No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that federal labor law preempts state and local regulation of labor-management relations. In addition, the Airline Deregulation Act expressly preempts state and local regulations that "relate to" airline prices, routes, and services. Both types of preemption are subject to a narrow exception that applies when a state or local government does not use its sovereign power to "regulate," but instead acts as a "market participant" by purchasing goods or services in the marketplace. Because contractual terms negotiated in market purchases are not "regulations," they are typically immune from federal preemption.

In the present case, the Ninth Circuit radically expanded the market participant exception. The court held that the City of Los Angeles could enact a licensing rule that bars companies from providing services to airlines at Los Angeles International Airport (LAX) unless they enter a "labor peace" agreement with any union that demands one. This rule plainly regulates labor-management relations and "relates to" airline services, but has nothing to do with any service purchased by the City. The Ninth Circuit nevertheless upheld the rule under the market participant exception solely because the City owns and operates LAX.

The question presented is:

Does the "market participant" exception allow a state or local government to impose an otherwise-preempted rule on private companies even if the government is not procuring any good or service from them?

PARTIES TO THE PROCEEDING; RULE 29.6 STATEMENT

Petitioner Airline Service Providers Association ("ASPA") is a trade organization representing businesses providing ground services (including fueling, cleaning, baggage handling, security, ticket counter and the like) to airlines across the United States, many of which operate at Los Angeles International Airport. ASPA's members are Air Serv Corporation; Airport Terminal Services, Inc.; Aviation Safeguards; Baggage Airline Guest Services, Inc.; Delta Global Services; G2 Secure Staff, LLC; Hallmark Aviation Services, L.P.; Huntleigh USA Corporation; Menzies Aviation USA, Inc.; Pacific Aviation Corp.; Primeflight Aviation Services, Inc.; SAS Services Group, Inc.; Swissport USA Inc.; Total Airport Services Inc.; and Worldwide Flight Services.

Petitioner Air Transport Association of America, Inc., d/b/a Airlines For America ("A4A"), is a nonprofit corporation advocating for its member air carriers on issues relevant to the airline industry. A4A's members are Alaska Airlines, Inc.; American Airlines Group, Inc.; Atlas Air, Inc.; Federal Express Corporation; Hawaiian Airlines, Inc.; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc. (United Airlines); and United Parcel Service Co.

Respondents Los Angeles World Airports and City of Los Angeles, CA, are municipal corporations under the laws of the State of California. They own and operate Los Angeles International Airport, the fourth busiest passenger airport in the world, and the second busiest in the United States.

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CONSTITUTIONAL AND STATUTORY AUTHORITIES

INTRODUCTION

This case involves an effort by the Ninth Circuit to undermine well-established principles of federal preemption. The National Labor Relations Act (NLRA) and other provisions of federal labor law generally preempt any state or local regulation of labor-management relations. In particular, federal law prohibits any state or local rule that would require private companies to enter any type of agreement with organized labor, which would upset the delicate balance that Congress struck in regulating the bargaining process between labor and management. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613–14 (1986). At the same time, the Airline Deregulation Act (ADA) expressly preempts any state or local regulation "related to a price, route, or service" of an airline. 49 U.S.C. § 41713(b)(1).

In the present case, the City of Los Angeles disregarded these bedrock principles and amended its licensure rules at Los Angeles International Airport (LAX) to require airline service providers to enter into a "labor peace" agreement with any union that demands one. Petitioners filed suit, arguing that this rule is preempted by both federal labor law (because it intrudes on the field of labor-management relations) and the ADA (because it closely relates to airline prices and services).

Over the dissenting opinion of Judge Richard Tallman, a panel of the Ninth Circuit held that the "labor peace" rule is not subject to federal preemption because it is not truly a "regulation" at all. Instead, the majority held that the City

imposed the rule in its capacity as a "market participant." Pet. App. 8a. As Judge Tallman's dissent recognized (without disagreement by the majority), the Ninth Circuit's holding "hinges entirely on the applicability of the market participant exception," and without that exception the "labor peace" rule "would plainly be preempted." Pet. App. 25a, 27a (Tallman, J., dissenting).

Under this Court's clear precedent, the market participant exception applies only when a government entity is purchasing goods or services in the marketplace. When the government hires a company to provide some good or service, it can negotiate for that company to adhere to certain contractual terms, which are generally not subject to federal preemption because they are commercial conditions rather than "regulations." But when the government imposes licensure rules on a company that it has not hired to provide any good or service, the rules are "regulations" subject to ordinary principles of federal preemption.

