No. 11-798

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Airports Council International – North America ("ACI-NA") represents the state, regional, and local government bodies that own and operate the principal commercial airports in North America.[1] ACI-NA's member airports serve approximately 95 percent of the domestic and international airline passenger and cargo traffic in the United States. ACI-NA's advocacy on behalf of its members includes participation as *amicus curiae* in order to ensure that applicable law promotes safe and efficient airport operations. ACI-NA has participated as intervenor or *amicus* in a number of cases to protect the ability of airports to exercise proprietary powers in diverse contexts. *E.g., Nw. Airlines, Inc. v. Cnty. of Kent, Mich.*, 510 U.S. 355 (1994) (challenge to airport rates and charges); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

[1] Pursuant to Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party, party's counsel, or person – other than ACI-NA – contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this *amicus* brief. Counsel notes, in the interest of full disclosure, that our Firm represents Los Angeles World Airports, which is a department of the City of Los Angeles, on matters unrelated to this case. Counsel has not, however, conferred with the City regarding this brief for ACI-NA.

672 (1992) (challenge to airport ban on solicitation); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 613 F.3d 206 (D.C. Cir. 2010) (proprietary right of airport sponsor to set congested-weighted landing fees not preempted even if fees designed to affect airline price, route, or service); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38 (D.C. Cir. 1997) (challenge to the Department of Transportation's Final Policy Regarding Airport Rates and Charges).

ACI-NA and its members have a particular interest in the first question presented in this case relating to the "market-participant" exception. Airports rely on their proprietary powers to accomplish a wide range of goals essential to assuring that airports remain financially viable and able to provide safe, high quality services to the traveling public. Petitioner American Trucking Associations ("ATA") and its *amici*, including in particular Airlines for America ("A4A"), seek to limit the scope of the unpreempted power of airports, ports, and other public proprietary entities by asking the Court to reject the long-recognized market-participant doctrine. A4A goes further and seeks to limit the scope of proprietary powers by (1) arguing that the Court should decline to acknowledge a market-participant exception to preemption except where it is expressed in the statute, and (2) asserting a narrow and incorrect construction of airport proprietary powers preserved in the express proprietor's rights exception in the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(3) ("ADA").

ACI-NA and its members file this *amicus curiae* brief for two reasons. First, ACI-NA urges the Court to affirm the core principle of the Ninth Circuit's decision – that under the market-participant doctrine, the exercise of proprietary powers by publicly-owned enterprises is not preempted. Although this case is narrowly concerned with parking and placard conditions in a drayage truck concession agreement at the Port of Los Angeles ("Port"), the implications of this case extend to all publicly owned entities exercising proprietary powers, such as airports, ports, and utilities. Airports are particularly concerned with this case, because airports exercise proprietary powers in areas beyond the scope of the ADA's proprietor's exception, including, for example, managing vehicular traffic accessing their property (including trucks, buses, automobiles, courtesy vans, taxis, and aviation support vehicles), acquiring property for expansion and environmental mitigation, and setting the terms by which commercial entities may use airport property and facilities. The continued ability to exercise those proprietary powers is critical to allowing airports to manage the numerous commercial enterprises that operate on airports in order to provide the services demanded by the public and aeronautical users.

Second, ACI-NA opposes A4A's mischaracterization of the scope of the proprietor's exception under the ADA, 49 U.S.C. § 41713(b)(3). A4A seeks to use the analysis of the market-participant exception in the context of motor carrier preemption under 49

U.S.C. § 14501(c)(1) ("FAAA Act") as a means of limiting the scope of the express proprietor's exception under the ADA in the distinct context of airport operations. Courts, however, have long recognized a broad construction of airports' proprietary powers under the ADA, and have affirmed such proprietary power in a variety of contexts. The meaning and scope of the ADA's proprietor's exception is not before the Court, and the Court should reject A4A's effort to alter the well-established understanding regarding airport proprietary powers under the ADA.

