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6 v. :

8 CALIFORNIA, ET AL. :

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10 Washington, D.C.

11 Tuesday, April 16, 2013

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 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.

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?

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 of 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 Harbor --

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 -- of
22 the express preemption clause and this Court does not
23 need to 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 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

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 nature
6 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 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. So 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 for 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 port
9 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 exemption. 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

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

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: Right, not only are we arguing
21 a different question, I think that gets to -- and I
22 would like to answer this question and then reserve my
23 time 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 Justice Breyer suggested,
 20 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 weight. 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 at
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 bide 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 -- 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 it 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? You can ask the question.

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

1 JUSTICE SCALIA: Seems to me the answer is
2 no.

3 MR. BASH: But I -- I just wanted to
4 emphasize for Justice Ginsburg, though, that there are a
5 lot of things that ports and other -- other municipal
6 entities can do to address environmental concerns. And
7 they've been done in this case.

8 It is the replacement of these trucks, which
9 was done through a subsidy and incentive program that's
10 remarkably similar to the one this Court blessed as
11 market participation in Hughes that allowed these
12 extensive emission reductions that the Port's seen.
13 That sort of direct participation in the market has all
14 the hallmarks of what we don't have here. It's not
15 enforced through criminal penalties. It's not the --
16 the Port acting as a regulator of this public
17 infrastructure. It's actually entering the drayage
18 market and purchasing trucks, effectively becoming a
19 part owner of the truck.

20 So I do think that the Port has extensive
21 authority to address environmental concerns within the
22 confines of this preemption statute.

23 The Chief Justice asked about the Castle
24 question, whether it matters or what if you just didn't
25 want a road or what's the size of it?

1 I will say that the court in Castle seemed
2 to think it made a difference, the sort of size of the
3 imposition, but I don't think it needs to make a
4 difference anymore because we have a direct preemption
5 statute.

6 We think that the logic of Castle applies
7 not only in the context of the licensing scheme that has
8 changed but was effectively in place during Castle, but
9 under Section 14501(c) itself. 14501(c) says States
10 can't pass regulations that relate to prices, routes,
11 and services, but it also gives States safety exceptions
12 and so forth. And there needs to be a reconciliation of
13 those two provisions.

14 I think we'd all agree that if a State -- if
15 a truck committed two safety infractions, you couldn't
16 say, well, now we're going to regulate your prices,
17 routes, and services as punishment for that infraction.
18 This -- the framework we've set forth in the Castle
19 portion of our brief I think is a reasonable
20 reconciliation of the State's --

21 JUSTICE SOTOMAYOR: So you -- do you think
22 that a statute that says if you're a trucking company
23 operator and you have three violations of X safety
24 regulations, you just can't use our highways because we
25 don't trust you, is that okay?

1 MR. BASH: No, that's certainly not okay.
2 We think that fails under both the holding of Castle and
3 just under the current presumption provision, which is
4 maybe the easier way to do it.

5 JUSTICE SOTOMAYOR: Why? Why isn't it a
6 standard fact that States and cities use to stop people
7 from repetitive violations to tell them, if you keep
8 doing this and don't remedy what you've done, we're just
9 not going to let you do X, Y, and Z? Why wouldn't the
10 safety violate --

11 MR. BASH: Well, it should be clear at the
12 outset that we're not talking about people, we're
13 talking about motor carriers as an ongoing enterprise.
14 So we're not saying an individual can't have their
15 license revoked.

16 Are you finished with the question?

17 CHIEF JUSTICE ROBERTS: Finish your answer.

18 MR. BASH: But more broadly, we think the
19 Federal regulatory scheme in combination with this
20 preemption provision just bars States from taking
21 certain actions that would affect the interstate
22 operations of motor carriers.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Rosenthal?

1 ORAL ARGUMENT OF STEVEN S. ROSENTHAL

2 ON BEHALF OF THE RESPONDENTS

3 MR. ROSENTHAL: Thank you,
4 Mr. Chief Justice, and may it please the Court:

5 At issue today are two provisions contained
6 in a contract between commercial actors. They set forth
7 conditions under which drayage trucks can enter the
8 nonpublic portions of the Port, and they are
9 indistinguishable, indistinguishable from contract
10 provisions that private parties routinely impose on
11 those who seek to enter their property. In our view,
12 the FAAAA does not deal with contracts, and it doesn't
13 deal with the right of landowners to condition those
14 seeking entry into their Port.

