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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Los Angeles World Airports ("LAWA") is a proprietary department of the City of Los Angeles. LAWA owns and manages Los Angeles International Airport ("LAX"), the nation's second-busiest commercial airport and one of the busiest airports in the world. To protect its interests as the proprietor of this important revenue-generating enterprise, LAWA requires companies that provide commercial ground services on its property – "airline service providers" or "ASPs" – to enter into contracts obligating them to pay LAWA a fee for the privilege of operating at LAX and to adhere to a range of required business practices, including terms protecting LAX's operations from the adverse effects of strikes, picketing and similar labor activities. In rejecting Petitioners' claim that this requirement is preempted by the National Labor Relations Act ("NLRA") and Railway Labor Act, the Ninth Circuit followed this Court's long-standing rule that "[w]hen a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to State *regulation*." *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 227 (1993); Pet. App. 8a-10a. The same reasoning applied to Petitioners' Airline Deregulation Act preemption claim. Pet. App. 21a. The questions presented are:

1. May LAWA protect its proprietary interests in the efficient operation of its

QUESTIONS PRESENTED – Continued

revenue-generating airport by conditioning commercial access to airport property on agreements designed to avoid disruptive labor disputes?

2. Do Petitioners have standing when they have failed to allege any actual, concrete harm resulting from the labor-peace requirement they challenge?

RULE 29.6 STATEMENT

Neither Respondent is a nongovernmental corporation.

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STATEMENT

1. In recognizing the market-participant doctrine as an exception to NLRA preemption, this Court has held that "[w]hen a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to State *regulation*." *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 227 (1993) ("*Boston Harbor*").

2. The market-participant doctrine has never been artificially limited to situations in which government is directly "purchasing goods and services in the marketplace" – the premise on which Petitioners base their petition. Pet. at i, 2. Rather, state and local units of government participate in the market when they own and manage revenue-generating property such as commercial airports, *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992); when they provide incentives for the market behavior of licensed market participants, *Hughes v. Alexandria Scrap Metal*, 426 U.S. 794, 797-98, 808-09 (1976); when they sell products on the market, *Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980); when they "enter the market for debt securities" as a bond issuer, *Department of Revenue v. Davis*, 553 U.S. 328, 344 (2008) (plurality op.); when they provide funding for a project, *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214-15 (1983); and in other contexts in which a government "entity, like a private person, may

buy and sell or own and manage property in the marketplace." *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417 (2d Cir. 2002).

3. As a proprietary department of the City of Los Angeles ("City"), Los Angeles World Airports ("LAWA") has broad powers to manage Los Angeles International Airport ("LAX") and is obligated to ensure that the airport is financially self-sustaining. *See* Los Angeles City Charter ("Charter"), Art. VI. LAWA has the power to fix rates and collect charges for the use of airport property and facilities, and to lease, maintain and operate LAX. Charter, § 632. As the sponsor of LAX, LAWA has a federal obligation to make the airport as financially self-sustaining as possible. 49 U.S.C. § 47107(a)(13). All revenues derived from LAX go to the City's Airport Revenue Fund and may only be used for the capital and operating costs of the City's airport system. Charter, § 635(a), (b); 49 U.S.C. §§ 47107(b)(1) & 47133(a).

LAWA participates in the market for commercial airport facilities as the owner, operator and lessor of its revenue-generating property at LAX. LAWA charges airlines rent for their lease and use of passenger terminals, as well as landing fees for their use of the airfield at LAX, to cover the costs of these airport facilities. *See Alaska Airlines, Inc. v. U.S. Dep't of Transp.*, 575 F.3d 750, 753 (D.C. Cir. 2009); *City of Los Angeles v. U.S. Dep't of Transp*., 103 F.3d 1027, 1029 (D.C. Cir. 1997). The airlines, in turn, contract with commercial airline service providers ("ASPs") to provide a variety of support services including

aircraft-cleaning, baggage-handling and wheelchair support on LAWA's property at LAX. To help make LAX financially self-sustaining, LAWA also leases space in its passenger terminals (and elsewhere within the airport) to concessionaires. *See Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal.4th 446, 451 (2010). In order to be able to maintain and improve LAX, the City issues bonds backed only by its airport revenues; the projected debt-service requirements on currently outstanding LAX revenue bonds is approximately $9.5 billion.[1]

4. Since 1985, LAWA has required that all ASPs doing business on its property at LAX enter into an agreement detailing the terms on which their commercial activities may take place. Pet. App. 45a. Various airlines, Petitioner Airline Service Providers Association ("ASPA"), and LAWA negotiated the current version of this agreement – the Certified Service Provider License Agreement ("CSPLA") – beginning in 2008. *Id*.; R. App. 6. Under the CSPLA, in return for the right to do business at LAX, ASPs must agree to pay LAWA a percentage of their gross revenues at LAX and abide by certain eligibility criteria and service and reporting requirements. Pet. App. 87a-88a. ASPs are required, for example, to have in place adequate insurance naming LAWA and the City as insureds, Pet. App. 99a; submit to audits by the City, Pet. App. 96a;

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[1] *See* LAWA, "Annual Disclosure Filing for LAX – FY 2017" at 10, at https://lawa.org/en/lawa-investor-relations (last visited April 20, 2018).

covenant that their services will "conform to high professional standards," Pet. App. 129a; and agree that LAWA's Executive Director may request the removal of any ASP employees who are not performing their duties to the City's satisfaction, Pet. App. 130a.

