No. 11-798

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

DAVID A. BERG
DOUGLAS MULLEN
Airlines for America
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4177

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
Spotswood Sansom & Sansbury LLC
1819 Fifth Avenue North
Suite 1050
Birmingham, AL 35203
(205) 986-3620
rks@spotswoodllc.com

Counsel for Amicus Curiae *Airlines for America*

QUESTIONS PRESENTED

Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision . . . may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." It contains an exception providing that the express preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). The questions presented are:

1. Whether an unexpressed "market participant" exception exists in Section 14501(c)(1) and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services.

2. Whether permitting a municipal governmental entity to bar federally licensed motor carriers from access to a port operates as a partial suspension of the motor carriers' federal registration, in violation of *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954).

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BRIEF OF *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Airlines for America (A4A), formerly known as the Air Transport Association of America, Inc., is the trade organization of the principal U.S. airlines. It represents the interests of eleven airline members and one associate airline member, which together transport more than ninety percent of U.S. airline passenger and cargo traffic. Those members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co.; US Airways, Inc.; and Air Canada, which is an associate member.[2]

The mission of A4A is to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, thus stimulating economic growth locally, nationally, and internationally. As part of that mission, A4A seeks to identify, highlight, and

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] A4A also has a number of airline-related industry partners and members, a list of which is available at http://www.airlines.org/Pages/Members.aspx.

challenge laws and government policies that impose inappropriate regulatory burdens or unfairly impinge on the free operation of the marketplace for the services of its members. Throughout its seventy-five-plus year history, A4A has been actively involved in the development of the law applicable to commercial air transportation by advocating common industry positions on policy and legal issues of interest and importance to its members.

A4A has frequently participated as *amicus curiae* before this Court and other courts. In particular, A4A has participated as *amicus curiae* in litigation relating to the preemption provision of the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (1978) (currently codified, as amended, at 49 U.S.C. § 41713(b)(1)), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states and municipalities from enacting or enforcing laws or regulations directly or indirectly "related to" an air carrier's prices, routes, or services.[3] This Court has recognized that the preemption provision in the subsequently enacted Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-06

[3] Contrary to what the Ninth Circuit's opinion says, the ADA is no longer codified at 49 U.S.C. app. § 1305(a)(1) and no longer refers to "rates" rather than "prices." *Cf. Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 396 n.8 (9th Cir. 2011). In 1994, the ADA was recodified at its current location with technical changes (including the change from "rates" to "prices") that Congress intended to have no substantive effect. *See Am. Airlines v. Wolens*, 513 U.S. 219, 222-23 & n.1 (1995).

(1994) (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)), which is at issue in this case, has the same preemptive effect as the ADA, and cases interpreting the FAAAA also affect the ADA (and vice versa). *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008).

Proper application of ADA preemption, and by extension FAAAA preemption, is of critical importance to A4A's members, which rely on ADA preemption to shield airlines from a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an airline. Carriers routinely rely on nationally uniform rules governing interstate transportation by air in structuring their business dealings with a variety of third parties, just as Congress envisioned they would. Judicial rulings that allow a patchwork of local laws and regulations undermine the ability of A4A members to operate efficiently, innovate, plan and make informed decisions about their business relationships. The Ninth Circuit's decision below would allow for such a patchwork and conflicts with decisions from this Court. Accordingly, a reversal of that decision by this Court is crucial to A4A's members.

BACKGROUND AND SUMMARY OF THE ARGUMENT

Because the preemptive language in the FAAAA is the same as that in the ADA, and cases interpreting the FAAAA also apply to the ADA, the Ninth Circuit's decision below affects not only motor

carriers, but also air carriers such as A4A's airline members because it impacts the interpretation of the ADA preemption provision on which they rely.

Congress passed the ADA in 1978 to release the air transportation industry from intensive regulation, based on its determination that deregulation would best further the goals of "efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) (quotation marks and alterations omitted). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *Id.* With fifty states in the union, plus the District of Columbia and various territories, airlines were potentially subject to more than fifty regulatory schemes, not to mention an array of municipal and local regulations, each with its own obligations and prohibitions. The resulting patchwork of laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Id.* at 378-79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a preemption provision . . . ."). Subject to certain express exceptions, the ADA preempts any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." 49 U.S.C. § 41713(b)(1).