15 JUSTICE SCALIA: What exception do you
16 appeal to? There are a number of exceptions there.

17 MR. ROSENTHAL: What --

18 JUSTICE SCALIA: What exception are you
19 appealing to from the -- from the preemption provision?

20 MR. ROSENTHAL: Your Honor, my first -- my
21 first exception is the actual force and effect of law.
22 We do not believe --

23 JUSTICE SCALIA: Well, that's a different
24 point, but -- but you're -- you're talking about, you
25 know, an exception for private contract operations as

1 opposed to public matters.

2 MR. ROSENTHAL: We're --

3 JUSTICE SCALIA: There are exceptions to the
4 preemption and that is not one of them. And other
5 statutes do have exceptions for -- for commercial
6 operations or private operations. This one doesn't.

7 MR. ROSENTHAL: With -- with due respect,
8 the statute says "law, regulation, or provision having
9 the force and effect of law." That's a -- that's
10 something which applies to the general public. We
11 submit that what we are calling the market participant
12 exception, what it is generally congruent with, what is
13 meant by Congress by the term "force and effect of law."
14 The Sixth -- the Fifth Circuit in Cardinal said that the
15 market participant analysis should inform what is meant
16 by force and effect of law. We're not --

17 JUSTICE SCALIA: Do market participants
18 impose civil and criminal penalties?

19 MR. ROSENTHAL: Ah. I think --

20 JUSTICE SCALIA: Ah. Yes.

21 MR. ROSENTHAL: The answer is no, but I
22 think the criminal penalties is a red herring in this
23 case, and if you will -- if you'll just indulge me a
24 moment. The -- the concession agreement everyone
25 concedes does not include any criminal penalties. The

1 tariff which applies to the marine terminal operators,
2 yes, it contains a criminal penalty, but the criminal
3 penalty is not included in this tariff against the
4 marine terminal operators. It's intended for other
5 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
18 opponents 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

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, what
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
18 Street. That under a strict definition of the statute
19 would be prohibited to us. But you can't prohibit a
20 landowner 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 a
3 tariff, and what the tariff says is anyone who contracts
4 with a person in this State, a property owner, to move
5 his goods and services, cannot charge less than \$30 a
6 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
10 services. 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 -- can say nobody's
23 going to come on our highways until it signs a contract?
24 Okay? These highways belong to us, they are State land,
25 and anybody who wants to ride on the highways, you have

1 to 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.

12 MR. ROSENTHAL: No, but --

13 JUSTICE SCALIA: Okay? It's specially
14 reinforced and everything, but you have to enter a
15 contract with the State in order to drive your truck on
16 this highway. And that -- that's okay.

17 MR. ROSENTHAL: But we're not -- we're not
18 dealing with that hypothetical. We don't --

19 JUSTICE SCALIA: I know we're not. That's
20 why it's a hypothetical.

21 MR. ROSENTHAL: But there's a difference,
22 and let me give you the difference, Justice Scalia. And
23 that is in this particular case we are dealing with a
24 business, a commercial enterprise. And I think the
25 appropriate standard which we would contend controls

1 whether force and effect of law, market participant
2 applies, is whether this was an action taken, reasonably
3 taken to deal with a genuine commercial interest of the
4 Port.

5 JUSTICE SCALIA: Okay. The State makes
6 money on this truck highway. It's a money-maker, okay?

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

8 JUSTICE SCALIA: And that makes it okay?

9 MR. ROSENTHAL: No. We are not prepared to
10 concede that making money is sufficient, taxes are
11 sufficient. No -- we have findings in the district
12 court here that this was undertaken to advance a
13 commercial objective, that commercial objective being to
14 allow the port to grow.

15 This -- the city undertakes regulatory
16 activities. It runs a police department, it runs -- it
17 runs a fire department, public works. It does, in the
18 case of the city of Los Angeles, run three enterprises:
19 A port, an airport, and a power and water department.
20 That is substantively different than running the public
21 roads and the bridges.

22 And we believe what's critical to this
23 analysis and what we have extensive findings from the
24 district court is that this was run as a business, like
25 the cement plant, like the Boston Harbor. Boston Harbor

1 I think I would posit is far closer case, it seems to me
2 than what we're dealing with here, which are marine
3 terminals.

