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, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES (continued)

INTEREST OF THE *AMICUS CURIAE*[1]

The International Air Transport Association (IATA) is an international trade association founded in 1945 by air carriers engaged in international air services. Today, IATA consists of 279 member airlines from 120 countries representing roughly 84 percent of the world's total traffic. As part of its core mission to advance the best interests of air transportation users, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain a uniform legal and regulatory framework governing international air services.

The decision below threatens to disrupt and compromise that mission by undermining the primacy of uniform federal regulation of labor-management relations in general and airline services in particular, directly contrary to Congress's chosen approach. IATA's members, many of whom operate at Los Angeles International Airport (LAX) and the many other airports throughout the Ninth Circuit, thus have a keen interest in ensuring that Congress's preference for a uniform, national labor policy at this Nation's airports is upheld. For the reasons explained below, ensuring the proper scope of the market participant exception to federal preemption—which immunizes state and local labor

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for both parties received timely notice of the intent to file this brief. All parties have granted consent to the filing of this brief.

regulation from federal challenge—is critically important to *amicus*'s members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

State and local governments have virtually no role to play in regulating labor relations, much less in regulating labor relations at U.S. airports. Congress has made that judgment explicit in multiple statutes, including the National Labor Relations Act (NLRA), the Railway Labor Act (the RLA also governs airlines), and the Airline Deregulation Act (ADA). Labor-management negotiations, Congress determined, should be guided by national regulatory policy, or, in many cases, by the "free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976) (quotations omitted).

Respondents have attempted to displace that congressional judgment with their own, enacting a "labor peace" rule that dramatically alters labor-management relations at LAX, the second busiest passenger airport in the U.S. and fourth busiest in the world. The rule requires, on pain of expulsion from LAX, that service providers enter into so-called "labor peace" agreements (LPAs), on any topic, at labor's request, even if the requesting labor organization has not been certified under federal law to engage in collective bargaining. Moreover, the rule denies both labor and management "the free use of economic weapons during the course of negotiations," *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 617 (1986), by providing only 60 days to allow

management to negotiate regarding the topics requested by the labor organization before subjecting management to arbitration. This scheme is a blatant effort to transform labor relations at LAX, to force unwanted labor negotiations not required by federal law and, ultimately, to influence the outcome of negotiations—precisely what Congress has precluded states and municipalities from doing.

The court below concluded, however, that respondents' "labor peace" rule was consistent with federal law because respondents were "market participants" and thus were beyond the reach of federal preemption. That decision is not only incorrect but warrants this Court's immediate review.

The "market participant" exception to federal preemption is necessarily narrow: it allows state and local governments to influence labor relations only when they directly participate in the market by purchasing or selling goods or services, just like a private party would. But when the state acts in a way that a private party would not, or where it uses its participation in one market to regulate private conduct in another, the market participant exception cannot apply. In those circumstances, the state is not acting like a private party but is instead *regulating*, contrary to express federal policy.

The Ninth Circuit ignored these basic rules. Indeed, it ignored the most basic rule of all: that the government must actually participate in the market before it can be deemed a market participant. Respondents do not participate in the market for goods and services sold at LAX and thus could not have acted like market participants in regulating that

market with their "labor peace" rule. The Ninth Circuit's contrary conclusion departed from multiple of this Court's precedents and created a split with five courts of appeals. That decisional conflict itself warrants this Court's review.

But review is also warranted because the Ninth Circuit's decision exacerbates a related, already-existing conflict on which this Court has perviously granted certiorari, but has not resolved—*viz.*, whether a state or municipality must participate in the market on which the relevant restriction is imposed to qualify under the market participation exception. The Ninth Circuit tried to justify its novel rule by pointing to respondents' participation in the nebulous "air transportation market"—not the market for services on which it sought to impose its "labor peace" restriction. Yet this Court has concluded the opposite, limiting the market participant exception to circumstances in which the state's restriction is on the same market in which it participates. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984) (plurality opinion).

Because *Wunnicke* was a four-Justice plurality opinion for an eight-Member Court, the courts of appeals have split as to the vitality of the *Wunnicke* rule, with the Fifth and Eleventh Circuits following the *Wunnicke* plurality and the Eight Circuit rejecting it. The Ninth Circuit joined the Eighth in the decision below. This Court has already granted certiorari to resolve this conflict, *see* Pet for Cert. i, *Am. Trucking Associations, Inc. v. Los Angeles*, 568 U.S. 1119 (2013), but the Court's decision left the question unresolved. This critical and recurring question is presented yet again here.

