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 FOR PETITIONER

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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Title 49 U.S.C. § 14501(c)(1), originally enacted as a provision of the Federal Aviation Administration Authorization Act of 1994, provides that "a State [or] political subdivision .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 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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The opinion of the court of appeals, as amended October 31, 2011 (Pet. App. 1a-58a), is reported at 660 F.3d 384. The opinion of the district court (Pet. App. 59a-137a) is unreported. The earlier opinions of the court of appeals in connection with petitioner's request for a preliminary injunction (Pet. 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 (Pet. App. 149a-207a, 239a-272a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on September 26, 2011. This Court's jurisdiction rests on 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 Pet. App. 273a-279a.

STATEMENT

In 2008, the Port of Los Angeles set out to transform the market for motor carrier services at what was then and is now the busiest container port in the United States. Adopting what amounts to a comprehensive licensing scheme, the Port required each motor carrier serving terminal operators at the Port to enter into a "Concession Agreement" with the Port governing everything from the maintenance by motor carriers of trucks serving the Port, to the

locations where trucks could be parked when not in service at the Port, to the organization of the motor carriers' work force. The Port enforced its new concession requirements in two ways. The Port amended its tariff to impose a penally enforceable prohibition on terminal operators doing business with motor carriers that had not agreed to the Port's requirements. And it included within the concession agreements themselves remedial provisions purporting to grant the Port the right to take actions up to and including revoking a motor carrier's authority to operate at the Port in the event the carrier committed a "default" under the concession.

The Port's actions would plainly be preempted had it imposed the same conditions as part of a licensing scheme. Yet the Port seeks to use the fact that it is imposing conditions on the provision of motor carrier services here through what it has termed a concession agreement rather than a license to avoid preemption. The form the requirements take makes a difference, the Port argues, citing the "market participant" doctrine developed in this Court's Commerce Clause cases. This case therefore poses the question whether any such exception exists under a statutory scheme expressly preempting states from "enact[ing] or enforc[ing] a 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). If so, this case presents the question whether such an exception, properly construed, could save the Port's attempt here to impose conditions on a market in which it does not participate. And, because the Port asserts authority to enforce the concession requirements by suspending or revoking a motor carrier's authority to operate at the Port, this case also poses the question whether a

municipal governmental entity may impose such a remedy on a federally licensed motor carrier, in conflict with longstanding precedent of this Court.

A. The Federal Aviation Administration Authorization Act of 1994

The trucking industry has for almost two decades operated under a comprehensive deregulatory regime at the federal and state levels. Deregulation at the federal level came first, through enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. That Act displaced a body of pervasive federal regulation of the interstate trucking industry under the Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543.

In 1994, Congress passed the Federal Aviation Administration Authorization Act (FAAAA) to preempt States from counteracting this deregulatory federal policy through the introduction of a multiplicity of state and local regulation. As Congress noted in express findings within the Act, expansive preemption was required because even state regulation of *intrastate* transportation of property "(A) imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, § 601(a)(1)(A)-(B), 108 Stat. 1569 (1994). To remove those impediments to interstate commerce, Congress enacted a broad preemption clause, modeled on the equally expansive preemption clause of the Airline Deregulation Act (ADA) of 1978. Pub. L. No. 95-504, 92 Stat. 1705. That Act had, for the airline industry, combined deregulation at the federal level with expansive preemption of state and local

regulations to "ensure that the States would not undo federal deregulation with regulation of their own." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2007) (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Congress copied the language of the ADA "fully aware" of the broad preemption interpretation that language had been given by this Court in *Morales*. *Ibid.* (citing H.R. Conf. Rep., No. 103-677, at 83, 85 (1994)).

The FAAAA therefore provides that "a State, political subdivision of a State, or political authority of 2 or more States 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." 49 U.S.C. § 14501(c)(1). The Act expressly addresses vehicle identification requirements, providing that "[n]o State, political subdivision of a State, interstate agency, or other political agency of two or more States may enact or enforce any law, rule, regulation standard, or other provision having the force and effect of law that requires 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." *Id.* § 14506(a).

B. The Port's Mandatory Concession Agreements

Petitioner, the American Trucking Associations, Inc. (ATA), is a nonprofit national trade association for the trucking industry, with its membership including motor carriers providing drayage services at the Port. Pet. App. 67a. Drayage providers are

federally licensed motor carriers (LMCs)[1] that contract with ocean carriers, cargo owners, or others in the transportation chain to transport cargo between marine terminals and customers or other avenues for further transport such as off-Port long-distance trucks and railheads. Pet. App. 6a, 71a-72a.

In November 2006, the Board of Harbor Commissioners for the Port of Los Angeles decided, in conjunction with the physically contiguous Port of Long Beach, to adopt a "Clean Air Action Plan." That plan was designed to reduce emissions relating to the Port's activities through, among other things, changes in the ways drayage services were provided by the Port. Pet. App. 79a-80a.

The Port is, by cargo volume, the largest port in the United States, handling more than $240 billion in cargo in 2007. Indeed, considered with the Port of Long Beach, the Port of Los Angeles was the fifth busiest port in the world by cargo volume in 2007. Pet. App. 69a. Formally organized as the Los Angeles Harbor Department, the Port is a department of the City of Los Angeles, managed by the Board of Harbor Commissioners. *Id.* at 67a-68a. The Port operates as a landlord port: rather than operate terminal facilities itself, it develops those facilities and then leases them to marine terminal operators. *Id.* at 71a.

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[1] The Secretary of Transportation registers motor carriers to operate in interstate commerce. 49 U.S.C. § 13902. The Secretary must find, among other things, that the carrier is "willing and able to comply with" safety regulations imposed by the Secretary, safety fitness requirements established under *id.* § 31142, and minimum financial responsibility requirements established under *id.* §§ 13906, 31138, and 31139.

In the past, LMCs frequently provided drayage services by contracting with independent owners and operators of the drayage trucks at the Port. Before the actions giving rise to this litigation, drayage services had never had to enter into any contract or lease with the Port to provide services. Pet. App. 84a.

In November 2007, the Board of Harbor Commissioners approved the first step of a "Clean Truck Program," amending the Port's Tariff No. 4 to put in place a progressive ban on older trucks providing drayage services at the Port. Pet. App. 83a. In March 2008, the Board amended the Tariff again, this time to impose a requirement that, beginning on October 1, 2008, all motor carriers seeking to provide drayage services at the Port sign a mandatory concession agreement. *Id.* at 84a. In its order instituting the new requirement, the Board concluded that it was necessary because "[u]nder the existing drayage trucking market structure certain economic costs of the drayage service business are externalized, and not paid for by the Licensed Motor Carriers or the cargo owners, but often borne by [independent] truck drivers, the Port or the communities near the Port." C.A. Supp. E.R. 5.