Congress later recognized that motor and intermodal carriers also needed the benefit of this

"deliberately expansive" preemption clause, *Morales*, 504 U.S. at 384, so it extended the same preemption to them through the FAAAA. The FAAAA expressly preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," 49 U.S.C. § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter, "intermodal carrier"). Congress made clear its intent that the preemptive effect of these provisions is the same as that of the ADA, and this Court has therefore held that cases interpreting one statute's preemption provision apply with equal force to the preemption provision of the other statute. *See Rowe*, 552 U.S. at 370.

This Court has addressed ADA and FAAAA preemption on three occasions, and each time it has reaffirmed its breadth and expansiveness. In *Morales*, this Court held that the preemptive language used by Congress in the ADA "express[es] a broad preemptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." 504 U.S. at 383-84. Given this starting point, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal law. *Id.* at 385-87. Instead, this Court held that the ADA preempts *any* state law having a connection with or reference to an airline's prices, routes, or services, unless that connection or reference is "too tenuous, remote, or

peripheral . . . to have preemptive effect." *Id.* at 384, 390.[4]

Three years later, in *American Airlines v. Wolens*, 513 U.S. 219 (1995), this Court reaffirmed the far-reaching scope of ADA preemption. It held that even state laws of general applicability affecting "unessential" airline matters—such as frequent flier programs—are sufficiently "related to" air carriers' prices, routes and services as to be preempted by the ADA. *Id.* at 226-27. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232-33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.* at 229 n.5.

Most recently, in 2008, relying on *Morales* and *Wolens*, this Court held that the FAAAA preempts local laws that affect motor carriers' services even indirectly. *Rowe*, 552 U.S. at 372 ("We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers*

[4] Although the Court mentioned this outer limit, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Id.* at 390.

what to do."). The relevant inquiry is the *effect* of the local law, and the FAAAA preempts state regulation, whether direct or indirect, "of the essential details of a motor carrier's system for picking-up, sorting, and carrying goods—essential details of the carriage itself." *Id.* at 373.

Thus, this Court has on every occasion emphasized and affirmed the broad scope of ADA and FAAAA preemption.

The Ninth Circuit's decision is contrary to this established breadth and expansive scope of FAAAA and ADA preemption, however. The Ninth Circuit read into the FAAAA a broad, non-textual "market-participant" exception to save from preemption certain local requirements that "relate to" carriers' prices, routes or services, in disregard of relevant decisions from this Court. Specifically, the Ninth Circuit failed to consider several "express or implied indications" making clear that Congress did not intend for a general market-participant exception to apply to the FAAAA. Congress knows how to include a market-participant exception to preemption when it wants to, but it did not include such an exception in the FAAAA—despite including several other express exceptions. This omission is particularly telling since the ADA, on which the FAAAA's preemption provision is based, *does* include an express (albeit narrow) market-participant exception. Further, while this Court has made clear that the FAAAA and ADA preserve air and motor carriers' ability to contract with third parties free from state policy interference, the Ninth Circuit's decision improperly allows municipalities to impose their own policy

decisions as a precondition to such third-party contracts. Approving the Ninth Circuit's decision would allow states and municipalities around the country to impose their own policies and regulations on motor carriers, in violation of the primary purpose of ADA and FAAAA preemption, which is to avoid a non-uniform patchwork of regulations around the country. Accordingly, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

The Ninth Circuit's decision below is due to be reversed because it inappropriately created a broad exception that is nowhere contained in the FAAAA—the market-participant exception—to save from preemption local requirements that "relate to" carriers' prices, routes or services. *Am. Trucking Ass'ns v. City of L.A. ("ATA")*, 660 F.3d 384, 406-07, 409 (9th Cir. 2011). The application of this broad, non-textual exception to the FAAAA, in disregard of relevant decisions from this Court, concerns air carriers because the Ninth Circuit or other courts may also attempt to apply it to the ADA, notwithstanding that the ADA, unlike the FAAAA, already contains an express but limited market-participant exception to preemption.

