No. 17-1183

In the Supreme Court of the United States

AIRLINE SERVICE PROVIDERS ASSOCIATION, ET AL., PETITIONERS

v.

LOS ANGELES WORLD AIRPORTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Respondent Los Angeles World Airports is a component of respondent City of Los Angeles. Together, respondents own and operate the Los Angeles International Airport (LAX). Airline-service-provider companies provide services, such as baggage handling, fueling, and wheelchair services, to air carriers at LAX. Petitioners contend that a labor-peace provision in respondents' service-provider license agreement, which airline service providers must execute to operate at LAX, is impliedly preempted by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, or the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and is expressly preempted by a provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b)(1). This Court has recognized a "market participant" exception to implied preemption under the NLRA for a state or local government that acts as a proprietor rather than a regulator. The question presented is:

Whether a "market participant" exception to preemption can apply to a state or local government's imposition of a requirement on a private company if the government does not directly procure goods or services from that company.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondents operate the Los Angeles International Airport (LAX). Pet. App. 2a & n.1. This case concerns whether certain contractual requirements established by respondents for companies that provide services at LAX to airlines (airline service providers (ASPs)) are impliedly preempted by either the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, or the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*; and are expressly preempted by a provision of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. 41713(b)(1). See Pet. 4-5.

a. The NLRA protects the "right [of covered employees] to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining," 29 U.S.C. 157. The National Labor Relations Board (NLRB) determines the appropriate collective-bargaining unit, which may be an "employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b).

The NLRA vests the NLRB with power to enforce the Act's prohibition against "unfair labor practices" by an employer or labor organization, 29 U.S.C. 158, 160, including an employer's interference with the aforementioned rights, 29 U.S.C. 158(a)(1), and either party's refusal to bargain collectively, 29 U.S.C. 158(a)(5) and (b)(3). That bargaining obligation requires good-faith negotiations but does not require either party "to agree to a proposal" or make any "concession." 29 U.S.C. 158(d).

"[T]he NLRA itself contains no express preemption provision." *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 65 (2008). This Court, however, has construed the NLRA to embody "two types of [implied] pre-emption" deemed "necessary to implement federal labor policy." *Ibid.* First, *Garmon* preemption "forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits,'" in order to prevent "'state interference with the [NLRB's] interpretation and active enforcement of the [NLRA's] integrated scheme of regulation.'" *Ibid.* (citations omitted) (discussing *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959)). Second, *Machinists* preemption forbids regulation of "conduct that Congress intended

[to] 'be unregulated'" and "'left to be controlled by the free play of economic forces.'" *Ibid.* (quoting *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) (*Machinists*)).

This Court has held that *Garmon* and *Machinists* preemption "apply only to state *regulation*." *Building & Constr. Trades Council* v. *Associated Builders & Contractors, Inc.*, 507 U.S. 218, 227 (1993) (*Boston Harbor*). The Court has thus concluded that the implied "preemption principles of the NLRA" do not apply where a State is a "market participant," *e.g.*, where it "acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking." *Id.* at 229-230.

b. The RLA's labor-relations provisions displace the NLRA, see 29 U.S.C. 152(3), in the railroad- and air-carrier industries. 45 U.S.C. 151 First, 181. Congress enacted the RLA to "avoid any interruption to commerce," 45 U.S.C. 151a, by promoting the "peaceful and efficient resolution" of labor disputes that might "lead to strikes [that could] bring[] railroads to a halt." *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 72 (2009). In 1936, Congress extended the RLA to "cover the airline industry." *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246, 248 (1994).

As relevant here, the RLA applies to air carriers and to every "other person who performs any work as an employee or subordinate official of [the air] carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." 45 U.S.C. 181. The National Mediation Board (NMB), which administers the RLA, 45 U.S.C. 155, 160a, 183, construes the RLA to apply to any company "directly or indirectly owned or controlled by, or under

common control with, [an air] carrier," where the carrier has a contractual relationship with that company and the nature of the company's work is that "traditionally performed by employees of * * * air carriers." *In re Air Serv Corp.*, 33 N.M.B. 272, 284-286 (2006); cf. 45 U.S.C. 151 First. Under the RLA, an employee bargaining unit represents a "craft or class" of employees of an employer. 45 U.S.C. 152 Fourth and Ninth. In administering the RLA, the NMB requires a single bargaining unit for a craft or class of employees at all "work locations" in "a carrier's entire system." *In re LSG Lufthansa Servs., Inc.*, 25 N.M.B. 96, 108 (1997); cf. *Switchman's Union* v. *NMB*, 135 F.2d 785, 794-796 (D.C. Cir.), rev'd on other grounds, 320 U.S. 297 (1943).