The Board subsequently issued form "contracts" setting out the terms of the mandatory concession agreement. As the Port's Operations and Finance & Administration Bureaus noted, the "LMC-accountable requirements contained in the concession agreement" are "designed to help transform the drayage marketplace from one where multiple participants can operate with little oversight, to a safe, secure, sustainable and environmentally responsible system." 4 C.A. E.R. 565. Among the numerous "Concession Requirements" imposed by the

Port were requirements (1) that motor carrier providing drayage services at the Port transition over five years to "100% Employee Concession drivers" in place of independent contractor drivers (the "employee-driver provision"), JA__; (2) that the motor carrier "submit for approval by the Concession Administrator, an off-street parking plan that includes off-street parking location(s) for all Permitted Trucks" (the "off-street-parking provision"), JA__; (3) that the motor carrier "prepare an appropriate maintenance plan for all Permitted Trucks" and "ensure that the maintenance of all Permitted Trucks . . . is conducted in accordance with manufacturer's instructions" (the "maintenance provision"), JA__; (4) that, "[w]hen entering and leaving Port property and while on Port Property," the motor carrier "post placards on all Permitted Trucks referring members of the public to a phone number to report concerns regarding truck emissions, safety and compliance to the Concession Administrator and/or authorities" (the "placard provision"), *ibid.*; and (5) that the motor carrier "demonstrate to the satisfaction of the Executive Director that it possesses the financial capability to perform its obligations under this Concession" (the "financial-capability provision"), JA__.

The mandatory concession agreement provides that, among other things, "[a]ny failure to comply with the terms and conditions of this Concession" constitutes a default that, if not timely cured, would permit the Port to treat the concession agreement as terminated. JA__. In the event of such a termination, the Port may "deny any and all access to Port property" to the defaulting motor carrier. *Ibid.* Moreover, any violation of the concession requirements—which are incorporated into Tariff No.

4—can give rise to criminal penalties, including fines and imprisonment. 4 C.A. E.R. 712.

C. Prior Proceedings in This Case

Following the adoption of the Port's novel concession agreement requirement, Petitioner filed a complaint against Respondents 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.[2] The complaint alleged that the mandatory concession agreements were preempted by the Supremacy Clause of the United States Constitution and Section 14501(c) of the FAAAA.

Petitioner sought a preliminary injunction in connection with the preemption-related counts of its complaint. Respondents defended the imposition of the concession agreements on three principal grounds. First, they claimed that, because the Port was located on "sovereign tidelands," any requirements imposed by the concession agreements are exempted from preemption. Pet. App. 249a. Second, they claimed that the concession agreements fall within a "market participant" exception to preemption under the FAAAA. *Ibid.* Finally, they claimed that the concession agreements fall within the FAAAA's express exception to preemption for

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[2] Petitioner also initially filed suit against the City of Long Beach, the Harbor Department of the City of Long Beach, and the Board of Harbor Commissioners of the City of Long Beach, challenging a similar but not identical concession plan imposed by the Port of Long Beach. See Pet. App. 242a-243a. Petitioner and the Long Beach defendants settled during the preliminary injunction proceedings in this litigation. *Id.* at 7a n.5

state and local regulations passed under the "safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(c)(2)(A). Pet. App. 249a.

The district court concluded that the concession agreements likely fall within the FAAAA's preemption clause. It also concluded, initially, that neither the Port's location on "sovereign tidelands" nor any "market-participant" exception insulates the Port's actions from FAAAA preemption. Pet. App. 250a-252a, 254a-261a. But, the court concluded, the requirements imposed by the concession agreements fall within the statutory safety exception. *Id.* at 262a-266a.

On appeal, the Ninth Circuit unanimously held that the district court had erred in failing to recognize that "the mere fact that one part of a regulation or group of regulations might come within an exception to preemption does not mean that all other parts of that regulation or group are also excepted." Pet. App. 225a. It noted that the preliminary injunction record included evidence of several other purposes for the concession agreements beyond simply addressing vehicle safety, including "an expansive attempt to reshape and control the economics of the drayage industry in one of the largest ports in the nation." *Id.* at 225a-226a. Finding it "likely that many of those provisions are preempted," *id.* at 229a, the Ninth Circuit remanded to allow the district court to consider whether the concession agreement was preempted in its entirety or only in part. *Id.* at 237a.

On remand, the district court enjoined the employee-driver, financial-capability, and off-street-parking provisions. It denied a preliminary injunction against the maintenance and placard provisions,

concluding that they fall within the FAAAA's safety exception. Pet. App. 204a-205a. On a subsequent appeal, the Ninth Circuit reversed the district court again with respect to the placard provision, holding that the provision was likely preempted by the preemption clause of 49 U.S.C. § 14506(a), which includes no safety exception. Pet. App. 144a.

Following the preliminary-injunction proceedings, the district court conducted a bench trial. The court held that none of the challenged provisions of the concession agreement is preempted. Rejecting ATA's argument that all of the concession agreement requirements are *per se* "related to a price, route, or service" of a motor carrier, the district court held that the maintenance, placard, and financial-capability provisions do not fall within the Act's preemption clause, Pet. App. 101a-04a, while concluding further that the maintenance and placard provisions fall within the FAAAA's express exception for safety regulation, Pet. App. 109a-110a.

The district court further held that the market-participant doctrine *also* saved from preemption each of the five challenged provisions of the concession agreement. According to the district court, (1) the employee-driver provision was "economically motivated" and an action "that a private company with substantial market power—such as the oligopoly power of the Port—would take when possible," Pet. App. 125a; (2) the off-street parking and placard provisions were "designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them," Pet. App. 127a; and (3) the maintenance and financial capability provisions were designed "to ensure that the trucking companies had

the resources to sustain the Port's investment in cleaner trucks," *ibid.*[3]

D. The Court of Appeals' Decision

In a 2-1 decision, the Ninth Circuit affirmed in part and reversed in part. The court concluded that the employee-driver provision is preempted but that the other four challenged concession provisions are not.

First, the court concluded, as the district court had, that the financial-capability provision does not fall within the terms of the FAAAA's preemption clause. Pet. App. 33a-34a. It further agreed with the district court that the maintenance provision falls within the FAAAA's express safety exception. Pet. App. 35a. That the requirement was also motivated by environmental concerns does not, the Ninth Circuit held, preclude application of the safety exception, "provided that the State's safety motives are not pre-textual." *Id.* at 36a. Moreover, the fact that the regulations in part simply duplicate federal law similarly does not preclude application of the exception because "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." *Id.* at 38a.

With respect to the final three challenged requirements (the off-street-parking, employee-

[3] As part of its Clean Truck Plan, the Port had provided financial incentives to purchase compliant new drayage trucks or to retrofit older trucks. Pet. App. 11a. The concession agreement requirements, however, are not limited to LMCs using trucks purchased through the Port's incentive plan. See Pet. App. 44a.

driver, and placard provisions), the court's decision turned on its analysis of a "market participant" exception found nowhere in the text of the FAAAA itself. Outlining a "two-prong test adopted by [the Ninth Circuit] as a guide for determining whether the market participant doctrine applies," *id.* at 21a-22a, the court held that a State's action would qualify for the exception if *either* of two questions could be answered in the affirmative:

> 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 problem?

Id. at 22a (quoting *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)).

