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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). That cardinal rule applies with particular force to preemption statutes. "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1977 (2011) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)). Yet respondents' briefs focus on everything *but* the language and purpose of the statutes at issue.

Respondents do not seriously dispute that the Port's concession requirements have the "force and effect of law"—and therefore fall within the express preemption provision of the Federal Aviation Administration Authorization Act (FAAAA). Their principal argument is that, even so, the requirements are saved by an unstated market-participant exception. But respondents do not attempt to show how a free-floating market-participant exception is consistent with the text, structure, history, or purpose of the FAAAA.

Respondents prefer to focus on the Port's *motives* for promulgating the concession requirements. But respondents ignore the only intent that matters: Congress's. The Port's requirements fall squarely within the text of the FAAAA's preemption clause and undermine Congress's objectives.

Respondents' efforts to avoid *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954), evince a similar indifference to congressional intent. Respondents attempt to distinguish *Castle* on the ground that that case dealt with the denial of access to state roads, whereas this case involves the denial of access to a state port. But *Castle*'s holding was not limited to the particular channel of interstate commerce to which a State threatens to deny access.

Respondents also contend that *Castle* is no longer good law in light of the deregulatory shift in federal trucking policy. But Congress has *preserved* the federal scheme on which *Castle* relied. And respondents' suggestion that *Castle* has been overturned by the enactment of the FAAAA's safety exception fails to address the text of that provision, which does nothing to expand state regulatory authority beyond the limits articulated in *Castle*. Finally, respondents' promise that the Port will not punish cured violations through suspension of access to the Port does not obviate the authority claimed in the mandatory concession agreement—nor does it go far enough. The Port still claims the authority to punish motor *carriers* for past and ongoing violations through denial of access. *Castle* forbids that type of "veto power" over interstate trucking operations.

I. THE CHALLENGED CONCESSION REQUIREMENTS FALL WITHIN THE FAAAA'S TEXT—AND CANNOT BE SAVED BY AN UNSTATED MARKET-PARTICIPANT EXCEPTION

1. This is a statutory interpretation case. The only statutory language at issue here is the FAAAA's requirement that, to be preempted under the Act, a

state provision must have the "force and effect of law." 49 U.S.C. § 14501(c)(1); *id.* § 14506(a). At the certiorari stage, however, respondents never mentioned the "force and effect of law" language—except to assert that it is "beside the point." Opp. 13. Now, with more than 100 pages of additional briefing, respondents devote just a few cursory sentences to the text at issue.

As we explained in our opening brief (at 19-23), the challenged requirements have the "force and effect of law" because they are "state-imposed obligations" backed by criminal penalties. *American Airlines* v. *Wolens*, 513 U.S. 219, 228 (1995). Attempting to downplay the criminal penalties, the Port states that Tariff No. 4 imposes those penalties only on marine terminal operators—not on the motor carriers. Resp. Br. 25 n.18.

But it is irrelevant whether the criminal penalties for violating the concession requirements are imposed on terminal operators, motor carriers, or both.[1] Municipal ordinances backed by criminal penalties are provisions carrying the "force and effect of law"—regardless of *who* gets fined or sent to jail. In *Rowe* v. *N.H. Motor Transport Association*, 552 U.S. 364 (2008), a provision held to be preempted by the FAAAA prohibited tobacco retailers from employing

[1] Tariff No. 4 provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession or a Day Pass," JA105, and imposes criminal penalties on any person who fails to "comply with any of the provisions of the rules and regulations prescribed by this Tariff," JA85. The concession agreement provides that licensed motor carriers must also "comply with Port of Los Angeles Tariff No. 4." JA53.

delivery services unless those services adhered to specific procedures. Yet there was no question that the provision (which imposed civil penalties on retailers) had the "force and effect of law" even though it told "*shippers* what to choose rather than *carriers* what to do." *Id.* at 372.

The Port also suggests that the concession agreement lacks the "force and effect of law" because it is a "'private agreement.'" Resp. Br. 18-19 (quoting *Wolens*, 513 U.S. at 229 n.5). But requirements promulgated by a government agency and incorporated into a City ordinance cannot qualify as a "private agreement" rather than "state-imposed obligations." And the Port misses the lesson of *Wolens*. *Wolens* held that state-court enforcement of a frequent-flier agreement between an airline and its passengers lacks the "force and effect of law." If, however, a government-owned *airport* imposed a penally enforceable requirement that all airlines offer specific frequent-flier benefits to passengers, that requirement *would* have the "force and effect of law." Here, the Port is invoking the full coercive power of the state to impose substantive standards on motor carriers. That is the very definition of "force and effect of law."