The RLA provides a "comprehensive framework for resolving labor disputes" involving covered bargaining units by establishing procedures for "major" and "minor" disputes. *Hawaiian Airlines*, 512 U.S. at 252. Major disputes relate to "the formation of"—and "efforts to secure"—collective bargaining agreements (CBAs), *ibid.* (citation omitted), governing "rates of pay, rules, or working conditions," 45 U.S.C. 151a. Parties must complete a multi-step process "designed to induce agreement" to resolve major disputes—including mediation, voluntary arbitration (§§ 157-159), and possible proceedings before a Presidential Emergency Board (§ 160)—before resorting to self-help, such as work stoppages. *Elgin, Joliet & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 725 (1945). Minor disputes, by contrast, involve controversies over the "interpretation or application," 45 U.S.C. 151a, "of an existing [CBA] in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 252-254 (citation omitted). The RLA prohibits work stoppages over minor disputes, *Brotherhood of R.R.*

Trainmen v. *Chicago River & Ind. R.R.*, 353 U.S. 30, 31, 34-35 (1957), which are resolved under a CBA's grievance procedures and, if that fails, mandatory arbitration subject to judicial review, *Union Pac. R.R.*, 558 U.S. at 73-75.

The RLA does not include an express preemption provision. This Court has resolved implied preemption claims based on "congressional intent" underlying the RLA. *Hawaiian Airlines*, 512 U.S. at 252. In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), this Court also considered NLRA provisions and precedents in analyzing RLA preemption where the RLA's text and legislative history "provide[d] little guidance," while "emphasiz[ing]" that "the [NLRA] cannot be imported wholesale into the railway labor arena." *Id.* at 382-383.

Petitioners argued below, citing *Jacksonville Terminal*, that the NLRA's "two preemption doctrines, *Machinists* and *Garmon*," "apply under the NLRA and RLA." 15-55572 Pet. C.A. Br. 18-19; see 15-55571 Pet. C.A. Br. 3 n.2, 17-18. Those NLRA doctrines, as noted, do not apply if a State "acts as a proprietor" rather than a regulator. *Boston Harbor*, 507 U.S. at 229-230.

c. The ADA's express preemption provision generally prohibits a State or political subdivision thereof from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). But it includes an exception allowing a government that "owns or operates an airport" to "carry[] out its proprietary powers and rights," 49 U.S.C. 41713(b)(3). Congress enacted the ADA's preemption provision "'[t]o ensure that the States would not undo'" the ADA's "deregulat[ion of] domestic

air transport" with "'regulation of their own.'" *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 222-223 & n.1 (1995) (citation omitted).

2. Respondents own and operate LAX, Compl. ¶¶ 10-11, and charge airlines rent and fees for using LAX. Pet. App. 2a. Airlines, in turn, contract with ASPs for various services. *Ibid.*

In order to enter and use LAX to furnish services to carriers and passengers, ASPs must sign a Certified Service Provider License Agreement (Pet. App. 83a-136a) with respondents. *Id.* at 89a-90a. In that Agreement, an ASP agrees to provide specified services in compliance with conditions in a Certified Service Licensee Program, *id.* at 86a, and in accordance with numerous other conditions, including a warranty of the quality of the services it will furnish, a requirement to charge reasonable and not unjustly discriminatory prices, and provisions concerning employee training and requiring the ASP to terminate any employee at respondents' request. *Id.* at 111a, 125a-126a, 129a-130a. The ASP also agrees to pay respondents a monthly fee based on the ASP's revenue, as well as other charges to use the airport. See 15-55571 Resp. C.A. Br. 10 n.1, 46-47, 50; see also Pet. App. 87a-88a, 91a-92a, 98a; cf. *id.* at 114a (provision applicable if such payments exceed $100,000).