This decisional conflict would be reason enough for this Court to grant review, but it is not the only reason. The decision below threatens to open the floodgates to local regulation of labor relations. In the Ninth Circuit alone, there are 756 significant publicly-owned airports, and each may now be subject to labor rules like respondents'—precisely the patchwork of labor regulation that Congress sought to avoid in enacting the NLRA, RLA, and ADA. The decision below necessarily applies also to the myriad sea ports, train stations, bus depots, public schools, public parks, and public stadia in the Ninth Circuit—indeed, to any public venue in which state or local government can claim a "proprietary interest" in the efficient provision of services. Pet. App. 11a. And it threatens to distort Dormant Commerce Clause and federal antitrust jurisprudence, where market participation is also a threshold issue in cases challenging state action. The question presented, in short, is very frequently recurring and exceptionally important.

The petition should be granted.

ARGUMENT

I. The Decision Below Impermissibly Shields State And Local Labor Regulation From Federal Scrutiny

Respondents' "labor peace" rule contravenes Congress's determination that labor policy affecting the Nation's airports should be uniform and federal, and not subject to the vicissitudes of local politics. The Ninth Circuit's contrary decision rests on a patently erroneous construction of the market participant exception to federal preemption. Not only is

the decision below wrong, but it directly conflicts with cases from this Court and other courts of appeals. This Court's immediate review is warranted.

A. Respondents' "Labor Peace" Rule Undermines Federal Labor And Aviation Policy

1. In enacting the NLRA, "Congress 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). "The purpose of the Act," this Court has explained, "was to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (quotations omitted). Congress thus replaced state and local labor regulation with a "complex and interrelated federal scheme of law, remedy, and administration," and "entrusted administration of the labor policy for the Nation to a centralized administrative agency." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959).

"[C]oncerned with conflict in its broadest sense," this Court has broadly construed the NLRA's preemptive scope, *id.* at 243, concluding that the Act preempts not only state and local regulation of "activity that the NLRA protects, prohibits, or arguably protects or prohibits," *Gould*, 475 U.S. at 286, but also regulation of conduct that Congress left to "the free play of economic forces," *Machinists*, 427 U.S. at 140 (quotations omitted). Together, these two preemption principles—*Garmon* and *Machinists*

preemption, respectively—ensure that state and local policies do not disrupt the careful balances struck by Congress between labor and management, and between regulation and market freedom.

2. Congress has spoken even more clearly on the importance of uniform, national labor policy favoring the free market in the airline industry.

a. Airline "labor disputes typically present problems of national magnitude," and thus Congress in the RLA ensured that airline industry participants would not be "subjected to various and divergent state laws." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969). Both *Garmon* and *Machinists* preemption apply under the RLA. *Id.*

b. Congress has also specifically found that "maximum reliance on competitive market forces" best furthers "efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. Trans. World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quotations and alterations omitted). Congress thus deregulated the airline industry, but it also recognized that state and local governments, if left to their own devices, could "undo federal deregulation with regulation of their own," *id.*, and so included in the ADA an express preemption provision prohibiting state and local rules that "relate[] to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1). This Court has emphasized that the "expansive sweep" of ADA preemption, *Morales*, 504 U.S. at 383-84 (quotations omitted), reaches even state and local regulations whose effect

on prices, routes, or services are "only indirect," *id.* at 386 (quotations omitted).

3. There is no meaningful dispute that respondents' "labor peace" rule "directly contravenes [this] federal law." Pet. App. 27a (Tallman, J., dissenting).

