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

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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INTRODUCTION

The United States agrees with Petitioners that the Ninth Circuit has (again) misunderstood the market-participant doctrine; that Los Angeles' repeated abuse of that doctrine has exceptionally important consequences; and that the issue warrants this Court's attention, as in previous cases involving the City. The Government thus makes a compelling case for certiorari—only to swerve at the end of its brief and recommend the softest of soft denials. The United States' sole reason for that recommendation, frankly, makes no sense.

"[T]he United States is concerned" that the Ninth Circuit's decision:

- "[M]isframed the test for the NLRA's market-participation exception." U.S. Br. 23.
- Has troubling implications—"both here and in other cases"—because it allows "state and local governments to escape preemption of what are regulatory measures." *Id.*
- Allows local governments to evade preemption of "virtually *any* regulation of labor relations" at airports and other public facilities, which *always* "could be reframed as a proprietary measure" to avoid service disruptions. *Id.* (emphasis added).
- Raises "particularly acute" concerns because Los Angeles is a recidivist that "continues to take an unduly expansive view of the market-participation exception," *id.*, even

after this Court's unanimous decision against it in *American Trucking Associations v. City of Los Angeles*, 569 U.S. 641, 648-652 (2013) (*ATA*).

- Involves an issue that is "no less important now than it was in *ATA*," where "the Court granted review in the absence of a circuit conflict"—and over the United States' recommendation to deny certiorari. U.S. Br. 23.

Despite all that, the United States cannot bring itself to recommend certiorari. Why not? Because "[i]t is not clear" that Petitioners make the same argument as the Government for why the Ninth Circuit is mistaken, so it is "uncertain that this case will provide an appropriate opportunity for the Court to resolve broader questions about the proper test for the market-participant exception." *Id.*

The only thing that "is not clear" is why the Government thinks there is a problem. Petitioners principally advocate a bright-line rule limiting the market-participant exception to the procurement of goods or services. The United States—while considering procurement a quintessential case for the exception—would also allow it to apply in other limited circumstances, based on "close[] scrutiny to ensure that [local government action] fairly serves proprietary, rather than regulatory, interests." *Id.* at 19. But those circumstances are absent here. So whether or not the market-participant doctrine can theoretically apply in other narrow circumstances, it does not apply in this case, because the labor-

peace rule at LAX is not "necessary or tailored" to any proprietary or financial interest. *Id.* at 22.

The United States' objection—that it urges a potentially broader market-participant exception than Petitioners prefer—is no basis to deny certiorari. The Court has often granted review to consider a petitioner's proposed bright-line rule, and the United States as amicus has urged a more flexible standard while agreeing with the petitioner's bottom line. So too here. The Court can definitively clarify this area of the law by adopting a bright-line rule, or it can stop short of that categorical pronouncement and adopt the Government's preferred approach. Either way, granting review would give the Court every "appropriate opportunity" to consider the right test.

I. THIS CASE PROVIDES AMPLE OPPORTUNITY TO CONSIDER THE PROPER TEST FOR THE MARKET-PARTICIPANT EXCEPTION

The United States makes the case for granting certiorari: The Ninth Circuit has—once again—misconstrued the market-participant doctrine. Its decision allows local governments to evade preemption of "virtually any regulation of labor relations" at airports. U.S. Br. 23. The issue is important enough to warrant review even if there is no "circuit conflict." *Id.* And Los Angeles is a repeat offender that continues to exploit an "unduly expansive view of the market-participant exception" to undermine federal preemption. *Id.*; *see also* Pet. 13. In the face of all that, the United

States' reason for denying review does not hold water.

A. The Government says that it is "not clear" whether Petitioners "challenge the decision below except for its failure to impose a procuring-goods-or-services limitation on the market-participant exception." U.S. Br. 23. According to the United States, therefore, it is "uncertain" that the Court would have an "appropriate opportunity" to "resolve broader questions about the proper test for the market-participant exception" in this case. *Id.*

This case provides ample opportunity to consider the proper test. The Question Presented is: "Does the 'market participant' exception allow a state or local government to impose an otherwise-preempted rule on private companies even if the government is not procuring any good or service from them?"

