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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* SUPPORTING PETITIONERS

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

BENJAMIN J. HORWICH
Counsel of Record
JOSHUA PATASHNIK
GIOVANNI SAARMAN GONZÁLEZ
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
ben.horwich@mto.com
(415) 512-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page**

Cases—Continued: **Page**

Statutes:

Statutes—Continued: **Page**

Miscellaneous:

Miscellaneous—Continued: **Page**

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. Specifically, the Chamber has filed briefs in several of this Court's cases involving the market-participation exception, including *American Trucking Ass'ns* v. *City of Los Angeles*, 569 U.S. 641, 651 (2013); *Chamber of Commerce* v. *Brown*, 554 U.S. 60 (2008); *Building & Construction Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) ("*Boston Harbor*"); and *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986).

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to

---

[1] Pursuant to Rule 37.2(a), counsel for *amici curiae* provided timely notice of intent to file this brief to counsel for all parties. Petitioners have filed a notice of blanket consent with the Clerk. Respondents' counsel of record consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel, made such a monetary contribution.

legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files *amicus curiae* briefs on behalf of the retail industry.

Amici's members and affiliates, many of which operate in industries affected by preemptive federal regulatory regimes established by Congress, have a keen interest in ensuring that courts consistently and correctly apply the market-participation exception.

SUMMARY OF ARGUMENT

The City of Los Angeles (the "City" or "Los Angeles") by policy requires all service providers operating at Los Angeles International Airport (the "Airport" or "LAX") to enter into so-called "labor peace" agreements—*i.e.*, agreements with labor unions designed to prevent strikes or other service disruptions. Despite the settled rule that federal law broadly preempts local regulation of labor relations and air services, the Ninth Circuit approved this rule in the name of "market participation." The Court of Appeals' erroneous and overly expansive conception of the market-participation exception to preemption warrants review for the reasons stated in the petition, and because it more broadly threatens to swallow up any number of preemptive

federal laws carefully crafted by Congress to promote interstate commerce.

The market-participation exception rests on the "distinction" this Court has recognized between "government as regulator and government as proprietor." *Boston Harbor*, 507 U.S. at 227. This narrow doctrine reflects the reality that state and local governments sometimes must "enter[] into . . . contract[s] just as a private party would"—for example, to hire "a trucking company to transport goods at a specified price." *Am. Trucking*, 569 U.S. at 649-650. The market-participation exception allows governments to transact as private parties do, even though federal law preempts state and local *regulation* of (again, for example) the trucking industry.

The Ninth Circuit's approval of the City's policy requiring *other parties* contracting for services at LAX to enter into labor-peace agreements stretches the market-participation exception beyond recognition, with profound implications far outside the specific context of this case. The City's policy is not limited to service providers at LAX, nor is it unique to Los Angeles. An increasing number of jurisdictions have imposed similar requirements in a variety of circumstances.

The Ninth Circuit's reasoning here would transform the market-participation exception from a narrow doctrine allowing state and local governments to buy and sell goods and services into a hopelessly elastic theory on which state and local governments could regulate in fields that Congress has chosen to make the exclusive province of the federal government—from labor to transportation to air pollution to employee benefits and beyond.

Whatever one thinks of requiring labor-peace agreements as a matter of public policy, what matters here is that *it was a matter of public policy* when Los Angeles acted as a government regulator in requiring service providers at LAX to enter into such agreements. Under the law as this Court and other federal Circuits have articulated it, the City's labor-peace policy is regulatory and not contractual in nature, and thus falls outside the scope of the market-participation exception. This Court should grant certiorari to correct the Ninth Circuit's departure from that precedent and to reaffirm that the market-participation exception does not save laws like the City's here.

ARGUMENT

I. The Petition Presents a Question of Widespread and Recurring Importance

A. Los Angeles's Labor-Peace Requirement Mirrors Requirements Imposed by Other State and Local Governments

A labor-peace agreement (or labor-harmony agreement) is an agreement between an employer and a union representing or seeking to represent the employer's employees that includes terms preventing strikes or other disruptions. See, *e.g.*, Eric T. Smith et al., *Preemption of Worker-Retention and Labor-Peace Agreements at Airports*, Nat'l Acad. of Sci., Eng'g, & Med., Legal Res. Dig. 31, at 14 (Feb. 2017). The City's policy here, for example, requires that the agreement "prohibit[] . . . picketing, work stoppages, boycotts, or any other economic interference." Pet. App. 127a. In exchange for the union's agreement not to engage in these tactics, the employer agrees to waive certain rights under federal law with regard to union organiz-

ing. For example, employers may agree to provide workers' personal contact information to the union, give union organizers access to the workplace, or refrain from expressing opinions about the union.