4 But nonetheless, in Boston Harbor this Court
5 held that the regulation of who could work in Boston
6 Harbor, the circumstances fell within the market
7 participant doctrine.

8 JUSTICE SCALIA: It was -- it was implied
9 preemption in Boston Harbor. Here you have an express
10 preemption clause which contains exceptions, and among
11 those exceptions is not the running of a commercial
12 enterprise, even though that is made an exception in a
13 number of other Federal statutes -- Federal preemption
14 statutes. That's a very high hill for you to climb,
15 relying solely on the fact that you are a commercial
16 enterprise.

17 MR. ROSENTHAL: It's not the only thing,
18 Justice Scalia, I'm relying on. I'm also relying on the
19 language which Congress put in, which are words of the
20 limitation, which is force and effect of law.

21 If Congress had not -- had said any
22 requirement by the Port, any requirement by a city
23 whatsoever, I believe we'd have a closer case. But
24 they're only talking about things which have application
25 to the general public.

1 We submit that force and effect of law
2 almost invites a market participant analysis.

3 Let me also respond to your point about the
4 ADA, the Airport Deregulation Act. The reason there is
5 a limited exception for airport proprietors, as this
6 Court has held, is because there was a longstanding
7 issue about airports being able to impose restrictions
8 about noise pollution on surrounding communities.

9 Congress was well aware back in the 1970s,
10 when this statute was enacted, of that controversy and
11 they wanted to preserve the existing rights of
12 airports. There is no comparable controversy with
13 respect to truck ports or ports or the government that
14 was ongoing in 1994 when this particular statute was
15 adopted.

16 But let me point out that what did -- did
17 occur in 1994 was that Congress was writing against the
18 backdrop of this Court's decision in the Boston Harbor
19 case, in which Congress was told that in the absence of
20 something express, which says that a city or State can't
21 manage its own property when it pursues its proprietary
22 interests, that there would not be inferred -- not be
23 inferred -- a restriction on a State's power to manage
24 its own property.

25 So unlike the situation when the ADA was

1 adopted, when the FAAAA was adopted in 1994, there was,
2 we submit, a background principle, which this Court had
3 enunciated earlier, that there was a presumption that
4 our proprietary powers were to be preserved.

5 If -- if I can, I'd like to go on to the
6 Castle argument as well. Our point -- we make three
7 different points in Castle. First of all, our position
8 is that the Castle decision was predicated upon a very
9 specific statutory regime that existed in -- under the
10 Federal Motor Carrier Act of 1935.

11 Justice Black specifically noted the details
12 of that statutory regime, which included certificates of
13 convenience and necessity, very precise rules under
14 which trucks were to operate within -- within the United
15 States.

16 That regime has died. Died several decades
17 ago. And we would submit that the Castle doctrine, as
18 it existed, died with that regime.

19 JUSTICE KAGAN: Mr. Rosenthal, could I
20 interrupt you for a second and just make sure I
21 understand what your policy is? Who do you exclude from
22 the Port? What trucks -- what trucks or what trucking
23 companies do you exclude?

24 MR. ROSENTHAL: Well, in fact, we don't
25 exclude anybody from the Port. We simply ask that those

1 trucks that come on to port property sign a nonexclusive
2 concession agreement which agrees to certain conditions.

3 So drayage trucks that come on, on a regular
4 basis, have to sign these conditions. We would point
5 out that people who operate at our Port intermittently
6 can get day passes. And generally speaking --

7 JUSTICE SCALIA: What -- what if they
8 violate those conditions? I mean, that's -- that's
9 where the -- that's where the shoe pinches. What if
10 they violate those contractual conditions? Then do you
11 exclude only the truck that violates it, or do you
12 exclude the whole trucking company?

13 MR. ROSENTHAL: Well, we -- we -- there's a
14 gradation of remedies. We don't -- we have -- we have
15 generally not excluded or revoked. Generally, what
16 we've done is tried to get compliance. There are --
17 there are penalties, there are mechanisms of a
18 contractual nature which are used.

19 Those are the principal --

20 JUSTICE SCALIA: What's the ultimate?
21 What's the ultimate? You've tried everything else and
22 you whack them with a big penalty.

23 What is that?

24 MR. ROSENTHAL: In -- in cases involving
25 fraud, criminal penalties of a continuing nature, we can

1 suspend or revoke their right to come on to the
2 property. That's the ultimate. But -- but -- and this
3 deals with the Castle argument --

4 JUSTICE KAGAN: And -- and not just the
5 noncompliant trucks, but the entire operator for
6 having some noncompliant trucks, is that correct?