Los Angeles is a city with a large and active labor movement, and labor disputes and labor demonstrations at LAX are a fact of doing business there.[2] The use of labor-peace agreements in such places is consistent with their proprietary purpose because the risk of a labor dispute is obviously much higher where labor unions are active and consequential. Where unions are less prevalent and the risk of a labor dispute is lower, state governments may choose to balance their proprietary interests differently. *See* Chamber of Commerce Br. at 21 (citing laws in Louisiana, Georgia and Tennessee prohibiting municipal labor-peace requirements).

Concerned with the dramatic, adverse effect that labor strikes, picketing and demonstrations could have on essential revenue-generating activities at LAX, as well as on the traveling public, LAWA added CSPLA

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[2] *See, e.g.*, Sid Garcia, "LAX protest expected to affect LA travelers," ABC-7 EYEWITNESS NEWS, November 20, 2012, at http://abc7.com/archive/8893449/ (last visited April 20, 2018); "Resolution of LAX labor dispute comes on eve of holiday crunch," LOS ANGELES TIMES, July 1, 2014, at www.latimes.com/local/. . ./la-me-ln-garcetti-lax-labor-dispute-20140701-story.html (last visited April 20, 2018).

Section 25, over the objections of some airlines and ASPs, in 2014. Pet. App. 46a. Section 25 requires ASPs to enter into a "Labor Peace Agreement" with a labor organization that requests one. The only mandated term of the Agreement is one intended to protect LAWA's proprietary interest in LAX: "The Labor Peace Agreement shall include a binding and enforceable provision(s) prohibiting the Labor Organization and its members from engaging in picketing, work stoppages, boycotts, or any other economic interference for . . . the entire term of any CSPLA." Pet. App. 127a.

Section 25 does not mandate any other term in the Agreement; it leaves resolution of an Agreement's content up to the labor organization and the ASP, with arbitration before the American Arbitration Association if the parties are unable to agree. Pet. App. 127a. Section 25 states expressly that an ASP is not required to "change terms and conditions of employment for its employees, recognize a Labor Organization as the bargaining representative for its employees, adopt any particular recognition process, or enter into a collective bargaining agreement with a Labor Organization." Pet. App. 128a. Section 25 is limited to the protection of LAWA's core proprietary interest in avoiding disruptions to its revenue-generating operations at LAX.

5. The District Court (Walter, J.) dismissed the Complaint. Pet. App. 43a-82a. Petitioners falsely claim that the City's motion to dismiss "did not argue that the market participant exception should apply" and

that the "district court did not rely on the market participant exception." Pet. 7. The City made clear that LAWA adopted Section 25 to protect its proprietary interests, as Section 25 itself states. The District Court agreed, holding that "it is not uncommon for labor organizations and employers to negotiate agreements . . . related to the labor organization's waiver of its right to strike, boycott or picket." Pet. App. 63a. LAWA and the City, the District Court found, "are merely seeking to protect their proprietary interest in ensuring that labor disputes do not interfere with the efficient, revenue-generating operations of LAX to the extent allowable under existing federal labor laws." Pet. App. 65a. The District Court also sustained the City's contentions that Petitioners lacked standing, Pet. App. 56a-58a, 67a-68a; held that Section 25 is not preempted by the Airline Deregulation Act ("ADA") because its relation to the "price, route, or service of an air carrier" is too tenuous and peripheral, Pet. App. 71a-72a; and found that Section 25 "easily survives" Petitioners' due-process vagueness challenge. Pet. App. 79a.

6. The Ninth Circuit affirmed on the ground that Section 25 protects LAWA's proprietary interest in LAX's revenue-generating operations. The Court of Appeals held that ASPA had standing to bring the action solely because ASPA members would have to devote resources to negotiations with labor organizations, even though the Complaint did not claim this as an injury or allege that any labor organization has, in

fact, requested such negotiations. *See* Pet. 5. The court did not analyze A4A's standing. On the merits, the court recognized that LAWA participates directly in the commercial airport market and "must avoid commercial pitfalls as the proprietor of a commercial enterprise." Pet. App. 11a. It concluded that "[t]he City has merely imposed a contract term on those who conduct business at LAX, which the City operates, and that contract term serves a cabined purpose." Pet. App. 18a.

The Ninth Circuit recognized that even a valid proprietary rule may be preempted if it is enacted or enforced overly broadly to regulate private activities that do not affect the government's proprietary interest. Pet. App. 18a. The court invited Petitioners to amend their Complaint to allege such spillover effects, if any existed. But Petitioners declined to do so, representing that "nothing has occurred in the years since section 25 took effect that would enable them to amend their Complaint to add allegations of spillover effects or other indications that section 25 operates in practice as a regulation." Pet. App. 22a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's opinion is consistent with this Court's past market-participation decisions and properly reflects LAWA's strong proprietary interest in the smooth operation of its revenue-generating commercial airport. The Ninth Circuit's decision did not

create a circuit split. Petitioners' claims of a circuit split are based on misinterpretations of various appellate decisions and decontextualized snippets from easily distinguishable cases. And, as a preliminary matter, there are glaring standing problems facing both Petitioners.

I. Petitioners lack Article III standing.

1. The Ninth Circuit glossed over the significant standing problems that confront Petitioners, which the District Court recognized in dismissing the airlines' claims and the ASPs' ADA cause of action. Pet. App. 4a-7a, 53a-58a, 67a-68a.[3] The Court of Appeals decided that ASPA had standing to challenge Section 25 based solely on ASPA's "alleg[ation] that its members will be forced into unwanted negotiations" with labor organizations, even though this was not a harm that ASPA claimed and the Complaint contains no allegations that any labor organization has requested such negotiations. *See* Pet. App. 5a. The court did not address the standing of Air Transport Association of America, Inc. ("A4A"). Pet. App. 4a n.3.