SUMMARY OF ARGUMENT

The Court has long recognized that public entities act in a proprietary capacity when they participate in markets in the same manner that private entities do. *Building and Construct. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231-32 (1993) ("*Boston Harbor*"). The Court has further recognized that there is a difference under the law when public entities engage in regulatory actions as opposed to proprietary actions. Regulatory and proprietary actions warrant different treatment under the Commerce Clause and the Supremacy Clause because those Constitutional provisions address state and local regulatory actions, but not proprietary actions. Accordingly, the Court presumes that federal law does *not* preempt proprietary actions by state and local public entities, and that those public proprietary enterprises can operate

in the same unpreempted manner as private enterprises.

United States commercial airports are quintessential public proprietary entities. In providing air transportation services, airports operate like large commercial real-estate managers by leasing space to tenants, including airlines, and by managing and controlling how private entities use airport property and facilities for their own commercial purposes. Like any large, complex enterprise, airports face a wide range of operational challenges that they must overcome to provide transportation services in a safe and efficient manner. In addition, airport proprietors face complex business challenges relating to airport rents, rates, and charges; regulatory compliance; environmental challenges; and community opposition to expansion and changes in traffic patterns.

Airports principally meet these challenges by exercising their proprietary powers. Proprietary powers are, generally, those powers conferred on the airport's governing body by state and local law for the creation and operation of the airport as an enterprise. *See* J. Howick, *Analysis of Federal Laws, Regulations, and Case Law Regarding Airport Proprietary Rights*, Legal Research Digest 9 at 3-4 (Sept. 2010).[2] Proprietary powers are understood to encompass a broad range of commercial activities similar to

[2] Available at http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_010.pdf.

those exercised by a private entity, *id.* at 4, including the power to contract, lease and manage property, set fees and charges, and control access to the airport. *Id.* at 19-32. While airports can possess governmental authority, airports primarily use their proprietary authority to manage their business operations. Although the exercise of proprietary power is generally limited by standards of reasonableness, airports exercise their proprietary powers to achieve a diverse range of goals. *Id. See also, e.g., Four T's, Inc. v. Little Rock Mun. Airport Comm'n*, 108 F.3d 909 (8th Cir. 1997) (an airport charging rent to car rental company under concession agreement acted as a market-participant and was not subject to Commerce Clause); *Transport Limousine of Long Island, Inc. v. Port Auth. of N.Y. and N.J.,* 571 F. Supp. 576 (E.D.N.Y. 1983) (market-participant exception applied to bar commerce clause claim challenging fee of 8% of gross receipts for use of counter space at airport by limousine company).

For example, airports establish rules for the commercial use of airport property and facilities by entering into contracts, leases, license agreements, and concession agreements with airport users. Airports also adopt specific programs to address particular issues, such as initiatives to allay community concerns over noise and other environmental impacts, to assure customer safety and satisfaction, and to overcome regulatory hurdles when undertaking infrastructure projects. Such proprietary actions are analogous to the actions taken by private landlords to

control the use of their property and the actions taken by large corporations to control their supply chain and preserve their market position.

In addition to the proprietary powers preserved from preemption in the airline context pursuant to 49 U.S.C. § 41713(b)(3), airports rely on their proprietary powers in other contexts where federal law generally preempts state and local law, such as in the regulation of motor carrier prices, routes, and services; labor; and environmental impacts. Changing current law to make those actions presumptively preempted, as urged by ATA, would substantially impair the ability of airports to carry out their proprietary functions by denying them the authority to take unilateral action. It would also expose airports to increased litigation, and the accompanying expense, over the scope of preemption. Where a private company could, for business needs, limit access to its property to vehicles meeting certain emissions requirements, an airport could be preempted from doing so because its rules could be considered a "regulation" subject to preemption.

The consequences of losing such proprietary power extend beyond the details of a specific facility or industry. Airports often include environmental mitigation measures in leases and contracts, for example, in order to obtain federal and state permits for expansion projects. Treating airport contractual practices like government regulations would impair airports' abilities to pursue critical infrastructure and

expansion projects compared to a similarly regulated private entity.