With increasing frequency, state and local governments have sought to require private parties to enter into such agreements—both by law and by contract. Those jurisdictions favor such a requirement as a matter of policy because it promotes the interests of unions. The "practical effect" of these agreements "is to provide unions with significant negotiating leverage over employers who oppose unionization." Smith, *supra*, at 15. San Francisco pioneered the use of these agreements in the 1980s and ultimately codified such a requirement beginning in 1998. See U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate 5 (2016) (*Labor Peace Agreements*).[2] Since then, similar policies have been adopted in Los Angeles, Santa Monica, and San Jose, California; in New York, New York; in Seattle, Washington; in Portland, Oregon; in Washington, D.C.; in Baltimore, Maryland; and by the Port Authority of New York and New Jersey.

Of course, within applicable legal constraints, state and local governments in these jurisdictions are free to pursue whatever policies they wish. But there *are* a number of applicable legal constraints—including, as relevant here, several federal statutes expressly preempting such state and local regulations. See *infra* at 7-14. Certain jurisdictions, including Los Angeles, have therefore seized upon the market-participation

---

[2] https://www.uschamber.com/sites/default/files/documents/files/laborpeaceagreements.pdf.

exception as a vehicle for evading federal preemption to enact their preferred policies.

Certainly, 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. See *Labor Peace Agreements* at 13-15. But labor-peace-agreement requirements are by no means limited to that context, and cities have imposed the same requirements even where no proprietary interest exists. For example, three California cities, including Los Angeles and San Francisco, require labor-peace agreements for cannabis license applicants with ten or more employees. See Alameda, Cal., Ordinance 3201, § 6-59.5(m) (Nov. 21, 2017); Los Angeles, Cal., Mun. Code ch. X, art. 4, § 104.11(l); San Francisco, Cal., Police Code art. 16, § 1609(b)(12). On their face, these apply whether or not an applicant leases government property or interacts with government as a market participant; applicants simply operate their businesses in the city, which is acting as business licensor.

States have enacted similar state-wide requirements. Like San Francisco and Los Angeles, the State of California requires labor-peace agreements for cannabis license applicants with twenty or more employees. Cal. Bus. & Prof. Code § 26051.5(a)(1)(E)(5)(A). Maryland requires video lottery terminal licensees to enter into a "labor peace agreement with each labor organization that is actively engaged in representing or attempting to represent video lottery and hospitality industry workers in the State." Md. Code Ann., State Gov't § 9-1A-07(c)(7)(v)(1). New York has an analogous requirement for its gaming licensees, N.Y. Racing,

Pari-Mutuel Wagering & Breeding Law § 1346(2), and also requires labor-peace agreements for contracts relating to hotel and convention centers where there is a state ownership or financial interest, N.Y. Pub. Auth. Law § 2879-b(1)(d).

The number of jurisdictions with these requirements is only increasing. Millions of residents and businesses reside in these jurisdictions, and they are critically important to the national economy. Moreover, the decision below has outsized practical significance because the Ninth Circuit embraces many of these jurisdictions, including California. See *Labor Peace Agreements* at 13-15.

B. The Ninth Circuit's Incorrect Application of the Market-Participation Exception Could Undermine a Host of Preemptive Federal Regulatory Regimes

This case involves the intersection of two areas of law in which Congress has chosen to expressly preempt a wide range of state and local regulation: labor and air service. The Ninth Circuit's overly expansive conception of the market-participation exception could undermine the careful balance Congress has struck not only in these preemptive regimes, but in a number of others. See Pet. 24-27.