2. In their Complaint, Petitioners speculate about harms that might someday occur. ASPA alleged that if its members submitted to Section 25, but failed to reach an agreement with a labor organization

[3] The City filed its motion to dismiss before this Court issued its decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), *as revised* (May 24, 2016), and did not challenge ASPA's standing to bring its NLRA and RLA preemption claims at that time.

containing the labor peace terms mandated by LAWA, they would be subject to decertification and the loss of access to LAX. R. App. 20. Alternatively, ASPA alleged that if a member entered an agreement with a labor organization, the ASP would be required to alter the terms of employment for its employees. *Id*.

The Complaint, however, contains no allegation that any ASPA member has been approached by a labor organization demanding negotiations over a labor-peace agreement, that any such negotiations have taken place, or that ASPA members would be harmed by the bare requirement that they engage in such negotiations. There is no allegation that any ASP has actually been threatened with the loss of right to operate at LAX or that any ASP has declined to enter into a CSPLA with LAWA because of Section 25. The Complaint's allegation that negotiations with a labor organization – should such negotiations ever take place – would lead to an alteration "of the terms of employment for the ASP's employees" is contradicted by Section 25 itself, which states that "[n]othing in Section 25 shall be construed as [requiring] Licensee, through arbitration or otherwise, to change terms and conditions of employment for its employees." Pet. App. 128a.[4]

The Ninth Circuit gave Petitioners the opportunity to amend their Complaint to add additional

[4] Petitioners' Appendix contains a faulty transcription of this portion of Section 25. Pet. App. 128a. Section 25.7 refers to "*requiring* Licensee . . . to change terms and conditions of employment for its employees" not "*inquiring* Licensee" to do so.

detail about negotiations that had taken place since the case commenced, but they declined, representing that "nothing has occurred in the years since section 25 took effect that would enable them to amend their Complaint to add . . . other indications that section 25 operates in practice as a regulation." Pet. App. 22a.

3. ASPA's standing to assert its claims under the NLRA and the Railway Labor Act ("RLA") is undermined by *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), *as revised* (May 24, 2016). *Spokeo* stressed that, to establish standing, a plaintiff must show an invasion of a legally protected interest that is "'both concrete *and* particularized.'" *Id*. at 1545 (*quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). While the Complaint alleges particularity (because the CSPLA program is addressed to airline service providers), it does not allege any actual, concrete injury; instead, it merely speculates about potential harm that might arise under Section 25 if the stars aligned just so.

ASPA does not come close to meeting the concreteness requirement. The harm ASPA envisions is entirely "conjectural and hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and is based on a series of events, none of which is alleged to have occurred, including: (1) ASPs will refuse to sign the CSPLAs containing Section 25, (2) labor organizations will be willing to enter into agreements giving up their rights under the NLRA or the RLA to take economic action to reach their goals, (3) the agreements will have provisions making it easier for the labor

organizations to succeed in organizing employees, (4) the agreements will lead to union recognition and collective negotiations, and (5) the negotiations will result in agreements which alter the terms and conditions of employment, despite the fact that Section 25 does not require any ASP to agree to such changes, and under the law employers have no such obligation. *See* Pet. App. 128a (CSPLA, Section 25.7); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)); R. App. 11-13, 16. Alternatively, Petitioners speculate, an ASP might be decertified for failing to enter into a Section 25 agreement if it were ever asked to do so. R. App. 20. Aside from the fact that nothing like this is alleged to have occurred or even been threatened, the District Court correctly pointed out that it is essentially impossible because Section 25 requires arbitration if no agreement is reached. Pet. App. 56a-57a, n.9.

The Ninth Circuit did not take heed of *Spokeo*'s teaching concerning concreteness. It found that if a labor organization at some point asked to negotiate an agreement under Section 25, an ASP would be harmed because it would then have to spend some time in dealing with the organization, even though ASPA did not allege this harm or claim that such negotiations had ever been requested or were actually threatened. Pet. App. 5a. Thus, on standing, the Ninth Circuit made the same error the court of appeals made in *Spokeo*: accepting an allegation of potential harm as sufficient to confer standing.

Moreover, finding an unalleged "possibility of collateral consequences as adequate to satisfy Article III," as the court below did, "sits uncomfortably beside the long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record" because "it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Spencer v. Kemna*, 523 U.S. 1, 10-11 (1998) (internal quotations and citation omitted).

Even if ASPA had alleged it, the idea that time spent in complying with a law is concrete harm conferring standing is a novel proposition for which the Ninth Circuit cited no support. The cases the court cited in support of its conclusion instead undermine it. In *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013), the court found standing for a gun maker who had detailed plans and was ready to produce rifles, but who was prevented from doing so if federal law preempted a Montana law authorizing his production. This was the concrete injury supporting standing. *Id*. at 979-80. The court's remarks about the costs of complying with a government licensing scheme were not about the time spent in compliance, but rather the pecuniary cost of "licensing fees and taxes." *Id*. at 980. Similarly, *Central Arizona Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1538 (9th Cir. 1993), only found standing because of the likelihood of pecuniary harm. Section 25 imposes no pecuniary obligations.

4. The Ninth Circuit did not evaluate A4A's standing because it concluded that "[s]o long as one plaintiff has standing, an appellate court has jurisdiction to address his claims regardless of whether other plaintiffs have standing." Pet. App. 4a (*citing Rumsfeld v. Forum for Acad. & Inst. Rights, Inc*., 547 U.S. 47, 52 n.2 (2006)). But given ASPA's failure to allege concrete injury, the question of A4A's standing cannot be avoided.

