1   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICAN TRUCKING   :

4   ASSOCIATIONS, INC.,   :

5   Petitioner   :   No. 11-798

6   v.   :

7   CITY OF LOS ANGELES,   :

8   CALIFORNIA, ET AL.   :

9   - - - - - - - - - - - - - - - - - x

10   Washington, D.C.

11   Tuesday, April 16, 2013

12

13   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 11:17 a.m.

16   APPEARANCES:

17   DANIEL N. LERMAN, ESQ., Washington, D.C.; on behalf of

18   Petitioner.

19   JOHN F. BASH, ESQ., Assistant to the Solicitor General,

20   Department of Justice, Washington, D.C.; for United

21   States, as amicus curiae, supporting Petitioner.

22   STEVEN S. ROSENTHAL, ESQ., Washington, D.C.; on behalf

23   of Respondents.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:17 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 11-798, American Trucking

5   Associations v. City of Los Angeles.

6   Mr. Lerman?

7   ORAL ARGUMENT OF DANIEL N. LERMAN

8   ON BEHALF OF THE PETITIONER

9   MR. LERMAN: Mr. Chief Justice, and may it

10   please the Court:

11   This case is about the plain text of the

12   FAAAA express preemption clause and the continuing

13   vitality of this Court's decision in Castle v. Hayes

14   Freight Lines.

15   I'd like to start by showing why the Port's

16   requirements here fall within the text of the statute

17   and cannot be saved by any market participant exception.

18   The FAAAA provides that no State or

19   political subdivision of a State may enact or enforce

20   any law, regulation, or other provision having the force

21   and effect of law related to rates, routes, and services

22   of a motor carrier. The only statutory language at

23   issue here is the force and effect of law requirement.

24   And the Port's actions have the force and effect of law

25   under any reasonable interpretation of the phrase.

3

1   The Port is imposing binding standards of

2   conduct on motor carriers as a condition of accessing a

3   channel of interstate commerce. The Port is enforcing

4   those requirements through criminal penalties --

5   JUSTICE GINSBURG: I thought that the Port

6   said we don't apply criminal penalties which come from

7   the tariff, we don't apply those to licensed motor

8   carriers. They made that representation, so I think we

9   have to accept that as being so.

10   MR. LERMAN: They -- they did make that

11 representation and we could accept that, but it's

12 irrelevant because the Port is still imposing the

13 criminal penalties on the terminal operators. And when

14 a State is imposing criminal penalties, that is classic

15 governmental action, the State acting in its sovereign

16 capacity, regardless of whom the penalties are imposed

17 upon. And in this Court's decision in Roe, it made

18 clear that States could regulate trucking activity

19 through penalties, in that case civil penalties, imposed

20 only on people who do business with truckers.

21   Here, the State's requirements are coming at

22 the truckers from both ends. On the one end, you have

23 the criminal penalties imposed on the terminal operators

24 to coerce their conduct and exclude truckers. On the

25 other hand, you have the tariff which puts conditions on

1   access to the Port of Los Angeles, which is a key

2   channel of interstate commerce.

3   So the Port's requirements here have the

4   force and effect of law in spades, because using --

5   JUSTICE SOTOMAYOR: Can I break down your

6   arguments into two components, if you might? Whether or

7   not the market participant exception exists at all; and

8   if it does, how far does it go?

9   So, let's get to the first question in my

10   mind. Seems almost impossible for me to believe that

11   the States couldn't require someone to put a little

12   placard like you get at the -- at almost any building

13   that you go into to park your car. They ask you to put

14   a little placard in the front of your window so they

15   know who you are and where you're going in the Port,

16   okay?

17   Why is the placard requirement here any

18   different than that requirement generally? Because if

19   you enter property, you have -- most people tell you put

20   a placard in the window to tell us you got permission to

21   come in.

22   MR. LERMAN: It's -- it's different in this

23   case, Your Honor, because -- in addition to the overlay

24   that 14506 specifically targets identification

25   requirements, and -- and for purposes of this case,

1   it's -- but I understand --

2   JUSTICE SOTOMAYOR: But even if that, if we

3   didn't have a market participant, why couldn't the State

4   say: When you come into the terminal, you just got to

5   put a little placard in so we know that you're not

6   parking here overnight when you've already been unloaded

7   or something else?

8   MR. LERMAN: I think you need to look to the

9   particulars of this case, and the -- and the fact is

10   that the placard requirement here is codified into an

11   ordinance, it's backed by criminal penalties, and it's

12   restricting access to a channel of commerce. Because we

13   have all those factors here, it has the force and effect

14   of law.

15   JUSTICE SOTOMAYOR: Could the terminal say,

16   we have a pollution problem and only modern trucks can

17   come and unload here?

18   MR. LERMAN: No.

19   JUSTICE SOTOMAYOR: So they have to take

20   trucks that are too heavy for this crane to lift?

21   MR. LERMAN: Heavy is a different scenario,

22   Justice Sotomayor, because there's an express exception

23   to the FAAAA for weight and size restrictions. So

24   Congress carved out a series of exceptions for the FAAAA

25   for safety requirements, which gets to part of your

1 question, for height and weight and size limits, for

2 requirements pertaining to the transport of

3 nonconsensual goods and the like. It did not create a

4 proprietary exception. So a lot of Your Honor's

5 concerns may well be covered by one of these other

6 exceptions.

7   But there is no exception for a proprietary

8 action. If it has the force and effect of law and it

9 does not fall within one of the enumerated exceptions to

10 the statute, then it is preempted under the terms that

11 Congress used.

12   JUSTICE SCALIA: Even though -- even though

13 a related statute did -- did make an exception for

14 proprietary action, isn't that right? The FAAAA?

15   MR. LERMAN: The ADA.

16   JUSTICE SCALIA: The ADA.

17   MR. LERMAN: Yes, that's quite right, and

18 precisely because that statute contained an exception

19 and this Court has recognized that when Congress enacted

20 the FAAAA, it copied the ADA, and it copied the express

21 preemption clause, but it -- Congress chose not to

22 include that proprietary exception.

23   JUSTICE GINSBURG: Do we know why, why

24 Congress had a different regulation for ports and for

25 airfields?

7

1   MR. LERMAN: I don't believe the record --

2   the legislative history doesn't show why. But Congress

3   thought, clearly copied the statute and made the

4   decision not to include it.

5   So by the terms of the statute, Congress

6   wrote a statute that preempts any action with the force

7   and effect of law, and it chose not to carve out an

8   exception for proprietary action which, as you say, Your

9   Honor, was included in the Airline Deregulation Act.

10   So that just lends added force to the

11   argument that the Act here does not contain an unstated

12   exception, an exception that Congress has created not

13   only for the ADA, which is the express model for this

14   Act, but in a host of other statutes where Congress

15   carved out specific exceptions for proprietary actions.

16   JUSTICE SOTOMAYOR: Except in Boston Harbor,

17   we said that there was a presumption in favor of it

18   unless Congress explicitly indicated to the contrary.

19   MR. LERMAN: Well, Boston Harbor spoke to

20   express or implied indication of congressional intent.

21   Here there is express indication of congressional

22   intent, which is an express preemption provision

23   dictating the term -- the scope of preemption. And

24   Boston --

25   JUSTICE SCALIA: Boston Harbor was implied

 1   preemption, right?

