15-2334-cv(L), 15-2465-cv(XAP)

United States Court of Appeals

for the

Second Circuit

FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ANALAR CORPORATION, ASSOCIATED AIRCRAFT GROUP, INC., ELEVENTH STREET AVIATION LLC, HELICOPTER ASSOCIATION INTERNATIONAL, INC., HELIFLITE SHARES, LLC, LIBERTY HELICOPTERS, INC., SOUND AIRCRAFT SERVICES, INC., NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,

Plaintiffs-Appellees-Cross-Appellants,

– v. –

TOWN OF EAST HAMPTON,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK IN CASE NO. 2:15-CV-2246-JS-ARL JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE

RESPONSE AND REPLY BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE TOWN OF EAST HAMPTON

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COUNTERSTATEMENT OF ISSUE ON CROSS-APPEAL

Whether the district court correctly held that the Airport Noise and Capacity Act's requirements for airports to receive federal funds or impose passenger facility charges do not allow for private, injunctive relief against an airport that chooses not to receive federal funds or impose passenger facility charges.

SUMMARY OF ARGUMENT

Plaintiffs' answering/cross-appeal opening brief fails in its effort to defend the district court's preliminary injunction against the One-Trip Limit, which was enacted by The Town of East Hampton ("Town"), through a fair and careful legislative process, to combat the problem of aircraft noise at the East Hampton Airport. Plaintiffs likewise give no persuasive reason to overturn the district court's denial of injunctive relief against the Town's Mandatory Curfew and Extended Curfew, enacted to combat the same problem (collectively, the "Local Laws"). Faced with this Circuit's settled precedent precluding their arguments, Plaintiffs now seek a revolution in aviation law that would affect the regulation of thousands of airports across the country. This Court should reject that effort.

Specifically, Plaintiffs argue on cross-appeal that they have a private right of action for injunctive relief to enforce the federal Airport Noise and Capacity Act ("ANCA") against the East Hampton Airport. But ANCA has never in its 26-year existence been enforced against an airport that (like the East Hampton Airport)

receives no federal funding and imposes no passenger facility charges. Nor has ANCA ever given rise to a claim for injunctive relief. The text and structure of ANCA support this well-established practice. So does this Court's decision in *National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2d Cir. 1998), which upheld regulations much stricter than the Local Laws, with much less evidentiary support than the Local Laws, against the same challenges under ANCA and the proprietor exception that Plaintiffs raise here. Thus, the Local Laws fall readily within the proprietor exception—a well-established exception to preemption, codified in the Airline Deregulation Act of 1978 ("ADA")—and the applicability of this exception is not altered by ANCA's conditions on airports that use federal funds or impose passenger facility charges. This Court should reject Plaintiffs' arguments on appeal and cross-appeal:

First, Plaintiffs have no valid claim under ANCA. ANCA's text and structure establish Congress's intent to foreclose a private right of action for injunctive relief. Congress provided limited, monetary remedies for the FAA to address non-compliance with the relevant section of the statute, 49 U.S.C. § 47524: namely, removing an airport's eligibility to receive federal funds or impose passenger facility charges. And Congress expressly excluded section 47524 from the provision of ANCA allowing for injunctive relief. *See* 49 U.S.C. § 47533. Plaintiffs argue that this Court should ignore the plain text of section 47533

because it reflects a recodification of the statute, but the clear language of a current statute may not be ignored merely because there was more ambiguous language in a prior version. Plaintiffs also provide no explanation for why Congress would permit the FAA to withhold funding as a sanction for non-compliance with ANCA if the FAA and private parties had the alternative remedy of injunctive relief. Plaintiffs' speculation that the FAA might abdicate its responsibilities to enforce ANCA is unsupported and in any event cannot be attributed to Congress.

Furthermore, even if there were a private right of action under ANCA (there is not), it would not apply to airports that, like the East Hampton Airport, are willing to forego federal aviation grants and passenger facility charges. Congress did not intend ANCA to apply to such airports, as shown by the fact that the only remedy the statute affords is the loss of eligibility for federal funds and passenger facility charges. When Congress provides for withdrawal of federal funds as the only remedy, as it does in many statutes enacted under the Spending Clause, it is well established that recipients of federal aid may avoid the force of regulatory funding conditions simply by foregoing the receipt of federal funds.

While Plaintiffs point to the supposedly mandatory language of section 47524, they fail to look at the statute as a whole, which makes clear that ANCA obligations are only a condition of funding. And when analyzing *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), they ignore the fact

that the Medicaid Act has similar language, yet no one disputes that Medicaid restrictions apply only to states that choose to accept funding. In addition, Plaintiffs fail to consider the background of federal aviation law against which ANCA was passed. Those statutes make clear both that there is a proprietor exception to federal preemption and also that the FAA uses federal funds as the means to impose regulatory conditions on airports. There is nothing in the text or legislative history of ANCA to indicate that Congress intended to depart from these long-established principles, and thereby dramatically enlarge the scope of preemption and FAA authority.

Second, Plaintiffs fail to overcome the Town's showing that the district court abused its discretion in enjoining one of the Town's three Local Laws, the One-Trip Limit. That law is reasonable and thus well within the proprietor exception to federal preemption. The court was thus correct to find that the tens of thousands of complaints established a noise problem and that the Town fairly identified noisy aircraft and relied on empirical data. But it erred in applying a least-restrictive-alternative test that is foreclosed by this Court's established approach to deciding the reasonableness of such regulations. Contrary to Plaintiffs' suggestion, the court did apply such a test even if it did not use the magic words "least restrictive alternative," for it stated that the regulation must be "less restrictive" than all other measures. Under the correct standard, the One-Trip Limit is entirely reasonable.

The district court also abused its discretion in engaging in a balancing of benefits and harms that, as this Court has recognized, properly belongs to the local government. Plaintiffs claim that the Town's balancing was insufficient because it did not perform an economic modeling of the various possible regulations, but there is no such requirement, particularly where, as here, Plaintiffs do not dispute that the Local Laws will reduce aircraft operations by 23% while addressing over 60% of the noise complaints. That balance is reasonable by any measure, and reflects the Town's extraordinarily fair and thorough process for enacting the Local Laws. The order enjoining the One-Trip Limit should be reversed and the injunction vacated, and the decision below otherwise affirmed.

ARGUMENT

I. PLAINTIFFS HAVE NO PRIVATE RIGHT OF ACTION TO ENFORCE ANCA OR VALID CLAIM UNDER ANCA

Plaintiffs argue on cross-appeal that ANCA preempts the three Local Laws. Plaintiffs do not dispute that they have no statutory right of action and no right of action under the Supremacy Clause to enforce ANCA. Rather, Plaintiffs argue (Br. 31-35) only that they have a right of action under equity jurisdiction. However, as the Town has explained (Opening Br. 28-33), Plaintiffs have no such right. And even if they did, the district court correctly held that the preemptive scope of ANCA would not cover the East Hampton Airport.

A. Plaintiffs Have No Right Of Action Under Equity Jurisdiction

1. The Text And Structure Of ANCA Show Congress's Intent Not To Allow A Claim For Injunctive Relief

Plaintiffs do not dispute that the relevant question in deciding the existence of their claim is "Congress's 'intent to foreclose' equitable relief," and that such intent can be "express" or "implied." *Armstrong*, 135 S. Ct. at 1385 (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)); *see also id.* at 1386 ("We have no warrant to revise Congress's scheme simply because it did not 'affirmatively' preclude the availability of a judge-made action at equity."). Here, Congress's decision to allow only a limited, monetary remedy for non-compliance with section 47524—and its exclusion of injunctive relief—establish that Congress intended no private right of action for injunctive relief.