A4A's alleged injury is even more speculative than is ASPA's. The airlines do not need to obtain CSPLAs and are not themselves subject to the requirements of Section 25. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (internal citations omitted); *see also Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

A4A alleged that Section 25 harmed its member airlines because if an ASP were ever decertified for declining to enter into the CSPLA or for failing to reach an agreement with a labor organization – something that the Complaint does not allege has occurred or even been threatened – "competition among ASPs would be diminished; the airlines would have fewer ASPs from which to select; and the cost of the services provided would increase." R. App. 19-20; *see also id*. at 20 ("Airlines will suffer because there will be uncertainty over whether any particular ASP will be certified to do business at LAX; airlines will have fewer ASPs with which to contract; and the cost of

services will increase."). This is far too speculative for Article III purposes; there is no allegation that " 'injury is *certainly* impending.' " *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (*quoting Lujan*, 520 U.S. at 565 n.2); *see New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (Article III standing from injury to competition applies only "to an agency action that itself imposes a competitive injury . . . not an agency action that is, at most, the first step in the direction of future competition."). The District Court correctly decided that "A4A's allegations of highly speculative future harms resulting from Section 25's implementation are plainly insufficient to establish standing." Pet. App. 58a.

II. The Ninth Circuit's decision follows from this Court's market-participation precedents.

A. The City has a proprietary interest in owning and managing its revenue-generating commercial airport.

1. This Court has never confined the market-participation doctrine to the purchase of good and services, as the Petitioners assert, and such a ruling would hamper the ability of state and local governments to compete in commercial markets, including domestic and international markets for commercial airport facilities.

2. *Boston Harbor* demonstrates that Petitioners' theory is misplaced. That case involved a Massachusetts Water Resources Authority ("MWRA") requirement

that contractors on a state cleanup project enter into a pre-hire collective bargaining agreement with a no-strike clause, which would ensure the efficient completion of sewage-treatment plants that MWRA would own. 507 U.S. at 221-22. The Court found that the market-participant exception applied even though MWRA did not contract directly with the companies bound to the labor-peace agreement, and the agreement applied to subcontractors that entered into contractual relationships with the general-contractor bidders. *Id*. at 222, 232. "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id*. at 231-32; *see, e.g.*, *Sprint Spectrum*, 283 F.3d at 421 ("[A] private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions.").

3. This Court has previously recognized that "airports are commercial establishments funded by users' fees and designed to make a regulated profit" and that "[a]s commercial enterprises, airports must provide services attractive to the marketplace." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 682. Accordingly, when an airport proprietor takes steps to prevent expressive activity from interfering with the free flow of airport passengers, it is "acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license,

[and] its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Id.* at 678; *see McDonnell v. City and County of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018) (reversing injunction against application of commercial airport's permitting requirements to spontaneous demonstration against President Trump's "travel ban"). The Courts of Appeals have similarly recognized that an airport operator's federal obligation and proprietary interest to be financially self-sustaining can also justify restrictions on otherwise-protected speech. *See*, *e.g.*, *Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1308 (11th Cir. 2003) (the airport, "operated as a self-sufficient business by the City, as mandated by statute and required by federal regulation," could limit the placement of news racks to protect airport retail concession revenues); *Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 664-65 (8th Cir. 1997) (airport's proprietary interest in retail concession revenues justified banning unlicensed news racks). LAWA's adoption of Section 25 serves exactly the same proprietary purposes: the avoidance of disruptions to air transportation and the preservation of the airport's ability to generate revenue.

4. Congress and the federal courts have long recognized the breadth and importance of the proprietary functions that public airport managers perform. The ADA preempts any state or local regulation that is "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). But the ADA contains an exception to preemption, permitting a municipality, such

as the City, "that owns or operates an airport" to "carry[] out its proprietary powers and rights." *Id*. at § 41713(b)(3). The ADA – unlike the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 14501(c)(1), at issue in *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013) ("*American Trucking*") – thus explicitly recognizes that the exercise of an airport's proprietary rights is not federally preempted.

Notably, this principle has been applied when airport operators seek to exercise their proprietary rights to preserve the smooth and efficient flow of air traffic and passengers at their facilities. For example, the ADA does not preempt the proprietary right of airport operators to set landing fees to create incentives for airlines to change their operations to reduce congestion and delay in the air, *Air Transp. Ass'n of Am., Inc. v. Dept. of Transp*., 613 F.3d 206, 216 (D.C. Cir. 2010), or to enforce a "perimeter rule" prohibiting long-haul flights, to reduce congestion and delay on the ground. *W. Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 817 F.2d 222, 226 (2d Cir. 1987).

5. Following *Boston Harbor*, lower courts have found proprietary interests justifying labor-peace requirements in contexts other than the direct "purchasing [of] goods and services in the marketplace." Pet. at i. *See*, *e.g*., *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 217-18 (3d Cir. 2004) (Chertoff, J.) (market-participant exception applied where city issued bonds used to finance hotel, repayable from hotel tax increments);

Hotel Employees & Restaurant Employees Local 2 v. Marriott Corp., No. C-89-2707, 1993 WL 341286 (N.D. Cal. Aug. 23, 1993) (market-participant exception applied where city required labor-peace agreement to protect lease revenues from commercial property). Similarly, here, the City is acting to protect the revenue streams derived from airlines, concessionaires and other businesses that cover the costs of improving, maintaining and operating LAX and back the City's airport bonds.

