No.

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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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Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision .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 a required concession agreement setting out various conditions a motor carrier must meet to serve a particular port imposes any requirements that are "related to a price, route, or service of any motor carrier" for the purposes of preemption under Section 14501(c)(1).

3. 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).

RULE 14.1(b) STATEMENT

Petitioner is the American Trucking Associations, Inc., plaintiff-appellant below.

Respondents are the City of Los Angeles, the Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles, all defendants-appellees below, and Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air, Inc., all defendants-intervenors-appellees below.

RULE 29.6 STATEMENT

Petitioner has no parent companies or non-wholly-owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals, as amended October 31, 2011 (App. 1a-58a), is reported at 660 F.3d 384. The opinion of the district court (App. 59a-137a) is unreported. The earlier opinions of the court of appeals in connection with petitioner's request for a preliminary injunction (App. 138a-148a, 208a-238a) are reported at 596 F.3d 602 and 559 F.3d 1046. The district court opinions issued in connection with the preliminary injunction (App. 149a-207a, 239a-272a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on September 26, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Supremacy Clause of the Constitution and of the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501 *et seq.*, are reproduced at App. 273a-279a.

STATEMENT

This case raises important and recurring questions that have divided the circuits concerning three subjects. The first is the preemptive scope of the Federal Aviation Administration Authorization Act ("FAAAA"). The second is the scope and applicability of the "market-participant exception"—first recognized in the dormant Commerce Clause context—to an express preemption scheme such as that set out by the FAAAA. The third is the enduring vitality of this

Court's decision in *Castle* v. *Hayes Freight Lines., Inc.*, 348 U.S. 61 (1954), under the deregulatory scheme created by the FAAAA.

As the dissent below observes, the majority's opinion creates conflicts with at least one other circuit over whether the "market participant" defense can be invoked by a governmental entity to save its actions from preemption when (a) the governmental entity owns property on which the market operates but does not actually participate in the market in which it is imposing conditions, and (b) the conditions are unrelated to the efficient procurement of services. The decision below also entrenches and extends a longstanding conflict with the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits over the meaning of the preemption clause's coverage of state and local requirements "related" to motor carriers' "price[s], route[s], or service[s]" (49 U.S.C. § 14501(c)(1)). Finally, the decision below conflicts with *Castle*, a longstanding precedent of this Court precluding States from enforcing regulations through actions that (as here) amount to a partial suspension of a federally licensed motor carrier's grant of nationwide operating authority.

A. The Deregulatory Scheme of the FAAAA

In 1994, Congress enacted the FAAAA, complementing the earlier-enacted Motor Carrier Act of 1980 ("MCA"). The MCA had broadly deregulated the trucking industry at the federal level. The FAAAA prevented state and municipal governments from counteracting that policy through their own regulation of motor carriers. Congress believed state economic regulation of motor carrier operations resulted in "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and

technology and curtail[ment of] the expansion of markets." H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758. Congress concluded that broad preemption was required to free interstate carriers from the inefficiencies created by a multitude of local regulatory schemes.

The FAAAA therefore provides that a State or its 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." 49 U.S.C. § 14501(c)(1). The Act provides for limited exceptions, including a provision noting that it "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." *Id.* § 14501(c)(2)(A). Nevertheless, the general scope of the FAAAA's express preemption clause—modeled after language in the Airline Deregulation Act ("ADA")—is expansive. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008). Broad preemption fosters a deregulatory policy aimed at ensuring that prices, routes, and services reflect "'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices.'" *Id.* at 371 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

B. The Port's Mandatory Concession Agreements

This litigation arises out of restrictions imposed by the Port of Los Angeles on motor carriers seeking to contract with shipping lines that lease terminal space at the Port. The Port is an independent division of the City of Los Angeles, occupying land granted to the City by the State of California. App. 5a. The Port acts much like a "landlord," developing terminal

facilities that it leases to shipping lines and stevedoring companies in exchange for property leases and fees. App. 5a-6a, 71a. The Port is a major avenue of interstate and foreign commerce, handling more containerized cargo than any other port in the country. App. 6a.

The Port has no non-regulatory interaction with the drayage trucks that transport cargo from the Port to customers or to other trucking or railroad facilities. Cargo from the ships docked at the Port is unloaded by terminal operators into marine terminals. Cargo owners, ocean carriers, railroads, and other providers of freight transportation then arrange for drayage services through federally licensed motor carriers (LMCs).[1] Before 2008, these LMCs frequently provided drayage services with and through independent contractors who owned and operated the drayage trucks. The Port does not itself contract with any drayage providers. App. 6a.

In 2008, the Port began prohibiting its tenant terminal operators from allowing drayage trucks to enter their terminal facilities unless the drayage trucks were operated by motor carriers that had first agreed to enter into "concession agreements" with the Port imposing multiple requirements on the carriers and their operations. App. 3a-4a, 12a. This measure was enacted as part of a larger "Clean Truck Program," designed in response to environmentally grounded legal and political opposition to the Port's expansion. App. 4a.

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[1] A motor carrier engaged in interstate commerce receives operating authority from the Department of Transportation, under the registration provisions of the MCA, 49 U.S.C. § 13902, and must comply with safety regulations and inspection requirements promulgated under the Federal Motor Carrier Safety Act, *id.* §§ 31136, 31142.

