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 THE CITY OF LOS ANGELES RESPONDENTS

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

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

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, a trucking deregulation provision of the Federal Aviation Administration Authorization Act of 1994, 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 aspects of a motor carrier-related contract utilized by the Port of Los Angeles – a commercial enterprise located on governmentally owned land and operated by a municipal 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 49 U.S.C. § 14501.

RESTATEMENT OF QUESTIONS PRESENTED – Continued

2. Whether *Castle v. Hayes Freight Lines, Inc.,* 348 U.S. 61 (1954), provides a separate and independent basis, apart from 49 U.S.C. § 14501, for precluding a contractual requirement by the Port that motor carriers seeking access to the city-owned property on which the Port is located agree to take certain safety-related measures.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

I. FACTS AND HISTORY OF THE CASE 1

II. THE MARKET-PARTICIPANT DOCTRINE ... 12

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE MARKET-PARTICIPANT DOCTRINE SHIELDS FROM PREEMPTION THE OFF-STREET PARKING AND PLACARD PROVISIONS, THE ONLY PROVISIONS OF THE CONCESSION CONTRACT HELD TO FALL WITHIN THE DOCTRINE 16

A. The FAAAA's Express Preemption Language Does Not Foreclose Application of the Market-Participant Doctrine, the Existence of Which is Confirmed by Uniform Case Law 17

B. POLA's Adoption of Its Concession Contract Provisions Falls Within the Market-Participant Doctrine............... 28

1. ATA's Fallback Argument Regarding Application of the Market-Participant Doctrine to the Facts of this Case Is Flawed 28

2. The Position of the United States as to the Market-Participant Doctrine's Application Here Consists Merely of an Admittedly Incomplete List of "Considerations" That Are in Part Hypothetical Rather than Reflecting the Essential Facts of this Case 38

TABLE OF CONTENTS – Continued

Page

II. *CASTLE* DOES NOT BAR SAFETY-BASED RESTRICTIONS ON LMC ACCESS TO PRIVATE PORT PROPERTY.... 48

A. ATA's *Castle* Argument Pertains Only to the Concession Contract's Safety-Related Provisions and So Applied Has Unsupportable Consequences...... 50

B. *Castle* and the *City of Chicago* Cases Relied on by ATA Are No Longer Governing Law as to Issues Such as Those Involved in this Case 53

C. Denial of Access to Private, Restricted Access Land at POLA Does Not Implicate *Castle* 59

D. Remand is Not Warranted to Determine Whether the Port Intends to Punish Past, Cured Infractions of the Concession Contracts 61

CONCLUSION.. 63

TABLE OF AUTHORITIES

Page

CASES

American Airlines, Inc. v. Department of Transportation, 202 F.3d 788 (5th Cir. 2000) 26

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 18, 21, 28

Anderson v. Edwards, 514 U.S. 143 (1995) 62

Associated General Contractors of America v. Metropolitan Water District, 159 F.3d 1178 (9th Cir. 1998) 22

Bradley v. Public Utilities Commission, 289 U.S. 92 (1933) 49, 50

British Airways Board v. Port Authority, 558 F.2d 75 (2d Cir. 1977) 26

Bronco Wine Co. v. Jolly, 33 Cal. 4th 943 (Cal. 2004) 58

Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) .... *passim*

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999) 20, 23, 24, 29, 42

Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954) .... *passim*

Chamber of Commerce of U.S. v. Brown, 554 U.S. 60 (2008) 29

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 20

TABLE OF AUTHORITIES – Continued

Page

City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155 (4th Cir. 2002) 23, 24

City of Chicago v. Atchison, Topeka & Santa Fe Railway Co., 357 U.S. 77 (1958)....................*passim*

City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002)..........................52

Colfax Corp. v. Illinois State Toll Highway Authority, No. 93-7463, 1994 WL 444882 (N.D. Ill., Aug. 16, 1994)...22

Department of Revenue v. Davis, 553 U.S. 328 (2008)...33

Engine Manufacturers Association v. South Coast Air Quality Management District, 498 F.3d 1031 (9th Cir. 2007) 41, 42

Florida Transportation Services, Inc. v. Miami-Dade County, 703 F.3d 1230 (11th Cir. 2012)......33, 34, 35

Four Ts, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909 (8th Cir. 1997) .34, 35, 36

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986)..42

Griggs v. Allegheny County, 369 U.S. 84 (1962)........19

Hibbs v. Winn, 542 U.S. 88 (2004) 52

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)...13, 27, 31

Johnson v. Rancho Santiago Community College District, 623 F.3d 1011 (9th Cir. 2010)...........20

TABLE OF AUTHORITIES – Continued

Page

Kurns v. Railroad Friction Products Corp., 132 S. Ct. 1261 (2012) 58, 59

Lott Constructors, Inc. v. Camden County Board of Chosen Freeholders, No. 93-5636, 1994 WL 263851 (D.N.J. Jan. 31, 1994) 22

Marks v. United States, 430 U.S. 188 (1977) 32

Maryland v. Louisiana, 451 U.S. 725 (1981) 21

McDonald v. Thompson, 305 U.S. 263 (1938) 54

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 21, 27

National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976) 20

National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1998) 25

Patton v. City of Los Angeles, 169 Cal. 521 (Cal. 1915) 1

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) 23

Railroad Transfer Service, Inc. v. City of Chicago, 386 U.S. 351 (1967) 55, 57, 61

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) ....*passim*

Rowe v. New Hampshire Motor Transportation Association, 552 U.S. 364 (2008) 27

Smith v. Department of Agriculture, 630 F.2d 1081 (5th Cir. 1980) 34

TABLE OF AUTHORITIES – Continued

Page

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)....................32, 33, 36

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000)..23, 24

Transport Limousine of Long Island, Inc. v. Port Authority, 571 F. Supp. 576 (E.D.N.Y. 1983)...35, 36

United States v. Salerno, 481 U.S. 739 (1987)...........62

Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) 40, 41

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 29, 32, 45

STATUTES

15 U.S.C. § 1203 27

15 U.S.C. § 1476 27

15 U.S.C. § 2075 27

16 U.S.C. § 1801 23

29 U.S.C. § 151 14

29 U.S.C. § 1144...21

49 U.S.C. § 13902 58

49 U.S.C. § 14501 ....*passim*

49 U.S.C. § 14506 10

49 U.S.C. § 20102 58

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 20701 58

49 U.S.C. § 30103 27

49 U.S.C. § 32304 27

49 U.S.C. § 32919 27

49 U.S.C. § 41713 25

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 18

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 ....*passim*

Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), codified as amended, 49 U.S.C. § 1 *et seq*. 56

ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 58

Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 ....48, 53, 54

MISCELLANEOUS

ABA Section of Antitrust Law, Antitrust Law Developments 567-631 (7th ed. 2012)....................31

B. Eakin and M. Meitzen, Opinion: After 30 Years, Railroad Deregulation Continues to Deliver, AOL Opinion, Nov. 9, 2010........................57

City of Los Angeles Charter, art. VI, §§ 601, 651 (2011) 1

TABLE OF AUTHORITIES – Continued

Page

Trucking Deregulation in the United States, Submission by the United States to the Ibero-American Competition Forum, Sept. 2007 57

STATEMENT OF THE CASE

I. FACTS AND HISTORY OF THE CASE

Most of the introductory Statement ("Statement") in the brief of petitioner American Trucking Associations, Inc. ("ATA"), Pet. Br. 1-16, is factually accurate. However, that Statement includes conclusory attributions of purpose to the Port of Los Angeles ("POLA" or "the Port") as well as unsupported and incorrect factual and legal conclusions. Accordingly, we set out here our own Statement of the Case. We will not repeat unnecessarily points made in ATA's Statement, but we will correct inaccuracies in that Statement and will describe certain key points that are either omitted by ATA or that, while mentioned in passing, require emphasis because of their importance to the required legal analysis.

At the outset, it is critical that POLA, although controlled by the City of Los Angeles Harbor Department, is a *commercial* enterprise. POLA is the largest port in the United States by container volume. Pet. App. 6a, 69a. It competes with other ports in the country, as well as with ports in Mexico and Canada, for cargo and ship traffic. *Id.* at 6a, 73a. The Port is located on sovereign, city-owned land and operates for the most part as a landlord port.[1] *Id.* at 5a-6a, 71a.

[1] POLA is operated and the land on which it is located is owned by the city as trustee, for the benefit of the people of California, for purposes including "maritime commerce" and "navigation." *See Patton v. City of Los Angeles*, 169 Cal. 521, 524 (Cal. 1915); City of Los Angeles Charter, art. VI, §§ 601,

(Continued on following page)

This means that it secures its revenues principally from rent paid by Marine Terminal Operators ("MTOs") – private companies that do the necessary stevedoring work of loading and unloading cargo at wharves within the property covered by their leases and that control access to that property (which is not open to the general public) at their terminal gates. *See id*. at 71a-72a; JA105. POLA neither collects nor receives any of the City of Los Angeles' general fund taxes, nor does it expend any taxpayer money. Pet. App. 5a, 70a. The Port also receives revenue for the provision of port services such as pilotage services (piloting ships within the Port's channels to and from the wharves), as well as from wharfage fees (based on cargo amounts), dockage fees (based on each ship's dockage at the Port), and passenger fees (for commercial passenger vessels). *See id*. at 70a; Court of Appeals Excerpts of Record, vol. 4 of 5 ("4 C.A. E.R.") at 718-19, No. 10-56465 (9th Cir. Dec. 29, 2010), ECF No. 16.

POLA operates as a self-supporting entity. That is, it retains its revenues and its profits, which are not passed on to the City but are used to operate the Port and to improve its infrastructure. Pet. App. 5a, 70a. And its revenues vary with the number of vessels and the amount of cargo leaving and coming into the Port. *Id*. at 72a, 120a-21a. Thus, for straightforward

---

651 (2011), *available at* http://www.amlegal.com/library/ca/losangeles.shtml.

business reasons it seeks to maximize its infrastructure capacity to accommodate more vessel traffic and a greater volume of cargo. *Id*. at 72a-73a, 120a-21a.