The Ninth Circuit's decision below marks a continued expansion by lower courts of the contexts in which a market-participant exception is applied. The market-participant doctrine initially arose in a series of dormant Commerce Clause cases. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93

(1984) (plurality). Since then, courts, including this Court, also have applied a market-participant exception in cases involving implied preemption under the National Labor Relations Act ("NLRA"). *See, e.g.*, *Bldg. & Constr. Trades Council v. Assoc. Bldrs. & Contractors,* (*"Boston Harbor*"), 507 U.S. 218, 226-27 (1993). Some lower courts, particularly the Ninth Circuit, have gone further and created a market-participant exception to statutes, including the FAAAA, that contain express preemption provisions but no market-participant exception. *See, e.g.*, *Assoc. Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1182-85 (9th Cir. 1998) (creating a market-participant exception to ERISA's express preemption provision); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031, 1043 (9th Cir. 2007) (creating a market-participant exception to the Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (creating a market-participant exception to the FAAAA's express preemption provision). Prior to this case, however, no court had applied a market-participant exception to the FAAAA outside the limited factual circumstance of the provision of nonconsensual towing services to a municipality. Pet. at 10-11.

The Ninth Circuit's creation of a market-participant exception to the FAAAA in this case is contrary to relevant decisions from this Court regarding the applicability of the exception. This Court has made clear that a market-participant exception does not apply in all contexts where Congress has acted: "the '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." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289 (1986). In considering whether a market-participant exception to preemption applies, a court must assess whether there is "*any* express *or implied* indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests," which precludes application of a market-participant exception. *Boston Harbor*, 507 U.S. at 231-32 (emphasis added). As this Court has recently reiterated, "[w]hen a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v. Whiting*, __ U.S. __, 131 S.Ct. 1968, 1977 (2011) (quotation marks omitted).

Here, the Ninth Circuit created a market-participant exception to FAAAA preemption without conducting the necessary inquiry about congressional intent. Specifically, the Ninth Circuit failed to consider whether there is "any express or implied indication by Congress" against application of a market-participant exception to FAAAA preemption. *Boston Harbor*, 507 U.S. at 231. In fact, there are several concrete indications against such an exception. To start, there is the plain statutory language. Congress carefully calibrated FAAAA preemption through a number of specific, express exceptions—for state requirements related to motor-vehicle safety, highway route controls and limits, and insurance; the transportation of household goods; non-consensual towing; and the state of Hawaii—yet

it omitted any general market-participant exception like the one applied by the Ninth Circuit. 49 U.S.C. §§ 14501(c)(2)–(5), 41713(b)(4)(B).

Congress knows how to include expressly a market-participant exception when it wants to do so. *See, e.g.*, *id.* § 32919(c) (expressly excepting from preemption state fuel economy standards for automobiles obtained for the state's own use); *id.* § 32304(i) (same for state motor vehicle labeling requirements); 15 U.S.C. § 1476(b) (same for state packaging requirements for household substances obtained for the state's own use); *id.* § 1203(b) (same for state flammability standards for fabric obtained for the state's own use); *see also* Br. for Petitioner at 27. Congress' omission of such an express market-participant exception from the FAAAA indicates that Congress did not intend for it to apply.[5] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress" did not intend for the exclusion to apply); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

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[5] Arguably, the FAAAA's exception for state requirements relating to the price of non-consensual towing services, 49 U.S.C. § 14501(c)(2)(C), is a market-participant exception, *see* Br. for Petitioner at 27. The contrast between that narrow, express exception and the expansive, non-textual market-participant exception created by the Ninth Circuit is striking.

The omission of an express market-participant exception from the FAAAA is even more significant given that Congress specifically *included* such an exception—albeit a narrow one[6]—in the ADA. Section 41713(b)(3) of Title 49 expressly provides that the ADA's preemption provision "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." Congress included this express exception when enacting the ADA because it "recognized that airport proprietors—the majority of which are municipalities—were best equipped to handle local problems arising at and around their facilities." *Am. Airlines v. DOT*, 202 F.3d 788, 805 (5th Cir. 2000) (internal citation omitted).

