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

BRIEF IN OPPOSITION

CARMEN A. TRUTANICH
THOMAS A. RUSSELL
JOY M. CROSE
SIMON M. KANN
JANET KARKANEN
LA CITY ATTORNEY'S OFFICE
425 South Palos Verdes Street
San Pedro, California 90731
Phone: (310) 732-3750

STEVEN S. ROSENTHAL
Counsel of Record
ALAN K. PALMER
SUSANNA Y. CHU
KAYE SCHOLER LLP
901 15th Street, NW
Washington, DC 20005
Phone: (202) 682-3500
srosenthal@kayescholer.com

Counsel for 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

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED

49 U.S.C. § 14501(c) ("section 14501(c)"), a provision of the Federal Aviation Administration Authorization Act of 1994 (a trucking deregulation statute), provides in relevant part as follows:

> (c) Motor carriers of property. –
>
> (1) General rule. – Except as provided in paragraphs (2) and (3), 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 . . . .
>
> (2) Matters not covered. – Paragraph (1) –
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . .

The questions presented are:

1. Whether certain provisions of a motor-carrier-related contract utilized by the Port of Los Angeles – a commercial enterprise operated by a municipal governmental entity – designed to permit the Port to expand its business and to achieve other commercial objectives, fall within the market participant exception to preemption and hence are not preempted by section 14501(c).

2. Whether (a) a contractual requirement by the Port of Los Angeles, providing that motor carriers

RESTATEMENT OF QUESTIONS PRESENTED – Continued

must demonstrate their financial capability in order to access state-owned property on which the Port is located, or (b) the Port's requirement that motor carriers enter into a contractual relationship with the Port in order to gain access to the Port, relates to the prices, routes, or services of such carriers in a manner prohibited by section 14501(c).

3. Whether *Castle v. Hayes Freight Lines, Inc.,* 348 U.S. 61 (1954), precludes a contractual requirement by the Port of Los Angeles that motor carriers seeking to access state-owned property on which the Port is located agree to maintain their trucks pursuant to manufacturers' specifications.

PARTIES TO THE PROCEEDING

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 the Natural Resources Defense Council, the Sierra Club, and the Coalition for Clean Air, Inc., all defendants-intervenors-appellees below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

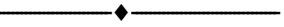
TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTORY STATEMENT

The petition for certiorari filed by the American Trucking Associations, Inc. ("ATA") fails to describe adequately either the facts surrounding the concession contract developed by the Port of Los Angeles ("POLA" or "the Port") or the governing law. The petition in fact goes so far as to rely on authority that ATA characterized as inapplicable before the Court of Appeals. As we will explain, (a) the concession contract was created for business purposes by POLA and hence is within the market participant exception to preemption, and (b) none of the three contentions asserted by ATA as a basis for review by this Court is well-founded. The challenged portions of the Court of Appeals' decision merely reflect application of established law to the particular facts of this case.



RESTATEMENT OF THE CASE

I. THE PORT OF LOS ANGELES

This case arises out of actions taken by POLA to enable expansion of its terminals and facilities in order to capture additional business and to maintain its position as the leading container port in the United States. Absent from ATA's petition is any real discussion of the District Court's factual findings regarding these circumstances, which ATA did not challenge and which form the factual basis for the Court of Appeals' ruling.

POLA is a major commercial entity owned and operated by the City of Los Angeles. Petitioner's

Appendix ("App.") 5a-6a, 68a-70a. It is entirely self-sustaining and does not depend on taxpayer support, handling its finances independently of the City. *Id*. at 5a, 70a.

POLA operates as a landlord port, leasing terminal facilities to marine terminal operators ("MTOs"). *Id*. at 5a-6a, 71a. Trucks serving the Port (known as "drayage" trucks) transport goods to and from MTOs, depending on whether the cargo is outbound or inbound. *Id*. at 6a, 71a. Accordingly, "[a] supply of drayage trucks and drivers is integral to cargo movement at the Port." *Id*. at 6a, 28a (quoting District Court's findings of fact).

POLA earns its revenues by charging fees for services and infrastructure provided to MTOs, and such revenues are directly tied to the volume of cargo moved through the terminals. *Id*. at 72a, 120a. It is in the Port's business interest, therefore, to increase cargo traffic through its terminals. *Id*. at 27a-28a, 72a, 120a-21a.

POLA currently competes for business against other United States ports and ports in Mexico and Canada. *Id*. at 6a, 73a. To capture additional business through expanded cargo capacity, the Port has sought to upgrade and expand its existing terminals and facilities. *Id*.

II. THE CONCESSION CONTRACT PROGRAM

The Port is located in California's South Coast Air Basin, which has been designated by the United

States Environmental Protection Agency as a high-pollution area, and operations at the Port are a major contributor to that designation. *Id*. at 73a-74a. Drayage trucks, which tend to be older and more highly polluting than those used by long-haul truck fleets, historically have accounted for a large percentage of air pollutants from Port sources. *Id*. at 75a.

As a result of the emissions caused by Port operations, environmental and community groups have mobilized to oppose Port expansion, blocking a series of expansion projects at the Port from approximately 2001-2008. *Id*. The first such project was

> stymied by legal opposition from community and environmental groups, which [initiated litigation] claim[ing] that the Port's expansion would increase air pollution [and] that such pollution would adversely [a]ffect the health of people in the surrounding communities . . . .

Id. at 6a; *see also id.* at 76a-77a. The lawsuit led to an injunction delaying construction of a proposed new terminal and to an eventual settlement costing the Port more than $80 million. *Id*. at 7a, 76a-77a. Similar opposition delayed another proposed expansion, and a threatened lawsuit was averted only by another costly settlement. *Id*. at 7a, 77a-78a.

In response to the environmental litigation that had thwarted the Port's expansion plans, POLA (jointly with the adjacent Port of Long Beach ("POLB")) adopted a Clean Air Action Plan ("CAAP")

in 2006.[1] *Id*. at 7a. As the Court of Appeals' decision describes it:

> In the CAAP, the Port announced its intention to . . . achieve a 45% reduction in total emissions by 2012. The Ports stated that they "recognize that their ability to accommodate the projected growth in trade will depend upon their ability to address adverse environmental impacts . . . ."