The Port's concession agreements are therefore distinguishable from state-hospital contracts specifying the time or location of a delivery. See California & Washington Br. 3. Such a routine contract would lack the requisite "force and effect of law" because—unlike the Port's requirements here—it is not promulgated by a Board order and codified into a City ordinance; it is not enforced with criminal penalties; it is not a rule of general applicability binding all motor carriers; it does not affect the

conduct of motor carriers even when they are not on state property; it does not regulate the services that one private business (drayage providers) can provide to another private business (terminal operators); and it is not a licensing scheme that restricts access to a crucial channel of interstate commerce. Not all state actions carry the "force and effect of law," but the Port's concession requirements do.

2. Although the Port states in passing (at 24 n.17) that it does "not concede" that the concession requirements have the "force and effect of law," its principal argument is that the statutory language is irrelevant. According to the Port, even if the concession requirements have the "force and effect of law," they nevertheless escape preemption under a market-participation exception that—by the Port's own admission—is disconnected from the statute itself. But the text, structure, and purpose of the FAAAA all show that Congress did *not* tacitly intend to graft a market-participant exception onto the FAAAA.

First, "[the FAAAA] explicitly lists a set of exceptions . . . but the list says nothing about" a market-participant exception. *Rowe*, 552 U.S. at 374. The Port dismisses that argument on the ground that some lower courts have recognized a market-participant exception to the FAAAA—"definitive refutation," the Port contends, of the textual principle articulated in *Rowe*. Resp. Br. 23. But citation to lower-court opinions is no substitute for the statute's language—much less "definitive refutation" of this Court's sensible construction of that language. That is particularly true given that those opinions pay short shrift to the statute's text. See *Millbrook* v. *United States*, 569 U.S. ___, 2013 WL

1222647, at *4 (2013) ("A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso. . . . None of these interpretations finds any support in the text of the statute."). In *Tocher* v. *City of Santa Ana*, 219 F.3d 1040, 1049 (9th Cir. 2000), for example, the Ninth Circuit discounted the statutory language, stating that, "[a]lthough the plain language of the [FAAAA] would appear to encompass" the state action, "it is saved from preemption by the municipal-proprietor exception."

The Port also tries to distinguish *Rowe* on the ground that it dealt with the question whether the FAAAA contained a public-health exception, not a market-participant exception. But *Rowe* enunciates a larger principle: When Congress enumerates specific exceptions to a preemption provision, it does not intend courts to read additional exceptions into the statute. "The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 87-88 (2006).

Second, even though Congress in drafting the FAAAA "copied" the language of the preemption clause in the Airline Deregulation Act (ADA), *Rowe*, 552 U.S. at 370, it *declined* to include the ADA's exception for state-owned airports acting in their "proprietary" capacity. See 49 U.S.C. § 41713(b)(3).[2]

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[2] When a Congress omits from one statute language that it included in other, similar statutes, this Court assumes that Congress intended to omit the language. *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013).

The Port's only response is to say that when the FAAAA was enacted "there was no equivalent to airports as to truck transportation—there are no 'truckports.'" Resp. Br. 26. There might not have been "truckports" in 1994, but there were bus stations, depots, and, of course, major shipping ports—all of which were known to be served by motor carriers and owned by public instrumentalities. See *California* v. *United States*, 320 U.S. 577, 585-86 (1944) ("Congress knew" that a large portion of the nation's dock facilities are "owned or controlled by public instrumentalities").

In any event, respondents' suggestion that Congress did not have "truckports" in mind when enacting the FAAAA is no reason to read into the text an exception that is not there. Congress *did* have motor carriers in mind—and the Port's requirements targeting motor carriers fall squarely within the statute's text. The exceptions to the FAAAA are the ones Congress wrote—not those a litigant thinks Congress would have enacted if only it were better informed about the trucking industry.[3]

Third, the Port dismisses Congress's repeated inclusion of proprietary exceptions in other express preemption statutes. The Port states that many of those exceptions apply only to a narrow subset of

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[3] There is no significance to the California and Washington amici's observation that a prior version of the ADA's proprietary exception stated that nothing in the preemption provision "*shall be construed* to limit" States acting in their proprietary capacity. California & Washington Br. 7 (quoting U.S. Br. 18) (quoting ADA, Pub. L. No. 95-504, § 4, 92 Stat. 1705, 1707-1708 (49 U.S.C. App. 1305(b)(1) (1992))). This Court has stated that the ADA's proprietary exception has independent content. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992).

proprietary actions—purchases for the State's "own use"—whereas the Ninth Circuit's market-participant exception applies to a much broader array of proprietary actions. Resp. Br. 27.

