No. 17-1183

IN THE
Supreme Court of the United States

AIRLINE SERVICE PROVIDERS ASSOCIATION *et al.*,
Petitioners,

v.

LOS ANGELES WORLD AIRPORTS *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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 goods or services from them?

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation, Inc.,[1] is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate for protecting workers against laws that illegally compel unionization and inhibit workers' free choice.

Currently, Foundation staff attorneys represent workers in more than 175 federal, state, and administrative cases involving compelled unionism, and have frequently represented individual workers in cases that have come before this Court. *E.g.*, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Janus v. AFSCME*, No. 16-1466 (U.S. pending).

The Foundation submits this brief because the Ninth Circuit's expansion of the market participant exception threatens to impinge on workers' rights to refrain from unionization under the National Labor Relations Act ("NLRA").

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received notice, at least ten days prior to the due date, of the Foundation's intention to file this brief. Both parties consented to the filing of its brief. Pursuant to Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Foundation made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an issue of national importance for thousands of workers across the nation: whether a state or local government, under the guise of market participation, may ignore the NLRA and implement a state regulation that impinges on workers' federally protected rights. The Court should take this case and answer "no" to that question.

The City of Los Angeles is forcing employers, including nonunion employers, to enter into so-called Labor Peace Agreements ("LPA") with unions to perform work at the Los Angeles International Airport ("LAX"). The agreement must require that the union not engage in "picketing, work stoppages, boycotts, or any other economic interference." (Pet. App. 25-26a). No union will agree to such terms unless it receives something in return, which leads to the true purpose of this regulation: to provide unions with leverage to compel nonunion employers to agree to assist a union with organizing their nonunion employees.

The Ninth Circuit upheld this regulatory scheme by stretching the market participant exception to NLRA preemption far beyond its breaking point. In so doing, the Ninth Circuit has undermined workers' right not to be subject to top-down union organizing campaigns. The Court should take this case and make it clear that state and local governments are not allowed to impinge on workers' rights under the guise of the market participant exception.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's opinion conflicts with this Court's precedents.

A. The market participant exception is a narrow exception to the general rule that the National Labor Relations Act preempts state and local labor policy.

The NLRA preempts state and local laws that regulate private labor relations. *See Wisconsin Dep. of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1989) (*Golden State I*). The Court has recognized two preemption doctrines relevant to this case. The first is *Garmon* preemption, which precludes state and local governments from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). The second is *Machinists* preemption, which precludes state and local governments from regulating conduct Congress, in implementing the NLRA, intended to be left unregulated and controlled by the free play of economic forces. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Commission*, 427 U.S. 132, 140 (1976).

In *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.,* 507 U.S. 218, 226 (1993) (*Boston Harbor*), the Court carved out a narrow exception to these general preemption rules for when a state or local government acts not as a regulator of labor policy, but as a "market participant." The market participant exception is not, however, a free-floating license for state and local government to skirt NLRA preemption. Ra-

ther it is a narrow exception with specific limiting principles. To qualify for the market participant exception, a state or local government must prove it is acting pursuant to a "*purely* proprietary interest" and that "analogous private conduct would be permitted." *Id.* at 231-32 (emphasis added).

The Court reaffirmed the narrow nature of *Boston Harbor*'s exception in three cases. In each case, the Court *rejected* a claim by the State of California or one of its subdivisions that it was acting as a market participant when interfering with activities federal law regulates. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008); *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In *Brown*, the Court explained that "[i]n finding that the state agency had acted as a market participant [in *Boston Harbor*], we stressed that, unlike the City's rule here, the challenged action was specifically tailored to one particular job, and aimed to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." 554 U.S. at 70.

B. The Ninth Circuit's opinion expanded the market participant exception beyond what this Court's precedents allow and thus failed to apply the proper preemption standard.

The Ninth Circuit has again ignored *Boston Harbor*'s limiting principles, and misapplied the market participant test. *First*, the Ninth Circuit ignored the fact that the City of Los Angeles does not procure goods and services for itself in the market place, but rather only licenses businesses (airline providers) to serve other businesses (airlines) at LAX. *See* (Pet.