In the late 1990s, the Port's management determined that in order to compete effectively with other ports in the future, when more and larger ships would be used on cargo routes, the Port would have to expand its facilities so as to be able to handle those ships. *Id*. at 6a. Its initial effort at expansion, however, was opposed by environmental groups, as well as by neighborhood groups whose residential property was located near the Port. *Id*. at 6a-7a, 75a-77a. That opposition, in which respondent Natural Resources Defense Council ("NRDC") was an active participant, was fueled by two facts.

The first is that the South Coast Air Basin, in which POLA is located, has one of the worst levels of air quality in the country, creating serious health hazards. *Id*. at 73a-74a. The second is that drayage trucks, which carry cargo to and from the Port's wharves, generally have been extremely high-polluting vehicles. Among other things, they have tended to be older than most long-distance trucks and therefore have had less effective pollution-control equipment than newer trucks. *Id*. at 75a, 87a. In addition, many persons living near the Port have long been concerned about the fact that drayage trucks often are used and parked on their residential streets, raising local air pollution, congestion, and safety issues. *Id*. at 87a-88a.

Opposition to POLA's first proposed expansion project resulted in litigation filed against the Port in 2001 by the environmental and neighborhood coalitions opposing that project. *Id*. at 6a, 76a. The litigation resulted in an injunction against POLA and, ultimately, a settlement that cost the Port approximately $80 million. *Id*. at 7a, 76a-77a. A second proposed expansion project was delayed by similar opposition and a threatened lawsuit, which was averted only by another costly settlement. *Id*. at 7a, 77a-78a.

In response to these setbacks, which threatened its planned expansion and thus its future economic and competitive success, in 2006 POLA – along with the adjacent Port of Long Beach ("POLB") – adopted a Clean Air Action Plan ("CAAP").[2] *Id*. at 7a, 79a. As the decision below put it:

> In the CAAP, the Port announced its intention to "grow green" and 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 (quoting from CAAP).

---

[2] POLB was but is no longer a party to this litigation, as a result of a 2009 settlement with ATA. *Id.* at 61a n.2.

As a part of the CAAP, POLA introduced a Clean Truck Program ("CTP").[3] The CTP was designed to reduce drayage trucks' contribution to the polluted air at and near the Port that had thwarted its efforts to expand. *Id*. at 8a, 80a-84a. As part of the CTP, POLA developed a "concession contract" requirement whereby licensed motor carriers ("LMCs") that wished to operate drayage trucks at the Port would be required to enter into contracts with POLA containing certain specified provisions. *Id*. at 10a-13a, 85a-93a. Those provisions included the five that were at issue before the court below:

> 1. An off-street parking provision, requiring concessionaires to submit to the Port for approval an off-street parking plan for their trucks;
>
> 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

[3] The CTP was not adopted as part of any California clean air regulatory regime.

> 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.

See id. at 12a-13a.

Separately from its adoption of the concession contract, which pertains to LMCs, POLA amended its Tariff No. 4 to require that MTOs admit to their leased premises at the Port only drayage trucks operated by LMCs that had executed concession contracts with the Port.[4] *Id*. at 12a, 83a-84a. This tariff provision by its terms applies only to MTOs, and not to LMCs:

> [N]o Terminal Operator shall permit access into any Terminal . . . to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass from the Port of Los Angeles . . . .[5]

JA105.

---

[4] POLA's Tariff No. 4 sets forth the rates, charges, rules, and regulations for use of POLA's harbor. *See* Pet. App. 83a.

[5] A "day pass" is a temporary access permit that provides an alternative mechanism for entry into POLA's terminals. It is intended for use by LMCs who use the Port infrequently. *See* 4 C.A. E.R. 576.

In 2008, ATA instituted this litigation against the City of Los Angeles respondents, claiming that POLA's concession contract was invalid in whole or in part on two principal grounds.[6] First, ATA claimed, the concession contract was preempted by 49 U.S.C. § 14501 ("section 14501"), a provision enacted as part of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569 ("FAAAA"), which is in part a trucking deregulation statute. Section 14501(c)(1) provides that no state or state entity may "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." The defendants pointed out that section 14501 contains an exception in subsection(c)(2)(A), stating that the quoted preemption clause "shall not restrict the safety regulatory authority of a State with respect to motor vehicles" ("the safety exception"); and in addition to relying on that exception, they also asserted that POLA's concession contract requirement fell within the judicially created "market participant" exception to preemption. The second ground upon which ATA claimed preemption lay in its contention that the safety-related provisions of the concession contract conflict with this Court's decision in *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), which

[6] We leave aside for purposes of this description a claim by ATA that the concession requirement violated the dormant Commerce Clause. That claim was rejected by the District Court, Pet. App. 129a-36a, and was not appealed by ATA.

held that states were limited in the extent to which they could deny interstate motor carriers the use of state highways.

After ATA had pared down its attack on the concession contract to a challenge to the five specific provisions described above (as well as to the contract mechanism itself), and after preliminary injunction-related litigation involving two appeals to the Court of Appeals for the Ninth Circuit, the parties presented their evidence and arguments to the District Court for the Central District of California in a seven-day bench trial in 2010.[7] Pet. App. 60a. The District Court held that neither POLA's use of a concession contract mechanism nor any of the five challenged contract provisions was preempted, *id.* at 136a-37a, and ATA appealed. In doing so, ATA failed to challenge any of the District Court's findings of fact.

In the decision now under review, the Ninth Circuit held that one of the five relevant contractual provisions was preempted but that the other four were not. The Court of Appeals ruled that the

[7] ATA's brief at times cites or quotes from the preliminary injunction decisions of the Ninth Circuit as if those decisions constituted definitive holdings of substantive law. *E.g.*, Pet. Br. 9-10, 23. Insofar as merits issues are concerned, however, the Court of Appeals' preliminary injunction rulings addressed only the parties' *likelihood* of success and thus expressed only tentative views based on the preliminary record available at the time. The decision currently under review – the Court of Appeals' ultimate determination on the merits of the case – of course reflects that court's actual ruling on the issues before it.

employee driver provision was preempted because it was outside the scope of the market-participant exception or doctrine and because it fell within the terms of the FAAAA's preemption language in section 14501, in that it related to the prices, routes, or services of LMCs. Pet. App. 41a-44a. That issue is not presently before the Court inasmuch as respondents did not ask this Court to review it.

The court below also held, however, that the financial capability provision of the concession contract, unlike the employee driver provision, did not relate to LMCs' prices, routes, or services in more than a "tenuous" fashion and hence was not preempted. *Id*. at 33a-34a. It also ruled for the same reason that POLA's general requirement that motor carriers seeking access to the Port enter into a concession contract was not preempted.[8] *Id*. at 19a-21a. And it held that the maintenance provision is "genuinely

---

[8] The Court of Appeals explicitly rejected ATA's contention that, quite apart from "the effect of each individual provision of the concession agreements," the "requirement of a concession agreement *per se* affects routes and services" because it provides "POLA [the] ability to prohibit non-concessionaire LMCs from entering its property." Pet. App. 19a (quoting from ATA's brief). The court held that argument to be "foreclose[d]" by prior case law. *Id*. Thus, while the Court of Appeals mentioned the contract mechanism issue in discussing the market-participant doctrine generally (the Port acted in "its proprietary capacity as a market participant when it decided to enter into concession agreements," *id*. at 29a), ATA's attack on the concession mechanism was rejected on the ground that it did not affect LMCs' prices, routes, or services.

responsive to safety," *id*. at 34a-35a, and thus falls within the safety exception contained in section 14501(c)(2)(A). These rulings are also not before the Court. They were included as part of Question 2 set out in ATA's petition for certiorari, but the Court granted certiorari only as to Questions 1 and 3.

For purposes of the market-participant issue, therefore, the only two rulings below that are before this Court for review are (1) the holding that the off-street parking provision is shielded from preemption by the market-participant doctrine, and (2) the parallel holding that the placard provision is also so shielded from preemption. For present purposes it is with respect to those two provisions of POLA's concession contract only, therefore, that we address the market-participant doctrine.[9]

[9] The Court of Appeals held that the placard provision fell within the safety exception to section 14501. Pet. App. 45a. It also analyzed that provision under 49 U.S.C. § 14506 ("section 14506"), however, which specifies that federal "identification" of motor carriers is exclusive and has no safety exception. With respect to section 14506, the court held that the placard provision was protected from preemption by the market-participant doctrine. Pet. App. at 45a-46a. Since the same preemption language (preempting state action having the "force and effect of law") is used in both section 14501 and section 14506, the market participant analysis set out below applies to both sections, as well as to both the placard provision and the off-street parking provision. No party has ever argued that a special market participant assessment is called for with regard to section 14506.

The Court of Appeals concluded as to those provisions, in the circumstances of this case and on the record created before the District Court, that:

> The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to customers or points of forwarding. The district court found [in findings not challenged by ATA] that . . . the "Port has a direct financial interest in the unhindered and efficient flow of cargo through its terminals and in increasing container traffic through the Port . . . ."

Id. at 27a-28a (quoting *id*. at 72a). On this basis, and on the basis of other unchallenged findings by the District Court, the Court of Appeals concluded as follows:

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

Id. at 40a. Thus, the court held, adoption of the concession contract's off-street parking and placard provisions, which were intended to engender such good-will and to facilitate the Port's expansion, reflected the conduct of the Port as a market participant

rather than as a regulator, so that those contract provisions are not preempted.[10] *Id.* at 38a-41a, 44a-46a. As support for this conclusion, the court below noted that, for business reasons, a "private port owner could (and probably would)" have acted in the fashion in which POLA acted with respect to those two provisions of the concession contract. *Id.* at 29a.[11]

As to *Castle*, finally, the Court of Appeals held that since the concession contract addressed only access to private state property (the Port) rather than to state highways generally, the decision does not govern the issues raised by ATA. *Id.* at 30a-32a.

