No. 11-798

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

CITY OF LOS ANGELES, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT S. RIVKIN
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
CHRISTOPHER S. PERRY
Trial Attorney
Department of Transportation
Washington, D.C. 20590

T.F. SCOTT DARLING, III
Chief Counsel
DEBRA S. STRAUS
Senior Attorney
Federal Motor Carrier Safety Administration
Washington, D.C. 20590

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
MARK B. STERN
ABBY C. WRIGHT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Section 14501(c) of Title 49 preempts a state or local "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Through concession agreements, the Port of Los Angeles, a municipal entity, requires motor carriers providing drayage services at the Port to comply with a number of requirements, including (i) submitting an off-street parking plan; (ii) displaying on vehicles placards that provide a phone number for members of the public to report environmental or safety concerns; and (iii) demonstrating that the carrier has sufficient financial resources to perform its obligations under the agreement.

The questions presented are as follows:

1. Whether the off-street parking and placard requirements are not preempted by Section 14501(c) because they lack "the force and effect of law."

2. Whether the financial-capability requirement is not preempted by Section 14501(c) because it is not "related to a price, route, or service of any motor carrier."

3. Whether *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), prohibits a municipal entity from imposing requirements on interstate motor carriers entering a port.

TABLE OF CONTENTS

Page

Statement 1
Discussion 6
A. The Ninth Circuit erroneously held that the off-street parking and placard requirements are valid because the Port of Los Angeles imposed them in a market-participant capacity, but that factbound determination does not warrant further review 6
B. The Ninth Circuit's conclusion that the financial-capability provision is not related to a price, route, or service rested on a factual conclusion not challenged by petitioner 16
C. The decision below does not conflict with this Court's decision in *Castle* v. *Hayes Freight Lines, Inc.* 19
Conclusion 23

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 513 U.S. 219 (1995) 7
Antilles Cement Corp. v. *Acevedo Vila*, 408 F.3d 41 (1st Cir. 2005) 14
Building & Constr. Trades Council v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) 8, 11
Branche v. *Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003), cert. denied, 540 U.S. 1182 (2004) 19
Cardinal Towing & Auto Repair, Inc. v. *City of Bedford, Tex.*, 180 F.3d 686 (5th Cir. 1999) 7, 15
Castle v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) 19, 20, 21, 22
Chamber of Commerce v. *Brown*, 554 U.S. 60 (2008) 8, 11

Cases—Continued: Page

Department of Revenue v. *Davis*, 553 U.S. 328 (2008).....14
Ginsberg v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), superseded by, 695 F.3d 873 (9th Cir. 2012), petition for cert. pending, No. 12-462 (filed Oct. 11, 2012) 18
Hayes Freight Lines, Inc. v. *Castle*, 117 N.E.2d 106 (Ill.), aff'd, 348 U.S. 61 (1954).....21
Hughes v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) 12, 15
Mason & Dixon Lines Inc. v. *Steudle*, 683 F.3d 289 (6th Cir. 2012).....7
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 2
Northwest Airlines, Inc. v. *Duncan*, 531 U.S. 1058 (2000) 18
Reeves, Inc. v. *Stake*, 447 U.S. 429 (1980) 15
Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 1, 2, 4, 17
South-Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 10, 13, 14, 15
Smith v. *Department of Agric.*, 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981) 12, 13
United Haulers Ass'n v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007) 8
Ventress v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010) 18
Washington State Bldg. & Constr. Trades Council, AFL-CIO v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983).....9
Wisconsin Dep't of Indus., Labor & Human Relations v. *Gould Inc.*, 475 U.S. 282 (1986) 8, 11

Constitution and statutes: Page

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause).....7, 12, 13, 15
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 2
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601(c), 108 Stat. 1606.....1
Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 20
Motor Carrier Act of 1980, Pub L. No. 96-296, 94 Stat. 793 1
49 U.S.C. 13102(14) 2
49 U.S.C. 14501(c).....*passim*
49 U.S.C. 14501(c)(1).....2
49 U.S.C. 14501(c)(2)(A) 2
49 U.S.C. 14506(a) 6, 7

Miscellaneous:

U.S. Dep't of Transportation, Bureau of Transportation Statistics, *America's Container Ports: Linking Markets at Home and Abroad* (2011) 9

In the Supreme Court of the United States

No. 11-798

AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

CITY OF LOS ANGELES, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 11-798 should be denied.