But the Port reaches the wrong conclusion from that observation. If the Port is correct that every preemption clause contains an unstated market-participant exception, there would be no reason for Congress to specify a *narrower* "purchasing" exception; such an exception would already be included in the broader (but unstated) market-participant exception. Indeed, respondents acknowledge (at 26) that their theory would render the ADA's proprietary exception superfluous—which is improper. See *Morales*, 504 U.S. at 386 ("if the preemption effected by" the ADA's express preemption clause "were such a limited one, no purpose would be served by the" ADA's proprietary exception).

3. Respondents next rely on an even more sweeping proposition: They contend that *every* preemption statute (express or implied) contains a free-floating market-participant exception. Resp. Br. 20-21. That argument rests on a profound misunderstanding of *Building & Construction Trades Council* v. *Associated Builders & Contractors* ("*Boston Harbor*"), 507 U.S. 218 (1993).

Boston Harbor addressed an amendment to the National Labor Relations Act (NLRA) permitting employers in the construction industry, but not in other industries, to enter into prehire collective-bargaining agreements. 507 U.S. at 229. The question in the case (which involved *implied* preemption) was whether Congress intended the NLRA to preempt "enforcement by a state authority, acting as the owner of a construction project, of" the type of

prehire agreements authorized by the statute. *Id.* at 220. The Court explained that there "is no reason to expect the[] defining features of the construction industry" that led Congress to authorize prehire agreements "to depend upon the public or private nature of the entity purchasing contracting services." *Id.* at 231. Thus, the Court stated, "[i]n 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." *Id.* at 231-32.

Latching on to the Court's reference to "express or implied indication by Congress," the Port asserts that *Boston Harbor* creates a presumption that even "express preemption provisions" contain an unstated market-participant exception—unless Congress specifically says otherwise. Resp. Br. 20-21. But that is not what this Court meant by "express or implied indication of Congress." An express preemption clause *is* an "express" indication that Congress meant to preempt state actions falling within the statutory language—without excepting "proprietary" state action from the scope of pre-emption. The Court's reference to "express" intent does not mean that Congress must append to every express preemption clause the modifier "—including state actions arguably motivated in part by proprietary interests."[4]

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[4] Airports Council International misreads *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 685 (1999). See Airports Br. 14-15. In *Florida Prepaid*, this Court stated (in the sentence after the one quoted by amicus) that the market-participant exception makes sense with respect to "*judicially created* dormant Commerce Clause

Unlike respondents, the Court in *Boston Harbor* looked to the statute at issue (the NLRA), and concluded that Congress did not intend *that statute* impliedly to preempt state enforcement of lawful prehire agreements. Here, in contrast, every indication of congressional intent—express and implied—points the other way.

The Court in *Boston Harbor* also relied on prior decisions interpreting implied preemption under the NLRA to apply only to state *regulations*—and not to other state requirements. 507 U.S. at 227. But the FAAAA's express preemption clause does not just preempt state "regulations." It also preempts any "provision having the force and effect of law." 49 U.S.C. § 14501(c)(1). That difference matters: Congress preempts what it says it preempts *in the statute at issue*—not what is impliedly preempted under another statute.

It is therefore irrelevant whether Congress "presumably was aware" of *Boston Harbor* when it enacted the FAAAA. Resp. Br. 20. Case law interpreting implied preemption under the NLRA cannot trump the plain wording of the FAAAA's express preemption clause. The text is clear, and the Port's actions fall within that text. See *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms.").

4. Respondents' *application* of the market-participant exception further illustrates just how far they have drifted from the text and purpose of the statute. "What the Commerce Clause would permit

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restrictions," but is *inapplicable* in the sovereign-immunity context. 527 U.S. at 685 (emphasis added).