The rule requires private companies providing services at LAX to enter into LPAs with any labor organization (union or not) that requests one. Pet. App. 126a-27a. LPAs must encompass any topic requested by the labor organization and also include a no-strike provision (i.e., a prohibition on engaging in "picketing, work stoppages, boycotts, or any other economic interference" at LAX). Pet. App. 127a. If a service provider and labor organization cannot reach an agreement on the requested topics within 60 days, the "labor peace" rule subjects the parties to binding arbitration on any "dispute" regarding those topics, where an arbitrator will determine its view of a fair bargain, "binding" on management if it wishes to continue operating at LAX. *Id.*

As Judge Tallman correctly explained, "[b]y forcing unwilling service providers to negotiate and accept LPAs, [the 'labor peace' rule] compels a result Congress deliberately left to the free play of economic forces." Pet. App. 27a. Congress designed the NLRA to "facilitate bargaining between the parties" by "[p]rotecting the free use of economic weapons during the course of negotiations." *Golden State*, 475 U.S. at 616-17. The NLRA thus "requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616. State and local governments cannot supple-

ment that duty either by prescribing the results of negotiations or by "impos[ing] a positive durational limit on the exercise of economic self-help." *Id*. at 615.

Respondents' "labor peace" rule does both. By requiring service providers to agree to LPAs on pain of expulsion from LAX, respondents have predetermined the outcome of negotiations, directly contrary to the NLRA. *See* 29 U.S.C. § 158(d). And by requiring the parties, if they cannot reach an agreement, to submit to binding arbitration within 60 days, respondents clearly have set a "positive durational limit on the exercise of economic self-help." *Golden State*, 475 U.S. at 615.

Respondents' "labor peace" rule is also preempted by the ADA. Most obviously, the rule directly targets companies providing core services to the airlines operating at LAX, including (for example) ticket counter and gate functions, aircraft fueling, and baggage sorting. Those are clearly "services" under the ADA, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc), and respondents' "labor peace" rule relates directly to them. 49 U.S.C. § 41713(a)(4)(A).

In enacting the NLRA, RLA, and ADA, Congress plainly intended foreclose this result.

B. The Market Participant Exception Applies Only When Government Participates Directly In The Market Affected By The Challenged Conduct

The court below never addressed the conflict between respondents' rule and federal law, however, because it concluded that respondents' conduct was

immune from challenge at the threshold under the market participant exception. That exception allows state and local governments to contract for goods or services just like a private entity, even if their conduct otherwise conflicts with federal law. But the doctrine offers state actors no quarter when they act instead like market regulators, setting the terms of competition rather than competing themselves.

Although it is undisputed that the market participant exception applies under the NLRA, RLA, and ADA, the contours of the exception remain undefined. *See Associated Builders & Contractors, Inc. N.J. Chapter v. Jersey City*, 836 F.3d 412, 418 n.8 (3d Cir. 2016) (outlining three divergent tests employed by the courts of appeals); Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, And The Market Participant Exception*, 78 U. Cin. L. Rev. 835, 847 (2010) ("despite more than thirty years of judicial tinkering, what it means to be a 'market participant' remains an open question"); *see also Am. Trucking Ass'ns, Inc. v. Los Angeles*, 569 U.S. 641, 651 (2013) (noting the "uncertain boundaries" between regulatory and proprietary conduct). Respondents' "labor peace" rule, however, is impermissible labor regulation under any plausible test for market participation. For the reasons that follow, the petition should be granted, and this Court should reject the Ninth Circuit's attempt (yet again) to shield state and local regulation from the preemptive force of federal law.

1. Borrowed from Dormant Commerce Clause jurisprudence, *see Gould*, 475 U.S. at 289, the market participant exception draws a crucial "distinction between government as regulator and government

as proprietor." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.* (*Boston Harbor*), 507 U.S. 218, 227 (1993). "When the State acts solely as a market participant," it does not regulate, so "no conflict between state *regulation* and federal regulatory authority can arise." *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of the City of Camden*, 465 U.S. 208, 220 (1984). The doctrine thus recognizes that state and local government, "just like any other party in an economic market, is free to engage in the efficient procurement and sale of goods and services." *Associated Builders*, 836 F.3d at 418; *see also Boston Harbor*, 507 U.S. at 231.

The exception does not apply, however, where the government entity "has not acted as a private party, contracting in a way that the ordinary commercial enterprise could mimic," *Am. Trucking*, 569 U.S. at 651, but instead has acted like a regulator, "setting policy" for the affected market, *Boston Harbor*, 507 U.S. at 229.