STATEMENT

1. In 1980, Congress deregulated the trucking industry. See Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Fourteen years later, Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, which included a provision preempting state and local regulation of trucking. See *id.* § 601(c), 108 Stat. 1606. That provision, now codified at Section 14501(c) of Title 49, generally bars state or local governments from "enact[ing] or enforc[ing] a law, regu-

lation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier." 49 U.S.C. 14501(c)(1). A "motor carrier" is defined as "a person providing commercial motor vehicle * * * transportation for compensation." 49 U.S.C. 13102(14). Section 14501(c) exempts from preemption, *inter alia*, an exercise of "the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A).

In *Rowe*, this Court held that certain Maine laws regulating the delivery of tobacco products were "related to a price, route, or service of any motor carrier" and therefore preempted. 49 U.S.C. 14501(c)(1); *Rowe*, 552 U.S. at 367. The Court noted that the operative language of Section 14501(c) was modeled on the preemption provision of the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, which Congress enacted to promote "maximum reliance on competitive market forces" in the airline industry. *Rowe*, 552 U.S. at 367 (quoting *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Relying on its prior construction of the ADA provision, the Court held that "pre-emption may occur even if a state law's effect on rates, routes, or services 'is only indirect'" and that "pre-emption occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption-related objectives." *Id.* at 370-371 (quoting *Morales*, 504 U.S. at 386, 390). The Court stated, however, that state laws are not preempted where they have only a "tenuous, remote, or peripheral" connection to motor carriers' prices, routes, and services. *Id.* at 375.

2. a. The Port of Los Angeles is an independent division of the City of Los Angeles. Pet. App. 5a. It owns

terminal facilities and leases those facilities to shipping lines and stevedoring companies, which load and unload cargo from docking ships. *Id.* at 5a-6a. This cargo is placed onto drayage trucks, which transport goods to customers or long-distance shippers. *Id.* at 6a. Motor carriers provide drayage services through arrangements with ocean carriers, cargo owners, and others, but do not enter into drayage contracts with the Port itself. *Id.* at 71a.

On the basis of a provision adopted in 2008, the Port prohibited drayage-service providers from using the facilities unless they had entered into "concession agreements" with the Port. Pet. App. 4a, 5a. Those agreements impose a number of requirements. As particularly relevant here, they require a drayage-service provider to (i) submit an off-street parking plan for all its permitted trucks; (ii) display on its trucks placards that provide a phone number for reporting environmental or safety concerns; and (iii) demonstrate that the carrier has sufficient financial resources to perform its obligations under the agreement.

b. Petitioner, a trucking-industry trade group, filed a complaint against the City of Los Angeles and the Port in July 2008 in the United States District Court for the Central District of California, seeking to enjoin provisions of the concession agreements. Pet. App. 61a. There followed two years of litigation over petitioner's request for a preliminary injunction, including two appeals to the Ninth Circuit. See *id.* at 61a-64a. Appearing as amicus curiae in the first appeal, the United States argued that "the concession agreements at issue fall squarely within the FAAAA's preemptive scope," and that at least some of the provisions could not qualify for the safety exemption. See Gov't C.A. Br. 7-18, 08-

56503 Docket entry No. 34 (Oct. 20, 2008). It also argued that the contention that the Port was exempt from Section 14501(c) as a "market participant[]" lacked merit because the Port does "not participate in any relevant market." *Id.* at 23, 25. The district court ultimately granted a preliminary injunction with respect to three of the challenged provisions. Pet. App. 203a.

The district court then held a bench trial in April 2010 to determine whether to permanently enjoin five challenged provisions. In addition to the off-street parking, placard, and financial-capability provisions, the court considered a requirement that drayage-service providers ensure that vehicle maintenance is conducted in accordance with manufacturers' instructions and a requirement that they use only employee-drivers, not independent owner-operators of drayage trucks. See Pet. App. 12a-13a. After making extensive factual findings, the court found none of the provisions preempted. *Id.* at 137a.

c. A divided panel of the court of appeals largely affirmed the district court, reversing only as to the employee-driver provision (a holding that respondents have not challenged in this Court through a cross-petition for a writ of certiorari). Pet. App. 41a-44a.

