No. 16-___

IN THE

Supreme Court of the United States

TOWN OF EAST HAMPTON,

Petitioner,

v.

FRIENDS OF THE EAST HAMPTON AIRPORT, INC., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Airport Noise and Capacity Act of 1990 ("ANCA") sets forth certain conditions for the imposition of airport access restrictions, and states that the remedy for non-compliance is the ineligibility for federal funds and the inability to impose passenger facility charges. The questions presented are:

1. Does equity jurisdiction allow a private plaintiff to obtain an injunction for non-compliance with ANCA against an airport that does not receive federal funds or impose passenger facility charges?

2. Does ANCA preempt noise and access restrictions by all airports, including the many thousands of small airports nationwide that do not receive federal funds or impose passenger facility charges?

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INTRODUCTION

The Town of East Hampton, as proprietor of the East Hampton Airport, enacted three laws—two curfews and a limit on the number of trips for certain aircraft—to address the noise problem from escalating use of its airport. The Second Circuit held that these laws were invalid as preempted by the Airport Noise and Capacity Act of 1990 ("ANCA"). ANCA lists procedures for airports to follow, including the need for FAA approval, when enacting certain access restrictions. *See* 49 U.S.C. § 47524(b), (c). ANCA states that, if an airport does not comply with these procedures, then it cannot receive federal funds or impose passenger facility charges. *Id.* §§ 47524(e), 47526. The Second Circuit held that, even though the Town of East Hampton ("Town") does not receive federal funds or impose passenger facility charges in connection with the East Hampton Airport, it is still subject to ANCA, and that private plaintiffs can enforce ANCA through an injunction.

This decision has radically transformed aviation law in a manner that Congress did not intend and the FAA has rejected, with the result of placing extraordinary burdens on many thousands of small airports across the country even if they take no federal funds. Large airports with scheduled commercial service all receive federal funding and all are highly regulated by the FAA. But the vast majority of airports—14,400 private airports (*i.e.*, airports not open to the public) and 1,800 public airports—do not receive federal funds and are not so regulated. ANCA makes no distinction between private and public airports, and in the 26 years since ANCA was enacted, *none* of these airports has ever submitted a restriction for FAA approval, nor has the FAA suggested they should do so. And when

the congressman for the district encompassing the Town asked the FAA if the Town would violate ANCA by enacting regulations to combat aircraft noise, the FAA gave assurances that it would not. The Second Circuit's decision defies this consistent practice, instead subjecting every tiny airstrip across the country to a years-long and very costly process to enact something as a simple as a curfew.

There is nothing in the text of ANCA that suggests that Congress intended to federalize every airport in the nation, preempting the traditional exercise of their proprietary powers even if they take no federal funds. Rather, ANCA's plain text makes withholding of funds the sole remedy for non-compliance, consistent with decades of aviation law that recognized federal funding as the basis for FAA oversight of airports. The Second Circuit's decision warrants this Court's review both because it creates a private claim for injunctive relief and because it applies ANCA preemption against all airports, regardless of whether they receive federal funds.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 841 F.3d 133 and reproduced at App. 1a-42a. The opinion of the U.S. District Court for the Eastern District of New York is reported at 152 F. Supp. 3d 90 and reproduced at App. 43a-79a.

JURISDICTION

The court of appeals issued its opinion on November 4, 2016. On January 6, 2017, Justice Ginsburg extended the time for filing a petition for a writ of

certiorari to March 6, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ANCA, 49 U.S.C. §§ 47521 *et seq.*, are reproduced at App. 80a-86a.

STATEMENT OF THE CASE

A. The Town Of East Hampton And The East Hampton Airport

The Town of East Hampton is the easternmost town on Long Island, approximately 100 miles east of New York City. A290 ¶ 3.[1] The Town's year-round population is approximately 21,000, but that number almost quadruples during the summer busy season. A291 ¶ 4. The tranquility and natural beauty of the Town are critical to its economy and also to the quality of life of its residents. A292 ¶ 7.

The Town owns and operates the East Hampton Airport ("Airport"). A291 ¶ 5. The Airport, unlike major New York airports like JFK and LaGuardia, offers no scheduled commercial service. *Id.* Rather, it serves a range of private recreational, personal, and corporate aircraft operations, as well as charter operations by fixed-wing aircraft and helicopters. A31 ¶ 57.

From 1983 to 2001, the Town received several federal grants for airport development under the Airport Improvement Program ("AIP"), pursuant to the Airport and Airway Improvement Act of 1982 ("AAIA"). A32 ¶ 61. The FAA has not awarded the Town an AIP grant since 2001. A32 ¶ 62. Under the

[1] Citations in the form A__ refer to the joint appendix before the Second Circuit.