7 MR. ROSENTHAL: Again, we -- this -- there
8 hasn't been this experience of -- of having to revoke
9 and -- and suspend in cases like what you're describing.
10 There are -- for example, there has been revocations
11 when LMC has not had the insurance it's required, but
12 that applies to all of their trucks.

13 JUSTICE KAGAN: Well, if you're saying there
14 isn't that experience, I mean, could -- are you in a
15 position actually to represent that you would not
16 exclude anything except noncompliant trucks?

17 MR. ROSENTHAL: There -- there hasn't been
18 the experience. What we said before is that the
19 severest penalties are intended for severe continuing
20 offenses. And our position is that, given the fact that
21 there are reasonable applications of the revocation --
22 of the suspension requirement, given the fact that ATA
23 has launched a facial attack on our regulation, that it
24 will be sufficient time to deal with an as-applied
25 Castle.

1 If Castle survives and this Court --

2 JUSTICE BREYER: There are three reasons,
3 and the first one, I -- I'm not sure why it wouldn't
4 survive in a policy of deregulation it would seem to
5 apply a fortiori, or equally, but I don't want to argue
6 that with you.

7 I want to be sure I have the second and
8 third.

9 MR. ROSENTHAL: Yes. Let me -- let me give
10 you -- let me give you my -- the three.

11 First, we don't believe Castle continues.

12 JUSTICE BREYER: But what is the second and
13 third?

14 MR. ROSENTHAL: Second -- second argument --
15 second argument is that even under the Castle regime,
16 all Castle talked about is going -- allowing a truck to
17 go up to a customer's property line, that -- that a
18 certificate of convenience and necessity never gave
19 anyone permission to go into Wal-Mart or anything else.
20 And that's what we're talking about here.

21 And thirdly, our position is that given this
22 is -- this being a facial attack, given the fact that we
23 believe that there are lawful applications of -- of the
24 revocation to ongoing continuing violations, which is,
25 frankly, the only -- I can't make a representation --

1 JUSTICE SCALIA: I've never heard of this
2 doctrine. This is a facial attack to a contract? Is
3 that it? I mean, you --

4 MR. ROSENTHAL: Well, but -- it's a -- it's
5 a facial attack to -- it is. It's a facial attack to a
6 contract. We don't believe that it applies to our
7 contract at all.

8 JUSTICE SCALIA: We have to attack this
9 contract provision by provision -- or application by
10 application?

11 MR. ROSENTHAL: But -- but they're arguing
12 that our contract is tantamount to a law.

13 CHIEF JUSTICE ROBERTS: Right. And I've
14 heard of facial attacks to criminal statutes.

15 MR. ROSENTHAL: Right. And -- but they are
16 attacking this remedy to -- they've -- they've --
17 talking -- they are attacking this on -- on its face and
18 saying that no application of this provision is -- is an
19 exception.

20 JUSTICE BREYER: And what's the one that
21 would be? Give me the example that you're thinking of
22 where, given Castle --

23 MR. ROSENTHAL: Yes.

24 JUSTICE BREYER: -- and its applications, it
25 would be --

1 MR. ROSENTHAL: Where -- where a truck is in
2 continuing violation, a company is in continuing
3 violation of a safety restriction.

4 JUSTICE BREYER: All right. Now, how
5 does -- how -- how would that differ from Castle?
6 Because what Castle was concerned about was a State that
7 has a perfectly lawful regulation, and it's violated,
8 then the State as the remedy excludes the truck from the
9 State.

10 MR. ROSENTHAL: Because --

11 JUSTICE BREYER: That's what it's concerned
12 about. And it didn't say anything about accepting very
13 serious violations, i.e., continuing ones. The reason
14 was the need for interstate regulation of an interstate
15 enterprise. And that was the reasoning. Leave it to
16 the ICC, a fortiori, where it's deregulatory policy, but
17 leave that to the side.

18 I want to know your best case in that one,
19 and I don't see the example yet.

20 MR. ROSENTHAL: Let me -- let me try to
21 respond, Justice Breyer.

22 I think if one reads the opinion in Castle,
23 Castle dealt with a past violation, not a continuing
24 violation. The record in that case didn't deal with
25 the -- and I think the words of the -- Justice Black

1 said that would be a different case, that there would be
2 a right to exclude a continuing violation.

