No. 11-798

IN THE

# Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

*Petitioner*,

v.

CITY OF LOS ANGELES, ET AL.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*


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## TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

I. The "Market Participant" Issue Warrants Review ..... 2

II. The "Financial Capability" Holding Was Based On The Ninth Circuit's Error In Interpreting "Related To A Price, Route, Or Service" ..... 6

III. The Decision Below Conflicts With *Castle* ..... 9

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

**Page(s)**

***CASES***

*American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995) ..... 4, 7

*Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003) ..... 8

*Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) ..... 1, 9, 10

*City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155 (4th Cir. 2002) ..... 4

*City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958) ..... 11

*Dan's City Used Cars, Inc.* v. *Pelkey*, No. 12-52 (cert. granted Dec. 7, 2012) ..... 6

*Florida Transportation Service, Inc.* v. *Miami-Dade County*, 757 F. Supp. 2d 1260 (S.D. Fla. 2010) ..... 3

*Four T's, Inc.* v. *Little Rock Municipal Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997) ..... 3

*Ginsberg* v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), *withdrawn and superseded on denial of reh'g by Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012) ..... 6

*Greater Washington Bd. of Trade* v. *Dist. of Columbia*, 948 F.2d 1317 (D.C. Cir. 1991), *aff'd*, 506 U.S. 125 (1992) ..... 8

*Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc) ..... 9

*In re Dyke*, 943 F.2d 1435 (5th Cir. 1991) ..... 8

**TABLE OF AUTHORITIES—Cont'd**

**Page(s)**

*Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996) ..... 4

*Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992) ..... 7

*Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) ..... 9

*R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351 (1967) ..... 11

*Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) ..... 1, 7

*Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980) ..... 3

*Ventress* v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010) ..... 6

*Wash. State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir. 1982) ..... 2

***STATUTES***

49 U.S.C. § 14501(c) ..... 3, 6

49 U.S.C. § 41713(b)(1) ..... 4

## SUPPLEMENTAL BRIEF FOR PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General concedes that the Ninth Circuit:

- reached the wrong result on question 1 presented by the petition (U.S. Br. 9-12);
- analyzed question 2 in a way that conflicts with *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (U.S. Br. 18); and
- erred in its analysis of question 3 in distinguishing *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (U.S. Br. 22 n.8).

Additionally, the Solicitor General does not dispute that the questions present recurring and nationally important issues implicating other preemption regimes as well as the Federal Aviation Administration Authorization Act (FAAAA). Yet he recommends denying certiorari.[1]

[1] The Solicitor General's position is in keeping with a pattern of apparent reluctance to support review even when substantial factors warranting certiorari are present. The Solicitor General recommended denial in 21 of the 22 invitation briefs filed between August 26, 2011, and November 30, 2012. The Court has granted review in many of those cases; four have already been argued this Term, and another is awaiting argument. *Ryan* v. *Gonzales* (10-930); *Decker* v. *Northwest Environmental Def. Ctr.* (11-338, 11-347); *Los Angeles Cnty. Flood Control Dist.* v. *NRDC* (11-460); *Vance* v. *Ball State Univ.* (11-556); *Bowman* v. *Monsanto Co.* (11-796). Yet another argued case, *Kirtsaeng* v. *John Wiley & Sons* (11-697), presents an issue on which the Court granted certiorari in 2010 over the Solicitor General's contrary recommendation, but the Court divided evenly in the 2010 case presenting that issue.

The Solicitor General is wrong. He substitutes a multi-factor approach derived from Commerce Clause cases for an analysis of the statutory language on question 1; mislabels a conclusion of law infected by the misinterpretation of *Rowe* as a finding of fact on question 2; and makes up an imaginative alternative ground for decision, advanced by neither the Ninth Circuit nor respondents, on question 3.

## I. The "Market Participant" Issue Warrants Review

The Solicitor General acknowledges that the Ninth Circuit erred in its market-participant holding. He concedes that the panel majority erred in ignoring the only relevant point for the purposes of applying the FAAAA's preemption clause—that the concession-agreement requirement is incorporated into a penally enforceable tariff and "[a]ny common-sense understanding of the term 'force and effect of law' is satisfied by a provision backed by 'criminal penalties which only a state and not a mere proprietor can enforce.'" U.S. Br. 9 (quoting *Wash. State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627, 631 (9th Cir. 1982)). His analysis of the merits of the market-participant issue further reflects that the Ninth Circuit erred in rejecting every previously recognized limitation on the doctrine. *Id.* at 10-11. Even though that analysis only underscores the conflicts created by the Ninth Circuit's holding, the government claims implausibly that no such conflicts exist and that the Ninth Circuit's error is "factbound" and therefore unworthy of review.