Labor Relations. This case itself shows how the Ninth Circuit's decision will undermine federal regulation of labor relations. "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Brown*, 554 U.S. at 65 (quoting *Lodge 76, Int'l Ass'n Machinists* v. *Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 n.4 (1976) (*Machinsts*)). The Na-

tional Labor Relations Act "largely displaced state regulation of industrial relations." *Gould*, 475 U.S. at 286. Congress's goal 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) (quoting *Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485, 490 (1953)). Similarly, for certain industries (including railroads and airlines) Congress sought to "avoid any interruption to commerce or to the operation of any carrier engaged therein" by establishing a centralized, "mandatory system of dispute resolution" in the Railway Labor Act. *Aircraft Serv. Int'l, Inc.* v. *Int'l Bhd. of Teamsters, Local 117*, 779 F.3d 1069, 1073 (9th Cir. 2015) (citing 45 U.S.C. 151a).

This Court has recognized a pair of preemption doctrines to protect this balance struck by Congress. Preemption under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), "preclude[s] state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA," *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 613 (1986). Preemption under *Machinists*, 427 U.S. 132, "forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces," *Brown*, 554 U.S. at 65 (quoting *Machinists*, 427 U.S. at 140) (internal quotation marks omitted). Thus, for example, this Court held preempted a California law that prohibited certain employers receiving state funds

from using those funds "to assist, promote, or deter union organizing." *Brown*, 554 U.S. at 62, 69-76.

The Ninth Circuit's approach here opens a gaping hole in these preemption doctrines. Nothing about its rationale is limited to service providers at airports; a city that believes a labor-peace requirement (or any other labor practice) fosters a more commercially hospitable environment could fashion a requirement like Los Angeles did here. That conception of the market-participation exception is virtually limitless. The court's analysis turned on its belief that Los Angeles participates in a "market" for airport services: "If the City operates the airport poorly, fewer passengers will choose to fly into and out of LAX, [and] fewer airlines will operate from LAX." Pet. App. 11a. But nearly everything state and local governments do constitutes "market participation" in that sense: all jurisdictions can be said to compete in the marketplace to attract residents, businesses, talent, and investment in the same way they do airline passengers. See, *e.g.*, Mark Strassmann, *Amazon HQ2: 20 Finalists Competing to Host New Headquarters*, CBS News (Jan. 18, 2018, 6:40 PM).[3] Permitting state and local regulations of this sort is the logical endpoint of the Ninth Circuit's approach, yet that result is entirely at odds with this Court's decades-long understanding of the preemptive scope of federal labor law.

Transportation. Congress has adopted broad deregulatory regimes governing various modes of transportation. In these areas, Congress has made an affirmative policy choice to rely on competitive market

---

[3] https://www.cbsnews.com/news/amazon-hq2-20-finalists-competing-to-host-new-headquarters/.

forces, preempting state and local regulation. The Ninth Circuit's approach allows clever jurisdictions to end-run that federal policy in the name of market participation.

In particular, in enacting the Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, Congress decided that " 'maximum reliance on competitive market forces' would best further '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) (quoting 49 U.S.C. App. 1302(a)(4), 1302(a)(9)). Congress expressly prohibited States from "enforcing any law 'relating to rates, routes, or services' of any air carrier" in order to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378-379 (quoting 49 U.S.C. App. 1305(a)(1)). Thus, for example, this Court has held that the ADA preempts a passenger's claim that an airline's operation of its frequent-flyer program breaches the implied covenant of good faith and fair dealing under state common law. *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1433 (2014).

Similarly, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, and the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1569, generally leave rail transportation and motor carrier transportation, respectively, to market forces, not local regulation. Congress vested the federal Surface Transportation Board with exclusive authority over "transportation by rail carriers," including "with respect to rates, classifications, rules . . . practices, routes, services, and facilities." 49 U.S.C. 10501(b)(1). And Congress preempted regulation "re-

lated to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) (quoting 49 U.S.C. 14501(c)). Thus, this Court held Section 14501(c) to preempt a law regulating the delivery of tobacco products within a state. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

In the context of maritime commerce, Congress created a preemptive regime requiring the Coast Guard to promulgate "regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels. 46 U.S.C. 3703(a). This Court has held that this statute preempted Washington State regulations for oil tanker operation and design adopted in the wake of the *Exxon Valdez* oil spill. *United States* v. *Locke*, 529 U.S. 89, 94 (2000).

The Ninth Circuit's reasoning could significantly undermine all of these regimes. For example, the Port of Seattle could impose by contractual demand what Washington was unable to accomplish by statute, as the Port could claim under the decision below that otherwise-preempted regulations would further its ownership interest in the safety and environmental conditions of its facilities. Or, if Los Angeles's proprietary interest in operating LAX in an efficient manner allows the City to require service providers to enter into labor-peace agreements, then why could the City not also require service providers to (for example) give discounts to airlines with superior on-time performance?