In protecting itself against the effects of labor disputes on these essential sources of income, LAWA is acting in the same manner as private-sector companies that have entered into labor-peace agreements with unions as a means of managing their property and protecting their investments. *See, e.g.*, *Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566-67 (2d Cir. 1993); *N.Y. Health & Human Svs. Union v. N.Y.U. Hosp. Ctr.*, 343 F.3d 117, 118-19 (2d Cir. 2003); *Service Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 984-85 (2d Cir. 2003); *Adcock v. Freightliner LLC*, 550 F.3d 369, 371-73 (4th Cir. 2008); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 407-08 (6th Cir. 1998); *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558-59 (6th Cir. 2002); *Patterson v. Heartland Indus. Partners LLC*, 428 F.Supp.2d 714, 715-16 (N.D. Ohio 2006).

Amicus International Air Transport Association ("IATA") concedes that "[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." IATA Br. at 16. But the point of the market-participation doctrine is to permit a government, acting in its proprietary capacity, to engage in the same kinds of market behavior as would a private-sector entity. LAX competes against both other publicly-owned commercial airports in this country and a large and growing number of private commercial airports throughout the world. Pet. App. 12a-13a.[5] There is no "indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted," and, in fact, "denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces." *Boston Harbor*, 507 U.S. at 531-32.

6. Petitioners claim that Section 25 is a "licensure rule" and is therefore not protected by the market-participation doctrine. Pet. at 2, 18-19. But the CSPLAs issued by LAWA do not provide ASPs with a general "license" to conduct their business throughout

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[5] For example, a 2016 study by Airports Council International ("ACI") found that 47 percent of airports in the 28 European Union ("EU") countries are either "mostly" or "fully" private, which is up from 23 percent in 2010. Since the largest airports in Europe tend to be the ones that have been privatized, the ACI study found that 75 percent of passenger trips in the EU are now through privatized airports. Airports Council International Europe, "ACI EUROPE Report: The Ownership of Europe's Airports 2016" (2017), available at: https://www.aci-europe.org/policy/position-papers.html?view=group&group=1&id=6 (last visited April 23, 2018).

the city, like the taxicab medallion at issue in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 609-11 (1986). The CSPLAs merely set forth the terms under which ASPs may do business on LAWA's revenue-generating property, just as a commercial property owner would set the terms under which a lessee's vendors and suppliers could do business on its property.

There is a fundamental difference between regulatory "licensure" of the right to do business generally and the proprietary act of conditioning commercial access to revenue-generating government property. *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961) ("[T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment."). This is so even when the "license" to use government property affects the licensee's contractual relationship with another private party. *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 150 (2011) (government acted "as 'proprietor' in managing its operations" and did not "exercise its sovereign power 'to regulate or license' " in conducting background checks of service-contract employees accessing the government's privately managed property) (internal citation omitted).

It is of no consequence that the instrument used by LAWA is entitled "License Agreement." This Court has never adopted a rule which says that by merely calling its required conditions to use public property a

"license," a state or local government loses its ability to invoke the market-participation doctrine. In fact, in *Alexandria Scrap Metal*, 426 U.S. at 797-98, 808-09, the Court upheld as market participation the State of Maryland's statutory licensing scheme providing bounties to in-state wreckers that took abandoned vehicles to scrap processors. The Court held that "[t]hese penalty and bounty provisions work with elementary laws of economics to speed up the scrap cycle" and to promote Maryland's goal "of protecting the State's environment." *Id*. at 797, 809. Similarly, the Eighth Circuit has held that a state's refusal to license video lottery machines for the state lottery unless the licensee was majority-owned by state residents did not violate Commerce Clause. *Chance Management, Inc. v. State of South Dakota*, 97 F.3d 1107, 1113 (8th Cir. 1996) ("The state's use of a licensing scheme rather than a contractual agreement does not take this case outside of the market participation doctrine, as the plaintiffs contend. The state, like any private gaming company, is free to choose those with whom it will deal, be it through licensure or contract.") (internal citations omitted).

It is myopic to focus exclusively on the term "license" as used in the CSPLA and to ignore the relationship between LAWA's contractual control over commercial access to its property at LAX and its proprietary interest in maintaining the revenue streams that fund the airport and enable LAWA to repay airport-related debt. "To indulge in this single vision . . . would require overruling most, if not all, of the cases

on point decided since *Alexandria Scrap*." *Davis*, 553 U.S. at 345 (plurality op.).

B. The Ninth Circuit decision does not conflict with *American Trucking* or *Golden State.*

1. Petitioners ask the Court to grant *certiorari* to correct a "conflict[] with the decisions of this Court," Pet. 11, but the decision below does not conflict with either of the two opinions Petitioners cite: *American Trucking*, 569 U.S. 641, or *Golden State*, 475 U.S. 608.

2. In *American Trucking*, this Court did not question the Ninth Circuit's determination that "when an independent State entity manages access to its facilities, and imposes conditions similar to those that would be imposed by a private landlord in the State's position, the State may claim the market participant exception." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 401 (9th Cir. 2011).[6] Instead, the Court held that the Port of Los Angeles could not use criminal sanctions – a tool available only to a sovereign – to coerce drayage trucking companies into agreements requiring off-street parking plans and the posting of placards. 569 U.S. at 650-52. While the Court did not doubt that "the Port acted to enhance goodwill and

[6] *Amicus* American Trucking Associations, Inc. admits that the Court decided *American Trucking* on "relatively narrow grounds" that did not address the market-participation issues that Petitioners now seek to raise, contradicting Petitioners' claim that the opinion below conflicts with this Court's decision. Am. Trucking Assoc. Br. at 8.

improve the odds of achieving its business plan – just as a private company might," the Court found that the Port "chose a tool to fulfill those goals which only a government can wield: the hammer of the criminal law" and, as a result, had acted "with the force and effect of law" in ways preempted by the FAAAA. *Id*. at 651-52.