 2   MR. LERMAN: That's correct, Your Honor, it

 3   was implied preemption. There was no express preemption

 4   clause to construe, and that language is in the context

 5   of an implied preemption case. Here, as Justice Scalia

 6   notes, we have an express preemption clause, and we have

 7   a clause that has carveouts for a lot of things, but it

 8   does not have a carveout for proprietary action. And

 9   that is -- that is the best evidence as Congress has

10   intended.

11   This Court has stated, when there's an

12   express preemption clause, the plain language of the

13   clause defines the scope of Congress's intent. And here

14   the plain meaning of the clause covers actions as here

15   that are backed by criminal penalties and impose

16   conditions of access to a key channel of interstate

17   commerce.

18   That is the very definition of force and

19   effect of law. The Port is invoking the full coercive

20   power of the State to impose conditions on motor

21   carriers, and that is exactly what Congress sought to

22   prevent. Congress sought to prevent State actions that

23   impede the free flow of trade or that would result in a

24   patchwork of requirements from jurisdiction to

25   jurisdiction.

1   That is what the Port's doing here. It --

2   it conflicts with Congress's objectives and it falls

3   within the text of the statute. And it cannot be saved

4   by virtue of a market participant exception that, by

5   Respondent's own admission, is untethered from the text

6   of the statute itself for the reasons that we've

7   discussed. Congress made quite clear what it wanted to

8   except from the broad scope of preemption, and this

9   Court has reinforced the breadth of preemption, and did

10   not include --

11   JUSTICE SOTOMAYOR: Do we need to get into

12   the market exception if we find that this is -- has the

13   force or effect of law rather than being a private

14   contract?

15   MR. LERMAN: No. If this has the force and

16   effect --

17   JUSTICE SOTOMAYOR: It's one or the other --

18   or both, but we could choose.

19   MR. LERMAN: It either has the force and

20   effect of law or it doesn't. If it has the force and

21   effect of law, it falls within the scope of the express

22   preemption clause and this Court does not need to

23   address any of that.

24   I'd like to turn my --

25   JUSTICE SCALIA: Some -- some of the rules

1   are okay, though, as you acknowledge, and I guess

2   there's a second question in the case.

3   MR. LERMAN: There is. Thank you --

4   JUSTICE SCALIA: You were about to get into

5   that anyway.

6   MR. LERMAN: I was going to, but thank you,

7   Your Honor.

8   JUSTICE SCALIA: Okay.

9   MR. LERMAN: I was going to get to the

10   second question in the case, which is this Court's

11   decision in Castle v. Hayes Freight Lines. In Castle,

12   this Court held that -- that a State cannot enforce

13   otherwise valid requirements through a partial

14   suspension of a motor carrier's federally granted right

15   to operate in interstate commerce.

16   That is precisely the authority that the

17   Port is claiming here. The Port is claiming the

18   authority to suspend or revoke motor carrier's access to

19   the Port of Los Angeles, the largest container port in

20   the United States and a key channel of interstate

21   commerce. That would affect --

22   CHIEF JUSTICE ROBERTS: That matters -- that

23   matters in your view whether it's a key component of

24   commerce or not. If it's -- if it's a particular

25   highway, a particular street, you think Castle doesn't

11

1   apply in that case?

2   MR. LERMAN: Your Honor, Mr. Chief Justice,

3   Castle spoke to partial suspensions of a motor carrier's

4   right to operate interstate commerce and I think it

5   cannot be denied that in this case, because of the

6   nature of the Port, it is -- it would affect a partial

7   suspension. I don't think this Court needs to get into

8   single roads and I don't think there's any reason --

9   CHIEF JUSTICE ROBERTS: Well, I think you

10   have to get into it since I asked you a question about

11   it.

12   (Laughter.)

13   MR. LERMAN: You're quite right,

14   Mr. Chief Justice. I don't see any reason to let that

15   camel's nose under the tent. If it's a partial --

16   JUSTICE SCALIA: Or maybe you should stop

17   referring to a key component of interstate commerce. It

18   doesn't matter whether it's key or not, does it?

19   MR. LERMAN: That's quite correct. It would

20   affect the partial suspension of interstate commerce, it

21   would seriously disrupt their interstate commerce

22   operations. This falls within Castle's exact terms.

23   And Congress has not --

24   CHIEF JUSTICE ROBERTS: So they say there's

25   this particular road, through a State park or something,

1   that's scenic, and sometimes the trucks drive on the

2   side of the road and it causes damage to what the

3   State's trying to preserve, and they have a rule: Look,

4   if you do that three times and we warn you, the fourth

5   time you can't use this road. That is preempted?

6   MR. LERMAN: That is --

7   CHIEF JUSTICE ROBERTS: There is another

8   road not too far away. You've got to use that one.

9   MR. LERMAN: That is preempted under Castle.

10   The conventional forms of punishment might include the

11   three times and we fine an individual truck. But that's

12   what the situation was in Castle. You can't punish a

13   violation of an otherwise valid regulation through a

14   partial suspension of interstate commerce. And I think

15   that would qualify.

16   And Castle is --

17   JUSTICE KAGAN: Castle's didn't say that,

18   Mr. Lerman. What if the Court is just saying, we want

19   to keep unsafe trucks off the road, but we're not

20   prohibiting you for past violations that you've cured.

21   All we're doing is keeping unsafe trucks out of our

22   port.

23   MR. LERMAN: Justice Kagan, the conventional

24   forms of punishment include, as we acknowledge, taking

25   an unsafe truck out of service or denying access. If --

1   if the truck is leaking hazardous material, the port can

2   deny access to that particular truck.

3   The key -- the key problem here is the

4   carrier-level suspension of access. And so saying,

5   because that one truck of the carrier might be leaking

6   hazardous material, we are not going to let any trucks,

7   even perfectly safe trucks that don't present any

8   present -- clear and present safety risk -- into the

9   port until you fix that unsafe truck.

10   And that's the authority reserved by the

11   State in this case, and that is what Castle said is

12   preempted. And so we are not denying the authority to

13   invoke what Castle called conventional forms of

14   punishment, which we would concede includes the -- the

15   type of punishment Your Honor's contemplating, but what

16   it doesn't allow is a -- a suspension of access to a

17   motor carrier as a business entity.

18   JUSTICE KAGAN: But why does that -- why

19   does it have to be truck by truck rather than operator

20   by operator? Why can't the port say, you know, when we

21   found a couple of trucks that this company uses that are

22   unsafe, we're just going to keep the company off our

23   premises until the company can show us that they've

24   cured all their trucks, that they are a safe operator

25   now.

1   MR. LERMAN: Because that's what Castle

2   dealt with, Your Honor. And I was going to turn to the

3   statutory scheme in Castle, which is Castle's decision

4   was predicated on a statutory scheme that gave the

5   Federal Government exclusive authority to grant

6   interstate commerce permits --

7   JUSTICE SCALIA: Does the Federal Government

8   inspect trucks for safety and --

9   MR. LERMAN: It has regulatory --

10   JUSTICE SCALIA: -- leaking hazardous

11   materials and such?

12   MR. LERMAN: I don't know that it inspects

13   it directly, and it has provisions for States to do

14   that. But the Federal Government still under 49 U.S.C.