At a bare minimum, just as the City could require labor-peace agreements at LAX, other state and local governments could adopt similar requirements for airports, ports, and other facilities they own or control. The extent of such control is substantial—nearly 98 percent of the airports identified by the FAA as "important to national air transportation" are publicly owned; only 77 of the 3,332 existing domestic airports identified are private. Fed. Aviation Admin., U.S. Dep't of Trans., Report to Congress, National Plan of Integrated Airport Systems (NPIAS) 2017-2021, at v, 2-3 (2016).[4] Governments also have unique control or ownership interests in other channels and instrumentalities of interstate commerce, such as ports. *E.g.*, Bureau of Transp. Statistics, U.S. Dep't of Transp., Port Performance Freight Statistics, Annual Report to Congress 2-2 (2017) ("Most ports are governed by port authorities or harbor districts, which are usually part of local or state government.").

Clean Air Act. The Ninth Circuit's decision could also undermine federal regulation of emissions. As part of amendments to the Clean Air Act, Congress implemented a national regime for new vehicle emission standards. *E.g.*, *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citing 42 U.S.C. 7543(a)). In *Engine Manufacturers*, this Court considered California's South Coast Air Quality Management District's rules setting emission standards for vehicles purchased or leased by public and private fleet operators. *Id.* at 248-249. The Court indicated that some rules appeared to be preempted by

---

[4] https://www.faa.gov/airports/planning_capacity/npias/reports/media/NPIAS-Report-2017-2021-Narrative.pdf.

the Clean Air Act, such as a rule for private airport-shuttle operators, but others might not be, such as those governing internal state procurement decisions (which could be insulated from preemption on a market-participation rationale). *Id.* at 258-259.

Under the City's reasoning, improved air quality at the Airport could be beneficial to passengers and employees, attracting more business to LAX and thereby advancing the City's ownership and financial interests. Thus, the City could try to accomplish what this Court recognized the air district could *not*: require precisely the same airport-shuttle operators at LAX to purchase vehicles satisfying precisely the same emissions standards. But that is not the way preemption works—state and local governments may not "evade the pre-emptive force of federal law by resorting to creative" mechanisms like Los Angeles has sought to do here. *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013).

ERISA. Federal courts have also recognized a market-participation exception to preemption under the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. See, *e.g.*, *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 180 F.3d 686, 692 (5th Cir. 1999). Accordingly, a municipality may not, for example, refuse to contract with a company because of a policy-based disagreement with the way in which the company structures its employee benefits. *Air Transp. Ass'n of Am.* v. *City & Cty. of S.F.*, 992 F. Supp. 1149, 1179 (N.D. Cal. 1998). The Ninth Circuit's approach here threatens to disrupt this area of federal preemption as well: Many state and local governments could be expected to assert a proprietary interest in ensuring that their contractors have

satisfied, productive employees with generous benefits structured in the way the government prefers.

II. The Decision Below Is Incorrect

A. The Ninth Circuit Has Misapplied This Court's Decisions and Misconceived the Market-Participation Exception

1. This Court's decisions make clear that the application of the market-participation exception turns on whether the government acts to further a proprietary interest it shares with similarly situated private participants in the relevant market, or instead to further its regulatory or policy interests. See, *e.g.*, *Am. Trucking*, 569 U.S. at 651 ("The Port here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic."); *Gould*, 475 U.S. at 289 ("[B]y flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services;' for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." (citation omitted)).

Determining whether the market-participation exception applies involves a two-part inquiry. First, the government must actually *participate* in the relevant market by buying or selling goods or services. See Pet. 14-16; *Am. Trucking*, 569 U.S. at 650 ("When a State acts as a purchaser of services, 'it does not "regulate" the workings of the market . . . ; it exemplifies them.' " (quoting *Boston Harbor*, 507 U.S. at 233)); *Gould*, 475 U.S. at 289 (a state must "function[] as a private purchaser of services"); *Cardinal Towing*, 180 F.3d at 693 (asking whether "the challenged action essentially

reflect[s] the entity's own interest in its efficient procurement of needed goods and services").

