15-2334-cv(L)

15-2465-cv(XAP)

IN THE

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

REPLY BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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PRELIMINARY STATEMENT

In 2011, the Town was repeatedly and correctly advised by its counsel (Kaplan Kirsch & Rockwell LLP) that it was obligated to comply with the Airport Noise and Capacity Act of 1990 ("ANCA") before imposing any Stage 2 or Stage 3 restrictions. A239–40, 266, 268. That same year, Kaplan Kirsch informed a court in a different proceeding (on behalf of another airport client) that: (i) ANCA's "express Congressional language" allows for "no dispute" that ANCA narrowed the proprietor's exception and "explicitly requires" FAA approval of "all" proposed Stage 3 restrictions; and (ii) to contend otherwise would be "facially preposterous." Brief by Palm Beach County, *Trump v. Palm Beach County*, 2011 WL 10068524, at 3–4 (Fla. Cir. Ct. Mar. 4, 2011) ("Trump Br."). The Town's counsel also flatly rejected the proposition that this Court's holding in *National Helicopter Corp. of America v. City of N.Y.*, 137 F.3d 81 (2d Cir. 1998) bore any relevance to the issue, explaining that "[*National Helicopter*] … simply does not address ANCA and thus is not authority for how ANCA affected proprietary powers." (Trump Br. at 4.)

Nothing has happened since 2011 to render the Town's present argument that it need not comply with ANCA any less facially preposterous. Nor has anything happened to convert *National Helicopter* – at most a *sub silentio* treatment of ANCA with no binding effect on subsequent panels – into controlling

authority for the erroneous proposition that ANCA's commands are merely precatory and affect only those airports that desire federal grant funding.

Confirming its uneasiness about the plain meaning of ANCA, the Town devotes much of its brief to arguing that judicial review of Plaintiffs' claim is foreclosed. It is not. The District Court correctly held that nothing in ANCA or in *Armstrong v. Exceptional Child Ctr. Inc.*, 135 S. Ct. 1378 (2015) precludes a federal court from invoking its "equitable jurisdiction to enjoin the implementation of preempted state legislation" (SPA23) – especially where Plaintiffs seek only to be shielded from the Town's imposition of criminal proceedings and fines under color of local laws that violate federal ones.

This Court has repeatedly recognized the importance of such relief and held that it will not lightly infer congressional intent to foreclose it. Here, far from providing sufficient evidence of such intent, the record offers none. The Town's strained comparison of this case to *Armstrong* fails for multiple reasons, including that ANCA's clear and easy-to-administer procedural requirements bear no resemblance to the complex, judgment-laden Medicaid Act provision at issue in *Armstrong*. Similarly, the Town's argument that Congress "must have" intended to foreclose private suits for injunctive relief because it purportedly stripped even the FAA of that remedy rests on a thorough misreading of ANCA that the Town offers for the first time on appeal.

When the merits of Plaintiffs' claim are reached – as they must be – review of ANCA's plain terms and context can lead to only one conclusion: the same conclusion that is reflected in the FAA's interpretive regulations, that was reached by D.C. Circuit Court of Appeals, and that was previously embraced by Town counsel. ANCA's requirements are mandatory on their face, and "grants or not," airports seeking to impose Stage 2 or Stage 3 restrictions must comply. *City of Naples Airport Auth. v. FAA*, 409 F.3d 431, 434 (D.C. Cir. 2005) ("*Naples*").

Because ANCA preempts the Town's Local Laws, the District Court's decision denying an injunction as to the Town's curfews should be reversed, and the remainder of the decision should be affirmed.

POINT I

NEITHER THE REASONING OF *ARMSTRONG* NOR THE TERMS OF ANCA OPERATE TO ELIMINATE THIS COURT'S EQUITABLE JURISDICTION

This action seeks equitable relief akin to *Ex parte Young* – a doctrine this Court has called "a landmark of American constitutional jurisprudence that operates to end ongoing violations of federal law and vindicate the overriding 'federal interest in assuring the supremacy of that law.'" *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

Although the Town attempts to dismiss the *Ex parte Young* doctrine as a "generic rule" (Town's Response and Reply Brief ("Br.") 17) and questions the seriousness of Plaintiffs' current predicament by noting that transgressions of the Town's Local Laws are now classified as merely violations rather than misdemeanors (Br. 16 n.6), the Town does not and cannot dispute that Plaintiffs – business professionals and pilots (including former military officers, A173) – face prosecution, fines, injunctive proceedings, and bans from a public airport upon which their livelihoods depend, for violating local laws that they contend are unconstitutional.

