No. 17-1183

IN THE

# Supreme Court of the United States

AIRLINE SERVICE PROVIDERS ASSOCIATION; and AIR TRANSPORT ASSOCIATION OF AMERICA, INC., d/b/a AIRLINES FOR AMERICA,

*Petitioners*,

*v.*

LOS ANGELES WORLD AIRPORTS; and CITY OF LOS ANGELES, CA,

*Respondents.*

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

## SUPPLEMENTAL BRIEF FOR RESPONDENTS


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## SUPPLEMENTAL BRIEF FOR RESPONDENTS

1. The Government explains precisely why this case is not cert-worthy: "The court of appeals … 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." U.S. Br. 10. As to the purported split, the Government's review of the case law demonstrates that Petitioners simply "misread" other circuits' decisions. U.S. Br. 17. As to the merits, the Government also demonstrates that Petitioners are "incorrect" that this Court's precedents impose Petitioners' rigid rule. U.S. Br. 10. There is "no persuasive reason" for limiting the market-participant exception to instances where a government is directly purchasing goods or services. U.S. Br. 12-13. "A local government may act in a proprietary capacity in other ways—for instance, when it acts as a landlord or financier." U.S. Br. 10.

The Government expresses certain concerns with how the Court of Appeals wrote its opinion. U.S. Br. 23. Notably, the Government correctly recommends that "[t]he petition for a writ of certiorari should be denied" despite those qualms. U.S. Br. 24. And for good reasons: First, this Court does not take cases to address issues that a petition did not raise and that are not properly developed on either side of the cert. briefing. S. Ct. R. 14(1)(a). Not only did Petitioners fail to reference those issues in their question presented, they failed to *mention* any of them anywhere in their cert. papers. Second, there is no circuit conflict on any of these issues. And third, the issues are neither important nor recurring. As explained *infra*

(at 8), there is no evidence that any ASP has ever been affected by the provision at issue in this case.

Had Petitioners presented—or even mentioned—any of the concerns the Government raises, we would have addressed them fully. And we might well have allayed those concerns. For now, we address just a few points to reinforce the Government's recommendation of a denial.

2. The Government's main concern is with an aspect of the Court of Appeals' framing of the market-participant test. U.S. Br. 23. The overall framing is uncontroversial. The court applied verbatim the market-participant test that the Fifth Circuit first articulated in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999). Pet. App. 8a. That test asks (1) whether the government is pursuing its proprietary interests in a manner that is typical of private parties in similar circumstances and (2) whether the measure in question is narrowly tied to a specific proprietary problem. *Cardinal Towing*, 180 F.3d at 693. As the Fifth Circuit has explained, the two questions are two sides of the same coin; each explores the same ultimate inquiry. *Id.* ("Both questions seek to isolate a class of government interactions with the market" where "a regulatory impulse can be safely ruled out."). Every circuit to consider the market-participant exception in recent years—

whether the preemption challenge is mounted by a labor organization or an employer—has asked the same two questions.[1]

The Court of Appeals held that Section 25 constitutes market participation under both of the *Cardinal Towing* questions. Pet. App. 10a. The Government does not take issue with the Court of Appeals' analysis of the first question. As explained below (at 4-8), the proprietary interests that LAWA is protecting with Section 25 are the same sorts of interests that private businesses routinely protect with exactly the same sorts of labor peace agreements.

The Government expresses qualms only about the Court of Appeals' analysis of the second *Cardinal Towing* question: "does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than to address a specific proprietary problem?" Pet. App. 9a (internal quotation marks and alterations omitted). The Government reads the opinion below as holding that "the narrow scope of governmental action" is "the only relevant factor." U.S. Br. 18-20. We do not read it that way—and nor, evidently, do Petitioners. The

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[1] *E.g.*, *Mich. Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572, 581-82 (6th Cir. 2013) (challenge by labor organization); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 215-16 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005) (challenge by employer); *see also Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (upholding school district's requirement that cell phone tower operator leasing space on school building comply with the lease's emissions standard).

Court of Appeals asked whether the condition in question is "narrowly *tied to a specific proprietary problem*." Pet. App. 13a (emphasis added) (quotation marks omitted). The test thus requires a valid proprietary problem and a solution with a narrowly tailored nexus to it. In assessing whether Section 25 meets those requirements, the Court of Appeals considered several factors, including those the Government lists.[2]

3. One reason the Government finds it "questionable" (U.S. Br. 20) whether Section 25 is market participation is that the Government has only a partial view of LAWA's proprietary interests. That is a natural consequence of Petitioners' decision not to address the merits of LAWA's interests beyond its proposed

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[2] For example, the court considered whether LAWA "attempted to regulate access to some public good (like infrastructure)," U.S. Br. 19, when it explained why operating an airport is an "inherently competitive and commercial" enterprise and how LAX was "participating in a *private* market," Pet. App. 12a-13a. *See also* Pet. App. 11a (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) ("[A]irports are commercial establishments ... [that] must provide services attractive to the marketplace.")). The court similarly considered "[w]hether [the government's] conduct significantly advances specific proprietary interests or more general public interests," U.S. Br. 19-20, when it relied on the narrow, tailored scope of Section 25 and distinguished cases where governments pursued policy goals untethered to a proprietary objective, *see* Pet. App. 14a-16a. Finally, because Section 25 plainly does not invoke "mechanisms that are not available to private parties (like criminal sanctions)," U.S. Br. 19—Section 25 uses ordinary contract remedies only, Pet. App. 92a-93a—there was no occasion for the court to examine this factor.

procuring-goods-and-services limitation. Had Petitioners raised the matter, we would have explained that LAWA is "the direct beneficiar[y] of the absence of labor disruptions," every bit as much as "the airlines and air travelers." U.S. Br. 21.