Id. at 7a-8a.

As part of the CAAP, the Port introduced a Clean Truck Program ("CTP"). The CTP was "designed to reduce emissions from the heavy-duty trucks involved in port drayage . . . ." *Id*. at 8a. The CTP included a requirement that drayage trucks serving the Port operate under a concession contract with the Port. *Id*. at 10a. That contract, which sets forth a series of requirements for drayage trucks serving the Port, is the subject of this litigation.

POLA made substantial monetary investments as part of the CTP. Specifically, it spent almost $60 million for the purpose of securing cleaner drayage trucks for use at the Port:

- POLA paid approximately $56.5 million in incentive payments and grants to put

[1] Though it was originally a defendant in this case, POLB settled with ATA in October 2009. *See* App. 7a n.5.

3500 new clean trucks into service at the Port.

- It participated in a truck "preorder" program with POLB under which the two Ports contracted with truck manufacturers to ensure the availability of clean trucks for motor carriers.
- It invested more than $1 million in developing an electric truck for use in port drayage and itself purchased 25 electric drayage trucks.

Id. at 90a-92a.

III. PROCEEDINGS BELOW

A. Background

ATA initiated this litigation in 2008, principally challenging the concession contract as being preempted by 49 U.S.C. § 14501(c) ("section 14501(c)"), part of the Federal Aviation Administration Authorization Act of 1994 (the "FAAAA"), a trucking deregulation statute. The relevant part of section 14501(c) is set out in the Restatement of Questions Presented. ATA also challenged, under *Castle v. Hayes Freight Lines, Inc*., 348 U.S. 61 (1954), the Port's ability to use a concession contract to limit motor carrier access to its property.

Although ATA initially directed its preemption challenge to the concession contract as a whole, it ultimately narrowed its challenge to (a) the Port's requirement that motor carriers enter into a

concession contract (the concession contract "mechanism"), and (b) five contract provisions:

> 1. An off-street parking provision, requiring concessionaires to submit to the Port for approval an off-street parking plan for their trucks and to comply with parking and route laws;
>
> 2. A placard provision, requiring carriers to post placards while on Port property, referring members of the public to a telephone number to report safety or emissions concerns;
>
> 3. A financial capability provision, requiring concessionaires to demonstrate that they possess the financial capability to perform their obligations under the contract;
>
> 4. A maintenance provision, requiring concessionaires to ensure that truck maintenance is conducted in accordance with manufacturers' instructions; and
>
> 5. An employee-driver provision, requiring concessionaires to transition over five years to using employee drivers rather than independent contractor drivers.

App. 12a-13a.

B. Proceedings in the District Court

Prior to trial, there were two District Court proceedings, both of which were appealed to the Ninth Circuit, involving preliminary injunction

issues. *See id*. at 138a-272a. Following a six-day bench trial, the District Court eventually issued an opinion holding that the concession contract was not preempted. *Id*. at 59a-137a.

C. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's decision in large measure, though it reversed with respect to the employee-driver provision.[2] The court relied on the District Court's findings of fact concerning the commercial motivation underlying the CTP and its concession contract component, and it determined that two provisions of the concession contract – the off-street parking and placard provisions – were not preempted because the Port acted as a market participant in adopting those provisions. *Id*. at 33a, 38a-41a, 44a-46a. In this connection (and more broadly) the court concluded that, in adopting the concession contract mechanism and the pertinent contract requirements, the Port acted as a private port owner would have acted under the circumstances:

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[2] Judge N. Randy Smith dissented from the majority opinion, expressing the view that the Port acted as a regulator, rather than a market participant, with respect to the concession contract. *Id*. at 48a-52a. Judge Smith further expressed the opinion that the concession contract serves to preclude motor carriers from participating in the transport of interstate goods, as prohibited in his view by *Castle*. *Id*. at 52a-56a.

> The Port has a financial interest in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent with the Port's overall goals for facilities management. A private port owner could (and probably would) enter into concession-type agreements with licensed motor carriers in order to further its goals.

Id. at 29a. The decision also specifically determined that

> [e]nhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest, particularly since the community has already proved its ability to stym[ie] Port growth and operations by pursuing litigation over health hazards and environmental impacts.

Id. at 40a. It additionally concluded that "[t]he off-street parking provision . . . serves the Port's business interest in promoting Port security." *Id*. However, the court determined that the employee-driver provision was "tantamount to regulation," *id*. at 44a, and hence was preempted, because it sought to "impact third party behavior unrelated to the performance of the concessionaire's obligations to the Port." *Id*. at 43a.[3]

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[3] Because the Port does not seek review of the Court of Appeals' ruling that the employee-driver provision is preempted, that provision is not at issue here.

The Court of Appeals also concluded that the financial capability provision was not preempted because it does not relate to prices, routes, or services in more than a "tenuous" fashion. *Id*. at 34a (quoting *Rowe v. New Hampshire Transp. Ass'n,* 552 U.S. 364, 371 (2008)). Nor, it ruled (for similar reasons), was POLA's general requirement that carriers seeking access to the Port enter into a concession contract preempted. *Id*. at 16a-21a.

Additionally, the court held that the maintenance provision "is intended to be and is genuinely responsive to safety, [and] so is not preempted [by virtue of section 14501(c)(2)(A)]." *Id*. at 33a. Finally, the Court of Appeals found that *Castle* does not bar the Port from permitting access only to motor carriers that comply with the safety restrictions set forth in the concession contract. *Id*. at 30a-32a.