AAIA, the FAA may approve a grant application only if the airport proprietor agrees to certain written assurances (*i.e.*, grant assurances) regarding airport operations. 49 U.S.C. § 47107(a). Grant Assurance 22(a) requires that an airport be available "for public use on reasonable terms and without unjust discrimination." A61.

In 2003, the Committee to Stop Airport Expansion (the "Committee"), an unincorporated association of residents living near the Airport, commenced several legal proceedings in an attempt to halt development of the Airport. *See Comm. to Stop Airport Expansion v. Dep't of Transp.*, No. 03-CV-2634 (E.D.N.Y.). In 2005, the Committee and the United States executed a settlement agreement, in which the FAA agreed that, with respect to the Airport, Grant Assurance 22(a) "[would] not be enforced [by the FAA] beyond December 31, 2014." A407 ¶ 7.

In December 2011, then-U.S. Representative Timothy Bishop, whose district included the Town, submitted questions to the FAA concerning the Town's ability to enact noise and access regulations at the Airport. A397-98. The FAA responded by stating that, in light of the 2005 settlement agreement, the FAA would not, as of December 31, 2014, "initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators ... or seek specific performance of Grant Assurance[] 22a" unless the FAA awarded a new AIP grant to the Town. A391 ("Bishop Responses"). The FAA also stated that "[t]he FAA's agreement not to enforce also mean[t] that unless the town wishe[d] to remain eligible to receive future grants of Federal funding, it [was] not required to comply with [ANCA] ... in proposing new airport noise and access restrictions." A391.

B. The Aircraft Noise Problem In The Town

For over a decade, the residents of the Town have expressed concern about the noise from aviation operations at the Airport. A292 ¶ 8. The Town attempted to address the noise problem through voluntary procedures. A302; A333 ¶ 27. But in the few years prior to this suit, noise from aircraft flying to and from the Airport increased dramatically. A292 ¶ 8. Helicopter operations (*i.e.*, landings and take-offs) increased by 47% from 2013 to 2014. A357 ¶ 8.

The increase in aircraft noise sparked an enormous response from the community. A333 ¶ 28. The Town received thousands of complaints by email, phone, testimony at Town Board meetings, and letters to local papers. A292-93 ¶ 9. The Town employed a system for residents to log complaints, and the result was 23,954 complaints filed by 633 separate households. *See* Ted Baldwin & Katie van Heuven, *East Hampton Airport Phase II Noise Analysis*, http://ehamptonny.gov/documentcenter/view/1624 (referenced at A308). The increase is also an economic concern, as real estate agents recognize that aircraft noise caused by use of the Airport is a "critical consideration" for people purchasing or renting property in the Town. A381-82 ¶¶ 6-7. In short, aircraft noise threatens the tranquility and rural quiet that are the foundation for the economy and quality of life in the Town. A298 ¶ 29.

Recognizing the escalating problem, the Town engaged in a detailed analysis and extensive, public debate for over a year to find a solution. A293 ¶ 13; A305-06. The Town also engaged noise experts to conduct a series of increasingly refined studies on the noise problem. A305; A308; A340. Those studies concluded that noise from operations at the Airport

disturbs many residents of the East End of Long Island, that helicopters created a greater disturbance than other aircraft, and that frequent and night operations caused the greatest disturbance. A308.

The Town considered numerous options to address the problem. A309-12. It then commissioned a study of proposed restrictions, which found that, if curfews and a seasonal, one-trip-per-week limit for aircraft classified as "noisy" (based on their high decibel level) had been in place during the prior year, "they would have affected under 23% of total operations, while addressing the cause of over 60% of the complaints." A325 ¶ 11. Over several months, the Town conducted a series of meetings with residents and businesses about the proposals, along with public hearings. A312-16; A333-34 ¶ 29. The Town also met with senior FAA officials, members of the New York congressional delegation, and several industry groups. A318-19. Concerned that a helicopter ban simply would divert helicopters to Montauk, the easternmost part of the township, the Town deferred consideration of a seasonal weekend ban on helicopters. A319. The Town also determined that, even without a helicopter ban, the other three proposed laws would provide meaningful relief from noise. A297 ¶ 24; A319-20.