The court of appeals began by explaining that "[i]n determining whether § 14501(c)(1) * * * preempts State action, we ask three questions." Pet. App. 16a. "First, we must consider whether the provision 'relate[s] to a price, route, or service of a motor carrier.'" *Ibid.* (citing *Rowe*, 552 U.S. at 368). "If the answer is yes, we must consider whether the provision 'has the force and effect of law'—that is, whether the provision was enacted pursuant to the State's regulation of the market, rather than the State's participation in the market in a

proprietary capacity." *Ibid.* The court held that although market participation often takes the form of a government entity's procurement of goods or services, an entity can also act as a market participant when it "manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord." *Id.* at 23a-29a. Finally, the court stated, if the challenged provision meets both of those requirements for preemption, it must be determined whether Section 14501(c)'s "express exemptions save the regulation from preemption." *Id.* at 16a.

Applying that framework, the court of appeals first held that the financial-capability provision is not "related to a price, route, or service of any motor carrier." See Pet. App. 33a-34a. It rested that conclusion on the district court's finding that the Port was unlikely to invoke the provision to deny any drayage-service provider access to the Port. *Id.* at 34a. Based in part on "[t]estimony by [petitioner's] licensed motor carrier witnesses," the district court had determined that "the provision would have no effect on prices, routes, or services." *Id.* at 104a. The court of appeals found that conclusion "well supported by the record." *Id.* at 34a.

The court of appeals further held that the off-street parking and placard provisions do not have "the force and effect of law" because, rather than regulating the drayage market, they advance the Port's own interest as a participant "in the market as a manager of Port facilities." Pet. App. 25a; see also *id.* at 38a-41a, 44a-46a. The court viewed the concession agreements as "contracts under which the Port exchanges access to its property for a drayage carrier's compliance with certain conditions." *Id.* at 25a. The off-street parking and placard requirements, it concluded, were "designed to ad-

dress specific proprietary problems"—in particular, the need to "increase the community good-will necessary to facilitate Port expansion." *Id.* at 40a; see *id.* at 46a.[1]

Finally, the court of appeals held that the maintenance requirement falls within the safety exception to Section 14501(c). Pet. App. 34a-38a. Although it "agree[d] with the district court that the maintenance provision has only a tenuous and remote connection to rates, routes, and services," it did not "rest [its] holding on this ground." *Id.* at 35a n.15.

DISCUSSION

This case does not warrant further review. Although the Ninth Circuit erred in its application of Section 14501(c), its decision does not conflict with the decision of any other circuit.

A. The Ninth Circuit Erroneously Held That The Off-Street Parking And Placard Requirements Are Valid Because The Port Of Los Angeles Imposed Them In A Market-Participant Capacity, But That Factbound Determination Does Not Warrant Further Review

The Ninth Circuit did not hold that the off-street parking and placard requirements are not "related to a price, route, or service" within the meaning of Section 14501(c), Pet. App. 38-41a, 44-46a; rather, it held that these requirements are not preempted on the rationale that the Port of Los Angeles imposed them as a market

[1] The court of appeals found that the placard provision comes within Section 14501(c)'s safety exception but concluded that if it had "the force and effect of law," it could be separately preempted by 49 U.S.C. 14506(a), which displaces requirements that motor carriers "display any form of identification" and contains no safety exception. Pet. App. 46a.

participant, *ibid.*[2] That ruling was erroneous, but it does not create or exacerbate any conflict of authority among the circuits.

1. As an initial matter, petitioner is wrong to suggest that the status of a government entity as a market participant is irrelevant to whether Section 14501(c) applies. See, *e.g.*, Pet. 11, 12, 29-30. Section 14501(c) preempts only a "law, regulation, or other provision having the force and effect of law." Like the Ninth Circuit below, other circuits to consider the issue have concluded that "by excluding government actions without the force of law," Section 14501(c) "seems to invite" an inquiry into whether a government entity has acted merely as a market participant by entering into arms-length agreements that impose contractual rather than legal obligations on other market participants. *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford, Tex.*, 180 F.3d 686, 694-696 (5th Cir. 1999); see also *Mason & Dixon Lines Inc.* v. *Steudle*, 683 F.3d 289, 294-296 (6th Cir. 2012).