Acknowledging that the Port's requirements in this case would not satisfy the second prong of the test, as they were "not limited to contracts of a particular size or subsidized by state funds, and are not limited to drayage operations for a particular time," the court instead focused on whether "the nature of the concession agreements is essentially proprietary." Pet. App. 23a. In doing so, the Ninth Circuit rejected the notion that any market-participant exception under the FAAAA is limited to state actions involving efficient procurement, or to state actions imposing conditions on the specific market in which the state participates, *id.* at 25a-28a. Thus, it held that "when an independent State entity man-

ages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant doctrine"—and therefore escape preemption under the FAAAA. *Id.* at 29a.

The court ostensibly recognized that, "'[w]here the State seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the State,' the State's actions are 'tantamount to regulation.'" Pet. App. 29a-30a (quoting *Johnson* v. *Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1025-26 (9th Cir. 2010)). The court then proceeded to consider individual provisions of the concession agreements.

For the off-street-parking provision, the court stated that the requirement was imposed based on a belief that it would "mitigate drayage trucks' negative impacts and increase the community good-will necessary to facilitate the Port expansion." Pet. App. 40a. It held that "[e]nhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest." *Ibid.*

For the placard provision, the court acknowledged that the challenged provision "may" fall within the section of the FAAAA specifically preempting state or local requirements that a motor carrier "display any form of identification on or in a commercial vehicle . . . other than the forms of identification required by the Secretary of Transportation," 49 U.S.C. § 14506(a). Pet. App. 46a. The court reasoned, however, that "the Port has a proprietary interest in receiving complaints about drayage trucks entering, leaving, and operating on its property" and that the placard requirement falls within the market-

participant exception as "[a] private facilities provider would do the same." *Ibid.*[4] The court made little effort to link that statement to statutory text or purpose.

Finally, the court rejected Petitioner's argument that, under *Castle* v. *Hayes Freight Lines*, 348 U.S. 61 (1954), the Port could not enforce even its nonpreempted regulations by denying a federally licensed motor carrier access to the Port. The majority held that, "[w]hile a denial of access to the Port may have more effect on motor carriers than a traditional fine, it does not rise to the level of the comprehensive ban at issue in *Castle*," such that the enforcement authority the Port provided itself under the concession agreements does not violate this Court's precedent. Pet. App. 32a.

Judge N. Randy Smith dissented in part. He concluded that the market-participant exception cannot save from preemption either the off-street-parking provision or the placard provision, and that the enforcement authority claimed by the Port in this case runs afoul of *Castle*.

On the market-participant exception, Judge Smith applied the same two-prong test as the majority but concluded that "[t]he Port's regulation of drayage services does not quality as 'efficient procurement' of needed services." Pet. App. 48a. Judge Smith cited with approval the Fifth Circuit's holding that "mere ownership of a facility does not make the government

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[4] The court concluded that the employee-driver provision could not be upheld under the market-participant doctrine. In imposing that requirement, the court held, the Port had "unilaterally insert[ed] itself into the contractual relationship between motor carriers and drivers." Pet. App. 43a.

a participant in the markets operating in that facility." Pet. App. 48a (citing *Smith* v. *Dep't of Agriculture*, 630 F.2d 1081 (5th Cir. 1980)). Relying on dormant Commerce Clause cases from this Court, including the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), he further reasoned that the Port impermissibly "reaches beyond the immediate parties with whom it transacts, because it does not transact business with drayage service providers." Pet. App. 50a. Because the Port neither purchases nor provides drayage services and indeed "does not involve itself in *any* market activity with the independent contractors and companies providing drayage services," its actions cannot be justified on any market-participant exception to preemption. Pet. App. 51a. Moreover, even if the Port could qualify as a market participant, Judge Smith noted, the off-street-parking requirement is preempted. It is directed not at the "efficient procurement" of services, but rather at "an attempt to address political concerns the Port alleges local community members have raised regarding drayage truck parking practices, which are not related to any contracts between drayage providers and the Port." Pet. App. 56a.

On the Port's ability to bar access to motor carriers to enforce its safety regulations, Judge Smith concluded that "the preemption analysis in *Castle* still applies, even if the form of comprehensive federal regulation has changed over the years." Pet. App. 53a-54a. Although the panel majority held that a bar from accessing the Port was distinguishable from the statewide ban at issue in *Castle*, Judge Smith recognized that *Castle* precludes even "partial suspension" of a motor carrier's federal permit to transport goods that "seriously disrupt[]," without

necessarily eliminating, the ability to transport goods. *Id.* at 55a. He further explained that the drayage operations at the heart of this case constitute interstate commerce as "part of the continuous flow of goods between locations *outside* California and customers *within* California." Judge Smith therefore concluded that "[b]arring access to the Port of Los Angeles—the largest port in the United States and one of only a handful of large commercial deep-water ports on the West Coast—would no doubt 'seriously disrupt' drayage carriers' ability to transport goods from ships to other destinations in and outside California." *Ibid.*

SUMMARY OF ARGUMENT

I.A. "When 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 of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). Here, the FAAAA's plain wording specifically defines the scope of preemption: Any "law, regulation, or other provision having the force and effect of law" that "relate[s] to" the statute's subject matter is preempted. 49 U.S.C. § 14501(c)(1). The Port's concession agreement constitutes a mandatory requirement, by order of the Board of Harbor Commissioners, imposed on all licensed motor carriers providing drayage services at the Port. Indeed, the concession requirements are incorporated into a tariff that is penally enforceable through fines and even imprisonment. The concession requirements easily have the requisite "force and effect of law"—and fall squarely within the FAAAA's

express preemption provision. None of the parties contends otherwise.

B. There is no reason to reach beyond the FAAAA's plain wording by grafting on to the Act a market-participant exception developed by courts in Commerce Clause cases. Congress created several other express exemptions to the FAAAA's broad preemption provisions, but chose not to include a market-participant exception (as it has in other express preemption statutes). Indeed, the Airline Deregulation Act (ADA) provision on which the FAAAA's preemption clause was modeled contains an express exception for "proprietary" acts—the very type of exception respondents ask this Court to create here. 49 U.S.C. § 41713(b)(3). But Congress *omitted* that exception when it drafted the FAAAA. Congress therefore did not intend to include such an exception to the FAAAA's preemption provisions.

Even if the FAAAA does contain an unstated market-participant exception, no such exception can save the Port's actions here. The Port is not a participant in the market for drayage services, because it neither purchases nor provides such services. Nor do the Port's concession requirements serve any conceivable interest in "efficient procurement." Pet. App. 25a. The Port is therefore acting as a regulator of the drayage market, not as a participant in that market. The falseness of the dichotomy between "regulation" and "market participation," however, is a reason not to go down this path in construing the FAAAA, which uses neither term.

II.A. The decision below conflicts with *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). In *Castle*, this Court held that a State cannot enforce otherwise-valid trucking regulations by "partial[ly]

suspending" a motor carrier's access to the channels of interstate commerce. But that is precisely the authority claimed by the Port here: the right to suspend or even *revoke* a drayage provider's access to the Port of Los Angeles, the busiest container port in the United States and a crucial channel of interstate commerce. The Port's concession-enforcement provisions cannot be squared with *Castle*.