C. The Town's Enactment Of Noise Restrictions

On April 16, 2015, the Town passed the Local Laws denominated as Sections 75-38 and 75-39 of the Town of East Hampton Code. *See* Town of E. Hampton Res. 2015-411, 2015-412, 2015-413. The access restrictions are as follows: (1) a mandatory curfew prohibiting all aircraft from using the Airport between 11:00 p.m. and 7:00 a.m.; (2) an extended curfew prohibiting "Noisy Aircraft" from using the Airport from 8:00 p.m. to

9:00 a.m.; and (3) a weekly limit prohibiting "Noisy Aircraft" from using the Airport (*i.e.*, taking off or landing) more than two times per week during the "Season," which is from May to September (the "One-Trip Limit"). Town of E. Hampton Code §§ 75-38(B)-(C).

The Town determined that, while these three restrictions would not resolve all complaints, they struck a reasonable balance and would provide meaningful relief. A320. The Town would also revisit its decision after learning the effects of the Local Laws after they are in place for a season. A320.

D. Proceedings In The District Court

On April 21, 2015, Plaintiffs brought suit against the Town. Plaintiffs alleged that the three Local Laws are preempted by the AAIA and ANCA, and that they are preempted by federal law because they are unreasonable. A47-48 ¶¶ 104-15. Plaintiffs abandoned their AAIA claim on appeal.

On June 26, 2015, the district court issued an order granting in part and denying in part Plaintiffs' motion for a temporary restraining order, which the court treated as a motion for a preliminary injunction. App. 55a. Specifically, the court granted the preliminary injunction as to the One-Trip Limit and denied the preliminary injunction as to the two curfews. App. 79a.

The court ruled (App. 59a, 65a) that ANCA does not create a private right of action but that Plaintiffs may be able to invoke the court's equity jurisdiction to enjoin the allegedly preempted regulations. Nonetheless, the court held (App. 70a-72a) that ANCA does not preempt the Local Laws because ANCA does not displace the "proprietor exception." This exception to

preemption is codified in the Airline Deregulation Act, which states that laws "related to a price, route, or service of an air carrier" are preempted, but that this "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport ... from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(1), (3). The court recognized (App. 73a-78a) that the proprietor exception requires the Local Laws to be reasonable and ruled that, based on the evidence, the curfews satisfy this test, but the One-Trip Limit does not.[2]

E. The Court Of Appeals Decision

The U.S. Court of Appeals for the Second Circuit affirmed in part and vacated in part the district court's decision, holding that all three Local Laws were preempted by ANCA.

First, the court held that equity jurisdiction allowed Plaintiffs to bring a claim for injunctive relief for violations of ANCA. App. 18a-25a.[3] The court acknowledged that there was no equity jurisdiction in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), because withholding of federal funds was the sole remedy and the statute was not judicially administrable. App. 21a. The court held that neither of those factors was met here because 49 U.S.C.

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[2] In January 2015, many of Plaintiffs in this case filed a separate action against the FAA, alleging that the FAA has a statutory obligation to enforce Grant Assurance 22(a), and that the FAA's position on ANCA is erroneous. *See Friends of the East Hampton Airport, Inc. v. FAA*, No. 15-CV-00441 (E.D.N.Y.). That action was stayed pending the outcome of this case.

[3] The court noted that Plaintiffs abandoned on appeal any argument that they had a private right of action under ANCA or the Supremacy Clause. App. 15a n.9.

§ 47533 allows the FAA to seek injunctive relief and ANCA is judicially administrable. App. 21a-25a.

Second, the court held that ANCA preempts the Local Laws. The court noted that the statute allowed restrictions "only if" the ANCA requirements were satisfied. App. 26a-27a (quoting 49 U.S.C. § 47524). It concluded that "[t]he phrase 'only if' is unambiguously limiting," and thus "the plain statutory text is fairly read to mandate the identified procedural requirements for local noise and access restrictions on Stage 2 and 3 aircraft at *any* public airport." App. 27a-28a.[4] The court further held that its interpretation was supported by the statutory findings, legislative history, and FAA regulations. App. 30a-34a.

Third, the court recognized that its prior decision in *National Helicopter Corp. of America v. City of New York,* 137 F.3d 81 (2d Cir. 1998), had upheld local regulations enacted without compliance with ANCA. App. 35a-37a. But the court held that case was not binding precedent because it did not explicitly address the preemptive scope of ANCA. App. 37a.

Fourth, the court held that its opinion does not transform federal aviation law. App. 39a-41a. The court noted that the fact that only one airport proprietor had ever applied for FAA approval of proposed noise restrictions did not mean that others could not do so or that the agency would arbitrarily withhold consent. App. 40a.

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[4] "Stage 2" and "Stage 3" aircraft are defined in FAA regulations by the noise output of the aircraft. 14 C.F.R. § 36.1(f).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to address the court of appeals' decision to allow a private injunctive claim under equity jurisdiction and its decision that ANCA preempts the access restrictions of all airports.