3 JUSTICE SOTOMAYOR: Could I just go back
4 because --

5 MR. ROSENTHAL: You certainly may.

6 JUSTICE SOTOMAYOR: -- the theoretical
7 questions. The agreement requires the operators to have
8 offsite parking.

9 MR. ROSENTHAL: Yes.

10 JUSTICE SOTOMAYOR: All right? It has to do
11 that for a reason. It means that if its trucks don't
12 use that off -- off-site parking, that the operator is
13 in default? Is that the City's position?

14 MR. ROSENTHAL: If -- if it does, it submits
15 an off-street parking plan for all of the trucks which
16 are registered to go onto the property, and it has to
17 agree to keep those trucks in the off-site parking.

18 If it breaches that agreement, it's treated
19 as a breach, and we --

20 JUSTICE SOTOMAYOR: I just wanted to make
21 sure. What you're saying is if trucks park anywhere
22 else, then the operator's in violation of the agreement.

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

24 JUSTICE SOTOMAYOR: All right. With respect
25 to the placard, as I read the provision it says you have

1 to have the placard coming in and going out. Is this
2 like one of those parking placards that people can affix
3 temporarily or does it have to be a permanent?

4 MR. ROSENTHAL: No, it does not have to be
5 permanently affixed to the truck.

6 JUSTICE SOTOMAYOR: Well, how does that help
7 you? Meaning to --

8 MR. ROSENTHAL: Well, there were -- we -- we
9 provide them if they want a sticker they can put on
10 their truck, but we don't require it. We just give them
11 the words. And most trucks, in fact virtually all
12 trucks of this type, have a -- have a frame on the
13 outside where they temporarily put plaques, for example,
14 at times when they are carrying hazardous materials.
15 You probably have seen that color design on the side.
16 Those are temporarily affixed.

17 So if a trucking company, an LMC, wished to
18 just put the plaque on as it's crossing the gate and
19 take it off when it's leaving the gate, it's -- it's
20 fully lawful to do that under our restrictions.

21 Most of them just leave -- leave it on, but
22 that's not required. The plaque is only required as it
23 enters, while it's on Port property, and when it leaves,
24 as it leaves.

25 JUSTICE SOTOMAYOR: So how is the public

1 going to use that plaque?

2 MR. ROSENTHAL: What?

3 JUSTICE SOTOMAYOR: How is the public going
4 to use that? The public hangs around the Port as it's
5 loading to call in complaints?

6 MR. ROSENTHAL: There are -- there are --
7 there are members of the public include also the people
8 who are on -- at the MTO, also other truckers. The
9 purpose of it is essentially to provide a -- a remedy to
10 notify from people who are on the Port, and -- and also
11 to act essentially as a notice to the drivers in the
12 trucking company that if they are violating the rules,
13 there -- people know there's a phone number they can
14 call. So it acts -- it has a certain enforcement
15 effect.

16 My point --

17 JUSTICE GINSBURG: Would you clarify --
18 would you clarify what the -- what happens when there is
19 an infraction? Say three trucks. Is it right that you
20 can suspend until the infraction is cured, that you can
21 suspend all of that operator's trucks?

22 MR. ROSENTHAL: We -- we are -- there has
23 been very little practice, Justice Ginsburg, under that,
24 but basically our enforcement where there have been
25 violations has been to ban the particular truck in

1 question, not the entire LMC.

2 JUSTICE GINSBURG: But you could do the
3 other. See, I'm -- what -- what are -- is it -- is it
4 just a matter of grace that you will say, well, we'll
5 require them to fix those two trucks and all the others
6 can travel? Or could you say, until you fix those two
7 trucks, none of your trucks come through?

8 MR. ROSENTHAL: We -- we have built in a
9 gradation. I mean, it's not purely a matter of grace.
10 We classify things as minor violations and major
11 violations.

12 JUSTICE GINSBURG: Let's say it's a major
13 violation.

14 MR. ROSENTHAL: If it were a major violation
15 involving something we believe was systemic within the
16 LMC, the -- the -- not the regulation, but the
17 concession agreement would leave the possibility that we
18 could revoke or suspend until the problem was corrected.
19 But -- but --

20 JUSTICE GINSBURG: And how about after it's
21 corrected? The government then says there's some
22 uncertainty about that, whether you --

23 MR. ROSENTHAL: We have -- we have never
24 enforced it that way. I mean, the enforcement -- we
25 haven't used revocation. We haven't used suspension.