In the present case, the Ninth Circuit held that the market participant exception allows the City to impose a "labor peace" rule on private companies that operate at LAX even though the City has not purchased any good or service from them (or even from the airlines to whom they provide services). As Judge Tallman's dissent pointed out, "[a]t the risk of stating the obvious, the City here is not directly procuring goods and services to execute a discrete project, but rather providing ongoing licenses permitting a host of service providers . . . to

do business at the airport." Pet. App. 31a. But nonetheless, the panel majority reasoned that because the City has a "proprietary" interest in avoiding service disruptions at LAX, it is effectively immune from federal preemption and has free reign to impose any labor rules it wants on any company that provides services to airlines at the airport.

The Ninth Circuit's decision creates a gaping hole in federal preemption jurisprudence and conflicts sharply with the binding precedent of this Court and multiple circuits. Until now, every court has recognized that the market participant exception applies only when a local government is contracting for goods and services for *itself*, not using its sovereign power to impose rules on companies that provide services to *others*. If allowed to stand, the decision below will eviscerate federal preemption not only in the airline industry but also across a broad range of other areas where the market participant exception applies.

OPINIONS BELOW

The U.S. District Court for the Central District of California entered an Order of Dismissal in favor of Respondents (see 2015 WL 13546227) (Pet. App. 43a–82a). A divided panel of the Ninth Circuit Court of Appeals affirmed (Pet. App. 41a–42a) (originally published at 869 F.3d 751 (2017), but withdrawn). After timely petitions for rehearing, to both the panel and to the Circuit *en banc*, the panel slightly modified the opinion, denied rehearing, and again affirmed in an opinion drawing the dissent of Judge Tallman, published at 873 F.3d 1074 (9th Cir. 2017) (Pet. App. 1a–40a).

JURISDICTION

The Ninth Circuit issued an initial panel opinion on August 23, 2017. Pet. App. 41a–42a. On October 16, 2017, the court denied a petition for rehearing en banc and issued a new panel opinion to replace the initial one. Pet. App. 2a. On January 5, 2018, this Court (acting through Justice Kennedy) extended the time to file this Petition until February 15, 2018.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const., Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

A. Legal Background

The underlying dispute in this case involves two overlapping areas of federal preemption. First, federal labor law has "largely displaced state [and local] regulation of industrial relations." *Wis. Dep't of Indus., Labor, & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986). As a result, no state or local government may impose labor regulations that would upset the delicate "balance" that

Congress struck for negotiations between labor and management in the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA), which governs the airline industry. *Id.* This includes regulations requiring private companies to enter into "labor peace" agreements, which distort the parties' ability to "resort to economic pressure" to support their positions in the bargaining process. *Golden State*, 475 U.S. at 615.

Second, when Congress deregulated the airline industry in 1978, it enacted an express preemption clause to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992). Accordingly, the Airline Deregulation Act (ADA) prohibits states from enacting or enforcing any "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). This language "express[es] a broad pre-emptive purpose," prohibiting any state or local regulation that relates to "prices, routes, or services," even if "the effect is only indirect." *Morales*, 504 U.S. at 385-86 (citation omitted).

B. The City's "Labor Peace" Rule

Unsatisfied with the uniform federal scheme for negotiating labor agreements, and undeterred by the ADA, the City of Los Angeles designed its own scheme to achieve what it called "labor harmony" for airline service providers at LAX. Specifically, the City adopted a new licensure rule requiring companies that provide services to airlines at LAX to execute a "labor peace"

agreement with any union that demands one. The City put this rule in place through Section 25 of its "Certified Service Provider License Agreement," which "establish[es] eligibility criteria, service classifications, and various monitoring and enforcement procedures for companies" that the City allows to be "retained or hired" by "airlines" to provide various "services at LAX." Pet. App. 45a, 126a–127a.

Under the new Section 25, all licensed service providers at LAX must "have in place, at all required times, a labor peace agreement" with any covered "Labor Organization" that "requests" one. Pet. App. 127a. The required agreement must prohibit "the Labor Organization and its members from engaging in picketing, work stoppages, boycotts, or any other economic interference." *Id*. If the parties "are unable to agree to a Labor Peace Agreement within 60 days of the Labor Organization's written request," they must "submit the dispute" to mediation and then binding arbitration. *Id*. Section 25 thus differs sharply from the NLRA, which requires parties to negotiate in good faith, but does not require them to reach any agreement. 29 U.S.C. § 158(d).