Nor can the Town dispute that such a scenario has time and again been found to justify invocation of federal courts' equitable powers of review. *See Armstrong*, 135 S. Ct. at 1384 ("[A] court may not convict a criminal defendant of violating a state law that federal law prohibits."); *id.* ("[W]e have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted."); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (equitable relief under *Ex parte Young* prevents "the infliction of real damage … upon the plaintiff").[1]

[1] The Town also incorrectly suggests that this is a statutory enforcement suit. (Br. 1.) Plaintiffs do not seek to privately enforce ANCA; they merely seek to stop the Town from enforcing local laws imposed in violation of ANCA. The distinction is

Neither the Town's invocation of *Armstrong* nor its newly minted interpretation of ANCA's terms provides a basis for denying Plaintiffs' equitable claims for relief. Instead, as the District Court correctly recognized, where there is no evidence of congressional intent to foreclose review of a preemption claim, courts can and should exercise their equitable power to hear the claim. SPA28.

A. The Procedural Provisions of ANCA Bear No Resemblance to the Statutory Provision at Issue in *Armstrong*.

Although the Town characterizes *Armstrong* as effectively precluding private enforcement of any legislation that can be classified as "Spending Clause" legislation (Br. 24–25) – a universe that includes the Medicaid Act and (at least in the Town's view) ANCA[2] – this Court has already rejected that broad-brush

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one this Court has previously recognized as "important and [] not a trifling formalism." *Air Transport Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008) (per curiam). The Town's citations to *Schweiker v. Chilicky*, 487 U.S. 412 (1988) and *United States v. Fausto*, 484 U.S. 439 (1988) are likewise inapposite (Br. 15), because those cases involved statutory claims seeking retroactive money damages.

[2] In fact, ANCA is not Spending Clause legislation. None of ANCA's terms provide for any outlay of money by the federal government. Indeed, members of Congress objected to ANCA's inclusion in the budget reconciliation process precisely because its provisions do not affect the budget. *See* 136 Cong. Rec. S15777-02, S15818–21 (Oct. 18, 1990) (statements of Senators Lautenberg, Durenberger, Sarbanes). The Senate responded by approving a waiver so that ANCA could be included although unrelated to budget reconciliation. *Id.* at S15821. Further still, ANCA's terms and legislative history make clear that the legislation was an exercise of Congress's Commerce Clause powers, not its Spending Clause powers. *See, e.g.*, 136 Cong. Rec. S13616-05, S13619 (Sept. 24, 1990) (Sen. Ford introducing ANCA as impacting "interstate commerce" and

approach to *Armstrong*. Thus, for example, in *Fishman v. Paolucci*, 628 F. App'x 797 (2d Cir. Oct. 15, 2015) (summary order), this Court dismissed the contention that *Armstrong* broadly precludes courts from enforcing the Medicaid Act through actions brought under 42 U.S.C. § 1983 (which provides for a private right of action for deprivation of federal rights), and held that pre-*Armstrong* precedent regarding the enforceability of the Medicaid Act's "fair hearing" provision remained good law. *Id.* at 801 n.1.[3]

Similarly, in *Davis v. Shah*, No. 14-543-CV, -- F. 3d --, 2016 WL 1138768 (2d Cir. Mar. 24, 2016), this Court once again declined to read *Armstrong* as broadly precluding all private enforcement of the Medicaid Act, focusing instead upon whether the particular provisions at issue involved "the type of broad, complex, judgment-laden language that, *Armstrong* held, precludes private

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"interstate travel"); 136 Cong. Rec. H13058-02, H13065 (Oct. 26, 1990) (Rep. Hyde commenting on ANCA's preemptive "commerce clause" provisions). Accordingly, even were the Town correct that private enforcement of Spending Clause legislation did not survive *Armstrong* – and, as discussed below, the Town is not correct – it would have no bearing on the availability of equitable relief relating to ANCA.

[3] It further bears noting that this Court's precedent regarding the private enforceability of the Medicaid Act's "fair hearing" provision focused on the fact that the provision is procedural in nature and could be "easily administered by judicial institutions, which are intimately familiar with issues of process[.]" *Shakhnes v. Eggleston*, 740 F. Supp. 2d 602, 615 (S.D.N.Y. 2010), *aff'd in part, vacated in part on other grounds sub nom. Shakhnes v. Berlin*, 689 F.3d 244, 250 (2d Cir. 2012). As a result, it is anything but surprising that the *Fishman* court did not regard *Armstrong* as calling the validity of that precedent into question.

enforcement." 2016 WL 1138768, at *10 n.6. Thus, the *Davis* Court held that *Armstrong* precludes private enforcement of the "reasonable standards" provision of the Medicaid Act (which, like the provision in *Armstrong* involved a broad grant of discretion to the states, *id.* at *9), but also made a point of noting (even though the issue had been waived) that private enforcement of the "home health services" and "comparability" provisions (both of which provided specific standards by which to measure benefits) remained viable. *Id.* at *10 n.6, *18 n.12.