For that reason, the market participant doctrine, developed in connection with this Court's "dormant" Commerce Clause and implied-preemption cases, usefully informs judicial consideration of whether a requirement has "the force and effect of law." Cf. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-229 & n.5 (1995). The chief inquiry set forth in those decisions is

---

[2] Those provisions are not saved from preemption under the safety exception contained in Section 14501(c). The off-street parking requirement is "insufficiently related to motor vehicle safety so as to fall within the safety exception" of Section 14501(c), Pet. App. 108a-109a (internal quotation marks omitted), and the placard requirement is independently preempted by Section 14506(a), which contains no safety exception, see n.1, *supra*.

whether a government entity seeks to further its own proprietary interests rather than general regulatory policies. See, *e.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 70 (2008); *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 232 (1993) (*Associated Builders*). Thus, for example, in *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986), this Court held that a Wisconsin statute barring repeat violators of the National Labor Relations Act (NLRA) from doing business with the State was preempted. See *id.* at 283. The "manifest purpose and inevitable effect" of the statute, the Court reasoned, was "to enforce the requirements of the NLRA," rather than to respond "to state procurement constraints or to local economic needs." *Id.* at 291. Similarly, a requirement that has the purpose and effect of regulating the trucking industry rather than advancing a government entity's proprietary interests would have "the force and effect of law" under Section 14501(c).

Of course, whether a government entity has sought to advance its own proprietary interests is not the only question that a court must answer to determine whether a requirement has "the force and effect of law." Despite such a purpose, for example, a government entity "acts as a market regulator when it employs tools in pursuit of compliance that no private actor could wield, such as the threat of civil fines, criminal fines and incarceration." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157 (2d Cir. 2006), aff'd, 550 U.S. 330 (2007). Ultimately, the question whether a requirement imposed by a public entity like a port, which often engages in activity with both commercial and regulatory characteristics, has "the force and effect of law"

turns on a close evaluation of its factual and legal context.

2. The court of appeals erred in holding that the off-street parking and placard provisions are not preempted. See Pet. App. 38a-41a, 45a-46a. Four considerations, taken together, indicate that the provisions have "the force and effect of law" and thus are not imposed by the Port merely as a market participant.

First, the requirement that drayage-service providers enter into concession agreements is incorporated into a tariff that is "penally enforceable." Pet. App. 83a n.5. The tariff provides that any violation of its provisions constitutes a misdemeanor subjecting the violator to a fine of $500 and imprisonment of up to six months, and that "[e]ach person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Tariff is committed." 4 C.A. E.R. 712 (Tariff No. 4, Item No. 220(b)).[3] Any common-sense understanding of the term "force and effect of law" is satisfied by a provision backed by "criminal penalties which only a state and not a mere proprietor can enforce." *Washington State Bldg. & Constr. Trades Council, AFL-CIO* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Second, a container port like the Port of Los Angeles is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation. Like the Port of Los Angeles, the largest container ports in the Nation are owned and administered by public agencies. See U.S. Dep't of Transportation, Bureau of Transportation Statistics,

---

[3] See http://www.portoflosangeles.org/Tariff/SEC02.pdf.

America's Container Ports: Linking Markets at Home and Abroad 6 (2011) (listing twenty largest container ports). A port manages access to channels of interstate and international trade and often exercises near-monopoly power within a region. Indeed, any drayage-service provider that seeks to do business in the Los Angeles region has little choice but to accede to the concession agreements or agreements required by the physically integrated Port of Long Beach.[4] For that reason, the agreements resemble licenses more than ordinary arms-length commercial contracts. Although the Port faces competition from other public ports, Pet. App. 73a, it is common for regulatory agencies, such as agencies overseeing industrial development, housing, and parkland, to compete in this sense with counterpart agencies of other sovereigns and municipalities to attract investment to their region.

Third, the Port of Los Angeles does not itself contract with drayage-service providers (apart from the concession agreements themselves). See Pet. App. 50a (Smith, J., dissenting in part). Standing alone, that fact is not fatal; in appropriate circumstances, a government entity can act as a market participant when it seeks to affect a different but integrally related market. But that more attenuated relationship calls for a more substantial commercial justification to dispel the inference that the government entity is "using its leverage in [one] market to exert a regulatory effect in [another] market." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 98 (1984) (opinion of White, J.).

---

[4] The Port of Long Beach "form[s] a single physical Port" with the Port of Los Angeles, "although they are managed independently." Pet. App. 7a n.5.