The purpose of the Supremacy Clause is to assure that federal law is the law of the land, rather than a patchwork of diverse state and local laws. Proprietary action by publicly owned enterprises is not regulation, and the supremacy of federal law is not threatened when public entities establish rules relating to the commercial use of their own property and facilities. The Court and lower courts have been able to distinguish between proprietary and regulatory conduct under the Court's existing precedents. There simply is no need to change current law and undermine the historic presumption against preemption of proprietary conduct.

ARGUMENT

I. Airports Operate as Proprietary, Business-like Enterprises

A. Airports Are Akin to Landlords for Complex Commercial Operations

The overwhelming majority of large commercial airports in the United States, including ACI-NA's member airports, are public entities. Municipalities or counties directly operate about half of the country's commercial airports, while special purpose

government agencies such as port authorities or airport authorities operate the other half.[3]

Despite public ownership, airports operate as independent financial entities. Airports earn revenue from airport leases, licenses, use agreements, and user fees such as landing fees. Federal laws require airports receiving federal funds to be self-sustaining and to use their revenue only for airport-related purposes, and not general governmental purposes. 49 U.S.C §§ 47107(a)(13), 47107(b), and 47133. Airports operate as "enterprise funds" separate and apart from the other funds and functions of the government entity that owns the airport, and manage their operations so the airport is self-sustaining and financially viable.

The operation of an airport is analogous to a large commercial real estate development. Airports rent terminal space to airlines, aeronautical service providers, food and retail concessionaires, airport rental car companies, and other private entities that provide goods and services to the traveling public. Airports grant permission to operate to the many subcontractors hired by airport tenants, such as baggage handlers, aviation fuel providers, aircraft service companies, and cargo companies. Airports also grant

[3] There are a number of private airports in the United States, as well. For example, Branson Airport, a commercial airport in Branson, Missouri, is privately owned and managed and competes with publicly owned Springfield-Branson National Airport and Northwest Arkansas Regional Airport.

concessions or licenses to a variety of service providers who seek to take advantage of the market created by the airport, such as taxi and limousine operators, Wi-Fi service providers, off-airport parking operators, and off-airport rental car companies. For example, at Boston Logan International Airport ("Boston Logan"), there are approximately 550 different license, lease, concession, and operating agreements with a wide variety of aeronautical service providers and other airport users. These licensees employ approximately 15,750 persons. In contrast, Massport itself, which operates Boston Logan, employs less than 700 people at the airport.

Furthermore, airports function in a competitive marketplace. Airports, together with airlines, compete with other transportation modes. Many airports compete with other airports for customers. For example, Boston Logan competes with nearby airports in Manchester, New Hampshire and Providence, Rhode Island for passengers. Airports also compete with other airports for international service across a wider region. For example, airports as far apart as Seattle, Portland, San Francisco, and Los Angeles compete with one another for flights to Asia and the Pacific Rim.

B. Airports Use Leases, Licenses, and Concession Agreements to Advance Proprietary Interests

Airports face a number of challenges in managing their facilities, including:

- The need to make the airport safe and secure;
- The need to generate revenues to remain self-sustaining and control costs for airline tenants;
- The need to remain competitive with other airports and modes of transportation;
- The need to assure customer satisfaction to maintain their competitive position;
- The need to manage the risk of litigation from users, the community, and regulators;
- The need to comply with regulatory requirements and grant obligations across a broad range of activities, particularly environmental regulations; and
- The need to maintain the support of neighbors and other stakeholders for future expansion.

In addition to the daily challenges of managing a complex enterprise, airports often face larger challenges to their long-term development. Similar to the Port of Los Angeles's experience, airports often face community opposition to expansion and increased airport activity, even when necessary to assure the airport's continued viability in a competitive market. *See* Government Accountability Office, GAO-10-50, *Aviation and the Environment, Systematically Addressing Environmental Impacts and Community*

Concerns Can Help Airports Reduce Project Delays, at 1-2 (Sept. 2010) (noting that community opposition and related litigation can add years to the approval process for new runway projects). *See generally* J. Johnson, *Case Studies on Community Challenges to Airport Development*, Legal Research Digest 9 (June 2010) (surveying aviation related causes of action).[4] In addition to community opposition, airports also face complex regulatory and operational challenges when expanding or accommodating increased operations.