Of particular relevance here, Section 25 of the License Agreement requires an ASP to have a separate "Labor Peace Agreement" with any "Labor Organization" that "requests" one. Pet App. 126a-127a. Under Section 25, a Labor Organization is an organization "in which employees participate" and which exists for the "purpose" of "dealing with service providers at LAX concerning" employee-labor issues. *Ibid.* "The Labor

Peace Agreement shall include a binding and enforceable provision[] prohibiting the Labor Organization and its members from engaging in picketing, work stoppages, boycotts, or any other economic interference." *Id.* at 127a.

If an ASP and Labor Organization "are unable to agree to a Labor Peace Agreement within 60 days" of the organization's request, Section 25 requires that the dispute be submitted to informal mediation, and, if that fails to produce a "reasonable Labor Peace Agreement," to arbitration by the American Arbitration Association. Pet. App. 127a; cf. Compl. ¶¶ 42, 43.b.

Section 25 includes a savings provision, which states that Section 25 "shall [not] be construed" to require an ASP, "through arbitration or otherwise," to "change [its employees'] terms and conditions of employment," "recognize a Labor Organization as the bargaining representative for its employees," "adopt any particular recognition process," or enter a CBA. Pet. App. 128a.

3. Petitioner Airline Service Providers Association (ASPA) is an association of ASPs. Pet. App. 44a. Petitioner Air Transport Association of America, Inc. (A4A) is an association of air carriers. *Ibid.* Shortly after respondents approved Section 25 in May 2014, petitioners filed this action alleging that Section 25 is preempted by the NLRA, RLA, and ADA. *Id.* at 45a, 48a-49a. The district court dismissed petitioners' complaint, *id.* at 43a-82a, and a divided panel of the court of appeals affirmed, *id.* at 1a-40a.

a. The court of appeals first held that ASPA had associational standing to bring its preemption claims, Pet. App. 4a-7a & n.5, because ASPA alleged that Section 25 will force its ASP members "into unwanted negotia-

tions that must terminate in either an agreement or arbitral award." *Id.* at 5a. The court declined to determine if A4A had standing. *Id.* at 4a n.3.

On the merits, the court of appeals concluded that Section 25 is not preempted by the NLRA, RLA, or ADA. Pet. App. 7a-22a. Following *Boston Harbor*'s holding that NLRA preemption under *Garmon* and *Machinists* does not apply when a government acts as a market participant, the court held that respondents were "acting as a market participant and not a regulator" in including Section 25 in the License Agreement. *Id.* at 8a; see *id.* at 8a-19a. The court based that ruling on its conclusion that (1) respondents adopted Section 25 "in pursuit of the 'efficient procurement of needed goods and services,'" like "one might expect of a private business in the same situation," and (2) Section 25 has a narrow scope reflecting that respondents' "'primary goal'" was to address "'a specific proprietary problem'" rather than implement "'general policy.'" *Id.* at 8a-9a (citation omitted); see *id.* at 10a.

The court of appeals reasoned that respondents' adoption of the labor-peace-agreement requirement was an "attempt[] to avoid disruption" of LAX's operation that would result from "strikes, picket lines, boycotts, and work stoppages" by ASP employees. Pet. App. 10a. The court rejected petitioners' contention that respondents have "not directly participated in the market," explaining that respondents "participate directly in a market for goods and services" by running LAX as a "'commercial establishment[]'" that must "'provide services attractive to the marketplace'" and, as such, "must avoid commercial pitfalls as the [airport's] proprietor." *Id.* at 10a-11a (citation omitted). The court acknowledged that "most airports in the

United States are run by or affiliated with a governmental entity," but it noted that "the same is not true internationally" and that this Court has "recognized the inherently competitive and commercial nature of airport operations." *Id.* at 12a-13a (citing *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 682 (1992)). The court also determined that Section 25 did not reflect an attempt to impose general policy, explaining that petitioners' complaint did not allege that the provision would have "spillover effects on the service providers' operations beyond their work for LAX." Pet. App. 17a; see *id.* at 18a-19a.