The conflicts identified in the petition are real. Satisfied that no fair reading of the cases could support the Solicitor General's purported distinctions,

we give one example in the margin of the government's erroneous analysis.[2]

But there is a more fundamental reason why this case cries out for review. The *only* statutory language being construed is the requirement in 49 U.S.C. § 14501(c) that a provision, to be potentially preempted, have "the force and effect of law." No one—not respondents, not the Ninth Circuit, not any other court of appeals, and not the Solicitor General—contends that there is statutory language, other than the quoted phrase, to support a market-participant exception to preemption.

Yet what do respondents, the Ninth Circuit, and now the Solicitor General analyze? Not the statute's language, legislative history, or deregulatory pur-

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[2] The Solicitor General distinguishes *Smith* v. *Department of Agriculture*, 630 F.2d 1081 (5th Cir. 1980), because the court "did not appear to consider whether . . . [the State] had commercial interests as a manager of the property integrally linked to the functioning of th[e] market [for produce]" and there was "no plausible argument that the discriminatory restriction related to the State's commercial interest in managing its property." U.S. Br. 13. That account of the issues considered in *Smith* ignores the dissent in the case, which would have rejected the limitation endorsed by the majority to conclude precisely that the State was "a participant in the market for marketplace space." *Smith*, 630 F.2d at 1088 (Randall, J., dissenting); see also *Four T's, Inc.* v. *Little Rock Municipal Airport Comm'n*, 108 F.3d 909, 912 (8th Cir. 1997) (concluding dissent in *Smith* was "more persuasive" on market-participant issue). And the Solicitor General does not address the conclusion in *Florida Transportation Service, Inc.* v. *Miami-Dade County*, 757 F. Supp. 2d 1260, 1282 (S.D. Fla. 2010), now pending on appeal to the Eleventh Circuit, that *Smith* compelled rejection of a market-participant defense that the Port of Miami raised in support of an attempt to impose restrictions on stevedores analogous to the Port of Los Angeles's effort here. See Pet. 13.

pose. Instead, they analyze this Court's cases concerning the judicially developed market-participant exception to invalidation of state statutes under the dormant Commerce Clause.

Other than a citation to lower-court cases with no effort to support their reasoning (or to grapple with the contrary reasoning of *City of Charleston* v. *A Fisherman's Best, Inc.*, 310 F.3d 155, 178-79 (4th Cir. 2002)), the Solicitor General's explanation for urging this Court to examine off-point constitutional precedents is "Cf. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-229 & n.5 (1995)." U.S. Br. 7. Nothing on those pages supports the enormous leap taken. The Solicitor General also cites cases involving *implied preemption under the NLRA*. U.S. Br. 7-8. But he makes no effort to contend with the crucial distinction between implied-preemption cases (in which there is no preemptive statutory language to construe) and express-preemption cases like this one—even though petitioner has highlighted that distinction. Pet. 31-32; Reply Br. 2.

If the lawyer who speaks to this Court for the Executive Branch insists in a statutory case that off-point constitutional doctrine should be analyzed instead of statutory text and purpose, something is terribly wrong. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). The error is all the more striking for a reason the Solicitor General does not address: in the ADA (whose preemption clause was the model for the FAAAA's, with identical language regarding provisions with "the force and effect of law," see 49 U.S.C. § 41713(b)(1)), when Congress wanted to include a "proprietary" exception

for municipally owned airports, it did so expressly. See Pet. 29-30.

Only the legerdemain of substituting Commerce Clause analysis for the tools of statutory construction allows the Solicitor General to characterize the error in this case as "factbound." Not even respondents contend that the concession agreements lack the "force and effect of law." Rather, respondents contend that the statutory language is "beside the point." Opp. 13. The Solicitor General acknowledges that the concession agreements have the "force and effect of law," but his Commerce-Clause-centric analysis requires him to analyze "[f]our considerations, taken together," and "some considerations that might be thought to cut the other way." U.S. Br. 9, 11. *Nothing that the Solicitor General cites, other than the first factor, is relevant.* It is, instead, dispositive—under clear statutory language rather than mushy constitutional tests—that the agreements are incorporated into a tariff that is penally enforceable. See U.S. Br. 9. A penally enforceable requirement has "the force and effect of law," and *no one before this Court contends otherwise.*

The error in this case is not factbound. It is a fundamental *legal error*: substituting irrelevant constitutional doctrine (applicable only if Congress has *not* acted) for the ultimate touchstone, the intent of Congress. This case merits review.