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS' DECISION APPLYING THE MARKET PARTICIPANT DOCTRINE TO THE PARTICULAR FACTS OF THIS CASE DOES NOT MERIT REVIEW

A. ATA's Petition Fails to Adequately Analyze the Market Participant Doctrine

ATA's discussion of the market participant doctrine is flawed in that it lacks any grounding in the origin of and essential basis for the doctrine. The first

case in which this Court identified and applied an exception to preemption principles for proprietary conduct by a state was *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). *Hughes* involved a Maryland plan for ridding the state of abandoned automobiles. Under the plan, licensed scrap processors who came into possession of old, inoperative vehicles ("hulks") could claim a monetary "bounty" from the state. Because certain of the plan's requirements were more onerous for out-of-state scrap processors, a Virginia plaintiff claimed that the program violated the negative or dormant Commerce Clause. The Court rejected the challenge on the ground that the Maryland plan did not involve "regulation":

> Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.

Id. at 806. And the Court continued:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Id. at 810.

Four years later, in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the doctrine was applied for a second time to sustain, against Commerce Clause attack, a policy of a cement plant owned by South Dakota that discriminated between in-state and out-of-state cement

purchasers. The Court found that the state was a market participant and that "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id*. at 437.

Although both *Hughes* and *Reeves* found the existence of a market participant exception to preemption in the context of the negative Commerce Clause, the Court has applied the principles of those decisions to create exceptions to statutory preemption as well. *See, e.g., Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 232-33 (1993) (the "*Boston Harbor*" decision) (state activities shielded from National Labor Relations Act ("NLRA") preemption under market participant doctrine).[4]

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[4] *Cf. Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282, 288-89 (1986) (state conduct preempted by NLRA because such conduct sought to regulate labor relations policy); *Chamber of Commerce v. Brown*, 554 U.S. 60, 70-71 (2008) (same). In light of *Boston Harbor*, any suggestion that the Court of Appeals here improperly applied law relevant only to the Commerce Clause, and not to federal statutes, is incorrect. *See, e.g.*, *Amicus* Br. for the Chamber of Commerce of the United States and the National Industrial Transportation League ("Chamber *Amicus* Br.") 13-14, 17. Any attempt to distinguish *Boston Harbor* on the ground that it concerned the NLRA, which does not contain an express preemption clause, also is meritless. *See* Pet. 31; Chamber *Amicus* Br. 14. As we will show, Courts of Appeals have applied the doctrine to save state action from preemption under the FAAAA's express preemption clause. Moreover, the doctrine has been applied to exempt state action from preemption by the Employee Retirement Income Security Act, which likewise

(Continued on following page)

Thus, the essence of the market participant doctrine concerns whether a state entity is acting in a proprietary fashion as an owner of property or is engaged in regulation. As this Court stated the point in *Boston Harbor*:

> When a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption . . . because pre-emption doctrines apply only to state *regulation*.

507 U.S. at 227 (emphasis in original). The decision below relied precisely on that distinction.

It bears emphasis that the market participant doctrine creates exceptions to preemption where there is no statutory language providing for such an exception. In *Boston Harbor*, for example, the doctrine was found to be applicable even though the NLRA contains no textual basis for its application. Hence ATA's multiple references to the fact that the decision below applies the doctrine although the FAAAA contains no textual exception, *see, e.g.*, Pet. 11, 12, lack substance.[5]

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contains an express preemption clause. *See, e.g., Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998).

[5] ATA's petition seeks to rely on an *amicus* brief filed in the Court of Appeals by the United States in 2008. Pet. 18-19. That brief, however, was filed in the initial, preliminary injunction

(Continued on following page)

The *amicus* brief filed by the Chamber of Commerce of the United States and the National Industrial Transportation League spends several pages in this connection seeking to show that POLA's concession contracts have (in the language of section 14501(c)) "the force and effect of law." Chamber *Amicus* Br. 3-4, 7-12. That issue is beside the point, however.

Even if a measure enacted by a state entity has such force and effect, that does not mean that the measure is regulatory or that the market participant doctrine otherwise does not apply. It means merely that the measure falls within the language of section 14501(c). Whether the market participant doctrine is applicable is a separate question. *See, e.g., Hughes*, 426 U.S. at 796 ("comprehensive [state] statute" held to fall within market participant doctrine); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1045-47 (9th Cir. 2007) (state agency rules dictating government purchases held to be within market participant doctrine although they were emission control "standards" within Clean Air Act's express preemption provision); *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 689

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phase of the case, before discovery or trial, and it failed to address much of the majority's reasoning below. It was only at trial that the District Court became persuaded of the market participant doctrine's applicability here, *cf*. App. 252a-53a, based on detailed factual findings that the Government's 2008 brief could not possibly have taken into account.

(5th Cir. 1999) (city "ordinance" held covered by doctrine).[6] *Engine Manufacturers* held in fact that although the rules in question were enforceable by "criminal sanctions and fines," 498 F.3d at 1048, they nonetheless were within the market participant doctrine. Thus, although the Chamber *amicus* brief emphasizes that the concession contracts are reflected in the Port's tariff and in a city ordinance "backed by the threat of criminal prosecution," Chamber *Amicus* Br. 9, that fact is similarly irrelevant.

ATA goes so far as to state that in the context of "FAAAA preemption[, . . . n]o [market participant] exception exists *at all* . . . ." Pet. 12 (emphasis in original). That statement is flatly incorrect. Even ATA elsewhere recognizes that to be so, inasmuch as its petition states a few pages later that some circuits "have recognized [a] market-participant exception to the FAAAA." Pet. 15.[7]

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[6] To be sure, there is language in *Cardinal*, 180 F.3d at 695 (quoted in *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001)), suggesting that proprietary action by a state generally is "without the force of law," and the Court of Appeals here also so indicates, *see* App. 16a. But such language clearly does not mean that *only* state actions lacking the "force and effect of law" are within the market participant exception to the FAAAA – as *Cardinal*'s conclusion that a city ordinance fell within the doctrine (as well as the other decisions cited above) demonstrates.