Airports address these challenges, in part, through terms and conditions of leases, licenses, and concession agreements. For example, like private hotels or apartments, airports often restrict the manner in which taxicab and limousine operators solicit business to assure a high level of service to airport customers and to promote customer satisfaction. Airports also rely on proprietary power to develop mitigation programs to meet environmental compliance obligations, such as Clean Air Act requirements to show conformity with State Implementation Plans. 42 U.S.C. § 7506(c); 40 C.F.R. Part 93, Subpart B. *See also Tinicum Twp. v. Dep't of Transp.*, 685 F.3d 288 (3d Cir. 2012) (summarizing airport's mitigation measures under Clean Air Act).

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[4] Available at http://onlinepubs.trb.org/onlinepubs/acrp/acrp_lrd_009.pdf.

For example, airports might require vehicles using the airport, including aeronautical ground service vehicles (like baggage tugs or loaders), taxicabs, courtesy vans, and delivery and freight trucks, to meet certain alternative fuel requirements. Several airports have implemented programs to increase the number of cleaner vehicles to reduce airport-related emissions. Although such efforts may be critical to obtain regulatory approval, avoid litigation, or gain community support for a project, under ATA's theory they could be challenged as preempted emissions standards under Section 209 of the Clean Air Act, or perhaps as affecting the prices, routes, and service of trucks under the FAAA Act. *See Engine Mfr's Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 498 F.3d 1031 (9th Cir. 2007) (Clean Air Act did not preempt emission standards for agency's own fleet under market-participant exception). Airports also face complex environmental challenges under the Clean Water Act and other environmental laws that affect their business interests.

Similarly, airports make contracting choices that address community opposition to airport operations in general or to a particular project. If community concerns about air pollution, for example, threaten the ability of the airport to advance its proprietary interests, the airport should be able to increase the percentage of clean-burning vehicles on its property to address that concern, just as a private entity could. If such actions are deemed preempted, simply because they are undertaken by a public entity, airports

would be deprived of the legal authority to take any action in the preempted area, even if a private entity in the same situation would not be similarly constrained.

C. Overturning the Presumption Against Preemption Would Impair Proprietary Functions by Depriving Airports of the Power to Act in Preempted Areas

As described above, airports rely on their proprietary powers on a daily basis to manage their facilities and to develop new programs to promote the efficient operation and growth of their facilities. It is difficult to predict the possible future business challenges to operating an airport, the programs airports may pursue to meet those challenges, and what laws may be implicated by those programs. However, airports should be able to address those challenges in the same manner as private companies without being limited by principles of preemption (unless expressly stated or clearly implied by Congress). As the Court has explained, "[s]ince 'state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants,' '[e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the [dormant] Commerce Clause.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (quoting

White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 207-08, n.3 (1983)).

Airports are currently subject to extensive oversight and regulation by FAA, even where there is no preemption. *E.g.*, 49 U.S.C. § 47107 (obligations imposed through federal grant assurances); 49 U.S.C. § 44706 (operating certificate requirements for commercial service airports); and 14 C.F.R. Part 139 (airport operating certificate regulations). In addition, airports are subject to regulation under a wide range of environmental, labor, occupational safety, and other laws. Further, when airports seek FAA approval for large development projects, FAA must demonstrate that the airport's project will comply with over 40 separate environmental laws; and FAA itself must study the project pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-47. *See* U.S. Department of Transportation, *Report to the U.S. Congress on Environmental Review of Airport Improvement Projects* at iii-iv (May 2001). Airports are also subject directly to numerous state environmental laws and procedures. *Id.*

Moreover, airport action remains subject to general constitutional standards; only restrictions on airport access that are "reasonable, nonarbitrary, and non-discriminatory" are not preempted. *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 806-07 (5th Cir. 2000) (summarizing cases); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (curfew and other noise-control measures not preempted, but ban on jet operations struck down

on equal protection and commerce clause grounds); *City and County of San Francisco v. FAA*, 942 F.2d 1391 (9th Cir. 1991) (airport's ban on certain loud aircraft was not preempted, but violated obligations under FAA grants).