This Court's approach in *Fishman* and *Davis* is fully consistent with the analysis undertaken by the *Armstrong* Court – which focused on the specific characteristics of § 30(A) of the Medicaid Act in divining congressional intent, *see Armstrong*, 135 S. Ct. at 1385 (emphasizing §30(A)'s "sheer complexity," breadth and nonspecificity); *id.* at 1388 (Breyer, J., concurring) (focusing on "complexity and nonjudicial nature of the rate-setting task" for federal agency to perform under § 30(A)) – and it mandates rejection of the Town's contention that *Armstrong* precludes Plaintiffs' claim for equitable relief.

Although the Town would have it otherwise (Br. 15–16), the procedural provisions of ANCA that are at issue here simply bear no resemblance to the statutory provision at issue in *Armstrong*. Unlike § 30(A) of the Medicaid Act, ANCA's procedural provisions involve no grant of discretion to any governmental

agency; indeed, they are not even directed to any governmental agency. Moreover, ANCA's procedural provisions, which state that:

- no Stage 3 restriction can take effect unless "submitted to and approved by" the FAA or agreed to by all aircraft operators (§ 9304(b), recodified at 49 U.S.C. § 47524(c)(1)); and

- no Stage 2 restriction can take effect unless the airport operator first publishes certain analyses for notice and comment "at least 180 days before the effective date" (§ 9304(c), recodified at 49 U.S.C. § 47524(b))

are indisputably clear, narrow, and easily capable of judicial administration. As a result, the nature of the provisions at issue provides no support for concluding that Congress intended to preclude judicial review of an application for equitable relief. *See Davis*, 2016 WL 1138768, at *10 n.6; *Tohono O'odham Nation v. Ducey*, No. CV-15-1135, 2015 WL 5475290, at *10–11 (D. Ariz. Sep. 17, 2015) (*Armstrong* did not preclude equitable relief under provision of Indian Gaming Regulatory Act that, unlike § 30(A), was neither "unusually complex [nor] contained standards that reasonably could be applied only with the expertise of the executive branch agency").[4]

[4] Nor, of course, is it of any moment that the substantive provisions of ANCA might not be easily capable of judicial administration. (Br. 15–16.) As this Court implicitly recognized in rejecting the argument that *Armstrong* precludes private enforcement of *all* provisions of the Medicaid Act, *Fishman*, 628 F. App'x at 801 n.1, Congress's intent with respect to one provision of a statute does not necessarily carry over to all provisions of the statute.

B. The Town's Newly Minted Interpretation of ANCA's Savings Clause Is Meritless.

Nor does the Town fare any better in its argument that Congress must have intended to preclude private plaintiffs from seeking to enjoin the enforcement of laws that violate ANCA because it affirmatively deprived the FAA itself of that power. (Br. 6–12.)

In that regard, in an extended analysis of a provision that it studiously ignored in the District Court, the Town now contends that a provision of ANCA currently codified at 49 U.S.C. § 47533 operates to strip the FAA of the injunctive power it otherwise would have to enforce ANCA. Otherwise stated, the Town contends that the District Court erred in failing to recognize – despite the Town's own silence on the point – that Plaintiffs' claim for injunctive relief was precluded because § 47533 demonstrates that Congress affirmatively intended for no party – including the FAA – to have the ability to enforce ANCA through an application for injunctive relief. But even if this Court were to entertain the Town's belated argument regarding § 47533 – and it should not, *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.") – that provision does not remotely bear the interpretation the Town now seeks to give it.

As the Town now would have it, the "savings clause" contained in ANCA is in fact a "stripping clause" of FAA powers because: (i) its express preservation of

"the authority of the Secretary of Transportation to seek and obtain legal remedies the Secretary considers appropriate, including injunctive relief," § 47533(3), is qualified by the introductory phrase "[e]xcept as provided by section 47524 of this title"; and (ii) § 47524 (which specifies certain financial consequences for noncompliant airport proprietors) makes no mention of the possibility of injunctive actions. That argument fails for several reasons.

First, by its plain meaning, the phrase "except as provided by" refers to provisions that would directly conflict with the rights and authority being preserved in § 47533, and nothing in § 47524 in any way conflicts with a preservation of the FAA's ability to pursue injunctive relief. To the contrary, § 47524 is entirely silent on that point.

Second, the precise phrase used in the version of ANCA originally passed by Congress was not "except as provided by" but "[e]xcept to the extent required by the application of the provisions of this section," § 9304(h), and nothing in § 47524 can remotely be read as "requiring" the FAA to be stripped of its traditional enforcement powers.[5]

[5] Given the expressly non-substantive history of the 1994 recodification of Title 49 – and the canon that "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is *clearly expressed*," *Finley v. United States*, 490 U.S. 545, 554 (1989) (emphasis added) (internal quotation marks omitted) – federal courts have consistently looked to the pre-1994 text of aviation statutes in interpreting the recodified laws in the face of any ambiguity or where, as here, an interpretation is proffered that puts the

Third, even if the provision at issue were ambiguous (and it is not), the FAA's interpretation of the provision as preserving its ability to seek injunctive relief for violations of ANCA would be entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984). *See also Naples*, 409 F.3d at 434–35 (noting that ANCA gives the FAA "more power," not less; construing the interplay of § 47533 and § 47524; and placing "particular[]"