[7] ATA asserts that "[o]nly once has this Court applied a market-participant exception to conclude that a state action was not preempted – and it did so in a case involving . . . implied preemption under the National Labor Relations Act." Pet. 17

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The *amicus* brief submitted by Airlines for America ("A4A *Amicus* Br.") bases its contention that there is no market participant exception to the FAAAA principally on the fact that the Airline Deregulation Act ("ADA"), on which the FAAAA was to some extent patterned, contains a specific exception for the proprietary actions of municipally owned airports, while the FAAAA contains no comparable "proprietary action" exception. A4A *Amicus* Br. 12. As we have noted, however, several Courts of Appeals have held that there does exist a market participant exception to FAAAA preemption, and no court has held to the contrary. To the extent that the A4A *amicus* brief also bases its argument on the fact that section 14501(c) contains certain explicit exceptions but no express market participant exception, its argument likewise is inconsistent with all of the FAAAA-related decisions cited above. Finally, A4A's reliance in this regard on decisions such as *Russello v. United States,* 464 U.S. 16 (1983), *see* A4A *Amicus* Br. 13, ignores the fact that such decisions relate to interpreting

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(citing *Boston Harbor*, 507 U.S. at 232). This statement is baffling given the actual case law. As we have explained, the first two cases in which the doctrine was considered, for example – *Hughes* and *Reeves* – "applied [the] market participant exception to conclude that a state action was not preempted . . . ." Furthermore, ATA's observation that prior FAAAA market participant decisions happen to have involved municipal towing, Pet. 15, is simply irrelevant. No such decision in any way suggests that towing presents the sole set of circumstances in which the market participant doctrine may be applied to the FAAAA.

different provisions of the same statute, not provisions of different statutes (even statutes that are related, such as the ADA and the FAAAA).

B. None of the Supposed "Conflicts" Discussed with Respect to the Market Participant Doctrine in ATA's Petition is in Fact a Conflict

1. The Decision Below Does Not Conflict with the Fifth Circuit's *Smith* Decision

First, ATA claims that the decision below conflicts with *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981). But the key factors relied on by the Court of Appeals here with respect to the market participant doctrine distinguish this case from the Fifth Circuit's two-to-one decision in *Smith*.

In *Smith*, a farmers' market operated by Georgia on state-owned land discriminated against out-of-state farmers. The Fifth Circuit majority concluded that the market's treatment of sellers was regulatory in nature and so was outside the scope of the market participant doctrine. 630 F.2d at 1083.

But the Ninth Circuit in this case emphasized points that significantly distinguish *Smith*. For example, its opinion recognizes that POLA is a commercial enterprise – a "business entity, operating wholly separately from the city government," which is "entirely self-sustaining . . . ." App. 27a. The Port

competes in what the Court of Appeals referred to as a "port[s] market," App. 25a-26a, and seeks to operate so as to "maintain its competitive position with respect to other ports and capture additional business . . . ." App. 28a (quoting District Court's findings of fact). POLA's concession contract grew directly out of that competitive interest, given the environmental and community opposition that had impeded the Port's expansion for several years.[8] There is no indication in *Smith* that the farmers' market in question was a self-sustaining or even a substantial business entity,[9] that it was in competition with other farmers' markets, or that it sought to maintain its competitive position in any market at all.

Furthermore, the decision below concluded that because of POLA's interest "in ensuring that drayage services are provided in a manner that is safe, reliable, and consistent" with the Port's business goals for facilities management, a privately owned port likely would have insisted on a concession contract of the type the Port actually approved. App. 29a. There is no reason, by contrast, why a privately owned farmers' market would discriminate against farmers

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[8] The assertion in the Chamber *amicus* brief, at 11-12, 17, that the purpose of the concession contract requirement is "environmental" thus misses the point. The requirement has environmental goals (among others) because the Port reasonably perceives such goals as being in its *business interest*.

[9] In fact, the farmers' market operated at a loss. The State of Georgia had to fund almost half of the market's operating expenses from its general revenues. *See* 630 F.2d at 1082 n.1.

from states other than the one in which the market is located. In fact, no business interest at all was served by Georgia's discrimination against out-of-state farmers in *Smith*.

To equate, for market participant purposes, a multi-billion dollar enterprise that is the largest port in the United States – and that took actions a privately owned port also would have taken for business and competitive reasons – with a farmers' market that was not a profit-making entity and that acted quite differently from the way a privately owned market would have acted thus is not plausible. Indeed, although ATA tellingly failed even to cite *Smith* in its briefs to the merits panel below, the Court of Appeals did analyze that decision in a footnote, along with certain similar cases, concluding that those cases "are distinguishable . . . ." App. 28a-29a n.13. As the court saw it, such decisions merely "illustrate that other courts examine whether a particular provision is actually related to the State's proprietary interest" or whether "it reflects the State's regulatory interest . . . ." *Id*. That is exactly the principle for which *Smith* stands – *i.e.*, that the actions of a state entity that is a "market regulator" fall outside the market participant doctrine. Far from rejecting *Smith*'s reliance on that distinction, the decision below is fully consistent with that principle.

This conclusion is underscored by the Court of Appeals' treatment of the Port's employee driver requirement, which is almost entirely ignored by ATA and the *amici* supporting it. That aspect of POLA's

concession contract, the majority concluded, was outside the scope of the market participant doctrine because it was really "tantamount to regulation" of the types of drivers drayage trucks may utilize. *Id*. at 44a (quoting *Gould*, 475 U.S. at 289). Thus, the majority applied a nuanced, provision-by-provision analysis of the concession contract in a fashion wholly congruent with *Smith*, and any suggestion that the decision below renders the market participant doctrine without "boundaries" or "rational limits," *see* Chamber *Amicus* Br. 6, 16, is simply incorrect.

Accordingly, there is no conflict between the decision below and *Smith*. At most, there is a fact-specific issue as to whether POLA's operations – and in particular, specific provisions of its concession contract – fall on one side or the other of the dividing line that both *Smith* and the decision below recognize as determinative. This sort of fact-based issue is not the sort that justifies review by this Court. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931).