Because of Congress' retained authority to preempt or regulate proprietary conduct, a holding in this case that airports, ports, and similar public enterprises are presumptively preempted from taking *proprietary* action whenever there is express preemption of their *police powers* would go far beyond the purpose of the Supremacy Clause. There is no threat to federal authority when a publicly owned entity establishes conditions for the use of its own property by commercial entities who seek to use that property for private, commercial purposes. Nor is there a risk of a regulatory patchwork, as A4A argues, A4A Br. at 8, because the public entity would not be issuing regulations to third parties unrelated to the airport enterprise. Allowing public entities to take non-regulatory actions to manage their own property plainly does not undermine Congress' legislative power.

A holding that public entities are presumptively preempted from taking proprietary actions would deprive airports and similar public enterprises of the authority to take certain actions at all because of the preemptive force of federal law. Airports' proprietary hands would be tied unfairly in a way that comparable private enterprises are not. To the extent federal control is needed, direct regulation or express (or clearly implied) preemption is available without the

need to upset the long-established recognition of the powers of local governments to own and operate airports and similar facilities. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir. 1991) (federal government does not plan or develop airports).

II. Petitioners and Their *Amici* Fail to Demonstrate That the Court Should Overturn the Presumption in *Boston Harbor* that Preemption Does Not Apply to Proprietary Activity

A. The Lack of an Express Exception in Section 14501(c)(1) for Proprietary Action Does Not Imply an Intent to Preempt Proprietary Action

As the Port demonstrates in its brief, ATA fundamentally errs by reversing the presumption of non-preemption clearly set forth in *Boston Harbor*. Port Br. at 18-20. In an attempt to bolster their arguments, ATA and A4A argue that the inclusion of an express proprietor's exception in the ADA, but the absence of an express market-participant exception in the FAAA Act, reflects Congressional intent to preclude a market-participant exception to the FAAA Act. ATA Br. at 27-28; A4A Br. at 12. ATA and A4A rely on cases applying the canon of statutory construction that the inclusion of language in one part of a statute, but its omission in another part of the statute, reflects an intentional choice. *See Custis v. United States*, 511 U.S. 485, 492 (1994). While that

canon of statutory construction applies to different provisions in the *same* statute, it does not apply here because the FAAA Act and the ADA are *different* statutes, enacted at *different* times, and addressing *different* subjects. There is no recognized canon of statutory construction to allow such an inference here.

Second, the inclusion of the proprietor's exception in the ADA reflects a set of concerns particular to the aviation industry that do not apply to the trucking industry. There is no analogue in the trucking industry to the close, symbiotic relationship between airports and air carriers. Accordingly, when Congress enacted the ADA to deregulate the airline industry, and to preempt expressly state laws relating to airline prices, routes, and services, *it took particular care to preserve the recognized powers of airport owners to take proprietary actions that could affect airline prices, routes, and services*. For example, airport rents, landing fees, and other charges may have an effect on airline prices. Similarly, airport access rules, such as a curfew, have an effect on airline routes and services. Congress acted expressly to preserve these, and other, proprietary powers even if the exercise of proprietary authority would affect airline prices, routes, and services. Indeed, Congress has consistently been careful to preserve airport proprietary powers when otherwise preempting state laws in the aviation area. *E.g.*, 49 U.S.C. § 40116(c) (exempting airports from general prohibition on state and local taxes on passengers in air transportation).

See also, W. Airlines, Inc. v. Port Auth. of N.Y. and N.J., 658 F. Supp. 952, 956 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987) (discussing legislative history of aircraft noise legislation showing Congressional intent to preserve airport proprietary powers).