II. THE MARKET-PARTICIPANT DOCTRINE

ATA's brief includes little if any analysis of the origin or purpose of the market-participant doctrine.

[10] The Court of Appeals also found that the off-street parking requirement "serves the Port's business interest in promoting Port security." Pet. App. 40a-41a.

[11] Although ATA is able to pluck from the record occasional suggestions that other motivations may have been to some extent involved, *see, e.g.*, Pet. Br. 11, JA93-94, there is no doubt that POLA's essential reason for adopting the concession contract was commercial, as all of the quotations from the opinions of the District Court and the Court of Appeals set out herein demonstrate. Certainly, the effort in one *amicus* brief to attribute to POLA views that were merely discussed in the report of a consultant retained by the Port prior to adoption of the concession contract is without foundation. *See* Brief *Amicus Curiae* of Center for Constitutional Jurisprudence and Harbor Trucking Association in Support of Petitioner at 3, 9-10 (Feb. 22, 2013).

We believe that a brief discussion of those issues is important as background for assessing the doctrine's applicability here.

The doctrine was first articulated by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). There, the state of Maryland sought to reduce the number of abandoned, inoperative vehicles ("hulks") within its borders by awarding monetary "bounties" to scrap processors who came into possession of such hulks. Certain of this scheme's requirements were especially onerous for non-Maryland scrap processors, and one such processor challenged the plan as violating the negative or dormant Commerce Clause. The Court upheld the Maryland statute, however, on the ground that it 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.

426 U.S. 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.

Hughes was followed by *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Reeves*, the state of South Dakota

owned and operated a cement plant and, in a time of shortage, discriminated in favor of in-state and against out-of-state purchasers. This 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." 447 U.S. at 437.

Nor has the Court's application of the market-participant doctrine been limited to Commerce Clause cases. The doctrine was held to protect from preemption under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), a state entity's plan for dealing with labor issues, *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 232-33 (1993) (the "*Boston Harbor*" decision), and application of the doctrine to other federal statutes is discussed below.

SUMMARY OF ARGUMENT

The Court should affirm the Court of Appeals' decision as to the issues before it. The Port's concession contract was motivated by commercial rather than by regulatory concerns and thus falls squarely within the market-participant exception to preemption. This is especially true of the only two contract provisions upheld below on the basis of that exception – the parking provision and the placard provision. These conclusions rest on factual findings by the

District Court that were not challenged on appeal by ATA.

ATA's arguments in favor of preemption ignore basic holdings by this Court to the effect that, absent a statement of clear congressional intent to the contrary, the courts should presume that proprietary state conduct dealing with management of state-owned property is within the market-participant doctrine. Those arguments also ignore and in fact contradict uniform authority allowing application of that doctrine in situations, like this one, involving express statutory preemption. Indeed, the case law uniformly authorizes, contrary to ATA's contention, application of the market-participant doctrine in FAAAA cases. The pertinent decisions also indicate that POLA's concession contract does not (in the language of section 14501) have the "force and effect of law." That conclusion is fortified, additionally, by the concession contract's reference only to contractual remedies for any breach and by the fact that POLA's tariff – which according to ATA gives the contract the "force and effect of law" – applies in relevant part only to MTOs, not to LMCs, so that LMCs cannot be penally liable for violating the provisions of a concession contract.

The bases for ATA's argument that any market-participant exception to FAAAA preemption here should exclude POLA's concession contract (for example, because the program does not involve procurement or because the Port supposedly does not participate in a "drayage market") are based on

unjustifiably narrow readings of judicial authority defining the contours of the exception. Finally, *Castle* – which has implications only for the contract's maintenance provision or, at most, that provision and the placard provision – is no longer good law in light of the trucking deregulation that has occurred since it was decided. In any event, its application here is unjustified where only access to state-owned property (rather than state highways) is at issue, and would produce consequences contradicting fundamental legal canons concerning statutory construction.

ARGUMENT

I. THE MARKET-PARTICIPANT DOCTRINE SHIELDS FROM PREEMPTION THE OFF-STREET PARKING AND PLACARD PROVISIONS, THE ONLY PROVISIONS OF THE CONCESSION CONTRACT HELD TO FALL WITHIN THE DOCTRINE

As we have described, the only aspects of the Port's concession contract held by the court below to be protected from preemption by the market-participant doctrine are the off-street parking and placard provisions. As a consequence, this Court has no reason to assess whether the mechanism of a concession contract (apart from its content) is within the market-participant doctrine. *See* pp. 9-10, nn.8-9, *supra*. As we have also outlined, the contract mechanism and the other three provisions of the concession

contract – the maintenance provision, the financial capability provision, and the employee driver provision – were held either to be preempted (in the case of the employee driver provision) or not to be preempted on grounds not implicating the market-participant doctrine.

A. The FAAAA's Express Preemption Language Does Not Foreclose Application of the Market-Participant Doctrine, the Existence of Which is Confirmed by Uniform Case Law

ATA's principal argument against application of the market-participant doctrine here consists essentially of three steps. First, says ATA, section 14501 is an express rather than an implied preemption provision, so that law governing application of the doctrine to implied preemption situations is distinguishable. Second, the scope of preemption with respect to express preemption statutes is determined by the intent of Congress, which in turn is determined principally by its language. Third, the relevant language here – "force and effect of law" – covers the Port's concession contract. Therefore, ATA concludes, there is no room for a market-participant exception from preemption under the terms of the statute, which does not expressly provide for one. Pet. Br. 19-25.

The central difficulty with ATA's argument lies in its third step and in the logic leading to its

conclusion. ATA asserts that the concession contract has the "force and effect of law," and it similarly asserts, without any citation, that there can be no market-participant exception to an express preemption provision like section 14501 unless the pertinent statutory language specifically provides for one. Unless both of those propositions are correct, ATA's contention fails. But in fact both propositions are incorrect.

As an initial matter, consider ATA's argument that the "plain language" of the "force and effect of law" provision shows that it covers POLA's concession contract. The first striking puzzle about this contention is that the language in question is one of limitation. That is, not all state action is preempted by section 14501 – only state action having the "force and effect of law." Far from indicating an intent to preempt broadly something like the Port's concession contract requirement, that language instead suggests a more restricted intent to preempt only some state action.

For present purposes it is not difficult to determine what sort of state action Congress's language was intended *not* to preempt. To begin with, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995), construing identical language in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 ("ADA") (after which, ATA emphasizes, the FAAAA was modeled), concludes that the phrase "force and effect of law" is "most naturally read to refer to binding standards of conduct that operate

irrespective of any private agreement." (Internal quotation marks omitted.) The concession contract is just such a "private agreement."

Just as importantly, the FAAAA was enacted a year after *Boston Harbor*, which laid down a presumption as to whether a statute preempts a state's activities as a market participant: "In the absence of any express or implied indication by Congress that a State may not *manage its own property* when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-32 (emphasis added). Thus, *Boston Harbor* created a rule providing that, in the absence of a clear indication of congressional intent to the contrary, courts should presume that Congress did not intend to preempt a state entity's proprietary action. As the quoted language makes clear, moreover, this principle is quintessentially applicable where a state entity owns and manages its own property – the sort of situation in which the entity necessarily has to have some control over entry onto that property.[12]

[12] The necessity of at least some state control over entry onto property that it owns is self-evident but is illustrated by pre-ADA law governing airports, discussed below. In *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962), this Court held that a municipal airport proprietor could be held liable for taking the property of nearby residents on the basis of excessive takeoff and landing noise. Accordingly, the courts held that such municipal airports had authority, despite federal regulation of air transportation, to limit entry of aircraft, setting restrictions based (for example) on noise levels and the time of day. *See, e.g.*,

(Continued on following page)

Congress presumably was aware of this *Boston Harbor* principle in enacting the FAAAA, so that it knew it was not creating a prohibition on state proprietary activities; but in any event, *Boston Harbor* requires that the language of that statute be so interpreted. *See also Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1022 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2096 (2011) (market-participant doctrine "offers us a presumption about Congress's purposes. In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant"). In short, contrary to ATA's assertion that the "plain language" of the FAAAA's "force and effect of law" language somehow necessarily covers state action such as POLA's concession contract requirement, that language, "by excluding government actions without the force of law . . . *seems to invite*" a "proprietary analysis." *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 695 (5th Cir. 1999) (emphasis added).

Nor is the presumption somehow different in the case of express preemption statutes, as ATA argues. Although *Boston Harbor* involved implied preemption under the NLRA, its presumption applies, in the Court's own language, to "express *or* implied" indications of Congress's intent to preempt state proprietary action and so applies to express preemption

---

National Aviation v. City of Hayward, 418 F. Supp. 417, 420-22 (N.D. Cal. 1976) (citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973)).

provisions that say nothing about such action. *See* 507 U.S. at 231-32 (emphasis added). *See generally Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").[13]

This analysis is confirmed again and again in governing case law not mentioned by ATA. Although ATA fails to make the Court aware of any of them, there are numerous decisions holding that the market-participant doctrine is applicable to an express preemption provision despite the absence of any statutory language indicating that the doctrine should be applied.

The Employee Retirement Income Security Act ("ERISA"), for example, contains an express preemption provision, displacing all state action relating to employee benefit plans if such action has "the effect of law." 29 U.S.C. §§ 1144(a), (c). Under ATA's logic, there can be no market-participant exception to preemption under ERISA, because ERISA involves express preemption and because the statutory language – which is strikingly similar to that of the FAAAA – does not, ATA would say, suggest the applicability of the exception. But in fact the case law

[13] Although ATA suggests that *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), is the pertinent backdrop against which enactment of the FAAAA should be considered, Pet. Br. 27, *Morales* – which, like *Wolens*, addressed the ADA – was not even a market-participant decision.

uniformly holds that there is indeed a market-participant exception to ERISA preemption. *See, e.g., Associated Gen. Contractors of Am. v. Metropolitan Water Dist.*, 159 F.3d 1178, 1183-84 (9th Cir. 1998); *Colfax Corp. v. Illinois State Toll Highway Auth.*, No. 93-7463, 1994 WL 444882, at *6 (N.D. Ill., Aug. 16, 1994), *aff'd*, 79 F.3d 631 (7th Cir. 1996); *Lott Constructors, Inc. v. Camden Cnty. Bd. of Chosen Freeholders*, No. 93-5636, 1994 WL 263851, at *18-19 (D.N.J. Jan. 31, 1994). We are aware of no decision, in fact, that rejects the existence of a market-participant exception in an ERISA context.

