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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES-continued

Page(s)

STATUTE

REPLY BRIEF FOR PETITIONER

This case raises three recurring questions that have divided the circuits. The importance of these issues is confirmed by the briefs filed by *amici* representing multiple industries. See OOIDA Br. 2-7, 12; A4A Br. 3, 7-8, 15, 22; Chamber/NIT Br. 20-23.

The Port and other municipal respondents try to explain away the conflicts on all three issues. The intervenor-respondents focus solely on the "market participant" ruling, contending that the Port resembles an ordinary business entity because its "environmental program" is part of a "green growth strategy" aimed at "advanc[ing] the Port's economic interests," and therefore somehow escapes from the FAAAA's broad preemptive language. NRDC Opp. 1, 3, 7-9 11-20; see also Opp. 1-5, 7-8.[1] Whatever relevance the cited district court findings may have under respondents' analysis of the "market participant" issue, they are irrelevant to the correct analysis of that issue. Respondents' conflict arguments are equally unpersuasive.

I. The "Market Participant" Issue Warrants Review

Over a dissent, the Ninth Circuit majority relied on an atextual market-participant exception to FAAAA preemption that is significantly broader than the market-participant exception applied by other circuits. As we showed (Pet. 12-19 & n.5), the Ninth Circuit's decision creates or exacerbates circuit conflicts with two different lines of case law.

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[1] We cite the Port's opposition brief as "Opp." and the intervenors' opposition as "NRDC Opp."

The only decision of *this Court* that has borrowed the "market participant" doctrine developed under the dormant Commerce Clause and applied it to defeat a *preemption* defense is *Boston Harbor*, which involved *implied* preemption, not an express clause with no market-participant exception. Conflating invalidation under the dormant Commerce Clause with preemption, respondents argue otherwise (Opp. 10-11, 14-15 n.7), but there is a crucial distinction between "the default rules of the dormant Commerce Clause," which apply only when Congress has *not* acted, and express preemption, which turns on the meaning of Congress's enacted text. Chamber/NIT Br. 7-8, 13; see Pet. 10-11, 17-18, 31-32.

Congress wrote the FAAAA's preemption clause broadly. That clause nullifies all laws, regulations, and other provisions "having the force and effect of law" that "relate[] to" the statute's subject matter, except for certain delineated exclusions. 49 U.S.C. § 14501(c)(1). The delineated exclusions do *not* include an exception for market participants, even though the statute after which the FAAAA was modeled, the ADA, *does* include a narrower market-participant exception.

Respondents say that it is "beside the point" whether the requirements imposed by the Port have "'the force and effect of law.'" Opp. 13. But the fact that the Port's requirements fall squarely within the language of the FAAAA's preemption provision is better evidence of Congress's intent than an unarticulated exception borrowed from Commerce Clause cases. Respondents deride as "flatly incorrect" the suggestion that no market-participant exception should ever exist under the FAAAA, but they ignore

the Fourth Circuit's decision in *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155 (4th Cir. 2002), (see Pet. 32) and merely cite contrary circuit decisions. Opp. 14-15. Respondents beg the question whether the contrary decisions are correct.

The FAAAA includes some exceptions but not a market-participant exception. This Court in *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008), expressly rejected an "implied 'public health' or 'tobacco' exception" to FAAAA preemption for exactly the same reason it should reject a market-participant exception. See *id.* at 374 ("The Act says nothing about a public health exception. To the contrary, it explicitly lists a set of exceptions . . ., but the list says nothing about public health.").

If a market-participant exception to FAAAA preemption exists, it must be narrowly cabined to make sure that the exception does not swallow the preemptive rule, which is broad and explicit and in furtherance of a deregulatory purpose. Respondents, however, take anything that a private actor might *conceivably* do in its own self-interest to fall on the "market participant" rather than the "regulation" side of the line. Only by such alchemy could classic regulation such as the off-street-parking and placard provisions – said unconvincingly to further environmental goals – be converted into the "proprietary" actions of a market participant.[2] But this Court has