First, ANCA provides a specific, limited form of relief for the FAA. In two provisions, the statute makes clear that there is a particular monetary remedy—ineligibility for a federal grant and inability to impose a passenger surcharge—for non-compliance with ANCA's conditions:

> (e) [A] sponsor of a facility operating under an airport noise or access restriction on the operation of stage 3 aircraft . . . is eligible for a grant under section 47104 of this title and is eligible to impose a passenger facility charge under section 40117 of this title only if the restriction has been—
>
> (1) agreed to by the airport proprietor and aircraft operators;
>
> (2) approved by the Secretary as required by subsection (c)(1) of this section; or

> (3) rescinded.

49 U.S.C. § 47524(e).

> Limitations for Noncomplying Airport Noise and Access Restrictions. Unless the Secretary of Transportation is satisfied that an airport is not imposing an airport noise or access restriction not in compliance with this subchapter, the airport may not—
>
> (1) receive money under subchapter I of chapter 471 of this title; or
>
> (2) impose a passenger facility charge under section 40117 of this title.

Id. § 47526.

Plaintiffs fail to confront the clear language of these provisions. Plaintiffs argue (Br. 43) that section 47524(e) "makes *no* reference to ANCA's requirements for Stage 2 restrictions," but Plaintiffs ignore the fact that section 47526 applies to both Stage 2 and Stage 3 restrictions. As to section 47526, Plaintiffs' principal response (Br. 42) is that the heading was changed in the recodification of the statute, and the heading should therefore be ignored. However, the current heading is perfectly consistent with the prior heading,[1] and as the Ninth Circuit held in rejecting the same argument Plaintiffs put forward here, a new heading in a recodification should be read to "reflect Congress's understanding of the then-

[1] Plaintiffs assert (Br. 42) that the prior heading at issue is "Ineligibility for PFC's and AIP Funds," but that was the heading for section 47524(e). The prior heading for section 47526 was "Limitation on Airport Improvement Program Revenue." Plaintiffs' Addendum ("PA") 5.

current substance of the statute." *City of Los Angeles v. FAA*, 239 F.3d 1033, 1036 (9th Cir. 2001). In any event, regardless of the heading, the text establishes the limited, monetary remedy for non-compliance. Plaintiffs argue (Br. 42-43) that the text "does no more than state . . . that loss of eligibility for those revenue sources is *one* consequence of failing to comply with ANCA's requirements." However, the text does not list the specific monetary remedies as *one* consequence; it lists them as *the* consequence.

Second, the statute expressly states that other possible consequences, including injunctive relief, apply *only* to other substantive provisions of ANCA not at issue here. In particular, section 47533 states:

> *Except as provided by section 47524 of this title*, this subchapter does not affect— . . .
>
> (3) the authority of the Secretary of Transportation to seek and obtain legal remedies the Secretary considers appropriate, including injunctive relief.

49 U.S.C. § 47533 (emphasis added). Thus, Congress plainly intended section 47524 to affect the FAA's authority to seek injunctive relief. That effect is apparent: Non-compliance with section 47524 is not subject to an injunction, but rather loss of federal funding eligibility and inability to impose a passenger facility charge.[2] And since Congress did not intend the FAA to have an injunctive remedy

[2] Congress also made clear its intent to have greater remedies for other sections of ANCA than for section 47524 by providing for civil penalties for

for non-compliance with section 47524, Congress plainly did not intend that private plaintiffs have this remedy.

Recognizing that they cannot have a greater right to injunctive relief than does the FAA, Plaintiffs instead argue that section 47533 does not mean what it says. In particular, Plaintiffs note (Br. 44 n.19) that the original version of the statute used the phrase "[e]xcept to the extent required by application of the provisions of this section," rather than "[e]xcept as provided by section 47524 of this title." However, once again, Plaintiffs misplace their reliance on the idea that the current language was a product of a recodification. To be sure, the recodification did not intend to make substantive changes, but that does not mean that the current statutory language is somehow irrelevant or subordinate to a prior, repealed statute. Rather, the recodification clarifies what Congress meant in the first place: the "provision[] of this section" that required a remedy other than an injunction was section 47524, and Congress simply made that explicit when it recodified the statute. A more specific provision governing the precise issue at hand (the availability of injunctive relief) controls over a more general provision offering guidance across the entire recodification. *See, e.g.*, *Nat'l Cable &*

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violations of sections 47528, 47529, 47530, or 47534, but not for non-compliance with section 47524. *See* 49 U.S.C. § 47531. Furthermore, the judicial review provision explicitly excludes section 47524 from its coverage. *Id.* § 47532 ("An action taken by the Secretary of Transportation under any of sections 47528-47531 or 47534 of this title is subject to judicial review . . . .").

Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two."). Indeed, codification of laws would be useless if their plain language has no operative legal effect.[3]

Plaintiffs also argue (Br. 44 n.19) that the opening phrase in section 47533 applies to the clauses numbered (1) and (2), but not clause (3). But this argument contradicts the clear language of the section, whereby all three numbered clauses are connected to the introductory clause. That is why they are numbered (1), (2), and (3), and there is no plausible basis to extract the third clause.[4]

Third, it would make no sense to allow for injunctive relief while providing for the lesser remedy of withholding federal funds. According to Plaintiffs' theory, an airport restriction on Stage 2 and 3 aircraft is void as preempted by ANCA if the airport does not comply with section 47524. But if that is the case, then there is no

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[3] To be sure, a prior version of a statute can be relevant where the prior language was clear and the recodification is ambiguous. *See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 107 (2010) (holding that the recodified statute at issue should not be "dramatically expanded . . . beyond its historical coverage," such that "'from any point in the United States to a point in an adjacent foreign country'" (*i.e.*, the original language) would apply to non-adjacent overseas countries). But there is no authority to support the treatment of an ambiguous, prior version of a statute as controlling over a clear, current statute.

[4] Plaintiffs mention (Br. 44 n.19) the D.C. Circuit's interpretation of this clause in *City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005), but *Naples* had nothing to do with injunctive relief, which section 47533 expressly allows for "[e]xcept as provided by section 47524 of this title." *Naples* is also inapposite for the reasons discussed *infra* at 23.

reason why Congress would grant the FAA the remedy of withholding federal funds until the restriction is rescinded. Congress would then be suggesting that the FAA should allow an unlawful restriction to remain in place, and rather than simply compel its rescission, merely withhold federal money. In short, if injunctive relief were available, the logical response of the FAA would be to enjoin the preempted regulation; withholding federal funds would be superfluous. Such an illogical construction of a statute should be avoided. *See, e.g.*, *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 368 (2d Cir. 2006) ("[W]e have long held that where a statute is ambiguous, it should be interpreted in a way that avoids absurd results.") (quotation marks omitted).

Plaintiffs suggest (Br. 35 n.15) that their theory is not illogical because a private injunctive claim is necessary "where, as here, the agency charged with enforcing the federal law at issue has – for reasons that it is best situated to explain – elected to abdicate those responsibilities." Plaintiffs' allegation of FAA abdication is baseless. But even if that assertion were supported (it is not), there would be no reason to attribute any such expectation to Congress. To the contrary, there is no reason to think that Congress believed the FAA would fail to properly exercise its delegated authority over airports insofar as those airports receive federal funds. The fact that the FAA does not agree with Plaintiffs' position here, as the FAA stated in its correspondence with Congressman Bishop, *see* A391, does

not mean that the FAA "abdicated its responsibilities." To the contrary, the FAA has actively engaged at a policy and legal level with respect to the restrictions at issue in this case, including meeting with Town officials. *See* A318.