15   13905 has exclusive authority to revoke a Federal -- a

16   motor carrier's Federally granted operating authority.

17   And so there are significant rights that States have to

18   impose --

19   JUSTICE SCALIA: Has it ever done that?

20   MR. LERMAN: I don't know if it's ever done

21   that, but what it has done is -- is what Castle said,

22   which is -- is -- there was no reason to -- to deny that

23   the conventional forms of punishment are sufficient to

24   protect the State's safety concerns, and then if they

25   are not sufficient there was then and there still exists

1 a remedy, which is to go to the Department of

2 Transportation and ask them.

3   And that remedy exists to this day under 49

4 U.S.C. 13905. The same statutory scheme that was

5 present in Castle and animated this Court's decision in

6 Castle is present today. So if they have a safety

7 concern, there are ways to deal with it.

8   They can do what Justice Kagan suggested,

9 which is to deny access to a particular truck. They can

10 go to the Department of Transportation and ask for --

11 for some type of action. But what they can't do is

12 assert the veto power that this Court held was precluded

13 in Castle and in the city of Chicago cases, and that is

14 precisely the veto power that they are asserting here.

15   JUSTICE BREYER: Can I make a somewhat --

16 this is how I'm seeing the case and there is some

17 mystery in it to me and it would affect how I might

18 write this thing or consider it.

19   Look, what they want to do is to not have

20 trucks park in the neighborhood on the street, and they

21 want to put a tag on it. All right. So the second --

22 you seem to have said what they should have done: You

23 go to the NTSB and you ask, and they do it. They

24 approve it or they don't.

25   And their -- their problem is that they

16

1   don't want 40 or 50 States each saying a different

2   sticker, all right? So then the whole back fills up

3   with stickers and that's the problem. That's the

4   problem. You go explain, et cetera, okay.

5   But the first part, the parking, it seemed

6   to me of course they should be able to do that. And

7   there seems to me to be a tailor-made exception: The

8   authority of the State to impose highway route controls

9   or limitations. And if that isn't tailor-made for this,

10   I don't know what is, I mean, I don't know what it's

11   doing there. And so why has nobody done that?

12   When I read the lower court on that, they

13   said: Oh, it affects fares and it affects services.

14   Every route restriction affects fares and services, you

15   know? So here I see an exception which seems

16   tailor-made for what they want to do. I see all kinds

17   of problems with the proprietary thing. What am I

18   supposed to do? What -- what I see as the exception

19   tailor-made for this isn't in the case.

20   MR. LERMAN: I think that's --

21   JUSTICE BREYER: So what do you suggest?

22   And it's a question for both sides.

23   MR. LERMAN: You're right that it's not in

24   the case, Your Honor. It's not in the case because the

25   only issue here was whether it has the force and effect

17

1   of law, because that's what the court below held. The

2   court below held that these could escape preemption

3   because the port was acting arguably in part by a

4   motivation for community goodwill.

5   JUSTICE SCALIA: You -- you agree with

6   that -- that that provision would apply? I don't see

7   that it applies.

8   MR. LERMAN: I don't know if it applies.

9   That was going to be the second answer.

10   JUSTICE SCALIA: Route restrictions?

11   MR. LERMAN: I don't think this is a route

12 restriction. I don't know if it would qualify, and that

13 would be --

14   JUSTICE BREYER: I mean, you can't say,

15 don't drive our truck through the neighborhood? This is

16 residential area, no trucks over such-and-such. If you

17 can say that, why can't you say do it part of the time?

18 Why can't you say -- we're arguing a different question.

19   I agree it is not --

20   MR. LERMAN: Not only are we arguing a

21 different question, I think that gets to -- and I would

22 like to answer this question and then reserve my time

23 for rebuttal if I might.

24   But that gets to the "related to" question:

25 Is that in fact related to rates, routes, and services

1   with respect to the transportation of property? That

2   sometimes is a more factual inquiry. But that is not at

3   issue here. The only issue here is whether it can

4   escape preemption because the Port was arguably

5   motivated in part by a proprietary concern such as

6   community goodwill.

7   None of those words are in the statute,

8   which preempts all actions that have the force and

9   effect of law, and they are preempted on this basis.

10   And I would like to reserve my time.

11   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12   Mr. Bash, welcome.

13   ORAL ARGUMENT OF JOHN F. BASH,

14   FOR UNITED STATES, AS AMICUS CURIAE,

15   SUPPORTING THE PETITIONER

16   MR. BASH: Thank you, Mr. Chief Justice, and

17 may it please the Court --

18   JUSTICE SOTOMAYOR: Do you think the city

19 could pass a regulation like as Justice Breyer

20 suggested, that says, stay off residential streets?

21   MR. BASH: Well, if the city were to pass

22 that regulation, they'd have to make out a record that

23 it either -- it comes within one -- one of the

24 exceptions. Now, it could have been the safety

25 exception. The Port argued for that here and the

1   district court rejected it on the record after hearing

2   testimony about the alleged safety and hazardous cargo

3   justifications.

4   They didn't make an argument under sizes and

5   weights. Presumably, they could make that record.

6   You'd have to see about the strength of their

7   justifications. I'd note that I -- it would probably be

8   the case they would have to apply uniformly to trucks of

9   a given size or weights. Here, they were only going

10 after drayage trucks, which are a particular category of

11 trucks. I don't know if they could make that showing

12 with respect to all trucks or if that was their intent

13 here.

14   I would like to turn, if I could, to Justice

15 Ginsburg's question about the criminal penalties in this

16 case. We accept the Port's statement in their brief on

17 face value that the criminal penalties would only fall

18 on the marine terminal operators. But, like Petitioner,

19 we don't think that makes a difference.

20   If, for example, the State Highway

21 Commission said, okay, certain trucks can't use our

22 roads unless you sign a certain agreement, but don't

23 worry, if you don't agree to abide by that agreement we

24 won't do anything to you, but we will throw every person

25 who does business with you in jail.

1   Whatever else you could say about that

2   scheme, I think it would be pretty clear that it would

3   be the act of a sovereign and so it would have the force

4   and effect of law within the meaning of this statute.

5   JUSTICE KAGAN: Mr. Bash, what would you

6   think of this case if the criminal penalties were taken

7   out of it? In other words, if the Port did this all

8   through contract, basically said to each terminal

9   operator, look, if you contract with truckers that don't

10   have this concession agreement, we are going to charge

11   you a higher price.

12   So -- so if the criminal penalties were not

13   in the case, is there enough here to still make this the

14   force and effect of law?

15   MR. BASH: Yes. We think not only is there

16   enough here, but there's another sort of a bright-line

17   rationale before you get into the Boston Harbor sort of

18   understanding of if this is regulatory or market

19   participant. And that's the second factor we cite in

20   our brief, which is we don't consider the Port the

21   equivalent of the cement factory in Reeves, like a

22   commercial enterprise that you might see in the private

23   marketplace.

24   This port authority, like I think virtually

25   all other port authorities in charge of these massive

1   container ports, hold land much like a highway

2   commission in trust for the public.

3   This is not private property ownership. If

4   you look at all the different metrics of success the

5   court of appeals pointed to and the district court

6   pointed to and I think the port points to in their

7   brief, they are not bottom line business metrics like

8   shareholder value and dividends and so forth.