I. The court of appeals' holding that equity jurisdiction allowed a private plaintiff's claim for an injunction to enforce ANCA conflicts with this Court's decision in *Armstrong*. Here, as in *Armstrong*, the statute provides only a remedy of withdrawal of funding for non-compliance with the statute. This sole remedy provision provides a strong indication of congressional intent to disallow injunctive relief.

Furthermore, the congressional intent to deny injunctive relief is even clearer than in *Armstrong*. *First*, rather than allowing an injunction as an additional remedy to withdrawal of funds, the court of appeals allowed an injunction here against a municipality that does not receive federal aviation funding at all. The injunctive remedy therefore effectively turns a spending statute into a statute that requires compliance regardless of the acceptance of federal funds. This Court has never countenanced the use of equity jurisdiction to expand spending statutes in this manner, and the court of appeals' approach has significant consequences for the interpretation of Spending Clause legislation.

Second, ANCA states that the FAA can obtain injunctions "[e]xcept as provided by section 47524," the section relevant here. 49 U.S.C. § 47533. This provision makes clear that the FAA could not obtain an injunction here, and *a fortiori* neither can private plaintiffs. Moreover, even if the FAA could obtain an injunction under section 47533, the express provision

for an injunction for the FAA would imply that injunctions are not available for private plaintiffs, who are not mentioned in ANCA.

Third, an injunctive remedy for ANCA would make the express funding remedy completely superfluous. Under the court of appeals' approach, there is no reason to have withdrawal of federal funding as a remedy because the restriction should be enjoined as preempted in the first place.

II. The court of appeals' holding that the preemptive scope of ANCA covers restrictions at all airports, whether or not they take federal funds, conflicts with the plain text of ANCA and would create an enormous, detrimental change in aviation law. The text of ANCA establishes that section 47524 has no preemptive scope beyond airports that receive federal aviation grants or impose passenger facility charges because withdrawal of those funds is the only remedy for noncompliance. 49 U.S.C. §§ 47524(e), 47526. Moreover, aviation law prior to ANCA expressly provides an exception to preemption for an airport exercising its proprietary authority. 49 U.S.C. § 41713(b)(3); *see also British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 83 (2d Cir. 1977). There is nothing in ANCA about preemption and no suggestion of an intent to displace the express preemption provision already well established in aviation law. There is also no suggestion that Congress intended to have the FAA regulate non-federally funded airports after refusing to do so in numerous statutes over the course of decades. Indeed, even the FAA has not taken this position, instead stating in the Bishop Responses that the Town would not be subject to ANCA unless it sought federal funding—assurances on which the Town relied.

Moreover, the effect of the court of appeals' ruling will be enormous. Prior to this ruling, for the 26-plus years ANCA has been in effect, both the nation's airports and the FAA have operated on the understanding that ANCA does not apply unless the airport seeks federal funds. But now, under the decision below, the thousands of airports nationwide that do not receive federal funds will be unable to undertake even minor restrictions, like curfews, without going through a lengthy and burdensome regulatory process under ANCA, subject to FAA scrutiny. And the cost of such effort would be enormous, requiring expensive and time-consuming studies of cost-benefit analysis—so difficult to complete that in fact no airport has ever received FAA approval for a restriction on Stage 3 aircraft. This radical change in aviation law, contrary to the statute and the FAA's interpretation provided to the Town, provides a strong basis for a grant of certiorari.

I. THE DECISION BELOW CONFLICTS WITH *ARMSTRONG* BY GRANTING EQUITY JURISDICTION FOR PRIVATE INJUNCTION CLAIMS

There is no dispute that Plaintiffs lack a statutory right of action or a right of action under the Supremacy Clause to enforce ANCA. App. 15a & n.9. The court of appeals held that Plaintiffs could pursue an injunction in federal court nonetheless under equity jurisdiction. This holding conflicts with *Armstrong* and erroneously expands the scope of funding legislation.

A. Just Like The Statute At Issue In *Armstrong*, ANCA Provides A Sole Remedy Of Withholding Funds

1. *Armstrong* recognized that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." 135 S. Ct. at 1384. But this authority is limited: "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id.* at 1385. Thus, to determine whether equitable relief is available in connection with a federal statutory scheme, courts look to "Congress's 'intent to foreclose' equitable relief." *Id.* (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)).

Applying this test of "express" or "implied" "intent to foreclose," this Court held that the Medicaid Act implicitly precluded enforcement of the relevant provision. In *Armstrong*, "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services." *Id.* *Armstrong* held that Congress's listing only the 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.'" *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996).