2. The Decision Below Does Not Conflict with this Court's *Wunnicke* Decision

ATA also claims that the decision below conflicts with this Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). But the court below was correct in concluding that *Wunnicke* is "not controlling" with respect to whether, as ATA contends, the market participant doctrine is

applicable only when a state agency's actions are confined to a "'narrow' market defined by contractual privity." App. 26a n.12. ATA suggested to the Ninth Circuit that the "narrow" market here is a "ports" market and does not extend to a supposed "drayage trucking" market. *See id*. at 25a-26a.

First, as both the District Court and the Court of Appeals noted, *see id*. at 118a-19a n.11 and 26a n.12, the market participant aspect of *Wunnicke* is not a holding by this Court but reflects only the views of a plurality of four of the eight participating Justices. Those four Justices viewed an Alaska statutory policy as to the processing of timber harvested from state-owned lands as being outside the market participant doctrine because it imposed restrictions "downstream" from the market for the sale of raw timber. 467 U.S. at 99. The other four participating Justices did not join in the plurality's analysis of the market participant doctrine, though two Justices concurred in the result on unrelated and narrower grounds. Hence the plurality's view does not constitute the holding of the Court and is not binding law. *See Marks v. United States,* 430 U.S. 188, 193 (1977).

ATA notes that various other decisions refer to the plurality opinion in *Wunnicke* and implies that even if that opinion does not reflect a holding by this Court, it is the law of circuits whose decisions have referred to that opinion. Pet. 14 & n.5. But lower courts routinely refer in the course of their decisions to plurality or even dissenting opinions authored by Justices of this Court. Such references do not, of

course, transform (for instance) a dissent from a decision of this Court into the law of the lower court in question. As the court below stated, moreover:

> Subsequent cases either distinguish *Wunnicke* as an outlier involving special considerations of natural resources, foreign commerce, and restrictions on resale, or cite *Wunnicke* for general positions of law not unique to its analysis.

App. 26a n.12 (citations omitted). And at least the great majority of such cases carefully note that the pertinent part of *Wunnicke* is merely a "plurality" opinion.[10]

It is noteworthy, in addition, that for all of ATA's discussion concerning what is the "relevant market" here, its petition provides no real analysis of relevant market principles as those principles are applied in, for instance, antitrust law. *See, e.g.,* ABA Section of Antitrust Law, Antitrust Law Developments 549-622 (6th ed. 2007). No holding of this Court dictates, moreover, that any such analysis must be undertaken in a market participant case. In *Reeves*, for example –

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[10] *See, e.g., Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 348 n.17 (2008), in which a three-Justice plurality merely denied the dissent's suggestion that its reasoning conflicted with what it explicitly referred to as "the *plurality's* conclusion" in *Wunnicke* (emphasis added). *See also Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1177 (9th Cir. 1992) (citing *Wunnicke* as a "plurality opinion"); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1056 (9th Cir. 1987) (referring to *Wunnicke*'s "4-2-2 decision").

and in other decisions by this Court – the Court merely assessed whether the state entity in question participated in "the free market," 447 U.S. at 437, underscoring the fact that the fundamental issue underlying application of the market participant doctrine is whether a state is acting in a business capacity (in whatever market) or in a regulatory fashion.[11]

3. The Decision Below Does Not Conflict with Market Participant Decisions by Other Courts of Appeals Analyzing the Existence of "Procurement" by the State Entity in Question

ATA next purports to find a conflict between the decision below and the following language, which appears in some Court of Appeals decisions (including

[11] One Court of Appeals decision has engaged in a truncated market definition analysis, sustaining application of the market participant doctrine in circumstances analogous to those presented here. *See Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913 (8th Cir. 1997) (airport leasing counter space to rental car companies participated in car rental market). *See also Transp. Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (airports leasing space to limousine companies participated in market for provision of limousine services); *cf. Florida Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 2d 1260, 1282 (S.D. Fla. 2010) (port did not participate in stevedoring market although it utilized stevedores). The fact-bound issue of defining a relevant market in a given case such as this one is in any event not one meriting certiorari.

those of the Ninth Circuit) and which sets out two questions relevant to whether the market participant doctrine is applicable:

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

Cardinal Towing, 180 F.3d at 693. *See also Engine Mfrs.*, 498 F.3d at 1041 (9th Cir. 2007) (same). The Court of Appeals here held that the second part of this framework is inapplicable, so that the sole issue in this case concerns the "procurement" portion. App. 21a-23a.

ATA argues in this respect that POLA's concession contract provisions do not fall within the market participant doctrine because the Port does not itself directly purchase – *i.e.*, "procure" – drayage services. *See* Pet. 18-19. This contention fails for multiple reasons.[12]

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[12] It is noteworthy that ATA's semantic "procurement" argument is not even supported by several of the cases it cites. *See, e.g., Cardinal Towing*, 180 F.3d at 693 (referring to "efficient performance" as well as efficient "procurement"); *Council of City of N.Y. v. Bloomberg*, 6 N.Y. 3d 380, 395 (N.Y. 2006) (referring to "efficient performance of contracts").

First, as the court below noted, Maryland did not "procure" any junked cars in *Hughes*, yet this Court held the market participant doctrine to be applicable in that case. App. 24a.[13] Even more clearly, the same is true in *Reeves*, where the issue had nothing to do with "procurement" at all but instead addressed discrimination in the sales made by South Dakota's cement plant.

Second, the Court of Appeals fully considered and rejected ATA's mechanistic argument, which is based after all only on certain decisional language relating to procurement. The court first noted (quoting and following *Reeves*) that "[i]n applying the market participant doctrine, we undertake a single inquiry: whether the challenged program constitute[s] direct [S]tate participation in the market." App. 21a (citation and internal quotations omitted). The opinion then went on to mesh that point with the "efficient procurement" language of *Cardinal Towing*:

> The first prong of *Cardinal Towing* 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. *Cardinal Towing* acknowledged as much, noting

[13] Although the Court in *Hughes* did observe that Maryland was "a purchaser, *in effect*," 426 U.S. at 808 (emphasis added), of hulks, that very phrase indicates that the state was not truly a purchaser. And the decision is clear that Maryland had none of the attributes of a purchaser of hulks – it did not, for instance, use them in any way or even own or possess them.