The Government correctly describes *part of* that benefit: "the absence of labor disruptions will make LAX a more attractive airport." U.S. Br. 22. Making sure that ground crews continue working and refrain from disrupting the flow of air traffic is, indeed, critical to "ensure that services provided at LAX meet the City's (and airlines') needs and are attractive to the marketplace." U.S. Br. 21. But LAWA's primary interest in smooth operations at LAX is not the psychic benefit of happy passengers. LAWA has an immense financial stake in the airport's commercial success. Each year, LAWA derives hundreds of millions of dollars from fees paid by airport concessions that serve (and depend upon) the traveling public, such as parking garages, rental-car companies, duty-free shops, and terminal restaurants. *See Series 2018DE Subordinate Bonds Official Statement*, LAWA 65 tbl. 11 (Oct. 31, 2018), https://tinyurl.com/y4lxptqx. In Fiscal Year 2018 alone, LAWA collected $469 million in concession revenue at LAX. *Id.* LAWA also receives hundreds of millions of dollars a year—$227 million in Fiscal Year 2018 alone, *id.*—in Passenger Facility Charges imposed on "each paying passenger … boarding an aircraft" at LAX, 49 U.S.C. § 40117(b)(4), and Customer Facility Charges collected from rental car customers, *see* Cal. Gov't Code § 50474.21. These funds are earmarked by statute for important new facilities at LAX.

All of these revenue streams are tied directly to the volume of passenger traffic at LAX. If baggage handlers, aircraft cleaning crews, and other ground personnel go on strike or picket at the entryway, disrupting airport operations, LAX will attract fewer passengers and LAWA will lose the revenues those passengers would generate. These revenues are critical to LAWA because LAWA has a federal obligation to make LAX financially self-sustaining. 49 U.S.C. § 47107(a)(13). LAWA cannot depend upon the City's general fund to make up any revenue shortfalls, Los Angeles City Charter §§ 609, 635, and relies upon the revenue generated at LAX to keep the airport running and cover its massive debt obligations as LAWA strives to rebuild LAX and improve its competitive position.

By adopting Section 25, LAWA strives to prevent costly disruptions before they cause significant financial harm—to LAWA itself, not just to airlines. And it does so using a device that private enterprises frequently use as well. For example, in locales where unions are prevalent and active, it is common for private commercial landlords to require tenants to have no-strike agreements with companies serving those tenants, like janitorial companies. They do it for the same reason as LAWA: When unions strike or picket a building, they affect all the tenants and jeopardize the landlord's commercial interests. *Cf.* IATA Amicus Br. 16 ("[N]o one disputes that if a private entity operated a public venue like LAX, that entity would have a similar interest in labor peace, and perhaps could require 'labor peace' provisions across the board.").

That makes this case very different from two cases in which this Court found that the city was not acting in a proprietary capacity. In *American Trucking Association, Inc. v. City of Los Angeles (ATA)*, the Ninth Circuit had sustained as proprietary action the use of "a tool … only a government can wield: the hammer of the criminal law," 569 U.S. 641, 651 (2013). As the Government notes, the Court "did not purport to define proprietary actions if unaccompanied by criminal sanctions." U.S. Br. 15. In this case, by contrast, the decision below sustains LAWA's contracting "in a way that the owner of an ordinary commercial enterprise could mimic." *ATA*, 569 U.S. at 651.

Similarly, in *Golden State Transit Corp. v. City of Los Angeles*, the city refused to grant a private taxi company a license unless it ended a labor dispute. 475 U.S. 608, 609 (1986). The city was regulating a business in which it had no proprietary interest. *Id.* at 618. As this Court later observed, "a very different case would have been presented had the City of Los Angeles purchased taxi services from Golden State in order to transport city employees." *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227 (1993). That is the case here, since LAWA owns, operates, and finances LAX.

Understood this way, the decision's narrow tailoring requirement does not create the slippery slope the Government hypothesizes. U.S. Br. 22-23. The Government worries that the decision below invites governmental entities to adopt virtually any labor requirement "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." *Id.* But Section 25 does not rely on an attenuated chain from contractual provision to contented employee to happier passenger to better brand—a chain that surely would not pass the *Cardinal Towing* narrow-scope test. It targets only the labor disruptions that directly threaten LAWA's proprietary interests in LAX's operational and financial stability.

If a court ever distorts the market-participant exception to sustain labor-related policymaking divorced from a valid proprietary interest, this Court could intervene then.

4. Because the Government recommended denying certiorari, it had no need to address a fatal vehicle flaw: Petitioners' lack of Article III standing. As our brief explained (BIO 9-10), Petitioners do not allege—and, indeed, they waived any claim—that Section 25 has ever been invoked to trigger negotiations with an ASP; that any ASP has refused to sign a contract containing Section 25 or been threatened with loss of the right to operate at LAX; or that any ASP has been deterred from operating at LAX due to Section 25. Nor do Petitioners even attempt to defend A4A's standing. *Compare* BIO 13-14, *with* Reply 12-13. The same vehicle problems that would interfere with this Court's review of the actual question presented will also preclude this Court's review of the concerns that the Government discusses.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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