Of the 14 requirements imposed under the concession agreements on motor carriers, five remain at issue. These require a motor carrier seeking to serve the Port to (1) transition over five years to the use of only employee-drivers rather than independent owner-operators (the "employee-driver provision"); (2) submit an "off-street parking plan," including parking locations for all "Permitted Trucks," and ensure that Permitted Trucks comply with municipal parking restrictions (the "off-street-parking provision"); (3) ensure that maintenance of all Permitted Trucks is conducted in accordance with the manufacturers' instructions, with the concessionaires responsible for vehicle condition and safety (the "maintenance provision"); (4) post placards on Permitted Trucks while the trucks are entering, leaving, or on Port property, providing a number for members of the public to call with concerns regarding truck emissions, safety, and compliance (the "placard provision"); and (5) demonstrate to the satisfaction of the Port's Executive Director that the concessionaire possesses the financial capability to perform its obligations under the agreement (the "financial-capability provision"). App. 12a-13a.

C. Prior Proceedings in This Case

Petitioner American Trucking Associations, Inc. ("ATA"), a national association of motor carriers, sued to challenge the mandatory imposition of these agreements, arguing that the Port's requirements are preempted by the FAAAA. App. 4a.

The district court originally denied a preliminary injunction entirely. The court acknowledged that the concession-agreement requirements fell within the FAAAA's preemption clause and the Port's action could not be justified as that of a market participant.

App. 247a-248a, 252a-261a. But, the court held, the fact that some of the provisions could be upheld under the vehicle-safety exception saved the agreements from preemption in their entirety. App. 266a.

A unanimous panel of the Ninth Circuit agreed that the agreements likely fell within the FAAAA's preemption clause, explaining: "[t]hat the Concession agreements relate to prices, routes or services of motor carriers *can hardly be doubted*." App. 221a (emphasis added). The Ninth Circuit reversed the district court regarding its application of the safety exception, holding that the court must consider whether each individual provision of the concession agreements could be justified under the safety exception. App. 229a-230a. On remand, the district court granted a preliminary injunction with respect to a number of the individual provisions of the concession agreements. App. 203a.[2]

The district court conducted a bench trial concerning a permanent injunction. ATA argued (1) that the concession agreements were *per se* "related to a price, route, or service" for the purposes of FAAAA preemption, (2) that they could not be justified under the "market participant" exception, and (3) that the FAAAA's vehicle-safety exception neither justified any specific provision in the concession agreements

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[2] The district court preliminarily enjoined the employee-driver, financial-capability, and off-street-parking provisions, but not the maintenance and placard provisions. App. 203a-204a. In a later appeal, the Ninth Circuit reversed the district court again with regard to the placard provision. App. 144a. Consistent with the Ninth Circuit's prior determination that it could "hardly be doubted" that the concession agreements imposed requirements that "relate to prices, routes or services of motor carriers," App. 221a, petitioner and the City "agree[d]" on that point in this second appeal. App. 143a.

nor allowed the Port to refuse access to LMCs as a general matter. The district court held that none of the disputed provisions of the concession agreement was preempted. The court concluded that the Port was acting as a "market participant" in requiring the agreements and that specific provisions were further justified either as not "related to the price, route, or service of a motor carrier" or as falling within the exception to preemption for motor vehicle safety. App. 136a-137a.

D. The Court of Appeals' Decision

A divided panel of the Ninth Circuit affirmed in part and reversed in part. App. 47a.

1. The majority began by addressing whether the concession agreements and their individual provisions were "related to a price, route, or service of any motor carrier" such that they were preempted by the FAAAA's express preemption clause. The court of appeals noted that under Ninth Circuit precedent the phrase "price, route, or service" is understood only "in the public utility sense," referring to things such as the "frequency and scheduling of transportation" or the "courses of travel." App. 17a-18a (internal quotation marks omitted). The majority held "that a State may condition access to State property so long as the conditions do not impose costs that compel the carrier to change rates, routes, or services." App. 21a. The majority concluded that the financial-capability provision was insufficiently related to rates, routes, or services to be preempted. App. 33a-34a.

The panel also held that some provisions of the concession agreements escaped preemption under a market-participant exception nowhere expressed in the text of the FAAAA. According to the majority, agreements can escape preemption even if (a) they

were not directed at the "efficient procurement" of goods or services, and (b) the Port did not purchase the drayage services on which it imposed the disputed conditions. App. 23a-29a. In a statement that made no pretense of having anything to do with statutory text, the majority concluded that "[a] private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals." App. 29a.

Analyzing individual provisions of the agreements to determine whether each served the government's "interests as a facilities manager," App. 30a, the panel concluded that the off-street-parking and placard provisions were not preempted. In doing so, it held that "[e]nhancing good-will in the community surrounding the Port," App. 40a, and "receiving complaints about drayage trucks entering, leaving, and operating on its property," App. 46a, qualified as proprietary interests justifying imposition of the restrictions. None of those statements had anything to do with the text of the statute.[3]

The court also rejected petitioner's contention that—under *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954)—States cannot limit a federally registered motor carrier's access to a particular port (even to enforce vehicle-safety laws). App. 30a-32a. Without expressly deciding whether the FAAAA's enactment modified *Castle*'s holding, the majority concluded that the ban on a motor carrier's access to the Port did not so limit its participation in the

[3] The Ninth Circuit did, however, reverse the district court with respect to the employee-driver provision. The court concluded that, "[w]hile the Port may impose conditions on licensed motor carriers seeking to operate on Port property, it cannot extend those conditions to the contractual relationships between motor carriers and third parties." App. 43a.

transport of interstate goods as to run afoul of *Castle*. App. 32a.