This Court did not decide whether this fact alone would suffice to preclude equity jurisdiction. It stated: "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. No decision was necessary on whether it might suffice by itself because "the judicially unadministrable nature of [the statute's] text" also suggested an intent to preclude a private right of action. *Id.*

2. Just like the Medicaid provision at issue in *Armstrong*, ANCA provides a specific, limited form of relief for the agency. 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. In short, just as in *Armstrong*, the statute here makes clear that "[u]nless" the airport complies, it loses certain funding. *Id.*

B. The Congressional Intent To Foreclose Private Injunctive Relief Here Is Even Clearer Than In *Armstrong*

Not only does the existence of a sole remedy of withholding federal funds mirror *Armstrong*, but in other respects the congressional intent to foreclose injunctive relief here is substantially *stronger* than in *Armstrong*.

First, the court of appeals held that an injunction would be available even against a municipality that does not receive federal funding for its proprietary airport. The injunction would therefore function not as a remedy in addition to an explicit statutory remedy of withholding funds, but rather as the sole and entirely implicit remedy. In *Armstrong*, in contrast, the state received federal funding and the only question was whether the remedy of injunction could be allowed *in addition to* the withholding of funds. The analogous situation in *Armstrong*, therefore, would be if an injunction were allowed even against a state that did not choose to take federal funds. That would constitute a dramatic expansion of the Medicaid statute. Here, as discussed *infra* at 25-28, it constitutes a dramatic expansion of federal aviation law—not

merely providing an additional remedy, but rather establishing a remedy where none exists in the statute. Thus, the decision below goes far beyond even the dissenting opinion in *Armstrong* by holding 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 funds.

This extreme position would undermine the basic principle that, for Spending Clause legislation, the state or municipality has a choice of whether to accept the funds and to thereby face restrictions. In short, even assuming that the creation of a funding remedy in a spending statute does not always demonstrate an intent to preclude an additional remedy of injunction, it at least demonstrates a clear intent not to allow private injunctions against those that do *not* receive the funding. Petitioners are aware of no case ever holding the contrary, and such a novel idea should not be imputed to Congress given the absence of any statutory basis for it.

Second, ANCA states expressly 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). 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

to enforce section 47524. Indeed, this Court has held that this kind of deliberate exclusion suffices to show congressional intent to foreclose an additional remedy. *See United States v. Fausto*, 484 U.S. 439, 455 (1988). And since Congress did not intend the FAA to have an injunctive remedy for non-compliance with section 47524, Congress plainly did not intend that private plaintiffs have this remedy.

The court of appeals held that section 47533 supported equity jurisdiction here, but its analysis has no statutory basis. The court stated that the "[e]xcept as provided" language is irrelevant because "§ 47524 provides only limited exceptions to the Secretary's authority to bring suit: as against local Stage 2 aircraft restrictions if the airport proprietor complies with § 47524(b)'s notice-and-comment process; and as against local Stage 3 and 4 aircraft restrictions 'agreed to by the airport proprietor and all aircraft operators' or approved by the FAA, *id.* § 47524(c)." App. 22a (footnote omitted). The problem with this analysis is that section 47524 says nothing at all about the FAA's "authority to bring suit." Rather, it provides the procedure for Stage 2 and Stage 3 restrictions, 49 U.S.C. § 47524(b), (c), and then it says (along with section 47526) that withholding funds is the remedy, *id.* §§ 47524(e), 47526.

The FAA has *never* stated that injunctions are available for a violation of ANCA and *never* attempted to impose such an injunction in the 26-plus years since ANCA was enacted.[5] It is, at a minimum, questionable

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[5] The court of appeals mentioned (App. 34a) a regulatory provision, which states that funding restrictions "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). But the possibility of other

for a court to enlarge the scope of agency authority far beyond what the agency itself has purported to assume.

The denial of a private action for injunctive relief is further supported by the fact that Congress provided greater remedies for other sections of ANCA than for section 47524. For instance, it provided civil penalties for violations of sections 47528, 47529, 47530, or 47534, but not for non-compliance with section 47524. *See* 49 U.S.C. § 47531. Furthermore, the provision allowing for judicial review of FAA decisions under ANCA explicitly excludes section 47524 from its coverage. *Id.* § 47532. There is no logical basis for Congress to disallow judicial review for FAA actions taken under section 47524 while simultaneously allowing private plaintiffs to circumvent the FAA entirely by going directly to court under equity jurisdiction. The court of appeals ignored these provisions entirely.