9   It's economic vitality of the region. It's

10   the number of jobs it brought to the L.A. area. That is

11   not the mark of a commercial enterprise. It's the mark

12   of a regulatory body. It's something a mayoral

13   candidate might point to.

14   CHIEF JUSTICE ROBERTS: Well, that's not

15   true. I mean, a commercial enterprise might want to

16   attract customers because of its reputation as a -- as a

17   green company, because of its reputation of hiring local

18   workers.

19   I think you have too confined a notion of

20   what's good business.

21   MR. BASH: I think it's true that Wal-Mart

22   might say: Hey, we don't do business with labor law

23   violators, or we adhere to certain environmental

24   practices, as part of a marketing campaign. But I think

25   what this Court said in Boston Harbor was that, yeah, a

1   private business could boycott labor law -- law

2   violators too, and, in a sense, the private business

3   would be engaged in quote-unquote regulation.

4   But when the Government does that, when the

5   Government uses its special place in society and its

6   enormous economic power to effectively leverage its

7   power to impose regulation, that's -- that's

8   fundamentally different, and that is not the Government

9   acting in a market capacity even though, sure, Wal-Mart

10   or Starbucks could do a similar thing.

11   JUSTICE KENNEDY: Is it part of your

12   argument that the city contracts with the port and then

13   the port contracts with the truckers, but at that point,

14   the ports are -- are confined in what they can do?

15   There can be really no bargaining between the ports and

16   the truckers based on what the city has already told the

17   port?

18   MR. BASH: Justice Kennedy, that -- that's

19   like our third order argument. I mean, our first order

20   argument is criminal penalties and just the nature of a

21   port and -- the Port doesn't contract with the city.

22   The Port is a department of the city, and its members

23   are appointed by the mayor and its revisions to the

24   tariff are codified in city ordinances. So it's in

25   every way a part of the city, it's not just a

 1   contractual relationship.

 2   We think just the criminal penalties here

 3   and the nature of what a port is. A port -- a

 4   regulatory body that governs a critical part of public

 5   infrastructure is enough to resolve this case. If you

 6   think no, the criminal penalties don't matter and this

 7   Port is more like the cement factory in Reeves, it's

 8   really just a plain vanilla commercial enterprise, we do

 9   think the fact that it's leveraging significant economic

10   power, that it's the only place in L.A. to do this

11   business, is part of this sort of Gould market

12   participant analysis.

13   JUSTICE GINSBURG: Mr. Bash, how then do you

14   deal with the problem that precipitated all of this?

15   Here is a port that's getting lots of complaints from

16   the neighborhood people. It wants to expand the port,

17   it's being thwarted by environmental suits, so it wants

18   to go green and it wants to do something about the

19   pollution and the traffic and the hazards from the

20   truck. You're saying that it can't do that?

21   MR. BASH: We're -- we're not saying it has

22   no recourse. And I just note parenthetically that the

23   same could be true of any state highway commission

24   that's contemplating an expansion of a highway project.

25   They could face similar suits based on environmental

1   complaints. They could face similar community

2   opposition: We don't want these huge trucks coming

3   through our neighborhood. That doesn't make the decrees

4   and acts of a highway commission, particularly if backed

5   by criminal penalties, acts that lack enforcement.

6   JUSTICE GINSBURG: And how could a port

7   respond to the complaints if you're making this -- this

8   neighborhood around the Port an environmental hazard?

9   And so we're going to make sure that our representatives

10   vote against any expansion of the Port.

11   MR. BASH: To -- to deal with that sort of

12   effectively political opposition, community opposition,

13   I think the Port retains a lot of flexibility under the

14   statute to address them.

15   If you look at page 90 through 93 of the

16   Pet. App, it discusses the extensive incentive programs

17   that the Port established. 35 percent of the drayage

18   trucks currently serving the Port, or at least at the

19   time the district court's opinion was written, are new,

20   clean trucks that don't have the same emissions problem.

21   JUSTICE BREYER: But wait. Why isn't the --

22   I mean, I thought that the purpose of these

23   exceptions -- of course cities can have parking

24   regulations. Of course States and cities can have

25   regulations involving trucks as to how and where they

1   use the highways and which ones they can't use and which

2   routes, et cetera. That's the purpose of that

3   exception, isn't it? I mean, I -- I thought that's what

4   it was.

5   And, of course, you're quite right in saying

6   they should have to do it uniformly. It says based on

7   size and weight. Okay. Fine. What's the problem with

8   that, that I'm not seeing?

9   MR. BASH: I took Justice Ginsburg's

10   question to be addressing a slightly different point.

11   The exceptions are for things like safety, hazardous

12   cargo --

13   JUSTICE BREYER: No, no, it says, "The

14   authority of a state to impose highway route controls or

15   limitations based on the size and weight of the motor

16   vehicle or the -- or hazard -- or hazardous nature."

17   And it's size and weight, hazardous nature. I mean,

18   isn't there room in those words to include environmental

19   consideration?

20   MR. BASH: There -- there may be. It's

21   obviously an issue that hasn't been briefed in this

22   case.

23   JUSTICE SCALIA: I don't think there is.

24   You think there is? He's saying that you can answer

25   questions.

1   JUDGE BREYER: I -- I myself don't know.

2   JUSTICE SCALIA: Seems to me the answer is

3   no.

4   MR. BASH: But I -- I just wanted to

5   emphasize for Justice Ginsburg, though, that there are a

6   lot of things that ports and other -- other municipal

7   entities can do to address environmental concerns. And

8   they've been done in this case.

9   It is the replacement of these trucks, which

10   was done through a subsidy and incentive program that's

11   remarkably similar to the one this Court blessed as

12   market participation in Hughes that allowed these

13   extensive emission reductions that the Port's seen.

14   That sort of direct participation in the market has all

15   the hallmarks of what we don't have here. It's not

16   enforced through criminal penalties. It's not the --

17   the Port acting as a regulator of this public

18   infrastructure. It's actually entering the drayage

19   market and purchasing trucks, effectively becoming a

20   part owner of the truck.

21   So I do think that the Port has extensive

22   authority to address environmental concerns within the

23   confines of this preemption statute.

24   The Chief Justice asked about the Castle

25   question, whether it matters or what if you just didn't

1   want a road or what's the size of it?

2   I will say that the court in Castle seemed

3   to think it made a difference, the sort of size of the

4   imposition, but I don't think it needs to make a

5   difference anymore because we have a direct preemption

6   statute.

7   We think that the logic of Castle applies

8   not only in the context of the licensing scheme that has

9   changed but was effectively in place during Castle, but

10   under Section 14501(c) itself. 14501(c) says States

11   can't pass regulations that relate to prices, routes,

12   and services, but it also gives States safety exceptions

13   and so forth. And there needs to be a reconciliation of

14   those two provisions.

15   I think we'd all agree that if a State -- if

16   a truck committed two safety infractions, you couldn't

17   say, well, now we're going to regulate your prices,

18   routes, and services as punishment for that infraction.

19   This -- the framework we've set forth in the Castle

20   portion of our brief I think is a reasonable

21   reconciliation of the State --

22   JUSTICE SOTOMAYOR: So you -- do you think

23   that a statute that says if you're trucking company

24   operator and you have three violations of X safety

25   regulations, you just can't use our highways because we

28

1   don't trust you, is that okay?