As the Ninth Circuit recognized, because service providers at LAX "may not operate without" the required "labor peace" agreement, they must "give benefits" to requesting unions "to induce them to enter the agreement." Pet. App. 3a. The coercive effect of the mandate is thus clear. It gives unions "an incentive to trigger negotiations toward labor peace agreements to obtain such benefits," and

unions "advocated for inclusion of section 25" in the LAX licensure rules. *Id.*

C. The Proceedings Below

1. Petitioners sued the City, arguing that its new "labor peace" rule was preempted under both federal labor law and the ADA. As to labor law, they argued that the rule was preempted because it disrupts the uniform and exclusive federal scheme of labor-management relations as described by this Court in *Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976), and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). As to the ADA, Petitioners argued that the labor peace rule is preempted because it affects the "prices" and "services" of airlines at LAX by increasing the labor costs of airline service providers and hampering their efficiency.

The City filed a motion to dismiss, which notably did not argue that the market participant exception should apply. Instead, the City accepted the premise that the labor peace rule is a "regulation," but argued that it should survive federal preemption under the reasoning of *Machinists* and *Garmon* and the text of the ADA's preemption clause.

2. The district court granted the City's motion to dismiss. Like the City itself, the district court did not rely on the market participant exception. The closest it came was to mention in passing that the labor peace rule was designed "to protect [the City's] proprietary interest in ensuring that labor disputes do not interfere with the efficient, revenue-generating operations of LAX." Pet. App.

65a. But it did not hold that the rule was exempt from federal preemption on that ground.

Instead, the court concluded that the labor peace rule is not preempted because it "does not frustrate the purpose of the NLRA or the RLA," Pet. App. 66a, and its "effect" on airline "prices, routes, or services" is too "indirect" to be preempted under the ADA. Pet. App. 73a. The court also held in the alternative that Petitioners lacked prudential "standing" to raise their ADA argument, because the airlines are not directly subject to the labor peace rule, and the airline service providers do not fall within the "zone of interests" protected by the ADA. Pet. App. 67a–68a.

3. On appeal, the Ninth Circuit held that Petitioners have "standing to pursue all of [their] claims." Pet. App. 4a. On the merits, the City argued for the first time on appeal that the labor peace rule should be exempt from federal preemption under the market participant exception. A divided panel of the Ninth Circuit agreed and affirmed on this alternative ground without reaching any of the other merits arguments.

a. The majority began by correctly explaining that federal preemption typically applies only to state and local "regulation." Pet. App. 8a. Accordingly, when a state or local government "acts as a 'market participant,' not as a regulator," courts must "presume that its actions are not subject to preemption." *Id.* But the majority then struggled to explain how "the City was acting as a market participant and not a regulator" when it imposed

the labor peace rule on private companies that operate at LAX. Pet. App. 8a–13a.

The majority acknowledged the argument that the City is not a true "market participant" because it "has not directly participated in the market [for airline services] and has instead dictated contract terms to others who do." Pet. App. 10a–11a. The majority rejected this argument, however, on the ground that the City has a "proprietary" interest in operating LAX airport, which is part of a global "market" for transportation services. *Id*. "If the City operates the airport poorly, fewer passengers will choose to fly into and out of LAX, fewer airlines will operate from LAX, and the City's business will suffer." Pet. App. 11a. For that reason, the majority concluded that the City is immune from federal preemption whenever it imposes labor rules on companies operating at LAX in order to protect its "commercial" interest in avoiding "service disruptions" at the airport. Pet. App. 11a–13a.

Because the majority held that the "labor peace" rule is exempt from federal preemption under the market participant exception, it did not address whether the rule would be preempted if that exception did not apply.[1]

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[1] The panel majority initially ordered a remand to determine whether the labor peace rule might be preempted due to "spillover effects" on operations beyond LAX. Pet. App. 22a. But after Petitioners filed a rehearing petition disclaiming any such argument, the majority amended its opinion to eliminate the remand order, rendering its judgment final. Pet. App. 2a, 22a.

b. In dissent, Judge Tallman pointed out that the majority's decision ignored the settled rule that the market participant exception applies only when a government entity has hired a company to provide goods or services in the marketplace. As he explained:

> At the risk of stating the obvious, the City here is not directly procuring goods and services to execute a discrete project, but rather providing ongoing licenses permitting a host of service providers handling baggage, assisting passengers, refueling aircraft, serving food and beverages, and otherwise keeping planes operating on schedule to do business at the airport.