Petitioners argue for a categorical "no." We advocate a bright-line rule that would limit the exception to the procurement context. The United States answers with a qualified "no." It says that if a local government is not procuring goods or services, then it cannot impose otherwise-preempted rules on third parties unless particularly "close[] scrutiny" shows that doing so is "necessary or tailored to serve [its] own proprietary and financial interests." U.S. Br. 19, 22. It then spends several pages explaining the City's many problems in satisfying that more flexible test. *Id.* at 20-23. The only difference between Petitioners and the United States is thus that the Government prefers to leave open the possibility that the

exception could still apply, absent procurement, in a *different* case.

Nothing prevents the Court from considering the United States' position. This Court often grants review to consider a bright-line rule but chooses to adopt a more flexible standard. *See, e.g., Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018) (petitioner argued for bright-line rule that "the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control," but Court treated possession and control as merely relevant factors); *Madison v. Alabama*, 139 S. Ct. 718, 727-28 (2019) (petitioner argued for bright-line "rule" prohibiting death penalty when defendant could not remember crime, but Court treated memory loss as a non-dispositive "factor"); *Nieves v. Bartlett*, No. 17-1174, 2019 WL 2257157, at *9 (U.S. May 28, 2019) (petitioner argued for bright-line rule that probable cause always defeats retaliatory-arrest claims, but Court recognized a "narrow qualification . . . for circumstances where officers have probable cause . . . but typically exercise their discretion not to [arrest]").

The United States often files amicus briefs urging the Court to do just that. *See, e.g.*, *NIFLA v. Becerra*, Br. of the United States as Amicus Curiae, 2018 WL 461222, at 18 (U.S. Jan. 16, 2018) (rejecting the parties' "broad arguments" and advocating a standard that "depends on the context"); *Impression Prod., Inc. v. Lexmark Int'l, Inc.*, Br. of the United States as Amicus Curiae, 2017 WL 371923, at 22 (U.S. Jan 24, 2017) (arguing that "[n]either of [the parties'] positions is correct,"

and advocating an "intermediate approach" that "balances" competing interests). And sometimes the United States even rephrases the question presented to reflect its argument. Indeed, in *ATA*, the Court granted certiorari on a question presented that tied the market-participant exception to Los Angeles' "efficient procurement of services" (133 S. Ct. at 928; 2011 WL 6780156, at *i), and the United States' amicus brief rephrased the question to account for its slightly broader view of the exception. *See* 2013 WL 683042, at *i.

Finally, though it is unnecessary, the Court itself could rephrase the Question Presented, as it has done in at least seven recent cases.[1] Just within the last few months, the United States has repeatedly urged the Court to do that. *See, e.g., Opati v. Republic of Sudan*, Br. of the United States as Amicus Curiae, 2019 WL 2226024, at 20 (U.S. May 21, 2019) (where the petitioners' question presented asked only whether a federal cause of action authorizes punitive damages, suggesting that the Court "may wish to rephrase the second question presented to encompass the availability of punitive damages under both federal and state causes of action"); *Thole v. U.S. Bank*, Br. for the United States as Amicus Curiae, 2019 WL

[1] *See R.G. & G.R. Harris Funeral Homes v. EEOC*, et al., No. 18-107; *Kansas v. Garcia*, No. 17-834; *Va. House of Delegates v. Golden Bethune-Hill*, No. 18-281; *PDR Network, LLC, v. Carlton & Harris Chiropractic*, No. 17-1705; *Dawson v. Steager*, No. 17-419; *Bucklew v. Precythe*, No. 17-8151; *NIFLA v. Becerra*, No. 16-1140.

2209252, at 1 (U.S. May 21, 2019) ("The Court also may wish to direct the parties to brief an additional question as described herein."); *Kansas v. Garcia*, 2018 WL 6382966, at 8 (U.S. Dec. 4, 2018) ("The Court may wish to add a question addressing implied preemption . . . .").