3. The specter of criminal sanctions does not arise in LAWA's relationships with ASPs. The remedies available to LAWA if an ASP violates its CSPLA are the same any private commercial landlord might insist upon to maintain the efficient use of its property. ASPs that default on any of the obligations they have contracted for – not only in Section 25, but throughout the CSPLA – are subject only to termination of the agreement and of the right to use LAWA's property at LAX. Pet. App. 92a-93a, Section 3.1. LAWA does not enforce its right to payments from ASPs through the hammer of criminal sanctions, but only through a contractual "Performance Guarantee." Pet. App. 93a. This is consistent with LAWA's proprietary role as owner and manager of LAX.

4. *Golden State* predated the Court's decision in *Boston Harbor* and did not involve the issue of market participation. The City had no financial stake in taxicab operations; it simply conditioned renewal of a taxicab medallion on the company settling its employees' strike. 475 U.S. at 619. Petitioners claim that the Court held "the City had a proprietary interest in operating its public streets and ensuring the efficient provision of public transportation" and that this interest was insufficient to justify the city's action. Pet. 18. But the

Court held nothing of the kind; it did not even discuss market participation or proprietary interests. The Court simply rejected the City's argument that its action was justified because franchising taxicabs was a "traditional municipal function." *Id*. at 618.

C. There is no conflict between the Ninth Circuit's decision and those of any other circuit.

1. LAWA's proprietary interest in Section 25 as the owner and operator of LAX, and its reliance on the market-participation doctrine, fit comfortably within this Court's precedents, so it is no surprise that Petitioners' attempts to manufacture a circuit split come to nothing.

2. Petitioners mischaracterize the holding in *Metropolitan Milwaukee Chamber of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), which the Ninth Circuit properly distinguished. Pet. App. 16a-17a. That case did not purport to limit the market-participant rule to situations in which the state is a purchaser of services, as Petitioners assert. Pet. 20. Instead, it held that Milwaukee County could not use its status as a market participant to extend a labor-peace requirement to employees whose work had no relationship to the County's proprietary interests.

The ordinance required that firms contracting with the County for transportation of the elderly and disabled enter into a labor-peace agreement with any union seeking to represent the firm's employees. 431

F.3d at 278. The Seventh Circuit expressed no doubt that "the 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, as distinct from enforcing or modifying the NLRA." *Id*. The problem with the ordinance was that the labor-peace requirement would inevitably cover employees providing services to "private hospitals and nursing homes" because "[i]t would hardly be feasible for the contractors to segregate their workforces, with one part governed by the labor-peace agreements and the other not even though the two groups of workers would be doing identical work, just for different customers." *Id*. at 279. Because the ordinance covered firms that both contracted with the County and, with the same workforces, provided services to private customers, "disputes arising out of the private contracts, although unrelated to any spending or procurement activity of the County, are in fact regulated by the labor peace agreements and therefore made subject to the County's philosophy of labor relations." *Id*. The ordinance thus had a "spillover effect on labor disputes arising out of the contractors' non-County contracts." *Id*.[7]

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[7] The court reiterated this as the basis for the *Metropolitan Milwaukee* decision in *Northern Illinois Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005), which Petitioners do not cite. There, the court upheld a state law conditioning ethanol plant subsidies on the adoption of a labor-peace agreement and distinguished *Metropolitan Milwaukee* as involving "a purchasing rule prescribing how employers must handle labor relations in all aspects of their business" rather

Section 25 does not have this feature. It affects only the workforces of ASPs at LAX, not workforces that are unrelated to LAWA's proprietary interest in LAX's operations. *See* Pet. App. 17a ("there is no allegation that . . . [Section 25] will have spillover effects on the service providers' operations beyond their work for LAX."). An ASP is only required to "covenant[ ] that its employees at LAX shall be able to work in labor harmony in order to protect LAWA's proprietary and economic interests." Pet. App. 126a.

Petitioners' attempt to create a circuit split based on *Metropolitan Milwaukee* is foreclosed by their inability to amend their complaint to allege the types of "spillover" effects that the Seventh Circuit held preempted. The Ninth Circuit offered them opportunity to do so, but Petitioners "represented that nothing has occurred in the years since section 25 took effect that would enable them to amend their Complaint to add allegations of spillover effects or other indications that section 25 operates in practice as a regulation." Pet. App. 22a.

Metropolitan Milwaukee mentioned other defects in the challenged county ordinance, all of which LAWA has assiduously avoided. The Seventh Circuit noted that the ordinance's requirement of labor peace applied only during the phase when unions were "organizing" and not as a condition when unions were "pressing for a collective bargaining agreement" at an

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than only the business in which the state had a proprietary interest.

already-unionized firm. *Metropolitan Milwaukee*, 431 F.3d at 281. Section 25 requires that the labor-peace agreement's protections last for the entire duration of LAWA's proprietary relationship with the ASP under the CSPLA. Pet. App. 127a. The ordinance in *Metropolitan Milwaukee* barred employers from requiring employees to attend meetings intended to "influence his or her decision in selecting or not selecting bargaining representative." *Metropolitan Milwaukee*, 431 U.S. at 280. In contrast, LAWA imposes no such condition, and requires only that ASPs act to protect LAWA from the effects of "picketing, work stoppages, boycotts, or . . . other economic interference." Pet. App. 127a. Section 25 has none of the features held to be preempted in *Metropolitan Milwaukee*.