Third, Congress carefully included an express proprietor's exception in the ADA to ensure that the otherwise broad preemption provision did not preempt long-recognized proprietary powers. The legislative history of the ADA plainly reflects the strong desire of Congress to assure the preservation of existing airport proprietary powers. *W. Airlines*, 658 F. Supp. at 957 ("'the legislative history is unmistakably clear that Congress did not intend that the preemptive force of [49 U.S.C. § 41713(b)(1)] would interfere with "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level."'") (quoting *Midway Airlines v. Cnty. of Westchester*, 584 F. Supp. 436, 440 n.18 (S.D.N.Y. 1984)). *See also* 124 Cong. Rec. 38526 (Oct. 14, 1978) (remarks of Congressman Anderson, House of Representatives sponsor, noting that House conferees did not intend to limit "in any way the normal exercise of a proprietor's power" to limit access to the airport or to set fees and charges). In acting to preempt portions of established law regarding regulation of airline rates, prices, and services, Congress was prudent to identify expressly what aspects of then-existing law related to airline prices,

routes, and services it intended to preempt and what it did *not* intend to preempt.[5]

Finally, Congress adopted the ADA *before* the Court decided *Boston Harbor,* so Congress did not have the benefit of the Court's clear statements that the exercise of proprietary powers is not presumptively preempted. In contrast, Congress adopted the FAAA Act *after* the Court decided *Boston Harbor*, and Congress can be presumed to have legislated with knowledge of the *Boston Harbor* decision, and intended to preserve the Court's presumption against preemption. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

Because of those particular concerns, the purposes behind the proprietor's exception to the ADA do not apply to, and cannot guide an analysis of, Congress' decision in the FAAA Act *not* to include an express proprietor's exception. The correct analysis, as explained by the Port, starts with the application of long-accepted background principles of preemption, including the general presumption *against* preemption of traditional local powers, and then considers

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[5] Similarly, when Congress amended 49 U.S.C. § 41713(b) to add Section 41713(b)(4)(B) which provides that Section 41713(b) does not preempt state and local regulation of certain airport-related aspects of motor vehicle transportation, including safety routes, financial responsibility, and hazardous material, it did so to preserve then-existing authority and to specify that such regulation is not regulation of airline prices, routes, and services. *See* Conference Report on H.R. 2139, reprinted in 140 Cong. Rec. H7051 at H7071 (Aug. 5, 1994).

whether Congress intended to disrupt the traditional allocation of federal and state authority.

B. The Unpreempted Proprietary Powers of Airports Are Broad

A4A attempts to bolster its argument that Congress intended the FAAA Act to preempt proprietary powers by contrasting the absence of an express market-participant exception in the FAAA Act with the inclusion of an express proprietor's exception in the ADA. A4A further argues that a broad market-participant exception would undermine what it characterizes as the ADA's "limited" scope of unpreempted proprietary power pursuant to the ADA's express exception for proprietary powers. A4A Br. at 15.

The premise of A4A's argument is false, however, because airport proprietary powers under the ADA are broad. As a general matter, the scope of airport proprietary powers is defined by state and local grants of power, not federal law. Federal law can only limit such power by preemption. In the case of airport proprietary powers, Congress acted explicitly to *preserve* the proprietary powers of publicly owned airports without any express or implied limitation. 49 U.S.C. § 41713(b)(3).

Those proprietary powers have been recognized to be broad. For example, courts recognize that the proprietary power of airports to set rates and charges, and to establish landing fees, even when such fees

were expressly intended to affect airline services, is not preempted.

> We recognize, of course, that prices alter behavior . . . and understand prices that vary from place to place will yield incentives that vary as well. Neither the ADA nor any other statute concerning air traffic, however, demands uniform prices or uniform incentives . . . In sum, although the ADA forbids states and local authorities from directly regulating air traffic, the structure the Congress created virtually ensures, and surely accepts, that fees will vary across airports. The resulting differences in incentives are unavoidable, not unlawful.