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post-1994 text at odds with the pre-1994 text. *See, e.g.*, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014); *Tinicum Twp. v. Dep't of Transp.*, 685 F.3d 288, 299 (3d Cir. 2012); *Port Auth. of N.Y. and N.J. v. Dep't of Transp.*, 479 F.3d 21, 41 (D.C. Cir. 2007); *Newton v. FAA*, 457 F.3d 1133, 1142–43 (10th Cir. 2006); *City of Bridgeton v. FAA*, 212 F.3d 448, 463 (8th Cir. 2000); *Bower v. Fed. Express Corp.*, 96 F.3d 200, 204–05, 208 (6th Cir. 1996). This Court should follow that same approach. The Town's reliance on *City of Los Angeles v. FAA*, 239 F.3d 1033 (9th Cir. 2001), to argue that this Court should construe a new congressional "understanding" of ANCA's meaning from looking at the recodified text standing alone (Br. 7–8), overlooks that *City of Los Angeles*, like this Court's decision in *Committee to Stop Airport Expansion v. FAA*, 320 F.3d 285 (2d Cir. 2003), was nullified by Congress, which amended the underlying statute to make clear that the pre-1994 meaning controlled. Pub. L. No. 108-176, § 228, 117 Stat. 2490 (2003) (amending 49 U.S.C. § 46110(a)); S. Rep. 108-41, 2003 WL 21005787, at *22–23 (2003) (discussing FAA's view that *City of Los Angeles* "wrongly interpreted current law"). The Town further ignores that the reasoning employed by this Court in *Committee* (which the Town unsurprisingly does not cite) does not support the Town's urging to ignore ANCA's original text. In *Committee*, this Court in fact closely compared the pre-1994 and post-1994 text and concluded that the post-1994 text had included a palpably new, substantive term that necessarily affected the statute's meaning. 320 F.3d at 289–90. Here, by contrast, the minor changes in phraseology between ANCA's original and recodified versions are stylistic, involve no new terms, and cannot be read as evidence of congressional intent to change or clarify the meaning of the original statute.

emphasis on ANCA's savings clause in finding the FAA's interpretation that ANCA did nothing to disturb the FAA's pre-existing powers was reasonable).

The FAA's Part 161 regulations make clear that ANCA's financial penalties (loss of eligibility for grants and passenger facility charges) "may be used with or in addition to any judicial proceedings initiated by the FAA to protect the national aviation system and related Federal interests." 14 C.F.R. § 161.501(a); *see also* 14 C.F.R. § 161.7(d)(3). The FAA's accompanying commentary explains that ANCA's termination-of-eligibility procedures "only supplement, and do not circumscribe" other remedies within "the agency's statutory authority to promote voluntary compliance and impose sanctions for violations of the Act [ANCA] and the Federal Aviation Regulations [Part 161]," including "an injunction to stop a restriction [from] being implemented." 56 Fed. Reg. 48661-01, 48690 (Sept. 25, 1991). *See also* 56 Fed. Reg. 8644-01, 8660 (Feb. 28, 1991) (FAA commenting that benefits of the notice and 180-day waiting period for Stage 2 restrictions include "assuring that … the Federal government and other affected parties have a chance to make a case against objectionable restrictions in court before the restriction is imposed").

Fourth, although the Town characterizes it as "illogical" for Congress to have intended to preserve the FAA's injunctive authority with respect to ANCA given that financial consequences were specified for non-compliance (Br. 11), it is

anything but illogical or uncommon for Congress to adopt a "carrot and stick" approach to the enforcement of statutory obligations.[6]

Fifth, and finally, it is anything but logical to assume that if Congress had intended to abrogate the FAA's traditional injunctive powers, it would have done so through the odd mechanism of declaring those powers to be preserved "except as provided" in § 47524, and then making no reference to those powers in § 47524.[7]

In short, the Town does not – because it cannot – offer any basis for concluding that Congress intended to preclude equitable injunctive relief with respect to laws issued in violation of ANCA. And given the critical role that traditional forms of equitable relief – such as the *Ex parte Young* doctrine – play in

[6] In the same vein, the Town's citation to ANCA's finding that revenues controlled by the U.S. government can help resolve noise problems (Br. 27), in no way establishes that Congress intended compliance with ANCA to be voluntary rather than mandatory. Instead, that finding simply acknowledges that with the "carrot" of potential federal funding and PFCs being made contingent on compliance with ANCA, the "stick" of injunctive actions for non-compliance might have to be used less often. Moreover, the legislative history of ANCA leaves no room for doubt that Congress had concluded that simply encouraging voluntary compliance – *i.e.*, a "carrots-only" approach – had not worked. (Plaintiffs' Opening Brief ("Pl. Br.") 6–7, 46.)