3. There is also no conflict with the Third Circuit's decision in *Associated Builders & Contractors, Inc. v. Jersey City*, 836 F.3d 412 (3d Cir. 2016). In *Jersey City*, the local government attempted to condition tax exemptions on the adoption of labor-peace agreements. *Id*. at 413-14. The Third Circuit recognized that a market-participant argument based on exemption from taxation had been "rejected outright by the Supreme Court" in *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568 (1997). *See Jersey City*, 836 F.3d at 419. LAWA is not claiming a proprietary interest in tax receipts or tax exemptions here – something only a sovereign taxing jurisdiction can do – but in the revenues it derives from operating and leasing LAX.

Petitioners claim that the Third Circuit limited market participation to instances in which a city "purchase[s] or otherwise fund[s]" the services in question, but that was not the court's holding. Instead, it stated: "The Supreme Court has recognized a government's proprietary interest in a project when it 'owns and manages property' subject to the project *or* it hires, pays, and directs contractors to complete the project[;] when it provides funding for the project[;] *or* when it purchases or sells goods or services." *Id*. at 418 (emphasis added, internal citations omitted). The court relied heavily on its decision in *Sage Hospitality*, *supra*, 390 F.3d at 216-17, which did not involve the government "purchasing goods or services in the marketplace," Pet. i, but rather acting as a bond issuer that desired to protect its interest in revenue that had been pledged to back its bonds – an interest identical to the City's here.

4. Nor is there a circuit split with the Fifth Circuit. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), in fact, undermines Petitioners' attempt to artificially limit the range of market relationships that courts may consider proprietary.

There, the City of Bedford adopted an ordinance awarding an exclusive towing contract for the performance of "non-consensual" tows – those in which the police ordered the removal of vehicles on public streets that were abandoned or disabled in accidents. The ordinance set forth certain business practices that the towing company had to follow, including the guarantee

of a speedy response time, access to heavy-tow equipment, and computerized record keeping. *Id*. at 689.

The city, however, did not pay for the services. Instead, "the owner of the vehicle would actually pay for the service." *Id*. at 689. Even though the city was not "purchasing goods or services in the marketplace" (Pet. at 2), "contracting for goods or services for itself," Pet. 3, or "utilizing its spending power at all," *Cardinal Towing*, 180 F.3d at 696, the city was participating in the marketplace for non-consensual towing services and pursuing its own interest in "the need to maintain traffic flow in the wake of an accident and remove abandoned vehicles blighting their environment." *Id*. at 697. The Fifth Circuit was "convinced that the City's role here is of a proprietary nature, notwithstanding the fact that a third party pays for the service." *Id*.

Petitioners also cite *Stucky v. City of San Antonio*, 260 F.3d 424, 437-38 (5th Cir. 2001), *cert. granted, judgment vacated*, 536 U.S. 936 (2002), *abrogated by City of Columbus v. Ours Garage & Wrecker Serv., Inc*., 536 U.S. 424 (2002). But in that case, the City of San Antonio stated that the "reason for enacting the Ordinances was to regulate and control the practice of tow truck drivers from racing to the scenes of accidents" and that "the City was acting as 'the guardian of the public rights in the public streets, ways and public property' and that its purpose was to protect the 'public peace, safety and welfare of the City of San Antonio.'" 260 F.3d at 437-38. Unlike the situation here – where LAWA is acting to further its proprietary interests – in

Stucky, the city's purpose was expressly regulatory. *Id*. at 438-39.

Cardinal Towing and *Stucky* are distinguishable for another, more obvious reason. Neither involved efforts to avoid disruptions to economic activity taking place on revenue-generating municipal property such as LAX.

5. Petitioners' remaining arguments simply lift phrases from circuit court decisions and elevate them to principles that the courts did not endorse. Petitioners claim that the court held in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), that "the market participant exception is available *only* when the 'government acts as a purchaser of goods and services.'" Pet. 23 (*citing Reich*, 74 F.3d at 1334). But, in fact, what the court stated was that "[w]hen the government acts as a purchaser of goods and services NLRA preemption is still relevant." *Reich*, 74 F.3d at 1334. The court did not purport to limit the circumstances in which the market-participant exception could be invoked. *See also* Pet. 23 (similarly mischaracterizing the scope of the court's holding in *Building & Constr. Trades Council v. Allbaugh*, 295 F.3d 28, 34-35 (D.C. Cir. 2002)).

Similarly, in upholding a state-wide *ban* on municipal governments adopting labor-peace agreements in the construction industry, *Michigan Building & Construction Trades Council v. Snyder*, 729 F.3d 572, 579 (6th Cir. 2013), did not limit the scope of the market-participant exception to the facts before it. It merely

held that "[j]ust as a private purchaser can choose not to enter into PLAs, believing them to be inefficient, a state legislature, sharing that same belief, can decide that public money should not to [sic] be used for PLA projects." *Id*.

6. *Amicus* IATA asks the Court to use this case to resolve a "split as to the vitality of" the plurality decision in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984). IATA Br. at 4. But no such split exists, and even if one did, this case would not be the proper vehicle for resolving it.

In *Wunnicke*, Alaska imposed "downstream" requirements on the purchasers of its unprocessed timber, requiring them to partially process the timber in-state before shipping it outside of the State. 467 U.S. at 96-98. Alaska argued that it participated in the "processed timber market" by selling timber that would later be processed; however, the State "acknowledge[d] that it participate[d] in no way in the actual processing." *Id.* at 98. A plurality of the Court held that Alaska was in fact regulating the downstream processing market in a manner different from a private business: "In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale." *Id*. at 96.