Moreover, even if injunctions were available to the FAA, that would not show Congress's intent to make them available for private parties. Rather, the specific provision of injunctive relief for the FAA (even assuming such injunctions would apply to violations of section 47524) suggests Congress did *not* intend injunctions for anyone other than the FAA. Indeed, the FAA deems injunctions available only to "protect the national aviation system and related Federal interests," 14 C.F.R. § 161.501(a), and Plaintiffs here have made no showing that, by seeking to land noisy aircraft at a

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relief for the FAA *only* "to protect the national aviation system and related Federal interests" does not remotely suggest that non-compliance with the specific requirements of section 47524 is subject to judicial proceedings for injunctive relief.

town airport in violation of local noise curfews, they are engaging in such protection of federal interests.

The court of appeals offered only one unexplained sentence as its reason for assuming that injunctions for the FAA support injunctions for private parties: "The fact that Congress conferred such broad enforcement authority on the FAA, and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements." App. 23a. However, it is unclear why not enforcing federal law gives private plaintiffs a stronger claim to injunctive relief. And there is no reason to believe that Congress sought to protect private injunctions by saying nothing about them at all, while expressly saying when FAA injunctions were available.

Third, it would make no sense to allow for injunctive relief while providing for the lesser remedy of withholding federal funds. According to the court below, an airport restriction is void as preempted by ANCA if the airport does not comply with section 47524. But if so, then there is no 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. Such an illogical construction of a statute should be avoided.[6]

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[6] The court of appeals posited that the withholding of funds was insufficient because a municipality could take the funds one

In *Armstrong*, there was a reasonable argument for allowing injunctive relief in addition to the withholding of federal funds: 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." 135 S. Ct. at 1396 (Sotomayor, J., dissenting). Here, in contrast, not even that argument is available. There is no ground to suppose that the FAA would be unaware of relevant restrictions, and indeed third parties can file complaints of ANCA violations to the FAA. 14 C.F.R. § 161.503. Also unlike in *Armstrong*, the withholding of funds would not punish third-party recipients (as in Medicaid), but the airports themselves.

Finally, the court of appeals held that ANCA was distinguishable from the statute in *Armstrong* largely because it deemed the requirements of ANCA judicially administrable. App. 24a-25a. 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. The

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day and then violate ANCA the next. App. 23a. This theory misunderstands the reality of airport grants. Grant assurances (allowing FAA oversight) typically last for twenty years after an airport receives federal funds, *see, e.g.*, A30 ¶ 53, and those assurances would provide an independent basis for FAA to enjoin unreasonable access restrictions.

indirect and inferential showing of congressional intent based on administrability is substantially weaker than the showing here, based on express language and the need to make logical sense of the statute as a whole.

At a minimum, even discounting all of the statutory indications of intent to foreclose private injunctive claims discussed above, this case raises the question left open in *Armstrong*: whether a provision specifying solely withholding of federal funds as the remedy for a violation, by itself, shows Congress's intent to preclude private injunctive relief. This is an important question that this Court should resolve, and it should answer the question in the affirmative. In noting that such a provision by itself "might not" suffice to disallow equity jurisdiction, *Armstrong*, 135 S. Ct. at 1385, this Court cited *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247 (2011) ("*VOPA*"). But in *VOPA*, 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. 563 U.S. 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). Thus, this Court has not held that private injunctions through equity jurisdiction are available when Congress has set forth a different remedy in the statute. And any new principle of law of this kind—imputing to Congress an intent to allow remedies beyond those stated in a statute—should be considered by this Court.

II. THE COURT OF APPEALS' HOLDING THAT ANCA PREEMPTS NOISE AND ACCESS RESTRICTIONS FOR ALL AIRPORTS CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE

Even if Plaintiffs have a right of action under equity jurisdiction, this Court should grant review to consider the court of appeals' holding that noise restrictions like the Local Laws are preempted under ANCA.

A. The Text And Structure Of ANCA Establish That There Is No Preemption Of Restrictions By Airport Proprietors That Do Not Receive Federal Funding

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.

The court of appeals nonetheless stated (App. 29a) that "§ 47526 provides for loss of funding eligibility as *a* consequence of noncompliance with § 47524 procedures," ignoring that the text lists such monetary remedies as *the* consequence, not merely *one* consequence, of noncompliance. In particular, section 47524(e) makes clear that the procedures in section 47524 are conditions of "eligib[ility]," not requirements. *See* 49 U.S.C. § 47524(e). And section 47526, entitled "Limitations for noncomplying airport noise and access restrictions," states that an airport "may not" receive funding "[u]nless" it complies with the conditions of

section 47524. *Id.* § 47526. These terms—eligible, may not, limitations, and unless—are not terms that are ordinarily associated with requirements. Rather, they are used to denote conditions that must be followed if, and only if, a certain benefit is to be attained.