Finally, the two specific provisions that the Ninth Circuit upheld on market-participant grounds are more regulatory than commercial in character. They are both provisions of general applicability insofar as they govern on a permanent basis all drayage-service providers that wish to gain access to the Port, and they each concern quintessential functions of local government (parking and vehicle identification). Neither provision is "specifically tailored to one particular [transaction]," nor are they responsive "to state procurement constraints or to local economic needs." *Chamber of Commerce*, 554 U.S. at 70 (quoting *Associated Builders*, 507 U.S. at 232, and *Gould*, 475 U.S. at 291); see also Pet. App. 23a. Rather, as the district court found, they "were designed specifically to generate goodwill among local residents and to minimize exposure to litigation from them." *Id.* at 127a; see also *id.* at 40a, 46a. Although the court of appeals was correct that "[e]nhancing good-will in the community" can be an "objectively reasonable business interest," *id.* at 40a, a government entity could convincingly claim such an interest for even the most thinly veiled regulatory action. It therefore cannot suffice to establish that an action constitutes market participation.

To be sure, there are some considerations that might be thought to cut the other way. The Port is "self-sustaining solely from revenues it receives from property leases and fees for dockage," not taxpayer-funded, Pet. App. 70a, 78a-79a; a steady "supply of drayage trucks and drivers is integral to cargo movement at the Port," *id.* at 28a; and its expansion has been impeded by community opposition and costly lawsuits that the concession agreements are intended to help avert, *id.* at 72a-73a, 75a. Moreover, the mere fact that the concession agreements were prompted in part by environmen-

tal concerns does not categorically render them non-proprietary. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976). Numerous Fortune 500 companies have launched similar "green" initiatives. See NRDC Br. in Opp. 18-20. Nonetheless, on balance, the off-street parking and placard provisions have "the force and effect of law" and should therefore be preempted.

3. The Ninth Circuit's market-participant holding does not conflict with any decision of another court of appeals. It therefore does not warrant further review.

a. Petitioner's first contention is that the decision below conflicts with decisions of other circuits because it "permits a municipal entity, as a supposed market participant, to set conditions on a market in which it does not participate." Pet. 12. None of the cases cited by petitioner to support this assertion involved the FAAAA, and they therefore did not interpret the phrase "force and effect of law." In any event, the broader reasoning of those cases does not conflict with the Ninth Circuit's analysis below.

Petitioner claims, for example, that the holding conflicts with the Fifth Circuit's pre-FAAAA decision in *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (1980), cert. denied, 452 U.S. 910 (1981). In *Smith*, the Fifth Circuit held that a state regulation relegating nonresidents to inferior sales locations at a state-operated farmer's market was barred by the dormant Commerce Clause. See *id.* at 1082. In a one-paragraph analysis rejecting the State's market-participant defense, the Fifth Circuit found significant that the State did not participate in the produce market but rather had "simply provided a suitable marketplace for the buying and selling of privately owned goods." *Id.* at 1083. Accord-

ingly, the court concluded, "its essential role is that of market regulator." *Ibid.*

Smith did not appear to consider whether, even though the State did not participate directly in the market for produce, it had commercial interests as a manager of the property integrally linked to the functioning of that market—the basis for the Ninth Circuit's decision below. See Pet. App. 28a ("The drayage and port markets are so closely related that the Port's interest in managing its facilities can extend to imposing conditions on drayage carriers that operate on Port property."). That is unsurprising in light of the facts of the case: In *Smith*, there was no plausible argument that the discriminatory restriction related to the State's commercial interest in managing its property, because "the admitted purpose of the rule was to give a preference to Georgia residents over non-residents of Georgia, thereby providing a competitive advantage to Georgia farmers." 630 F.2d at 1082. The Fifth Circuit therefore did not have occasion to consider the circumstance confronted by the Ninth Circuit below.

Petitioner also argues that the decision below conflicts with decisions from other circuits adopting the conclusion of the plurality opinion in *Wunnicke*, another dormant Commerce Clause case. The state law invalidated in *Wunnicke* required purchasers of timber from a state agency to process it within the State before exporting it. Four of the eight participating Justices concluded that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." 467 U.S. at 98 (opinion of White, J.). The plurality based this reasoning on the belief that "[i]n the commercial context, the seller usually

has no say over, and no interest in, how the product is to be used after sale." *Id.* at 96.