B. *Castle* remains good law. *Castle*'s holding rested on the fact that, under the Motor Carrier Act, only the federal government can issue—or revoke—interstate transportation permits. Although the Motor Carrier Act has been amended since *Castle*, Congress has not disturbed the overall federal regulatory regime on which this Court relied in *Castle*. To the contrary, Congress has repeatedly reaffirmed that the federal government has exclusive authority to issue and revoke interstate transportation permits. *Castle* therefore remains a vital means of preserving a uniform scheme of federal regulation.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN APPLYING A MARKET-PARTICIPANT EXCEPTION TO CONCLUDE THAT THE OFF-STREET-PARKING AND PLACARD PROVISIONS ARE NOT PREEMPTED BY THE FAAAA

The court of appeals did not disturb the district court's holding that the Port's off-street-parking provision is "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). Nor did it dispute that the Port's placard provision requires motor carriers "to display [a] form of identification on

or in a commercial motor vehicle . . . other than forms of identification required by the Secretary of Transportation." *Id.* § 14506(a). Yet the Ninth Circuit held that both concession requirements escape federal preemption because they advance vague "proprietary goals" of the Port (Pet. App. 39a)—and therefore fall within an unstated market-participant exception to the FAAAA.

But the FAAAA provisions at issue here say nothing about a market-participant exception. Rather, the statute preempts any "law, regulation, or other provision *having the force and effect of law*" that "relate[s] to" the statute's subject matter. 49 U.S.C. § 14501(c)(1) (emphasis added); see *id.* § 14506(a). As we show below, no one seriously disputes that the off-street-parking and placard provisions have "the force and effect of law." The challenged requirements therefore fall squarely within the text of the FAAAA's express preemption provisions. There is no reason to depart from that text by reading an unstated market-participant exception into the Act—and every reason not to.

A. The Two Challenged Concession Requirements Fall Within The Statutory Text

The only statutory text at issue is the FAAAA's requirement that, to be preempted under the Act, a state provision must have "the force and effect of law." 49 U.S.C. § 14501(c)(1); *id.* § 14506(a). The challenged concession requirements easily satisfy that statutory standard.

Indeed, in its Brief in Opposition, the Port did not dispute that the requirements have "the force and effect of law." Instead, the Port asserted that it is

simply "beside the point" whether the concession agreements have "the force and effect of law" because that "means merely"—*merely*—"that the measure *falls within the language of section 14501(c)*." Opp. 13 (emphasis added). As we discuss below, the Port's dismissive approach to the statutory language in an express-preemption case is remarkable—and cannot be squared with this Court's precedents. But the Port's tacit acknowledgment that the challenged requirements have "the force and effect of law" is scarcely surprising: the requirements are imposed on all licensed motor carriers by order of the Board of Harbor Commissioners and are incorporated into a penally enforceable tariff.

In March 2008, the Board of Harbor Commissioners amended the Port's Tariff No. 4 to require all drayage providers to enter into concession agreements. The Board then issued orders delineating the requirements imposed on drayage providers. As amended, Tariff No. 4 provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles." C.A. Supp. E.R. 15. A separate provision of Tariff No. 4—entitled "Penalties for Violation"—declares it "unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this Tariff." 4 C.A. E.R. 712; see also Pet. App. 83a n.5. Any failure to comply with the concession-agreement requirement can therefore give rise to criminal penalties—including a misdemeanor conviction, fines, and imprisonment for up to six months. 4 C.A. E.R. 712. The tariff further provides that violators "shall be guilty of a separate offense for each and every day during any portion of

which any violation of this Tariff is committed, continued or permitted by that person." *Ibid.*

The "concession agreement," then, amounts to a comprehensive licensing scheme, enforced by a "penally enforceable" requirement that all terminal operators contract only with motor carriers who obtained the mandatory concession. Pet. App. 83a, n.5. As the United States explained at the certiorari stage, "[a]ny common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by 'criminal penalties which only a state and not a mere proprietor can enforce.'" U.S. Br. 9 (quoting *Wash. State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)).

That commonsense conclusion finds additional support in this Court's interpretation of identical language in the preemption clause of the Airline Deregulation Act (ADA). In *American Airlines* v. *Wolens*, 513 U.S. 219, 226 (1995), members of an airline's frequent-flyer program alleged that the airline breached its contracts with passengers and that it violated the State's Consumer Fraud Act. The Court held that the fraud claims were clearly preempted because the state statute was "prescriptive; it control[led] the primary conduct of those falling within its governance" and served as "a means to guide and police" the practices of the airlines. *Id.* at 227, 228.

The Court went on to rule that the contract claims were not preempted under the ADA. State-court enforcement of "privately ordered obligations," the Court held, does not constitute the enforcement of "any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of" the Act. *Id.* at 228-29 (quoting Br.

for United States as *Amicus Curiae* 9).[5] *Wolens* therefore stands for the proposition that the ADA's preemption clause "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* at 232-33; see *id.* at 229 n.5 ("States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.").

The challenged action here is not state-court enforcement of any privately ordered obligations between, for example, motor carriers and terminal operators. Rather, the challenged action is the Port's imposition of "substantive standards" and "theories of competition" on the operations of drayage providers. Indeed, the placard provision requires motor carriers to adopt a Port-specified identification tag—in the face of express statutory language barring precisely that. See 49 U.S.C. § 14506(a) (no State or subdivision may require a motor carrier to "display any form of identification on or in a motor vehicle"). The off-street-parking provision likewise represents a *direct* regulation of motor carriers, contrary to the FAAAA's broad preemption language. See 49 U.S.C. § 14501(c)(1).

Small wonder, then, that the first Ninth Circuit panel acknowledged that the concession requirements represent "an expansive attempt to reshape and

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[5] The Court noted that "the phrase 'having the force and effect of law' is most naturally read to 'refer to binding standards of conduct that operate irrespective of any private agreement.'" *Id.* 513 U.S. at 229 n.5 (brackets omitted) (quoting Br. for United States as *Amicus Curiae* 16).

control the economics of the drayage industry in one of the largest ports in the nation," and to advance an array of "purely environmental" policy goals. Pet. App. 224a-25a; see E.R. 565 (Port sought to "transform the drayage marketplace"). The imposition of such "substantive standards"—however classified, but especially through a penally enforceable municipal ordinance—constitutes the "enact[ment of] . . . a law, regulation, or other provision having the force and effect of law," 49 U.S.C. § 14501(c)(1), and is preempted on that basis.

B. There Is No Reason To Depart From The Statutory Text In This Case

1. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). "When a federal law contains an express preemption clause," this Court "focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)).

Here, "the plain wording" of the FAAAA's preemption clause expressly defines the scope of preemption to encompass any "law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 14501(c)(1); see *id.* § 14506(a). It is therefore irrelevant in this case whether the concession requirements have "proprietary" aspects, "regulatory" aspects, or both: The dispositive question, according to Congress, is whether the challenged requirements constitute a "law, regulation, or other provision, having the force and effect of law" and related to the

statutory subject matter. That may be a difficult question in some cases, but not here: As shown above, the penally enforceable concession requirements have "the force and effect of law" under any commonsense definition of the phrase. That should be the end of the matter.