Brief 10-11); (Pet. App. 31a). The City of Los Angeles does not buy anything from the providers, nor does it buy anything from the airlines. (Pet. Brief at 9). As Judge Tallman recognized in dissent:

> At the risk of stating the obvious, the City here is not directly procuring goods and services to execute a discrete project, but rather providing ongoing licenses permitting a host of service providers handling baggage, assisting passengers, refueling aircraft, serving food and beverages, and otherwise keeping planes operating on schedule to do business at the airport.

(Pet. Brief 10); (Pet. App. 31a). This case is wholly unlike *Boston Harbor*, because the City is not hiring these providers to work for the City, but is deciding who will be licensed to work at the airport. Licensing is a "classic" use of regulatory authority. *See Am. Trucking Ass'ns, Inc.*, 569 U.S. at 650.

Second, business at the airport is perpetual and not specifically tailored to one job. As Judge Tallman once again aptly stated: this case is "markedly different in kind … from cases like *Boston Harbor* … where local governments required project labor agreements that were specifically tailored to one job." (Pet. App. 31a) (citations omitted).

The LPA requirement at issue in this case is thus nothing like the project labor agreement held to be an action of market participation in *Boston Harbor*. Rather, the LPA requirement is akin to the licensing scheme held preempted in *Golden State*. There the City of Los Angeles withheld a license from a taxicab company that failed to enter into a labor agreement with a union. 475 U.S. at 609. The Court held that

the City was preempted "from conditioning Golden State's franchise renewal on the settlement of [a] labor dispute." *Id.* at 618. The City's action contravened Congress' intent that the terms of agreements that employers and unions enter into with one another be left to the free forces of the parties' economic concerns. *Id*. at 618-19. "Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *Id.* at 619 (citation and quotation marks omitted).

As in *Golden State*, here Los Angeles is denying a business license to companies that do not enter into a specified agreement with a union. (Pet. Brief 6); (Pet. App. 126a-127a). This directly interferes with Congress' "balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Brown*, 554 U.S. at 65 (citations and internal quotation marks omitted); *see also* Archibald Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972) ("[The true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire … that would be upset if a state could also enforce statutes or rules of decision[.]").

In short, the Ninth Circuit failed to properly apply *Boston Harbor* and created a conflict with this Court's precedents. In so doing, it allowed the City of Los Angeles to regulate in an area of labor regulations—the collective bargaining process—where federal law controls to let the market forces of the parties play out.

II. This case presents a question of national importance because labor peace regulations, like the LAX Airport regulation, subvert the freedom of thousands of workers to choose or reject unionization that the NLRA protects.

"[L]abor-peace agreements . . . are not recognized by the [NLRA]." *Metro Milwaukee Ass'n of Commerce v. Milwaukee Cnty*, 431 F.3d 277, 282 (7th Cir. 2005). The purpose of those union agreements is to circumvent the NLRA's organizing process and employee protections.

The NLRA authorizes union collective bargaining with employers only *after* a majority of employees choose a union to be their exclusive representative. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-39 (1961). "There could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation. *Id.* at 737.

In a traditional, or "bottom up," organizing process provided for under the NLRA, a union must first gain employees' support before entering into an agreement with their employer.[2] If 30% of employees choose to support the union, they can petition for a secret-ballot election under NLRA Section 9, 29 U.S.C. § 159, which is "the most satisfactory—indeed the preferred—method of ascertaining whether a un-

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[2] *See* James J. Brudney, *Collateral Conflict: Employer Claims of Rico Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731, 742-43 (2010); Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 713-15 (2012).

ion has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Alternatively, if more than 50% percent of employees support the union, they can request the employer's voluntary recognition under 29 U.S.C. § 159(a), although an employer can refuse or demand a secret-ballot election. *Id.* § 159(c)(1)(B).

To effectuate employee free choice, the NLRA also provides rules to prevent employer and union misconduct, and to spur the free flow of information about the pros and cons of unionization. NLRA Section 8 defines unfair labor practices intended to protect employees from union and employer misconduct. 29 U.S.C. §§ 158(a) & (b). And, NLRA Section 9(c) provides free-speech protections, *see* 29 U.S.C. § 158(c), to encourage "'uninhibited, robust, and wide-open debate in labor disputes.'" *Brown*, 554 U.S. at 68 (citation omitted).