Pet. App. 31a.

Because the City was not hiring the affected companies but instead imposing licensure rules on them to govern whether they could operate at a public airport, it was plainly acting as a regulator, not a market participant. That made this case "markedly different in kind" from cases where the government hires a company subject to commercial terms that are "specifically tailored to one particular job." *Id.* (citations omitted). Indeed, Judge Tallman noted that the "'manifest purpose and inevitable effect' of [the labor peace rule] appears to be aimed at altering the balance of power between service providers and organized labor." Pet. App. 36a.

Judge Tallman concluded by highlighting the danger posed by the majority's radical expansion of the market participant exception:

> If we are to give effect to Congress' intent to "avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies,'" we cannot allow the market participation exception to become too broad. It is not enough to simply accept state and local governments' assurances that they only seek to enforce labor policies as market participants, particularly when those policies would directly interfere with core rights protected by the NLRA[.]

Pet. App. 39a–40a (citation omitted).

REASONS FOR GRANTING THE WRIT

This Court should grant review of the decision below because it conflicts with decisions of this Court and other Circuits, and because it undermines federal preemption across a wide variety of areas. This Court has made clear that the market participant exception applies only when a local government is not exercising its regulatory authority, but is instead procuring goods and services in the marketplace just as any private actor could: If the government hires a company to complete a project, it can contract with the company to adhere to certain labor conditions or other terms. Because such terms are not "regulations," they are typically immune from federal preemption. As this Court and many circuits have recognized, however, the government

cannot claim "market participant" immunity when it imposes freestanding rules on companies that it has *not* hired to provide any good or service.

In the decision below, the Ninth Circuit distorted the market participant exception beyond all recognition. It held that, simply because the City purportedly has a "proprietary interest" in running LAX airport in a competitive manner, it enjoys complete immunity from federal preemption whenever it impose rules that are designed to avoid "service disruptions" at the airport. Pet. App. 2a, 10a, 13a. Thus, the court concluded that the City has a free hand to impose a labor peace rule on any company that operates at the airport—and the rule is entirely exempt from federal preemption—even though the City has never hired that company to provide any good or service.

The Ninth Circuit's radical expansion of the market participant exception not only conflicts with the precedent of this Court and other Circuits, but has sweeping implications for federal preemption in the airline industry and beyond. Under the court's reasoning, state and local governments can now effectively defy federal labor law and impose their own patchwork of laws regulating the labor relations of virtually any private company that does business at an airport, or anywhere else where the government can claim to be a "market participant" because it has a "proprietary" interest in avoiding "service disruptions." For example, the City could disregard the NLRA and the RLA and construct an entirely new set of bargaining rules that the airlines *themselves* must follow when

negotiating terms and conditions of employment at the airport. As long as these new rules were aimed at avoiding "service disruptions," the Ninth Circuit's rationale would treat them as fully exempt "market participant" activity. Moreover, because the Ninth Circuit expressly applied its "market participant" analysis to the ADA, the City could also adopt a series of new rules with a direct bearing on airline "prices, routes, and services," which would again be entirely exempt from federal preemption—a result squarely at odds with the ADA. Indeed, because the market participant exception applies equally to virtually all types of federal preemption, the Ninth Circuit's decision will inevitably expand well beyond the realm of labor and airline regulations.

This is not a new issue, either for the City or the Ninth Circuit. As Judge Tallman's dissent observed, this is not the first time that "Los Angeles has been in trouble . . . for flouting federal labor laws." Pet App. 26a. Indeed, this Court has twice before reversed Ninth Circuit decisions finding creative ways to insulate the City from federal preemption on facts strikingly similar to those here. *See American Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 650-51 (2013); *Golden State*, 475 U.S. at 615. Yet the City and the Ninth Circuit continue to ignore this Court's rulings in this area. Accordingly, this Court's review is urgently needed once again to enforce the authority of its precedents, to maintain uniformity among the Circuits, and to correct the Ninth

Circuit's unrelenting efforts to undermine basic principles of federal preemption.