B. The United States' "uncertain[ty]" that this case will allow the Court to consider the full range of options is particularly baffling because the Government's arguments straddle those of the parties. There is thus no doubt that its position is fair game for the Court to consider. The United States and Respondents agree on one limited point: the market-participant exception should not be strictly limited to procurement. And in analyzing whether Respondents could have a valid "proprietary" interest to justify the labor-peace rule, the United States makes many of the same arguments as Petitioners.

For example, the United States argues that the labor-peace rule does not primarily benefit the economic interests of the City itself; instead, the "most direct beneficiaries" of the rule are "the labor organizations that may request [a labor-peace] agreement." U.S. Br. 21. And even taking at face value Respondents' argument that the rule benefits "airlines and their passengers," the City is not advancing its *own* proprietary interests. *Id.* This tracks Petitioners' argument that the City is regulating because it is not doing business with the affected parties, but is "using licensure requirements to impose labor rules on private companies that do business among themselves at

the airport." Pet. 17. In other words, far from acting like a private market participant, the City is "maintain[ing] the public space where passengers, airlines, and related companies do business among themselves." Pet'r Reply 5. In doing so, it is "coerci[ng]" service providers to give in to the demands of labor unions. Pet. 6. No wonder unions "'advocated for inclusion of section 25' in the LAX licensure rules." *Id.* (quoting Pet. App. 3a).

The Government likewise argues that "LAX is not an ordinary commercial enterprise in an open market, just as the port in *ATA* was not"; instead, it is "more akin to publicly managed transportation infrastructure." U.S. Br. 22. This mirrors Petitioners' argument that the City cannot be a market actor when it "set[s] rules to govern how companies are permitted to operate at a public airport." Pet. 17. Indeed, there is no "'market' in public airports, any more than there is a 'market' in competing cities," because they "are sovereign entities, not market competitors." Pet'r Reply 5.

The United States is also on the same page as Petitioners in arguing that the Court should consider whether LAX's labor-peace rule is backed by enforcement "mechanisms that are not available to private parties." U.S. Br. 19. Petitioners have similarly argued that "the power to exclude airline-service companies from a major international airport such as LAX is also uniquely available to sovereign governments." Pet'r Reply 6. For that reason, the City's "power to impose the labor rules at [LAX] comes not from its *commercial* role . . . but from its *governmental* role as the sovereign

authority that owns and controls the second largest airport in the United States." *Id*. at 5.

Finally, the United States tracks Petitioners in explaining that Respondents' argument would "prove too much" by exempting "virtually any regulation of labor relations" from federal preemption. U.S. Br. 23. Petitioners made the same point: the decision below would "dramatically undermine federal preemption across a wide range of areas," and "obliterate the preemptive force of federal labor law in any situation where a state or local government can claim that it needs to impose labor rules on private companies to avoid 'service disruptions' in some facility or enterprise that the government owns or operates." Pet. 25-26.

The arguments of the parties fully encompass the points made by the United States. In Petitioners' view, the arguments above support cabining the market-participant exception to the procurement context. In the United States' view, the exception may apply more broadly in some other case, but almost certainly not here. And Respondents, for their part, argue that the labor-peace rule is proprietary, not regulatory. This case thus provides every "opportunity" for the Court to resolve "[t]he proper test for the market-participant exception." U.S. Br. 23.

* * * * *

The United States agrees that the Ninth Circuit's test for market participation is wrong and that the issue is "acute[ly]" important. U.S. Br. 23. The issue is significant enough—for both this case

and others—to justify granting certiorari even "in the absence of a circuit conflict." U.S. Br. 23. That is what the Court did in *ATA*, the last time the Ninth Circuit rubber-stamped Los Angeles' attempt to evade preemption under the guise of market participation. And the Court granted certiorari there despite the contrary recommendation of the United States. The issue is "no less important now than it was in *ATA*." *Id.* Here, the United States gives every reason to grant certiorari, and no credible reason not to, because the proper understanding of the market-participant doctrine is teed up for this Court's decision. The Court should grant review.