According to the Port, however, "[w]hether the market participant doctrine is applicable is a *separate question*" from the question whether state action "falls within the language of section 14501(c)." Br. in Opp. 13 (emphasis added). In other words, the Port concedes that the market-participant exception it invokes is untethered to the "force and effect of law" standard—or to any other statutory language. The court of appeals likewise did not seriously address whether the challenged requirements carry the "force and effect of law." Applying a variant of the market-participant exception developed by courts primarily in Commerce Clause cases, the panel majority asked *only* whether the concession requirements were "proprietary" in nature. See Pet. App. 39a ("The real issue is whether the off-street parking provision was adopted to further specific proprietary goals."); *id.* at 46a ("[T]he placard provision is proprietary in nature.").

"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 Industry, Labor and Human Relations* v. *Gould Inc.*, 475 U.S. 282, 289 (1986). Because Congress *has* acted here, the proper inquiry is therefore not "[w]hat the Commerce Clause would permit States to do in the absence of the [FAAAA]," but rather "what States may do with the Act in

place." *Id.* at 290. Here, the "Act in place" expressly bars States from taking any action having "the force and effect of law." Nothing in the text of the Act even hints that Congress intended to include an unstated market-participant exception as an additional limit to the clause's expansive reach.

The FAAAA provides several statutory exceptions to its broad preemption scheme—but no market-participant exception. Indeed, the same statutory subsection of the FAAAA broadly preempting regulation of motor carriers specifically provides that the clause "shall not restrict the safety regulatory authority of a State" or the state's authority to impose highway route controls and financial-responsibility regulations relating to insurance requirements. 49 U.S.C. § 14501(c)(2)(A). Separate provisions similarly indicate that the statute's pre-emptive scope does not extend to "intrastate transportation of household goods," *id.* § 14501(c)(2)(B), or to a State's or municipality's authority to regulate "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" of the motor vehicle, *id.* § 14501(c)(2)(C).

The presence of those carefully crafted statutory exceptions forecloses any inference that the FAAAA also contains another, unstated, exception. In *Rowe*, the State defended a law regulating the delivery of tobacco by focusing on the "*reason why* it [had] enacted" the challenged law. *Rowe*, 552 U.S. at 374. The State contended that the law was not preempted under the FAAAA because the Act "does not pre-empt a State's efforts to protect its citizens' public health." *Ibid.* This Court rejected the argument that the Act contains any such unstated exemption: The FAAAA

"explicitly lists a set of exceptions (governing motor vehicle safety, certain local route controls, and the like), but the list says nothing about public health." *Ibid*. So too here: The FAAAA "explicitly lists a set of exceptions . . . but the list says nothing about" the market-participant exception applied by the court of appeals.

That silence is all the more striking in this case because the preemption clause of the ADA—on which Congress expressly modeled the FAAAA's clause (*id*. at 370)—includes a statutorily defined form of the very exception that respondents seek to read into the FAAAA. The ADA provides that the Act's preemption clause does not prevent a state- or municipality-owned or operated airport "from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Given the degree to which Congress looked to the ADA's preemption language in crafting the identical language in the FAAAA, the omission of any market-participant exception from the FAAAA shows that Congress did not intend to include any such exception to the FAAAA's preemption clause. See *Custis* v. *United States*, 511 U.S. 485, 492 (1994).

Congress was aware of *Morales* in drafting the FAAAA's preemption clause. See *Rowe*, 552 U.S. at 370. In *Morales*, this Court rejected a narrow reading of the ADA's preemptive scope proposed by a party, stating that "if the pre-emption effected by § 1305(a)(1) were such a limited one, no purpose would be served by the very next subsection, which preserves to the States certain proprietary rights over airports." 504 U.S. at 385-386. In omitting even the ADA's limited "proprietary rights" exception from the FAAAA's preemption subsection, Congress could not have intended to enact *sub silentio* an even

broader—yet unexpressed—market-participant exception.

When Congress *intends* to create a market-participant exception, it knows how to do so expressly. See, *e.g.*, 15 U.S.C. § 2075(b) (preemption provision "does not prevent . . . a State from establishing or continuing in effect a safety requirement applicable to a consumer product for its own use"); *id.* § 1203(b) (preemption provision does not prohibit a State from establishing "a flammability standard or other regulation applicable to a fabric, related material, or product for its own use"); *id.* § 1476(b) (preemption provision does not prevent a State from establishing packaging standards "with respect to a household substance for its own use"); 49 U.S.C. § 30103(b)(1) (preemption provision does not prevent a State from "prescrib[ing] a standard for a motor vehicle or motor vehicle equipment obtained for its own use"); *id.* § 32919 (preemption provision does not prevent a State from establishing "requirements for fuel economy for automobiles obtained for its own use"); *id.* § 32304 (preemption provision regarding motor vehicle country-of-origin labeling does not prevent a State from prescribing requirements "related to the content of passenger motor vehicles obtained for its own use"). In the FAAAA, in contrast, the only provision even arguably providing an exception for state and local government's proprietary interests is the Act's exception for laws relating to the price of tows performed without a vehicle owner or operator's prior consent. See 49 U.S.C. § 14501(c)(2)(C). See also *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002) ("We find no explicit provision creating a proprietary exception" to the Magnuson Act). And Congress would have had no reason to create express

market-participant exceptions to other preemption statutes if it intended courts to simply read such an exception into the statutes.

Relying on *Building & Construction Trades Council* v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* ("*Boston Harbor*"), 507 U.S. 218 (1993), the Port nevertheless argues that "the market participant doctrine creates exceptions to preemption where there is *no* statutory language providing for such an exception." Br. in Opp. 12 (emphasis added). *Boston Harbor* supports no such sweeping proposition.

Boston Harbor dealt with *implied* preemption under the National Labor Relations Act (NLRA). By definition, then, there was no preemptive language to construe. This case, in contrast, concerns the interpretation of an *express* preemption clause. And that clause defines the scope of preemption broadly to encompass any State action with "the force and effect of law." That statutory language—and not a distinct body of dormant Commerce Clause case law—is surely the "best evidence of Congress' preemptive intent." *Whiting*, 131 S. Ct. at 1977 (quoting *CSX Transp.*, 507 U.S. at 664).

Nor does *Boston Harbor* even remotely suggest—as respondents do—that a market-participant exception applies in every preemption case *irrespective* of the statute involved. To the contrary, the Court in *Boston Harbor* looked to specific "NLRA preemption principles," 507 U.S. at 224, and determined that Congress did not intend *that statute* to preempt "enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement." *Id.*

at 220.[6] In other words, *Boston Harbor* reinforces the fundamental principle stated just one Term earlier: When courts interpret a preemption provision, "[t]he question, at bottom, is one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales*, 504 U.S. at 383 (internal quotation marks omitted); see *Boston Harbor*, 507 U.S. at 231-232.