I. THE NINTH CIRCUIT'S DECISION DEFIES THIS COURT'S PRECEDENTS

This Court's cases make clear that the market participant exception applies only when a government entity acts not as a regulator but as a commercial actor by "enter[ing] a contract" to acquire goods or services "just as a private party would." *American Trucking*, 569 U.S. at 649-50. "To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a [labor] agreement, a public entity *as purchaser* should be permitted to do the same." *Bldg. & Constr. Trades Council v. Associated Builders etc.*, 507 U.S. 218, 231 (1993) ("*Boston Harbor*") (emphasis in original). Thus, for example, the exception may apply if a city hires a construction company to complete a public project, or hires a taxi company to transport city employees. *See Boston Harbor*, 507 U.S. at 227. In such situations, the city may contract with the company to abide by certain labor practices or other commercial terms, and those terms are presumptively immune from federal preemption because they are not "regulations." *Id*.

At the same time, this Court has made clear that the market participant exception does not apply when a city imposes requirements on a private company from which it is not purchasing any good or service. The exception provides a shield against preemption only when the government "expend[s] . . . its own funds in entering into

[commercial] contracts." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 214-15 (1983). The critical inquiry is thus whether the city is truly using its commercial relationship with the company to negotiate the terms of service that the company will provide *for the city*; or whether the city is regulating the company by imposing rules that it must follow when providing services *for others*. As this Court has stated, whether "employees of contractors and subcontractors on public work projects [a]re or [a]re not, in some sense, *working for the city* [is] crucial to [the] analysis." *United Bldg. & Constr. Trades Council of Camden County & Vicinity v. City of Camden*, 465 U.S. 208, 219 (1984) (emphasis added).

Tellingly, this Court has never suggested that the market participant exception can apply outside of the narrow circumstance when a government entity contracts with a private company to provide some good or service. Instead, this Court has emphasized that even when a private company is hired to perform some job for the government, any labor condition must be "specifically tailored to [the] particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Boston Harbor*, 507 U.S. at 232. This requirement of narrow tailoring is essential to maintain "the distinction between government as regulator and government as proprietor." *Id.* at 227. It ensures that the government is truly using its commercial

market power to contract for terms, rather than using its regulatory power to impose rules.

Here, the Ninth Circuit's decision conflicts directly with this Court's controlling precedent. The Ninth Circuit held that the City qualifies for the market participant exception—and thus enjoys complete immunity from federal preemption when imposing certain labor rules on private companies at LAX—even though the City has never purchased any good or service from them.

The Ninth Circuit's decision conflicts most starkly with this Court's decision in *American Trucking*. There, the City of Los Angeles was the owner and operator of the Port of Los Angeles, and it imposed certain rules on trucking companies that transported cargo for terminal operators at the Port. The Ninth Circuit upheld the City's regulation under the market participant exception because the City "directly participates in the market as a manager of Port facilities," and it has a "business interest" in the trucking services to support the City's competitive position vis-à-vis other ports and to ensure cargo movement. *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 400-01 (9th Cir. 2011). Thus, even though the City did not purchase the trucking services, the Ninth Circuit held that there was no preemption because "such services are an integral part of Port business." *Id.* at 401. This is *precisely the same rationale* used by the Ninth Circuit majority here.

This Court reversed, holding that the City "exercised classic regulatory authority" by using its

sovereign power to impose rules directly on private companies that were providing services to other private companies at the port—not to the City itself. *American Trucking*, 569 U.S. at 650. Although the City attempted to portray itself as a commercial actor with a right to require "contracts" determining which companies could operate at the Port, this Court flatly rejected that argument. The "contracts" between the City and the trucking companies "d[id] not stand alone, as the result merely of the parties' voluntary commitments." *Id*. Rather, the City was regulating port operations and "wielding coercive power over private parties" by determining who was permitted to do business at the public port. *Id*. For that reason, the City fell on the wrong side of the "line between a government's exercise of regulatory authority and its own contract-based participation in a market." *Id*. at 649.

This case involves the same situation addressed in *American Trucking*, except here the setting is a public airport instead of a public sea port. The City is not purchasing services from the airlines or the companies that service them. Instead, the City is using licensure requirements to impose labor rules on private companies that do business among themselves at the airport. Accordingly, under the clear holding of *American Trucking*, the City is not acting as a "market participant" but as a regulator: It is setting rules to govern how companies are permitted to operate at a public airport, and such regulations cannot be immune from federal preemption regardless of

whether they are designed to avoid "service disruptions."