2. The Clear Indications Of Congressional Intent Here Suffice Under *Armstrong* To Preclude A Private Right Of Action For Injunctive Relief

Rather than cite any cases in their favor, Plaintiffs simply attempt to distinguish *Armstrong*. That attempt fails on several grounds.

First, Plaintiffs suggest (Br. 34 n.14) that, under *Armstrong*, the existence of a remedy of withholding federal funds is insufficient to demonstrate intent to foreclose an equitable injunction claim. However, *Armstrong* insisted that a remedy of withholding federal funds was a very strong indication of an intent to foreclose injunctive relief, stating that "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996). Plaintiffs latch onto one sentence in *Armstrong*: "The provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief." *Armstrong*, 135 S. Ct. at 1385. But the idea that a provision for withholding funds "might not" be enough in some case to foreclose injunctive

relief does not change the fact that such a provision is a very strong indication of congressional intent.[5]

Moreover, the provision for withholding federal funds here, *i.e.*, section 47526, is not "by itself." Rather, there is another provision, *i.e.*, section 47533, expressly providing for injunctive relief "except for" the section at issue here, *i.e.*, section 47524. A right of action for injunctive relief would conflict directly with Congress's decision to exclude section 47524 from the limited injunctive authority provided in Section 47533. Simply put, Congress would not have "except[ed]" section 47524 from section 47533 if it wanted the injunctive remedy permitted by section 47533 to be created as an equitable right by the courts. Indeed, the

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[5] Plaintiffs do not attempt to rely upon the cases the Supreme Court cites for its "might not" language, and for good reason: Those cases are plainly inapposite. In *Virginia Office for Prot. & Advocacy v. Stewart*, 537 U.S. 247 (2011), the plaintiffs conceded that the injunction could have been granted to a private plaintiff; the question was simply whether it mattered that the plaintiff there was a state agency. *Id.* at 255-56. Moreover, the statute at issue there, unlike here, expressly authorized the plaintiff to "pursue administrative, legal, and other appropriate remedies." 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i). The case that *Virginia Office* cites, in turn, is likewise readily distinguishable. *See Virgnia Office*, 537 U.S. at 256 n.3 (citing *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002)). *Verizon* held only that a statutory provision authorizing jurisdiction over certain kinds of state decisions does not divest jurisdiction over another kind of decision. *See Verizon*, 535 U.S. at 643 ("[Section] 252(e)(6) merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under § 1331."). Of course, neither *Virginia Office* nor *Verizon* (nor any other case of which we are aware) has held that an injunction claim is allowed despite an express statutory statement that an injunction would be allowed "except for" the statutory provision at issue.

Supreme Court has held that this kind of deliberate exclusion does suffice to show congressional intent to foreclose an additional remedy. *See United States v. Fausto*, 484 U.S. 439, 455 (1988) ("[The statute's] deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act.").

The congressional intent to foreclose injunctive relief here is therefore substantially *stronger* than in *Armstrong*. In *Armstrong*, there was no provision discussing injunctive relief; the statute simply stated that the agency should not pay federal funds if there was a violation of the Medicaid provision at issue. 135 S. Ct. at 1385 (citing 42 U.S.C. § 1396c). Moreover, in *Armstrong*, there was a reasonable explanation for allowing withholding of federal funds in addition to injunctive relief: without private injunctive claims, "it must suffice that a federal agency, with many programs to oversee, has authority to address such violations through the drastic and often counterproductive measure of withholding the funds that pay for such services." *Armstrong*, 135 S. Ct. at 1396 (Sotomayor, J., dissenting). Here, in contrast, there is no ground to suppose that the FAA would be unaware of relevant restrictions, and the withholding of funds would not be punishing third-party recipients (as in Medicaid), but the airports themselves.

Second, Plaintiffs argue (Br. 32-33) that *Armstrong* is distinguishable because there the text was judicially unadministrable. However, *Armstrong* never suggested that lack of administrability is a requirement for precluding a private injunction claim. Rather, that was simply a part of the basis for showing congressional intent to preclude such a claim. *See Armstrong*, 135 S. Ct. at 1385-87. And other cases have found preclusion of additional remedies without a finding of lack of administrability. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 74-76; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Fausto*, 484 U.S. at 455. Moreover, the indirect and inferential showing of congressional intent based on the administrability of the language is substantially weaker than the showing here, based on express language and the need to make logical sense of the statute as a whole, as discussed above.

Furthermore, there *is* a significant administrability problem here. Plaintiffs suggest (Br. 32-33) that there is no problem because they would seek to enforce only the procedural requirements of section 47524, rather than the substantive requirements (which Plaintiffs do not dispute are unadministrable, as the Town explained, *see* Opening Br. 32-33). But Plaintiffs' decision to limit the nature of their claim—because this case happens to implicate the procedural requirements—does not explain how such a right can be inferred from the statute. If there is a private right of action for injunctive relief to enforce a particular section of a

statute, then there is no basis to think that Congress intended to separate out the procedural and substantive components of the statute.

In any event, if the requirements are only procedural, that is all the more reason why Congress intended that the FAA, not private parties, enforce them. There is no plausible basis to think that Congress intended that private parties enforce requirements about how and when airport proprietors submit proposed access restrictions to the FAA. Indeed, this case is a perfect illustration of why it would be anomalous to have private plaintiffs attempt to enforce the agency's right to obtain information in a particular way. The Town actively engaged the FAA and kept agency officials informed of its process and the proposed Local Laws in advance of their adoption. *E.g.*, A318. If the FAA wanted the Town to employ a different procedure in presenting the Local Laws to the FAA, the agency would have said so. The FAA certainly did not need private plaintiffs to protect *its* right to review the Local Laws in a different manner.

Third, Plaintiffs try (Br. 33-34) to distinguish *Armstrong* on the basis that violation of the Local Laws supposedly results in criminal fines,[6] not loss of federal benefits. But this is a distinction without a difference as to the question at issue, which is whether Congress intended to preclude injunctive relief. The

[6] An amendment to the Local Laws, enacted in May 2015, made clear that a violation of the three Local Laws at issue here was not a criminal offense but rather a violation. *See* Town of E. Hampton Res. 2015-569.

provisions of ANCA do not depend on whether the airport restrictions are civil or criminal, and there is accordingly no basis to place significance on that issue. Plaintiffs suggest (Br. 34) that this is "precisely the sort of scenario that has been 'long recognized' as warranting invocation of a federal court's equity power to 'assur[e] the supremacy of federal law.'" (quoting *Armstrong*, 135 S. Ct. at 1384 (in turn quoting *Ex parte Young*, 209 U.S. 123, 155-156 (1908))). However, this sentence from *Armstrong* said nothing about criminal fines as opposed to loss of benefits; it was simply referring to the generic rule of *Ex parte Young*, whereby an injunctive claim is allowed if there is no congressional intent to foreclose it. *See Armstrong*, 135 S. Ct. at 1384-85.

Finally, Plaintiffs argue (Br. 35) that, unlike in *Armstrong*, Plaintiffs cannot pursue their ANCA claims administratively. That is simply erroneous. Plaintiffs correctly note that ANCA claims cannot be brought in Part 16 proceedings, which apply to alleged violations of grant assurances under 49 U.S.C. § 47107 but not ANCA. *See Aircraft Owners & Pilots Ass'n Members v. City of Pompano Beach, Fla.*, No. 16-04-01, 2005 WL 3722717, at *25 ("*Pompano Beach*") (Dec. 15, 2005 Director's Determination). However, the FAA has provided an administrative remedy for ANCA in the regulations implementing ANCA itself, which expressly contemplate a third-party "complaint" that the FAA attempts to resolve informally. 14 C.F.R. § 161.503. If informal resolution is unsuccessful, there is a formal

process for the FAA to terminate eligibility for federal funding and for imposing a passenger facility charge. *Id.* § 161.505.[7] This ability to seek administrative relief thus further supports the point that Congress saw no need for a private claim for injunctive relief.