Finally, the panel considered the district court's application of the FAAAA's vehicle-safety exception to the maintenance provision. Acknowledging that the restriction was imposed in part as a result of *environmental* concerns, it held that such mixed motives did not preclude application of the safety exception and that the provision did respond to safety concerns. App. 36a-37a. Moreover, although the provision largely duplicated federal safety requirements, the court held that "the Port need not demonstrate that the requirement to comply with manufacturer's instructions creates safety benefits over and above those [already] created by federal law." App. 38a.

2. Judge N. Randy Smith dissented in part. App. 47a. He agreed that the FAAAA preempts the employee-driver provision but not the financial-capability provision.[4] He also agreed that the maintenance provision is not preempted. Judge Smith disagreed, however, with the panel's conclusions regarding both the market-participant exception and the effect of *Castle*.

With respect to the market-participant exception, Judge Smith noted that the majority opinion conflicts with *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980). *Smith* held that simply owning a facility does not make a government entity a par-

[4] Although the dissent states that Judge Smith "concur[red] that the . . . financial capability provision[] [is] preempted by federal law," App. 58a, it appears he in fact agreed that this provision was *not* preempted, as the dissent provides no other indication of disagreement with the relevant portions of the majority opinion.

ticipant in a market operating within that facility. App. 49a.

Moreover, Judge Smith concluded that the majority permitted the Port to "reach[] beyond the immediate parties with whom it transacts." App. 50a. Such a holding, he noted, is in conflict with Ninth Circuit precedent and with the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). App. 50a.

Judge Smith noted further that, even if the Port had been a participant in the relevant sense, in imposing the off-street-parking provision the Port was "attempt[ing] to address political concerns the Port alleges local community members have raised." It was not—as the market-participant doctrine requires—addressing the "efficient procurement" of goods or services. App. 56a.

Finally, Judge Smith dissented from the conclusion that the Port could completely deny access to federally licensed motor carriers. As he recognized, "*revoking access*, under *Castle*, is an enforcement mechanism beyond the reach of California and its political sub-parts, including the Port." App. 55a. As in *Castle*, barring motor carriers from accessing the largest port in the United States both "would no doubt 'seriously disrupt' drayage carriers' ability to transport goods from ships to other destinations in and outside California" and represents an impermissible "'partial suspension' of drayage carriers' federal permits to transport goods in the stream of interstate commerce." App. 55a-56a.

REASONS FOR GRANTING THE PETITION

The decision below creates and exacerbates multiple conflicts concerning important and recurring issues of federal law. It represents the first time the

market-participant exception has been recognized under the FAAAA outside the highly specific context of municipal actions taken to arrange for the provision of involuntary towing services. No such exception is even hinted at in the statute. In addition, the decision below construes this atextual exception expansively to allow a governmental entity to escape preemption in regulating a market in which it does not itself participate. And the Ninth Circuit, in conflict with previous decisions recognizing only a limited exception to FAAAA preemption, applied an exception untethered to any governmental interest in the efficient procurement of goods and services. The conflicts created by the decision below threaten to create the very patchwork of regulation that the FAAAA was enacted to prevent.

Further review would also allow the Court to resolve a circuit conflict over the scope of "related to" language in the FAAAA preemption clause. That conflict persists even after *Rowe*. The decision below reflects continuation of the Ninth Circuit's uniquely crabbed view of the meaning of the crucial phrase "rates, routes, or services."

Finally, review would allow the Court to reaffirm the continued vitality of its decision in *Castle*. Since *Castle*, federal regulatory policy related to the trucking industry has shifted from one of comprehensive regulation to one of expansive deregulation. But allowing municipal entities such as the Port here to exercise a veto power over federally licensed motor carriers remains entirely inconsistent with the uniform scheme established by Congress, and there is no indication that in enacting the FAAAA Congress intended to overturn *Castle*.

I. The Circuits Are Deeply Divided over the Scope of the "Market Participant" Exception

A. This Case Squarely Presents Two Conflicts in the Context of the FAAAA.

The Ninth Circuit assumed that certain challenged provisions of the concession agreement would be preempted but for an atextual market-participant exception to FAAAA preemption. No such exception exists *at all*, but we can assume for present purposes that the exception does exist. Even on that assumption, the decision below conflicts with two lines of case law. First, it permits a municipal entity, as a supposed market participant, to set conditions on a market in which it does not participate, in conflict with *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980). Second, it allows the Port to impose restrictions wholly divorced from any governmental interest in the "efficient procurement" of goods or services, in conflict with FAAAA decisions from other circuits.

1. The Ninth Circuit held that a State could escape FAAAA preemption by using its *ownership* of a facility to claim that it participated in markets operating *within* that facility. The Fifth Circuit has rejected that argument. App. 48a-49a.

Smith involved a dormant Commerce Clause challenge to rules adopted by Georgia's Department of Agriculture, which gave non-residents inferior sales locations in a farmers' market owned and operated by the State. 630 F.2d at 1082. The Fifth Circuit rejected the State's argument that it was acting as a market participant. The court noted that neither the State nor its Department of Agriculture "produce[d] the goods to be sold at the market" or "engage[d] in the actual buying or selling of those

goods." *Id.* at 1083. Instead, the State "has simply provided a suitable marketplace for the buying and selling of privately owned goods." *Ibid.* As a result, within that marketplace, the State's "essential role is that of market regulator" rather than a participant. *Ibid.*

Smith is binding precedent in the Eleventh Circuit under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Unsurprisingly, *Smith*'s approach has been applied by a district court in the Eleventh Circuit to a situation analogous to that presented here. In *Fla. Transp. Serv., Inc.* v. *Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1281-1282 (S.D. Fla. 2010), the district court concluded that *Smith* precluded the Port of Miami from claiming it was a market participant, when the Port sought to impose conditions on the purchase and sale of stevedoring services while not itself purchasing or providing such services. The court held that "[t]he market participant doctrine does not help the County because the market for port services is distinct from the market for stevedore services. . . . Ownership of the Port does not make the County a participant in the stevedore market any more than ownership of the farmers' market made Georgia a participant in the produce market." *Id.* at 1282.