The Ninth Circuit's decision likewise conflicts with this Court's decision in *Golden State Transit*. In that case, the City of Los Angeles conditioned the renewal of a taxi company's operating franchise on its "reaching a labor agreement with" a union. 475 U.S. at 609-11, 619. After the Ninth Circuit upheld the City's action, this Court reversed. Although the City had a proprietary interest in operating its public streets and ensuring the efficient provision of public transportation, this did not suffice to shield the city from federal preemption. The City could "not ensure uninterrupted service to the public" by imposing labor conditions on "a privately owned local transit company." *Id*. at 617-18. Crucially, the City was not hiring the taxi company to provide any service, but was regulating how the company could operate in providing services to others on the City's public streets. *Id*. at 618.

In a subsequent decision, this Court emphasized that *Golden State* would have been a "very different case . . . . had the city of Los Angeles purchased taxi services from [the taxi company] in order to transport city employees," because then the City would have had a true commercial interest in setting labor terms to avoid "serious interruptions in the services the city had *purchased*." *Boston Harbor*, 507 U.S. at 227-28 (emphasis added). That precise distinction is what is at issue in the present case: The City has not hired any airline or other company to provide

services to the City itself at LAX, but is instead imposing rules on companies that provide services to each other at the airport. That is the antithesis of acting as a "market participant" under this Court's exception.

In the decision below, the panel majority stated that it "does [not] matter" that the City here is "not [ ] a party to the contracts" that are subject to the labor peace rule, because the same was supposedly true in *Boston Harbor*. Pet. App. 12a n.6. But that case was starkly different, because there the City of Boston had hired a private company to perform a project, on the condition that the company and its "subcontractors" adhere to certain labor terms. 507 U.S. at 222. Thus, while the City was technically not a *direct* party to the contract with the subcontractors, it was nonetheless using its commercial power to negotiate the contractual terms they would follow when providing a service to the City in a market transaction, which qualified the City for the market participant exception. In the present case, by contrast, the City of Los Angeles is not negotiating terms in the course of procuring any service from the airlines or the airline service providers, but is instead using its raw licensure power to *impose* labor rules on them.

In short, this Court's cases plainly hold that the market participant exception is strictly limited to situations where the government acts like a private party by procuring some good or service in a market transaction. That is directly contrary to the decision below, which vastly expands the exception to immunize local rules from preemption whenever

they are designed to serve the government's interest in avoiding "service disruptions," *regardless* of whether they are part of any market transaction.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FIVE OTHER CIRCUITS

The Ninth Circuit's radical expansion of the market participant exception brings it into conflict with several other circuits.

1. The most obvious conflict is with *Metro. Milwaukee Assn. of Commerce v. Milwaukee Cnty.*, 431 F.3d 277 (7th Cir. 2005) (Posner, J.), which held that federal labor law preempted a county ordinance that "require[d] firms . . . to negotiate 'labor peace agreements' with any union that wants to organize employees." *Id.* at 278. The Seventh Circuit specifically held that the market participant exception did not apply because the labor peace rule was not tailored to "any spending or procurement activity of the County." *Id.* at 279. The court explained that the market participant exception is limited to vindicating the principle that "[t]he state has the same interest as any other purchaser in *imposing conditions in contracts with its sellers* that will benefit the state *in its capacity as a buyer*." *Id.* at 278 (emphasis added).

Under the Seventh Circuit's rule, the decision below would have come out the other way because the City did not establish the labor peace rule at LAX "in its capacity as a buyer." *Id.* Indeed, the rule has no connection to the City's buying *anything* from the companies that are subject to the

rule, and thus it cannot be characterized as a mere commercial term in a market transaction. That explains why the rule is a "regulation" subject to federal preemption, as opposed to exempt "market participant" activity.

In the decision below, the panel majority attempted to distinguish *Metro Milwaukee* on the ground that the city ordinance there "imposed several additional conditions favorable to union organizing and did little to avoid service interruptions." Pet. App. 16a. But under the Seventh Circuit's rule (as under this Court's precedent), whether a rule is exempt from federal preemption under the market participant exception does not turn on whether it is "favorable to union organizing" or is aimed at preventing "service disruptions." Instead, it turns on whether the city is acting "in its capacity as a buyer," 431 F.3d at 278, rather than a regulator.