1 And generally speaking, our intent has been, as we
2 stated in the lower court and as we stated repeatedly,
3 to use this for continuing violations. But we are
4 really talking about future actions because revocation
5 and suspension have not been common.

6 Let me conclude by making two points here.
7 Number one, this Port undertook these actions as a
8 reasonable and genuine response to the needs to build
9 and grow a port. If we are prohibited from taking what
10 are substantively limited actions to control trucking,
11 then essentially we're going to be in a posture in which
12 this Port will be disabled by its surrounding community
13 from doing what it needs to do to compete.

14 Secondly, we submit you cannot be the
15 owner-proprietor of property without having some control
16 over the conditions under which owner -- under which
17 invitees, business invitees, come onto your property,
18 that this statute of Congress was not intended to
19 constrain that property interest.

20 JUSTICE BREYER: Make -- make this argument
21 precisely and substitute for "port authority" the words
22 "city of San Diego," okay? And -- and you'd be still
23 right. I mean, what's bothering me is, I -- I don't
24 know you've got the right one. So -- so if we decide in
25 your way, what we've done is distinguish precisely the

1 same situation, you from the city of Los Angeles, simply
2 because of the method they have of governmentally
3 regulating the port.

4 MR. ROSENTHAL: No. I disagree --

5 JUSTICE BREYER: Why?

6 MR. ROSENTHAL: -- Justice Breyer. It's not
7 because we're -- we have the Port as the proprietorship.
8 It's because these actions were commercial in nature.

9 JUSTICE BREYER: All right. I see.

10 MR. ROSENTHAL: These -- the port is
11 operating as an enterprise not because it has the label
12 "enterprise," but because this is a business and as a
13 business we should be entitled under even-handedness to
14 do what a Wal-Mart or any other company could do to
15 enable us to prosper, grow, and nurture our business
16 enterprise.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Lerman, you have 4 minutes.

20 REBUTTAL ARGUMENT OF DANIEL N. LERMAN

21 ON BEHALF OF THE PETITIONER

22 MR. LERMAN: Justice Scalia, the criminal
23 penalties are not a red herring. Rowe makes clear that
24 you can't circumvent the Act by -

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

1 red herring.

2 MR. LERMAN: I know you didn't, Your Honor.
3 I was referring to Mr. Rosenthal's argument that -- in
4 response to a question of yours. You did not say they
5 were any kind of herring and they're not.

6 Justice Breyer, in response to your
7 question, rates, routes and services are not at issue in
8 this case. The only issue is whether they have force
9 and effect of law. That's the only issue before this
10 Court. The court below said they lack -- they fell
11 outside the scope of the statute because of the
12 proprietary nature.

13 Mr. Rosenthal talked a lot about the
14 commercial motivations, but the statute doesn't speak to
15 criminal motivations. The statute speaks to actions
16 with the force and effect of law. These have the force
17 and effect of law and are preempted on that ground.

18 Mr. Rosenthal said Castle has died. Castle
19 is still alive. The statutory scheme that formed the
20 basis of this Court's decision in Castle remains to this
21 day in Title 49 of the U.S. Code, and that was the basis
22 for the decision then, and it's the basis today.

23 Justice Ginsburg, the concession agreements
24 gives the Port unfettered discretion to determine
25 whether or not to suspend or revoke access. In this

1 Court's city of Chicago cases, the fact that the city
2 claimed at least some power to deny a license or access
3 to interstate commerce was sufficient and it's
4 sufficient in this case.

5 Thank you.

6 JUSTICE GINSBURG: But I thought there --
7 there was a representation made that they toe the line
8 that the government draws. That it, they can say, no
9 access as long as you have trucks in your fleet that
10 don't comply. But once you've gotten your fleet in
11 order and you are in compliance, then we can't punish
12 you for having wronged in the past by saying you're --
13 you're suspended.

14 That -- that's the position that the
15 government is taking, and I take it you don't agree with
16 that.

17 MR. LERMAN: I don't agree and I think
18 counsel said right here that they reserve the authority
19 to suspend access for past or ongoing violations, and
20 that runs afoul of Castle under its plain terms.

21 If there are no further questions?

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 12:16 p.m., the case in the
25 above-entitled matter was submitted.)

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