States to do in the absence of" a statute is "an entirely different question from what States may do with the Act in place. Congressional purpose is of course the ultimate touchstone of pre-emption analysis." *Wis. Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 290 (1986) (internal quotation marks omitted).

This Court reaffirmed that principle in *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60 (2008): "[I]t is not 'permissible' for a State to use its spending power to advance an interest that—even if legitimate 'in the absence of the NLRA'—frustrates the comprehensive federal scheme established by that Act." *Id.* at 73-74 (quoting *Gould*, 475 U.S. at 290). Thus, both the existence *and* scope of any market-participant exception depend on the statute at issue. This Court has therefore limited the market-participant exception in NLRA implied-preemption cases (the only statutory cases in which this Court has inferred a market-participant exception) to state actions "specifically tailored to one particular job" and related to "the efficient procurement of goods and services." *Id.* at 70. It is undisputed that the Port's actions here fail both requirements.

Although the scope of any market-participant exception depends on the statute at issue, respondents make no attempt—none—to show how the unbounded market-participant exception they propose is consistent with the text or purpose of the FAAAA. According to respondents' market-participant theory, it doesn't matter if the Port is buying anything, selling anything, spending anything, or even *participating* in the drayage

market.[5] What matters, according to respondents, is the Port's alleged "*objective* in seeking to create community goodwill." Resp. Br. 44 (emphasis added); see also *id.* at 12 n.11, 14, 30, 34, 35, 45, 46 (citing Port's motives and objectives). Indeed, the NRDC's brief is devoted entirely to the observation that businesses are sometimes motivated by community or environmental concerns.[6]

But the FAAAA does not exempt from preemption actions "motivated" by commercial or environmental concerns or actions taken with the "objective" of enhancing community goodwill. Rather, it expressly preempts provisions with the "*force*" and "*effect*" of law—irrespective of the State's motives for enacting such provisions. In *Rowe*, Maine's arguments fo-

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[5] The Port argues that "no market-participant decision has ever" required participation in a relevant market. Resp. Br. 31. But even the dormant Commerce Clause cases cited by the Port undermine that assertion. See *Camps Newfound/Owatonna, Inc.* v. *Harrison*, 520 U.S. 564, 592 (1997) ("In *Alexandria Scrap* we concluded that the State of Maryland had, in effect, entered *the market for abandoned automobile hulks as a purchaser* because it was using state funds to provide bounties for their removal from Maryland streets and junkyards. In *Reeves*, the State of South Dakota similarly participated in *the market for cement as a seller* of the output of the cement plant that it had owned and operated for many years.") (emphasis added and internal citations omitted).

[6] It is irrelevant whether private businesses are sometimes motivated by such concerns. "[I]n our system States simply are different from private parties and have a different role to play." *Gould*, 475 U.S. at 290. A private business might choose to "[l]imit the use of child labor." NRDC Br. 31. But when a *State* forbids the use of child labor (on threat of criminal punishment), it is acting as a regulator, not as a proprietor, *and*—more importantly—doing so through requirements with the "force and effect of law."

cused on the "*reason why* it ha[d] enacted the provisions in question"—to protect the public health. *Rowe*, 552 U.S. at 373-74. But this Court declined to wade into any dispute over the State's motives, holding instead that the FAAAA simply did not contain any exception for actions motivated by public-health concerns. The prospect of endless litigation over a State's motives is yet another reason not to adopt respondent's atextual market-participant exception.

The intent that matters is *Congress's*, not the Port's. The Port's requirements not only fall squarely within the text of the FAAAA's preemption clause; they undermine the "federal Act's ability to achieve its pre-emption-related objectives." *Rowe*, 552 U.S. at 371-72. Congress enacted the FAAAA to prevent state actions that would "impede[] the free flow of trade," Pub. L. No. 103-305, § 601(a)(1)(B), 108 Stat. 1569 (1994), or result in a "patchwork" of "state requirements" that undermine Congress's deregulatory objectives. *Rowe*, 552 U.S. at 373; see H.R. Conf. Rep. No. 103-677, at 87 (1994) ("The need for section 601 has arisen from this patchwork of regulation."). By imposing requirements on motor carriers as a condition to accessing a key channel of interstate commerce, the Port has produced "the very effect that the federal law sought to avoid." *Rowe*, 552 U.S. at 372.[7]

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[7] The NRDC protests that, if state regulation of motor carriers in the guise of market participation creates a patchwork of burdensome requirements, "that is a task for Congress, not the courts, to resolve." NRDC Br. 46-47. But that's exactly backwards. This Court does not read into statutes exceptions that conflict with the text and purpose of the statute on the assumption that Congress will clean up the mess.