This Court has repeatedly emphasized that the market participant exception is necessarily "narrow," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589 (1997), given its capacity to shield government conduct from review. In *Boston Harbor*, for instance, the Court "stressed that the challenged action"—subcontracting for a court-ordered harbor remediation project—only fell within the market participant exception because it "'was specifically tailored to one particular job,' and aimed 'to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest

cost.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008) (quoting *Boston Harbor*, 507 U.S. at 232). The Court has also applied the doctrine when state or local government provides funding for public projects "or when it purchases or sells goods or services," *Associated Builders*, 836 F.3d at 418 (collecting cases)—but in all cases only when "the challenged program constituted *direct state participation in the market*." *Camps Newfound*, 520 U.S. at 593 (quotations omitted; emphasis added).[2]

Where there is no state or local participation in the market, by contrast, the market participant exception is self-evidently inapplicable. As petitioners demonstrate (Pet. 14-20), this Court has consistently recognized that principle in preemption cases, rejecting attempts at regulation disguised as market participation. *See, e.g.*, *Am. Trucking*, 569 U.S. at 650-51; *Brown*, 554 U.S. at 70-71; *Golden State*, 475 U.S. at 618; *Gould*, 475 U.S. at 289. The courts of appeals—save the court below—have likewise recognized that the market participant exception cannot apply where the government entity "does not purchase or otherwise fund the services of private" parties who effectively work for the government or "sell those services or goods or invest, own, or finance the projects." *Associated Builders*, 836 F.3d at 419; *see* Pet. 20-24.

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[2] As petitioners explain (Pet. 19), the government agency in *Boston Harbor* was effectively a direct participant in the labor market because it was funding a public project and the affected contracts were between its contractor and subcontractors, all of whom acted on the agency's behalf.

2. The decision below directly conflicts with this precedent. The Ninth Circuit held that respondents' "labor peace" rule constituted market participation, not regulation, even though respondents do not directly participate in the market for goods and services at LAX. The decision rests on two crucial legal errors, both of which implicate circuit conflicts and merit this Court's immediate review.

a. The court's principal justification for applying the market participant exception was that the "labor peace" rule furthered respondents' "proprietary interest in avoiding labor disruptions of airport services." Pet. App. 15a. But a proprietary interest in the functioning of a market is not the same as *participation in that market*, which is what matters under the market participant exception. Indeed, a government interest in the functioning of a market in which it does not participate is on its face regulatory in nature. And as Judge Tallman's dissent explained, this Court's cases have "made clear that not every government action escapes preemption simply because it touches a proprietary interest." Pet. App. 28a (Tallman, J., dissenting).

The Ninth Circuit's contrary rule is squarely foreclosed by this Court's precedents. The market participant exception obviously requires market participation, and a government entity participates in the market only when it contracts or subcontracts for goods or services. *See supra* at 12. Thus, the Court has emphasized on numerous occasions that the market participant exception calls for "a single inquiry: whether the challenged program constituted direct state participation in the market." *Reeves,*

Inc. v. Stake, 447 U.S. 429, 435 n.7 (1980) (quotation omitted); *see Camps Newfound*, 520 U.S. at 593; *White v. Mass. Council of Constr. Emp'rs., Inc.*, 460 U.S. 204, 208 (1983).

That is the import of this Court's decision in *Golden State*, which rejected a similar effort by the City of Los Angeles to impose its views on labor relations on the local transportation industry. The issue in that case was the City's conditioning renewal of a taxi company's franchise agreement on it "reaching a labor agreement with" a striking union. 475 U.S. at 619. The market participant exception was unavailable, the Court held, because the City was not a market participant: The City did not purchase taxi services, and local governments may not dictate labor conditions on "privately owned local transit compan[ies]" merely because they have an interest in "uninterrupted service to the public." *Id.* at 618. "[A] very different case would have been presented," the Court later explained, "had the City of Los Angeles purchased taxi services from Golden State in order to transport city employees." *Boston Harbor*, 507 U.S. at 227. But the fact that the City did not purchase or sell goods or services in the relevant market meant that the City was regulating that market, which is precisely what federal law forbids.