The court of appeals accordingly concluded that its "market participant" analysis foreclosed petitioners' NLRA-preemption claim. Pet. App. 19a-20a. Consistent with petitioners' argument that the NLRA's "two preemption doctrines, *Machinists* and *Garmon*," "apply under the NLRA and RLA," 15-55572 Pet. C.A. Br. 18-19, the court concluded that "the RLA likewise does not preempt such conduct." Pet. App. 20a. Finally, the court concluded that the ADA's express preemption of state and local provisions having "'the force and effect of law'" was not intended "to upset proprietary conduct like that at issue here." *Id.* at 21a.

b. Judge Tallman dissented in part. Pet. App. 23a-40a. In his view, NLRA "*Machinists* and *Garmon* preemption also apply in the RLA context," *id.* at 25a, and, under the complaint's allegations, the "market participant exception" to such preemption did not apply, *id.* at 27a-39a.

Judge Tallman concluded that respondents' "own[ership] and operat[ion]" of LAX and their associated "interest in minimizing disruptions to air travel" were insufficient, because a proper market-participant analysis

must address Section 25's "practical consequences" and "'inevitably is fact-specific.'" Pet. App. 28a-29a (citation omitted). Judge Tallman reasoned that respondents "provid[e] ongoing licenses" and do not "directly procur[e] goods and services to execute a discrete project." *Id.* at 31a. He also stated that "no evidence" in the record indicates that labor-peace agreements are generally used "in the private marketplace" and that Section 25 is "ill-fitted" to "minimize work stoppages at LAX." *Id.* at 32a.

DISCUSSION

Petitioners contend that "the 'market participant' exception" to preemption applies only if a local government like the City of Los Angeles is "procuring [a] good or service" from the parties on which it imposes challenged requirements. Pet. i. That is incorrect. A local government may act in a proprietary capacity in other ways—for instance, when it acts as a landlord or financier. The court of appeals therefore correctly rejected petitioners' procuring-goods-or-services limitation on the market-participant exception to NLRA preemption, and that ruling does not conflict with any decision of this Court or another court of appeals. More broadly, however, the court of appeals did not apply the correct test for market participation. And it is far from clear that, under the correct approach, respondents are acting in a proprietary rather than a regulatory capacity by requiring service providers at LAX to have labor-peace agreements upon request.

A. The Decision Below Correctly Holds That The NLRA's Market-Participant Exception Is Not Limited To Governmental Purchases Of Goods Or Services

Petitioners do not say, and the court of appeals did not resolve, whether this case is governed by the NLRA (which applies generally to most industries) or the RLA (which applies to railroad and air carriers). Petitioners and the court of appeals have assumed that the NLRA's implied-preemption doctrines of *Garmon* and *Machinists*, along with their exception for market participation, apply equally under the RLA. See 15-55572 Pet. C.A. Br. 18-19; see also 15-55571 Pet. C.A. Br. 3 n.2, 17-18. They also have assumed that the differences in the manner in which work stoppages are treated by the NLRA and RLA do not affect the scope of *Garmon* or *Machinists* preemption, or the market-participant exception from such preemption, under the two statutes. Taking the case on those assumptions, as the court of appeals did, that court correctly declined to limit the NLRA's market-participant exception to governmental purchases of goods or services.

1. In the absence of an express-preemption provision, federal law impliedly preempts a state provision if it either "conflicts with" or "frustrate[s] the federal scheme," or if the federal statute "occup[ies] the [relevant] field." *Building & Constr. Trades Council* v. *Associated Builders & Contractors, Inc.*, 507 U.S. 218, 224 (1993) (citation omitted). In *Boston Harbor*, this Court held that the NLRA's *Garmon* and *Machinists* implied-preemption doctrines "apply only to state *regulation*." *Id.* at 227; see *id.* at 224-227. "[T]he NLRA," the Court reasoned, was not "intended to supplant" "all legitimate state activity that affects labor." *Id.* at 227. "When a State owns and manages property, for example, it must

interact with private participants in the marketplace" and "is not subject to pre-emption" "[i]n doing so," because it is acting "as [a] proprietor" rather than a "regulator." *Ibid.* In other words, the actions of a State "act[ing] as a proprietor," like any "market participant with no interest in setting policy," are "not 'tantamount to regulation'" that might be preempted by the NLRA. *Id.* at 229-230.

