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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition confirms that the decision below defies this Court's precedent and eviscerates federal preemption in the airline industry and beyond. Like the Ninth Circuit, Respondents embrace the principle that because the City of Los Angeles "owns and manages" LAX, it can impose whatever labor rules it wants on companies that operate there, and those rules are completely exempt from federal preemption due to the City's interest in "generating revenue" from the airport. That logic has stunning implications. It allows local governments to ignore federal labor law and impose their own otherwise-preempted labor rules at every airport in the country—for pilots, baggage handlers, runway crews, flight attendants, security guards, and more—on the theory that avoiding labor disruptions is loosely related to the government's "proprietary" interest in generating airport revenue. The same sweeping logic destroys federal preemption at public seaports, train stations, stadiums, universities, parks, and more.

Respondents cannot reconcile the Ninth Circuit's boundless ruling with this Court's precedent or the other circuits that have applied that precedent. Until now, every other court has recognized that a local government cannot claim to be a "market participant" when it imposes a labor rule without participating in the relevant labor market.

I. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENT

1. As articulated by this Court, the market participant exception for labor rules is straightforward. A government acts as a "market participant" only if it *enters the labor market* by hiring a company to employ labor to provide some good or service. The "public entity *as purchaser*" may then "choose a contractor based upon [its] willingness to" follow certain labor rules. *Bldg. & Constr. Trades Council v. Associated Builders etc.*, 507 U.S. 218, 231 (1993) ("*Boston Harbor*") (emphasis added). However, the labor rules must be "specifically tailored to [the] particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232. Any further imposition of labor rules would cross the line into regulation because it would go beyond the government's role "as purchaser" in the labor market. *Id.* at 231. It is thus "crucial to [the] analysis" whether "employees of contractors and subcontractors on public works projects [a]re or [a]re not, in some sense, working for the city." *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984).

Respondents seek to eliminate that "crucial" component of the analysis: In their view, local governments need not participate in the labor market *at all* in order to be considered "market participants" when imposing labor rules. Instead, they are market participants whenever they impose

labor rules as a "condition[]" of "commercial access" to "revenue-generating government property." Resp. Br. 20. But that allows the government to use its participation in one market (i.e., its role as a monopoly lessor of public property) to impose labor rules in an entirely *different* market in which it does *not* participate (i.e., the market for servicing airlines). That is exactly what this Court has forbidden: The government cannot use its "unique position of power" in one market as leverage to impose labor rules in a completely *different* market. *See Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986).

2. Respondents distort this Court's precedent to claim that whenever "a State owns and manages property" it may impose labor rules on companies that operate there, and those rules are categorically "not subject to pre-emption." Resp. Br. 1 (quoting *Boston Harbor*, 507 U.S. at 227). But if that simplistic rule were correct, then the Court's analysis in *Boston Harbor* would have ended with the fact that the city owned and generated revenue from the harbor. Instead, the Court explained that the market participant exception applied only because the city had acted as a "*purchaser* of construction services" to clean up the harbor. *See Boston Harbor*, 507 U.S. at 233 (emphasis added). Because the city had *purchased labor*, it was a participant in the labor market, and could set the labor rules that would apply during the cleanup work. *Id*. The analysis did not turn on the fact that the city owned and managed the harbor, but on

"[t]he conceptual distinction between regulator and purchaser." *Id.* at 229.

Respondents point out that in *Boston Harbor*, the city "did not contract directly with the companies bound to the labor-peace agreement," because they were subcontractors. Resp. Br. 15. But the point is that the subcontractors were providing labor to complete a job for the city, which had hired them indirectly through a contractor. The labor rules for the subcontractors were permissible because the city had participated in the labor market, and imposed rules that were "[]related to the . . . performance of contractual obligations to the [city]." *Boston Harbor*, 507 U.S. at 229.

3. Respondents point out that the market participant exception is not *always* limited to situations where the government is "purchasing goods and services in the marketplace." Resp. Br. 1. They cite other situations where a government may act as a market participant, such as by "sell[ing] products" or issuing bonds. *Id.* But that misses the point: Here, the City has imposed a *labor* condition, and thus it cannot be considered a market participant unless it was participating in the *labor* market. If the City was not *purchasing* labor, then it has no claim to be engaging in market activity by imposing labor rules. "The limit of the market-participant doctrine must be that it allows a State to [act] within the market *in which it is a participant*, but allows it to go no further." *S.-Cent. Timber Dev., Inc. v. Wunnic*ke, 467 U.S. 82, 97-98 (1984) (plurality op.) (emphasis added). Here the City has gone much further. Its power to impose

the labor rules at issue comes not from its *commercial* role as a purchaser in the labor market, but from its *governmental* role as the sovereign authority that owns and controls the second largest airport in the United States.