[7] Nor, of course, is the Town correct that congressional intent to strip the FAA of injunctive remedies for violations of § 47524 may be inferred from the fact that, as to ANCA's Stage 2 phase-out requirements, violating aircraft are specified to be subject to the penalties and procedures that ordinarily govern the FAA's regulation of aircraft certification and safety (*see* § 9308(e)–(f), recodified at §§ 47531–47532). (Br. 8 n.2.) Simply put, one has nothing to do with the other.

preventing "the infliction of real damage" by laws that are themselves violative of federal law, *Dairy Mart*, 411 F.3d at 372, this Court should adhere to its practice of declining to readily infer an intent by Congress to preclude equitable relief. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 289 (2d Cir. 2003).[8]

POINT II

NATIONAL HELICOPTER DOES NOT CONTROL THIS ACTION

The Town likewise cannot avoid analysis of ANCA's provisions on the ground that this Court's decision in *National Helicopter* mandates rejection of Plaintiffs' claim for equitable relief. In fact, as the Town's own counsel acknowledged to another court, "[*National Helicopter*] … simply does not address ANCA and thus is not authority for how ANCA affected proprietary powers." (Trump Br. at 4.)

[8] Nor is the Town correct in its claim (once again made for the first time on appeal) that invocation of the federal courts' equitable powers is unnecessary because Plaintiffs' ANCA claim can be heard administratively by filing a "complaint" under 14 C.F.R. § 161.503. (Br. 17–18.) Section 161.503 has no application here. It merely sets out procedures to initiate the termination of grant eligibility – procedures that are irrelevant because the Town has already cashed the checks it received from the federal government and disavowed future funding.
As the District Court correctly recognized, there exists no mechanism for Plaintiffs to pursue their ANCA claim administratively. SPA28. Moreover, even if there were some applicable administrative remedy (which there is not), this Court has stated that "in the absence of express direction from Congress, we will not find that reliance on *Ex parte Young* has been foreclosed when the alternative scheme for enforcing the pertinent federal provisions is not so 'detailed' that we must infer that Congress could not have intended private enforcement." *Henrietta*, 331 F.3d at 289 (citation omitted).

National Helicopter did no more than mention ANCA once in passing, without analysis, as "prelude to another legal issue that command[ed] the panel's full attention." *United States v. Hardwick*, 523 F.3d 94, 101 n.5 (2d Cir. 2008) (quoting *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring)). As a result, under the settled rule that subsequent courts are not bound by a court's *sub silentio* treatment of an issue, *Hardwick*, 523 F.3d at 101 n.5, *National Helicopter* cannot be read as having ruled on ANCA's impact on the proprietor's exception.

Moreover, as the underlying appellate briefing makes clear, the Court in *National Helicopter* had no reason to believe that an analysis of ANCA was necessary to resolve the issues before it. Thus, while the Town is correct that the plaintiff in *National Helicopter* cited ANCA's procedural requirements as an additional basis for affirming the decision below (National Br. 40), the Town omits to mention that the plaintiff then went on to concede – incorrectly – that "ANCA does not affect … the scope of proprietor's rights[.]" (National Reply Br. 6). In light of that erroneous concession – which occurred after the City had misquoted both ANCA's statutory language and the FAA's interpretation of that language[9] –

[9] As the briefing reflects, the City argued that ANCA had no effect on the proprietor's exception, quoting a portion of ANCA's savings clause as support, but omitting the portion that in fact established the opposite. (*See* City Reply Br. 15 (quoting 49 U.S.C. § 47533(1)'s language preserving the "law in effect on November 5, 1990 on airport noise or access restrictions by local authorities" but

it is unsurprising that the Court saw no need to analyze ANCA independently, and assumed instead that ANCA merited no more than inclusion in a list of statutes illustrating the general proposition that airport noise abatement has been the subject of extensive regulation. *National Helicopter*, 137 F.3d at 88.

The Town now seeks to profit from that erroneous concession and cast *National Helicopter* as having considered and ruled on an issue that the Court indisputably did not address. But that is not – nor should it be – the law. Instead, as this Court has made clear on numerous occasions, a panel's *sub silentio*

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omitting the introductory phrase "[e]xcept as provided by section 47524 of this title" (which contains the procedural provisions of ANCA).) The City also misquoted the FAA's comments during regulatory proceedings – again by omitting the "except for" part of the FAA's statement – and thus wrongly suggested that the FAA itself had confirmed that ANCA did not shift the allocation of noise liability or power as between the federal government and local proprietors. (City Reply Br. 15 (quoting all but the italicized portion of the following sentence: "*Except for the limited case of the taking-based liability specified in section 9306 of the Act with respect to disapproved restrictions on Stage 3 aircraft*, the Act did not change the liability normally borne by the airport operator under [*Griggs*].").) 56 Fed. Reg. 48661-01, 48671 (Sept. 25, 1991).