2   MR. BASH: No, that's certainly not okay.

3   We think that fails under both the holding of Castle and

4   just under the current expansion provision, which is

5   maybe the easier way to do it.

6   JUSTICE SOTOMAYOR: Why? Why isn't it a

7   standard fact that States and cities use to stop people

8   from repetitive violations to tell them, if you keep

9   doing this and don't remedy what you've done, we're just

10   not going to let you do X, Y, and Z? Why wouldn't the

11   safety violate --

12   MR. BASH: Well, it should be clear at the

13   outset that we're not talking about people; we're

14   talking about motor carriers as an ongoing enterprise.

15   So we're not saying an individual can't have their

16   license revoked.

17   Are you finished with the question?

18   CHIEF JUSTICE ROBERTS: Finish your answer.

19   MR. BASH: But more broadly, we think the

20   Federal regulatory scheme in combination with this

21   preemption provision just bars States from taking

22   certain actions that would affect the interstate

23   operations of motor carriers.

24   Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   Mr. Rosenthal?

2   ORAL ARGUMENT OF STEVEN S. ROSENTHAL

3   ON BEHALF OF THE RESPONDENTS

4   MR. ROSENTHAL: Thank you,

5   Mr. Chief Justice, and may it please the Court:

6   At issue today are two provisions contained

7   in a contract between commercial actors. They set forth

8   conditions under which drayage trucks can enter the

9   nonpublic portions of the Port, and they are

10 indistinguishable, indistinguishable from contract

11 provisions that private parties routinely impose on

12 those who seek to enter their property. In our view,

13 the FAAAA does not deal with contracts, and it doesn't

14 deal with the right of landowners to condition those

15 seeking entry into their Port.

16   JUSTICE SCALIA: What exception do you

17 appeal to? There are a number of exceptions there.

18   MR. ROSENTHAL: What --

19   JUSTICE SCALIA: What exception are you

20 appealing to from the -- from the preemption provision?

21   MR. ROSENTHAL: Your Honor, my first -- my

22 first exception is the actual force and effect of law.

23 We do not believe --

24   JUSTICE SCALIA: Well, that's a different

25 point, but -- but you're -- you're talking about, you

1   know, an exception for private contract operations as

2   opposed to public matters.

3   MR. ROSENTHAL: We're --

4   JUSTICE SCALIA: There are exceptions to the

5   preemption and that is not one of them. And other

6   statutes do have exceptions for -- for commercial

7   operations or private operations. This one doesn't.

8   MR. ROSENTHAL: With -- with due respect,

9   the statute says "law, regulation, or provision having

10 the force and effect of law." That's a -- that's

11 something which applies to the general public. We

12 submit that what we are calling the market participant

13 exception, what it is generally congruent with, what is

14 meant by Congress by the term "force and effect of law."

15 The Sixth -- the Fifth Circuit in Cardinal said that the

16 market participant analysis should inform what is meant

17 by force and effect of law. We're not --

18   JUSTICE SCALIA: Do market participants

19 impose civil and criminal penalties?

20   MR. ROSENTHAL: Ah. I think --

21   JUSTICE SCALIA: Ah. Yes.

22   MR. ROSENTHAL: The answer is no, but I

23 think the criminal penalties is a red herring in this

24 case, and if you will --if you'll just indulge me a

25 moment, the concession agreement everyone concedes does

1   not include any criminal penalties. The tariff which

2   applies to the marine terminal operators, yes, it

3   contains a criminal penalty, but the criminal penalty is

4   not included in this tariff against the marine terminal

5   operators. It's intended for other purposes.

6   We have no recollection of a cargo operation

7   ever having had a criminal penalty. Yes, it's in there,

8   there is a misdemeanor penalty but it applies to people

9   like trespassers, people who perform traditional

10   criminal acts.

11   There is evidence in the record. I asked

12   the director, the deputy director of the Port, how do

13   you enforce these requirements, and his answer was,

14   primarily through our lease contract. Obviously, we

15   don't want to do away with the -- with our lessor, but

16   there is no indication, and there is no fact on the

17   record that these criminal penalties which our opponents

18   keep dredging up are ever used against MTO's.

19   JUSTICE SCALIA: Is that how we decide these

20   things? When there is on the books a criminal penalty

21   that can apply to everybody, do we let the State come in

22   and say: Oh, you know, no harm, no foul because it's on

23   the books but we -- we don't really use it. Well, I

24   don't know -- I don't know that we do that. If it's

25   there, it's a criminal penalty, and if -- if the

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1   condition of -- of -- of you're being able to impose

2   these limitations is that you not have criminal

3   penalties, there is a criminal penalty.

4   MR. ROSENTHAL: Justice Scalia, first of

5   all, the direct criminal penalty doesn't apply to the

6   truckers at all.

7   JUSTICE SCALIA: Okay.

8   MR. ROSENTHAL: So the argument is, this is

9   an indirect effect, and what I'm trying to argue is the

10   indirect effect is not criminal in nature. Yes, there

11   is a criminal provision. But I'm saying as a practical

12   matter, criminal penalties aren't used indirectly to

13   enforce this prohibition.

14   CHIEF JUSTICE ROBERTS: Well, but like a lot

15   of criminal penalties, that's the whole point. They

16   keep people from doing crimes. It doesn't seem to me to

17   be very probative to say we've never had to throw

18   anybody in jail or we never had to prosecute anybody

19   criminally. They have a coercive effect that a private

20   operator cannot avail itself of.

21   MR. ROSENTHAL: But, Mr. Chief Justice,

22   usually criminal penalties apply to the public. The

23   reason I'm bringing this up is we have an entirely

24   separate and much more robust relationship with our own

25   tenants through the lease. The lease is the way this is

 1   enforced. Criminal penalties -- no MTO thinks for a

 2   second about the criminal penalty. They think about the

 3   contractual relationship.

 4   And that's an important point here because

 5   what we're talking about and what's central here is the

 6   management of land which we own, which we will not,

 7   underscore "not," be able to grow and develop unless we

 8   have some modicum of control. And we are not talking

 9   about expansive control here, but some modicum of

10   control over who enters our land.

11   Let me make one additional point which I

12   think is terribly important. The owner of land -- the

13   owner of land has to have some control of the type which

14   ATA and the Government says we can't have control over.

15   I will give you a simple example where we cut a hole in

16   our fence and say the trucks can come in, you can come

17   in on Navy Way but you can't come in on Prospect Street.

18   That under a strict definition of the statute would be

19   prohibited to us. But you can't prohibit a landowner

20   from saying: You've got to identify yourself.

21   JUSTICE BREYER: Well, that's why the route

22   regulation thing is the exception. But the State of

23   California decides --

24   MR. ROSENTHAL: But we're not acting --

25   JUSTICE BREYER: Pardon me. I know you're

1   not. The State of California decides: Here's what we

2   have: A State public utilities commission which issues

3   a tariff, and what the tariff says is anyone who

4   contracts with a person in this State, a property owner,

5   to move his goods and services, cannot charge less than

6    $30 a pound. All right? Plainly preempted.

7   And your case differs because?

8   MR. ROSENTHAL: My case differs because we

9   are not dealing directly with rates, routes or services.