The provision of limited monetary remedies—and the deliberate exclusion of section 47524 when the statute provides for civil penalties and injunctions, *see* 49 U.S.C. §§ 47531, 47533, discussed *supra* at 16-18—establishes Congress's intent to follow the well-recognized approach in Spending Clause legislation. That approach ensures that recipients always retain the option of foregoing federal funds and thus avoiding any regulatory conditions attached to accepting such funds. As this Court has explained, "[w]e have repeatedly characterized ... Spending Clause legislation as 'much in the nature of a *contract.*'" *Barnes v. Gorman,* 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)). In particular, "the 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." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (opinion of White, J.)) (quoting *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970)). "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012)

(opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

The court of appeals held that the words "only if" in the description of the section 47524 procedures indicate that the procedures are mandatory. App. 27a. But "[s]tatutory language cannot be construed in a vacuum. It is a fundamental canon 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*, 136 S. Ct. 1061, 1070 (2016) (internal quotation marks omitted). Thus, the "only if" language must be read together with the remedy provisions immediately thereafter. Read together, the provisions of the statute evince congressional intent to allow an airport not to comply if it foregoes funding.

Congress has followed this approach—mandatory-sounding language in one section with only a funding remedy in another—in other Spending Clause legislation where it is clearly intended that the supposed requirement is conditional on acceptance of federal funds. For instance, 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).

Furthermore, 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). The court of appeals asserted that "Congress can certainly regulate commerce both by providing monetary incentives for voluntary compliance by some actors, while at the same time allowing for enforcement actions more generally." App. 31a. To be sure, Congress can do so, but the court of appeals failed to explain why it would make sense to treat federal funds as helping to resolve the problem if any regulation that did not comply with ANCA would be void as preempted anyway.[7]

B. The Federal Aviation Law Scheme 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 Airline Deregulation Act of 1978 ("ADA") expressly deals with preemption, in a section entitled "Preemption." 49 U.S.C. § 41713(b). That section establishes that a state or local government cannot

[7] The court of appeals mentioned (App. 31a) that other findings note the "national interest" and the prevention of "inconsistent restrictions." 49 U.S.C. § 47521(1)-(4). But these findings do not indicate *which* airports are being targeted, and certainly the coverage of airports that receive federal funding—which includes all major airports across the country with scheduled, commercial service—would qualify as a national set of restrictions.

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 ADA's "proprietor exception." What the court of appeals has created, 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 court of appeals suggested (App. 38a) that there is no implied repeal because ANCA merely defines what is unreasonable and therefore what does not fall within the proprietor exception. But there is nothing in ANCA to suggest that any regulation that does not comply with section 47524 is, by definition, unreasonable. And it is implausible that a particular procedure and FAA approval are required to make a regulation reasonable, given that the proprietor exception is supposed to preserve local authority. Indeed, the enormous time, expense, and uncertainty in attempting to satisfy the section 47524 conditions for Stage 3 aircraft—which no airport has ever satisfied—show that this is far more than a simple reasonableness requirement.

Second, the court of appeals' ruling improperly expands the scope of preemption into an area of traditional state and local authority. 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 88-89 (explaining the history of the proprietor exception).[8] As the Second Circuit itself recognized long before the decision below, "[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*, 558 F.2d at 83. And "Congress repeatedly has declined to alter this cooperative scheme." *Id.* Indeed, it was expressly adopted in the ADA.

Third, not only would the court of appeals' 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. Pub. L. No. 85-726, § 308, 72 Stat. 731, 750-51 (1958). The only

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[8] This Court recognized the support for such an exception in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973), noting that for a prior statute, the Secretary of Transportation had stated (in language quoted with approval in the Senate Report): "[T]he proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id.* at 635-36 n.14 (emphasis added in opinion; quotation marks omitted). Because *City of Burbank* considered only police powers, this Court held that "[w]e do not consider here what limits, if any, apply to a municipality as a proprietor." *Id.*

restriction as to airports not using federal funds was that they could not be constructed or have their runways substantially altered in a manner that interfered with the FAA's authority over airspace. *Id.* § 309. Likewise, the AAIA requires that airports that receive federal funds be subject to grant assurances. 49 U.S.C. § 47107(a).[9] In short, the historical statutory scheme, established over decades, is one in which the federal government regulates airports that receive federal funds. Any departure from this scheme should not be imputed to Congress based on a statute that mentions no remedy other than loss of funding.