Second, the government must participate in a manner comparable to that of similarly situated private parties. Otherwise, there is a strong "inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693; see Pet. 27-28; *Am. Trucking*, 569 U.S. at 651 (a state must act "just as a private company might," *i.e.*, "contracting in a way that the owner of an ordinary commercial enterprise could mimic"); *Boston Harbor*, 507 U.S. at 229 (conduct is regulatory if it is "on the basis of a labor policy concern rather than a profit motive"); *Gould*, 475 U.S. at 290.

The goal of this two-part inquiry is "to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Cardinal Towing*, 180 F.3d at 693. For example, in *Gould*, this Court invalidated a Wisconsin policy under which the State refused to contract with persons or firms that had repeatedly violated the NLRA. 475 U.S. at 283-284. Recognizing that Wisconsin sought to deploy its state procurement policies to enforce federal labor law, the Court unanimously concluded that "Wisconsin 'simply [wa]s not functioning as a private purchaser of services,' [and] for all practical purposes, Wisconsin's debarment scheme [wa]s tantamount to regulation." *Id.* at 289. Thus, even where a government clearly participates in a market, the market-participation exception does not shield that activity from preemption if its function is to advance a regulatory policy, as opposed to achieve the

sort of economic efficiency exhibited by similarly situated profit-motivated private actors.

By contrast, in *Boston Harbor*, this Court approved the challenged government procurement policy—a prehire collective-bargaining agreement that would bind successful contract bidders—precisely because it *was* in keeping with how similarly situated private parties might act. There, the Massachusetts Water Resources Authority (MWRA) was under a court order to clean up pollution in Boston Harbor. 507 U.S. at 220-221. The order specifically "required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes." *Id.* at 221. Key to the Court's reasoning was the fact that Congress had specifically amended the NLRA to "permit[] employers in the construction industry—but no other employers—to enter into prehire agreements." *Id.* at 230. Accordingly, "[t]here [wa]s no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost . . . [and] the challenged action . . . was specifically tailored to one particular job, the Boston Harbor cleanup project." *Id.* at 232. The Court contrasted this situation with a hypothetical one in which a government structured its purchasing decisions "on the basis of a labor policy concern rather than a profit motive," which the Court emphasized *would* be preempted, because the government would be "perform[ing] a role that is characteristically a governmental rather than a private role." *Id.* at 229.

Likewise, in the context of the Dormant Commerce Clause, a plurality of this Court refused to apply the market-participation exception to Alaska's sale of timber where "[t]he notice of sale, the prospectus, and the

proposed contract for sale all provided . . . that 'primary manufacture within the State of Alaska . . . be required as a special provision of the contract.' " *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 84 (1984).[5] The plurality emphasized that although Alaska was acting as a seller of timber, it was seeking to "leverage" such sales "to exert a regulatory effect in the processing market, in which it [wa]s not a participant." *Id.* at 98. "Instead of merely choosing its own trading partners," Alaska was "attempting to govern the private, separate economic relationships of its trading partners." *Id.* at 99. No private party would have behaved in the same way—because none would share Alaska's policy-based interest in promoting Alaska timber production.

2. The Ninth Circuit's decision cannot be squared with these cases. By essentially ending its inquiry upon concluding that the City participates in *some* market, the Ninth Circuit ignored overwhelming signs the City acted "on the basis of a labor policy concern rather than a profit motive." *Boston Harbor*, 507 U.S. at 229.

To begin with, the Ninth Circuit's reasoning fails to recognize that the market-participation exception generally allows the government to influence only the market *in which it participates*. That is not the case here. Rather, much as in *Wunnicke*, where Alaska was

---

[5] Courts have recognized that the scope of the market-participation exception is the same in the preemption and Dormant Commerce Clause settings. See, *e.g.*, *Associated Builders & Contractors, Inc.* v. *Jersey City*, 836 F.3d 412, 417 (3d Cir. 2016); *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir. 2007).

"using its leverage in th[e raw timber] market to exert a regulatory effect in the processing market," 467 U.S. at 84, the City is using its position as airport operator to control its licensees' independent interactions with third parties (*viz.*, the licensees' employees), in a market for airport labor in which the City generally does not participate. The policy similarly removes a degree of bargaining freedom that licensees would otherwise enjoy in the labor market. And, unlike in *Boston Harbor*, there is no particular authorization for these agreements in the NLRA, nor is the City the ultimate purchaser of the services governed by the challenged labor agreements. See 507 U.S. at 231 (applying the market-participation exception because the state agency was "purchasing contracting services"). "[T]he market-participant doctrine . . . allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further." *Wunnicke*, 467 U.S. at 97. The Ninth Circuit's opinion allows state and local governments to go much, much further.