10   We are not regulating. We are --

11   JUSTICE BREYER: You're saying it falls

12   outside the definition of "routes." Well, that argument

13   is not in front of us. I mean, I thought we were

14   conceding here it falls within the definition of routes

15   or rates or services.

16   MR. ROSENTHAL: No.

17   JUSTICE BREYER: The parking regulation --

18   MR. ROSENTHAL: That question was --

19   JUSTICE BREYER: Well, if it doesn't fall

20   within, then I'm not sure what we're talking about,

21   because I thought the problem was that it does fall

22   within the rates, routes and services, and then the

23   question is, is there proprietary exception, et cetera.

24   MR. ROSENTHAL: Well, the -- the answer --

25   our position is that even if it is rates, routes and

1   services, that what we are doing is not regulation, that

2   this is proprietary.

3   JUSTICE BREYER: That's why I asked you, and

4   how does it differ from the hypothetical I just put.

5   MR. ROSENTHAL: I think -- I think -- it

6   differs from that because we're not prescribing any --

7   if we are describing -- if we are prescribing it, it's

8   inherent within our ability to access our particular

9   land.

10   JUSTICE KENNEDY: You are saying that you

11   can do by contract what you cannot do by regulation.

12   And I don't understand that argument when there are

13   criminal penalties that attach to the breach of the

14   contract.

15   MR. ROSENTHAL: But, Justice Kennedy, let me

16   say again, there are no criminal penalties that attach

17   to the breach of the contract. It is purely a contract.

18   The remedies are purely civil. Even our other side in

19   their argument has conceded there are no criminal

20   penalties to the breach of the concession agreement.

21   JUSTICE SCALIA: I'm not sure that's

22   crucial. You think a state can say nobody's going to

23   come on our highways until it signs a contract? Okay?

24   These highways belong to us, they are State land, and

25   anybody who wants to ride on the highways, you have to

1   enter a contract with the State. And that's going to

2   get around this Federal statute?

3   MR. ROSENTHAL: No, no, no. Justice Scalia,

4   there is a critical distinction here. The roads, the

5   bridges, the parks are open generally to the public.

6   There is a difference between that and the private part

7   of the city hall. For example, we restrict who comes

8   into the garage under the city hall. We restrict who

9   comes --

10   JUSTICE SCALIA: Okay. It's a highway only

11   for trucks. It's a truck highway. Okay? It's

12   specially reinforced and everything, but you have to

13   enter a contract with the State in order to drive your

14   truck on this highway. And that's okay?

15   MR. ROSENTHAL: But we're not -- we're not

16   dealing with that hypothetical.

17   JUSTICE SCALIA: I know we're not. That's

18   why it's a hypothetical.

19   MR. ROSENTHAL: But there's a difference,

20   and let me give you the difference, Justice Scalia. And

21   that is in this particular case we are dealing with a

22   business, a commercial enterprise. And I think the

23   appropriate standard which we would contend controls

24   whether force and effect of law, market participant

25   applies, is whether this was an action taken, reasonably

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1   taken to deal with a genuine commercial interest of the

2   Port.

3   JUSTICE SCALIA: Okay. The State makes

4   money on this truck highway. It's a money-maker, okay?

5   MR. ROSENTHAL: No, no, we're not --

6   JUSTICE SCALIA: And that makes it okay?

7   MR. ROSENTHAL: No. We are not prepared to

8   concede that making money is sufficient, taxes are

9   sufficient. We have findings in the district court here

10   that this was undertaken to advance a commercial

11   objective, that commercial objective being to allow the

12   port to grow. This -- the city undertakes regulatory

13   activities.

14   It runs a police department, it runs -- it

15   runs a fire department, public works. It does, in the

16   case of the city of Los Angeles, run three enterprises:

17   A port, an airport, and a power and water department.

18   That is substantively different than running the public

19   roads and the bridges.

20   And we believe what's critical to this

21   analysis and what we have extensive findings from the

22   district court is that this was run as a business, like

23   the cement plant, like the Boston Harbor. Boston Harbor

24   I think I would posit is far closer case, it seems to me

25   than what we're dealing with here, which are marine

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1   terminals.

2   But nonetheless, in Boston Harbor this Court

3   held that the regulation of who could work in Boston

4   Harbor, the circumstances fell within the market

5   participant doctrine.

6   JUSTICE SCALIA: It was implied preemption

7   in Boston Harbor. Here you have an express preemption

8   clause which contains exceptions, and among those

9   exceptions is not the running of a commercial

10   enterprise, even though that is made an exception in a

11   number of other Federal statutes, Federal preemption

12   statutes. That's a very high hill for you to climb,

13   relying solely on the fact that you are a commercial

14   enterprise.

15   MR. ROSENTHAL: It's not the only thing,

16   Justice Scalia, I'm relying on. I'm also relying on the

17   language which Congress put in, which are words of the

18   limitation, which is force and effect of law.

19   If Congress had not -- had said any

20   requirement by the Port, any requirement by a city

21   whatsoever, I believe we'd have a closer case. But

22   they're only talking about things which have application

23   to the general public.

24   We submit that force and effect of law

25   almost invites a market participant analysis.

1   Let me also respond to your point about the

2   ADA, the Airport Deregulation Act. The reason there is

3   a limited exception for airport proprietors, as this

4   Court has held, is because there was a longstanding

5   issue about airports being able to impose restrictions

6   about noise pollution on surrounding communities.

7   Congress was well aware back in the 1970s,

8   when this statute was enacted, of that controversy and

9   they wanted to preserve of the existing rights of

10   airports. There is no comparable controversy with

11   respect to truck ports or ports or the Government that

12   was ongoing in 1994 when this particular statute was

13   adopted.

14   But let me point out that what did -- did

15   occur in 1994 was that Congress was writing against the

16   backdrop of this Court's decision in the Boston Harbor

17   case, in which Congress was told that in the absence of

18   something express, which says that a city or State can't

19   manage its own property when it pursues its proprietary

20   interests, that there would not be inferred -- not be

21   inferred -- a restriction on a State's power to manage

22   its own property.

23   So, unlike the situation when the ADA was

24   adopted, when the FAAAA was adopted in 1994, there was,

25   we submit, a background principle, which this Court had

1   enunciated earlier, that there was a presumption that

2   our proprietary powers were to be preserved.

3   If -- if I can, I'd like to go on to the

4   Castle argument as well. Our point -- we make three

5   different points in Castle. First of all, our position

6   is that the Castle decision was predicated upon a very

7   specific statutory regime that existed in -- under the

8   Federal Motor Carrier Act of 1935.

9   Justice Black specifically noted the details

10   of that statutory regime, which included certificates of

11   convenience and necessity, very precise rules under

12   which trucks were to operate within -- within the United

13   States.

14   That regime has died. Died several decades

15   ago. And we would submit that the Castle doctrine as it

16   existed died with that regime.

17   JUSTICE KAGAN: Mr. Rosenthal, could I

18   interrupt you for a second and just make sure I

19   understand what your policy is? Who do you exclude from

20   the Port? What trucks -- what trucks or what trucking

21   companies do you exclude?

22   MR. ROSENTHAL: Well, in fact, we don't

23   exclude anybody from the Port. We simply ask that those

24   trucks that come on to port property sign a nonexclusive

25   concession agreement which agrees to certain conditions.