There is no conflict between the *Wunnicke* plurality opinion and the decision below. As an opinion cited by petitioner (Pet. 14 n.5) explains, *Wunnicke* was concerned with "'downstream regulation'" of goods; "[t]he case turned on the plurality's conclusion that the processing requirement constituted a 'restrictio[n] on dispositions subsequent to the goods coming to rest in private hands.'" *Department of Revenue* v. *Davis*, 553 U.S. 328, 349 n.17 (2008) (opinion of Souter, J.) (quoting *Wunnicke*, 467 U.S. at 98, 99 (opinion of White, J.)) (second alteration in original); see also *id.* at 374 (Kennedy, J., dissenting); *Antilles Cement Corp.* v. *Acevedo Vila*, 408 F.3d 41, 47 (1st Cir. 2005) (cited Pet. 14 n.5) (explaining that under *Wunnicke* market participation "does not extend to hybrid proprietary/regulatory activities that have downstream effects"). Such downstream regulation of products sold by a government entity is not at issue here.

To be sure, the *Wunnicke* plurality stated that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." 467 U.S. at 97. But the plurality had no reason to consider the circumstance as perceived by the Ninth Circuit here, in which a government entity "manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord" on participants in a different market who use those facilities. Pet. App. 29a.

b. Petitioner also argues that the decision below creates a second circuit conflict because "it allows the Port to impose restrictions wholly divorced from any gov-

ernmental interest in the 'efficient procurement' of goods or services." Pet. 12, 15-19. But none of the cases it cites contradicts that holding. Rather, each of the decisions merely concluded that action in furtherance of "efficient procurement" is *sufficient* to qualify as market participation, not that it is necessary. See, *e.g.*, *Cardinal Towing*, 180 F.3d at 693-696.

Indeed, as the Ninth Circuit explained below, limiting a government entity's market participation to the efficient procurement of goods and services for the operation of government would conflict with this Court's holding in *Hughes*. See Pet. App. 24a. In *Hughes*, the Court rejected a dormant Commerce Clause challenge to a Maryland statute that gave Maryland companies that destroyed out-of-use vehicles an advantage over out-of-state companies in obtaining a bounty from the State, finding that the State was a market participant. See 426 U.S. at 796-810. The Court did not suggest that the law furthered efficient procurement but rather found that its purpose was "protecting the State's environment." *Id.* at 809.

Moreover, there are other contexts where a State clearly acts as a market participant despite the fact that its activity is not aimed at the procurement of goods or services, such as the production and sale of natural resources, see *Wunnicke*, *supra*, and finished products, see *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 440 (1980). The dissent in *Reeves*, in fact, pointed out that the majority had extended the market-participant exception to the dormant Commerce Clause beyond "procuring goods and services for the operation of government." *Id.* at 450 (Powell, J., dissenting); see also *id.* at 436 n.8 (opinion of the Court). The Ninth Circuit was thus correct that while the "efficient procurement" inquiry is "useful

in cases where the government is buying goods or seeking services, * * * it is not the be-all-and-end-all of proprietary action." Pet. App. 25a.

B. The Ninth Circuit's Conclusion That The Financial-Capability Provision Is Not Related To A Price, Route, Or Service Rested On A Factual Conclusion Not Challenged By Petitioner

Petitioner's second question presented asks this Court to resolve alleged conflicts over the meaning of "related to a price, route, or service" in Section 14501(c). See Pet. 20. But although petitioner obscures the point, see Pet. 20, 23, 26, the only provision of the concession agreements that the court of appeals upheld on the basis that it is not "related to a price, route, or service" was the financial-capability provision, Pet. App. 33a-34a. That conclusion rested on the district court's unchallenged factual finding that the provision "would have no effect on prices, routes, or services." *Id.* at 104a. This case therefore does not implicate the conflicts of authority that petitioner has posited.

1. The financial-capability provision requires a drayage-service provider to demonstrate that it has sufficient financial resources to perform its obligations under the concession agreement. In the Ninth Circuit, the United States argued that this provision, like every other provision incorporated into the concession agreements, "directly relate[s] to motor carriers' routes and services and therefore fall[s] within the FAAAA's preemptive scope" because the "agreements essentially impose a licensing requirement on motor carriers seeking to provide drayage services to those customers within the Ports." Gov't C.A. Br. 6. The government concluded that some of the provisions are therefore clearly

preempted, while others might come within Section 14501(c)'s safety exception. See *id.* at 7.