To be sure, the Port's actions here *are* regulatory. Market participants do not—because they cannot—impose criminal penalties. "A governmental 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). And market participants do not impose licensing schemes that restrict access to the channels of interstate commerce.[8]

But the larger point is that a state action that has the "force and effect of law" is preempted by the FAAAA irrespective of whether that action also serves some proprietary interest. "Force and effect of law" is not the converse of "proprietary interest." A state advisory opinion stating that trucks should use snow tires and avoid bridges in inclement weather would lack the "force and effect of law"—even though there is nothing "proprietary" about such an opinion. A state provision requiring all in-state builders to purchase concrete exclusively from a state-owned concrete factory, on the other hand, would have the "force and effect of law"—even though the provision would also advance the State's proprietary goals.

Of course, when a government acts in a proprietary capacity, it *may* also be acting without the "force and effect of law." But such an action would

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[8] It is irrelevant whether the Port helped fund the purchase of some trucks. See Resp. Br. 35. As the court of appeals recognized below, "the concession agreements bind all licensed motor carriers operating at the Port, not merely those who drive Port-subsidized trucks." Pet. App. 44a.

escape preemption because it lacks the "force and effect of law"—the requirement imposed by Congress—not because it advances proprietary interests. The Port's concession requirements have the "force and effect of law" under any reasonable definition of the phrase, and are preempted on that basis.

II. *CASTLE* REMAINS GOOD LAW AND PRECLUDES THE MANDATORY CONCESSION ENFORCEMENT PROVISIONS

1. As we demonstrated in our opening brief (at 36-41), *Castle* prevents the Port from enforcing even otherwise nonpreempted regulations by denying federally licensed motor carriers access to the Port. Respondents do not meaningfully distinguish *Castle*.

First, respondents halfheartedly defend the Ninth Circuit's holding that denying access to the Port "'does not rise to the level of the comprehensive ban at issue in *Castle*.'" Resp. Br. 49 (quoting Pet. App. 32a). But *Castle* does not prohibit only "comprehensive bans" on a motor carrier's operations. It bars the "equivalent of a *partial suspension* of [a motor carrier's] federally granted certificate." *Castle*, 348 U.S. at 64 (emphasis added). A "partial suspension" is, by definition, less than a "comprehensive ban." See *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 176-77 (1959) (concluding that a punishment covering three percent of a carrier's operations was "tantamount to a partial suspension").

Second, the Port claims that the denial of access to the Port of Los Angeles is equivalent to the denial of access to "one state highway extending from Cleveland to the Ohio-Michigan border." Resp. Br. 49. In support, the Port cites *Bradley* v. *Public*

Utilities Commission, 289 U.S. 92 (1933), where this Court ruled that a denial of access to a single road did not violate the dormant Commerce Clause. But *Bradley* was issued 20 years before *Castle*—and 2 years before the Motor Carrier Act of 1935, which established the statutory scheme on which *Castle* relied. As discussed below, the federal regulatory scheme currently—as it did when this Court decided *Castle*—grants the federal government comprehensive authority over interstate commerce licensing for motor carriers. *Bradley*'s dormant Commerce Clause analysis is therefore off point.

In any event, denial of access to "an important gateway to interstate and international commerce" (U.S. Br. 30) such as the Port of Los Angeles dwarfs the effect of denial of access to a single state road, when, "[f]or aught that appears, some alternate or amended route was available," *Bradley*, 289 U.S. at 94. As we noted in our opening brief (at 39), denial of access to the busiest container port in the United States would have foreclosed access to $240 billion of cargo value in 2007 alone. See also Pet. App. 69a. Such a ban would "seriously disrupt[]" affected motor carriers' interstate operations. *Castle*, 348 U.S. at 64.