1   So drayage trucks that come on, on a regular

2   basis, have to sign these conditions. We would point

3   out that people who operate at our Port intermittently

4   can get day passes. And generally speaking --

5   JUSTICE SCALIA: What -- what if they

6   violate those conditions? I mean, that's -- that's

7   where the -- that's where the shoe pinches. What if

8   they violate those contractual conditions? Then do you

9   exclude only the truck that violates it, or do you

10   exclude the whole trucking company?

11   MR. ROSENTHAL: Well, we -- we -- there's a

12   gradation of remedies. We don't -- we have -- we have

13   generally not excluded or revoked. Generally, what

14   we've done is tried to get compliance. There are --

15   there are penalties, there are mechanisms of a

16   contractual nature which are used.

17   Those are the principal --

18   JUSTICE SCALIA: What's the ultimate?

19   What's the ultimate? You've tried everything else and

20   you whack them with a big penalty.

21   What is that?

22   MR. ROSENTHAL: In -- in cases involving

23   fraud, criminal penalties of a continuing nature, we can

24   suspend or revoke their right to come on to the

25   property. That's the ultimate. But -- but -- and this

1   deals with the Castle argument --

2   JUSTICE KAGAN: And -- and not just the

3   noncompliant trucks, but the entire operator who are

4   having some noncompliant trucks, is that correct?

5   MR. ROSENTHAL: Again, we -- this -- there

6   hasn't been this experience of -- of having to revoke

7   and -- and suspend in cases like what you're describing.

8   There are -- for example, there has been revocations

9   when an LMC has not had the insurance it's required, but

10   that applies to all of their trucks.

11   JUSTICE KAGAN: Well, if you're saying there

12   isn't that experience, I mean, could -- are you in a

13   position actually to represent that you would not

14   exclude anything except noncompliant trucks?

15   MR. ROSENTHAL: There -- there hasn't been

16   the experience. What we said before is that the

17   severest penalties are intended for severe continuing

18   offenses. And our position is that, given the fact that

19   there are reasonable applications of the revocation --

20   of the suspension requirement, given the fact that ATA

21   has launched a facial attack on our regulation, that it

22   will be sufficient time to deal with an as-applied

23   Castle.

24   If Castle survives and this Court --

25   JUSTICE BREYER: There are three reasons,

1   and the first one, I -- I'm not sure why it wouldn't

2   survive in a policy of deregulation if it seemed to

3   apply a fortiori, or equally, but I don't want to argue

4   that with you.

5   I want to be sure I have the second and

6   third.

7   MR. ROSENTHAL: Yes. Let me -- let me give

8   you -- let me give you my -- the three.

9   First, we don't believe Castle continues.

10   JUSTICE BREYER: But what is the second and

11   third?

12   MR. ROSENTHAL: Second -- second argument --

13   second argument is that even under the Castle regime,

14   all Castle talked about is going -- allowing a truck to

15   go up to a customer's property line, that -- that a

16   certificate of convenience and necessity never gave

17   anyone permission to go into Wal-Mart or anything else.

18   And that's what we're talking about here.

19   And thirdly, our position is that given this

20   is -- this being a facial attack, given the fact that we

21   believe that there are lawful applications of -- of the

22   revocation to ongoing continuing violations, which is,

23   frankly, the only -- I can't make a representation --

24   JUSTICE SCALIA: I've never heard of this

25   doctrine. This is a facial attack to a contract? Is

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1   that it? I mean, you --

2   MR. ROSENTHAL: Well, but -- it's a -- it's

3   a facial attack to -- it is. It's a facial attack to a

4   contract. We don't believe that it applies to our

5   contract at all.

6   JUSTICE SCALIA: We have to attack this

7   contract provision by provision, or application by

8   application?

9   MR. ROSENTHAL: But -- but they're arguing

10   that our contract is tantamount to a law.

11   CHIEF JUSTICE ROBERTS: Right. And I've

12   heard of facial attacks to criminal statutes.

13   MR. ROSENTHAL: Right. And -- but they are

14   attacking this remedy to -- they've -- they've --

15   talking -- they are attacking this on -- on its face and

16   saying that no application of this provision is -- is an

17   exception.

18   JUSTICE BREYER: And what's the one that

19   would be? Give me the example that you're thinking of

20   where, given Castle --

21   MR. ROSENTHAL: Yes.

22   JUSTICE BREYER: -- and its applications, it

23   would be --

24   MR. ROSENTHAL: Where -- where a truck is in

25   continuing violation, a company is in continuing

1   violation of a safety restriction.

2   JUSTICE BREYER: All right. Now, how

3   does -- how -- how would that differ from Castle?

4   Because what Castle was concerned about was a State that

5   has a perfectly lawful regulation, and it's violated,

6   then the State as the remedy excludes the truck from the

7   State.

8   MR. ROSENTHAL: Because --

9   JUSTICE BREYER: That's what it's concerned

10   about. And it didn't say anything about accepting very

11   serious violations, i.e., continuing ones. The reason

12   was the need for interstate regulation of an interstate

13   enterprise. And that was the reasoning. Leave it to

14   the ICC, a fortiori, where it's deregulatory policy, but

15   leave that to the side.

16   I want to know your best case in that one,

17   and I don't see the example yet.

18   MR. ROSENTHAL: Let me -- let me try to

19   respond, Justice Breyer.

20   I think if one reads the opinion in Castle,

21   Castle dealt with a past violation, not a continuing

22   violation. The record in that case didn't deal with

23   the -- and I think the words of the -- Justice Black

24   said that would be a different case, that there would be

25   a right to exclude a continuing violation.

1   JUSTICE SOTOMAYOR: Could I just go back,

2   because --

3   MR. ROSENTHAL: You certainly may.

4   JUSTICE SOTOMAYOR: -- the theoretical

5   questions. The agreement requires the operators to have

6   offsite parking.

7   MR. ROSENTHAL: Yes.

8   JUSTICE SOTOMAYOR: All right? It has to do

9   that for a reason. It means that if its trucks don't

10   use that offsite parking, that the operator is in

11   default? Is that the City's position?

12   MR. ROSENTHAL: If -- if it does, it submits

13   an off-street parking plan for all of the trucks which

14   are registered to go onto the property, and it has to

15   agree to keep those trucks in the off-site parking.

16   If it breaches that agreement, it's treated

17   as a breach, and we --

18   JUSTICE SOTOMAYOR: I just wanted to make

19   sure. What you're saying is if trucks park anywhere

20   else, then the operator's in violation of the agreement.

21   MR. ROSENTHAL: That -- that's correct.

22   JUSTICE SOTOMAYOR: All right. With respect

23   to the placard, as I read the provision it says you have

24   to have the placard coming in and going out. Is this

25   like one of those parking placards that people can affix

47

1   temporarily or does it have to be a permanent?

2   MR. ROSENTHAL: No, it does not have to be

3   permanently affixed to the truck.

4   JUSTICE SOTOMAYOR: Well, how does that help

5   you? Meaning to --

6   MR. ROSENTHAL: Well, there were -- we -- we

7   provide them if they want a sticker they can put on

8   their truck, but we don't require it. We just give them

9   the words. And most trucks, in fact virtually all

10   trucks of this type, have a -- have a frame on the

11   outside where they temporarily put plaques, for example,

12   at times when they are carrying hazardous materials.