Indeed, the Ninth Circuit's conception of what it means to participate in a market is virtually limitless. The City's participation in the "market" to attract airline passengers and airlines to LAX is qualitatively different from a government's role in, say, purchasing cars or computers for state employees to use at work. Instead, it is akin to the kind of regulatory, policy-based competition governments engage in routinely to attract businesses and talent. See *supra* at 9. This Court has never suggested the market-participation exception can reach so far, and for good reason—such an exception would swallow up the preemptive rules laid down by Congress.

It is no answer to suggest, as the Ninth Circuit did, that "[i]f a private entity operated LAX, that entity would have a pressing interest in avoiding strikes, picket lines, boycotts, and work stoppages." Pet. App. 10a. As the dissent below noted, no evidence suggests that similarly situated private parties advance this interest by requiring labor-peace agreements. See Pet. App. 32a. And the fact that the City (and like-minded jurisdictions) also require labor-peace agreements in many different contexts, from hotels to cannabis dispensaries, shows that the City's asserted proprietary interest is a mere cloak for the City's preferred labor policy, not an economic judgment rooted in the City's proprietary interest in airport management. See *Metropolitan Milwaukee Ass'n of Commerce* v. *Milwaukee Cty.*, 431 F.3d 277, 279 (7th Cir. 2005) (noting that the principle of *Gould* is that "the spending power may not be used as a pretext for regulating labor relations").

The Ninth Circuit expressly discounted this part of the analysis, concluding that a government entity "may entertain non-economic purposes and yet rely on the market participant doctrine" and that "lurking political motives are an inevitable part of a public body's actions and are not 'a reason for invalidity.' " Pet. App. 17a-18a. That reasoning directly contradicts this Court's decisions. A government entity must "function[] as a private purchaser of services," *Gould*, 475 U.S. at 289, and "act[] as a 'market participant *with no interest in setting policy*,' " in order to "not offend the pre-emption principles of the NLRA," *Brown*, 554 U.S. at 70 (emphasis added). Indeed, the regulatory purpose behind Wisconsin's procurement policy is precisely why *Gould* concluded that policy was preempted. The Ninth Circuit ignored that, as a gov-

ernment entity, the City is "different from private parties and ha[s] a different role to play." *Gould*, 475 U.S. at 290.

B. The City's Asserted Proprietary Interest Is a Pretext for Advancing Union-Favored Public Policy

The larger context of this case and the prevalence of labor-peace agreement requirements reveal that the City is using a purported interest in avoiding airport service disruptions as a pretext for furthering its regulatory ends. Again, the question here is not the *wisdom* of those regulatory ends, but simply whether they are rooted in the City's public policies or in its private ownership interests.

In contrast to *Boston Harbor*, Los Angeles's policy here is not "specifically tailored to one particular job," 507 U.S. at 232, or to one specific vendor or class of vendors with a close nexus to potential service disruptions. Rather, the City has a blanket policy for all LAX licensees—and that is only part of a larger policy program favoring labor-peace agreements and requiring them in other contexts as well. Such a broad, untailored policy is necessarily regulatory: Los Angeles requires labor-peace agreements by policy where it has the political leverage to do so, not to further its ostensible proprietary interests in the airport-services market.

For example, Los Angeles also requires labor-peace agreements from cannabis license applicants. Los Angeles, Cal., Mun. Code ch. X, art. 4, § 104.11(l). Applicants simply seek to operate their businesses within Los Angeles, and the City is acting as business licensor with no proprietary interest. The City also

requires labor-peace agreements for commercial and multifamily waste collection franchisees, Los Angeles, Cal., Mun. Code ch. VI, art. 6, § 66.33.6, as well as for hotel operators with leases from the City, Los Angeles, Cal., Admin. Code div. 7, ch. 3, art. 4, § 7.202. These diverse requirements can only be understood as a policy decision of broad application, belying any claim that the labor-peace requirement at LAX was tailored to interests particular to the Airport, or aligns with how profit-motivated private parties act.