Congress was undeniably aware of the ADA's preemption provision, and its narrow market-participant exception for state and local airport proprietors, when it enacted the FAAAA. In fact, the stated purpose of the FAAAA was to extend ADA preemption to motor and intermodal carriers, and Congress used the ADA's preemption language in the FAAAA. H.R. Rep. No. 103-677, at 82-85 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1754-60. Yet, Congress failed to include an analogous market-participant exception in the FAAAA. This omission strongly indicates that Congress did not intend for a market-participant exception to apply to

[6] See discussion, *infra*, at 15.

the FAAAA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that if Congress had intended to restrict a statutory section, it would have done so expressly, as it did in another section) (quotation marks and alteration omitted); *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (refusing to read language from one provision into parallel provisions because "Congress did not write the statute that way"); *Pac. Operators Offshore, LLP v. Valladolid*, __ U.S. __, 132 S.Ct. 680, 687-88 (2012) ("[O]ur usual practice is to make the . . . inference" that Congress acts intentionally and purposely when it includes a restriction in one section of a statute but omits it in another section).

Finally, there are "express or implied indication[s]" that Congress respects carriers' contracts with third parties and would not want state or local authorities imposing their "public policies or theories" as a precondition to the carriers' fulfillment of those contracts under a market-participant exception. As this Court has previously concluded, Congress, in enacting the ADA, "presuppose[d] the vitality of contracts governing transportation by air carriers." *Wolens*, 513 U.S. at 230. Thus, this Court held on the one hand that private parties may pursue breach of contract actions to enforce "a term" that an airline itself had "stipulated." *Id.* at 232-33. On the other hand, this Court held that the ADA forbids state or local authorities from seeking "to impose

their own public policies or theories of competition or regulation on the operations of an air carrier." *Id.* at 229 n.5. Here, the Ninth Circuit's market-participant exception improperly allows the port authorities to impose their "public policies or theories" on carriers as a precondition to the port access necessary for fulfilling the carriers' drayage contracts with third parties.

The port authorities' attempt to control participation in the drayage services market—a market in which they undisputedly do not participate—through the concession agreements is analogous to state efforts to influence the labor market through restrictions on the receipt or use of state funds. *Chamber of Commerce v. Brown*, 554 U.S. 60, 70-71 (2008); *Gould*, 475 U.S. at 291.[7] This Court correctly has held that such activity—which is "neither specifically tailored to one particular job nor a legitimate response to state procurement constraints or to local economic needs"—is that of a market regulator, and thus is not saved from preemption by a market-participant exception. *Brown*, 554 U.S. at 70 (quotation marks omitted). As this Court has recognized, because "government occupies a unique position of power in our society," it can exercise its proprietary powers in ways that are "tantamount to regulation," and "its conduct,

[7] It is likewise analogous to Alaska's effort to use its proprietary timber rights to influence timber processing, a market in which Alaska did not participate. *Wunnicke*, 467 U.S. at 95-99; *id.* at 99 ("Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate, economic relationships of its trading partners . . . .").

regardless of form, is" therefore "rightly subject to special restraints." *Gould*, 475 U.S. at 289-90.

The Ninth Circuit's improper application of a non-textual market-participant exception to the FAAAA is an important issue to air carriers. Although the ADA, unlike the FAAAA, does include an express market-participant exception, as discussed above, that exception is narrowly limited to specific proprietary powers and rights related to airports. 49 U.S.C. § 41713(b)(3). Courts have recognized the narrow scope of this exception. *See Am. Airlines*, 202 F.3d at 806 (explaining that "courts have recognized that local proprietors play an 'extremely limited' role in the regulation of aviation," and citing cases). The non-textual market-participant exception created by the Ninth Circuit in this case, however, is broadly expansive. *See* Pet. at 32. Given that cases interpreting the FAAAA also apply to the ADA, and vice versa, the Ninth Circuit's decision could result in courts applying this broad, non-textual market-participant exception to the ADA, notwithstanding the limited, express market-participant exception in the ADA itself. This Court should reverse the Ninth Circuit's decision and clarify that, for purposes of the ADA and FAAAA, the only applicable market-participant exceptions (like all exceptions to ADA and FAAAA preemption) are those that are expressly found in the statutes themselves.

CONCLUSION

A4A respectfully urges the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

DAVID A. BERG
DOUGLAS MULLEN
Airlines for America
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4177

ROBERT K. SPOTSWOOD
Counsel of Record
KENNETH D. SANSOM
EMILY J. TIDMORE
Spotswood Sansom & Sansbury LLC
1819 Fifth Avenue North
Suite 1050
Birmingham, AL 35203
(205) 986-3620
rks@spotswoodllc.com

February 22, 2013