The "labor peace" rule fails for the same reason: respondents do not participate in the market affected by that rule. "At the risk of stating the obvious," Judge Tallman observed in dissent, "the City here is not directly procuring goods and services"; it is instead "permitting a host of service providers handling baggage, assisting passengers, refueling aircraft, service food and beverages, and otherwise

keeping planes operating on schedule to do business at the airport." Pet. App. 31a. Those service providers, along with the airlines, are the participants in the market affected by the "labor peace" rule, not respondents. That is enough under this Court's cases to reject the Ninth Circuit's rule.

Indeed, this Court has already rejected the exact reasoning adopted below in invalidating yet another impermissible attempt by the City to regulate labor relations. In *American Trucking*, the Ninth Circuit held that various rules imposed by the City of Los Angeles on private trucking companies operating at the Port of Los Angeles were immune from challenge because they furthered the City's "business interest" as the Port's "property manager." *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 660 F.3d 384, 400-01 (9th Cir. 2011). As petitioners note, that is "*precisely the same rationale*" employed by the panel below, Pet. 16, and that this Court unanimously rejected. This Court held the City's proprietary interest in "enhance[ing] goodwill and improv[ing] the odds of achieving its business plan" were not enough to qualify it for the market participant exception, because the City had not acted like a private market participant would. 569 U.S. at 651-52. In other words, under *American Trucking*, a state actor's proprietary interest in ensuring efficient provision of services does not give it free reign to regulate labor conditions affecting those services. A state actor must act like a market participant would, including actually participating in the affected market.

None of this diminishes state and local government's legitimate "interest in avoiding strikes, picket lines, boycotts, and work stoppages" at the public

venues they operate. Pet. App. 10a. And no 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. *Id.*[3] But this Court long ago recognized that "government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." *Gould*, 475 U.S. at 290. Those special restraints include the preemptive force of federal labor law. *Id.*; *see also Boston Harbor*, 507 U.S. at 229 (market conduct undertaken by private parties may still be regulatory in nature and thus proscribed when undertaken by state or local government). And although federal preemption is itself subject to a narrow market participant exception, that exception only applies to a "public entity *as purchaser*." *Boston Harbor*, 507 U.S. at 231.

The Ninth Circuit's rule, in short, squarely conflicts with cases from this Court and five courts of appeals, *see* Pet. 20-24, and would allow state and local governments to invoke the exception as "a pretext to regulate the labor relations of companies that happen, perhaps quite incidentally, to do some [public] work." *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 431 F.3d 277, 282 (7th Cir. 2005). The Court should grant certiorari to resolve the deci-

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[3] There is good reason to believe that a private entity with no interest in covertly regulating labor relations would not use "labor peace" provisions to accomplish those aims. That rule "is both too narrow and too broad as a means of achieving its purported objective," thus raising the specter that the rule is merely pretext for regulating labor relations. Pet. App. 32a (Tallman, J., dissenting).

sional conflict and restore the market participant exception to its proper, limited place.

b. Presumably recognizing that it makes no sense to apply the market participant exception where the state actor is not a market participant, the Ninth Circuit concluded that respondents' "labor peace" rule fell beyond the preemptive reach of federal law because respondents do, in fact, "participate directly in *a* market." Pet. App. 11a (emphasis added). That market, however, is *not* the market in which respondents' "labor peace" rule operates. The court below instead upheld the rule on the ground that respondents were "participating in the air transportation market" writ large. *Id.* at 12a. According to the court, because respondents participate in the global market for air transportation, and because the market for goods and services at LAX affects respondents standing in that broad market, respondents have unfettered discretion to regulate labor relations so long as those regulations further respondents' "interest in running the airport smoothly." *Id.* at 11a.

The Ninth Circuit's reasoning is flatly inconsistent with this Court's precedents, and adds to an existing circuit conflict about whether the government must participate in the market on which the relevant restriction is imposed to qualify under the market participation exception. Indeed, this Court already granted certiorari to consider that question in *American Trucking*, *see supra* at 4, but did not resolve it there. The issue is necessarily presented in the petition, because if the market is limited to goods and services at LAX, then respondents cannot be considered market participants. *See* Pet. i. This

case affords this Court another opportunity to answer this important question.