13   You probably have seen that color design on the side.

14   Those are temporarily affixed.

15   So if a trucking company, an LMC, wished to

16   just put the plaque on as it's crossing the gate and

17   take it off when it's leaving the gate, it's -- it's

18   fully lawful to do that under our restrictions.

19   Most of them just leave -- leave it on, but

20   that's not required. The plaque is only required as it

21   enters, while it's on Port property, and when it leaves,

22   as it leaves.

23   JUSTICE SOTOMAYOR: So how is the public

24   going to use that plaque?

25   MR. ROSENTHAL: What?

1   JUSTICE SOTOMAYOR: How is the public going

2   to use that? The public hangs around the Port as it's

3   loading to call in complaints?

4   MR. ROSENTHAL: There are -- there are --

5   there are members of the public include also the people

6   who are on -- at the MTO, also other truckers. The

7   purpose of it is essentially to provide a -- a remedy to

8   notify from people who are on the Port, and -- and also

9   to act essentially as a notice to the drivers in the

10   trucking company that if they are violating the rules,

11   there -- people know there's a phone number they can

12   call. So it acts -- it has a certain enforcement

13   effect.

14   My point --

15   JUSTICE GINSBURG: Would you clarify --

16   would you clarify what the -- what happens when there is

17   an infraction? Say three trucks. Is it right that you

18   can suspend until the infraction is cured, that you can

19   suspend all of that operator's trucks?

20   MR. ROSENTHAL: We -- we are -- there has

21   been very little practice, Justice Ginsburg, under that,

22   but basically our enforcement where there have been

23   violations has been to ban the particular truck in

24   question, not the entire LMC. -

25   JUSTICE GINSBURG: But you could do the

1   other. See, I'm -- what -- what are -- is it -- is it

2   just a matter of grace that you will say: Well, we'll

3   require them to fix those two trucks and all the others

4   can travel? Or could you say: Until you fix those two

5   trucks, none of your trucks come through?

6   MR. ROSENTHAL: We -- we have built in a

7   gradation. I mean, it's not purely a matter of grace.

8   We classify things as minor violations and major

9   violations.

10   JUSTICE GINSBURG: Let's say it's a major

11   violation.

12   MR. ROSENTHAL: If it were a major violation

13   involving something we believe was systemic within the

14   LMC, the -- the -- not the regulation, but the

15   concession agreement would leave the possibility that we

16   could revoke or suspend until the problem was corrected.

17   But -- but --

18   JUSTICE GINSBURG: And how about after it's

19   corrected? The Government then says there's some

20   uncertainty about that, whether you --

21   MR. ROSENTHAL: We have -- we have never

22   enforced it that way. I mean, the enforcement -- we

23   haven't used revocation; we haven't used suspension.

24   And generally speaking, our intent has been, as we

25   stated in the lower court and as we stated repeatedly,

1   to use this for continuing violations. But we are

2   really talking about future actions because revocation

3   and suspension have not been common.

4   Let me conclude by making two points here.

5   Number one, this Port undertook these actions as a

6   reasonable and genuine response to the needs to build

7   and grow a port. If we are prohibited from taking what

8   are substantively limited actions to control trucking,

9   then essentially we're going to be in a posture in which

10   this Port will be disabled by its surrounding community

11   from doing what it needs to do to compete.

12   Secondly, we submit you cannot be the

13   owner-proprietor of property without having some control

14   over the conditions under which owner -- under which

15   invitees, business invitees, come onto your property;

16   that this statute of Congress was not intended to

17   constrain that property interest.

18   JUSTICE BREYER: Make -- make this argument

19   precisely and substitute for "port authority" the words

20   "city of San Diego," okay? And -- and you'd be still

21   right. I mean, what's bothering me is, I -- I don't

22   know you've got the right one. So -- so if we decide in

23   your way, what we've done is distinguish precisely the

24   same situation, you from the city of Los Angeles, simply

25   because of the method they have of governmentally

1   regulating the port.

2   MR. ROSENTHAL: No. I disagree --

3   JUSTICE BREYER: Why?

4   MR. ROSENTHAL: -- Justice Breyer. It's not

5   because we're -- we have support as the proprietorship.

6   It's because these actions were commercial in nature.

7   JUSTICE BREYER: All right. I see.

8   MR. ROSENTHAL: These -- the port is

9   operating as an enterprise not because it has the label

10   "enterprise," but because this is a business and as a

11   business we should be entitled under even-handedness to

12   do what a Wal-Mart or any other company could do to

13   enable us to prosper, grow, and nurture our business

14   enterprise.

15   Thank you.

16   CHIEF JUSTICE ROBERTS: Thank you, counsel.

17   Mr. Lerman, you have 4 minutes.

18   REBUTTAL ARGUMENT OF DANIEL N. LERMAN

19   ON BEHALF OF THE PETITIONER

20   MR. LERMAN: Justice Scalia, the criminal

21   penalties are not a red herring. Rowe makes clear that

22   you can't circumvent the Act by --

23   JUSTICE SCALIA: I didn't say they were a

24   red herring.

25   MR. LERMAN: I know you didn't, Your Honor.

 1   I was referring to Mr. Rosenthal's argument that -- in

 2   response to a question. You did not say they were any

 3   kind of herring and they're not.

 4   Justice Breyer, in response to your

 5   question: Rates, routes and services are not at issue

 6   in this case. The only issue is whether they have force

 7   and effect of law. That's the only issue before this

 8   Court. The court below said they lack -- they fell

 9   outside the scope of the statute because of the

10   proprietary nature.

11   Mr. Rosenthal talked a lot about the

12   commercial motivations, but the statute doesn't speak to

13   commercial motivations. The statute speaks to actions

14   with the force and effect of law. These have the force

15   and effect of law and are preempted on that ground.

16   Mr. Rosenthal said Castle has died. Castle

17   is still alive. The statutory scheme that formed the

18   basis of this Court's decision in Castle remain to this

19   day in Title 49 of the U.S. Code, and that was the basis

20   for the decision then, and it's the basis today.

21   Justice Ginsburg, the concession agreements

22   gives the Port unfettered discretion to determine

23   whether or not to suspend or revoke access. In this

24   Court's city of Chicago cases, the fact that the city

25   claimed at least some power to deny a license or access

1   to interstate commerce was sufficient and it's

2   sufficient in this case.

3   Thank you.

4   JUSTICE GINSBURG: But I thought there --

5   there was a representation made that they toe the line

6   that the government draws. That it, they can say: No

7   access as long as you have trucks in your fleet that

8   don't comply. But once you've gotten your fleet in

9   order and you are in compliance, then we can't punish

10   you for having wrongs in the past by saying you're --

11   you're suspended."

12   That -- that's the position that the

13   government is taking, and I take it you don't agree with

14   that.

15   MR. LERMAN: I don't agree and I think

16   counsel said right here that they reserve the authority

17   to suspend access for past or ongoing violations, and

18   that runs afoul of Castle under its plain terms.

19   If there are no further questions?

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   The case is submitted.

22   (Whereupon, at 12:16 p.m., the case in the

23   above-entitled matter was submitted.)

24

25

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