Petitioners provide no persuasive reason for limiting that rationale only to circumstances in which a State is "procuring [some] good or service" from the entity that is subject to the challenged provision (Pet. i). A State must "interact with private participants in the marketplace" in other contexts, including when it acts as a "proprietor" that "owns and manages property." *Boston Harbor*, 507 U.S. at 227. In cases under the Commerce Clause that similarly turn on whether state and local governments act "as 'market participants'" and not "as 'regulators,'" the Court has held that "market participation" does not "stop at the boundary of formal privity of contract" and can apply to governmental action concerning "economic activity in which the [government] is a major participant." *White* v. *Massachusetts Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 206, 211 n.7 (1983). Thus, in *White*, the Court upheld a city's requirement that city-funded construction projects have a workforce of at least 50% city residents, concluding that the city acted as a market participant. *Id.* at 205-206, 208-211, 214-215.

Like this Court, the courts of appeals have applied the market-participant exception under the NLRA where governments have not procured goods and services. The Third Circuit, for instance, applied the ex-

ception where a city imposed labor-agreement requirements on a private developer to protect the city's bond financing for the developer's project, a context in which the City did not procure any goods or services but nevertheless acted in a proprietary capacity. *Hotel Emps. & Rest. Emps. Union* v. *Sage Hospitality Res., LLC*, 390 F.3d 206, 208, 215-217 (2004), cert. denied, 544 U.S. 1010 (2005). If such a requirement "serve[s] to advance or preserve" a government's "proprietary interest" as "an investor, owner, or financier," the court reasoned, the market-participant exception applies so long as the government's requirement is tailored to that interest. *Id.* at 216.

The D.C. Circuit similarly upheld against an NLRA-based challenge a Presidential Executive Order that prohibited any entity receiving federal assistance for a construction project from requiring its bidders or contractors to enter into certain labor agreements. *Building & Constr. Trades Dep't* v. *Allbaugh*, 295 F.3d 28, 29, 34-36 (2002), cert. denied, 537 U.S. 1171 (2003). The Order, the court held, reflected permissible market participation—even though the government did not own the projects—because "the Government unquestionably is the proprietor of its own funds" and acted as "a private entity" would as the "lender to" or "benefactor of" such projects. *Id.* at 35. Thus, although a State must impose conditions that are logically tied to a proprietary interest, see *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 287-288 (1986) (addressing provision concededly designed only to "deter labor law violations"), the concept of market participation is not limited to the procurement of goods or services.

b. Petitioners rely (Pet. 16-19) on two of this Court's decisions, but neither supports petitioners' categorical procurement-of-goods-or-services limitation. *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986), held that the NLRA impliedly preempted a city council's attempt to condition renewal of a taxicab company's franchise on its settlement of a labor dispute. *Id.* at 613-618. The Court explained that, under *Machinists*, the city could not "ensure uninterrupted service *to the public* by prohibiting a strike," and likewise could not restrict a "transportation employer's ability to resist a strike." *Id.* at 618 (emphasis added). In other words, the city was acting as a regulator in attempting to achieve a benefit for the general public. As petitioners note (Pet. 18), the Court subsequently stated in *Boston Harbor* that *Golden State Transit* would have been a "very different case" if the city had "purchased taxi services from [the company] in order to transport city employees" and the "strike had produced serious interruptions in the services the city had purchased." 507 U.S. at 227. But the Court's point was not that a government acts as a market participant only when it procures goods or services. Rather, the Court's point was that if the city had been acting *for its own benefit* as a purchaser of services, the character of its conduct would have been proprietary rather than regulatory.

