LOCAL GOVERNMENT LAW — PREEMPTION — SOUTHERN DISTRICT OF NEW YORK HOLDS THAT NEW YORK CITY HYBRID TAXI REGULATIONS ARE LIKELY PREEMPTED BY THE EPCA. — *Metropolitan Taxicab Board of Trade v. City of New York*, No. 08 Civ. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008).

As cities increasingly provide public service delivery through partnerships with private organizations rather than provide those services directly, cities risk exposing themselves to preemption by state and federal law. Recently, in *Metropolitan Taxicab Board of Trade v. City of New York*,[1] the U.S. District Court for the Southern District of New York exemplified this restraint on municipal choice, forcing New York City to choose between its environmental goals and the efficient structuring of its public transportation system. The court enjoined New York City from mandating a hybrid taxi fleet based on its holding that the City's regulation of taxi fuel efficiency was likely preempted by the Energy Policy and Conservation Act[2] (EPCA),[3] which authorized federal fuel efficiency requirements for auto manufacturers.[4] The court rejected the City's argument that because taxis are part of the City's public transportation network, the taxicab rules were expressly exempted from preemption by the section of the EPCA that allows cities to set fuel economy standards for vehicles obtained for their "own use."[5] The court should have interpreted "use" broadly and held that taxicabs are obtained for the "use" of the City under the EPCA. A broad interpretation of "use" best accords with the plain meaning of the word, is consistent with the goals of the EPCA, and provides cities with needed flexibility in structuring and overseeing the delivery of public services.

On April 22, 2007, Mayor Michael Bloomberg released PlaNYC, an ambitious plan for accommodating anticipated growth in New York City by creating a "greener, greater New York."[6] PlaNYC aims to improve air quality by encouraging public transportation and decreasing the emissions of City vehicles, including those used in public transportation.[7] It further aims to decrease emissions from the City's taxicabs,

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[1] No. 08 Civ. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008).

[2] Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended in scattered sections of 42 and 49 U.S.C.).

[3] *Metro. Taxicab*, 2008 WL 4866021, at *12.

[4] § 502, 89 Stat. at 906–07.

[5] *Metro. Taxicab*, 2008 WL 4866021, at *11; *see* 49 U.S.C. § 32919(c) (2006).

[6] CITY OF N.Y., PLANYC: A GREENER, GREATER NEW YORK 3 (2007) [hereinafter PLANYC]; *see also Metro. Taxicab*, 2008 WL 4866021, at *3.

[7] PLANYC, *supra* note 6, at 122; *see also id.* at 119 (noting benefits of improved emissions for Metropolitan Transportation Authority and school buses and the City's purchase of hybrid and compressed natural gas vehicles).

which account for approximately four percent of the City's ground transport carbon dioxide emissions.[8]

This aspect of the plan was implemented by the New York City Taxi and Limousine Commission (TLC),[9] which is charged with "establish[ing] an overall public transportation policy governing taxi, coach, limousine, wheelchair accessible van services and commuter van services as it relates to the overall public transportation network of the city."[10] Specifically, the TLC is empowered to regulate numerous aspects of taxi and limousine services, including, inter alia, rates, standards of service, and pollution and efficiency standards for vehicles.[11]

To carry out the public transportation emissions reduction goals of PlaNYC, the TLC adopted amendments to its Taxicab Specifications on December 11, 2007.[12] The amendments provided that all new taxicabs that are not wheelchair accessible must have a rating of at least twenty-five miles per gallon by October 1, 2008,[13] and a rating of at least thirty miles per gallon by October 1, 2009[14] (the "TLC Rule"), effectively requiring them to be hybrid.[15] By taking advantage of the mandatory retirement years for taxis, these rules aimed to double the efficiency of the City's taxi fleet by 2012.[16]

On September 8, 2008, a group of plaintiffs including taxi owners, drivers, and passengers filed suit against the City of New York, the TLC, and several City officers acting in their official capacities, arguing that the TLC Rule was preempted by provisions of both the EPCA, which authorizes federal fuel economy standards for automobiles,[17] and the Clean Air Act[18] (CAA), which authorizes federal emissions standards for automobiles.[19] The plaintiffs claimed that the TLC Rule was preempted under the EPCA's express preemption

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[8] *Id.* at 123.

[9] *See* N.Y. CITY CHARTER §§ 2300–2304 (2004); *see also Metro. Taxicab*, 2008 WL 4866021, at *2.