2. Even if the FAAAA includes an unstated market-participant exception, no such exception could save the regulatory actions taken by the Port here.

The court of appeals purported to adopt the first "prong" of the market-participant test applied by some lower courts. That prong asks whether the "challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services," Pet. App. 22a (quoting *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 695 (5th Cir. 1999)). The court of appeals acknowledged that, in this case, the challenged requirements do *not* further any conceivable interest by the Port in efficient procurement. Yet the panel majority set aside that fact on the ground that the "efficient procurement" requirement does not actually require any interest in "efficient procurement" at all:

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[6] Congress amended the NLRA to authorize employers in the construction industry—but not other employers—to enter into such agreements. The Court explained that there was "no reason to expect the[] defining features of the construction industry [promoting enactment of the prehire provision] to depend upon the public or private nature of the entity purchasing contracting services." *Boston Harbor*, 507 U.S. at 230.

The "efficient procurement" test, the panel explained, "is useful in cases where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action." *Id.* at 25a. The court therefore applied a vague "proprietary action" standard that asked only whether the Port did something here that a private landlord could *conceivably* do.

But every time this Court has recognized a market-participant defense in a preemption context, it has limited the exception to state actions aimed at the efficient procurement of goods and services or to the use of state-allocated funds. In *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60 (2008), this Court held that a state statute was preempted by the NLRA, and not within a market-participant exception, because it was "neither 'specifically tailored to one particular job' not a 'legitimate response to state procurement constraints.'") *Id.* at 70 (quoting *Gould*, 475 U.S. at 291). That case stands in contrast to *Boston Harbor*, in which "MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." 507 U.S. at 232.

Unbounded by any "efficient procurement" constraint in this case, the panel majority applied a sweeping market-participant exception that exempts from preemption restrictions on motor carriers so long as they were imposed to "[e]nhanc[e] good-will in the community surrounding the Port." Pet. App. 40a. Even if it is true that a private entity put in the shoes of the Port would take actions "to placate community concerns," *id.* at 41a, allowing a municipal governmental body to justify its actions as a "market participant" using that open-ended rationale creates an exception that swallows the FAAAA's deregulatory

scheme. As the United States explained in the certiorari stage, "a government entity could convincingly claim such an interest for even the most thinly veiled regulatory action." U.S. Br. 11. That is precisely what the Port has done here.

The court of appeals' market-participant analysis suffers from yet another fundamental defect: The Port is *not* a participant in the drayage market. As the panel majority recognized, the Port neither provides nor procures drayage services. Pet. App. 27a-28a ("[T]he Port does not purchase drayage services."). By imposing requirements governing drayage services, the Port is therefore acting as a *regulator* of—not a proprietor in—the drayage market. This Court has recognized even in Commerce Clause cases that the market-participant exception requires "*direct* state participation in the market." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 435 n.7 (1980) (internal quotation marks omitted) (emphasis added).

Nor can the Port defend its regulation of the drayage market on the ground that it interacts with terminal operators who, in turn, contract with drayage providers. A plurality of this Court rejected such an attempt to regulate downstream markets in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). In that case, the State of Alaska proposed to condition the sale of timber from state-owned lands on a contractual requirement whereby the purchaser agreed that the timber be processed in the State before it was exported. See *id.* at 84-85. The plurality rejected the State's argument that it was merely acting as a market participant: "The 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.* In reaching that conclusion, the plurality emphasized that "downstream restrictions have a greater regulatory effect than do limitations on the immediate transaction. Instead of merely choosing its own trading partners, the State is attempting to govern the private, separate economic relationships of its trading partners." *Ibid.* The same principle forecloses the Port's sweeping version of the market-participant argument here.

Indeed, in *Florida Transportation Services, Inc.* v. *Miami-Dade County*, 2012 WL 19581 (11th Cir. Dec. 28, 2012), the Eleventh Circuit held (in a Commerce Clause challenge) that the market-participant exception does not apply in a situation analogous to that presented here. In *Miami-Dade*, the Port of Miami sought to impose conditions on the purchase of stevedore services at the port even though the port was not itself a provider or purchaser of such services.[7] The Eleventh Circuit held that the port was not acting as a market participant because "the County does not provide stevedore services." *Id.* at *29; see *Smith* v. *Dep't of Agriculture*, 630 F.2d 1081 (5th Cir. 1980) (state owner of a farmers' market was not acting as a participant within that market because it did not engage in the purchase or sale of goods sold there).

As the United States noted in its brief at the certiorari stage, the Port of Los Angeles functions essentially as publicly managed transportation infrastructure, not simply a commercial operation. U.S. Br. 9. Indeed, ports generally, and the Port of

[7] Stevedores manage the loading and unloading of ships. Pet. App. 6a.

Los Angeles specifically, often exercise a near-monopoly power on the channels of interstate and international trade they control. See Pet. App. 125a. Ratifying the Port's market-participant defense would create exactly the patchwork the FAAAA is meant to avoid, with each port in the nation free to use its market power to impose its own particular set of goodwill-enhancing requirements on motor carriers. See *Rowe*, 552 U.S. at 373 ("[T]o interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations. That state regulatory patchwork is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.").

So the Ninth Circuit's decision is wrong—blatantly so—on its own terms. But the artificial nature of this exercise reflects the wisdom of following statutory language and purpose, not doctrine from other areas perceived to be analogous. The looseness of the Ninth Circuit's analysis was not a necessary evil. There is no reason for this Court to follow the Ninth Circuit down that path.

II. *CASTLE* BARS THE PORT FROM ENFORCING EVEN OTHERWISE NON-PREEMPTED REGULATIONS ON MOTOR CARRIERS BY SUSPENDING OR REVOKING THEIR ACCESS TO THE PORT

In *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), this Court recognized important limits on a State's authority to enforce specifically targeted laws against federally licensed motor carriers. Those restrictions on a State's ability to disrupt the

interstate operations of licensed motor carriers, even in the enforcement of an otherwise permissible regulation, remain vital to the deregulatory scheme Congress has now instituted over the trucking industry. The panel majority's decision below disregards those limits and allows the Port to claim precisely the authority that *Castle* bars it from asserting.

A. The Decision Below Conflicts with *Castle*

In *Castle*, Justice Black wrote the opinion for a unanimous Court. A motor carrier challenged an Illinois statute governing weight limits on freight transported by commercial trucks through the state. The statute provided that repeated violations of the weight limits were punishable by the suspension of the carrier's right to use Illinois highways for a period of 90 days or one year, depending on the number of infractions. 348 U.S. at 62.

Assessing the State's authority to impose such a punishment, this Court noted that, through the Motor Carrier Act of 1935, Congress "adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce . . . [that] was so all-embracing that former power of states over interstate motor carriers was greatly reduced." 348 U.S. at 63. Under the Motor Carrier Act's regulatory scheme, the Interstate Commerce Commission (ICC) was given the *exclusive* power to determine which motor carriers could operate in interstate commerce. *Ibid.* In addition, a separate provision of the same Act "placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate," *ibid.*, with the Act providing that "[n]o certificate is to be revoked, suspended or changed until after a hearing and a finding that a

carrier has willfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it," *id.* at 63-64.