In ultimately upholding the financial-capacity provision, however, the court of appeals rested on what it perceived to be the district court's finding that it is unlikely that the requirement would actually be enforced to bar access to the Port. The court stated that the "district court disagreed" with petitioner's argument that "the provision 'gives [the Port] discretion to deny [licensed motor carriers] the right to provide drayage services on routes involving the Port'" and deemed the district court's purported finding to be "well supported by the record." Pet. App. 34a. The court of appeals therefore concluded that the possibility that the Port would invoke the requirement to deny access to its facilities was "tenuous or remote," and found it not to be preempted on that basis. *Ibid.* (quoting *Rowe*, 552 U.S. at 371).

That factbound determination makes this case a poor vehicle to consider the scope of Section 14501(c). Given the court of appeals' conclusion that the financial-capability requirement is essentially toothless, this would not be an appropriate case to determine whether a municipal port may impose requirements on motor carriers seeking to use its facilities. If a motor carrier is denied access to the Port in the future for failure to satisfy the financial-capability requirement, moreover, it could file a challenge to the provision at that point.

2. Petitioner nevertheless asserts that the decision below conflicts with two lines of authority. But even if petitioner is correct that the court of appeals articulated certain principles that differ from those adopted by other circuits, the ultimate ground for its conclusion that

the financial-capability provision was not preempted did not turn on that difference.

a. Petitioner contends (Pet. 24-26) that this case implicates a division of authority over the meaning of the term "service" in Section 14501(c). Before this Court's decision in *Rowe*, the Third and Ninth Circuits had defined "service" to include only "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail," while other circuits had defined it more broadly. See *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting from denial of certiorari). The government does not agree with that position, and, as petitioner notes, *Rowe* clearly embraced a broader understanding of "service" than the Ninth Circuit. See Pet. 25. It is unclear whether the Ninth Circuit will revisit the issue in light of *Rowe*.[5]

The decision below, however, did not rest on the definition of "service" and therefore does not implicate the alleged division of authority. Indeed, the section of the opinion setting forth the definition of "service" cited *Rowe* for the proposition that the term encompasses a motor carrier's "system for picking up, sorting, and car-

---

[5] Petitioner cites *Ginsberg* v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), an ADA case, as reaffirming the pre-*Rowe* understanding of "service," but that opinion was withdrawn after petitioner filed its reply brief and replaced by an opinion that did not articulate the pre-*Rowe* standard. See 695 F.3d 873 (9th Cir. 2012), petition for cert. pending, No. 12-462 (filed Oct. 11, 2012). *Ventress* v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010), another ADA case, did not address *Rowe*. The validity of the Ninth Circuit's pre-*Rowe* standard is now before that court, and the government has filed an amicus curiae brief arguing that it was abrogated by *Rowe*. See Gov't C.A. Br. at 24-28, 11-16240 Docket entry No. 22 (Oct. 18, 2011).

rying goods," not only the more limited class of activities listed in the circuit's pre-*Rowe* precedents. Pet. App. 18a. And the court of appeals did not base its ultimate holding on the view that the concession agreements do not "regulate the contractual features of the provision of trucking services," as petitioner suggests. Pet. 26. Rather, it held only that the financial-capability provision would have no impact on trucking services because the Port was unlikely to invoke it to deny access to motor carriers. That limited holding does not conflict with the authority cited by petitioner.

b. Petitioner also maintains (Pet. 20-24) that the decision below implicates a conflict of authority over whether a state law "specifically targeted" at the subject matter of a federal statute can survive an express preemption provision, citing mostly ERISA decisions. But although the government agrees as a general matter with the proposition that such a law cannot survive preemption, the cases petitioner cites did not hold that a provision with *no* effect on the subject matter is preempted. See, *e.g.*, *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-1259 (11th Cir. 2003) (explaining that a provision that "directly regulates such services or * * * has a significant economic impact on them" is preempted), cert. denied, 540 U.S. 1182 (2004). In any event, in light of the determination by both the courts below that the financial-capability provision is likely to be of little or no practical significance, the court of appeals' ruling on this point does not warrant review.

C. The Decision Below Does Not Conflict With This Court's Decision In *Castle* v. *Hayes Freight Lines, Inc.*

Petitioner's third question presented asserts a conflict between the decision below and *Castle* v. *Hayes*

Freight Lines, Inc., 348 U.S. 61 (1954).[6] There is no conflict.