ATA notes that the "FAAAA provides several statutory exceptions to its broad preemption scheme," Pet. Br. 25, referring to exceptions such as the safety exception. *Id*. at 25-26. On this basis, it argues that the "presence of those carefully crafted statutory exceptions forecloses any inference that the FAAAA also contains another, unstated exception" – *i.e.*, the market-participant exception. *Id*. at 26. But as ATA once again fails to inform the Court, every judicial decision considering whether there exists a market-participant exception to the FAAAA's preemption provision has concluded that there is – a result directly contrary to the contention urged by ATA. We know ATA is aware of such decisions, because in its petition for certiorari it conceded that case law has "recognized [a] market-participant exception to the

FAAAA." Pet. 15.[14] ATA cited in this respect *Cardinal Towing*, 180 F.3d at 693, *Petrey v. City of Toledo*, 246 F.3d 548, 559 (6th Cir. 2001) (same), and *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048-50 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001) (same).[15]

This uniform case law under the FAAAA provides definitive refutation of ATA's argument that the "plain language" of section 14501 precludes the existence of a market-participant exception to preemption under the FAAAA.[16] The decisions vary in

[14] ATA sought to explain away those decisions in its petition for certiorari by noting that they involved nonconsensual towing. Pet. 15. But ATA has failed to provide any reason why that fact should be relevant to the existence of a market-participant exception under the FAAAA.

[15] At page 23 of its brief ATA seeks to inject some uncertainty into the case law by citing and quoting from what it concedes is "the first Ninth Circuit panel" to address the preliminary injunction phase of this case. *See* Pet. App. 225a-26a. As we have explained, however, that panel merely addressed likelihood of success in the context of a preliminary record, and the Ninth Circuit decision currently under review, which rejects ATA's position, constitutes the Court of Appeals' actual resolution of the market-participant issue based upon the full trial record.

[16] ATA points to *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), which held that no market-participant doctrine was applicable to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (which addresses fishing issues). Not only is the Magnuson-Stevens Act quite a different statute from the FAAAA and the ADA, however, but the court's opinion in that case fails to apply the principle of *Boston Harbor* that a congressional intent to preserve state proprietary action free from preemption should be presumed. The opinion's analysis may also be found severely wanting inasmuch as it fundamentally

(Continued on following page)

the language they use and the approach they take to reach the conclusion that there is such a market-participant exception. At times they state that the market-participant doctrine *informs* the interpretation of the phrase "force and effect of law," so that that language itself excludes state proprietary action. *See Cardinal Towing*, 180 F.3d at 691 (defendant contends that "market participation . . . does not constitute a law, regulation, or provision having the force and effect of law under section 14501(c). We agree"). In some instances, however, the decisional language suggests that even if a given state action does have the "force and effect of law," it is nonetheless subject to a presumed market-participant exception. *See Tocher*, 219 F.3d at 1049 ("Although the plain ['force and effect of law'] language of the statute would appear to encompass [the municipal conduct at issue], it is saved from preemption by the municipalproprietor exception (also called the market participant exception) to the preemption doctrine").[17]

mischaracterizes *Cardinal Towing*, incorrectly referring to it – twice – as a decision involving ERISA rather than the FAAAA. 310 F.3d at 178. Judge Luttig's dissent offers an analysis much more in keeping with the *Boston Harbor* presumption. *Id.* at 182-83.

[17] It was from this perspective that we stated in our opposition to ATA's petition for certiorari that whether a measure "falls within the ['force and effect of law'] language" does not necessarily "mean that the measure is regulatory or that the market participant doctrine otherwise does not apply." POLA Cert. Br. 13. Given the frequently used first approach to the meaning of that language, we of course do not concede that POLA's concession contract provisions in fact have the "force and effect of law" as that phrase is used in section 14501.

Either approach may fairly be thought to reflect the presumption established by *Boston Harbor*, though the first may be more generally stated in the case law. Regardless of which perspective is adopted, however, the conclusion is the same: action taken by a state entity in "managing its property" and otherwise acting in a proprietary fashion is not preempted by the "force and effect of law" language of section 14501.[18]

In light of the uniform case law under the FAAAA, ATA's reliance on the existence of an explicit "proprietary" exception in the ADA, after which the FAAAA was patterned, is of no consequence. The ADA's exception states that the statute's preemption provision shall not prevent a state entity owning or operating "an airport . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). The absence of any such provision in the FAAAA indicates, according to ATA, that the FAAAA contains no market-participant exception to preemption.

But the cited provision deals specifically, in the language of several decisions, with problems of airport noise pollution and environmental concerns. *E.g.*, *National Helicopter Corp. of Am. v. City of N.Y.*,

---

[18] In this respect ATA's reference to POLA's Tariff No. 4, which speaks of the responsibilities of MTOs – not LMCs – in connection with concession contracts, Pet. Br. 20-21, for multiple reasons does not assist its "force and effect of law" argument. The same is true of its observation that the tariff may be enforced criminally. *Id*. This general issue is discussed at length at pp. 39-42, *infra*.

137 F.3d 81, 88-89 (2d Cir. 1998). This specific focus stems from pre-ADA law making state and municipal airport owners liable for noise and related pollution that affected the airports' neighbors and reflects a congressional intent not to alter pertinent law predating the ADA. *See, e.g., British Airways Bd. v. Port Auth.*, 558 F.2d 75, 82-84 (2d Cir. 1977).

Given that there was no equivalent to airports as to truck transportation – there are no "truckports," and no truck-related controversies involving seaports had at the time arisen – the absence of a cognate exception in the FAAAA is not surprising and says nothing about Congress's market-participant intent in passing the FAAAA. Indeed, the *Boston Harbor* requirement that an intent to preempt state proprietary action should not be found in the absence of a clear indication of such an intent by Congress directly undercuts ATA's contention that some negative implication should be drawn from the absence of a proprietary noise/environmental exception in the FAAAA. Moreover, at least one leading ADA decision suggests that there are two separate proprietary exceptions to preemption under that statute – the market-participant gloss on the meaning of "force and effect of law" as well as the more specific proprietary action exception relied upon by ATA. *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 806-808, 810 (5th Cir. 2000), *cert. denied*, 530 U.S. 1284 (2000). In any event, as we have noted, ATA's contention runs counter to every FAAAA preemption decision issued by any federal court of which we are aware.

Of even less help to ATA is the fact, pointed to in its brief, that in certain other far different statutes Congress inserted something like a market-participant exception. *See* Pet. Br. 27-28. The provisions cited by ATA, however, only address purchases "for [the state's] own use." *See* 15 U.S.C. §§ 2075(b), 1203(b), 1476(b); 49 U.S.C. §§ 30103(b)(1), 32919(c), 32304(i)(2). Accordingly, they reflect a reach narrower than that of the market-participant doctrine, which applies to state conduct not reflecting any procurement (*Hughes*) or, indeed, to state action in selling rather than buying products (*Reeves*). The *amicus* brief filed by the United States similarly rejects ATA's argument with respect to these statutes and supports the existence of a market-participant exception to the FAAAA. U.S. Br. 15-19.

Morales, also relied upon in this respect by ATA, Pet. Br. 27, similarly is of no significance. There, the Court rejected a contention that the ADA's preemption language, which precludes states from taking certain actions that "relate to" rates, routes, and services, preempted states only from "actually prescribing rates, routes, or services." 504 U.S. at 385. While true, therefore, it is of no relevance that under the rejected contention no purpose would have been served (as ATA observes) by the ADA provision preserving to the states proprietary rights over airports. And the Court's rejection of a "public health" exception to FAAAA preemption in *Rowe v. New Hampshire Motor Transportation Association*, 552 U.S. 364 (2008), is of no import given the fact that no health exception

has ever been recognized in any preemption context and is not at issue here. *See* Pet. Br. 26.

Wolens, which ATA also cites, actually undercuts its position. *Wolens* first of all was not a market-participant decision, and in any event laid down a definition of "force and effect of law" under which that language means "binding standards [not based on] *private agreement*." 513 U.S. at 229 n.5 (emphasis added). That definition is not one on which ATA can rely. No LMC is "bound" by the concession requirement unless it agrees to be so bound in a "private agreement" with POLA. Otherwise it is free to ignore the requirement and to service other ports or destinations.

B. POLA's Adoption of Its Concession Contract Provisions Falls Within the Market-Participant Doctrine

1. ATA's Fallback Argument Regarding Application of the Market-Participant Doctrine to the Facts of this Case Is Flawed

ATA's second principal contention is that even if the FAAAA includes a market-participant exception, no such exception can save the actions taken by the Port here from preemption. Pet. Br. 29. None of its arguments in support of this position is persuasive.

First, ATA contends, "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 at the use of state-allocated funds." *Id.* at 30. But not only does ATA fail to cite any decision holding the market participation doctrine inapplicable with respect to a governmental entity's use of state-owned property to conduct a business; in addition, its contention simply ignores the reality of key market-participant decisions by this Court (which it also fails to cite). *Reeves,* for instance, involved no procurement of goods or services at all, efficient or otherwise. The South Dakota conduct at issue there involved sales of goods (cement), not procurement.