B. Plaintiffs Have No Valid Claim Under ANCA

Even if Plaintiffs have a private right of action under ANCA (and they do not), that claim would be unsuccessful as a matter of law because ANCA does not preempt the Local Laws. Rather, as the district court correctly held (SPA34-36), the preemptive scope of section 47524 extends only to airport proprietors that receive federal funding or impose passenger facility charges. Because the Town does not do so, and is willing to accept the financial consequences of not seeking

[7] The FAA mentions the possibility of other relief *only* "to protect the national aviation system and violated federal interests." 14 C.F.R. §§ 161.501, 161.503. This provision does not remotely suggest that non-compliance with the specific requirements of ANCA section 47524—as opposed to an interference with federal interests—is subject to injunctive relief. Indeed, that language is just another way of recognizing the general preemptive scope of the federal aviation laws, subject to the proprietor exception. Regardless, the ability of the federal government to protect the national aviation system has no bearing on whether a private individual has a private injunctive right to enforce ANCA *regardless* of whether such interests are implicated. The other regulatory provision Plaintiffs cite (Br. 18) is simply a recitation of 49 U.S.C. § 47533, and Plaintiffs fail to mention the "Except to the extent" clause at the start that section. 14 C.F.R. § 161.7(d)(3). Thus, the FAA has never suggested—let alone officially concluded in a manner warranting deference (*contra* Br. 47)—that non-compliance with ANCA's procedural requirements alone would be a basis for injunctive relief.

FAA approval under ANCA, there is no preemption of the Local Laws under ANCA.

Plaintiffs suggest in passing (Br. 44) that "ANCA's requirements are mandatory for the airport at issue here because that airport indisputably remains federally obligated through 2021." However, the term "federally obligated" refers only to the obligations in grant assurances under the Airport and Airway Improvement Act of 1982 ("AAIA"), which generally last up to 20 years after the federal grant is provided. *See* 49 U.S.C. § 47107; A52. Yet Plaintiffs have abandoned their argument for preemption based on the AAIA. And the question of whether an airport is federally obligated under the AAIA is irrelevant to ANCA's provisions limiting relief to airports that are *currently* receiving federal funds or are imposing a passenger facility charge. *See* 49 U.S.C. §§ 47524(e), 47526. There is no dispute that the Town does not fall under these provisions.[8]

1. This Court's Decision In *National Helicopter* Is Controlling

This Court's prior precedent compels the conclusion that Plaintiffs have no valid claim for preemption under ANCA. In *National Helicopter*, the plaintiffs raised the same argument Plaintiffs raise here: "The District Court's order enjoining the restrictions can also be affirmed on the ground that the Airport Noise

[8] Moreover, Plaintiffs neglect to mention that the Town is in a unique situation created by the 2005 Settlement Agreement by which the Town is federally obligated *but for the expiration of the two relevant grant assurances*. *See* A407.

and Capacity Act ('ANCA') preempts restrictions on Stage 2 and Stage 3 aircraft that were imposed without following ANCA's required procedures and cost-benefit calculations." Brief of Plaintiff-Appellee-Cross-Appellant at 40, *Nat'l Helicopter Corp. v. City of New York*, No. 97-7082 (2d Cir. Mar. 31, 1997). This Court nonetheless held that various noise-related regulations were not preempted by federal law. *See Nat'l Helicopter*, 137 F.3d at 89-91.

Plaintiffs err in arguing (Br. 48-49) that *National Helicopter* is irrelevant because it did not squarely address ANCA. The opinion expressly cited ANCA as one of four statutes that together set forth the scope of federal preemption. *See Nat'l Helicopter*, 137 F.3d at 88 (listing the "Airport Noise and Capacity Act" among "acts implying preemption of noise regulation at airports"). It then stated in the next paragraph that this preemptive scope was subject to the "proprietor exception," a well-established exception to preemption codified in the ADA, 49 U.S.C. § 41713(b)(3). *Id.* Thus, the reasoning of this Court was plain: Local regulations that fall within the proprietor exception are not preempted because that exception applies to all of the federal aviation laws listed, including ANCA.[9]

[9] In the district court, then-Judge Sotomayor similarly applied the proprietor exception regardless of the plaintiff's assertion that ANCA and other aviation statutes supported a "general claim of implied preemption." *Nat'l Helicopter Corp. of Am. v. City of New York*, 952 F. Supp. 1011, 1023 (S.D.N.Y. 1997).

There is no legal basis to ignore this holding. Even a holding that was implicit in a decision is binding where it was a necessary step in the decision. *See, e.g.*, *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1561 (11th Cir. 1996) ("That the *Gadsden County* Court examined the intent issue as one of fact to be decided anew in that case is itself a holding, albeit an implicit one, that is binding upon this panel."); *see also Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180, 1186 (9th Cir. 2000) (an "implied holding" that was "a necessary step in that court's determination" of a legal issue "cannot be dismissed as mere dicta"). Here, the *National Helicopter* holding was far more than implicit, since ANCA was mentioned explicitly, and it was plainly a necessary step in the decision on preemption.

None of the cases Plaintiffs cite (Br. 48-49) suggests that a holding as to one statute can be disregarded simply because it was discussed together with several other statutes. Most of the cases Plaintiffs cite concern issues both not addressed and not adequately raised in the prior precedent.[10] Here, the ANCA preemption

[10] *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (issue was "by no means adequately presented"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, *neither brought to the attention of the court nor ruled upon*, are not to be considered as having been so decided as to constitute precedents." (emphasis added)); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) ("[I]nasmuch as the punitive damages issue was not briefed, argued or addressed by the *Quaker State* panel, we are not constrained by it . . . ."). Another case Plaintiffs cite is readily distinguishable because the legal issue was mentioned but not decided because a

issue was plainly raised, not just in passing but in a separate section of the cross-appellant's brief before this Court, and then discussed in detail in opposition and reply briefs.

The principal case Plaintiffs rely upon specifically refutes Plaintiffs' argument: Plaintiffs cite (Br. 48) the *dissenting* opinion, which Plaintiffs fail to indicate was a dissent. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 118 (1993) (O'Connor, J., dissenting). The majority explained that a prior decision was binding where the issue was "necessarily" decided, even in a single sentence. *See Harper*, 509 U.S. at 98 ("Because a decision to accord solely prospective effect to *Davis* would have foreclosed any discussion of remedial issues, our 'consideration of remedial issues' meant 'necessarily' that we retroactively applied the rule we announced in *Davis* to the litigants before us."); *cf. id.* at 118-19 (O'Connor, J., dissenting) ("the solitary sentence upon which the Court relies . . . does not 'squarely address' the question of retroactivity," and "unexamined assumptions do not bind this Court"). Here, the binding nature of the precedent is even clearer than in *Harper* because the preemption ruling was not just

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factual ruling made the issue moot. *See Blum v. Schlegel*, 18 F.3d 1005, 1015 (2d Cir. 1994) ("Although this court proceeded to cite cases for the proposition that violation of such contractual procedures did not implicate a constitutionally cognizable property interest, this court did not squarely hold that the violation of such procedures did not implicate a constitutionally protected property interest. Instead, this court indicated that the contractual procedures governing Dube's tenure review were complied with.").

"necessarily" decided; the supposed preemptive scope of ANCA was expressly cited, and the Court then held that several regulations were not preempted. This is a holding by any definition, and it is therefore binding.