1. In *Castle*, a trucking company's motor carriers had repeatedly violated Illinois weight restrictions, and under state law, repeated violations could lead to a carrier's suspension from the use of state highways for up to one year. See *Castle*, 348 U.S. at 62-63. The company challenged the suspension provision, and this Court held that it was preempted by the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543, which authorized the Interstate Commerce Commission to license motor carriers to operate in interstate commerce. See 348 U.S. at 63. The Court reasoned that the Act imposed significant procedural obstacles before the Commission could suspend or revoke a carrier's authorization, so "it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate." *Id.* at 63-64. The Court considered "suspension of this common carrier's right to use Illinois highways * * * the equivalent of a partial suspension of its federally granted certificate." *Id.* at 64.

Castle thus stands for the proposition that even where a State seeks to enforce non-preempted requirements on federally licensed motor carriers, the enforcement mechanism chosen by the State may conflict with federal law. The Court acknowledged that Illinois's weight requirement did "not itself conflict with the Federal Act" due to an express provision in the Motor Carrier Act permitting such regulation, but concluded that

---

[6] This is the only basis on which petitioner now challenges the maintenance provision of the concession agreements, which the court of appeals found to fall within Section 14501(c)'s safety exception to preemption.

"it would stretch this statutory provision too much to say that it also allowed states to revoke or suspend the right of interstate motor carriers for violation of state highway regulations." *Castle*, 348 U.S. at 64. The decision made clear, however, that States could enforce non-preempted regulations through more "conventional forms of punishment." *Ibid.*

2. Assuming for the sake of this argument based on *Castle* that the relevant provisions of the concession agreements are not preempted by the FAAAA, the Port's enforcement of those provisions would not necessarily run afoul of *Castle*.[7] As noted, the concession agreements have been incorporated into a tariff that punishes infractions through criminal penalties—"conventional forms of punishment." *Castle*, 348 U.S. at 64; see also *Hayes Freight Lines, Inc.* v. *Castle*, 117 N.E.2d 106, 108 (Ill.) (discussing plaintiff's concession that a "schedule of fines" was permissible), aff'd 348 U.S. 61 (1954). Petitioner argues that *Castle* applies because "the Port can enforce a provision of the concession agreements by denying [licensed motor carriers] access to the Port." Pet. 26. But it is not clear that the Port would punish violations of the provisions at issue here through a "total suspension of the carrier's right to use [the Port]," as in *Castle*. 348 U.S. at 62; see 3 C.A. E.R. 488 (Concession Agreement Schedule 4) (setting forth Port remedies for a "Minor Default," not including suspension or revocation).

To be sure, the Port has conditioned access to the facilities on a carrier's registration under the concession

---

[7] The government cited *Castle* in its amicus curiae brief before the Ninth Circuit to support the general proposition that "state or local licensing schemes are inconsistent with the FAAAA's deregulation of motor carriers' service." Gov't C.A. Br. 9-10.

agreement (or attainment of a day pass). See Pet. App. 12a. But *Castle* did not hold that a State was required to allow carriers on its highways that refused at the outset to agree to abide by its valid state laws; indeed, the Court noted that the plaintiff was operating under a license from Illinois state authorities and did not suggest that such a licensing scheme was preempted. See 348 U.S. at 62. The problem in *Castle* was not that the State insisted on the carrier's agreement to comply with certain non-preempted regulations prospectively, but that it punished past infractions through a draconian prohibition on the use of state highways, effectively suspending the carrier's federal license. See *id.* at 64. In the event that the Port does punish violations of the provisions at issue here through a suspension or revocation of a carrier's right to use the facilities, the carrier, like the plaintiff in *Castle*, could bring an as-applied challenge.[8]

[8] The court of appeals distinguished *Castle* on the ground that it involved "all of a State's freeways," whereas this case involves only "access to a single Port." Pet. App. 32a. That distinction is immaterial, however, given the importance of the Port to interstate and international commerce.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT S. RIVKIN
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
CHRISTOPHER S. PERRY
Trial Attorney
Department of Transportation

T.F. SCOTT DARLING, III
Chief Counsel
DEBRA S. STRAUS
Senior Attorney
Federal Motor Carrier Safety Administration

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
MARK B. STERN
ABBY C. WRIGHT
Attorneys

NOVEMBER 2012