## II. The "Financial Capability" Holding Was Based On The Ninth Circuit's Error In Interpreting "Related To A Price, Route, Or Service"

The government agrees that the court below espoused a narrow understanding of the key language

in the FAAAA's preemption clause even though *Rowe* "clearly embraced a broader understanding of 'service.'" U.S. Br. 18 & n.5.[3] It agrees "as a general matter" that "a state law 'specifically targeted' at the subject matter of a federal statute" falls within an express preemption clause. U.S. Br. 19. It argues, however, that review should be denied as to question 2 because the Ninth Circuit's analysis turned on an "unchallenged factual finding" regarding the effect of the "financial capability" provision on prices, routes, or services. U.S. Br. 16. Nonsense.

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[3] The Solicitor General asserts that "[t]he validity of the Ninth Circuit's pre-*Rowe* standard is now before that court, and the government has filed an *amicus curiae* brief arguing that it was abrogated by *Rowe*." U.S. Br. 18 n.5. The government's *amicus* brief in that proceeding, however, did not address the decision in *American Trucking*. In their reply, appellants correctly cited *American Trucking*—along with *Ventress* v. *Japan Airlines*, 603 F.3d 676 (9th Cir. 2010), and the since-withdrawn *Ginsberg* v. *Northwest, Inc.*, 653 F.3d 1033 (9th Cir. 2011), *withdrawn and superseded on denial of reh'g by Ginsberg* v. *Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012)—as reflecting the Ninth Circuit's "repeated, affirmative rejections of a broader standard" for interpreting "service" under the ADA and FAAAA. Appellants' Reply Br. at 5, *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No. 11-16240 (Dkt. 31) (Nov. 11, 2011). The fact that the Ninth Circuit will now get a fourth chance to stop disregarding binding precedent from this Court is no reason to wait. In this regard, we note that the Court granted certiorari the afternoon of December 7, 2012, in No. 12-52, *Dan's City Used Cars, Inc.* v. *Pelkey*. Because *Pelkey* involves the meaning of "related to" and "service" in Section 14501(c), this case should at least be held for *Pelkey*. However, *Pelkey* involves the meaning of those words in a very different factual context, and has nothing to do with the first or third question presented in this case. Because there are three certworthy questions in this case, and because a decision in *Pelkey* is unlikely to be any more effective than *Rowe* was in reining in the Ninth Circuit, the petition should be granted for plenary review, not just held for *Pelkey*.

*Rowe*, 552 U.S. at 370-73, demonstrates how to conduct an analysis of whether a challenged provision "relate[s] to" a price, route, or service so as to be within the scope of FAAAA preemption. See also *Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 383-391 (1992); *American Airlines, Inc.* v. *Wolens,* 513 U.S. 219, 226 (1995). Nowhere does *Rowe* suggest (nor did *Morales* or *Wolens* suggest) that it is a question of fact rather than law whether a challenged provision has only a "tenuous, remote, or peripheral" effect on rates, routes, or services. Rather, this Court in *Wolens* reversed in relevant part a decision of the Supreme Court of Illinois purporting to determine that frequent-flyer programs were related only "tenuously" to an airline's rates, routes, or services. 513 U.S. at 226. The Court thought the question so clear that there was no need to "dwell on" it. *Ibid.* The Court certainly did not suggest that the question required factfinding, rather than a comparison of the challenged state regulation with the language and deregulatory purposes of the statute and with the only examples this Court has ever given of a "tenuously" related provision: state gambling and prostitution laws. *Morales*, 504 U.S. at 390.

Here, every provision of the concession agreements, including the financial-capability provision, is specifically targeted at motor carriers. The gaping chasm between such provisions and general state laws like gambling and prostitution laws cannot be bridged by a supposed "factual finding" of "*no* effect on the subject matter." U.S. Br. 19.

In fact, it was only by erring in *both* respects we highlighted (Pet. 20-26) that the Ninth Circuit rested its decision on the irrelevant "factual" ground identified by the Solicitor General.

*First*, the Solicitor General fails, as the Ninth Circuit did, to address fully the *specifically targeted* nature of the financial-capability provision and the concession agreements in general. See Pet. 21-24. As the Eleventh Circuit has recognized, a provision implicating the subject matter of the ADA's or FAAAA's preemption clauses will be preempted if it "directly regulates such services *or* . . . has a significant economic impact on them."[4] Here, the Port's mandatory concession agreements *directly* target motor carriers, such that establishing a given provision's "significant economic impact" is beside the point.[5] The Ninth Circuit's surprising conclusion that what amounts to a licensing scheme for motor carriers represents a "borderline" case of preemption, Pet. App. 18a, is made possible only by ignoring this wealth of conflicting authority as to the import of a specifically targeted requirement. The United States recognized as much in its earlier submission to the Ninth Circuit in this case. U.S. *Amicus* Br. 8-9, *quoted in* Pet. 23-24.