II. ON THE MERITS, THE DIFFERENCES BETWEEN THE POSITIONS OF PETITIONERS AND THE UNITED STATES ARE IMMATERIAL

As for the merits, there is little practical difference between Petitioners and the United States. The United States says that procurement is one of three categories where the market-participant exception should "typically" apply. U.S. Br. 19. In its view, the exception may also apply when a government "appropriately conditions the expenditure of governmental funds," or "manages access to or use of governmental property." *Id*. To begin with, the United States is incorrect to claim that this Court has ever "applied the market-participant exception under the NLRA where governments have not procured goods and services." *Id*. at 12. Petitioners are aware of no such case, and the United States does not cite one.

Perhaps that is because, with the possible exception of a few marginal hypotheticals, the Government's two additional categories are not different categories at all—they are subsumed within Petitioners' procurement rule.

A. "[A]ppropriate" government funding conditions are almost always the same thing as conditions on procurement. As Petitioners explained (Pet. 19; Pet'r Reply 3-4), in *Boston Harbor* the reason the City could impose labor rules that would otherwise be preempted was that the City, in funding a construction and clean-up project, acted as a "*purchaser* of construction services" 507 U.S. 218, 233 (1993) (emphasis added) (quoting then-Chief-Judge Breyer). So too in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). There, City-funded construction projects had to be "performed by a work force consisting of at least half *bona fide* residents of Boston." *Id.* at 205-06. In setting those labor rules, the City was a "market participant" because it acted as a purchaser of services to complete "public projects." *Id.* at 215. Likewise, in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality*, the City used its "spending or procurement power" to act as a "partner" in procuring "urban redevelopment" services. 390 F.3d 206, 214 (3d Cir. 2004). And in *Building & Construction Trades Department v. Allbaugh*, the Government used its power under "the Procurement Act" to fund certain construction projects, including the "the Woodrow Wilson Bridge." 295 F.3d 28, 31 (D.C. Cir. 2002).

All of these examples fall within Petitioners' procurement rule. In each case, the market-participant exception applied because a state or local government acted as a *purchaser* of services by *funding* projects.

B. As to the second category, the United States does not identify a single real case (until the decision below) in which "managing access to government property" qualified for the market-participant exception. And the hypotheticals it imagines would not implicate the Question Presented anyway because they would not be preempted.

As its lead example, the United States says that the Government may "restrict[ ] the type of employees who may be employed by a cafeteria business operating within a military base." U.S. Br. 20. The United States cites *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961), but that case had nothing to do with market participation. The Court simply noted the Government's role as "proprietor" of the military base to explain why it had unquestioned authority to exclude unauthorized personnel for security reasons. *Id.* at 893-94. And even if the Government restricted such employees for other reasons, it is not clear why the Question Presented here would come into play, because the United States does not explain what federal law would preempt regulation of food-service employment on a military base.

Likewise, the United States says that "the Government may restrict the type of employees whom businesses hire in order to ensure safe and

secure operations" at public facilities. U.S. Br. 20. True enough, but not because such hiring rules are always market-participant activity. They simply are not preempted by any federal law. By contrast, if Congress *did* preempt hiring rules that companies must follow to ensure safety at public facilities, a local government could not nullify Congress' choice by characterizing its restrictions as "conditions of access" to its property.

In any event, even if "managing access to government property" could theoretically justify the market-participant exception in another case, it is not worth sacrificing the clarity of a bright-line rule for that rare hypothetical. And even if it were, that is no reason to deny review here. Petitioners agree with the reasons articulated by the United States that the labor-peace rule is regulatory even under a "managing access" rationale. Nothing would prevent this Court from reaching that conclusion if it stops short of a bright-line rule.

CONCLUSION

The Court should grant certiorari.

JUNE 4, 2019

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