American Trucking Ass'ns v. *City of Los Angeles*, 569 U.S. 641, 648-652 (2013) (*ATA*), held that an express preemption provision prohibiting certain state provisions having "the force and effect of law," 49 U.S.C. 14501(c)(1), preempted two sections of a Port of Los Angeles concession agreement with trucking companies. The Court agreed that "Section 14501(c)(1) draws a

rough line between a government's exercise of regulatory authority and its own contract-based participation in a market," but it rejected the Port's argument that its contract was like "'a private agreement'" that advanced its "proprietary interests." 569 U.S. at 649 (citation omitted). The Court held that the Port "exercised classic regulatory authority" because its "contracts d[id] not stand alone": The Port "chose a tool to fulfill [its] goals which only a government can wield," *i.e.*, a local ordinance imposing *criminal* sanctions for failing to comply with the contract's requirements. *Id.* at 650-651. The Court acknowledged that "whether governmental action has the force of law" may "pose difficulties" "[i]n some cases" because "the line between regulatory and proprietary conduct has soft edges," but it concluded that the case before it was not close, because the criminal prohibition—a mechanism "available to no private party"—"manifest[ed] the government *qua* government, performing its prototypical regulatory role." *Id.* at 651. *ATA* limited its analysis to the statutory text before it, *id.* at 649 n.4, and did not purport to define proprietary actions if unaccompanied by criminal sanctions.[*]

B. The Decision Below Is Not The Subject Of A Circuit Conflict

Contrary to petitioners' submission (Pet. 20-24), the court of appeals' resolution of the question presented

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[*] Petitioners discuss (Pet. 5, 13, 26) express ADA preemption only in passing. But for reasons similar to those discussed above, no sound basis exists for interpreting Section 41713(b)'s "force and effect of law" requirement or its exception for "proprietary powers and rights," 49 U.S.C. 41713(b)(1) and (3), as limiting permissible market participation to situations where the government itself procures goods or services.

does not conflict with that of any other court of appeals. No court of appeals has limited the NLRA's market-participant exception to a government's direct procurement of goods and services. And petitioners cite no decision applying any similar exception in the RLA (or ADA) context.

Metropolitan Milwaukee Ass'n of Commerce v. *Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), held that the NLRA preempted a county ordinance requiring firms providing transportation and other services to certain Milwaukee County residents under contracts with the County to "negotiate 'labor peace agreements'" with unions wanting to organize the firms' employees. *Id.* at 277-278. The Seventh Circuit concluded that the ordinance was not limited to advancing the County's interest as purchaser of such services because the ordinance applied beyond the County's contracts and had "a spillover effect on labor disputes arising out of the contractors' non-County contracts." *Id.* at 279; see *id.* at 280. The court also concluded that the required agreements were not "actually tailored to preventing work stoppages" and were just as likely to "increase" them. *Id.* at 280-281.

Metropolitan Milwaukee's rejection of the County's ordinance-based regulation of labor contexts in which the County had no proprietary interest does not purport to restrict the NLRA's market-participant exception only to contexts in which a government acts in a capacity as a buyer, as petitioners assert (Pet. 20). *Metropolitan Milwaukee* merely reflects that the NLRA preempts "a purchasing rule prescribing how employers must handle labor relations in *all aspects* of their business." *Northern Illinois Chapter of Associated Builders & Contractors, Inc.* v. *Lavin*, 431 F.3d 1004,

1007 (7th Cir. 2005) (emphasis added), cert. denied, 549 U.S. 813 (2006).

Petitioners rely (Pet. 21-22) on a Third Circuit decision holding that the NLRA preempted a city's imposition of labor requirements on "private developers of projects" funded entirely with private funds. *Associated Builders & Contractors Inc.* v. *City of Jersey City*, 836 F.3d 412, 414, 418-419 (2016). They also rely (Pet. 23) on a D.C. Circuit decision invalidating a Presidential Executive Order that prohibited government contracts with any employer that had previously hired permanent replacements for lawful strikers. *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1334-1335 (1996); see *id.* at 1324, 1332-1339. Those decisions merely reflect that the NLRA can prevent the imposition of labor requirements that do not actually advance the government's own proprietary interests. Neither suggests, much less holds, that the market-participant exception applies only if the government purchases goods or services. Indeed, as explained above, the Third and D.C. Circuits have both applied the exception outside that context. See pp. 12-13, *supra*.