*Second*, the Solicitor General's effort to suggest that the Ninth Circuit's continued endorsement of its pre-*Rowe* interpretation of "rates, routes, and services" did not infect its legal conclusion regarding the financial-capability provision also fails. Although the Ninth Circuit did invoke *Rowe* in its discussion of what constitutes a "service" under the FAAAA, it did

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[4] *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1258-59 (11th Cir. 2003) (emphasis added), *quoted in* U.S. Br. 19.

[5] *Cf. Greater Washington Bd. of Trade* v. *Dist. of Columbia*, 948 F.2d 1317, 1322 n.13 (D.C. Cir. 1991) (exception to ERISA preemption for state laws that "affect benefit plans in a tenuous or peripheral manner . . . applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans") (quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir. 1991)), *aff'd*, 506 U.S. 125 (1992).

so only as a citation ostensibly *supporting* its reaffirmation of a "public utility" understanding of the key language in the FAAAA's preemption clause. Pet. App. 17a-18a. At no point either in its reaffirmation of pre-*Rowe* circuit law or in its discussion of the financial-capability provision (Pet. App. 17a-18a, 33a-34a) did the Ninth Circuit give any indication that it understood the term "service" in the FAAAA to extend more broadly to the "[contractual] features" of motor carrier transportation as its sister circuits have, see *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (dissent from denial of certiorari) (alteration in original) (quoting *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).

The incompatibility of the Ninth Circuit's analysis with *Rowe* is at this point uncontested. Pet. 25-26; Opp. 30-31; Reply Br. 8-9; U.S. Br. 18 & n.5. The only contested point is whether the Ninth Circuit's admitted failure to follow controlling precedent of this Court mattered to its decision. This Court should either grant plenary review, or summarily reverse for the Ninth Circuit to apply the correct standard.

### III. The Decision Below Conflicts With *Castle*

The sole basis the panel majority gave for distinguishing *Castle* was that the "limitation on access to a single Port" provided for by the concession agreements supposedly does not rise to the level of a "ban on using all of a State's freeways." Pet. App. 32a. The Solicitor General agrees with petitioner that the distinction is "immaterial, . . . given the importance of the Port to interstate and international commerce." U.S. Br. 22 n.8. And the Solicitor General conspicu-

ously fails to agree with respondents (Opp. 36-38) that *Castle* and the cases following it are no longer good law. That is enough to justify a grant of certiorari.

Nevertheless, the Solicitor General implausibly claims that the Ninth Circuit's holding does not conflict with *Castle*. He argues that "it is not clear that the Port would punish violations of the provisions at issue here through a 'total suspension of the carrier's right to use [the Port],'" despite the provisions of the concession agreement giving the Port just that authority. U.S. Br. 21. That argument should not be considered because it was not raised below or by any party in this Court. In any event, the Solicitor General is wrong.

The Port's mandatory concession agreement provides unambiguously that "[a]ny failure to comply with the terms and conditions of this Concession" constitutes a default under the agreement. 3 C.A. E.R. 485. It further states that, in the event of a default not timely cured, the Port may consider the concession agreement terminated and "may deny *any and all* access to Port property by the Concessionaire." *Ibid.* (emphasis added). Upholding that remedy cannot be reconciled with *Castle*'s holding that a State cannot enforce otherwise valid safety regulations through even a partial suspension of a federally licensed motor carrier's right to use a State's highways. 348 U.S. at 64-65.

The government provides no support for its novel objection that a plaintiff seeking to challenge a state or local remedy inconsistent with *Castle* must wait to bring suit until the punishment has been levied against it. To the contrary, the government recog-

nized in its Ninth Circuit *amicus* brief (at 10) that "a federal system of broad deregulation is susceptible to disruption by state or local officials' attempts to 'exercise veto power' by imposing a licensing requirement to provide services." A lawsuit can be brought to avoid such disruption if a local governmental entity "*claims at least some power* . . . to decide whether a motor carrier may" transfer goods to and from the Port. *R.R. Transfer Serv., Inc.* v. *City of Chicago*, 386 U.S. 351, 357 (1967) (emphasis added) (quoting *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 85 (1958)). The Port claims such power here, and the Ninth Circuit's decision upholding that power should be reversed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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