The Eighth Circuit, by contrast, has indicated its disagreement with *Smith*. According to the Eighth Circuit, when a municipal airport commission provides facilities for a car rental company, it is acting as a market participant. See *Four T's, Inc.* v. *Little Rock Municipal Airport Comm'n*, 108 F.3d 909, 912-913 (8th Cir. 1997). Thus, the Ninth Circuit's decision rejecting *Smith* exacerbates a preexisting conflict.

The Ninth Circuit's decision here additionally conflicts (as Judge Smith recognized in dissent) with the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). The majority did not attempt to claim its position is consistent with *Wunnicke*, stating simply that *Wunnicke* is "not controlling" and is "a perfect example of the Supreme Court's fractured views on the market participant doctrine." App. 26a n.12.

In *Wunnicke*, this Court addressed the permissibility under the dormant Commerce Clause of a requirement imposed by Alaska conditioning the sale of timber on a contractual agreement that the timber be processed within the State before export. See 467 U.S. at 84. A four-Justice plurality of an eight-Justice Court rejected Alaska's claim that it was acting as a market participant. Reasoning that "the doctrine is not carte blanche to impose any conditions that the State has the economic power to dictate," *id.* at 97, the plurality concluded that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further," *ibid.* Justice Powell, joined by Chief Justice Burger, concurred in the judgment and suggested that this Court should have remanded rather than decided the market-participant issue. *Id.* at 101.

This Court and federal courts of appeals have followed the plurality opinion in *Wunnicke*.[5] Yet the

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[5] See, *e.g.*, *Dep't of Revenue of Kentucky* v. *Davis*, 553 U.S. 328, 348 n.17 (2008) (plurality opinion) ("[T]he type of 'downstream regulation' that *South–Central* found objectionable is simply not present here."); *United Healthcare Ins. Co.* v. *Davis*, 602 F.3d 618, 625 (5th Cir. 2010); *Brooks* v. *Vassar*, 462 F.3d 341, 356-357 (4th Cir. 2006); *Antilles Cement Corp.* v. *Acevedo Vilá*, 408 F.3d 41, 46-47 (1st Cir. 2005); *Endsley* v. *City of Chicago*, 230

Ninth Circuit felt free to contradict it. This Court should resolve the conflict.

2. Even if a State may properly claim that it acts as a market participant when imposing conditions on markets in which it does not participate, the Ninth Circuit's holding creates a circuit conflict. According to the decision below, a State acts as a market participant and escapes preemption when it pursues considerations entirely divorced from the efficient procurement of services. Other circuits disagree, even in the very FAAAA context in which this case arises. The limited case law of this Court recognizing such an exception to preemption under a different statute is also wholly at odds with the Ninth Circuit's approach.

Only a few circuits have recognized any market-participant exception to the FAAAA. All have done so in one highly specific factual circumstance. In *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686 (5th Cir. 1999), a municipality decided that the non-consensual towing of vehicles from the public streets would be handled by contracting with a single company in lieu of the previous rotation system. A losing bidder asserted that the contracting ordinance was preempted by the FAAAA. *Id.* at 689. Disagreeing, the Fifth Circuit concluded that a city's contracting decision is shielded from preemption if it "applied to a single discre[te] contract" and was

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F.3d 276, 285 (7th Cir. 2000); *Huish Detergents, Inc.* v. *Warren Cnty., Ky.*, 214 F.3d 707, 716 (6th Cir. 2000); *Chance Mgmt., Inc.* v. *South Dakota*, 97 F.3d 1107, 1112 (8th Cir. 1996); *USA Recycling, Inc.* v. *Town of Babylon*, 66 F.3d 1272, 1282-1283 (2d Cir. 1995); *Atl. Coast Demolition & Recycling, Inc.* v. *Bd. of Chosen Freeholders*, 48 F.3d 701, 716 & n.19 (3d Cir. 1995); *GSW, Inc.* v. *Long County, Ga.*, 999 F.2d 1508, 1515-1516 (11th Cir. 1993).

"designed to insure efficient performance rather than advance abstract policy goals." *Id.* at 693. The court set out its test as follows (*ibid.*):

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary program?

In contrast to the panel decision here, the Fifth Circuit indicated that preemption would apply to a similar scheme that had been primarily motivated by "economics, community development, and social policies." According to the Fifth Circuit, "[w]hile private parties might choose to take into account such factors, the ever present temptation to leverage the spending power and thus intrude on congressional design is such that *the proprietary exception should be reserved for more archetypical market behavior*." *Id.* at 693 n.2 (emphasis added).