By contrast, the ANCA precedent Plaintiffs rely upon (Br. 37-39), *City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005) ("*Naples*"), is inapposite. *Naples* mentioned the injunction issue under ANCA only in passing, in dicta, without explanation, in a situation where the issue was not implicated at all. *Naples* concerned an airport proprietor's petition for review of an FAA decision to withdraw eligibility for funding under the AAIA. *Id.* at 432. The proprietor argued that ANCA removed the FAA's authority to withhold funding for a violation of the AAIA if the proprietor satisfied the procedural requirements of ANCA for Stage 2 restrictions. *Id.* at 433. The D.C. Circuit disagreed, concluding that, "[b]ecause the Noise Act does not clearly reveal whether the FAA may withhold grants when an airport operator imposes an unreasonable Stage 2 noise restriction, we shall defer to the FAA's determination that it retains that power under the Improvement Act." *Id.* at 434-35. To be sure, the court stated that "subsection [47524](c)'s requirement of FAA approval is not tied to grants." *Id.* at 434. But this offhand remark, in a case in which the proprietor was fighting to *retain* its grant eligibility, certainly does not constitute a persuasive holding on the injunction issue.

2. The Text And Structure Of ANCA Establish That There Is No Preemption Here

The text and structure of ANCA show that section 47524 has no preemptive scope beyond airports that wish to continue to receive federal aviation grants and to impose passenger facility charges. ANCA is structured to give airports a choice: enact noise regulations with FAA approval or forego certain funding. That is why the only remedy for non-compliance with section 47524 is the ineligibility for funding. *See* 49 U.S.C. §§ 47524(e), 47526. And that is why section 47524 is expressly excluded when the statute provides for other remedies: civil penalties and injunctions. *See* 49 U.S.C. §§ 47531, 47533.

The provision of such limited monetary remedies establishes Congress's intent to follow the well-recognized limit on Spending Clause legislation whereby recipients always retain the option of foregoing federal funds and thus avoiding any regulatory conditions attached to accepting such funds. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (opinion of White, J.) ("[T]he Court has more than once announced that in fashioning remedies for violations of Spending Clause statutes by recipients of federal funds, the courts must recognize that the recipient has 'alternative choices of assuming the additional costs' of complying with what a court has announced is necessary to conform to federal law or 'of not using federal funds' and withdrawing from the federal program entirely.") (quoting *Rosado v. Wyman*, 397 U.S. 397, 420-421

(1970)); *Doe v. Chiles*, 136 F.3d 709, 722 (11th Cir. 1998) ("[T]he appellants argue that the district court abused its discretion because it did not give Florida officials the option of 'terminat[ing] [the] receipt of federal money rather than assum[ing] unanticipated burdens.' The appellants' concern here is overstated, as a recipient of federal funds under Spending Clause legislation always retains this option.").

Indeed, the sections of the Medicaid Act at issue in *Armstrong* are structured and worded just like the ANCA provisions at issue here. The Medicaid Act provides that states "must" conform to certain federal requirements. *See* 42 U.S.C. § 1396a(a) ("A State plan for medical assistance must . . . ."). And there is a remedy of withholding federal funds for non-compliance with those requirements. *See id.* § 1396c. Congress did not see any need to expressly state that the requirements for state plans did not apply if the state chose to forego funding. Yet courts have repeatedly held that Medicaid is voluntary and that states can choose to forego federal funding and exempt themselves from the Medicaid requirements that apply to those that do accept federal funds. *See, e.g.*, *Frew v. Hawkins*, 540 U.S. 431, 433 (2004) ("Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor. State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements."). Simply put, Plaintiffs' argument would go

far beyond even the dissenting opinion in *Armstrong*, to suggest that an injunction is a permissible remedy when there is a funding remedy *and* the state or local government has foregone the receipt of federal funding. This extreme position would undermine the well-established interpretation of Spending Clause legislation like the Medicaid Act.

Plaintiffs argue (Br. 37-40) that the language of sections 47524(b) and (c) is mandatory. But Plaintiffs rely on the word "shall" that appeared in the original statute but not in the current version, which uses the word "may." 49 U.S.C. § 47524(b), (c)(1). And as discussed above, the current statute is controlling. Plaintiffs also err in looking at these provisions in isolation and ignoring the rest of the statutory text. As the Supreme Court recently stated, "[s]tatutory language cannot be construed in a vacuum. It is a fundamental rule of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, --- S. Ct. ----, 2016 WL 1092415, at *10 (2016) (internal quotation marks omitted). Just as in the Medicaid Act, the supposedly mandatory language in ANCA is followed by a section prescribing the remedies for failure to comply, which concern only funding. Read together, the provisions of the statute thus evince congressional intent to allow an airport not to comply if it foregoes funding.

Moreover, this interpretation is confirmed by the express findings Congress made in ANCA. In particular, Congress stated that "revenues controlled by the United States Government can help resolve noise problems and carry with them a responsibility to the national airport system." 49 U.S.C. § 47521(6). But the revenues would not resolve noise problems if the requirements were mandatory regardless of funding. Rather, this finding makes sense only as a clear expression of congressional intent that funding be the means of encouraging compliance.

Finally, Plaintiffs suggest (Br. 41) that the grandfather clause in ANCA—whereby regulations in place at the time of ANCA's enactment are allowed to remain in place—would be superfluous if compliance were voluntary. But this argument misses the essential point that, while compliance is voluntary, there is a consequence to non-compliance: ineligibility for federal funding and inability to impose a passenger facility charge. *See* 49 U.S.C. §§ 47524(e), 47526. The grandfather clause therefore had a clear role to play in ensuring that this consequence would not apply to regulations already in existence at the time of ANCA's passage.

3. Other Federal Aviation Law Establishes That There Is No Preemption Here

The background of federal aviation law against which ANCA was passed also establishes that there is no preemption under ANCA here.

First, the ADA expressly deals with preemption, with a section entitled "Preemption." 49 U.S.C. § 41713(b). That section establishes that a state or local government cannot enact any regulation "related to a price, route, or service of an air carrier," but that this preemption does not apply to a state or local government that owns or operates an airport when "carrying out its proprietary powers and rights." *Id.* In contrast to the ADA, ANCA does not mention preemption at all. Accordingly, there is nothing in ANCA to suggest that Congress intended to dramatically change the scope of preemption established in the ADA by invalidating the proprietor exception. What Plaintiffs seek, in effect, is a repeal by implication of the express preemption provision of the ADA. Such a repeal is disfavored and should not be found where, as here, the statutes can easily be reconciled. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.") (internal quotation marks omitted).

Second, Plaintiffs' theory is also disfavored because it seeks to expand the scope of preemption into an area of traditional state and local authority. The Supreme Court has long recognized that there is a "presumption against preemption," which applies even in areas with extensive federal regulation. *See Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). This presumption "applies with

particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

Plaintiffs' interpretation would expand preemption into an area of traditional state and local authority because the proprietor exception reflects the traditional role of state and local government airport owners that had been understood for decades even before the passage of the ADA. *See Nat'l Helicopter*, 137 F.3d at 88. As this Court has recognized, "[t]he regulation of excessive aircraft noise has traditionally been a cooperative enterprise, in which both federal authorities and local airport proprietors play an important part." *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 83 (2d Cir. 1977). The role of local airport proprietors is to provide reasonable, non-discriminatory regulations to address noise concerns. *Id.* at 83-84. And "Congress repeatedly has declined to alter this cooperative scheme." *Id.* at 83. There is no basis to conclude that Congress decided to depart from this approach that had been established in numerous statutes by passing a law that said nothing at all about preemption or the proprietor exception.

