15-349, 41-803, 49-412, 49-474.01, 49-571, 49-573 (2006). Oregon law requires State agencies and transit districts to purchase alternative fuel vehicles to the maximum extent possible. *See* Ore. Rev. Stat. §§ 283.327 and 267.030 (2006). Montana's Hydrogen Futures Project is the key economic development focus of the State, and by 2020 half of all vehicles and equipment in Montana and 100 percent of State-run vehicles will be powered by alternative fuels. *See* House Joint Resolution No. 26 (2003). Hawaii has enacted a procurement policy requiring the purchase and leasing of energy-efficient vehicles, with a series of increasing annual fleet percentage requirements up to 75 percent. *See* Haw. Rev. Stat. § 103D-412 and 196A (2006). In Nevada, fleets operated by a State agency, or by a political subdivision in a county whose population is 100,000 or more, are mandated to acquire alternative fuel or ultra-low emission vehicles, with 90 percent of new vehicles required to meet these criteria. *See* Nev. Rev. Stat. §§ 486A.010 through 486A.180 (2006); Nev. Admin. Code 486A.010 through 486A.250 (2005).

As part of the West Coast Governors' Global Warming Initiative (http://www.ef.org/westcoastclimate/), agencies in Washington State are

required to achieve a 20 percent reduction in petroleum use in State vehicles by September 1, 2009, and they must give priority to the purchase and use of hybrid electric and other fuel efficient, low-emission vehicles. *See* Wash. Exec. Order 05-01 (2005). Moreover, at least 30 percent of all new vehicles purchased through a State contract must be clean-fuel vehicles, with this percentage increasing at the rate of 5 percent each year. *See* Wash. Rev. Code § 43.19.637 (2006).

Many other States have similar laws that could be jeopardized under an unduly narrow analysis of the market participant exception.[4] The U.S.

[4] *E.g.*, Colo. Rev. Stat. § 24-30-1104 (2006); Conn. Gen. Stat. §§ 4a-59, 4a-67d (2006); D.C. Code § 50-703 (2006); Fla. Exec. Order 05-241 (2005); Georgia Exec. Order 02.28.06.2 (2006); 625 Ill. Comp. Stat. 5/12-705.1 and 415 Ill. Comp. Stat. 20/10 (2006); Ill. Exec. Order 7 (2004); Iowa Code §§ 260C.19A, 262.25A, 307.21 and 904.312A (2004); Iowa Exec. Order 41 (2005); Kan. Stat. Ann. §§ 75-3744a, 75-4616(b)(5) (2006); La. Rev. Stat. Ann. §§ 33:1418, 39:364 (2006); Me. Rev. Stat. Ann. tit. 5 § 1812-E (2006); Me. Exec. Order 11 (2004); Md. Exec. Order 01.01.2001.02 (2001); Mass. Regs. Code tit. 310 § 7.45 (2006); Mass. Exec. Order 388 (1997); Minn. Stat. § 16C.135 (2006); Minn. Exec. Order 04-10 (2004); Minn. House File 3718 (2006); Miss. Code Ann. 25-1-77 (2006); Miss. Senate Bill 2398 (2006); Mo. Rev. Stat. §§ 414.400, 414.410 (2006); Mont. House Joint Resolution 26 (2003); N.H. Exec. Order 2005-4 (2005); N.J. Stat. Ann. § 27:1B-22 (2006); N.J. Exec. Order 94 (1999); N.M. Stat. Ann. §§ 13-1B, 13-1-188 (2006); N.M. Senate Joint Memorial 89 (2003); N.C. Gen. Stat. § 143-215.107(c) (2006); N.C. Session Law 2005-276, § 19.5 (2005); Ohio Rev. Code Ann. § 123.011(F) (2006); Okla. Stat. Ann. tit. 74, § 130.3 (2006); Or. Rev. Stat. §§ 267.030, 283.327 (2006); R.I. Exec. Order 05-13 (2005); S.D. Exec. Order 2006-01 (2006); Utah Code Ann. 19-2-105.3 (2006); Vt. Stat. Ann. tit. 29 § 903 (2006); Vt. Exec. Order 14-03 (2003); Wash. Rev. Code