Third, respondents argue that we have failed to make a "showing that suspension or revocation of a motor carrier's concession contract by POLA would result in exclusion of the carrier from any state highway or public road." Resp. Br. 59-60. But nothing in *Castle* suggests that its holding turns on whether the state-owned property from which a licensed motor carrier is excluded is a *road* rather than another channel of commerce. Rather, that artificial limitation is at odds with *Castle*'s animat-

ing concern: the disruption to a licensed motor carrier's interstate operations. The Port is not analogous to a state-owned cement plant (see Resp. Br. 60) but is a gateway to huge amounts of container traffic, including significant streams of international commerce with China, Japan, Taiwan, South Korea, and Thailand, among other countries. Pet. App. 69a. Barring a motor carrier from participating in such commerce effects the partial suspension of federally granted operating authority. *Castle* precludes it.

2. Respondents also argue that *Castle*'s holding has been qualified either by the enactment of the FAAAA or by the deregulatory shift in federal policy toward the trucking industry. Those arguments turn a blind eye to the text and purpose of the statutes at issue.

The Port first contends that our position rests on the premise that "*Castle* somehow overrules the express safety exception adopted by Congress as part of the FAAAA in 1994." Resp. Br. 52. That mischaracterization ignores the terms of the FAAAA's safety exception (which respondents do not quote). The safety exception provides that the FAAAA's preemption clause "shall not *restrict* the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (emphasis added); see also *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002) (noting that the safety exception protects States' "*preexisting and traditional* state police power over safety" (emphasis added)). As we explained in our opening brief (at 44), the safety exception therefore simply preserves—and does not *expand*—state safety regulatory authority. And that regulatory authority is limited by a statutory regime that gives the federal

government the exclusive authority to grant, suspend, or revoke carriers' interstate operating authority. Nothing in the FAAAA remotely suggests that Congress silently overturned those longstanding limits on the scope of States' regulatory authority.

Castle and the FAAAA therefore present *separate* limits on a State's authority. "*Castle* teaches that even if a state law is not preempted because it falls within an exception to Section 14501(c), the method the State chooses to punish violations of the law might be independently preempted by that provision or due to a conflict with the federal licensing scheme." U.S. Br. 29.[9] Requiring compliance with both the FAAAA's limits on a State's substantive authority and *Castle*'s long-recognized limits on its enforcement powers does not, as the Port suggests (at 52), amount to taking "two bites at the apple"; it simply gives effect to Congress's intent and this Court's precedents.

Respondents' second argument—that "the regulatory regime that was addressed in *Castle* has been superseded," Resp. Br. 53—also fails. As we noted in our opening brief, *Castle*'s holding rested on two particular features of the federal regulatory framework. The Motor Carrier Act of 1935 (1) gave a federal agency (the ICC) the exclusive power to determine whether motor carriers could operate in

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[9] Respondents are therefore wrong to suggest (at 50-51) that *Castle*'s limitations apply only to safety-related concession provisions. *Castle* acknowledges that States may impose "conventional forms of punishment" to promote safety. Nothing in the opinion, however, limits its holding (that States cannot effect a "partial suspension" of a motor carrier's "federally granted certificate") to state actions motivated by safety concerns. 348 U.S. at 64, 65.

interstate commerce, and (2) "placed within very narrow limits" the ICC's exclusive power to suspend or revoke that authority. *Castle*, 348 U.S. at 63. Because respondents cannot demonstrate that either element underlying the *Castle* holding has been altered, that decision continues to govern. See *Transcon. Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 417 (1986) ("Whether [an earlier] decision governs this case depends on whether Congress . . . altered those characteristics of the federal regulatory scheme which provided the basis . . . for a finding of pre-emption."); see also *Kurns* v. *R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1267 (2012).

With respect to the federal government's power to issue interstate commerce licenses, the Port emphasizes changes in the showing a motor carrier must make to obtain interstate operating authority and in the identity of the federal entity charged with granting that authority. The crucial point under *Castle*, however, is that it remains the "[e]xclusive power of the Federal Government to make this determination." *Castle*, 348 U.S. at 63. It is irrelevant whether that task is performed by the Secretary of Transportation (rather than the ICC), and whether the requirements for obtaining interstate operating licenses have changed.

Respondents assert that "there is no functional equivalent in today's deregulated trucking regime to the certificates of convenience and necessity formerly issued by the ICC." Resp. Br. 58. But 49 U.S.C. § 13902(a) continues to set out specific conditions under which the Secretary shall register motor carriers to operate in interstate commerce. Indeed, the ICC Termination Act of 1995, Pub. L. No. 104-88,

109 Stat. 803 (1995), makes clear that the registrations issued under the current regime are the "functional equivalent" of the certificates granted under the prior regime. See 49 U.S.C. § 13905(a) ("PERSON HOLDING ICC AUTHORITY.—Any person having authority to provide transportation or service as a motor carrier, freight forwarder, or broker under this title, as in effect on [the day before the effective date of this section], shall be deemed, for purposes of this part, to be registered to provide such transportation or service under this part.").