[10] N.Y. CITY CHARTER § 2300 (also charging TLC with "the continuance, further development and improvement of taxi and limousine service" in New York); *see also id.* § 2303(b)(9) (extending regulation to "[t]he development and effectuation of a broad public policy of transportation affected by this chapter as it relates to forms of public transportation in the city").

[11] *See id.* § 2303(b)(1), (2), (6).

[12] *See Metro. Taxicab*, 2008 WL 4866021, at *2.

[13] CITY OF N.Y., N.Y., RULES OF THE CITY OF N.Y. § 3-03(c)(10) (2008) (amended March 26, 2009), *available at* http://www.ci.nyc.ny.us/html/tlc/downloads/pdf/specrules.pdf.

[14] *Id.* § 3-03(c)(11).

[15] *See Metro. Taxicab*, 2008 WL 4866021, at *2.

[16] *See id.*; PLANYC, *supra* note 6, at 124.

[17] 49 U.S.C. § 32902(a) (2006).

[18] 42 U.S.C. §§ 7401–7671 (2006).

[19] *Id.* § 7521; *see Metro. Taxicab*, 2008 WL 4866021, at *1, *3. The court did not think that the CAA was likely to preempt the TLC Rule and thus the EPCA issue was the focus of its opinion. *See id.* at *14.

clause, which provides that "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."[20] They further argued that the TLC Rule did not fall under the EPCA's explicit exemption to preemption, which provides that "[a] State or a political subdivision of a State may prescribe requirements for fuel economy for automobiles obtained for its own use."[21] The plaintiffs therefore requested a preliminary or permanent injunction preventing the City from implementing the TLC Rule.[22] They argued that the requirements for an injunction were satisfied because the implementation of the TLC Rule would cause them irreparable harm[23] and because their preemption argument was likely to be successful.[24]

The City argued that the TLC Rule was not a regulation "related to" fuel economy standards because it did not "actually interfere[] with Congress's objectives in enacting EPCA."[25] Furthermore, the City argued that because taxis are part of its public transportation network, the TLC Rule qualified for both an implied "market participant" exception to preemption and the express exception to preemption for vehicles obtained for the "use" of the City in providing public transportation.[26]

Judge Paul A. Crotty held that the plaintiffs had demonstrated that the TLC Rule is "most likely expressly preempted by the EPCA,"[27] and thus granted the plaintiffs' motion for a preliminary injunction.[28] The court first concluded that the TLC Rule was a "law or regulation related to fuel economy standards,"[29] rejecting the City's argument that fuel economy standards had to directly interfere with the purposes of the EPCA in order to be "related to" fuel economy standards.[30] The

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[20] 49 U.S.C. § 32919(a); *see Metro. Taxicab*, 2008 WL 4866021, at *8.

[21] 49 U.S.C. § 32919(c); *see Metro. Taxicab*, 2008 WL 4866021, at *8.

[22] *Metro. Taxicab*, 2008 WL 4866021, at *1.

[23] Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary or Permanent Injunction or a Summary Declaratory Judgment at 22–29, *Metro. Taxicab*, 2008 WL 4866021 (No. 08 Civ. 7837 (PAC)).

[24] *Id.* at 6–15.

[25] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary or Permanent Injunction or a Summary Declaratory Judgment at 24, *Metro. Taxicab*, 2008 WL 4866021 (No. 08 Civ. 7837 (PAC)) [hereinafter Defendants' Memorandum of Law].

[26] *Id.* at 14–17, 25.

[27] *Metro. Taxicab*, 2008 WL 4866021, at *12.

[28] *Id.* at *15. The court also concluded that the plaintiffs had proven that they would likely suffer irreparable harm from implementation of the TLC Rule. *Id.* It found that the plaintiffs would likely suffer financial harm from the TLC Rule and that damages would not be recoverable because the EPCA did not create a private remedy to recover damages if the TLC Rule were later declared preempted. *Id.* at *6–7.

[29] 49 U.S.C. § 32919(a) (2006).