In light of a regulatory scheme that (1) allocated to a federal agency the power to grant certificates of interstate operating authority to motor carriers and (2) placed specific limits on the agency's ability to revoke or suspend that certificate, the Court reasoned that "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." 348 U.S. at 64. And the Court explained that it "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." *Ibid.* The Court noted that, "if the ninety-day or the one-year suspension should become effective, the carriage of interstate goods into Illinois and other states would be seriously disrupted." *Ibid.* Thus, the State could set weight limits on trucks, but the Court held that the State could enforce those limits only through "conventional forms of punishment"—not through suspension of a carrier's federally granted right to use state highways for interstate commerce. *Id.* at 64, 65.

Subsequent cases have reaffirmed that the scheme of federal regulation of motor carriers precludes States from exercising a "veto power" over motor carriers—even to enforce otherwise permissible regulations. Four years after *Castle*, in *City of Chicago* v. *Atchison, Topeka, & Santa Fe Ry.*, 357 U.S. 77, 87 (1958), Justice Black again wrote for the Court (but this time over a dissent by Justice Harlan arguing that the Court was acting prematurely). Rejecting arguments made by the City of Chicago,

Justice Black's majority opinion stated: "[I]t would be inconsistent with [the Interstate Commerce Act's] policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers."

Nine years later, Justice Black again wrote for the Court and again rejected arguments—including prematurity—advanced by the City of Chicago. In *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351 (1967), the Court wrote: "Here the city seeks to enforce each and all of these related [licensing] requirements by denial of a license for noncompliance and then criminal sanctions for operation without a license. This is the 'veto power' which *Atchison* held the city may not exercise." *Id.* at 360. Justice Harlan dissented on the basis of the opinion below, which had held the preemption challenge to be premature. *Ibid.* (dissenting statement); *id.* at 356-357 (describing holdings below).

The concession agreements in this case arrogate to the Port exactly the "veto power" that state and municipal authorities are barred from exercising under *Castle* and its progeny: the power to suspend access to the channels of interstate commerce. Schedule 4 of the Port's mandatory concession agreement provides that "[a]ny failure to comply with the terms and conditions of this Concession" constitutes a "default under this Concession" by the motor carrier. 3 C.A. E.R. 539. In the event of a default not timely cured, the schedule provides that the Port has the authority to "deny *any and all access* to Port property by the Concessionaire. *Ibid.* (emphasis added). The schedule goes on to provide that, in the event of a "Major Default," the Port may issue either "[a]n order *suspending* for a period not to exceed thirty (30) days

the right of the Concessionaire to provide Drayage Services at the Port" or "[a]n order of *revocation* of this Concession Agreement and of the right of the Concessionaire to provide Drayage Services at the Port." 3 C.A. E.R. 542 (emphasis added).

The panel majority nevertheless attempted 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 the State' or eliminate 'connecting links to points in other states.'" Pet. App. 32a (quoting *Castle*, 348 U.S. at 64). The majority conceded that "a denial of access to the Port may have more effect on motor carriers than a traditional fine," but it concluded that such a denial "does not rise to the level of the comprehensive ban at issue in *Castle*." *Ibid.*

But *Castle* does not apply only to "comprehensive ban[s]" on the operations of licensed motor carriers. Rather, *Castle* forbids even any "*partial* suspension of [a motor carrier's] federally granted certificate." 348 U.S. at 64. The Port's authority to impose a "suspension" or complete "revocation" of a carrier's access to the Port is such a "partial suspension." It falls within *Castle*'s exact terms. The United States so recognized at the certiorari stage. U.S. Br. 22 n.8.

Indeed, as the district court recognized in its factual findings in this case, by 2007 cargo volume, the Port of Los Angeles "ranked as the busiest container port in the United States, the thirteenth busiest in the world, and the fifth busiest in the world when combined with the cargo volume of the adjacent the Port of Long Beach." Pet. App. 69a. In 2007, the total value of cargo handled by the port amounted to

over $240 billion, including over $115 billion in trade with China alone. Being denied access to the stream of foreign and interstate commerce passing through the Port would clearly "seriously disrupt[]" a motor carrier's operations. *Castle*, 348 U.S. at 64; see Pet. App. 54a (Smith, J., dissenting in part) (drayage operations at the Port "are part of the continuous flow of goods between locations *outside* California and customers *within* California").

Ignoring both *City of Chicago* decisions (although they had been cited in the certiorari petition), the United States suggested at the certiorari stage that a challenge to the enforcement provisions of the Port's concession plan can be brought only in an as-applied challenge once a punishment had been levied. U.S. Br. 22. That argument has been made by none of the parties, and an argument made only by an *amicus* should not be considered. In any event, the United States is palpably wrong. It is sufficient for invalidation under *Castle* and the *City of Chicago* cases that the Port claims the *authority* to suspend or revoke a motor carrier's access to the Port. Applying such a punishment to the licensed motor carrier as a business enterprise, rather than simply taking out of service a truck that does not meet a state or local safety regulation, goes well beyond the "conventional forms of punishment" permitted by *Castle*. *Castle*, 348 U.S. at 64. The fact that the Port here "claims at least some power . . . to decide whether a motor carrier may" operate at the Port renders the enforcement provisions of its concession agreement scheme invalid. *Railroad Transfer Serv.*, 386 U.S. at 356 (quoting *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. at 85).

Castle and the *City of Chicago* cases are controlling. Therefore, even those regulations that were

held below to be unpreempted (either because they fall within the safety exception or because, despite being specifically targeted at motor carriers, they are not related to a price, route, or service) cannot be enforced through a suspension of a motor carrier's right to operate in interstate commerce.

B. *Castle* Remains Good Law

In light of its strained conclusion that the Port's enforcement provisions do not conflict with *Castle*, the panel majority declined to decide whether Castle's holding was "modified" by the FAAAA (or any other statute). See Pet. App. 32a. But nothing that Congress has done since *Castle* has affected the existing limits on a State's or municipality's authority to enforce safety regulations through a suspension of a carrier's right to operate in interstate commerce. Pet. App. 54a (Smith, J., dissenting in part). To the contrary, Congress has, since *Castle*, repeatedly *reaffirmed* the federal government's exclusive authority to issue interstate commerce permits—and to revoke such permits. *Castle* therefore remains a valid means of preserving a uniform scheme of federal regulation.

When Congress deregulated the trucking industry at the federal level through the Motor Carrier Act of 1980, it preserved the key features of the system on which this Court relied for its holding in *Castle*, indicating its intent to continue to incorporate the Court's holding within the broader statutory scheme. Cf. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial

interpretations as well.' " (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)).