2. Like the Seventh Circuit, the Third Circuit has recognized that "[t]he market participant exception . . . is rooted in the principle that a government, just like any other party participating in an economic market, is free to engage in the efficient procurement and sale of goods and services." *Associated Builders & Contractors, Inc. v. Jersey City*, 836 F.3d 412, 417-18 (3d Cir. 2016). In that case, the city had a policy giving favorable treatment to private developers and contractors if they reached specified agreements with labor unions. The court rejected the city's claim that this policy should be shielded from federal preemption under the market participant exception. The city

was not a "market participant" because it did "not purchase or otherwise fund the services of [the] private developers or contractors . . . or the goods used in those projects." *Id*. at 419.

The same is true in the present case. The City does not "purchase or otherwise fund" the services provided by airline service providers at LAX. On the contrary, the City has imposed a licensing regime, and the service providers must pay a fee *to* the City to obtain and maintain the license required to do business at LAX. Pet. App. 126a–128a. The City thus is not acting as a market participant negotiating voluntary terms with the companies, but is instead acting as a regulator imposing a labor rule on them as a condition of their license to do business with other companies at the airport.

3. The Fifth Circuit also has recognized that the market participant exception was created to protect "state and local governments' *purchasing* efforts," because in "order to function, government entities must have some dealings with the market." *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 692 (5th Cir. 1999) (emphasis added). The Fifth Circuit has thus held that a city is a "market participant" when it "act[s] as a typical private party would" by hiring a towing company to provide service for the city itself. *Id*. at 693. But the court has simultaneously recognized that a city is *not* acting as a market participant when it imposes rules on towing companies that *other parties* have hired to perform services *for them*. *Stucky v. City of San Antonio*, 260 F.3d 424,

436 (5th Cir 2001), *abrogated on other grounds*, 536 U.S. 936 (2002). The court has also specifically recognized that the market participant exception does not apply to "licen[s]ing schemes." *Cardinal Towing*, 180 F.3d at 694 & n.2. That holding is squarely at odds with the Ninth Circuit's decision in the present case.

4. The Ninth Circuit's decision below also conflicts with the D.C. Circuit's decision in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), which involved an order purporting to guarantee a company's right to hire replacements for striking workers. The court found the order preempted by the NLRA, holding that the market participant exception is available only when the "government acts as a purchaser of goods and services." *Id.* at 1334. *See also Building and Construction Trades Department v. Allbaugh*, 295 F.3d 28, 34-35 (D.C. Cir. 2002). (framing the market participant test as whether the government is acting "just as a private contractor would act" by hiring a company to provide goods or services on voluntary commercial terms, or is instead using its regulatory power to impose terms "unrelated to the [private] employer's performance of contractual obligations" to the government). Here, the labor peace rule imposed by the City is unrelated to the airline service providers' performance of any contractual obligations to the City, and thus it does not fall within the D.C. Circuit's "market participant" test.

5. The Sixth Circuit, too, recognizes that the market participant exception is based on the state's

commercial prerogative to "decide that public money should not be used for [certain] projects," "[j]ust as a private purchaser can choose not to" spend its money in the same way. (*Mich. Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572, 579 (6th Cir. 2013).) Here, there is no "public money" being spent by the City on the service providers that are subject to the labor peace rule; their sole customers are the airlines, not the City.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Contrary to all of the cases discussed above, the Ninth Circuit held that the market participant exception gives the City a safe harbor to impose whatever labor rules it wants on companies that operate at LAX, even if it does not purchase any good or service from them, as long as the rules are designed to avoid "service disruptions." That sweeping logic badly distorts the scope of the market participant exception, and it has startling implications for federal preemption in the airline industry and beyond.

1. Properly understood, the market participant exception is a natural reflection of the principle that federal preemption applies only to state and local *regulation*, and thus does not interfere with the *commercial activities* of state and local governments. In the narrow circumstance when a local government is not exercising its power to regulate, but is instead engaged in a commercial transaction by procuring some good or service in the marketplace, the terms of the transaction are generally immune from federal preemption. Thus,

for example, if the City contracted with a company to repave the LAX runways, or to restripe the parking lots, or to provide any other service for the City, then the terms of that contract would be eligible for the market participant exception: The City could then require the service providers it hired to comply with all sorts of labor rules that would otherwise be preempted by federal labor law if they were imposed in the form of regulations.

In the present case, however, the City concededly does not purchase any good or service from any of the companies that are subject to the labor peace rule at LAX. It does not contract with them to provide anything to the City at all. Instead, it simply grants them *licenses* that allow them to do business at the airport, where they provide services to "airlines," Pet. App. 86a—which themselves do not provide any service to the City, but rather to private passengers.