It is thus largely irrelevant whether the City "participates in the market for commercial airport facilities." Resp. Br. 2. At the outset, it is highly dubious to say that there is a "market" in public airports, any more than there is a "market" in competing cities. These are sovereign entities, not market competitors. Los Angeles cannot claim to be acting as a "market participant" when it passes a pollution ordinance to make itself more "competitive" than New York. Nor can the City claim to be a market participant when it imposes a labor rule to make LAX more "competitive" than other public airports.

But more importantly, even if the City *did* participate in a "market" for public airports, that would not make it a participant in the *labor* market. Indeed, the City admits that it does not hire—either directly or indirectly—any of the airline service providers that are subject to the "labor peace" rule at issue here. Instead, those companies provide services to airlines, which provide services to passengers—not to the City itself, which simply maintains the public space where passengers, airlines, and related companies do business among themselves. Accordingly, because the City is *not itself participating in the labor market*, its imposition of a labor rule cannot be "market participant" activity.

4. Respondents do not seriously dispute that the decision below would effectively overturn *American Trucking Associations, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013). In that case, this Court held that the City's role as the owner and manager of a public sea port did not make it a "market participant" when it imposed rules on trucking companies that operated at the port. But under the decision below, the City can re-impose the precise same trucking rules simply by making them a "condition of access" to the port.

Respondents try to distinguish *American Trucking* by claiming that the rules there were enforced by "criminal sanctions" that were used to "coerce" the trucking companies. Resp. Br. 22-23. But the City's power to exclude airline service providers from LAX is no less "coercive" than criminal sanctions. If anything it is *more* coercive, because airline service providers are completely dependent on access to public airports, and thus the City can utterly destroy their business by excluding them unless they comply with the City's labor rules.

The City also claims that criminal sanctions are different because they are "a tool available only to a sovereign." *Id*. But the power to exclude airline-service companies from a major international airport such as LAX is also uniquely available to sovereign governments. No mere "private commercial landlord" enjoys such coercive power. Resp. Br. 23. As this Court has recognized, local governments that own public harbors and airports are far "more powerful than private

parties." *Boston Harbor*, 507 U.S. at 229. And because they "occup[y] a unique position of power in our society," their "conduct, *regardless of form*, is rightly subject to special restraints" under federal labor law. *Gould*, 475 U.S. at 290 (emphasis added). It thus makes no difference whether the City's regulatory coercion takes the "form" of imposing criminal sanctions, *id.*, or excluding airline service providers from the second largest airport in the country.

5. Finally, Respondents also cannot resist the conclusion that their rationale would overturn *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). If local governments are free to "condition access" to public property on compliance with labor rules, then there is no reason the City cannot impose such rules on taxi companies that operate on public streets. After all, it is indisputable that local governments are the owners and managers of public streets, no less than of public airports. They also generate significant revenue from public streets in the form of tolls, parking permits, and registration and license fees. But as this Court has explained, that is not enough. If the City wants to impose a labor rule on a taxi company as a "market participant," it needs to actually participate in the relevant labor market by "purchas[ing] taxi services." *Boston Harbor*, 507 U.S. at 227-29.

II. THE CIRCUITS ARE SPLIT

1. As Respondents admit, the Seventh Circuit has squarely held that a county government cannot impose a "labor-peace requirement" on private

contractors while they are not "providing services" to the government itself, but are instead providing services "to 'private hospitals and nursing homes.'" Resp. Br. 25 (quoting *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 431 F.3d 277 (7th Cir. 2005)). This is a perfect illustration of the principle that a government cannot use its power in *one* market (government contracting) as leverage to impose rules in *another* market (private services). That precisely describes the present case.

Respondents try to recast the Seventh Circuit's decision as holding that the labor-peace requirement was invalid there only because it covered "employees whose work had no relationship to the County's *proprietary interests*," broadly stated. Resp. Br. 24 (emphasis added). But that is not what the court said. Instead, the court held that the government was a market participant only insofar as it was "intervening in the labor relations *just of firms from which it buys services* . . . in order to reduce the cost or increase the quality of those services." *Metro. Milwaukee*, 431 F.3d at 278 (citing *Boston Harbor*, 507 U.S. at 226-27) (emphasis added). The court thus recognized that a labor rule is not "market participant" activity unless the government is *actually participating in the labor market* by acting "as a buyer of services." *Id.* at 282. That squarely contradicts the decision below here.

Respondents also claim that *Metropolitan Milwaukee* was about "spillover effects" that are absent here. Resp. Br. 26. Not so. The "spillover effect" the Seventh Circuit identified was the application of the County's labor-peace rule to

employees who were not working on "the provision of contractual services purchased by [the] County." *Metro. Milwaukee*, 431 F.3d at 279. Here, that describes *all* of the employees subject to the "labor peace" rule at LAX. *None* of them are providing any service purchased the City. The labor peace rule is thus nothing but one big spillover effect.