The Fifth Circuit's precise, narrow conclusion—that municipal contracting with the providers of nonconsensual towing service was not preempted—was adopted by the Sixth and Ninth Circuits. *Petrey* v. *City of Toledo*, 246 F.3d 548, 559 (6th Cir. 2001) (noting challenged provisions serve City's "narrow proprietary interest" with respect to towing), *abrogated in part on other grounds by City of Columbus* v. *Ours Garage & Wrecker Service, Inc.,* 536 U.S. 424 (2002); *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1049-1050 (9th Cir. 2000), *abrogated in*

part on other grounds by City of Columbus, 536 U.S. 424. However, when a municipality attempted to extend the holding to consensual towing services (for which the municipality is *not* a party to the relevant transaction), the Fifth Circuit rejected the effort. In this context, the challenged provisions "frustrate the normal working of private decisionmaking in a market," and "the City's market power cannot be said to be typical of similar private actors." *Stucky* v. *City of San Antonio*, 260 F.3d 424, 436 (5th Cir. 2001), *abrogated in part on other grounds by City of Columbus*, 536 U.S. 424.[6]

Only once has this Court applied a market-participant exception to conclude that a state action was not preempted—and it did so in a case involving judicially created doctrines of implied preemption under the National Labor Relations Act (NLRA). *Bldg. & Construction Trades Council* v. *Assoc. Builders & Contractors* 507 U.S. 217, 232 (1993) ("*Boston Harbor*"). In doing so, the Court emphasized that the challenged governmental action (1) "was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost" and (2) "was specifically tailored to one particular job." *Ibid.* Here, the Ninth Circuit applied no

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[6] By applying a market-participant exception when the legislative purpose is not efficient procurement, the Ninth Circuit has also created conflicts with decisions outside of the FAAAA context. See *Tri-M Group, LLC* v. *Sharp*, 638 F.3d 406, 421-422 (3d Cir. 2011); *Healthcare Ass'n of New York State, Inc.* v. *Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (quoting approvingly Fifth Circuit's test in *Cardinal Towing*); *Council of City of New York* v. *Bloomberg*, 6 N.Y.3d 380, 395 (2006) ("In enacting the Equal Benefits Law the Council was obviously 'setting policy.' . . . [I]t was not acting just as a manager or owner of property concerned with assuring the cheap and efficient performance of contracts.").

such limitations on the market-participant exception to express FAAAA preemption.

The Court reinforced the limited scope of the NLRA's market-participant doctrine in *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008). Holding a California law preempted by a 7-2 vote, the Court rejected a market-participant defense. The defense was unavailable because the legislative purpose was "not the efficient procurement of goods and services, but the furtherance of a labor policy," *id.* at 70. So too here.

Indeed, the United States, which submitted a brief in this case at the preliminary-injunction stage, termed the Port's market-participant argument "meritless." Brief for the United States as *Amicus Curiae* Supporting Reversal at 24, *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009) (No. 08-56503) ("U.S. *Amicus* Br."). As the United States recognized, "[t]he Ports do not participate in any relevant market." *Id.* at 25. Instead, because the Port's "control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce," the United States urged the court to reject the Port's market-participant argument. *Id.* at 25-26 (internal quotation marks omitted).

In this case, the majority acknowledged that the governmental requirement challenged is not a "narrow spending decision[]," App. 23a, nor does it reflect the Port's interest in "efficient procurement" of goods and services, *ibid.* Nevertheless, the panel concluded that the Port may, without preemption, impose conditions on a market in which it does not participate to ensure that services it does not purchase "are provided in a manner that is safe, reliable, and consis-

tent with the Port's overall goals for facilities management." App. 29a. No other court of appeals would have accepted that argument in the FAAAA context. The analogous argument has been consistently rejected—by this Court and others—outside the FAAAA context. Further review is appropriate.

B. The Questions Presented Are Significant and Recurring

As the many cases cited above demonstrate, the market-participant exception is frequently invoked in cases involving multiple statutes and the dormant Commerce Clause. It arises under the FAAAA and other statutes sharing similar express preemption language, and in cases involving implied field preemption (such as NLRA preemption). Thus, reviewing this case would bring clarity to a doctrine with potential application far beyond the particular context of this statute. At the same time, because this Court has never squarely addressed even the existence of a market-participant exception under an express preemption scheme, the context of this case represents an opportunity to define the particular limits applicable here.

Furthermore, the importance of uniformity to the deregulatory scheme set out by the FAAAA has repeatedly been recognized. As this Court noted in *Rowe*, the FAAAA's preemption clause was modeled on language in the ADA and reflected a congressional goal of "helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). As with the ADA, "[i]n reducing federal economic regulation of the field to al-

low the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Mass. Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Yet allowing the intercircuit differences discussed above to persist would lead to just that "patchwork of state service-determining laws, rules, and regulations" that this Court sought to avoid in *Rowe*. 552 U.S. at 373.

II. The Ninth Circuit Decision Also Expands and Entrenches a Circuit Split as to When a State Regulation Is "Related to a Price, Route, or Service"

The decision below reinforces the Ninth Circuit's cramped reading of "rates, routes, or services" under both the ADA and FAAAA. That reading has long conflicted with other circuits' position, as three Members of this Court recognized in *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (dissent from denial of certiorari). In addition, the challenged governmental restrictions here *directly targeted* motor carriers. The panel's conclusion that such targeted restrictions are not preempted because they are insufficiently related to the "prices, routes, or services" of motor carriers flies in the face of the teaching of this Court and other circuits in related preemption settings.

A. This Case Creates a Conflict with Preemption Decisions Under Related Statutes

Relying on a Ninth Circuit precedent permitting a municipality to condition airline leases of airport facilities on compliance with a generally applicable city ordinance, the decision below created a conflict as

to when a state regulation has a "reference to carrier rates, routes, and services." The majority created that conflict by ignoring the specifically targeted nature of the restrictions at issue in this case. That omission contravenes the binding precedent of this Court in the analogous context of preemption under the Employee Retirement Income Security Act (ERISA) and the decisions of several circuits that have faithfully followed that mandate.