IATA claims that lower courts are split on application of this rule, but the best it can come up with in the thirty-five years since *Wunnicke* was decided are three cases which applied Commerce Clause analysis to very different factual circumstances. In each case,

the court looked to the justification for the challenged rule to determine whether it supported a market-participation theory.

The Eleventh and Fifth Circuit decisions that IATA cites both involved concededly protectionist measures that bore no real relationship to any proprietary interest. In *Florida Transportation Services v. Miami-Dade County*, 703 F.3d 1230, 1234 (11th Cir. 2012), Florida Transportation Services ("FTS") filed suit against the County, alleging that the Miami-Dade Port Director applied a stevedore-permitting ordinance in a manner that was designed to protect incumbent stevedores from competition by keeping new entrants out of the stevedore market. FTS complained that the Port Director did not observe the ordinance's requirements, but instead "automatically renew[ed] permits for all existing stevedore permit holders at the Port and automatically den[ied] all new applicants[.]" *Id.* The Port Director, in prior litigation, conceded this point, admitting the practice's regulatory purpose: "to prevent 'economic hardship to the entire local stevedoring industry' that would result from 'dilut[ing] the market' with excessive stevedore permits." *Id.* at 1258; *see Amerijet Int'l, Inc. v. Miami-Dade Cty.*, 627 F. App'x 744, 752-53 (11th Cir. 2015) (recognizing the County's regulatory, protectionist purpose as the rationale for the decision in *Florida Transportation Services*).

In *Smith v. Georgia Department of Agriculture*, 630 F.2d 1081, 1083 (5th Cir. 1980), a fractured panel concluded that Georgia's facially discriminatory rule limiting out-of-state sellers to inferior booths at a

farmer's market violated the dormant Commerce Clause. But again, the government conceded that it did not have a proprietary interest in this practice: "the admitted purpose of the rule was to give a preference to Georgia residents over non-residents of Georgia, thereby providing a competitive advantage to Georgia farmers." *Id*. at 1082. As in *Florida Transportation Services*, the state's rule had no practical relationship to the supposed proprietary reason for its adoption – overcrowding – and openly discriminated against out-of-state interests.

Finally, in *Four T's, Inc. v. Little Rock Mun. Airport Comm.*, 108 F.3d 909, 912-13 (8th Cir. 1997), the court held that a commercial airport was a market participant in entering into a concession fee arrangement with a car-rental business granting the right to do business at the airport and therefore that the imposition of concession fees did not violate the Commerce Clause. The concession arrangement had a direct financial impact on the airport, so the court had little trouble concluding that the concession fee was a proprietary action. *Id*. at 913.

These cases thus do not represent some slow-simmering circuit split over *Wunnicke*, but merely three applications of dormant Commerce Clause analysis to different facts, including, in two cases, conceded purposes that undermined the notion that the government was acting for proprietary reasons. IATA does not dispute that there is a sound business rationale for the City's labor-peace requirement here. It admits that "if a private entity operated a public venue like LAX,

that entity would have a similar interest in labor peace[.]" IATA Br., at 16.

Even if a circuit split existed over *Wunnicke*, as IATA asserts, this case would not be the proper vehicle to address it. This case does not involve an attempt to apply the market-participation doctrine to a "downstream" market "after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship." *Wunnicke*, 467 U.S. at 99. The City's proprietary interest here is a "direct commercial" one in the management of LAWA's revenue-generating airport and in setting the terms for ASPs' ongoing commercial use of the City's property. It is no different from a private landlord's interest in managing commercial risk by dictating the terms under which tenants' vendors and subcontractors may access its property.

Wunnicke "applied 'more rigorous' Commerce Clause scrutiny because the case involved 'foreign commerce' and restrictions on the resale of 'a natural resource.'" *Davis*, 553 U.S. at 348 n.17 (plurality op.) (*quoting Wunnicke*, 467 U.S. at 100, 96). If there were some question about *Wunnicke*'s scope or ongoing "vitality," surely it would make sense to resolve it on a more developed factual record and in a case that actually raises a dormant Commerce Clause claim.

III. Petitioners have grossly exaggerated the impact of the Ninth Circuit's decision.

Petitioners and *amici* warn that if the Ninth Circuit decision stands, all manner of state regulations will follow "because local governments own and operate public streets." Pet. 26; Am. Trucking Assoc. Br. at 7. But public city streets are not contained, revenue-generating commercial enterprises like airports. When they are self-funding toll roads, however, their operation may constitute market participation. *See Endsley v. City of Chicago*, 230 F.3d 276, 284-85 (7th Cir. 2000) (recognizing city's role as owner and operator of toll bridge as market participation). As with any market-participation analysis, context matters.

Recognizing a proprietary interest in preventing labor disputes at a self-sustaining, commercial airport in which the City leases property, issues revenue-backed bonds, and enters into concession agreements does not mean that future courts must find market participation in various cannabis licensing statutes, port regulations of oil-tanker operations or the "marketplace to attract residents, businesses, talent, and investment" to cities, as *amicus* Chamber of Commerce warns. Chamber of Commerce Br. at 6, 9, 11. The Chamber admits that "[c]ertainly, some state and local laws mandating labor-peace agreements touch on facilities in which the government has some ostensible ownership or financial interest, such as airports, seaports, stadiums, hotels, and restaurants." *Id*. at 6. That is the case the Ninth Circuit addressed, not the hypothetical expansions of the market-participation

doctrine that Petitioners and *amici* prophesy. The Ninth Circuit properly recognized that the City acts as a market-participant in conditioning ASPs' commercial access to LAX. Its holding did not conflict with any of this Court's decisions or create a circuit split.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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