> that its questions "seek to isolate" those cases to which the market participant doctrine applies and help courts to "distinguish[ ] between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." 180 F.3d at 693. If the State is not engaged in "efficient procurement" but nonetheless directly participates in the market in a proprietary manner, we see no reason why *Cardinal Towing* should preclude the application of the market participant doctrine . . . . "[A] 'single inquiry' [should be used] to determine 'whether the challenged program constitute[s] direct state participation in the market . . . .'"

App. 25a (citation omitted). Far from rejecting the "efficient procurement" language of *Cardinal Towing*, therefore, the majority here incorporated it into a broad, eminently sensible, and already existing analysis fully consistent with *Hughes*, *Reeves*, and all other decisions regarding the market participant doctrine.

In any event, although the decision below stated in dictum that POLA does not engage in the procurement of drayage services, App. 28a, uncontested evidence in the record suggests otherwise.[14] Specifically,

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[14] In addition, despite the dictum referred to above, the Court of Appeals concluded that:

> The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to

(Continued on following page)

POLA has spent almost $60 million for the purpose of securing new, cleaner trucks for use at the Port. *See* pp. 4-5, *supra*.

II. THE ISSUE OF WHETHER THE CONCESSION CONTRACT REQUIREMENT GENERALLY OR THE CONTRACT'S FINANCIAL CAPABILITY PROVISION RELATES TO MOTOR CARRIERS' PRICES, ROUTES, OR SERVICES DOES NOT WARRANT CERTIORARI

As noted above, among the five concession contract provisions at issue, the Court of Appeals applied the FAAAA's preemption language only to the concession contract's financial capability provision, holding that that provision does not relate to motor carriers' prices, routes, or services "in a more than tenuous fashion," App. 33a, and hence is not preempted.[15] The court's holding to that effect does not justify review by this Court, nor does its conclusion that the Port's concession contract requirement itself is not preempted.

> customers or points of forwarding. The district court found that . . . a supply of drayage trucks and drivers is integral to cargo movement at the Port . . . . [Drayage] services are an integral part of Port business.

App. 27a-28a.

[15] As ATA concedes, the dissent evidently agreed with the majority regarding the financial capability provision. *See* Pet. 9 n.4.

A. Preemption Decisions Involving ERISA Do Not Support ATA's Petition

The petition relies heavily on preemption decisions dealing with the Employee Retirement Income Security Act ("ERISA"). This is (to say the least) surprising, because ATA specifically argued to the Ninth Circuit that ERISA preemption decisions have little if any relevance:

> [C]ases involving . . . ERISA do not control this case . . . . ERISA ties preemption to the scope of that particular statutory scheme, not . . . prices, routes, or services.

ATA Reply Brief 5, No. 10-56465 (9th Cir. Feb. 15, 2011), ECF No. 40. ATA's about-face by itself casts serious doubt on its ERISA-based arguments, but we will briefly explain why ATA's current contentions are wrong.

Statutory preemption analyses are based on the language of the statute in question and on the Congressional intent underlying that statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). Inasmuch as the specific prices, routes, or services language in the FAAAA was drawn by Congress from the ADA, *see DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 85-86 & n.4 (1st Cir. 2011), *cert. denied,* 132 S. Ct. 761 (2011), preemption decisions concerning that language under one of those statutes are relevant to preemption analysis under the other. ERISA, however, is (as ATA noted below) quite a different statute,

containing pertinent language different from that in the ADA or the FAAAA.

ERISA is a comprehensive act designed to "regulate[ ]" employee welfare and pension plans, including those that provide medical benefits for plan participants. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650-51 (1995). That is, it affirmatively sets up a regulatory regime within which pension and benefit plans must operate. The relevant part of the FAAAA, on the other hand (like the cognate portion of the ADA), is in essence simply a deregulation measure.

Moreover, as ATA also recognized below, the preemption language in ERISA differs significantly from the comparable terminology in the FAAAA. ERISA's chief preemption provision makes no reference to prices, routes, or services – the crux of ATA's current statutory preemption contentions. Instead, it provides that, with certain exceptions, its provisions "shall supersede any and all State laws insofar as they . . . *relate to any employee benefit plan*" of a type specified elsewhere in the statute. 29 U.S.C. § 1144(a), (b) (emphasis added). Thus, the statute preempts state laws that "relate to" a benefit plan, not to issues such as prices, routes, or services.

Accordingly, the ERISA preemption decisions cited in ATA's petition have no real relevance to the prices, routes, and services issue as to which ATA seeks review. In particular, ATA's contention that

preemption is called for where a state statute "singles out the subject of the federal scheme" – rather than being a statute of general applicability, Pet. 22 – fails because its source is ERISA preemption case law, not FAAAA or ADA case law.[16]

Rowe is this Court's most recent decision analyzing the FAAAA's prices, routes, or services language. There, a law enacted by the state of Maine required that deliveries of tobacco products be handled in certain ways – involving special conduct such as "recipient verification" by (for example) truck drivers making such deliveries. Applying *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), an ADA preemption case, the Court understandably concluded that the Maine statute had a "significant" impact on motor carriers' "services" and was therefore preempted. This was so because "the law . . . require[s] carriers to offer a system of services that the market does not now provide." 552 U.S. at 372. The Court was

[16] The language quoted by ATA from *Goodspeed Airport LLC v. East Haddam Island Wetlands and Watercourses Commission*, 634 F.3d 206, 212 (2d Cir. 2011), *see* Pet. 22, does not suggest that "generally applicable" state laws cannot, regardless of their impact, escape ADA preemption, much less that "targeted" state laws are generally so preempted. The holding of the decision was simply that there was no preemption "on the facts before us . . . ." *Id*. ATA's reliance on *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258-59 (11th Cir. 2003), *cert. denied*, 540 U.S. 1182 (2004), is similarly misplaced. The holding in *Branche* was that the state law claim in question was *not* preempted by the ADA. *Id*. at 1261.

careful to preserve the rule stated in *Morales* that the ADA (and hence the FAAAA) does not preempt state laws that affect prices, routes, or services of carriers in "too tenuous, remote, or peripheral a manner." *Id.* at 375 (quoting *Morales*, 504 U.S. at 390).