Finally, petitioners misread (Pet. 22-24) other decisions. The Fifth Circuit, in the course of rejecting an express-preemption claim under 49 U.S.C. 14501(c)(1), stated that the distinction between a state's proprietary and regulatory action is "most readily apparent" when it "purchases goods and services its operations require on the open market," not that that is the only context in which a government acts in a proprietary capacity. *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 691 (1999); see *id.* at 694-695. Likewise, in rejecting an NLRA-preemption claim, the Sixth Circuit determined that a State is the "'proprietor of its

own funds'" and acts as a "market participant" in prohibiting certain labor agreements in projects in which it invests to ensure the efficient use of its funding. *Michigan Bldg. & Constr. Trades Council* v. *Snyder*, 729 F.3d 572, 574, 580-581 (2013) (citation omitted). In short, no court of appeals has limited the NLRA's market-participant exception as petitioners suggest.

C. The Decision Below Is Wrong In Other Respects

Although the court of appeals correctly held that the NLRA's market-participant exception is broader than the procurement of goods or services, it did not properly state or analyze the general test for that exception. Under the right approach, it is far from clear that respondents are acting in a proprietary rather than a regulatory capacity by requiring service providers at LAX to have labor-peace agreements upon request.

1. The court of appeals reasoned that the market-participant exception applies when a government entity procures goods or services, or takes action whose "'narrow scope'" defeats "'an inference that its primary goal was to encourage a general policy rather than to address a specific proprietary problem.'" Pet. App. 8a-9a (brackets and citation omitted). The court emphasized that an entity "act[s] as a market participant" if "either" test is met, *id.* at 9a, and determined that respondents' actions "independently qualify as market participation" under the latter test, *id.* at 13a, because Section 25 does not extend beyond LAX, *id.* at 14a-19a. That analysis is flawed. Although the narrow scope of governmental action can be an important consideration, that is not the only relevant factor in determining whether the government's conduct is proprietary or regulatory, which remains the ultimate inquiry.

Typically a government acts as a proprietor when it procures or sells goods or services, appropriately conditions the expenditure of governmental funds, or manages access to or use of governmental property. In those circumstances, the government acts for its own benefit by imposing restrictions directly on the entities with whom it deals. When instead the government imposes restrictions on the entities' interactions with third parties, there is a more attenuated relationship to the government's proprietary interests, and a more substantial commercial justification should be required. See U.S. Amicus Br. at 25, *ATA*, *supra* (No. 11-798) ("[A] more attenuated relationship between the government entity and the motor carrier calls for a substantial commercial justification to dispel the inference that the government entity is using its leverage in one market to exert a regulatory effect in another market.") (brackets and internal quotation marks omitted). The action warrants closer scrutiny to ensure that it fairly serves proprietary, rather than regulatory, interests.

In conducting that inquiry, the narrowness of the governmental action can be a relevant factor. It may indicate, as the court of appeals reasoned, that the government is attempting to address a specific proprietary concern. Pet. App. 8a-9a. But the government may attempt to advance narrow regulatory policies as well as broad ones, and the narrowness of its action alone does not guarantee that the government is acting in a proprietary capacity. Courts should also consider, for instance, whether the government has invoked mechanisms that are not available to private parties (like criminal sanctions), whether it has attempted to regulate access to some public good (like infrastructure), and

whether its conduct significantly advances specific proprietary interests or more general public interests. See U.S. Amicus Br. at 22-25, *ATA*, *supra*. Here, the court of appeals erred in not undertaking that broader inquiry.

2. Considering those factors, it is questionable that respondents can satisfy the market-participant exception.

a. Governments may manage many types of properties —from recreational parks to toll roads, military complexes, airports, or stadiums—where private businesses offer services to the public. Governments have a strong proprietary interest in managing those properties as private entities would. For instance, the government may restrict the type of employees whom businesses hire in order to ensure safe and secure operations. See *Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961) (government acts as "a proprietor" when it restricts the type of employees who may be employed by a cafeteria business operating within a military base). Or the government may require the businesses to meet standards that ensure the services remain desirable to the intended audience or the general public. For example, the NLRA does not generally prevent a state-owned sports arena from requiring vendors to dress or comport themselves in particular ways when interacting with customers.