The court below had it exactly right in concluding that the procurement-related standard articulated and applied in *Cardinal Towing* and later cases (cited by ATA), *see* Pet. Br. 30-32, "is useful . . . where the government is buying goods or seeking services, but it is not the be-all-and-end-all of proprietary action." The more basic question in applying the market-participant doctrine is "whether the challenged program constitute[s] direct state participation in the market . . . ." Pet. App. 25a (quoting *White v. Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 208 (1983)). As for ATA's reference to the "use of state-allocated funds," its brief invokes principally *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008). Pet. Br. 30-31. But in *Brown*, California prohibited employers receiving state funds from using those funds to promote or oppose unionization, and the Court's holding rested on the challenged statute's explicit acknowledgement that the state's purpose was "the furtherance of a labor policy" rather than a commercial

objective. 554 U.S. at 70. Here, by contrast, the District Court found, and the Court of Appeals affirmed, that POLA's adoption of the pertinent provisions of the concession contract was based on a commercial motivation rather than on a regulatory effort to further any state "policy." *See generally* Pet. App. 25a-28a, 117a-23a.

Next, ATA states that the court below upheld POLA's concession contract requirement on the supposed ground that "a State acts as a market participant whenever it does something that a private party could do." Pet. Br. 31. Attribution of such reasoning to the Court of Appeals is baseless. The Court of Appeals simply ruled that one factor supporting its conclusion that the relevant aspects of the concession contract fall within the market-participant doctrine was that the Port acted, for business purposes, in the same way a "private port owner could (*and probably would*)" have acted – *i.e.*, by "enter[ing] into concession-type agreements with [LMCs] . . . to further its [business] goals." Pet. App. 29a (emphasis added) (citing *Boston Harbor*, 507 U.S. at 231-32). Many private corporations, including Wal-Mart, Proctor & Gamble, and Patagonia, have adopted "green growth" plans like the Port's CAAP, and a recent survey of business managers reveals that the great majority believe that such plans are either now or will soon be necessary for competitive reasons. *See* NRDC Cert. Br. 17-20.

The Court of Appeals' decision hence merely rests in part on its well-supported conclusion that POLA followed a course of business action that a private port owner "probably would" have followed. ATA's

assertion that following such logic would "create[ ] an exception that swallows the FAAAA's deregulatory scheme," Pet. Br. 32, is refuted by the Court of Appeals' own conclusion, reached on the basis of its approach to the market-participant doctrine, that the concession contract's employee driver provision did *not* fall within the scope of the doctrine because it reflected thinly veiled regulation designed to affect not just LMCs (the parties to the contracts) but also third parties – drayage truck drivers. *See* Pet. App. 41a-44a. If a state commercial entity follows a course of action that private business "probably would" have followed, that is good reason to doubt that inclusion of its conduct within the market-participant doctrine would somehow create an open-ended exception to the doctrine's requirements.

Finally, ATA challenges the decision below on the ground that the "Port is not a participant in the drayage market." Pet. Br. 32 (emphasis omitted). ATA thus suggests that the market-participant doctrine applies only to actions taken within a given "relevant market" – *i.e.*, the market within which the state actor participates. But no market-participant decision has ever engaged in the sort of painstaking relevant market definition that is a staple of the everyday application of antitrust law. *See, e.g.*, ABA Section of Antitrust Law, Antitrust Law Developments 567-631 (7th ed. 2012). And the cases from which recent market-participant decisions draw their principal contours belie the notion that any "relevant market" analysis is necessary. *Hughes* asked merely whether Maryland was a participant in "the market," 426 U.S.

at 806, and *Reeves* similarly assessed simply whether South Dakota was an actor in "the free market." 447 U.S. at 437. *White*, 460 U.S. at 211 n.7, specifically added, in fact, that application of the doctrine does not turn on whether there is "privity of contract" among the relevant actors.

The only decision of this Court cited by ATA regarding this issue is *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In *Wunnicke*, Alaska's action in restricting the processing options of purchasers of the state's timber – by requiring that the timber be processed in-state prior to export – was at issue. A plurality of four Justices concluded that the state's efforts did not fall within the market-participant doctrine because they involved "downstream" restrictions, including restrictions against foreign processing of the timber sought by a plaintiff purchaser. But that was not the Court's holding in *Wunnicke*, inasmuch as two Justices of the eight-Justice Court concurred in the result on narrower grounds, without analyzing the market-participant doctrine, while the other two dissented. Hence the Court's holding was determined by the views of the two concurring Justices, who based their opinion on statutory rather than market-participant grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest

grounds") (internal quotation marks and citations omitted).

In any event, there is no "downstream" reach to the concession contract provisions at issue, since the contract reflects the relations of the Port and LMCs only. At most, any downstream effects were removed from the concession contract when the Court of Appeals held that the employee driver provision was preempted on the ground that it directly affected, by its terms, third parties – *i.e.*, the drivers of drayage trucks. As three Justices have recognized, moreover, the plurality opinion in *Wunnicke* "expressly applied 'more rigorous' Commerce Clause scrutiny [than might otherwise have been warranted] because the case involved 'foreign commerce' and restrictions on the resale of 'a natural resource.'" *Department of Revenue v. Davis*, 553 U.S. 328, 348 n.17 (2008) (plurality, quoting *Wunnicke* plurality opinion, 467 U.S. at 96, 100). *See also Reeves*, 447 U.S. at 438 n.9 ("Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged").

ATA relies on the Eleventh Circuit's recent decision in *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012). There, the court held that efforts by the Port of Miami to restrict the number of stevedores working at the port did not fall within the market-participant doctrine because the port "[did] not provide stevedore services"

and thus did not participate in a vaguely defined "stevedore market." *Id.* at 1262.[19] But *Florida Transportation*'s market-participant holding, consisting in its entirety of three paragraphs, was based on precedent binding in the Eleventh Circuit – *Smith v. Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), *cert. denied*, 452 U.S. 910 (1981).[20] In *Smith*, the court held that Georgia's management of a farmers' market fell outside the scope of the market-participant doctrine. The United States (along with the respondents herein) convincingly distinguished *Smith* at the certiorari stage. U.S. Cert. Br. 12-13.

Moreover, the holding in *Smith* was explicitly rejected by the Eighth Circuit in *Four Ts, Inc. v. Little Rock Municipal Airport Commission*, 108 F.3d 909, 912-13 (8th Cir. 1997). There, an airport that contracted with and provided counter space and parking spaces to a car rental company was held to be a participant in a loosely defined "rental car market" and hence to be within the market-participant doctrine. This was despite the fact that the airport did not purchase or provide car rental services. *See also*

---

[19] Miami-Dade County has stated that it will seek review by this Court of the Eleventh Circuit's market-participant holding. *See* Appellant's Motion for Stay of Mandate Pending Petition for Certiorari, Nos. 11-10475 and 11-11116 (11th Cir. Feb. 28, 2013).

[20] The Port of Miami's action apparently did not rest on any business justification, but rather was based on "protectionist motivation[s] . . . aimed to prevent competition against incumbent stevedores." 703 F.3d at 1257-58.

Transport Limousine of Long Island, Inc. v. Port Auth., 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (port authority likewise participated in a "market for ground transport services" because it provided facilities at airports to limousine transport companies for a fee).

A sensible reading of the "market" analysis of *Four Ts* and *Transport Limousine* suggests that the governmental entities in those cases fell within the market-participant doctrine because they were securing ground transportation facilities and services for airport passengers, thus helping to achieve their business objectives. Under this analysis, POLA is a participant in a roughly defined drayage market because it provides facilities and port services and, through its concession contract, is securing drayage services that it needs in order for the Port to fulfill its essential business functions. *See* Pet. App. 27a ("The Port necessarily requires the interrelated service of drayage trucking in order to transport . . . goods to customers or points of forwarding"). In addition, it is important that, as the District Court found, POLA has helped to fund approximately 35 percent of the drayage fleet servicing the Port, helping LMCs to procure new, clean trucks, and has in fact purchased a modest number of electric drayage trucks for potential future use at the Port's facilities. Pet. App. 90a-92a. These facts show that POLA is intimately involved in local drayage and convincingly distinguishes the Eleventh's Circuit's *Florida Transportation* decision, where the Port of Miami did not finance or otherwise participate in stevedoring.

At the end of the day, any "relevant market" aspect of the market-participant doctrine should be resolved on the basis of the essential purpose of the doctrine. That purpose, as we have seen, is to shield from preemption activities of a state entity that do not constitute "regulation" but that instead are carried on for business purposes. It may well be that issues concerning exactly what market such an entity participates in are of no particular consequence, given the lack of any principles, articulated in any market-participant decision, governing definition of such "markets" and given the multiple references in this Court's market-participant jurisprudence to simple terms such as "the market" or "the free market."

Even if those issues are germane, however, we submit that, as the *Four Ts* and *Transport Limousine* decisions suggest, the key issue as to market participation should be whether the pertinent goods or services are an important part of the business conducted by the state entity in question (as lumber processing was not part of Alaska's timber-sale business in *Wunnicke*). Just as securing ground transportation to service airport passengers is essential to an airport's successful operation of its business, so too is the securing of drayage services critical to POLA's successful operation of its commercial enterprise: "[A] supply of drayage trucks . . . is integral to cargo movement at the Port." Pet. App. 28a.[21] Hence no

[21] The fact that a state entity acts as a private business would have acted of course provides persuasive evidence that the entity is addressing products or services that are important to its operation.

concern as to market definition should obscure placement of POLA's concession contract within the zone of business activities covered by the market-participant doctrine.

Finally, ATA expresses a fear that the decision below would lead to a "patchwork" of different rules applicable at various ports, a result at odds, it says, with an important purpose underlying the FAAAA – *i.e.*, to prevent such differences by providing a uniform (though minimalistic) federal system for trucking regulation. This fear – not echoed by the United States – is at a minimum greatly exaggerated and in fact is not a genuine concern.