If ATA were correct that a state statute singling out the "subject of the federal scheme" is thereby preempted under the FAAAA, *Rowe*'s careful analysis, based on *Morales*, of the Maine legislation's impact on motor carriers' services would have been unnecessary, because the state statute at issue was not one of general applicability but instead effectively singled out motor carriers. *See* 552 U.S. at 375-76. Indeed, as the First Circuit has recognized, the ADA's preemption language "might have been read to target only state enactments focusing solely on airlines, but that reading has been twice rejected by the United States Supreme Court." *DiFiore*, 646 F.3d at 86 (citing *Morales*, 504 U.S. at 386, and *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 227-28 (1995)).

B. ADA and FAAAA Preemption Decisions Do Not Support ATA's Petition

ATA fares no better with respect to its brief discussion of FAAAA/ADA precedent. The petition notes the existence of a pre-*Rowe* split among circuits as to the breadth of the statutory term "services." Pet. 24-25. However, that split – which evidently did not relate to prices or routes – was (as the petition notes) "superseded" by *Rowe, see DiFiore,* 646 F.3d at 88,

and is no longer a potential subject for review by this Court. And contrary to ATA's suggestion, *see* Pet. 25-26, the Court of Appeals here did not reject any other Circuit's approach to the term "services" and clearly included *Rowe* in its analysis of that term. App. 18a.[17]

Finally, the decision below is firmly grounded on record-based facts that do not even implicate the pre-*Rowe* split as to the meaning of "services." The decision here by the Ninth Circuit did not turn on any particular definition of that term. Instead, the majority relied on the fact that "the motor carriers who testified indicated that the financial capability provision *would not change their operations*." App. 34a (emphasis added).

The factual findings of the District Court, on which the Court of Appeals relied, show in similar fashion that the concession contract "mechanism" – *i.e.*, POLA's requirement that motor carriers serving the Port enter into a concession contract – does not affect prices, routes, or services. In a finding not

[17] Nor is there any problem in the Court of Appeals' statement that a state may condition entry onto its property as long as the conditions for entry do not "compel [a] carrier to change [prices], routes, or services . . . ." App. 21a. This is merely another way of phrasing the question of whether state law significantly affects carriers' prices, routes, or services. It is noteworthy, moreover, that in the same paragraph the court emphasized that the relevant issue is whether a given provision of a concession contract binds a carrier to a particular price, route, or service "directly *or indirectly* . . . ." *Id*. (emphasis added).

challenged by ATA, the District Court concluded as follows:

> Prices charged by motor carriers performing drayage at POLA have not risen as a result of the concession contract requirement. Motor carriers continue to provide drayage services at POLA despite the concession contract requirement, and they have not changed the services they provide to customers as a result of the concession contract requirement.

App. 93a (citation omitted). This finding more than supports the Court of Appeals' conclusion that the concession contract does "not necessarily affect [prices], routes, or services" and its provision-by-provision approach to that question. App. 21a (emphasis omitted).[18]

III. CERTIORARI IS NOT MERITED WITH RESPECT TO THIS COURT'S DECISION IN *CASTLE V. HAYES*

ATA finally argues that the decision below conflicts with this Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). In *Castle*, Illinois punished freight carriers that violated state

[18] The Court of Appeals invoked in this connection *Air Transport Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001), which held that application of a San Francisco anti-discrimination ordinance to airports did not affect airlines' rates, routes, or services under the ADA.

limits on the weight of trucks by temporarily suspending the carriers' right to use Illinois highways. 348 U.S. at 62. At the time, there existed a regime of comprehensive regulation of the motor carrier industry (regulation that terminated between the 1970's and the 1990's through multiple trucking deregulation statutes, including the FAAAA). Under the Motor Carrier Act of 1935 (operative at the time of *Castle*), the Interstate Commerce Commission ("ICC") had exclusive authority to grant, revoke, or suspend federally granted certificates of convenience and necessity to motor carriers operating in interstate commerce. In this context, the Court found that the exclusion of an interstate carrier from Illinois' highways was "the equivalent of a partial suspension of [the carrier's] federally granted certificate," because Illinois highways were used by motor carriers "to transport interstate goods to and from that State . . . ." 348 U.S. at 64.

A. The Court Below Correctly Held that Denial of Access to Port Property Pursuant to the Safety-Related Aspect of the Concession Contract Does Not Run Afoul of *Castle*

ATA's petition may be thought ambiguous as to whether its reliance on *Castle* relates only to safety issues or to other aspects of the concession contract as well. As its own language indicates, however, the petition should be read as contending that the Port's concession contract contravenes "the longstanding

statutory interpretation [based on *Castle*] regarding the limits on States' abilities to enforce *vehicle-safety* regulations." Pet. 28 (emphasis added). Furthermore, that is the contention ATA made before the Court of Appeals – not surprisingly, inasmuch as *Castle* itself related to a state's safety-related restrictions. Indeed, both the Ninth Circuit majority and the dissent so recognized. The majority's discussion of *Castle* appears in a section of the opinion headed, "Safety Exception," App. 30a, and it characterized the issue as "whether the district court identified the correct legal principles in applying the safety exception to [FAAAA] preemption." *Id*. The dissent also headed its discussion of *Castle* "Safety Exception," *id*. at 52a, and in the end concluded that "the Port cannot justify any of the challenged regulations on the basis of safety." *Id*. at 56a.

Thus, the first point to be made about the petition's *Castle* contention is that even if it were persuasive – which it is not – it would have ramifications only as to the concession contract's maintenance provision, which (as noted above) is the only provision held to fall within the safety exception. *See* p. 9, *supra*.