This Court concluded in *Wunnicke* that a government entity can invoke the market participation exception only when it participates in *the particular market* affected by the challenged conduct. *Wunnicke* involved an Alaska rule prohibiting the export of unprocessed timber from state-owned lands, thus effectively requiring companies either to forgo purchasing unprocessed Alaskan timber or process it in state. 467 U.S. at 95. This Court rejected Alaska's attempt to evade scrutiny under the Dormant Commerce Clause merely because the State participated in the "timber market," broadly construed. *Id.* at 95, 98. The relevant market, the Court explained, was not the timber market, but the market for processed timber, i.e., the market actually affected by State regulation. *Id.* at 98. And although the State participated in the adjoining *un*processed timber market (it sold the unprocessed timber), that did not give it license to regulate the "timber market" writ large or to "govern the private, separate economic relationships of its trading partners" who operated in the processed timber market. *Id.* at 98-99. "The State," in other words, "may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market" in which it contracts for goods or services—that is "[t]he limit of the market-participant doctrine" beyond which a state can "go no further." *Id.* at 97; *see also id.* at 98 (emphasizing that the market must be "narrowly defined").

Wunnicke resolves this case. But because the decision was for a four-Justice plurality of an eight-

Member Court, the Ninth Circuit has rejected it as "not controlling," and characterized the decision as "a perfect example of the Supreme Court's fractured views on the market participant doctrine." *Am. Trucking*, 660 F.3d at 401 n.12.

The binding force of *Wunnicke* has thus divided the circuits. In *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), for example, the Eleventh Circuit held that the market participant exception did not shield from challenge a county ordinance for permitting stevedores at the Port of Miami—notwithstanding that the county participated in the sea transportation market more generally. The court held that the county's interest in "safe and efficient port operations" was insufficient because "neither the County nor the port itself provide[d] or purchase[d] stevedore services." *Id.* at 1262. "A state or local government may take advantage of the market-participant exception," the Eleventh Circuit explained, "only if the government is a proprietor of goods or services in the relevant market," and the county—like respondents here—was not. *Id.*

The Fifth Circuit adopted the same rule in *Smith v. Department of Agriculture of the State of Georgia*, 630 F.2d 1081 (5th Cir. 1980), which concerned a Georgia rule assigning non-residents inferior sales locations at a State-run farmers market. The court rejected the State's market participant defense, finding it "significant that [the State] neither produce[d] the goods to be sold at the market, nor engage[d] in the actual buying or selling of those goods." *Id.* at 1083. To be sure, the State participated in the broader market for farmers markets (or

other similar markets), and the State's standing in that market could have been affected by the configuration of sales locations at the farmers market at issue. *Id.* at 1088 (Randall, J., dissenting). But with respect to the particular farmers market at issue, the State "simply provided a suitable marketplace for the buying and selling of privately owned goods" and thus was acting in "its essential role" as a "market regulator" in deciding sales locations. *Id.* at 1083.

The Eighth Circuit, by contrast, has expressly rejected *Smith*'s reasoning, *see Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997), upholding a concession fee charged by the Little Rock Municipal Airport Commission to rental car companies at the airport based on the Commission's participation in the "rental car market." *Id.* at 912-13. There is thus now a 2-2 decisional conflict on the market definition question answered by the plurality in *Wunnicke* and that is dispositive of this case.

This case gives this Court the opportunity to resolve that conflict, and to answer the question left open in *American Trucking*.

Certiorari should be granted, and the Court should affirm *Wunnicke*'s principle that state or local governments can invoke the market participant exception to preemption only if they participate in the market in which the relevant restriction applies, rather than some other related but distinct market.

The petition should be granted.

II. THE PETITION PRESENTS A RECURRING QUESTION OF NATIONAL IMPORTANCE

Certiorari should also be granted because the question presented is both exceptionally important and frequently recurring.

A. Although this Court has always insisted that market participation represents a "narrow" exception to the controlling force of federal law, *Camps Newfound*, 520 U.S. at 589; *see also Wunnicke*, 467 U.S. at 98, the decision below gives the exception essentially unlimited reach. After all, state and local governments can always argue they have a proprietary interest in ensuring cheap and efficient services at a property they own. A city that operates a local sports stadium, for instance, could justify imposing labor harmony rules on its private vendors on the ground that it competes in the market for sports entertainment. The same is true of a county that operates a bus depot, because it competes in a market for ground transportation. And a state could make precisely the same argument for regulating the labor relations of the private companies providing services at all of its public universities, because states compete with each other and with private universities in the market for secondary education. In the Ninth Circuit, all of this conduct is now immune from challenge.