2. Respondents claim that the decision below does not conflict with *Associated Builders & Contractors, Inc. v. Jersey City*, 836 F.3d 412 (3d Cir. 2016), because that case was about "tax exemptions." Resp. Br. 27. But the tax exemptions were just the *means* by which the government was coercing private developers and contractors to "ent[er] into agreements with labor unions." 836 F.3d at 413. That coercive effort would have been perfectly permissible but for the fact that the government "d[id] not purchase or otherwise fund the services of [the] private developers or contractors" at issue. *Id.* at 419.

The Third Circuit specifically rejected the argument that the City "ha[d] a proprietary interest" simply because its policy was designed to "improve the City's economy, which in turn w[ould] lead to future tax revenues." *Id.* at 420. The court emphasized that municipal policies that are "designed to improve future revenue streams are not equivalent to the purchase or sale of goods or services and do not transform the City into" a market participant. *Id.* That contradicts the decision below, which held that the labor-peace rule at LAX falls under the market participant

exception because it supposedly "protect[s] [the City's] interest in revenue." Resp. Br. 28.

3. Respondents also cannot square the decision below with the law of the Fifth Circuit. In *Stucky v. City of San Antonio*, 260 F.3d 424, 436 (5th Cir. 2001), the market participant exception did not apply because the City was not trying to "purchase [towing] service[s] for its own proprietary interest," but was instead trying to impose terms on "private parties" that were "attempting to purchase services." *Id.* at 436. The same is true here: The City is not purchasing any services for airlines, but is nonetheless imposing labor terms on private airline service providers. By contrast, in *Cardinal Towing & Auto Repair, Inc. v. Bedford*, 180 F.3d 686 (5th Cir. 1999), the market participant exception applied only because the City "contract[ed] with a single company to perform [police] tows." *Id.* at 689. To be sure, the police ultimately required people whose cars were towed to "actually pay for the service," *id.*, but the *City itself* was the one contracting to serve its "own interest in [the] efficient procurement of needed [towing] services." *Id.* at 693.

4. Respondents claim that the D.C. Circuit has never "limit[ed] the circumstances in which the market-participant exception could be invoked." Resp. Br. 30. But in fact, the entire analysis in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), is based on the premise that "act[ing] as a purchaser" in the labor market is a *necessary* (but not sufficient) condition for the market participant exception to apply to labor rules. *Id.* at 1334.

Likewise, the Sixth Circuit has interpreted a state's proprietary right to impose labor conditions in the course of "own[ing] and manag[ing]" property as being limited to its role "as a private purchaser" of services in connection with the property. *Michigan Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572, 579 (6th Cir. 2013) (quoting *Boston Harbor*, 507 U.S. at 227, 231). That is directly contrary to the Ninth Circuit.

III. RESPONDENTS CANNOT DENY THE IMPORTANCE OF THE ISSUE

If the decision below is allowed to stand, it will create a massive loophole in federal labor preemption. As this Court has recognized, Congress has forbidden state and local governments from imposing their own "labor peace" rules because the NLRA and the RLA occupy the field of ensuring harmonious industrial relations. *See* Pet. 6-7; *Golden State*, 475 U.S. at 615. But under the decision below, local "labor peace" rules that would otherwise be clearly preempted can now be imposed on private companies that operate at every public airport, seaport, train station, school, university, park, and plaza—and even on public streets. All the local government needs to show is that it manages and derives revenue from the public property in question. That sweeping rule effectively repeals federal labor preemption across a wide swath of industries.

Respondents try to downplay these sweeping results as mere "hypothetical expansions of the market-participation doctrine." Resp. Br. at 35-36. But they cannot deny that these results flow

inexorably from the logic of the Ninth Circuit's decision.

IV. PETITIONERS HAVE STANDING

In an effort to insulate the decision below from review, Respondents claim that Petitioners lack standing. They are incorrect. Petitioner Airline Service Providers Association (ASPA) has standing because its members are directly subject to the regulation being challenged.

The injury is not speculative. LAX has already enforced the regulation by forcing ASPA's members to sign and submit to the terms contained in Section 25 of the "Certified Service Provider License Agreement." Pet. App. 126a (imposing legal "covenants" between companies and LAX). By forcing the companies to surrender their rights and bind themselves to those adverse contractual terms, the City has directly inflicted an injury that is not only "particularized" but "concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016); *see also id.* at 1552 (Thomas, J., concurring) (courts have "historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.").

Moreover, it has long been established that parties have standing to challenge bargaining rules that "limit[] the possible fruits of bargaining." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 853-54 (D.C. Cir. 2006). That is clearly the case here. By eliminating the companies' right to refuse a "labor peace" agreement while operating at LAX, Section 25 plainly harms their bargaining position. *Clinton v. City of New York*, 524 U.S. 417, 433 n.22

(1998) ("[T]he 'injury in fact' [i]s the harm to the [companies] in the negotiation process.")

CONCLUSION

The Court should grant certiorari.

MAY 11, 2018

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