This is principally because the decision below turns on the facts specific to this case – the need and efforts by POLA to expand in order to remain competitive, the litigation brought by opponents that frustrated the planned expansion, and the resulting CTP and concession contract, designed to serve POLA's business interests rather than any regulatory purpose. It is fair to doubt that many other ports will be able to show such persuasive background circumstances calling for application of the market-participant doctrine – and any that could do so presumably would be entitled to the protection of the doctrine. Additionally, drayage trucks are generally short-haul trucks unlikely to service more than one port except in the unusual circumstance in which two ports are located very close to one another (as is the case with POLA and POLB). In short, this case should be decided on

the basis of its own facts, not out of excessive concern about a conceivable problem that might never come into existence and the effect of which is unknowable.[22]

2. The Position of the United States as to the Market-Participant Doctrine's Application Here Consists Merely of an Admittedly Incomplete List of "Considerations" That Are in Part Hypothetical Rather than Reflecting the Essential Facts of this Case

We now address the position expressed in the brief of the United States as *amicus*. As we have already noted, the United States rejects ATA's position that there is no market-participant exception under the FAAAA. None of the points ATA makes in this connection, including the express nature of

---

[22] Moreover, in a sense truckers have always had to conform the provision of their services to limits imposed by major commercial actors to whom they provide services. Thus, for example, shopping centers, private communities, and multi-company industrial sites frequently limit deliveries to specific times during the day and to specific entry points. They may further require trucks to check in with security personnel or to post on their windshields visitor identification. In that sense, truckers already must comply with a "patchwork" of site requirements when making deliveries to or pick-ups from specific customers doing business at those sites. To be sure, such requirements are nongovernmental, but their existence should not be ignored in weighing the practical force of ATA's "patchwork" contention.

FAAAA preemption, the existence of certain explicit exceptions to FAAAA preemption, and the fact that the ADA (after which the FAAAA was modeled) contains an explicit "proprietary" exception for state and locally owned airports, is significant in the view of the United States. Nonetheless, the United States concludes that POLA's concession contract does not fall within the market-participant doctrine. This is because, focusing on one side of the analysis, the United States notes certain "considerations" that it believes support rejection of the market-participant doctrine's application here.

First, it notes that the Port's Tariff No. 4 refers to the concession agreement and that the tariff is "penally enforceable." U.S. Br. 22. However, this point is without force. Nowhere does the tariff state that an LMC shall enter into a concession or that an LMC with a concession may not breach it, nor does it provide for any criminal penalties against an LMC who fails to enter into a concession contract or who enters into one and breaches it. In fact, the only alleged connection between the penally enforced tariff and the concession agreement identified by the United States is grounded in a provision that explicitly applies only to "[Marine] Terminal Operator[s]," requiring that they "permit access" to their leased property only to trucks owned by LMCs who have entered into a concession. *Id*. An LMC cannot violate a requirement imposed only on MTOs and therefore cannot be criminally penalized. The Port's remedies for breach of a concession contract provision are set

forth, moreover, in the contract itself – specifically, the concession contract's default and termination provisions. *See* JA73-83. Nothing in those provisions – and nothing in the concession contract as a whole – suggests that breaches of concession requirements constitute crimes subject to enforcement via the criminal penalties set forth in the tariff. Accordingly, any contention that an LMC's failure to comply with concession requirements can give rise to criminal penalties is without merit.[23]

The United States admits that it is "not clear" a "breach of the [concession] agreement would constitute a crime." U.S. Br. 22. But to say that is to understate the point: as we have explained, there is no reason to believe that an LMC could violate the tariff by breaching a concession contract provision, much less "commit a crime" by doing so. Certainly the United States cites no provision of the tariff suggesting otherwise. Nor does it acknowledge more recent authority holding, contrary to *dictum* in *Washington State Building & Construction Trades Council v.*

---

[23] ATA has stated below that it is not challenging the progressive truck ban requiring over time that LMCs use newer, less polluting trucks at the Port. *See, e.g.*, ATA Statement of P. & A. in Supp. of Mot. for Summ. J. 13 n.2 (C.D. Cal. Dec. 9, 2009), ECF No. 235. If the relevant tariff provision is deemed to confer on the concession contract the "force and effect of law" for purposes of section 14501, however, then the truck ban, which is also embedded in the tariff, 4 C.A. E.R. 580-81, could perhaps also have such force and hence could be preempted. Thus, ATA's suit may be viewed as a potential stealth attack by ATA on the truck ban and its favorable environmental results.

Spellman, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) – the only decision cited by the United States in this regard – that the existence of criminal penalties for violation of a given state or local requirement does not necessarily remove such a requirement from the market-participant doctrine.

In *Engine Manufacturers Association v. South Coast Air Quality Management District*, 498 F.3d 1031 (9th Cir. 2007), the Ninth Circuit – the same Circuit that earlier decided *Washington State Building & Construction* – considered this issue and held as follows:

> [A]ppellants contend that the Fleet Rules [the relevant state program] are regulatory rather than proprietary because they are enforceable by criminal sanctions and fines. However, Appellants do not explain why such enforcement provisions preclude the application of the market participant doctrine.

498 F.3d at 1048. And the court concluded that the Fleet Rules "clearly constitute proprietary action within the meaning of the market participant doctrine." *Id*.

> We do not believe that the enforcement provisions have the effect of transforming the Rules from proprietary to regulatory action. . . . [W]e do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its

> proprietary character when enforced by some other mechanism.

Id. To be sure, *Engine Manufacturers* addresses procurement conduct, but its reasoning and holding are applicable whenever a state or local commercial provision is, absent the existence of criminal penalties, within the market-participant doctrine. *See also Cardinal Towing*, 180 F.3d at 690 (holding that an "ordinance" fell within the doctrine).

The second factor mentioned by the United States is its view that "a container port is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation." U.S. Br. 23. For that reason, the United States asserts, the concession agreement "resembles a license more than an arms-length commercial contract." *Id*.

The key point to consider in assessing this contention is that the United States cites no authority to support it. It cites no support for the notion that the concession contract resembles a license more closely than it resembles an "ordinary commercial operation," that a "license" cannot be a feature of a commercial operation,[24] or that the market-participant

---

[24] Some municipal "franchise" licenses may be invalid if they are unrelated to governmental proprietary activity and seek merely to further a public policy. *E.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 618-19 (1986) (taxi franchise). However, as the Court observed in *Boston Harbor*, 507 U.S. at 227, *Golden State* involved no proprietary conduct by

(Continued on following page)

doctrine is inapplicable to a commercial operation that is for some reason viewed as not "ordinary." And although the United States concedes that the Port faces competition from other ports, it seeks to minimize the importance of that factor by stating that:

> [I]t is common for regulatory agencies, such as agencies overseeing industrial development, to compete in this sense with counterpart agencies of other governments to attract investment to their region.

Id. But this statement ignores the fact that the Port is admittedly a commercial enterprise, not a state "agency" trying generally to "attract investment." Commercial enterprises do not try to attract investment "to their region" – they take whatever measures are thought useful in maximizing their profits and promoting the growth of their business, as POLA did here.

Third, the United States asserts that "the off-street parking and placard requirements . . . are more regulatory than commercial in character." *Id*. They are, says the United States, "provisions of general applicability" and concern "quintessential functions of government (parking restrictions and vehicle identification)." *Id*. But the off-street parking and placard provisions of the concession contract do not have "general applicability." They apply only to LMCs who

---

the municipality in question and "a very different case would have been presented" if such conduct had been at issue.

have signed a contract. As for their being "quintessentially governmental," private companies frequently place placards on their trucks saying something like "How's my driving? Call 800-xxx-xxxx." *See, e.g.*, Apr. 28, 2010 Trial Tr. at 30:1-8, ECF No. 338. And businesses serving the public might understandably insist that their employees park in parking garages rather than on nearby residential streets, in order to avoid complaints or opposition from neighbors. So such objectives are not necessarily, or "quintessentially," governmental in nature.

The United States does concede that the two provisions were designed "specifically to generate goodwill among local residents and to minimize exposure to litigation from them." U.S. Br. 24 (quoting District Court opinion, Pet. App. 127a). And generation of such goodwill in order to facilitate Port expansion is at the heart of the reason why POLA's concession contract is commercial in nature.

The United States nevertheless seeks to defend its position by stating that "a government entity could claim such an interest for even the most thinly veiled regulatory action." U.S. Br. 24. But the possibility that, on other facts, a government entity "could" use such a claim to try and justify regulation is, we submit, not pertinent. What is pertinent is POLA's actual objective in seeking to create community goodwill, and the factual findings below are clear that that objective was to avoid litigation which would undermine the Port's commercial objectives. Furthermore, the Court of Appeals expressly precluded

the supposed "sham" problem mentioned by the United States by holding that the employee driver provision of the contract did not fall within the market-participant doctrine because it was indeed "tantamount to regulation." Pet. App. 44a.

The United States' only other point on this particular topic is its statement that "a general interest in public approval does not suffice to establish that a governmental entity is acting as a market participant." U.S. Br. 24. That contention attacks a straw man, however. POLA has never contended that a "general interest in public approval" made the concession program proprietary, nor did the courts below so hold. Again, the key point here is that POLA undertook the concession contract not to obtain "general approval," but in direct response to litigation and community opposition that had hindered some of its key business objectives.

The fourth and final "consideration" pointed to by the United States is that "the Port does not itself contract with drayage-service providers (apart from the concession agreement itself)." *Id*. The United States concedes that "[s]tanding alone, that fact might not preclude a market-participant finding. It is conceivable that a government entity managing access to its property may act as a market participant even if it does not directly participate in the market it seeks to affect." *Id*. In this respect it cites (as it must) *White,* 460 U.S. at 211 n.7, which concludes that market participation does not "stop at the boundary of formal privity of contract." But the United

States nonetheless asserts that a "more attenuated relationship between the government entity and the motor carrier calls for a *substantial* commercial justification" in order for the entity's actions to fall within the market-participant doctrine. U.S. Br. 25 (emphasis added). No persuasive basis, nor any citation to a decision utilizing such a standard, is provided for the assertion that in such circumstances a more "substantial" business justification is necessary.

The courts below have carefully examined the facts here and have concluded that without question there was indeed a business justification – and not a weak one – for the concession contract requirements at issue, and that should be enough. Again, it is the facts here, not hypothetical facts that could exist in some other situation, that should govern application of the market-participant doctrine.