In the ERISA context, this Court has recognized the salience of the fact that a state law specifically targets the subject matter regulated by the preemptive federal statute. In *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988), the Court concluded that a state garnishment statute was preempted by ERISA, which displaces "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). The state statute at issue, the Court noted, "expressly refers to—indeed, solely applies to—ERISA employee benefit plans." *Mackey*, 486 U.S. at 829. The Court had "virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted." *Ibid.* Later cases have only reinforced the importance of that distinction. *E.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990) ("We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.").

Numerous courts of appeals have analyzed in the ERISA context whether the challenged regulation is generally applicable or instead singles out the subject of the federal scheme for special treatment. See, *e.g.*, *Ky. Ass'n of Health Plans, Inc.* v. *Nichols*, 227 F.3d 352, 360 (6th Cir. 2000) ("While a mere reference to an ERISA plan, without more, may not be enough to cause preemption, . . . if such a reference is combined with some effect on those plans, such as singling them out for different treatment, preemption will result."), *aff'd sub nom. Ky. Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329 (2003); *Greater Washington Bd. of Trade* v. *Dist. of Columbia*, 948 F.2d 1317, 1322 (D.C. Cir. 1991) ("[T]he '*Shaw* "exception"—that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner—applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans.'") (quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir. 1991)), *aff'd*, 506 U.S. 125 (1992). See also *Prudential Ins. Co. of Am.* v. *Nat'l Park Med. Ctr., Inc.*, 154 F.3d 812, 822 (8th Cir. 1998); *United Wire, Metal & Mach. Health & Welfare Fund* v. *Morristown Mem'l Hosp.*, 995 F.2d 1179, 1192 (3d Cir. 1993).

Courts of appeals have also recognized the salience of a law's general applicability outside the context of ERISA preemption. Applying the preemption provision of the ADA and conducting a field preemption analysis under the Federal Aviation Act of 1958, the Second Circuit in *Goodspeed Airport LLC* v. *E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212 (2d Cir. 2011), noted that "the generally applicable state laws and regulations imposing permit requirements on land use challenged here do not, on the facts before us, invade th[e]

preempted field [of aviation safety]." Applying the ADA in *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003), the Eleventh Circuit held that "the phrase 'related to the . . . services of an air carrier' means having a connection with or reference to the elements of air travel that are bargained for by passengers with air carriers. . . . This connection can be established by showing that the state law in question either directly regulates such services or . . . has a significant economic impact on them."

The decision below conflicts with this long line of authority and with the common understanding that state laws targeting the very subject of a preemptive federal act—whether it be ERISA plans, the airline industry, or the trucking industry—are preempted. As this Court noted in *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995), the expansive language of the ADA's preemption clause should be read in light of the statute's deregulatory purpose to indicate that "States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier" (internal quotation marks omitted). The challenged provisions in this case do exactly that.

Indeed, the United States, in its earlier *amicus* brief, recognized that the concession agreements fall "squarely within the FAAAA's preemptive scope." U.S. *Amicus* Br. 7. As the United States noted (*id.* at 8-9):

> The concession agreements at issue here affect motor carriers' "price, route, or service" far more directly than the regulations on tobacco shippers at issue in *Rowe*. The concessions are essentially licenses to provide motor carrier

> services within the Ports. To enter the Ports—and thus to access any routes or provide any services to customers within the Ports—carriers must agree to comply fully with the multifarious requirements of the concession agreements.

Here, however, although petitioner raised the concession agreements' specific targeting of drayage service providers in its Ninth Circuit brief, the panel ignored the significance of targeting in concluding that "a State may condition access to State property so long as the conditions do not impose costs that *compel* the carrier to *change* rates, routes, or services." App. 21a (emphasis added). Applying that novel rule even to conditions targeting motor carriers conflicts with governing precedent of this Court.

B. This Case Entrenches a Conflict Regarding the Scope of the FAAAA's Preemption Clause

As far back as 2000, three Justices recognized a conflict among the courts of appeals regarding when a given restriction "relates to carrier rates, routes, or services." As Justice O'Connor recognized in dissenting from the denial of certiorari, the Ninth and Third Circuits define "services" narrowly for the purposes of preemption to include only "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." *Northwest Airlines*, 531 U.S. at 1058 (quoting *Duncan* v. *Northwest Airlines, Inc.*, 208 F.3d 1112, 1114 (9th Cir. 2000), and citing *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998)). In sharp contrast, the Fourth, Fifth, and Seventh Circuits have all adopted a broader definition of "services," covering the "[contractual] features of air trans-

portation." *Ibid.* (alteration in original) (quoting *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc), and citing *Smith* v. *Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998), and *Travel All Over The World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996)). The Eleventh Circuit later adopted this broader understanding as well. See *Branche*, 342 F.3d at 1257.

Since the conflict was first recognized, this Court decided *Rowe*. There, it made clear that "services" under the FAAAA must extend at least to such things as a carrier's (a) use of a recipient-verification system, see 552 U.S. at 368, 371-372, and (b) examination of a package to ensure that it is not being sent by a party listed as an unlicensed tobacco retailer, *id.* at 369, 372-373. Although the Court did not expressly resolve the circuit split, neither provision of the Maine law held preempted in *Rowe* fits comfortably within the Ninth Circuit's "public utility" understanding of the FAAAA's preemption clause. See *Air Transp. Ass'n of Am.* v. *City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001). As a result, two circuits confronting this question after *Rowe* have adopted the broader approach first set out by the Fifth Circuit. *DiFiore* v. *Am. Airlines, Inc.*, 646 F.3d 81, 87-88 (1st Cir. 2011), *cert. denied*, No. 11-221 (Nov. 28, 2011); *Air Transp. Ass'n of Am.* v. *Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008). The First Circuit has correctly understood that the conflict "has been super[s]eded by controlling Supreme Court case law—namely, by *Rowe*'s expansive treatment of the term 'service.'" *DiFiore*, 646 F.3d at 88.