As for the second basis for *Castle*'s holding, the federal government continues to have the exclusive authority, subject to specific limits, to revoke or suspend a motor carrier's interstate operating authority. See 49 U.S.C. § 13905(e)-(f). Given Congress's preservation of an exclusive and circumscribed federal power to revoke or suspend operating authority, it would remain "odd if a state [or municipality] could take action amounting to a suspension or revocation" of a licensed motor carrier's right to operate in interstate commerce. *Castle*, 348 U.S. at 64.

More broadly, respondents suggest that the shift to a deregulatory approach at the federal level is by itself enough to displace *Castle*'s preemption analysis. See Resp. Br. 50. As shown above, however, the switch to a market-driven approach has *not* "dismantled" (Resp. Br. 57) a scheme in which the federal government retains exclusive power to grant, suspend, and revoke interstate operating authority—the key features on which *Castle*'s holding rested. And, in any case, "[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event

would have as much preemptive force as a decision *to* regulate." *Transcon. Gas Pipe Line Corp.*, 474 U.S. at 422 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original)).

As this Court has recognized, Congress made that determination here through enactment of the FAAAA's broad preemption scheme together with the series of statutes deregulating the trucking industry at the federal level. See *Rowe*, 552 U.S. at 373 (noting that "a patchwork of state service-determining laws, rules, and regulations . . . is inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace").

3. The Port closes its brief with the conclusory assertion that the Port would show, in some future proceeding, "that it does not claim the authority to punish past, cured violations of the requirements challenged here through suspension or revocation." Resp. Br. 62 (brackets and internal quotation marks omitted). That grudging admission is inconsistent with the veto power actually claimed by the concession agreement at issue—and is in any event insufficient to avoid the square conflict with *Castle*.

Reaffirming that States and municipalities are precluded from exercising "veto power" over federally licensed motor carriers, this Court held in *City of Chicago* v. *Atchison, Topeka & Santa Santa Fe Railway*, 357 U.S. 77 (1958), that the City of Chicago had "*no power* to decide whether [the respondent] c[ould] operate a motor vehicle service between terminals for the railroads because this service is an integral part of interstate railroad transportation authorized and subject to regulation under the

Interstate Commerce Act." *Id.* at 88-89 (emphasis added). Although "counsel for the City" denied that the City would assert such power, the Court stated that it was sufficient "that the City claims at least *some power* . . . to decide whether a motor carrier may transport passengers from one station to another." *Id.* at 85 (emphasis added); see also *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 357 (1967) (same). Whatever shifting litigating positions respondents choose to adopt in this case, the Port still demands that drayage carriers serving the Port sign a mandatory concession agreement purporting to grant the Port authority to take the very actions precluded by *Castle* and the *City of Chicago* cases.

The Port's admission, moreover, is simply insufficient. As we noted in our opening brief (at 40), the enforcement provisions operate by seeking to impose access restrictions on the licensed motor carrier as a business enterprise, not just on a potentially out-of-compliance truck. We have acknowledged that the "conventional forms of punishment" reserved to States and municipalities under *Castle*, 348 U.S. at 64, include the ability to take an unsafe truck out of service. By drafting the concession requirements and enforcement provisions to target the carrier and not the truck, however, the Port has reserved to itself the authority to conclude that even a carrier's *compliant* trucks may be excluded from the Port based on a finding of current non-compliance at the motor-carrier level. The use of such carrier-level exclusion power results in an order that "cannot be complied with in any way except by complete cessation of operations during the period of suspension." U.S. Br. 31 (quoting Resp. Br. at 15, *Castle*, *supra* (No. 44)). The result is the "partial

suspension" of operating authority precluded by *Castle*.

Because the concession agreement claims the authority to exclude *carriers* and not simply *trucks*, see JA73-83 (Default and Termination provisions), there is no need to remand this case to the Ninth Circuit. The Port cannot arrogate to itself that carrier-level veto power without running afoul of *Castle*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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