The Court may in fact fairly ask why a standard consisting of only certain selected "considerations" – some of them hypothetical and all having an unexplained provenance – is a sensible way of determining whether specific conduct by a state or local business entity falls within the market-participant doctrine. We submit that that question should be answered, as it has in every case of which we are aware, by assessing the exact conduct engaged in by the entity in question in the context of its basic motivation. Indeed, in its brief at the certiorari stage, the United States was more willing to give deference to the actual facts of this case rather than to what other state business entities "might" do.

In that brief, after noting the points included in its merits brief and addressed above, the United States conceded that "there are some considerations that might be thought to cut the other way." U.S. Cert. Br. 11. Those points are drawn principally from the record and relate to the actual conduct of POLA and the other facts of this case. First, said the United States (as we noted above):

> The Port is self-sustaining solely from revenues it receives . . . , [it is] not taxpayer-funded . . . , [and] a steady supply of drayage trucks and drivers is integral to cargo movement at the Port . . . . [Moreover, the Port's] expansion has been impeded by community opposition and costly lawsuits that the concession agreements are intended to help avert . . . .

Id. (internal citations and quotation marks omitted). Furthermore, acknowledged the United States at that time:

> [T]he mere fact that the concession agreements were prompted in part by environmental concerns does not categorically render them non-proprietary. . . . Numerous Fortune 500 companies have launched similar "green" initiatives.

Id. at 11-12.[25]

---

[25] Indeed, as the representative of a group of privately-owned marine terminal operators with facilities at POLA testified below, "addressing community concerns can be a positive thing[ ] from a business perspective." Apr. 27, 2010 Trial Tr. at 157:22-25, ECF No. 337.

We submit that those points, made by the United States at the certiorari stage but not emphasized in its merits brief – together with the analysis set out above – call for affirmance of the Court of Appeals' conclusion that the off-street parking and placard provisions of the Port's concession contract fall within the market-participant doctrine.

The District Court found that the "Port's adoption of the Concession Agreement as a whole is an 'essentially proprietary' action under the market-participant doctrine, because the Port took the action in order to sustain and promote Port operations." Pet. App. 120a. It also found that "through the Concession Agreement, POLA aims to secure the provision of responsible motor carrier services that are necessary for the maintenance and growth of its commercial operations." *Id*. More specifically, the court found that "both the off-street parking and placard provisions were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them . . . ." *Id*. at 127a. Those findings, which were not challenged by ATA, form the core of the basis for applying the market-participant decision here, as the Court of Appeals correctly held below.

II. *CASTLE* DOES NOT BAR SAFETY-BASED RESTRICTIONS ON LMC ACCESS TO PRIVATE PORT PROPERTY

In its 1954 *Castle* decision, this Court held that, under the Motor Carrier Act of 1935, the

state of Illinois could not punish a motor carrier for violations of state safety standards by suspending the motor carrier's right to use state highways, because such a suspension was "the equivalent of a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity.]" 348 U.S. at 64.

The District Court and the Court of Appeals here correctly 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. Pet. App. 30a-32a. As the Court of Appeals observed: "*Castle* does not . . . stand for the proposition that the States have no power to limit motor carrier access to particular land in order to further safety." *Id.* at 31a. In particular, denial of access to the Port "does not rise to the level of the comprehensive ban at issue in *Castle*." *Id.* at 32a. As the court explained, "[u]nlike a ban on using all of a State's freeways, a limitation on access to a single Port does not prohibit motor carriers from participating in 'transport [of] interstate goods to and from that State' or eliminate 'connecting links to points in other states.'" *Id*. (quoting *Castle*).

We submit that the majority's reasoning with respect to *Castle* is correct and should be affirmed. *See Bradley v. Public Utils. Comm'n*, 289 U.S. 92, 94 (1933) (state's denial of certificate of public convenience and necessity to motor carrier to operate on one state highway extending from Cleveland to the Ohio-Michigan border, with Michigan as the final

destination, did not exclude the motor carrier from operating interstate, but merely from that particular route). *Bradley* was decided under a negative Commerce Clause analysis analogous to the preemption assessment applicable in today's deregulated trucking context.

Quite apart from the Ninth Circuit's rationale, however, ATA's argument based on *Castle* and related cases fails for multiple reasons.

A. ATA's *Castle* Argument Pertains Only to the Concession Contract's Safety-Related Provisions and So Applied Has Unsupportable Consequences

Not surprisingly inasmuch as *Castle* concerned a state's safety restrictions, ATA framed its *Castle* argument below as a challenge to the Port's authority to suspend or revoke motor carrier access to Port property for safety-related violations of a concession contract. *See* Brief of Appellant ATA at 56-61, No. 10-56465 (9th Cir. Dec. 29, 2010), ECF No. 13 (discussing *Castle* under the headings "POLA Cannot Revoke Drayage Carriers' Interstate Authority on Safety Grounds" and "Reform of Motor Carrier Regulation Did Not Extinguish Exclusive Federal Control Over Safety-Related Suspension Or Revocation Of Interstate Operating Authority").

Accordingly, both the majority and the dissent below addressed *Castle* in the course of analyzing whether the District Court correctly applied the

safety exception contained in section 14501(c)(2)(A). The majority's opinion discusses *Castle* in a section headed, "Safety Exception," Pet. App. 30a, characterizing 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 concluded that "the Port cannot justify any of the challenged regulations on the basis of safety." *Id*. at 56a.

Thus, even if ATA's *Castle* argument were persuasive – and it is not – it would have ramifications only as to (a) the concession contract's maintenance provision, which the Court of Appeals and District Court found to be "genuinely responsive to safety" concerns and thus to fall within the express safety exception of section 14501(c)(2)(A), and (b) perhaps the placard provision.[26] Pet. App. 33a-38a, 45a.

Consideration of ATA's *Castle* argument with respect to the maintenance requirement illustrates the fallacy of ATA's position. ATA contends that *Castle* represents an independent limitation on state

---

[26] As discussed earlier, although the placard provision was held to fall within the safety exception contained in section 14501(c)(2)(A), it was also analyzed under section 14506, which does not contain a safety exception. *See* p. 10 n.9, *supra*. The Court of Appeals found that the placard provision is not preempted by section 14506 because that provision was adopted to address specific proprietary concerns at the Port, thus bringing it within the market-participant doctrine. Pet. App. 45a-46a.

authority precluding the Port from "enforcing *even otherwise-nonpreempted* regulations on motor carriers by suspending or revoking their access to the Port," Pet. Br. 35 (heading capitalization omitted; emphasis added). Thus, in ATA's view, even if it is undisputed that the maintenance requirement is not preempted by the FAAAA because it falls within that statute's express safety exception, that requirement may still be invalidated under *Castle*.

ATA's position evidently rests on the premise that the Court's 1954 decision in *Castle* somehow overrules the express safety exception adopted by Congress as part of the FAAAA in 1994. Such an illogical result would render the safety exception of section 14501(c)(2)(A) meaningless, contrary to basic interpretive canons. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). As a practical matter, moreover, ATA's argument would provide plaintiffs such as ATA with two bites at the apple on preemption claims under the FAAAA (since state safety provisions not preempted by the FAAAA could be challenged under *Castle*). This is not and cannot be the law. *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439, 442 (2002) (holding that the FAAAA's safety exception permits 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). *See also* U.S. Br. 33 ("*Castle*

does not provide an independent basis to challenge the substance of [the concession] requirements”).

B. *Castle* and the *City of Chicago* Cases Relied on by ATA Are No Longer Governing Law as to Issues Such as Those Involved in this Case

Regardless of whether it is read to relate only to safety or more broadly, ATA’s *Castle* argument also fails because *Castle* is not good law today with respect to the concession contract requirements, as the District Court recognized. *See* Pet. App. 128a-29a, 156a-58a.[27] *Castle* was decided in the context of a defunct regime of comprehensive federal regulation of interstate trucking. As the brief of the United States describes in detail, the regulatory system addressed by *Castle*, the Motor Carrier Act of 1935, was terminated between the 1970s and 1990s through multiple trucking deregulation statutes, including the FAAAA. U.S. Br. 1-7. Because the regulatory regime that was addressed in *Castle* has been superseded, that decision does not govern any issue in this case.

The Motor Carrier Act granted the Interstate Commerce Commission (“ICC”) broad authority to regulate interstate motor carriers’ rates, routes, and services. Motor Carrier Act, ch. 498, §§ 204, 216-18, 49 Stat. 543, 546, 558-63 (1935). In particular, it prohibited commercial motor carriers from engaging

---

[27] The Court of Appeals expressed no opinion on this point. *See* Pet. App. 32a.

in interstate or foreign transportation unless they first obtained a "certificate of public convenience and necessity" from the ICC. Ch. 498, § 206(a), 49 Stat. at 551; *see McDonald v. Thompson*, 305 U.S. 263, 265 (1938). The ICC was authorized to issue a certificate only if it found that "the proposed service . . . is or will be required by the present or future public convenience and necessity . . . ." Ch. 498, § 207(a), 49 Stat. at 551-52. Once issued, the certificate could be suspended or revoked only if the carrier willfully violated the terms of the certificate or federal law and only after notice and a hearing. Ch. 498, § 212(a), 49 Stat. at 555.

Since the Motor Carrier Act did not contain an express preemption clause, the Court in *Castle* applied conflict preemption principles to hold that the state of Illinois' suspension of a motor carrier's right to use state highways was impermissible as "equivalent [to] a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity]." 348 U.S. at 64. Describing the Motor Carrier Act's "comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce," the Court found that, "*[u]nder these circumstances*, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* (emphasis added).

A review of the decision and the briefs in *Castle* demonstrates that the federal interests giving rise to the outcome in that case no longer exist in today's

deregulated trucking environment. As the brief of the successful party in *Castle* pointed out, the Illinois suspension provision would upset the "delicately balanced federal system" contemplated by the then-applicable regulatory regime because, as applied to the particular motor carrier involved, "it would cause a complete cessation of the [interstate] operations . . . of a significant and essential certificated common carrier upon whom many communities are solely dependent." Brief for Respondent at 3, *Castle v. Hayes*, No. 44 (Sept. 15, 1954).