[2] ATA did not challenge aspects of the Clean Truck Program that existed independently of the concession agreements. The Clean Truck Program was working well, even while the challenged provisions were not being enforced because of the preliminary injunction. See Pet. App. 95a-96a. In any event, nothing the Port says suggests that it was engaged in anything

insisted that any market-participant exception to preemption be read narrowly. *E.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 70-71 (2008). And the United States correctly observed in its 2008 *amicus* brief: "Governmental action does not lose its regulatory nature simply because it is motivated by a desire to attract certain persons or businesses to a particular jurisdiction." U.S. *Amicus* Br. 25.[3]

Respondents cannot meaningfully distinguish the Fifth Circuit's conflicting decision in *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (1980), or the circuit decisions that have followed the plurality opinion in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). *Smith* held that a State cannot take advantage of any market-participant doctrine by using its *ownership* of a facility to claim that it was participating in markets operating within the facility. *Smith* cannot be distinguished on the miscellaneous factual grounds respondents claim (Opp. 16-19), which have no bearing on the governing legal principles. For example, it cannot be distinguished on the ground that the Port here is a "commercial enterprise," because so was the farmer's market. See *Smith*, 630 F.2d at 1082 (noting that State charged rent for space

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other than the kind of regulation that has never come within any market-participant exception to preemption.

[3] The Port tries to dismiss the United States' 2008 *amicus* brief because the brief was filed before the district court's "detailed factual findings" purportedly supporting the market-participant holding below. Opp. 12 n.5. However, the United States grounded its *amicus* position on the fact that "'[t]he Ports do not participate in any relevant market'" and should not be permitted to use their control over a key avenue of interstate commerce "'to erect substantial impediments to the free flow of commerce.'" Pet. 18. That remains true now.

in the market). Nor does the larger *size* of the Port (Opp. 18) say anything about whether the Port is setting conditions on a market in which it does not participate.

Respondents make no effort to reconcile the Ninth Circuit's decision with the plurality opinion in *Wunnicke*. Instead, they dispute that numerous circuits have followed the *Wunnicke* plurality. But those cases' legal analysis follows the *Wunnicke* plurality opinion. See, *e.g.*, *GSW, Inc.* v. *Long Cnty., Ga.*, 999 F.2d 1508, 1515-16 (11th Cir. 1993) (concluding that *Wunnicke* should be applied *even more broadly* than situations "where the state is imposing a downstream restraint on a market in which it is not a participant"); *Huish Detergents, Inc.* v. *Warren Cnty., Ky.*, 214 F.3d 707, 716 (6th Cir. 2000) (following *Wunnicke* plurality); *Nat'l Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 63 (1st Cir. 1999) (including *Wunnicke* in discussion of "controlling Supreme Court precedent"), aff'd sub nom. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Respondents note that the cases accurately describe *Wunnicke* as a plurality opinion (Opp. 21), but the point is that they adopt that opinion as circuit law, not that they mistake it for a holding of this Court.

Finally, respondents dispute our showing (Pet. 15-19) that the Ninth Circuit's decision conflicts with the FAAAA decisions of other circuits because it allows the Port to impose restrictions wholly divorced from any governmental interest in the "efficient procurement" of goods or services. Opp. 22-26; see also Pet. App. 25a. The language from the majority opinion quoted by respondents (Opp. 24-25), however, only confirms that the Ninth Circuit rejected that

crucial limitation.[4] Review is warranted to address the pervasive conflicts concerning the validity and scope of a "market participant" exception in this setting.

II. The Court Should Also Resolve the Circuit Conflict over When a State Regulation Is "Related to a Price, Route, or Service"

The Ninth Circuit held that requirements *directly targeting* motor carriers and imposed by the Port through mandatory concession agreements were not "related to a price, route, or service of any motor carrier" under 49 U.S.C. § 14501(c)(1). Pet. App. 17a-18a, 21a, 33a-34a. That holding rested on a cramped reading of "rates, routes, or services" that has long conflicted with the positions of other circuits. See Pet. 20, 24-26. It also rested on a narrow interpretation of the words "related to" that is at odds with decisions of other circuits and this Court involving identical language in the ADA and ERISA. See Pet. 20-24; A4A Br. 4-7. Respondents' efforts to explain away these substantial conflicts are unavailing.