Rather than pointing out those errors to the Court, the plaintiff accepted the City's brief as correct and conceded that "ANCA does not affect … the scope of proprietor's rights[.]" (National Reply Br. 6). Moreover, while the plaintiff went on to state that the City still needed to comply with ANCA "if they wish[ed]" to lessen their liability or exercise their powers, that argument was at best opaque given that the plaintiff never asserted (as Plaintiffs do here) an express preemption argument under ANCA, stipulated instead that preemption was "implied" by federal aviation laws generally (City Br. 31 n.8) and, as noted above, erroneously conceded that ANCA "does not affect" the scope of proprietary powers.

treatment of an issue, especially when it is the product of a party's concession, is non-binding on subsequent panels.

Thus, for example, in *Hardwick*, the Court ruled that it was not bound by a prior panel's ruling that evidence improperly admitted during a criminal trial should not be considered in weighing a sufficiency challenge to conviction because the government had improperly conceded the issue (despite the existence of prior rulings to the contrary) and because the panel had not "independently analyze[d]" the issue. 523 F.3d at 101 n.5.

Similarly, in *United States v. Ortiz*, this Court found that an issue regarding the application of the *Ex Post Facto* Clause to sentences under the advisory U.S. Sentencing Guidelines regime "remain[ed] open" for its review on the merits even though two prior panels had rendered decisions that, on the surface, appeared to have already decided the issue. 621 F.3d 82, 86 n.3 (2d Cir. 2010). In so ruling, *Ortiz* determined that the prior panels' treatment of the issue had been *sub silentio*, specifically because the first panel's decision "contained no discussion" of the issue, and the second panel had "assumed" the outcome of the issue based upon the government's "disclaimer [in its appellate briefing] of reliance" on a contrary position. *Id.* ("'a *sub silentio* holding is not binding precedent'" (quoting *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988))).

Further still, in *Orange County Water Dist. v. Unocal Corp.*, this Court determined that although a prior panel's decision "could be read to suggest" that a particular issue had been decided, the holding was at best *sub silentio* because there was no indication that panel had in fact "analyzed" the issue, and a subsequent panel accordingly was free to decide it. 584 F.3d 43, 51 (2d Cir. 2009) (citing *Hardwick* and *Getty*). *See also Johnson*, 256 F.3d at 915 (a court is not bound by a statement of law "[w]here it is clear that a statement is made casually and without analysis, where the statement is uttered in passing … or where it is merely a prelude to another legal issue that commands the panel's full attention") (cited with approval in *Hardwick* and *Orange County*).

Here, the Town does not – and cannot – point to any evidence that the Court in *National Helicopter* analyzed ANCA's provisions or assessed their impact on the scope of the proprietor's exception. As a result, under the settled law of this Circuit, the Court's inclusion of ANCA in a string cite of statutes (illustrating federal preemption of airport noise regulation generally) in no respect constitutes a holding on the scope of ANCA. Nor does it preclude this Court from considering and deciding the issues presented in this action.

The majority opinion in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) – to which the Town devotes considerable attention (Br. 22–23) – is not to the contrary. While the Town is correct that the citation to *Harper* in Plaintiffs'

principal brief (for its discussion of a longstanding rule) is from the dissenting opinion but not identified as such – an error for which we apologize to the Court – the Town is incorrect in contending that the majority opinion in *Harper* supports its position. That is so for two reasons.

First, in *Harper*, the majority read its prior decision in *Davis* as not only having explicitly commented upon the appellee's concession of an issue, but also as having endorsed it. *Harper*, 509 U.S. at 98.[10] Thus, in contrast to *National Helicopter* – where this Court did not remotely comment upon, let alone endorse, any concession or view as to ANCA's import – the *Harper* majority found that *Davis* had necessarily decided the issue there because, "[f]ar from reserving the retroactivity question," the Court had responded to it, "and our response to the appellee's concession constituted a retroactive application of the rule announced in *Davis* to the parties before the Court." *Id.* If anything, the majority's reasoning thus reinforces the conclusion that *National Helicopter* gave *sub silentio* treatment to ANCA, and did not decide the issue.

Second, the *Harper* majority expressed no quarrel with the "longstanding rule" – cited in Justice O'Connor's dissent and reaffirmed by the Court just two months prior to *Harper* in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) – providing

[10] In *Harper*, the Court considered whether *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817 (1989), which ruled on a taxation issue, had also decided whether its holding was to apply retroactively.

that if a decision does not squarely address an issue, a subsequent court remains free to address it on the merits. *Harper*, 509 U.S. at 118 (O'Connor, J., dissenting). The *Harper* majority differed from the dissent only in that it read *Davis* as having in fact addressed the issue at hand. Moreover, in *Brecht*, the Court held it was free to decide an issue (pertaining to the correct legal standard for reviewing *habeas corpus* claims), unconstrained by *stare decisis*, because even though four of its prior decisions had applied a different standard, those prior decisions had "at most assumed" the applicable standard without "squarely" addressing the issue. *Brecht*, 507 U.S. at 631.