[30] *Metro. Taxicab*, 2008 WL 4866021, at *10.

court found that the Supreme Court's decision in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*[31] rendered the City's argument untenable.[32]

Furthermore, the court rejected the City's arguments that the regulations were exempted from preemption under either the express exemption for automobiles "obtained for [the City's] own use,"[33] or an implied "market participant" exception,[34] imported into preemption cases from the Dormant Commerce Clause to protect "proprietary" action undertaken by state and local governments from preemption.[35] The court rejected these two arguments for "essentially the same reasons,"[36] effectively interpreting "obtained for [the City's] own use" as "bought and owned by the City." The court stated that the TLC Rule "would be a strange choice to impose for one's own use,"[37] and that the City regulating taxis is "materially and substantially different" from the City buying and taking title to cars.[38] The court thus held that the EPCA likely preempts the TLC Rule,[39] and issued a preliminary injunction against the City.[40]

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[31] 541 U.S. 246 (2004).

[32] *Metro. Taxicab*, 2008 WL 4866021, at *10. In *Engine Manufacturers*, the Court held that a local government's emissions requirements for various private fleets, including vans transporting people from the airport, were "standards" under the CAA. 541 U.S. at 252–55. The Court did not consider whether the regulations in that case directly interfered with the purposes of the CAA.

[33] 49 U.S.C. § 32919(c); *see Metro. Taxicab*, 2008 WL 4866021, at *11.

[34] *See Metro. Taxicab*, 2008 WL 4866021, at *7, *11.

[35] *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227 (1993).

[36] *Metro Taxicab*, 2008 WL 4866021, at *11.

[37] *Id.* The court gave no explanation as to why this would be so strange. Even private companies impose efficiency regulations on automobiles they acquire. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1047 (9th Cir. 2007) ("[T]wo prominent private fleet owners, FedEx and UPS, have, for their own purposes, adopted programs to introduce less-polluting vehicles into their fleets.").

[38] *Metro. Taxicab*, 2008 WL 4866021, at *11.

[39] *Id.* at *15. The court rejected plaintiffs' claim that the CAA also preempted the TLC Rule, relying on earlier cases clarifying that "the preemption provisions of the EPCA and the CAA relate specifically to their defined categories — fuel economy and emission regulation, respectively — and while they may overlap, they do not conflict." *Id.* at *14. For a more detailed discussion of the relationship between EPCA and CAA express preemption, see *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 343–54 (D. Vt. 2007).

[40] In response to *Metropolitan Taxicab*, the City promulgated amendments to the TLC Rules on March 26, 2009, to create financial incentives for fleet owners to purchase hybrid and clean diesel taxicabs. *See* CITY OF N.Y., N.Y., RULES OF THE CITY OF N.Y. § 1-78 (promulgated March 26, 2009), *available at* http://www.ci.nyc.ny.us/html/tlc/downloads/pdf/rules_leasecap_promulgated.pdf. Litigation continues over these new rules. *See* Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 12–30, *Metro. Taxicab*, 2008 WL 4866021 (No. 08 Civ. 7837 (PAC)) (S.D.N.Y. filed Apr. 17, 2009) (arguing that the new rule creating incentives for fleet owners to purchase hybrid vehicles is a de facto mandate and thus preempted by the EPCA and the CAA). A similar litigation has recently begun in Boston. *See* Complaint and Jury Demand, Ophir v. City of Boston, No. 09-10467-WGY (D. Mass. Mar. 27, 2009).

Although the court was probably correct that the TLC Rule constituted "a regulation related to fuel economy standards,"[41] it erred in equating "use" with "ownership," and in thus holding that the TLC Rule was not exempted from EPCA preemption.[42] The court should have interpreted "own use" broadly to include automobiles obtained as part of the City's public transportation network, including taxicabs. A broad interpretation best accords with the plain meaning of "use," comports with the underlying goals of the EPCA, and provides cities with the flexibility they need to structure the delivery of public services.

In issuing the injunction, the court in effect held that the TLC Rule was preempted because the City did not actually own the taxicabs. It relied on a comparison between the regulation of taxicabs by the TLC and the purchase of police cars, arguing that unlike taxicabs, the City purchases police cars "with its own funds, takes title to them, and then uses them exclusively for its own purpose."[43] It further noted that "[r]egulators are not the owners; for example, the New York State Public Service Commission does not own public utilities."[44] In interpreting "use," the court thus drew a clear line between regulation and ownership, concluding that for a vehicle to be for the "use" of the City, it had to fall on the ownership side of the line.[45]

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[41] The Court's reasoning in *Engine Manufacturers* seriously undercuts the City's argument that the TLC Rule is not "related to fuel economy standards." *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252–55 (2004). *But see id.* at 259–66 (Souter, J., dissenting) (relying on the presumption against preemption and the legislative history of the CAA to argue that preemption should not apply to regulations that do not require manufacturers to produce a new kind of engine).