A. Although conceding that ADA cases are "relevant" (Opp. 27), respondents attempt to distinguish *Goodspeed Airport LLC* v. *E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212

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[4] In the face of the Ninth Circuit's conclusion to the contrary, respondents assert that the Port here actually did "engage in the procurement of drayage services" (Opp. 25) through its creation of an "incentive program to support acquisition of clean trucks." Pet. App. 4a. Whatever participation in the market for drayage *trucks* this incentive program may have entailed, it provides no reason to think that the Port either procured or provided drayage *services* and thus no reason to think the Port's restrictions were directed at the efficient procurement of such services.

(2d Cir. 2011), and *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003). See Opp. 29 n.16; cf. Pet. 22-23. They point out that the Second Circuit, in holding that the ADA did not expressly preempt certain "generally applicable state laws," observed that its decision was based in part "on the facts before" the court (*Goodspeed Airport*, 634 F.3d at 212). Opp. 29 n.16. True enough, but the "facts" the Second Circuit deemed significant *included* the failure of the challenged Connecticut wetlands laws to "refer to aviation or airports." 634 F.3d. at 211. In *Branche*, the Eleventh Circuit rejected a preemption argument under the ADA, but in marked contrast with the decision below the court based its ruling on an interpretation of "relates to" that *includes* state laws that "directly regulate[]" or "'expressly refer[] to'" the "services" of an air carrier. 342 F.3d at 1259.

Respondents contend that ERISA cases construing the "relates to" language are inapposite because ERISA's preemption clause *also* includes certain language that *differs* from the FAAAA. Opp. 27-29. That argument is foreclosed by *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992), which "adopt[ed]" for use under the ADA the "same" meaning of "relates to" articulated under ERISA.[5]

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[5] Nothing about the petition's reliance on ERISA cases contradicts the position we took in the Ninth Circuit. The passage in our reply brief on which the Port relies (Opp. 27) did not suggest that ERISA cases are *categorically irrelevant* to interpretation of the FAAAA's preemption clause. Instead, we argued that *market-participant* cases involving the Commerce Clause, NLRA, and ERISA "do not control this case" because Commerce Clause cases are "constitutional," the NLRA "has no express preemption clause," and ERISA's preemption scheme

Finally, respondents suggest (Opp. 29-30) that our reading of "related to" is inconsistent with *Morales* and *Rowe*. In *Morales*, however, this Court acknowledged that the parallel ADA preemption provision broadly nullifies state regulations that "hav[e] a connection with *or reference to*" airline (or truckers') "'rates, routes, or services.'" *Morales*, 504 U.S. at 384 (emphasis added). *Rowe*, 552 U.S. at 371, explained that there is FAAAA preemption because the Maine law at issue "focuses on trucking and other motor carrier services . . ., thereby creating a direct 'connection with' motor carrier services." It is the Ninth Circuit's approach that is incompatible with *Rowe* and *Morales*. See generally A4A Br. 16-19.

B. Respondents admit the existence of a "pre-*Rowe* split among [the] circuits as to the breadth of the statutory term 'services.'" Opp. 30. Since *Rowe*, two additional circuits have adopted a broad understanding of "services" and rejected the Ninth Circuit's "public utility" understanding. See Pet. 25. As one of those circuits has explained, moreover, *Rowe*'s expansive use of the term "service" to encompass provisions that did not fit within the "public utility" understanding reflects a rejection of the Ninth Circuit's minority position. Pet. 25; see also A4A Br. 19-22.

Trying to make a virtue of necessity, respondents say that there is no need for this Court to grant review because the circuit split has been "superseded" by *Rowe*. Opp. 30-31. Their problem, however, is that the Ninth Circuit's approach falls on the wrong side of the line between the superseded and what has replaced it.

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differs in material ways from the FAAAA's. Pet. C.A. Reply Br. 5, No. 10-56465.

Respondents contend that the Ninth Circuit's decision "did not turn" on the "public utility" interpretation of "services." Opp. 31. But the Ninth Circuit *specifically invoked* the narrow "public utility" definition, explaining:

> The terms "rates, routes, and services" were "used by Congress in the public utility sense; that is, service refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.... Rates indicates price; routes refers to courses of travel."