Nowhere will the effect of this doctrinal expansion be more pronounced than in the Ninth Circuit itself, and on IATA's members in particular. The Ninth Circuit is home to eight of the Country's 30 Large Hub airports, and eight of its 31 Medium Hub

airports, which, under the Ninth Circuit's rule, are now subject to labor regulation by the various state and local entities that run them.[4] It is also home to 740 publicly-owned smaller yet significant airports, all of which will also now be subject to a patchwork of local labor regulation.[5] The Ninth Circuit's rule thus threatens to subject every service provider operating at those airports to the political whims of their local proprietors.

That is precisely the situation Congress sought to avoid when it enacted the NLRA, RLA, and ADA—all of which reflect Congress's judgment that labor relations in general, and the airline industry in particular, should be subject to uniform federal rules, not a crazy quilt of local regulation. The NLRA, for instance, embodies Congress's preference for a uniform, national labor policy that leaves room for "the free use of economic weapons during the course of [labor] negotiations." *Id.* Likewise in enacting the RLA, Congress recognized that airline labor disputes "present problems of national magni-

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[4] Large Hubs receive 1% or more of annual commercial enplanements. The international airports in Phoenix, Los Angeles, San Diego, San Francisco, Honolulu, Las Vegas, Portland, and Seattle are all Large Hubs. Medium Hubs receive more than .25% of annual enplanements and include the international airports in Anchorage, Oakland, Ontario, Sacramento, San Jose, Santa Ana, and Kahului. *See* FAA Report to Congress, National Plan of Integrated Airport Systems (NPIAS) 2017-2021 (Sept. 30, 2016), Appendix A, available at https://www.faa.gov/airports/planning_capacity/npias/reports/.

[5] Indeed, nearly 98% of airports identified in the FAA's most recent NPAIS report—which tracks airports that are "important to national air transportation"—are owned by public entities. *See* NPIAS Report, *supra* at v, 3.

tude" and thus that airline industry participants must be subject to a coherent national regulatory scheme, not "various and divergent state laws." *Jacksonville Terminal Co.*, 394 U.S. at 381. Yet a patchwork of state and local laws is exactly what the Ninth Circuit's rule allows.

These adverse consequences are not limited to the Ninth Circuit's airports, either. As discussed, precisely the same reasoning could justify local labor regulation at the Ninth Circuit's sea ports (including the Ports of Los Angeles, Long Beach, Valdez, Richmond, Portland, Tacoma, Seattle, and Honolulu, to name a few), train stations, and bus depots—indeed, at any public venue in which state or local government can claim a proprietary interest in the efficient provision of services.

B. On its own, this subversion of federal labor and aviation law is exceptionally important. But the question presented is even more important because the market participant exception is a threshold issue in a wide array of cases reaching far beyond just labor or airline preemption, as the cases cited above and in the petition attest.

The market participant exception may be a threshold issue in any federal preemption case involving state action. That is true where federal preemption is implied, as is the case under the NLRA, RLA, and myriad other federal regulatory schemes, and where Congress has expressly preempted state rules having "the force and effect of law," *see Am. Trucking*, 569 U.S. at 650; *see also, e.g.*, 49 U.S.C. §§ 508(c), 13902(b)(4), 44703(j)(2); 12 C.F.R. § 1024.5. Likely because of the ramifications

for preemption jurisprudence, this Court has granted certiorari to consider the market participant exception even in the absence of circuit conflict like that presented here. *See Boston Harbor*, 507 U.S. at 224.

And the Ninth Circuit's rule reaches further still. It invariably will have spillover effects in Dormant Commerce Clause jurisprudence, where the market participant exception originated. And it may have collateral consequences for federal antitrust law, where this Court has suggested that states are not immune from antitrust scrutiny when they act as market participants. *See FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 228 n.4 (2013); *City of Columbia v. Omni Outdoor Advers., Inc.*, 499 U.S. 365, 374-75 (1991).

The question presented in the petition is important, recurring, and implicates at least two related circuit conflicts. And if allowed to stand, it will open the floodgates in some of the Nation's largest and most important international airports to precisely the sort of local labor-market regulation that Congress sought to avoid. The petition should be granted, and the decision below reversed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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