Third, not only would Plaintiffs' interpretation depart from the long-established proprietor exception, but it would also depart from the long-established approach of using federal funds as the means to encourage airport compliance. The principle that the FAA would regulate airports that use federal funding, rather

than regulate all airports, has been consistently applied in statutes since the FAA's founding in the Federal Aviation Act of 1958. That statute made clear that the FAA exercised authority over airports through the use of federal funds. 72 Stat. 731 § 308 ("No Federal funds, other than those expended under this Act, shall be expended, . . . for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area . . . except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense."). The only restriction as to airports not using federal funds was that they could not be constructed or their runways altered in a manner that interfered with the FAA's authority over airspace. *See id.* § 309. Likewise, the AAIA requires that airports that receive federal funds be regulated through grant assurances. *See* 49 U.S.C. § 47107(a) ("The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—(1) the airport will be available for public use on reasonable conditions and without unjust discrimination . . . .").[11] In short, the historical

[11] Prior statutes, in particular the Federal Airport Act of 1946 and the Airport and Airway Development Act of 1970, also used grant agreements to place certain obligations on airports. *See, e.g.*, FAA Order 5090.3C, *Field Formulation of the National Plan of Integrated Systems* (2000) at 1, *available at*

statutory scheme, established over decades, is one in which the federal government regulates airports that receive federal grant funds.

Plaintiffs' interpretation of ANCA would depart radically from that scheme, and in doing so, would dramatically enlarge the FAA's role in a manner that Congress never intended and that has no precedent in the 26 years since ANCA was enacted. There are over 19,300 airports across the nation. FAA, *Report to Congress, National Plan of Integrated Airport Systems (NPIAS) 2015-2019* (2014) ("FAA Report") at 1-2, *available at* http://www.faa.gov/airports/planning_capacity/npias/reports. The vast majority (over 80 percent) of existing airports in this country are actually tiny airstrips or helipads that do not receive federal funding. *Id.* This includes approximately 14,200 private-use airports. *Id.* at 1. These small airports may have countless rules and regulations, but the FAA does not record or report on activity at, or regulate, these airports. *E.g.*, 49 U.S.C. § 47103. Plaintiffs' interpretation of ANCA would dramatically alter the FAA's authority, rather than provide an incremental addition of FAA oversight over noise regulations at federally-funded airports. Such a reading of ANCA is implausible, as "Congress . . . does not alter the fundamental details of a regulatory scheme in

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http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/12754.

vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

Plaintiffs' reading of ANCA to enlarge FAA authority would also be impractical. The sheer volume of airports, combined with the broad language of ANCA covering "any" restriction on Stage 3 aircraft, 49 U.S.C. § 47524(c)(1)(E), would mean that the FAA would face countless requests for approvals. And small, private airstrips that are not even open to the public would be forced to expend enormous time and resources complying with the statute for changes as minor as closing an airstrip an hour early. Since ANCA was passed in 1990, no such deluge of regulatory proceedings has occurred, suggesting widespread understanding that airports that do not receive federal funds or impose passenger facility charges are not regulated by the FAA under ANCA. In short, there is a reason why Congress in statute after statute has limited FAA oversight of general airport operations to those receiving federal funding, and there is no basis now to read ANCA for the first time to have broader application.

4. The Legislative History of ANCA Confirms That There Is No Preemption Here

The legislative history also demonstrates that there was no congressional intent in enacting ANCA to preempt noise regulation by proprietor airports that receive no federal funding and do not impose passenger facility charges. If Congress intended the dramatic changes that Plaintiffs seek—to the decades-old

proprietor exception and the scope of FAA authority—then surely the legislative debate would have revealed as much. But it does not. Rather, the bill was passed as part of a budget reconciliation without significant debate.

Moreover, the limited discussion of the bill reflects the accepted understanding that it would apply only to airports receiving federal funds or those that would impose passenger facility charges. Congressman Oberstar, sponsor of the legislation and Chairman of the Aviation Subcommittee, explained: "Airports which impose unapproved access restrictions after October 1990 would become ineligible for funds from the Airport Improvement Program and may not impose Passenger Facility Charges." 136 Cong. Rec. E3694 (1990). Similarly, the summary at the start of the hearing report states:

> Decisions to build new airports and expand the capacity of existing airports, a critical factor in noise impact, are basically local decisions, based largely on local economic and environmental considerations. *The Federal government has some ability to influence these decisions through its power to grant funds* for airport development, and through its power to determine whether the air traffic control systems can accommodate operations from a new or expanded airport.

Summary of Subject Matter at 1, *Federal Aviation Noise Policy: Hearings Before the Subcomm. On Aviation of the H. Comm. on Public Works & Transportation*, 101st Cong. (1990) ("Hearings") (emphasis added). The witnesses testifying at the Hearings consistently made the same point. *See id.* at 58 ("I understand that is not directly under FAA jurisdiction. However, the Federal Government through the

power of the purse has an awful lot of control and expansion of these airports is funded through FAA monies."); *id.* at 576 ("Airports and communities sharing in the benefits of air transportation and availing themselves of Airport Improvement Program funds must conform to the National Noise Program.").

Plaintiffs argue (Br. 45-47) that the legislative history shows an intent to apply ANCA to airports that do not receive federal funds. However, no statement they cite actually refers in any way to airports that are not federally funded. Rather, such statements concern only generic comments about the requirements of ANCA. For instance, Plaintiffs suggest (Br. 10) that the senators who opposed the bill understood it to be mandatory. But in fact they understood it be mandatory only for airports receiving federal funding. *See* 136 Cong. Rec. S15777-02 (remarks of Sen. Lautenberg) ("[I]t says that if an airport is not willing to play ball, it is not going to get Federal funding."). No one in the House or Senate mentioned coverage for airports not receiving federal funds, and there is no basis to infer such intent in the absence of any evidence to support it.

II. PLAINTIFFS FAIL TO DEFEND THE DISTRICT COURT'S ERRONEOUS PRELIMINARY INJUNCTION AGAINST THE ONE-TRIP LIMIT

Plaintiffs challenge the Mandatory Curfew and Extended Curfew only in their cross-appeal as to the applicability of preemption under ANCA, which fails for the reasons set forth above in Part I. Plaintiffs do not dispute that, assuming the

proprietor exception applies, the district court correctly held the Mandatory Curfew and Extended Curfew are reasonable and therefore not preempted under that exception.

As to the One-Trip Limit, Plaintiffs do attempt to defend the district court's injunction ruling, which found that law preempted as unreasonable. But Plaintiffs fail to overcome the errors of law the district court made in reaching that decision. Under this Court's precedent, the One-Trip Limit plainly satisfies the "reasonable, nonarbitrary and non-discriminatory" requirement (hereinafter "reasonableness test") first enunciated by this Circuit in *British Airways Bd. v. Port Authority of N.Y.*, 558 F.2d 75, 84 (2d Cir. 1977), and reiterated post-ANCA in *National Helicopter*, 137 F.3d at 87. The injunction against the One-Trip Limit accordingly should be vacated.

A. The District Court Erred In Applying A Least-Restrictive-Alternative Test To Decide The Reasonableness Of The One-Trip Limit

The district court erred as a matter of law in adopting a test whereby a regulation is "reasonable" only if it is the least restrictive alternative for addressing noise. Plaintiffs argue (Br. 54) that the district court did not adopt such a test because it used the phrase "less restrictive" rather than "least restrictive." This semantic distinction is meaningless: the district court stated that the One-Trip Limit is unreasonable because "there is no indication that a less restrictive measure

would not also satisfactorily alleviate the Airport's noise problem." SPA44. If, as the district court held, the existence of a less restrictive alternative makes a regulation unreasonable, then *ipso facto* the regulation must be the least restrictive alternative.