Air Transp. Ass'n of Am. v. Dep't of Transp., 613 F.3d at 216 (affirming airport proprietary power to impose landing fees to incentivize off-peak airline scheduling to reduce delays). *See also Air Transp. Ass'n of Am. v. City and Cnty. of San Francisco*, 266 F.3d 1064 (2001) (affirming proprietary power of city to require city contractors, including airport tenants, to provide benefits to same-sex partners).[6]

Moreover, "the precise scope of an airport owner's proprietary powers has not been clearly articulated by any court." *Am. Airlines*, 202 F.3d at 806. *See also W. Airlines*, 658 F. Supp. at 956 ("[49 U.S.C. § 41713(b)(3)] does not expressly limit proprietary

[6] A4A was formerly known as the Air Transport Association. A4A Br. at 1.

powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind"). As the Fifth Circuit explained, "[w]e do not limit the scope of proprietary rights to those which have been previously recognized. . . . Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and nondiscriminatory rules aimed at advancing a previously unrecognized local interest." *Am. Airlines*, 202 F.3d at 808 (citation omitted).

The only area where an airport's proprietary power may be considered to be judicially limited under the ADA is in the area of "regulation of aviation," *id.* at 202 F.3d at 806, where the federal government has retained the exclusive control over the use and regulation of the airspace. Thus, courts only acknowledge the "narrow" scope of airport proprietary powers when discussing the regulation of airspace. *Id.* at 806-07 (discussing cases involving perimeter rules, curfews, and other airport access restrictions). Counsel is not aware of a case identifying any other federal limits on the scope of airport proprietary powers under the ADA to manage access to, and use of, airport facilities.

The two other cases cited by A4A did not address proprietary powers and, thus, do not support the notion that airport proprietary powers are limited. *Morales v. Trans World Airlines, Inc.*, involved enforcement of state deceptive practices laws against airline advertising. 504 U.S. 374 (1992). Although *Morales* did not involve proprietary powers, the Court

implicitly recognized a broad understanding of proprietary powers by rejecting a narrow reading of the ADA's preemption provision, 49 U.S.C. § 41713(b), that would render the proprietor's exception, *id.* at § 41713(b)(3), surplusage. 504 U.S. at 385-86. Similarly, *American Airlines v. Wolens* involved a class action challenge to an airline frequent flier program under state consumer fraud laws without any discussion of airport proprietary powers. 513 U.S. 219 (1995). There simply is no basis for A4A's assertion that airport proprietary powers are limited in any area other than when airport access rules impinge on federal regulation of airspace.

C. The Use of Rules, License, Concession, and Similar Agreements to Advance Proprietary Objectives Is Not Regulatory in Nature

ATA and the United States argue that there is no need to consider the proprietary purpose of license conditions, because the concession agreement terms in dispute "clearly" have the force and effect of law and because licenses and similar agreements and rules are "quintessential regulations." ATA Br. at 20-23; U.S. Br. at 13-15. That argument simply is wrong.

The fact that a rule, license, or other contract may impose conditions on conduct does not make them "regulations" within the meaning of the Supremacy Clause. As Respondent Natural Resources Defense Council ("NRDC") demonstrates in its brief,

private corporations routinely impose detailed requirements on entities in their supply chains to assure quality control and certain standards of conduct. NRDC Br. at 30-31, 33-35. Shopping malls, industrial parks, and self-storage facilities, for example, impose a variety of rules and restrictions on tenant and visitor behavior. Although those requirements are imposed on others, there is little dispute that such conduct is related to the corporation's proprietary goals of maximizing profit, managing risk, protecting market share, and securing its place in the marketplace. NRDC Br. at 18-35. As this Court has recognized, government entities, like their private counterparts, exercise proprietary powers when they impose conditions on the conduct of others, and the legal treatment of such conduct depends on whether its actions are proprietary or regulatory in nature. *Boston Harbor*, 507 U.S. at 231-32. *See also College Savings Bank*, 527 U.S. at 685.

The United States also argues that recognizing a market-participant exception to preemption will make it too easy for public entities to use proprietary powers as a "thinly veiled" pretext for regulating in ways that would otherwise be preempted. U.S. Br. at 24. This concern also is unfounded. Applying existing law, the Court has had little difficulty distinguishing between proprietary and regulatory conduct. *Compare Boston Harbor*, 507 U.S. at 232 (labor contract provisions for a particular project were unpreempted proprietary actions) *with Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60 (2008) (state law limiting

use of state grants for labor organizing was regulatory). *See also Am. Airlines*, 202 F.3d at 808 (ordinance of Cities of Dallas and Fort Worth affecting operations at Love Field was insufficiently related to local interests to fall within proprietor's exception); *Cardinal Towing and Auto Repair v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999) (City's power to contract for towing services was proprietary).