Many aspects of respondents' licensing agreement reflect those sorts of legitimate proprietary interests. The agreement requires that, among other things, each ASP pay revenue-based fees and other charges to operate at LAX, p. 6, *supra*; provide specified airport services in a manner satisfying "high professional standards," Pet. App. 86a, 129a; establish a written training

program "to ensure that all employees are thoroughly trained and qualified to perform their job duties," *id.* at 125a; remove any employee who is not performing his duties "to [respondents'] satisfaction," *id.* at 130a; ensure that its activities do not interfere with airport operations, *id.* at 90a; and maintain insurance listing respondents as insureds with respect to its "operations, use, and occupancy" of LAX, *id.* at 99a. Those requirements ensure that services provided at LAX meet the City's (and airlines') needs and are attractive to the marketplace, and thus significantly advance respondents' proprietary and financial interests. See *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 682 (1992) ("As commercial enterprises, airports must provide services attractive to the marketplace.").

b. Respondents contend that Section 25 serves those same proprietary and financial interests through "the avoidance of disruptions to air transportation and the preservation of the airport's ability to generate revenue." Br. in Opp. 16. But the direct beneficiaries of the absence of labor disruptions are the airlines and air travelers, not respondents. In that respect, the case bears some similarity to *Golden State Transit*. There, the city council would renew the taxicab company's franchise license only if it settled a labor dispute, for the apparent benefit of taxicab passengers. See 475 U.S. at 613-618. Here, respondents will renew petitioners' licenses only if they enter into a labor-peace agreement upon request, for the apparent benefit of airlines and airline passengers. Of course, the most direct beneficiaries of Section 25 are the labor organizations that may request an agreement with an ASP, and petitioners allege that respondents are not acting to benefit the

traveling public and that they imposed Section 25 only after the Service Employees International Union failed to unionize service-provider employees at LAX. See Compl. ¶¶ 15-16. But assuming Section 25 is meant to "avoid[] disruptions to air transportation" and not to take sides in a labor dispute, it remains the case that the direct beneficiaries of labor peace will be airlines and their passengers.

Respondents suggest (Br. in Opp. 15-16) that the absence of labor disruptions will make LAX a more attractive airport for customers and thereby allow them to compete more effectively in the marketplace. There are a number of problems with framing respondents' proprietary interest at that level of generality. First, as explained above, because respondents are imposing a restriction on ASPs' interactions with third parties (labor organizations), and because respondents are at most an indirect beneficiary of that restriction, a substantial commercial justification should be required to invoke the market-participant exception. Here, it is not clear that Section 25 is necessary or tailored to serve respondents' own proprietary and financial interests. Second and related, LAX is not an ordinary commercial enterprise in an open market, just as the port in *ATA* was not. Rather, LAX is more akin to publicly managed transportation infrastructure. It is not apparent that respondents have justified Section 25 as necessary for LAX to compete with other airports or other modes of intercity transportation. Third, accepting respondents' argument could threaten to prove too much. Respondents could require ASPs to support union initiatives or to forgo arbitration proceedings, for example, on the theory that such provisions are desirable to employees,

more contented employees will provide a better experience for passengers, and LAX will thereby be more attractive in the marketplace. At respondents' level of generality, virtually any regulation of labor relations could be reframed as a proprietary measure.

c. In short, the United States is concerned that the court of appeals misframed the test for the NLRA's market-participation exception, and that the court's approach—both here and in other cases—could allow state and local governments to escape preemption of what are regulatory measures. The concern is particularly acute given the parallels between this case and *ATA*. There, the Court granted review in the absence of a circuit conflict, see U.S. Cert. Amicus Br. at 12-16, *ATA*, *supra*; the Court held that the City of Los Angeles could not invoke the market-participant exception for the regulatory requirements at issue; and yet the City continues to take an unduly expansive view of the market-participant exception. The proper test for that exception is no less important now than it was in *ATA*. It is not clear, however, that petitioners challenge the decision below except for its failure to impose a procuring-goods-or-services limitation on the market-participant exception—and as explained earlier, that portion of the decision below is correct and does not itself warrant review. It is therefore uncertain that this case will provide an appropriate opportunity for the Court to resolve broader questions about the proper test for the market-participant exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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