As this case demonstrates, however, the Ninth Circuit still clings to its narrow construction of the ADA's and FAAAA's preemption clauses. See App. 16a-17a; see also *Ginsberg* v. *Northwest, Inc.*, 653

F.3d 1033, 1041-1042 (9th Cir. 2011); *Ventress* v. *Japan Airlines*, 603 F.3d 676, 682-683 (9th Cir. 2010). The concession agreements imposed by the Port plainly regulate the contractual features of the provision of trucking services. Had the Ninth Circuit adopted other circuits' interpretation of "services" under the ADA and FAAAA, it would have been clear that a requirement directly targeting the provision of motor carrier services is subject to preemption under the FAAAA. The decision below should be reviewed (if not summarily reversed).

III. The Decision Below Conflicts with Controlling Precedent of This Court

Well before the passage of the FAAAA, this Court recognized limitations on the ability of States and municipalities to regulate federally licensed motor carriers. Even when regulating in an area of traditional state concern, a State is barred from enforcing its laws through even a partial suspension of the motor carrier's ability to operate in interstate commerce. The decision below rejects that limit—left unaltered by the passage of the FAAAA—in concluding that the Port can enforce a provision of the concession agreements by denying LMCs access to the Port of Los Angeles, thereby effecting a partial suspension of their federally granted licenses.

In *Castle* v. *Hayes Freight Lines, Inc.*, the Court addressed the scope of a State's "power . . . to bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations." 348 U.S. at 62. This Court noted that the adoption of the Motor Carrier Act of 1935 had greatly reduced States' former power over interstate motor carriers and that the Interstate Commerce Commission ("ICC") itself operated under specific

provisions governing the issuance and revocation or suspension of certificates. "Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 64. Since "[i]t cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate," the Court explained, a State may not enforce even an indisputably proper state regulation by resorting to such a penalty. *Ibid.*

Although the federal scheme regulating interstate motor carriers has changed since *Castle*, those changes have not altered this underlying limit on a State's regulatory authority. When Congress enacted the motor-vehicle-safety exception in the FAAAA's preemption clause, it acted against the backdrop of this settled law. It did not expand the regulatory authority of the States. See 49 U.S.C. § 14501(c)(2)(A) (noting the relevant preemption provision of the FAAAA "shall not restrict the safety regulatory authority of a State with respect to motor vehicles"). Indeed, just three days after the FAAAA's enactment, Congress enacted the Trucking Industry Regulatory Reform Act of 1994, reinforcing the ICC's authority to grant LMCs operating authority, while providing that the granted authority was now nationwide and not limited by a need to make a route-specific public interest finding. See Pub. L. No. 103-311, § 207 (1994), 108 Stat. 1683, 1686-1687. The 1995 ICC Termination Act, Pub. L. No. 104-88, provided for the retention of federal authority to license an interstate motor carrier's operations. See ICC Termination Act of 1995, Pub. L. No. 104–88, § 13902, 109 Stat. 803. Not one of those statutory amendments indicates an

intent to reverse the longstanding statutory interpretation regarding the limits on States' abilities to enforce vehicle-safety regulations.

The limits set out in *Castle*, and reaffirmed in cases such as *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), make clear that States and municipalities are prohibited from "exercising any veto power" over interstate motor carriers, *id.* at 85; see also *R.R. Transfer Serv. Inc.* v. *City of Chicago*, 386 U.S. 351, 359 (1967). In its *amicus* brief in the preliminary-injunction proceedings in this case, the United States made clear that, "[l]ike a federal system of comprehensive regulation, a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." U.S. *Amicus* Br. 10.

The panel majority below purported to distinguish *Castle* on the ground that, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.'" App. 32a. The penalty, according to the panel, did not rise to the level of the "comprehensive ban" in *Castle*. Yet *Castle* does not apply solely to a "comprehensive ban" on an LMC's operations but extends to a "partial suspension of its federally granted certificate." 348 U.S. at 64. A motor carrier's federally granted interstate operating authority includes the transport of commodities between ocean ports and inland locations within the same state. See *Lodi Truck Serv., Inc.* v. *United States*, 706 F.2d 898, 899-900 (9th Cir. 1983). As a result, suspending these operators' ability to

transport commodities to or from the Port of Los Angeles operates as a partial suspension of the carriers' federal registrations. The decision below therefore conflicts with settled precedent of this Court in a respect critical to the efficient operation of the federal deregulatory scheme.

IV. The Decision Below Wrongly Answers Each of the Questions Presented

The decision below is deeply flawed at every turn. As an initial matter, the panel was wrong to reverse the Ninth Circuit's earlier conclusion that it "can hardly be doubted" that "the Concession agreements relate to prices, routes or services of motor carriers." App. 221a. The concession-agreement scheme imposed by the Port *directly targets* motor carriers. The panel was also wrong to suggest that the broad term "relate to" should be interpreted as covering only those state and local requirements that "compel changes to" prices, routes or services. Moreover, the authority claimed by the Port to prohibit motor carriers from entering its property and providing services represents "the very effect the federal law sought to avoid, *i.e.,* a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U.S. at 365.