Department of Energy maintains a 107-page list (with hyperlinks) of State laws that require the purchase, or promote the use, of clean vehicles, without any suggestion that these laws are preempted or at odds with federal policy. *See* http://www.eere.energy.gov/afdc/progs/all_state_summary.cgi?afdc/0 Local governments, too, have similar procurement policies.[5]

Thus, the fleet rules at issue are not exotic or unusual. Rather, they constitute commonplace, workaday control over State and local purchasing decisions that is inherent in State sovereignty and fully accommodated by the Clean Air Act.

C. Fleet Purchasing Requirements Promote Environmental Federalism and Protect Vital State and Local Interests.

In recent years, a host of legal scholars has hailed the emerging role of State and local governments in the cooperative federalism that drives our nation's efforts to protect public health and the environment. State and local

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§43.19.637 (2006); W. Va. Code Ann. §§ 5A-2A-2, 8-27A-2(b) & (c) (2006); Wis. Stat. Ann. § 16.045 (2006).

[5] *E.g.*, New York City Administrative Code 24-163.1 and .2 (requiring, among other things, at least 80 percent of the city's light-duty, non-emergency fleet to be alternative fuel vehicles). For additional examples of municipal fleet purchasing programs for hybrid vehicles, see "Communities With Hybrid Vehicles," http://www.newdream.org/hev/Current_fleet_data.pdf (last updated Sept. 20, 2006).

solutions to contemporary environmental problems are especially appropriate to address "diffuse, diverse, and very local causes" of pollution such as motor vehicles. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365, 413 (2002) (recognizing that "[l]ocal responses are inherently flexible and context-specific," thereby enabling local governments "to become useful partners in the state and federal environmental protection systems"); *see also* David L. Markell, *States As Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation,* 58 Alb. L. Rev. 347, 355-57 (1994) (noting the role of State and local governments as central actors in environmental regulation); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State,* 1997 U. Chi. Legal F. 199 (1997) (observing that opinion polls indicate that the public wants both federal and State governments to protect the environment, according a preference to neither).

This prominent State role is especially important in addressing new environmental threats, such as global warming. In a comprehensive study of State and local initiatives on climate change, Professor Barry Rabe concluded that "at the very time federal institutions continued to thrash

about on this issue, major new initiatives were launched with bipartisan support in such diverse state capitals as Sacramento, Carson City, Sante Fe, Austin, Harrisburg, Albany, and Hartford." Barry Rabe, *Second Generation Climate Policies in the American States: Proliferation, Diffusion, and Regionalization*, at 1 (The Brookings Institution 2006) (http://www.brookings.edu/views/papers/rabe/20060825.pdf). At the local level, mayors of 349 municipalities representing more than 54 million Americans have signed the U.S. Mayors Climate Protection Agreement (*available at* http://www.ci.seattle.wa.us/mayor/climate/). These mayors have agreed to reduce greenhouse gas emissions in their own communities to 7 percent below 1990 levels by 2012.

State and local officials experience the impact of global warming in more immediate ways, including lost coastlines due to rising sea levels, impaired drinking water supplies from reduced snowpack, droughts, deadly heatwaves, and the devastating consequences of more intense storms. Because motor vehicles are a significant source of greenhouse gases, it comes as no surprise that State and local officials are trying to "green" their public fleets as part of a comprehensive effort to respond to these threats.

Accordingly, it is critical for the Court to recognize the implications of this case, not only for efforts to address carcinogenic toxins in the Los

Angeles Basin, but also for a host of other public health and environmental threats that may be mitigated through purchasing requirements like those at issue. Inappropriate restraints on the authority of State and local officials to control their own purchasing decisions would impair their ability to protect public health and welfare across the board.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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December 22, 2006

Certificate of Compliance Pursuant to Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32-1
For case Number 05-56654

Pursuant to FRAP Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains _____ words.

_____ _____

Date Timothy J. Dowling