Moreover, the City is not alone. As explained above, *supra* at 4-7, such policies have spread across the Nation, taking firmest root in jurisdictions in which unions are politically influential. The most natural inference from this strong correlation is that labor-peace requirements are a matter of political interest, not commercial calculation. Conversely, some States have prohibited their municipalities from enacting such requirements, further confirming the regulatory nature of these policies. See *Labor Peace Agreements* at 11-12; see La. Rev. Stat. § 23:984(b); Ga. Code Ann. § 34-6-21(c); Tenn. Code Ann. § 50-1-207(c)-(d).

Amici know of no evidence that private parties rely on labor-peace requirements in similar circumstances. These requirements thus stand in contrast to the prehire agreements approved in *Boston Harbor*, which are both recognized by the NLRA and a tested tool of private, profit-motivated parties. 507 U.S. at 231, 233.

There are, moreover, far more logical ways to advance the City's stated interest in avoiding service disruptions. For instance, it could rely on traditional contract remedies, such as damages or contract termination when service disruptions genuinely affect the

Airport. *Cf. Am. Trucking*, 569 U.S. at 650-651 (rejecting application of the market-participation exception where Los Angeles port regulations were not limited to ordinary contract remedies). That approach would abundantly serve Congress's deregulatory purposes by leaving the Airport's licensees—the true market participants—free to decide for themselves how best to minimize their liability for potential disruptions. And some might opt to enter labor-peace agreements. But any such agreement would be the product of genuine market forces, not the dictate of a blanket city policy.

III. The Courts of Appeals Are Split on the Question Presented

The Ninth Circuit's decision conflicts with decisions of the Third, Fifth, Sixth, Seventh, and D.C. Circuits. See Pet. 20-24.

The conflict with the Seventh Circuit's decision in *Metropolitan Milwaukee* is most direct, as both concern labor-peace agreements. The Seventh Circuit considered a labor-peace requirement for firms providing transportation services for elderly and disabled residents under contract with the County. *Metropolitan Milwaukee*, 431 F.3d at 278. The court held the market-participation exception inapplicable because, unlike the agreements in *Boston Harbor*, there was "no similar showing that labor-peace agreements are 'tried and true' " and the county pointed to no example of a comparable policy imposed by a similarly situated private party. *Id.* at 282. Moreover, "the existence of effective *contractual* remedies for service interruptions eliminates the need for states or their subdivisions to create a special regime for the labor relations of their contractors." *Id.* at 281. The court found the inference

"inescapable" that the County was motivated by "dissatisfaction with the balance that the National Labor Relations Act strikes between unions and management rather than concern with service interruptions." *Id.*

Similarly, in *Cardinal Towing*, the Fifth Circuit applied the market-participation exception to a contract for non-consensual towing services requested by the city. *Cardinal Towing*, 180 F.3d at 689. The court distinguished this policy from "[l]icensing schemes [which] do not invite proprietary analysis." *Id.* at 693 n.2. The Third, Sixth, and D.C. Circuits have likewise emphasized that the exception applies only where the government actually participates in the market and behaves as a profit-motivated private party would. See *Associated Builders & Contractors*, 836 F.3d at 420 (holding the exception inapplicable to a policy requiring labor agreements for developers to receive tax and other incentives because the city was "not selling or providing any goods or services . . ., nor acting as an investor, owner, or financier with respect to those projects"); *Michigan Bldg. & Constr. Trades Council* v. *Snyder*, 729 F.3d 572, 579 (6th Cir. 2013) (applying the exception to a procurement law prohibiting contracts from requiring labor agreements because the state was acting "[j]ust as a private purchaser [in] choos[ing] not to enter into PLAs"); *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1336-37 (D.C. Cir. 1996) (invalidating an executive order barring the federal government from contracting with employers that hire permanent replacement employees during a lawful strike because "[i]t does not seem to us possible to deny that the [order] seeks to set a broad policy," for private contractors would not "care whether a struck supplier hired permanent or temporary replacements").

The Ninth Circuit's decision cannot be squared with these decisions, all of which—unlike the decision below—reflect a faithful application of this Court's precedents. Review is warranted to resolve that conflict and reaffirm the proper, limited scope of the market-participation exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

BENJAMIN J. HORWICH
Counsel of Record
JOSHUA PATASHNIK
GIOVANNI SAARMAN GONZÁLEZ
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
ben.horwich@mto.com
(415) 512-4000

MARCH 26, 2018