If you're an environmental group and you find yourself in front of today's Supreme Court, in some sense you've already lost. Nothwithstanding the 2007 Mass v EPA victory for climate change regulation, the Supremes tend not to look kindly, lately, on environmental interests. (Richard Lazarus has argued that the record of NEPA losses at the Court isn't as bad as it looks, which may be true, but it's still a pretty dismal record.) Sometimes the best you can wish for is to lose really big — like, 9-0 big — because at least that signals that your loss isn't so terrible as to have given the liberal justices pause.

Which brings us to today's 9-0 loss for the Port of Los Angeles. Its groundbreaking Clean Trucks Program was put in place about five years ago to reduce diesel pollution harms to local communities from the many short-haul trucks serving the Port. The program requires a suite of measures including truck maintenance requirements, financial capacity requirements, and (at issue here) requirements to submit off-street parking plans and to put placards on trucks with a phone number for reporting environmental or safety concerns. The program was challenged by the American Trucking Association, upheld by the Ninth Circuit, and taken up earlier this year by the Court. The Port was joined by NRDC, the Sierra Club, and the Coalition for Clean Air in defending the program.

In an opinion by Justice Kagan, the Court unanimously agreed that two provisions of the program — the off-street parking plan requirement and the placard requirement — are unlawful because preempted by the Federal Aviation Administration Authorization Act, which prohibits localities from imposing service requirements with "the force and effect of law" on motor carriers such as these trucks. A central issue in the case (and one on which the Ninth Circuit sided with the Port) was whether the Port's requirements were merely contractual, the purview of any market participant, or regulatory and therefore embodying the force and effect of law. The Court concluded that the Port's requirements do, in fact, have the force of law because the Port's contracts with truckers "do not stand alone" but, instead, "function as part and parcel of a governmental program" created by ordinance and imposing criminal law penalties for violations. Because "the Port chose a tool to fulfill [its] goals which only a government can wield: the hammer of the criminal law," this was an exercise of "classic regulatory authority" and therefore preempted by the FAAA.

The Port lost these battles, but it did pretty well in the war. Its Clean Trucks Program lives on, and the (arguably more important) provisions for truck maintenance and financial capacity are safe and remain in effect. And the Court's 9-0 decision avoided two considerably worse outcomes from an environmental perspective. First, the Court declined to hold, as ATA had argued, that the Port should be prohibited from enforcing *any* of the provisions of its Clean Trucks Program because of an argument that such enforcement would conflict with federal law on interstate licences for motor carriers. If the Court had

decided, instead, to take up this argument and to hold against the Port, its program could have been effectively gutted.

Second, the Court affirmed its basic agreement with the notion of a "market participant" exception to FAAA preemption. It said nothing to foreclose the future use of that exception by other localities, or even by the Port itself, so long as more care is taken not to intertwine contracts with traditional regulatory enforcement authority.

All in all, a good loss.