In any event, regardless of whether it is read to relate only to safety or more broadly, ATA's *Castle* argument fails. As the court below recognized:

> Unlike a ban on using all of a State's freeways, a limitation on access to a single Port

> does not prohibit motor carriers from participating in "transport [of] interstate goods to and from that State" or eliminate "connecting links to points in other states."

App. 32a (citing *Castle*, 348 U.S. at 64).

This conclusion is supported by this Court's decision in *Bradley v. Public Utilities Commission of Ohio*, 289 U.S. 92 (1933). In that case, the Public Utilities Commission of Ohio denied an interstate carrier a certificate to operate as a common carrier over State Route 20, extending from Cleveland to the Ohio-Michigan border, with Michigan as the final destination. *Id.* at 94. This Court pointed out the likely existence of alternative routes and held that the state commission's denial of the certificate did not exclude the applicant from operating in interstate commerce: "The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20." *Id*.[19] Similarly, a motor carrier's failure to enter into and maintain a concession contract "excludes [it] merely from" POLA. Carriers barred from accessing POLA may continue to access the adjacent POLB, not to mention other California ports and all other California locations.[20]

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[19] *Bradley* was decided under a negative Commerce Clause analysis similar, we submit, to the analysis applicable to today's deregulated trucking circumstances.

[20] To be sure, POLB has adopted a Motor Carrier Registration and Agreement governing access of drayage trucks to its

(Continued on following page)

If exclusion of a motor carrier from a highway does not affect the ability of the carrier to participate in interstate commerce, then, *a fortiori*, exclusion of a motor carrier from state-owned property used for state business purposes does not preclude that carrier from operating interstate. Restrictions on access to state-owned property present special circumstances not specifically addressed by *Castle*. In fact, no decision of which we are aware addresses such a factual situation. By analogy, however, suppose that after the 1995 bombing of the federal building in Oklahoma City, cautious state authorities had set up a permanent perimeter around the state capitol (*i.e.*, around state-owned property) beyond which trucks could not pass but at which they would have to unload their cargo. Under ATA's position, *Castle* should be read to prohibit a state from doing this – *i.e.*, from regulating or restricting truck deliveries on the state's own property. As the court below correctly recognized, *Castle* does not go this far. *See* App. 31a.

B. *Castle* Is No Longer Governing Law

Although the court below expressed no opinion on this point, *see* App. 32a, *Castle* today is not good law with respect to the concession contract (as the District Court held, *see* App. 128a-29a, 156a-57a). Since

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facilities. However, ATA has specifically agreed to the registration agreement. *See* Stipulation of Settlement and Joint Motion for Voluntary Dismissal with Prejudice Between Plaintiff ATA and Long Beach Defendants 1-2 & Ex. A, No. 08-04920 (C.D. Cal. Oct. 19, 2009), ECF No. 203.

the passage of the ICC Termination Act in 1995, not a single federal court – apart from the courts below in this case – has analyzed the applicability of *Castle* on any set of facts, thus suggesting that the decision is of little if any import today.[21] Moreover, this Court has held that the safety exception from FAAAA preemption allows states to take motor carrier-related actions that are genuinely responsive to safety concerns, without once addressing whether *Castle* relates in any way to that issue. *City of Columbus v. Ours Garage*, 536 U.S. 424, 439, 442 (2002). Indeed, even prior to enactment of the FAAAA and trucking deregulation generally, this Court referred to the analysis underlying *Castle* as having been "significantly qualified." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

As we have noted, *Castle* was decided in the context of the Motor Carrier Act of 1935, which established a regime of extensive federal regulation of interstate trucking that has been dismantled in favor of a deregulated industry. In fact, one of the *amici* supporting ATA concedes that the federal trucking regime at the time of *Castle* is a "*now-defunct* body of federal regulation." Chamber *Amicus* Br. 5 (emphasis added). The federal licensing requirements that currently exist in today's deregulated trucking context, *see* Pet. 32-33, are relatively perfunctory in the

[21] One state supreme court decision, *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 995 (Cal. 2004), *cert. denied*, 544 U.S. 922 (2005), cited to *Castle* without analyzing the decision.

sense that although federal licensing still exists, licenses are freely granted without reference to the strict requirements that existed under the Motor Carrier Act of 1935. *See* FMCSA Registration, Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., https://li-public.fmcsa.dot.gov/LIVIEW/PKG_REGISTRATION.prc_option (last visited Feb. 16, 2012). ATA's petition in fact essentially admits as much. Pet. 27. In these circumstances, the federal interests that underlay *Castle* no longer exist, so that the decision has no relevance to POLA's concession contract requirement.[22]

[22] Unlike the FAAAA, the Motor Carrier Act did not contain any express safety exception to preemption. But even in the absence of a safety exception, *Castle* and related cases recognized that states and cities retained authority to require motor carriers to abide by "general safety regulations." *See, e.g., City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 88 (1958). If certain local regulations could have escaped preemption as "general safety regulations" under such a highly regulated regime, then *a fortiori* the concession contract's safety provisions cannot be preempted under a statute that (a) does away with that regulatory scheme, and (b) incorporates an explicit safety exception to preemption.

CONCLUSION

For the reasons stated above, ATA's petition for certiorari should be denied.

Respectfully submitted,

CARMEN A. TRUTANICH
City Attorney
THOMAS A. RUSSELL
General Counsel
JOY M. CROSE
Asst. General Counsel
SIMON M. KANN
Deputy City Attorney
JANET KARKANEN
Deputy City Attorney
LA CITY ATTORNEY'S OFFICE
425 South Palos Verdes Street
San Pedro, California 90731
Phone: (310) 732-3750

STEVEN S. ROSENTHAL
Counsel of Record
ALAN K. PALMER
SUSANNA Y. CHU
KAYE SCHOLER LLP
901 15th Street, NW
Washington, DC 20005
Phone: (202) 682-3500
srosenthal@kayescholer.com

Counsel for 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

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