Thus, under the regulatory scheme as modified by the 1980 Act, the ICC continued to grant certificates of operating authority, with the new legislation simply modifying the showing a motor carrier must make to receive such a certificate. See Pub. L. No. 96–296 (S 2245), at § 5(a)(3), 94 Stat 793 (1980) (setting out conditions under which the ICC "shall issue" an operating certificate to a motor carrier). Just as importantly, the law did not materially affect the ICC's ability to suspend or revoke an operating certificate.[8]

Almost simultaneously with the passage of the FAAAA, Congress enacted the Trucking Industry Regulatory Reform Act (TIRRA) of 1994, Pub. L. No. 103-311, 108 Stat. 1673 (1994). That Act again modified the showing needed to obtain a certificate of now nationwide interstate operating authority, but it too preserved the underlying structure of ICC approval of interstate motor carriers. See Pub. L. No. 103-311, § 207, 108 Stat. 1673.

The ICC Termination Act (ICCTA) of 1995, Pub. L. No. 104-88, 109 Stat 803 (1995), followed one year after the enactment of TIRRA. Although the ICCTA provides for "register[ing]" motor carriers, rather

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[8] Safety concerns were addressed in the legislation not by providing States *additional* regulatory authority, but rather by including new minimal insurance provisions within the Act. See H.R. Rep. No. 1069, 6, 1980 U.S.C.C.A.N. 2283, 2288 (safety concerns stemming from provisions for expanded entry of new carriers into trucking market addressed through "inclusion of minimum insurance coverage for operators as part of the fit, willing and able requirement").

than issuing certificates to such carriers (and has reassigned this task from the now-defunct ICC to the Secretary of Transportation), the statute still conditions registration on a showing that the carrier is willing and able to comply with applicable safety and minimum financial responsibility requirements. See ICCTA, Pub. L. 104–88, § 13902, 109 Stat 803; 49 U.S.C. § 13902(a)(1); see also *id.* § 31144(a)(1) (providing that the Secretary of Transportation shall "determine whether an owner or operator is fit to operate safely commercial motor vehicles, utilizing among other things the accident record of an owner or operator operating in interstate commerce"). And, once again, the ICCTA specifies exactly when and how the Secretary can suspend or revoke a carrier's interstate transportation registration. See ICCTA, Pub. L. 104–88, § 13905(c)-(e), 109 Stat 803; see 49 U.S.C. § 13905(e)-(f).[9]

Congress has therefore consistently reaffirmed the overall regulatory structure—in which the federal

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[9] In 2005, 49 U.S.C. § 31144 was amended to allow certain States to determine whether a motor vehicle operator is unfit to operate in interstate commerce under federal standards. Safe, Accountable, Flexible Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 4114(c), 119 Stat 1144. The statute as amended still provides that only the Secretary of Transportation can prohibit such operators from operating in interstate commerce, and sets out specific circumstances in which an operator can be deemed unfit. Moreover, while "State" is defined in other sections of the same title to include "a political subdivision of a State," it is *not* so defined for the statutory section governing an "unfitness" determination. See 49 U.S.C. § 31132(8). To the extent the 2005 amendment affects the ability of a state or local authority to bar a federally licensed motor carrier from participating in interstate commerce at all, then, it does so only by channeling state participation in a specific, statutorily prescribed fashion.

government has exclusive authority to issue and revoke interstate transportation permits—on which this Court based its decision in *Castle*. And nothing in the FAAAA, enacted in 1994, alters that regime. Although the FAAAA excepts state safety regulations from the otherwise broad scope of the Act's preemption clause, that exception does not create any *new* regulatory enforcement authority for the States. Rather, it provides simply that the Act's preemption clause "shall not *restrict* the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added); see also *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002).

The legislative history of the FAAAA confirms that Congress did not intend to *expand* States' authority to regulate interstate motor vehicles, even to enforce safety requirements. "Nothing in these new subsections [preserving States' authority over safety regulations] contains a new grant of Federal authority to a State to regulate commerce and *nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements*." H.R. Conf. Rep. No. 103-677, at 83, *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 (emphasis added).

Federal regulation of the interstate trucking industry has undoubtedly undergone significant changes between 1954 and the present. Through each amendment to the statutory scheme governing the trucking industry, however, Congress has preserved the overall regulatory structure that this Court relied on in *Castle*. A federal agency remains in charge of both the issuing and the suspension or revocation—through specifically outlined pro-

cedures—of a motor carrier's authority to transport goods in interstate commerce. Similarly, although Congress exempted state safety regulations from the scope of FAAAA preemption, in doing so it did not provide any indication that it intended to expand the regulatory authority of the states so as to overturn this Court's holding in *Castle*.

Kurns v. *R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1267 (2012), illustrates the correct analysis of an argument that a holding of this Court regarding preemption has been superseded by statutory changes. *Kurns* addressed whether state-law tort claims regarding defective locomotive parts were preempted by the Locomotive Inspection Act (LIA). As amended in 1915, the LIA provided specific safety regulations governing locomotive parts, and authorized the ICC to carry out the Act's requirements. In 1926, in *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), this Court held that state laws regulating locomotive parts were preempted by the LIA, which, the Court held, granted the ICC broad authority over the field of locomotive-equipment standards.

Seeking to avoid preemption of their state-tort claims, the petitioners in *Kurns* contended that *Napier* was no longer good law on the ground that the Federal Railroad Safety Act of 1970 (FRSA) altered the LIA's preemptive scope. The Court unanimously rejected that argument. Relying on language in the FRSA authorizing the Secretary of Transportation to prescribe regulations "supplementing laws and regulations in effect on October 16, 1970," the Court concluded that the FRSA "does not alter pre-existing federal statutes on railroad safety." Rather, the Court explained, "it leaves existing statutes intact."

Ibid. (internal quotation marks omitted). The Court therefore held that the preemption principles articulated in *Napier* were not altered by the subsequent legislation.

Here, as in *Kurns*, the statutory basis for this Court's decision in *Castle* remains intact. Indeed, Congress has expressly *preserved* the federal government's exclusive authority to issue and revoke interstate transportation permits. This Court has long recognized the "special force of the doctrine of *stare decisis* with regard to questions of statutory interpretation" *Kurns,* 132 S. Ct. at 1267 (quoting *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068 (2011)); see also, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008); *Neal* v. *United States*, 516 U.S. 284, 296 (1996) ("Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."). In the absence of any indication that Congress intended to alter the limits on a State's authority to suspend federally licensed carriers from engaging in interstate commerce, *Castle* remains good law. This Court should apply *Castle* and enjoin enforcement of the Port's concession requirements.[10]

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[10] Respondents' suggestion that *Castle*'s holding has been "qualified" by subsequent decisions of this Court is without merit. Opp. 37 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)). The principle that *Florida Lime* said was "qualified" was not the holding of *Castle*, but rather an argument from the petitioner that compliance with federal standards regarding avocado marketing immunized growers from more demanding state regulations. Indeed,

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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Florida Lime reinforces that a State cannot "exclude" a federally licensed entity from interstate commerce. See *id.* at 142. In any event, in the *City of Chicago* cases this Court (before and after *Florida Lime*) reaffirmed the basic principle adopted in *Castle*. See *R.R. Transfer Serv.*, 386 U.S. at 359; *Atchison*, 357 U.S. at 85.