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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN TRUCKING :

ASSOCIATIONS, INC., :

Petitioner : No. 11-798

v. :

CITY OF LOS ANGELES, :

CALIFORNIA, ET AL. :

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Washington, D.C.

Tuesday, April 16, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

APPEARANCES:

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

JOHN F. BASH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

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

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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 11-798, American Trucking Associations v. City of Los Angeles.

Mr. Lerman?

ORAL ARGUMENT OF DANIEL N. LERMAN  
ON BEHALF OF THE PETITIONER

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

This case is about the plain text of the FAAAA express preemption clause and the continuing vitality of this Court's decision in *Castle v. Hayes Freight Lines*.

I'd like to start by showing why the Port's requirements here fall within the text of the statute and cannot be saved by any market participant exception.

The FAAAA provides that no State or political subdivision of a State may enact or enforce any law, regulation, or other provision having the force and effect of law related to rates, routes, and services of a motor carrier. The only statutory language at issue here is the force and effect of law requirement. And the Port's actions have the force and effect of law 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 is, 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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