Rather than apply the market participant exception as designed by this Court and applied by other Circuits, the majority of the panel below relied on a rationalization repeatedly rejected by this Court. Because, it said, the City was simply seeking to avoid "service disruptions" at its airport, it was a participant in the general market for air transportation, and that is enough for its labor peace rule to be immune from preemption.

The logic of that decision will dramatically undermine federal preemption across a wide range of areas. For starters, it will obliterate the preemptive force of federal labor law in any situation where a state or local government can

claim that it needs to impose labor rules on private companies to avoid "service disruptions" in some facility or enterprise that the government owns or operates. For example, for companies that operate at public train stations, local governments could impose a particular process for union recognition, mandate recognition of a union, or even require specific bargaining terms, all in the name of "labor harmony." Likewise, state and local governments could impose the same type of rules on private shipping and trucking companies that operate at public sea ports, effectively overturning *American Trucking*, 569 U.S. 641. And because local governments own and operate public streets, they could impose all manner of labor regulations on private bus and taxi companies that operate there, effectively overturning *Golden State*, 475 U.S. 608.

The Ninth Circuit's decision would also hobble the preemption clause of the Airline Deregulation Act (ADA), which is expressly designed to preempt state and local regulations that are "related to a price, route, or service" of an airline. 49 U.S.C. § 41713(b)(1). Under the Ninth Circuit's rule, local governments will have wide latitude to ignore the preemptive force of the ADA and impose all manner of rules *directly related* to the "prices, routes, and services" of airlines. As long as the rules further the airport's "proprietary interest" in avoiding service disruptions, the Ninth Circuit's decision would treat them as "market participant" activity that is immune from federal preemption no matter how much they might fly in the face of federal law.

Moreover, because the same market participant exception applies widely to a variety of different types of federal preemption, the Ninth Circuit's rationale will have an enormously broad reach even beyond the context of labor law and the ADA. *See, e.g., Allied Constr. Indus. v. City of Cincinnati*, 879 F.3d 215, 220 (6th Cir. 2018) (applying market participant exception to "ERISA preemption.").

2. Contrary to the Ninth Circuit's decision, the purpose of the "proprietary interest" test is to *limit* the scope of the market participant exception, not to expand it. Specifically, this Court has recognized that *even when* a state government is procuring goods or services, it *still* may fail to qualify as a market participant if it goes beyond its "proprietary" interests and instead leverages its spending power to serve its "regulatory" interests. Thus, in *Gould*, this Court held that the State of Wisconsin did not qualify for the market participant exception when it refused to enter contracts with companies that it deemed "repeat violators" of federal labor law. *Gould*, 475 U.S. at 283. Even though this was commercial conduct that "private purchasers" could theoretically engage in, this Court explained that States are "subject to special restraints," and thus the State's boycott policy was treated as a form of "regulation" subject to preemption. *Id.* at 290. To preserve "the distinction between government as regulator and government as proprietor," any labor conditions that the government imposes on companies it hires cannot be treated as exempt "market participant" activity unless the conditions are "specifically

tailored to [the] particular job," and aimed "to ensure an efficient project." *Boston Harbor*, 507 U.S. at 227, 232.

The Ninth Circuit ignored this crucial context and held that the market participant exception applies even when the government is *not* procuring any goods or services, as long as it is imposing rules on companies to serve its own "proprietary" interests. The court thus ignored the fact that the "proprietary interest" doctrine is a means of *cabining* the procurement power, by ensuring that state and local governments are truly serving their proprietary interests when they are engaged in commercial transactions. It prevents them from leveraging their procurement power to serve their broader regulatory interests. It does not authorize them to impose freestanding rules on companies in order to serve their proprietary interests *wholly outside* of the procurement context.

3. In sum, the decision below is yet another example of the Ninth Circuit defying this Court's precedent to allow the City of Los Angeles to evade federal preemption, just as it did in *Golden State* and *American Trucking*. The decision presents an exceptionally important issue because its rationale will have far-reaching implications for federal preemption across a wide range of areas. Certiorari is thus warranted to avoid these sweeping consequences and to counter the Ninth Circuit's repeated attempts to undermine this Court's preemption doctrine.

CONCLUSION

For these reasons, this Court should grant the petition for certiorari.

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