Unsurprisingly, no decision has cited the *Harper* majority as having changed the settled rule that in order to constitute precedent on an issue, a decision must squarely address the issue.[11] Nor, in fact, did *Harper* change that settled rule. Instead, as this Court has repeatedly held – in a series of decisions post-dating *Harper* – a panel's *sub silentio* treatment of an issue does not bind subsequent

[11] In the 23 years since *Harper* was decided, the pertinent portion of the majority's opinion has been cited only once – as one of a number of opinions collected by a Ninth Circuit dissent in support of the proposition that the Supreme Court's treatment of *sub silentio* rulings has not been consistent, and that lower courts should be wary of declining to follow a Supreme Court ruling on that ground. *See Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 of Pima Cty., Ariz. v. Kirk*, 91 F.3d 1240, 1248–49 (9th Cir. 1996) (Reinhardt, J., dissenting), *on reh'g en banc*, 109 F.3d 634 (9th Cir. 1997). But even if that point is accepted as a sensible caution, it does not follow that, with respect to a court's own prior decisions, the court must – or should – regard itself as bound by a decision in which the resolution of a particular issue has been assumed rather than analyzed and decided.

panels, and those panels remain free to decide the issue. *See Ortiz*, 621 F.3d at 86 n.3; *Orange County*, 584 F.3d at 51; *Hardwick*, 523 F.3d at 101 n.5.

POINT III

ANCA'S REQUIREMENTS ARE MANDATORY

Tellingly, the Town has little to say when it ultimately reaches the merits of this action, and it even resorts to highly selective quotation of ANCA's provisions in its effort to suggest that the provisions are not mandatory.

The Town's proffered interpretation of ANCA thus addresses the provisions this Court is called upon to interpret – § 9304(b) and (c), recodified at 49 U.S.C. § 47524(b) and (c) – in a single sentence that quotes only one word of those provisions:

> … Plaintiffs rely on the word "shall" that appeared in the original statute but not in the current version, which uses the word "may."

(Br. 26.)

As the Town omits to mention, the full text of what it characterizes as the "current version" of ANCA – which is, in fact, more accurately described as the non-substantive 1994 recodification[12] – provides that Stage 2 and 3 restrictions

[12] *See* Pub. L. No. 103-272, 108 Stat. 745 (1994) (noting that the recodification was done "without substantive change" to the original meaning of the recodified statutes); *Ginsberg*, 134 S. Ct. at 1429 (observing that "Congress made it clear that [1994 recodification] did not effect any 'substantive change'").

"may" become effective "**only if**" ANCA's procedural requirements are followed. 49 U.S.C. § 47524(b) and (c) (emphasis added).[13]

And, as reflected by the Town's attempt to avoid the issue by quoting only part of the statutory text, the full phrase used in the 1994 recodification is no less mandatory than the phrase used by Congress in enacting ANCA. Thus, as the D.C. Circuit recognized in *Naples*, the plain text of ANCA leaves no room for doubt that airports "must comply" with its provisions. *Naples*, 409 F.3d at 433–34 (interpreting § 47524(b) and (c)'s plain text to mean that airports "must comply" with ANCA's requirements irrespective of grant status, and noting that "grants or not, no airport operator can impose a Stage 3 restriction unless the FAA gives its approval").

Similarly, even while paying lip service to the canon that courts should consider the context in which particular statutory language is used, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), the Town attempts to distort ANCA's legislative history by plucking a few sentences out of context,[14] while ignoring the

[13] In the original statute, Congress used the wording "no airport noise or access restriction … shall be effective unless[.]" § 9304(b). As recodified, the wording was stylistically amended to state that a "restriction … may become effective only if[.]" 49 U.S.C. § 47524(c).

[14] Thus, for example, the Town's quotation of Congressman Oberstar's description of ANCA's grant ineligibility provision omits his statements immediately preceding it: "Airports wishing to apply new [Stage 2] restrictions after October 1, 1990, *must* publish" the required analysis 180 days before "[t]he restriction would

substantial body of evidence demonstrating that ANCA was intended to significantly expand the federal government's role in regulating noise restrictions, and that ANCA's provisions were intended to be mandatory. That evidence includes:

- that Congress enacted ANCA only after the failure of its prior enactment of a *voluntary* program (*see* Pl. Br. 6–7, 46);
- Congress's finding that a "noise policy **must** be implemented at the national level" (*id.* 46);
- repeated references in the statute to the "**national**" scope of that policy (*id.* 46);
- Congress's decision to provide no exceptions for Stage 2 or Stage 3 restrictions proposed following ANCA's enactment (*id.* 14); and
- the FAA's implementing regulations, which interpret ANCA's provisions as mandatory (*id.* 14, 16).[15]

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go into effect," and new restrictions on Stage 3 aircraft "*must* either be agreed to by the airport and air carrier or be approved by DOT." 136 Cong. Rec. E3693-04 (Nov. 2, 1990) (emphasis added). And his full statement explains why ANCA's compulsory requirements constitute a "balanced noise policy" that "will also assure the flying public a truly national aviation system." *Id.* The Town also refers to a House Hearings report without noting that the report describes the *pre*-ANCA state of the law, and to Hearing witnesses who never purported to address the pending ANCA legislation. (Br. 32–34.)