As the Town explained (Opening Br. 37), this test is unsupportable. Plaintiffs do not dispute that a least-restrictive-alternative test, akin to strict scrutiny, conflicts with the usual meaning of "reasonable," the statutory basis for the reasonableness test, and the reasoning of *National Helicopter*. The correct test for reasonableness gives great deference to airport proprietors and certainly does not invalidate restrictions simply because there might be a less restrictive alternative. Accordingly, the district court's opinion is premised on clear legal error.

Plaintiffs' only defense of this test is the assertion (Br. 54) that Congress and the FAA look at alternatives in deciding reasonableness. But this assertion—without citation—says nothing about whether Congress and the FAA require the least restrictive alternative, let alone whether courts should do so. Plaintiffs suggest (Br. 65) that ANCA requires the least restrictive alternative, but in fact the statute never says any such thing. At most, the ANCA regulations require a showing that other available remedies are infeasible or would be less cost-effective. *See* 14 C.F.R. § 161.305(e)(2)(i)(A)(ii). Moreover, the fact that the

FAA compares alternatives—as the Town did—certainly does not mean that any less restrictive alternative makes a regulation unreasonable. In any event, the reasonableness test comes from the proprietor exception, not from ANCA.

B. The District Court Abused Its Discretion In Holding The One-Trip Limit Unreasonable

Under the correct test for reasonableness, the One-Trip Limit is more than reasonable and therefore not preempted, even on abuse-of-discretion review.

As an initial matter, Plaintiffs err in arguing (Br. 59) that a more deferential standard applies in preliminary than in permanent injunction cases. This Court has consistently applied the same "de novo" test for legal rulings and "clear error" test for factfinding at the preliminary injunction stage as at the permanent injunction stage. *See, e.g.*, *Citigroup Global Markets, Inc. v. VCG Special Opportunity Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (holding in preliminary injunction case that "[a] district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law"); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 315 (2d Cir. 1982) ("Beginning decades ago, we have not hesitated to reverse an order denying a preliminary injunction where the district court reached an erroneous conclusion on the facts before it; or, as stated now under Rule 52(a) of the Federal Rules of Civil Procedure, where the findings of fact are clearly erroneous.") (internal citations omitted); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 33 (2008) ("The standard

for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (quotation marks omitted).

Plaintiffs rely on *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740-41 (2d Cir. 1953), but there is nothing in that 63-year-old decision establishing greater deference for preliminary injunctions. Plaintiffs assert (Br. 59) that *Hamilton Watch* held that "a district court's preliminary fact findings" must be accepted if they "have support in the record." In fact, this Court stated that "the trial judge's findings derived from evidence presented at a preliminary hearing . . . have such support in the oral testimony that we cannot possibly declare them 'clearly erroneous.'" 206 F.2d at 740. Thus, *Hamilton Watch* held only that the particular evidence there sufficed; it did not purport to create a rule that *any* evidence suffices, and no court in the years since the case was decided has read it that way.

Plaintiffs also cite (Br. 67) a Ninth Circuit decision stating that a permanent injunction analysis is "stricter" than a preliminary injunction analysis, *Int'l Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 737 (9th Cir. 1986), but that approach has never been adopted by this Court. In any event, this statement was based on the idea that error may be "easier to discern" on appeal

from a permanent injunction. *Id.* But where, as here, the error is clear in a preliminary injunction order, it is subject to searching *de novo* review.

1. The Process, Data, And Analysis Underlying The Adoption Of The One-Trip Limit Establish Its Reasonableness

There are numerous, undisputed facts Plaintiffs ignore that establish the reasonableness of the One-Trip Limit:

- The Town has considered the noise problem for over a decade and tried voluntary measures that failed to fix the problem. *See* A292 ¶ 8; A301-03; A333 ¶ 27.
- The number of helicopter operations increased by almost 50% from 2013 to 2014, and noise complaints increased accordingly. A357 ¶ 8; A333 ¶ 28.
- The Town employed an extraordinarily open and thorough process in developing the Local Laws, meeting with community members, industry representatives, and federal officials, and conducting three phases of increasingly detailed studies. Opening Br. 10-16.
- The Town did not adopt a proposed ban on helicopters during the summer season, instead adopting the more modest measures in the Local Laws. Opening Br. 16-17.

- The Local Laws would reduce helicopter operations only to the level they were at in 2013. *See* A358 ¶ 9 (expert declaration of Peter Stumpp); *see also* A307-08.
- The Local Laws would affect "under 23% of total operations, while addressing the cause of over 60% of the complaints." A325 ¶ 11.

This undisputed evidence is far stronger than the evidence this Court accepted in upholding the much stricter 47% reduction in operations and weekend ban at issue in *National Helicopter*. *See, e.g.*, 137 F.3d at 90 ("the mandated 47 percent reduction in operations was not backed by any study reflecting the appropriate scenario"). Plaintiffs attempt (Br. 67-69) to distinguish *National Helicopter* on factual grounds, but none of these factual points were actually relied upon in the decision. Rather, this Court reasoned that "the proprietor was entitled to eliminate a portion of the Heliport's operations upon reaching a conclusion that a problem of excessive noise existed," and that "the City's desire to protect area residents from significant noise intrusion during the weekend when most people are trying to rest and relax at home" is "ample justification for the application of the proprietor exception." 137 F.3d at 90. And the Court held as much even in the absence of any study backing the proposed 47% reduction, in contrast to the detailed studies here. The Town's approach clearly satisfies the *National Helicopter* standard.

In any event, the Plaintiffs' supposed factual distinctions, even if accurate (they are not), are irrelevant.

First, Plaintiffs note (Br. 67) that the heliport in *National Helicopter* was neither federally obligated nor designated by the FAA as important to the national aviation system. As to federally obligated status, Plaintiffs fail to explain how the Town having accepted federal money 15 years ago affects the *reasonableness* of the One-Trip Limit now. And as discussed *supra* at 19 & n.8, federally obligated status is a term meaningful only in the context of the AAIA, a statute that Plaintiffs have abandoned in this appeal as the basis for any claim. As to the importance of the East Hampton Airport to the national aviation system, the FAA has never suggested that this importance is imperiled in any way by the One-Trip Limit, which when combined with the curfews would still only reduce helicopter operations to 2013 levels.

Second, Plaintiffs note (Br. 68) that the restrictions in *National Helicopter* redistributed flights to other heliports. But this Court's opinion states only that the proprietor had "goals of redistributing sightseeing flights away from the Heliport to other City heliports." 137 F.3d at 86. There was no suggestion that most, let alone all, operations would simply occur at other heliports, or that such a fact was necessary to support a reasonable restriction. Furthermore, the Town in its

analysis did take account of the fact that some operations would be shifted to other airports in nearby locations. A319-20, A366-79.

Third, Plaintiffs assert (Br. 68) that the restrictions at issue in *National Helicopter* affected only Stage 2 helicopters, not (as here) Stage 3 and Stage 4 aircraft. But Plaintiffs fail to support their assertion that the *National Helicopter* restrictions affected only Stage 2 aircraft, and this Court nowhere stated as much. In any event, this distinction between stages of aircraft matters under ANCA only in determining whether formal FAA approval is required (Stage 3 restriction) or whether the statute's procedural requirements apply (Stage 2 restrictions); it has nothing to do with reasonableness under the proprietor exception. Moreover, in ANCA, the stages are used generally as a proxy for how noisy the aircraft might be, and crucially, Plaintiffs do not challenge on appeal the Town's definition of "noisy aircraft," which the district court accepted and which is consistent with the FAA's approach. *See* Opening Br. 43 n.9.