The Ninth Circuit similarly erred in concluding that any aspect of the challenged provision can be justified under a market-participant exception. The FAAAA nowhere expressly provides that Ports or any other governmental entities may enact otherwise-preempted regulations provided they do so while acting in a "proprietary capacity." That absence is telling since, under the ADA's materially identical

preemption scheme, Congress *did* provide exactly such an exception for municipally owned airports. See 49 U.S.C. § 41713(b)(3).

Congress likewise has elected to include market-participant exceptions (in a variety of forms) in a number of express preemption schemes, but not in others. Compare, *e.g.*, 15 U.S.C. § 2075(b) (allowing a federal, state, or local government to "establish[] or continu[e] in effect a safety requirement applicable to a consumer product for its own use which requirement is designed to protect against a risk of injury associated with the product and which is not identical to the consumer product safety standard applicable to the product under this chapter if the . . . requirement provides a higher degree of protection from such risk of injury"); 49 U.S.C. § 30103(b)(1) (allowing federal, state, or local government to "prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard"), with 49 U.S.C. § 14501(c)(2)(C) (providing, in the FAAAA's only provision even arguably recognizing an exception for state and local governments' proprietary interests, that the Act does not preempt laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle"). There would be no need for Congress to include such provisions if the "market participant" exception could be read in by the courts. In addition, when Congress has elected to include such an exception in a preemption scheme, it ordinarily has limited it to the procurement activities of state or local governments (limits the Ninth Circuit in this case disregarded).

There is no textual basis for inferring, as the Ninth Circuit has, a market-participant exception to the broad terms of the FAAAA's preemption provision. The provision at issue here—a municipal ordinance backed by the threat of criminal prosecution requiring LMCs to enter into concession agreements to serve the Port—is a "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). That should be the end of the inquiry.

Boston Harbor is not to the contrary. That case did not deal with express preemption, but rather implied preemption. The same justification of adding a doctrine grounded in assumed congressional intent into the sphere of implied preemption under the NLRA is wholly lacking where, as in this case, Congress has expressly set out the scope of preemption.

Moreover, in *Boston Harbor* this Court relied on the fact that exempting a government's truly proprietary actions would serve the goals of the NLRA, because that statute included an exception for the construction industry specifically authorizing the use of pre-hire agreements of the very kind required by the government as the purchaser of services. See 507 U.S. at 231. The FAAAA, by contrast, provides no exceptions for private or public parties to create restrictions of the sort instituted by the Port here. Indeed, the FAAAA categorically bars a State from "requir[ing] a motor carrier . . . to display any form of identification on or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation" (49 U.S.C. § 14506(a)). In light of that proscription, it is difficult to see why a State or municipality should be entitled (as the Ninth Circuit held) to impose exactly such a requirement

merely because it purports to act as a market participant.

The Fourth Circuit has confronted a similar situation in which a municipal port sought to bar access to federally licensed fishermen. Facing a preemption challenge under the Magnuson Act, the port invoked what it termed a "proprietary capacity exception." The Fourth Circuit refused to read such an exception into the statute, concluding that there is "no explicit provision creating a proprietary exception[,] . . . [n]or does the City point to any basis for concluding that such an exception is implied." *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-179 (4th Cir. 2002).

Even if such an exception could properly be inferred by the courts, the breadth of the exception recognized here threatens to swallow the FAAAA's general preemption rule. The restrictions imposed by the Port here are unconnected with any interest in specifying what service it is procuring or "ensur[ing] that [its] funds are spent in accordance with the purposes for which they are appropriated." *Chamber of Commerce*, 554 U.S. at 70. Instead, the Port, as the panel acknowledged, neither provides nor procures any drayage services. App. 27a-28a. The Port's "participation" in the market is as a regulator only.

Nor is this all. The panel majority justified use of the market-participant exception on the sweeping ground that the Port's actions were undertaken to "[e]nhanc[e] good-will in the community surrounding the Port," App. 40a, or to "receiv[e] complaints about drayage trucks entering, leaving, and operating on its property," App. 46a. To allow a governmental actor to pursue actions simply because they "enhance goodwill in the community" is to recognize a market-par-

ticipant exception that swallows the general rule of preemption.

Finally, as noted above, the panel opinion is inconsistent with this Court's decision in *Castle*. While Congress in enacting the FAAAA did preserve the "safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(a)(2), neither the FAAAA nor any later statute indicated that the authority preserved was unconstrained by long-recognized limits on remedial authority. Instead, as the United States argued in the preliminary-injunction proceedings, "[l]ike a federal system of comprehensive regulation, a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." U.S. *Amicus* Br. 10. Moreover, as in *Castle* itself, there is no indication that the "conventional forms of punishment are inadequate" to enforce any safety regulations imposed by the Port. See *Castle*, 348 U.S. at 64.

The panel in this case did not directly conclude that *Castle* has been modified or overturned by later developments. Instead, it purported to distinguish the decision on the ground that denial of access to a Port is not the equivalent of a "comprehensive ban." App. 32a. But that rationale is untenable. The Port of Los Angeles "handles more shipping container and cargo volume than any other port in the country." App. 6a. Preventing federally licensed motor carriers from accessing this Port undeniably precludes them from engaging in the interstate transport of goods entering the United States through the Port and destined to customers both within and outside the State of California. The Port's actions thus plainly

serve as a partial suspension of these carriers' operating authorities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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