Notably, Congress did not grant unions a right to employer assistance with organizing their employees. Unions have no statutory right to use an employer's private property for organizing. *See Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992). Nor do they have a statutory right to information about the employer's nonunion employees before filing a valid NLRB election petition. *See NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 766 (1969). "By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original).

"Over the past twenty-five years," however, "unions have turned increasingly to strategies outside the traditional framework of the [NLRA]."[3] Their

[3] Brudney, *supra*, at 732.

primary new tactic is "top-down" organizing, in which a union, instead of first seeking employee support, coerces an employer to enter into an organizing agreement. Although the terms of organizing agreements vary, common features prohibit employers from speaking in opposition to unionization, ban NLRB secret-ballot elections, prohibit the filing of unfair labor practice charges with the NLRB, and require that employers give union organizers confidential information about their workforce and free use of their property for organizing.[4]

Unsurprisingly, employer assistance dramatically increases a union's odds of organizing targeted employees.[5] For example, when neutrality agreements were in place "unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections."[6]

Unions have increasingly turned to their political allies in state and local government to force employers to enter into organizing agreements, thus effectively handing their employees over to a union.[7] That

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[4] Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173,177 (2007); Charles I. Cohen *et al.*, *Resisting Its Own Obsolescence: How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522-23 (2006); Eigen & Sherwyn, *supra*, at 721-22.

[5] Eigen & Sherwyn, *supra*, at 722.

[6] *Id.*

[7] See U.S. Chamber of Commerce, *Labor Peace Agreements: Local Government as Union Advocate*, 13-15 (2013). https://www.uschamber.com/sites/default/files/documents/files/labor_peace_agreements_2013_09_12.pdf (listing the various labor peace agreements throughout the United States).

is the purpose of Los Angeles' LPA regulation. As Judge Tallman, in dissent below, recognized, "in exchange for relinquishing their right to strike, unions gain concessions from employers to support unionization of the employer's employees." (Pet. App. 35a).

Judge Tallman explained:

> LPA's often require an employer to remain neutral during union organizing drives. LPAs also often require employers to provide unions with employees' contact information and access to the employer's physical premises to assist with organizing efforts. A review of LPAs in California similarly found that, in most LPAs, employers must grant workplace access, provide employee information (names, job titles, contact information, etc.) early in the organizing campaign, refrain from making disparaging statements about the union, and/or require that employers assent to card check recognition and neutrality. Indeed, in this case, *counsel for the City admitted at oral argument that unions would likely seek neutrality from service providers as part of LPA negotiations*. We should therefore be unsurprised that, as the ASPA has alleged, the Service Employees International Union (SEIU) lobbied heavily for section 25 after it tried unsuccessfully to unionize service provider employees at LAX.

Id. at 35-36a (emphasis added) (quotation marks, citations, and footnotes omitted).

The LPA regulation, by conditioning a business license on entering into a union organizing agreement, puts extreme economic pressure on employers to assist union organizing campaigns, and thus subverts employees' free choice that the NLRA was designed to protect. *See* (Pet. App. 39-40a). For example, NLRA Section 8(c) protects employer free speech because "[i]t is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971). The gag clauses on employer speech, which are a feature of almost all union organizing agreements, prevents the open debate that NLRA Section 8(c) encourages and deprives employees of their "underlying right to receive information opposing un-ionization." *Brown,* 554 U.S. at 68.

Congress struck a delicate balance in 1947 when it passed the Taft-Hartley amendments to the NLRA. Those amendments gave employees a right to refrain from participating in union activities. 29 U.S.C. § 157. And, they regulated when and how employees can be unionized. 29 U.S.C. §§ 8-9. The purpose of those amendments was to protect employee free choice—the ability of employees to choose or reject union representation for themselves. *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act").

In contrast, the Ninth Circuit's ruling sets a precedent that states and local governments may ignore workers' rights and place a thumb on the scale for

unionization. This will lead to more employees in the states of the Ninth Circuit being organized against their will contrary to the NLRA's core purpose. Indeed, this ruling will bolster an ongoing effort by unions to obtain LPA's across the nation.[8] Thus, this case is one of importance for thousands of workers across the country.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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[8] As of 2013, more than eleven states, or one of their subdivisions, had an LPA in place. These cover various industries, including hotels, airports, and home care services. *See* U.S. Chamber of Commerce, *supra*, at 14.