[15] The Town likewise offers no response to the proposed *amicus curiae* brief by the General Aviation Manufacturers Association, which underscores that Congress's legislative balance achieved in ANCA would be eviscerated if ANCA's requirements were not mandatory.

Nor, of course, is the Town correct that giving effect to ANCA's plain terms will "invalidat[e] the proprietor exception" or "repeal" the Airline Deregulation Act. (Br. 28.) ANCA did not eliminate the proprietor's exception, it simply narrowed it. ANCA thus has no impact on a proprietor's power to address noise issues through, among other things, zoning and land use decisions, sound insulation, mutual agreement with aircraft operators on restrictions, noise abatement procedures like taxiing and engine runup, and application to the federal government for noise management funding. *See, e.g.*, 49 U.S.C. §§ 47505, 47524(c)(1); 14 C.F.R. § 161.7(a); FAA Order 5190.6B ¶ 20.2(a). In addition, ANCA only modestly narrowed proprietor's rights to impose Stage 2 restrictions by imposing notice and analysis provisions. And while ANCA did significantly narrow proprietor's rights to impose Stage 3 restrictions – by requiring FAA approval – that was by express congressional design.

To the extent the Town disputes the wisdom of requiring FAA approval for Stage 3 restrictions or the practicality of applying ANCA to airports that do not intend to seek federal grants (Br. 31–32) that is a dispute to be taken up with Congress, not the Courts. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits [a party's] policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them."); *In re Chateaugay Corp.*, 920 F.2d 183, 187 (2d Cir. 1990) ("[I]improving legislation by amending it is not our function;

only Congress can rewrite the statute."); *Mfrs. Hanover Trust Co. v. C.I.R.*, 431 F.2d 664, 668 (2d Cir. 1970) ("When a statute is plain and unambiguous and there is no evidence of a contrary purpose than the purpose appearing in the precise terms of the statute it transcends the judicial function to rewrite the statute to conform to considerations of policy." (internal quotation marks omitted)).

And, in any event, the Town's professed concerns about impracticality and overwhelming the FAA or private airports, (Br. 31–32), are misplaced. In practice, ANCA will rarely if ever affect the thousands of privately owned, non-public airports in this country for the simple reason that access to such airports is purely a matter of private contract – *see New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1087 (11th Cir. 1996) (public has no right of access to private airport, which is subject to owner's fundamental right to exclude) – and ANCA did not purport to affect private contract rights. In addition, as the Ninth Circuit very recently observed in *City of Mukilteo v. U.S. Dep't of Transp.*, 815 F.3d 632 (9th Cir. 2016), while ANCA indisputably "limit[s] … new airport access restrictions" from being imposed at airports already open to public access and general use, *id.* at 637 (citing § 47524(c)(1)), ANCA does not endorse a "come one, come all" theory requiring *all* airports to admit *all* aircraft. *Id.*[16]

[16] Likewise, while ANCA unquestionably did not exempt airports simply because they are small, the FAA considered the burden ANCA would have on small airports during its rulemaking proceedings and forecast that it was unlikely to be

Moreover, the reason there has been no "deluge," (Br. 32), of proposed Stage 3 restrictions in the 26 years ANCA has been in place is not because airports have regarded ANCA as non-binding, but because – as the Town's own counsel previously advised the Town (A263) – Congress has set a high standard for Stage 3 restrictions to be approved, causing few airports to seek approval.

Simply put, the Town's invitation to characterize ANCA's provisions as non-mandatory is an invitation to ignore not only the plain text of the statute, but also the context in which the statute was enacted, the interpretive regulations of the agency charged with its administration, and the holdings of the two circuit courts that have addressed the scope of ANCA. The Town's invitation to characterize ANCA's provisions as non-mandatory is thus an invitation to error and should be rejected.

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substantial because small airports would seldom propose Stage 3 restrictions. *See* 56 Fed. Reg. 8644-01, 8661–62 (Feb. 28, 1991). That forecast appears to have been accurate.

CONCLUSION

For the reasons stated, the District Court's decision to grant a preliminary injunction as to the One-Trip Limit should be affirmed, its decision to deny a preliminary injunction as to the Town's curfews should be reversed, and this action should be remanded to the District Court with instructions to grant a preliminary injunction as to the curfews on the ground that they are preempted by ANCA and Part 161.

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April 18, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 28.1(e)(2)(C) of the Federal Rules of Appellate Procedure ("FRAP") because this brief contains 6,994 words, excluding the parts of the brief exempt by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: April 18, 2016

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