Finally, other case law (Opening Br. 40-41) confirms the reasonableness of the One-Trip Limit, and Plaintiffs' attempt (Br. 69 n.27) to distinguish those cases is meritless. Plaintiffs argue that *SeaAir NY, Inc. v. City of N.Y.*, 250 F.3d 183 (2d Cir. 2001), is irrelevant because the restrictions affected only intra-state transportation, but as an alternative basis for decision this Court recognized that the total ban on commercial air tour flights by sea planes "would fall comfortably

within the proprietor exception." *Id.* at 187. Plaintiffs claim that *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), is irrelevant because it was decided before ANCA was enacted, but that does not affect the analysis under the proprietor exception. Finally, Plaintiffs claim that *NBAA v. City of Naples Airport Auth.*, 162 F. Supp. 2d 1343 (M.D. Fla. 2001), is irrelevant because the defendant had complied with ANCA, but once again that has nothing to do with the proprietor exception.[12]

2. The District Court Failed To Provide Any Persuasive Basis For Questioning The Reasonableness Of The One-Trip Limit

In addition to its erroneous use of a least-restrictive-alternative test, the district court abused its discretion in holding (SPA44) that the One-Trip Limit is unreasonable based solely on the idea that the complaints "originated from a small

[12] Plaintiffs also note (Br. 70 & n.29) that the FAA has found restrictions unreasonable in other cases, but those decisions—involving large commercial airports like LAX, and made by the agency rather than the courts—are inapposite. They also concerned an interpretation of ANCA or grant assurances under the AAIA, not the proprietor exception. *See* FAA Decision on 14 CFR Part 161 Study – Proposed Runway Use Restriction at LAX at 9 (Nov. 7, 2014), *available at* http://www.faa.gov/airports/environmental/airport_noise/part_161/media/Final-Determination-LAX-Part%20161-Application-20141107.pdf; FAA, Final Decision on the Application for a Curfew by Burbank-Glendale-Pasadena Airport Authority (Oct. 30, 2009), *available at* http://www.faa.gov/airports/environmental/airport_noise/part_161/media/Burbank_10_30_09.pdf.

percentage of the Town's residents" and the "drastic … effect it poses on some of Plaintiffs' businesses."

Plaintiffs assert (Br. 61) that the court was correct to discount the complaints because they came from 1.2% of households, but Plaintiffs ignore the district court's finding (SPA41) that this did demonstrate a noise problem: "The Court recognizes that a large portion of these complaints came from a small number of households, but it cannot be argued that the Town lacked data to support a finding of a noise problem at the Airport, particularly given the large increase in helicopter traffic in recent years." This finding was well supported by the evidence, including over 23,000 formal complaints made by 633 different households, thousands of informal complaints, resolutions passed by nearby towns, and statements made by Town residents at public meetings. Opening Br. 9-10, 15-16. Even looking solely at formal complaints, when over 600 households in a small community take the time to complain to their local government, and some are so badly affected that they complain repeatedly, then the government is justified in believing that there is a problem.

Plaintiffs argue (Br. 70) that the FAA does not use complaint data as evidence of noise problems, but the district court correctly held (SPA41) it appropriate because "courts have affirmed the FAA's use of complaint data 'as empirical data of a noise problem.'" (quoting *Helicopter Ass'n Int'l, Inc. v. F.A.A.*,

722 F.3d 430, 436 (D.C. Cir. 2013)). Plaintiffs argue (Br. 70 n.30) that *Helicopter Association* is distinguishable because it involved flight routes rather than access restrictions, but this distinction makes no difference to the question whether complaints are an acceptable means of determining whether a noise problem exists. Whether the solution to a noise problem is modified flight routes or airport restrictions, complaints are a valid tool to determine whether a noise problem exists in the first place. At a minimum, there was no clear error in the district court's finding that the complaint data here demonstrated a noise problem.

Once the district court correctly deferred to the Town's finding that there was a noise problem, the court was not entitled to second-guess the Town's balancing of interests based on the precise number of complaints. Opening Br. 45-46. Plaintiffs simply ignore this point as well as the case law supporting it. *See, e.g.*, *British Airways*, 558 F.2d at 85 (proprietors "are in a better position to assure the public weal"). Moreover, the balancing here is plainly reasonable, given that the Local Laws would achieve a 60% noise reduction while affecting only 23% of aircraft operations. A325 ¶ 11. And it is especially reasonable because, contrary to Plaintiffs' unsupported assertion (Br. 61-62), the Town looked at many other alternatives—voluntary measures, noise mitigation, fee-based restrictions, required routes and altitudes, a three-tier noise ranking system for aircraft, a restriction of two trips per week, and a total ban on helicopters—and could find none that, based

on available data, would balance all affected interests better than the Local Laws. Opening Br. 7-8, 12-16, 49; A341-44; A351. Plaintiffs claim (Br. 62) that the Town's balancing was insufficient because there was no economic analysis of costs and benefits, but such an analysis has never been a requirement for reasonableness. It is particularly unnecessary here because the Town's analysis of the number of aircraft operations affected is, in essence, an analysis of the costs of the regulation.[13]

3. Plaintiffs' Alternative Bases For Disputing Reasonableness Are Factually Unsupported And Legally Insufficient

While nominally relying on the district court's factfinding, Plaintiffs propose a number of arguments that the district court did not accept, and these arguments are unpersuasive.

First, Plaintiffs argue (Br. 60) that the One-Trip Limit is unreasonable because it departs from the historical practice at the Airport. Plaintiffs fail to note, however, that for all of this history, the activity at the Airport was very modest, and the number of helicopter operations jumped by 47% from 2013 to 2014. A357 ¶ 8. Indeed, Plaintiffs do not dispute that the Local Laws would simply reduce

[13] Plaintiffs also suggest (Br. 60 & n.23) that it was proper for the district court to consider the effect on their businesses in deciding reasonableness. This is a red herring: The impact on Plaintiffs can be part of the analysis, but the effect on a few businesses cannot be sufficient to deny the reasonableness of a regulation that benefits the community at large. That is especially true because the effect on Plaintiffs is greater than others because they fly helicopters, which cause the greatest noise problems.

helicopter operations to 2013 levels. *See* A358 ¶ 9; A307-08. There is therefore no significant departure from the way the Airport historically functioned.

Second, Plaintiffs argue (Br. 60) that the One-Trip Limit would "effectively shutter commercial service" at the Airport and "hinder the legitimate national goal of public airport access" (Br. 63), but they cite no evidence to support this proposition. And it is nonsensical because many aircraft—those that do not fall within the definition of "Noisy Aircraft" in the Local Laws—are not subject to the One-Trip Limit at all. Indeed, the evidence shows that the One-Trip Limit would reduce aircraft operations by only 23% even when combined with the curfews. A325 ¶ 11. Plaintiffs do not dispute this figure at any point in their brief.

Third, Plaintiffs argue (Br. 60) that the One-Trip Limit is unprecedented, but that is only because other airports have imposed much *stricter* regulations, including the total weekend ban that this Court upheld in *National Helicopter*. There is no basis to discard the One-Trip Limit because the Town sought a more moderate solution than the blanket ban that other airports have employed.

CONCLUSION

The district court's decision granting a preliminary injunction as to the One-Trip Limit should be reversed and the preliminary injunction vacated. The district court's decision denying a preliminary injunction as to the Mandatory Curfew and Extended Curfew should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 28.1(e)(2)(A) of the Federal Rules of Appellate Procedure ("FRAP") because this brief contains 11,603 words, excluding the parts of the brief exempt by FRAP 32(a)(7)(B)(iii).

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/s/ Kathleen M. Sullivan