[42] In its analysis, the court focused solely on the "own use" language of the statute and did not discuss the implications of any of the other language, like "obtained." *See Metro. Taxicab*, 2008 WL 4866021, at *11; *see also* 49 U.S.C. § 32919(c) (2006).

[43] *Metro. Taxicab*, 2008 WL 4866021, at *11.

[44] *Id.* The public utilities example in some sense cuts against the court's interpretation. The fact that public utilities are actually described as *public* suggests that, although not owned by the Public Service Commission, they are for the use of the City in delivering services to the public.

[45] The court's interpretation of "use" appeared to be influenced by the City's argument that the "own use" exception to preemption was a "statutory inclusion of the [Dormant Commerce Clause's] market participant doctrine," Defendants' Memorandum of Law, *supra* note 25, at 25. *See Metro. Taxicab*, 2008 WL 4866021, at *11 (rejecting the "own use" argument for "essentially the same reasons" as it rejected the market participant argument). The Supreme Court often incorporates the market participant doctrine into preemption analysis to distinguish between proprietary action, which is not subject to preemption, and regulatory action, which is subject to preemption. *See, e.g.*, Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227 (1993). Although the court was likely correct that the TLC Rule does not satisfy the market participant doctrine, *see* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 694 n.2 (5th Cir. 1999) ("Licensing schemes do not invite proprietary analysis."), in the preemption context, "[t]he purpose of Congress is the ultimate touchstone," Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963). Thus, when, as here, Congress has provided expressly for exemption from preemption, the court should not be restrained by the market participant doctrine in interpreting the statutory text. *See Boston*

This interpretation of use as ownership does not comport with the plain meaning of "use." The noun "use" is defined as "a particular service or end,"[46] and a vehicle is thus for the "use" of a city if it is for the city's particular service or end. It is hard to imagine a definition of "use" that directly equates use with ownership in the way the court does. Even from a common sense perspective, there are many ways that one could obtain something for one's own use without owning it, including renting it, borrowing it, or sharing it with someone else.

Based on the plain meaning of the statute, it is hard to deny that taxis are for the City's "own use" — for its own service or end — in delivering public transportation services. Taxis, despite being structured through licenses rather than direct ownership, are a crucial part of the City's public transportation plan. The TLC is specifically charged with ensuring that its taxicab regulations "relate[] to the overall public transportation network of the city,"[47] and the City maintains significant control over the operation of the taxicab industry.[48] Indeed, the court effectively admitted that taxis are for the use of the City in providing public transportation when it "acknowledge[d] that taxicabs may be part of the public transportation system."[49] If taxicabs are part of the City's public transportation system, even if the City does not directly operate them, it is hard to see how those taxicabs are not for the City's use in achieving its purpose of providing public transportation to its citizens.

In effect, then, the court's decision was not based on the use to which the taxis were being put, but on the structure by which the City chose to deliver taxicab services. As the court's opinion suggests, if the City chose to provide taxi services directly, it could choose to purchase as taxicabs only cars with a specified fuel economy.[50] Similarly, if the City contracted with a single private firm to provide taxi services, it could, as part of that contract, require that all taxis used by that firm

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Harbor, 507 U.S. at 231 (explaining that the market participant doctrine serves as an interpretive tool "[i]n the absence of any express or implied indication by Congress").

46 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523 (1981); *cf. Engine Mfrs.*, 541 U.S. at 252–53 (using a dictionary to determine the plain meaning of "standard" in the CAA).

47 N.Y. CITY CHARTER § 2300; *see also* GRAHAM RUSSELL GAO HODGES, TAXI!: A SOCIAL HISTORY OF THE NEW YORK CITY CABDRIVER 1 (2007) ("[T]axi drivers provide a critically important mode of city transportation exceeded in patronage only by the subway.").

48 *See, e.g.*, N.Y. CITY CHARTER § 2303(b)(1)–(6). Courts have long recognized this strict regulation of the taxi industry. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 125 (1877) ("[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate . . . hackmen . . . .").

49 *Metro. Taxicab*, 2008 WL 4866021, at *11.