Accordingly, there is no need to change existing law to hold that rules established by a public entity, whether through a contract or otherwise, are regulatory simply because they were issued by a governmental entity or intended to affect the behavior of others. Private entities impose rules on suppliers and vendors, and often enforce such rules with punitive or liquidated damages provisions, to achieve their business objectives. Similarly, public entities may advance proprietary goals by stating the terms and conditions pursuant to which they will (1) grant commercial entities the right to use the airport's own property, and (2) deal with third parties in a commercial context, including enforcement provisions. Whether a government action is subject to preemption depends on whether its purpose is regulatory or proprietary, not on the mere form of the action.

D. The Market-Participant Exception Reflects This Court's Holding That the Supremacy Clause Does Not Apply to Proprietary Conduct by Public Entities

Petitioners and their *amici* rely heavily on the assertion that the market-participant exception as applied by the Ninth Circuit is somehow "non-textual," A4A Br. at 15, and "untethered," ATA Br. at 22. But, this Court has long held, unanimously, that "pre-emption doctrines apply only to state regulation." *Boston Harbor*, 507 U.S. at 227. There is a "distinction between government as regulator and government as proprietor," *id.*; "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id.* at 231-32.

Because the Supremacy Clause establishes the laws of the United States as supreme, state actions that are proprietary in nature are not implicated by the Supremacy Clause. Consistent with that principle, many express preemption clauses, including 49 U.S.C. § 14501(c)(1), limit their preemptive scope to state and local actions to "enact or enforce a law, regulation, or other provision having the force and effect of law. . . ." Such provisions, however, simply codify the inherent limit of the Supremacy Clause to displace state and local actions that are regulatory in nature. Whether described as a market-participant

exception or a proprietary powers exception, the principle that proprietary conduct by government entities is presumptively not preempted is firmly grounded in the purposes of the Supremacy Clause and tethered to Congressional intent.

In contrast, ATA reaches beyond the textual limits of the Supremacy Clause and the FAAA Act in an effort to limit the scope of unpreempted proprietary power by employing such non-textual concepts as "efficient procurement" to limit the market-participant exception to the buying or selling of goods or services. ATA Br. at 30; A4A Br. at 14. But "efficient procurement" is only one proprietary interest and is not itself mandated by the principles animating preemption, or by the preemption provision of the FAAA Act. That single concept should not be employed to define the applicability (or inapplicability) of preemption principles. As the Court noted in *Boston Harbor*, and as the United States appears to acknowledge, "[w]hen a State owns and manages property, it must interact with private participants in the marketplace." 507 U.S. at 227. That may include actions to ensure the swift and most efficient completion of a project. *Id.* at 232. Such conduct sweeps far broader than efficient procurement. Both public entities and their counterpart private companies advance proprietary interests by doing more than simply buying and selling. The scope of preemption is thus determined by asking whether a public entity "acts as a proprietor and its acts therefore are not 'tantamount to regulation' or

policymaking." *Id.* at 229. Courts simply discern when a public entity is advancing legitimate proprietary goals, thus bringing their actions within the market-participant exception.

The Ninth Circuit's decision correctly applies this Court's prior decisions and articulated principles. The Ninth Circuit applied a definition of "market participant" that sought to distinguish a municipal governmental entity's regulatory functions from its proprietary functions, precisely as the Court directed in *Boston Harbor*. *Compare Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 401-02 (9th Cir. 2011) (analyzing proprietary purposes of the Port's actions and similarity to actions by private businesses) *with* 507 U.S. at 231-32. Because the Ninth Circuit followed this Court's clear precedent, the decision below should be affirmed.

CONCLUSION

For the foregoing reasons, ACI-NA respectfully urges the Court to affirm the Court of Appeals' decision.

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