The *City of Chicago* cases cited by ATA at pages 37 and 38 of its brief – *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77 (1958), and *Railroad Transfer Service, Inc. v. City of Chicago*, 386 U.S. 351 (1967) – were likewise decided in the highly regulated context of federal railroad regulation. Those cases arose from Chicago's "persistent efforts" to regulate the business of Railroad Transfer Service, Inc. ("Railroad Transfer"), a motor carrier organized by interstate railroads with lines terminating at different terminals in Chicago to transport interstate railroad passengers between the city's rail terminals. *R.R. Transfer Serv.*, 386 U.S. at 352.

In *Atchison*, the Court considered a municipal ordinance adopted by Chicago in response to the railroads' creation of Railroad Transfer, providing that no license for a transfer vehicle would issue unless the City Commissioner of Licenses first determined that the public convenience and necessity

required additional interterminal service. *Atchison*, 357 U.S. at 79-80. The Court analyzed the ordinance under then-existing provisions of the Interstate Commerce Act ("ICA"), ch. 104, 24 Stat. 379 (1887), codified as amended, 49 U.S.C. § 1 *et seq*., which the Court interpreted "not only [to] authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines, but [to] impose affirmative obligations on them in this respect." 357 U.S. at 86. As the Court explained, the provisions "manifest[ed] a congressional policy to provide for the smooth, continuous and efficient flow of [interstate] railroad traffic . . . subject to federal regulation," and "it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers." *Id.* at 87.

Accordingly, the Court concluded that the city could not exercise any "veto power" over Railroad Transfer's operations. *Id.* at 85. The Court recognized, however, that while the city could not prevent Railroad Transfer from operating, it retained "considerable authority" to regulate transfer vehicles, especially with regard to safety. *Id.* at 88 ("It could hardly be denied . . . that such [transfer] vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly, the City may require registration of these vehicles and exact reasonable fees for their use of the local streets").

Nearly a decade later, the Court considered amendments to the same municipal ordinance at issue in *Atchison*, adopted by Chicago in an effort to evade the Court's *Atchison* decision and to further regulate Railroad Transfer. The Court invalidated the amendments, again finding that Chicago's efforts were inconsistent with the ICA. *R.R. Transfer Serv., Inc.*, 386 U.S. at 359. In so holding, the Court continued to recognize the city's authority to regulate with respect to safety. *Id.* at 360.

Castle and the *City of Chicago* cases are far removed from the facts and law of this case. Those decisions addressed, under conflict preemption principles, state and local actions that interfered with comprehensive regimes of federal regulation in the interstate trucking and railroad contexts, respectively, that have since been dismantled. *See generally* Trucking Deregulation in the United States, Submission by the United States to the Ibero-American Competition Forum, September 2007, *available at* http://www.ftc.gov/bc/international/docs/ibero-trucking.pdf; B. Eakin and M. Meitzen, Opinion: After 30 Years, Railroad Deregulation Continues to Deliver, AOL opinion, Nov. 9, 2010, *available at* http://www.aolnews.com/2010/11/09/opinion-after-30-years-railroad-deregulation-continues-to-deli/. In particular, the ICC no longer exists. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 932-34. Thus, no barriers to entry in the trucking industry exist today in the form of ICC-granted certificates of convenience and necessity. Although, as the dissent below notes,

the Department of Transportation continues to issue interstate transportation "registrations" or "permits" to trucking companies, Pet. App. 53a, the Secretary is required to grant registration to any applicant "willing and able to comply" with relevant federal statutes and regulations. *See* 49 U.S.C. § 13902(a)(1).

Because there is no functional equivalent in today's deregulated trucking regime to the certificates of convenience and necessity formerly issued by the ICC, *Castle*'s holding that Illinois' suspension of a motor carrier's right to use state highways was tantamount to "a partial suspension of [the carrier's] federally granted certificate [of public convenience and necessity]," 348 U.S. at 64, has no relevance to this case. Indeed, since 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.[28] In short, *Castle* (and the *City of Chicago* cases) have little if any vitality today.[29]

---

[28] One state 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).

[29] ATA cites *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), in support of its argument that because Congress has preserved the federal government's authority to issue "interstate transportation permits," the Court's decision in *Castle* remains intact. *Kurns* is inapposite. In that case, the Court rejected an argument that the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, had been superseded by the Federal Railroad Safety Act of 1970, 49 U.S.C. § 20102 *et seq.* ("FRSA").

(Continued on following page)

C. Denial of Access to Private, Restricted Access Land at POLA Does Not Implicate *Castle*

Even if *Castle* were held to apply in this case, the limited holding of that decision would not extend to preclude the Port from denying access to private Port property. As described above, *Castle* involved state action barring a motor carrier's access to "state roads" in the context of expansive federal regulatory regimes. 348 U.S. at 62. *See also id*. at 64 (access to "Illinois highways" at issue).[30] The decision did not address state action, taken in a commercial and proprietary capacity, relating not to public highways but to state-owned property used as the site of a state-operated commercial enterprise.

As the District Court found, "[T]he [concession] agreement merely addresses the ability of drayage trucks to enter *the Port's own private property* for business purposes, not to drive generally on public highways." Pet. App. 135a-36a (emphasis added). As demonstrated by the District Court's finding, ATA has not met its burden of showing that suspension or revocation of a motor carrier's concession contract by

---

132 S. Ct. at 1267. As the Court explained, the FRSA supplemented existing railroad safety laws, and "[b]y its terms . . . does not alter pre-existing federal statutes on railroad safety." *Id.* As discussed above, through various trucking deregulation statutes, Congress has dismantled the federally regulated trucking regime at issue in *Castle*.

[30] *See also Atchison*, 357 U.S. at 88 ("use of local streets").

POLA would result in exclusion of the carrier from any state highway or public road, contrary to *Castle*.

In particular, ATA has failed to show that beyond the terminal gates – where a truck that is barred from accessing Port property would be turned away (*see* Tariff No. 4, JA105) – drayage trucks would be excluded from any state highways, public roads, or land otherwise open to the public. And the record indicates that ATA could not make such a showing. *See* Trial Demonstrative Ex. 2, Map of Los Angeles and Long Beach Harbors, JA back cover (indicating that local streets end some distance from wharves). *See also* Apr. 28, 2010 Trial Tr. at 77:14-20, 104:1-9, 108:7-9 (expert testimony regarding restrictions on truck access to marine terminals). On this basis alone, *Castle* is inapplicable.

Restrictions on access to state-owned private property present special circumstances not addressed by *Castle*. By analogy, suppose that in *Reeves*, in response to safety concerns South Dakota had erected a fence around the state-owned property in the middle of which its cement plant and an adjacent loading dock were located. Suppose further that only trucks that met certain state safety requirements were allowed to enter the state-owned property, proceed over the fenced-off macadam surrounding the plant, and pick up cement from the loading dock. Under ATA's view of *Castle*, such access restrictions would be prohibited. But as the courts below correctly recognized, *Castle* does not go this far. Indeed, the United States specifically agrees with this *Reeves*-based analysis in

its discussion of the market-participant doctrine. U.S. Br. 21.

Finally, even in the context of the then-existing comprehensive federal regulatory regimes governing trucking and railroads, *Castle* and the *City of Chicago* cases recognized that states retained "considerable authority" to condition access to state highways and city roads on compliance with safety requirements. *See Castle*, 348 U.S. at 64 (recognizing states' right to regulate the size and weight of motor vehicles under the Motor Carrier Act); *Atchison*, 357 U.S. at 88 (recognizing Chicago's authority to regulate transfer vehicles with regard to safety, including the authority to impose registration requirements and to exact reasonable fees for use of local streets); *R.R. Transfer Serv., Inc.*, 386 U.S. at 360 (same). Indeed, as the United States observes, "Nothing in *Castle* . . . supports the view that a State is required to allow unsafe vehicles to use its highways or gain access to its other transportation infrastructure." U.S. Br. 29-31.

D. Remand is Not Warranted to Determine Whether the Port Intends to Punish Past, Cured Infractions of the Concession Contracts

In its brief, the United States recommends that the *Castle* issue should be remanded for determination of whether the Port intends to punish "past, cured" breaches of the concession contract through

suspension or revocation of a motor carrier's concession agreement. U.S. Br. 32-33. This recommendation should be rejected.

ATA's complaint framed its allegations as a facial challenge to the concession contract prior to its implementation in October 2008. *See* Complaint for Declaratory Judgment & Injunctive Relief, No. 08-49420 (C.D. Cal. July 28, 2008), ECF No. 1. A facial challenge fails unless the plaintiff establishes that "no set of circumstances" exists under which the challenged provision would be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995). Of course, several challenged aspects of the concession contract have been upheld and are not even at issue here.

It would be premature to remand the issue identified by the United States, which relates to potential enforcement by the Port of concession contracts with respect to "past, cured" breaches of concession requirements. As the United States itself suggested in its brief at the certiorari stage, *see* U.S. Cert. Br. 22, such a claim is properly brought as an as-applied challenge by a motor carrier aggrieved by an actual revocation or suspension of its concession. Should such an as-applied challenge be brought, the Port will show that it does not "claim[ ] the authority to punish past, cured violations of the requirements challenged here through suspension or revocation," as

the United States frames the issue. But that is an issue for another day.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

CARMEN A. TRUTANICH	STEVEN S. ROSENTHAL
JANNA B. SIDLEY	*Counsel of Record*
JOY M. CROSE	ALAN K. PALMER
SIMON M. KANN	SUSANNA Y. CHU
LA CITY ATTORNEY'S OFFICE	KAYE SCHOLER LLP
425 South Palos Verdes Street	901 15th Street, NW
San Pedro, California 90731	Washington, DC 20005
Phone: (310) 732-3750	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

March 18, 2013