50 The court implies this power when noting that the City could have set fuel economy standards for its police cars. *See id.*

have a specified fuel economy.[51] The cars used as taxis would be equally for the use of the City regardless of the structure by which the City chose to provide them. Indeed, one of the reasons for the increasing role of the private sector in service delivery is that in some instances monitored privatization can provide public services better than direct provision by city governments.[52] Thus a city may get more use — its purposes or ends may be *better* achieved — when it does not directly own a particular aspect of service delivery.[53]

The Supreme Court recognized the importance of allowing cities to use the private sector to achieve public purposes in *Kelo v. City of New London*,[54] in which it held that the taking of private land to be transferred to private parties as part of an economic redevelopment plan constituted "public use" under the Takings Clause.[55] The Court emphasized that the land transfer was part of a "carefully formulated" and "comprehensive" development plan.[56] "Because that plan unquestionably serves a public purpose, the taking[] . . . satisf[ies] the public use requirement . . . ."[57] The Court's recognition that the private means by which New London achieved its ends were not determinative of the question of whether the action was for the "use" of the public is equally applicable in this context. Just as the economic development plan in *Kelo* implied that transfer of land to a private corporation was for the "public use," the City's public transportation plan suggests that taxis are obtained for the City's "own use."

Furthermore, interpreting "use" broadly is consistent with the important role given to local governments by the EPCA.[58] Congress envisioned a large role for local governments in administering the EPCA:

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[51] This power would almost certainly fall under even a traditional market participant exception. Courts have found cities to be acting as market participants even when they have not spent their own funds. *See* Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686, 696–97 (5th Cir. 1999) (rejecting the argument that a city was not a market participant when the city chose a towing company for nonconsensual tows because the city was not using its spending power).

[52] An example of such monitored privatization is the charter school movement, in which school districts license private organizations to operate public schools. For a case discussing the "public" nature of charter schools, see *Council of Organizations & Others for Education About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208 (Mich. 1997). *See also* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 123–32 (2002) (discussing privatization of public health care).

[53] *Cf.* MINOW, *supra* note 52, at 3 (noting that privatization has the potential to be animated by a governmental "spirit of experimenting" to improve government functioning).

[54] 545 U.S. 469 (2005).

[55] *Id.* at 484.

[56] *Id.* at 483–84.

[57] *Id.* at 484.

[58] In this case, the TLC Rule was also consistent with one of Congress's goals in passing the EPCA, which was to "reduce domestic energy consumption." S. REP. NO. 94-516, at 117 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

"Within Federal guidelines . . . States would establish programs in a manner tailored to local . . . conditions. The Act thus provides impetus, direction and financial assistance for energy conservation while *protecting the States' interest in self-determination and local control*."[59] Indeed, to be eligible for certain federal funds, states are required to develop "[p]rograms to promote . . . public transportation" and to implement "[e]nergy efficiency standards and policies in procurement."[60] Given that Congress strongly encouraged states to undertake their own conservation programs, it makes sense that Congress intended the "own use" exemption to preemption to be interpreted broadly, giving local governments the "local control" and "self-determination" they need to design effective and efficient public services and to best use those services to reduce energy consumption.

A broad interpretation of "use" not only accounts for the complex nature of public service delivery more effectively than a narrower reading, it also allows the City needed flexibility in structuring service delivery. One of the concerns about privatization of public services is that governments will lose the ability to relate public services to the broader aims and goals of the community.[61] The City runs its public transportation network as part of the broader set of policy objectives it pursues at any given time. It is important for local governments to have the opportunity to imbue public services with the goals and values of the government more generally. Thus, New York City, in providing public transportation, is not simply providing a means of transportation, but also is helping to implement and foster a citywide value of energy conservation. The court's finding that the taxis were not for the use of the City forces the City to choose between what it considered the most efficient way of providing taxicab service — through provision of regulated licenses to private drivers — and the City's value of energy conservation.

By interpreting "use" narrowly, the court ignored the word's plain meaning in the public context and acted based on an outdated understanding of how local governments structure the delivery of public services. Because of the public services they provide, local governments have an important role to play in achieving the environmental goals of the EPCA. Interpreting "use" broadly would have been a more appropriate reading of the EPCA, and would have left local governments with the flexibility they need both to efficiently structure service delivery and to do their part to decrease their environmental impact.

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[59] *Id.* at 120, *reprinted in* 1975 U.S.C.C.A.N. at 1961 (emphasis added).

[60] *Id.*; *see also id.*, *reprinted in* 1975 U.S.C.C.A.N. at 1960.

[61] *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 173–79 (1999); MINOW, *supra* note 52, at 3.