Pet. App. 17a (quoting *Air Transp. Ass'n of Am.* v. *City & Cnty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001)). In holding that the financial capability provision was *not* covered by the FAAAA's preemption provision, both the Ninth Circuit and the district court relied on the *legal* conclusion that "the provision did not relate to *rates, routes, and services* in more than a tenuous way." Pet. App. 33a (emphasis added); see also *id.* at 33a-34a.

III. Review Is Needed To Bring the Ninth Circuit into Conformity with *Castle*

In *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954), this Court held that States lack the authority to enforce their laws through even a "partial suspension" of a federally licensed motor carrier's ability to operate in interstate commerce. The decision below conflicts with *Castle* and intrudes on the federal government's "exclusive authority and limited discretion to grant or deny operating authority" to an interstate motor carrier. OOIDA Br. 11; see Pet. 26-29. The Ninth Circuit's suggestion that *Castle* forbids only "comprehensive ban[s]" (Pet.

App 32a) is incompatible with this Court's reasoning. As Judge Smith correctly noted in dissent, "[b]arring access to the Port of Los Angeles" is tantamount to "a 'partial suspension' of drayage carriers' federal permits to transport goods in the stream of interstate commerce." Pet. App. 55a-56a.

Respondents argue that *Castle*'s limitation on state remedial authority applies only to "comprehensive bans," but they fail to address *Castle*'s reference to partial suspensions. The only authority respondents can muster is a *dormant Commerce Clause* case decided more than 20 years before *Castle* and before passage of the Motor Carrier Act of 1935, which greatly reduced the States' power over interstate motor carriers. See Opp. 35 & n.19 (citing *Bradley* v. *Public Utils. Comm'n of Ohio*, 289 U.S. 92 (1933)); Pet. 26. That is far afield indeed.

Respondents argue that *Castle* is no longer good law. Opp. 36-38. But the Ninth Circuit declined to decide whether the FAAAA, passed long after *Castle*, "incorporated (rather than modified) *Castle*'s limitations on the State's authority." Pet. App. 32a & n.14.

Respondents contend that changes in motor carrier regulation since *Castle* have rendered that decision obsolete. Opp. 37-38. But they make no effort to address the detailed argument to the contrary made in the petition (at 27-28) and the OOIDA *amicus* brief (at 10-12), or to explain why (if respondents are correct) the United States relied on *Castle* in its *amicus* filing earlier in this case. See Pet. 33; see also Pet. App. 157a. The United States' filing also refutes respondents' suggestion that "the

federal interests that underlay *Castle* no longer exist." Opp. 38.

Finally, respondents suggest that *Castle*'s analysis has been "'significantly qualified'" by this Court's decisions, which "recognize[] that states and cities retain[] authority" to impose safety restrictions despite the existence of federal preemption. Opp. 37, 38 n.22 (quoting *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141-42 (1963)). This is doubly incorrect. First, our argument is not that true safety provisions are *preempted* but rather that the *remedy or penalty* of denying federally licensed motor carriers access to the Port of Los Angeles is inconsistent with *Castle*, even if non-preempted safety provisions are violated. Second, the suggestion that *Florida Lime* casts doubt on *Castle*'s continuing validity is wrong. In fact, in several cases cited in the petition (and in the United States' 2008 *amicus* filing), this Court reaffirmed the basic principle adopted in *Castle*. See Pet. 28 (citing *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 85 (1958), and *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 359 (1967)).

The principle that *Florida Lime* said had been "significantly qualified" was not the holding of *Castle* but rather the proposition that "a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations." 373 U.S. at 141-42 (citing, *e.g.*, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 447-48 (1960)). In *Huron*, this Court, in rejecting a Commerce Clause challenge to a provision of Detroit's Smoke Abatement Code that applied to certain ships

operating in interstate commerce, emphasized that "[t]he ordinance *does not exclude a licensed vessel from the Port of Detroit,* nor does it destroy the right of free passage." 362 U.S. at 448 (emphasis added). Even if *Florida Lime* had been referring to "qualifi[cations]" on *Castle*, then, those qualifications plainly did not include allowing a port to "exclude a licensed" carrier from the port.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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