Finally, the FAA has stated that ANCA does not apply when an airport foregoes federal funding. In the Bishop Responses, specifically concerning the East Hampton Airport, the FAA stated in no uncertain terms that, "unless the town wishe[d] to remain eligible to receive future grants of Federal funding, it [was] not required to comply with [ANCA] ... in proposing new airport noise and access restrictions." App. 52a. The Town relied on that assurance. The court of appeals did not address the import of this letter, and instead relied on FAA regulations as though they decide the issue. App. 33a-34a. But those regulations do not expressly consider airports that have foregone federal funding, and the FAA has never applied these regulations to an airport that has foregone federal funding. Indeed, the FAA has stated that "Part 161

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[9] Other 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 AIRPORT SYSTEMS (NPIAS) § 1-5 (Dec. 4, 2000), *available at* https://www.faa.gov/airports/resources/publications/orders/media/planning_5090_3C.pdf.

[the ANCA regulations] concerns notice, review, and approval by the FAA of restrictions by *federally funded* airport sponsors." Brief of Respondent FAA at 37-38, *Helicopter Ass'n Int'l, Inc. v. FAA*, No. 12-1335 (D.C. Cir. Feb. 1, 2013) (emphasis added). The court of appeals' departure from the FAA's interpretation of ANCA provides yet another reason for a grant of certiorari.

C. 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, then surely the legislative debate would have revealed as much. But it does not.

The limited discussion of the bill reflects the accepted understanding that it would apply only to federally-funded airports. Congressman James Oberstar, sponsor of the legislation and Chairman of the Aviation Subcommittee, explained: "Airports which impose unapproved restrictions ... would become ineligible for funds from the Airport Improvement Program and may not impose Passenger Facility Charges." 136 Cong. Rec. E3693-04, E3694 (Oct. 27, 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.

Federal Aviation Noise Policy: Hearings Before the Subcomm. On Aviation of the H. Comm. on Pub. Works & Transp., 101st Cong., Summary of Subject Matter at 1 (1990) (emphasis added).

The court of appeals suggested (App. 32a) that statements of some senators show an intent to apply ANCA to airports that do not receive federal funds. However, no statement it cited actually referred to airports that are not federally funded. And the court ignored statements from senators making clear that ANCA was mandatory only for airports receiving federal funding. *See* 136 Cong. Rec. S15777-02, S15818 (Oct. 18, 1990) (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.").

III. THE COURT OF APPEALS' DECISION TO FEDERALIZE ALL THE NATION'S AIRPORTS HAS ENORMOUS, HARMFUL CONSEQUENCES THAT WARRANT THIS COURT'S REVIEW

The effect of the decision below is that virtually every noise and access restriction of every airport must meet FAA approval under ANCA. This federalization of all airports marks a profound shift in how airports have been regulated both in the decades before ANCA was enacted and the decades since. It is also wildly impractical, as it would mean that thousands of small airports must take years and spend

enormous amounts of money to enact something as simple as a curfew—an onerous burden few can possibly undertake.

1. The court of appeals' ruling radically changes aviation law. There are over 19,500 airports across the nation. FAA, Report to Congress, National Plan of Integrated Airport Systems (NPIAS) 2017-2021, at 2 (Sept. 30, 2016) ("FAA Report"), *available at* https://www.faa.gov/airports/planning_capacity/npias/reports/media/NPIAS-Report-2017-2021-Narrative.pdf. The vast majority (over 80 percent) are actually tiny airstrips or helipads that do not receive federal funding. *Id.* This includes approximately 14,400 private airports. *Id.* There are also 1,800 public airports (typically small airports) that cannot receive federal funding because they do not meet the criteria. *Id.* These airports may have countless rules and regulations, but the FAA does not even record activity at (let alone regulate) these airports. *See* 49 U.S.C. § 47103; FAA Report at 3.

Under the court of appeals' interpretation of ANCA, all of these airports now must submit their regulations for FAA approval. The court stated that its decision applies to "public airports," App. 31a-34a, 42a, seemingly implying that it does not apply to private airports. But there is absolutely no distinction between public and private in ANCA, which simply refers to "airport[s]." 49 U.S.C. § 47524. And the FAA's regulations make clear that ANCA's reference to "airport[s]" covers both public and private airports, no matter how small. *See* 14 C.F.R. § 161.5.

The effect on all airports will be enormous. ANCA covers restrictions as simple as a curfew for night flights, as evident in the decision here. More generally, it includes a wide variety of access restrictions,

regardless of whether the purpose of the restriction was noise-related, as the FAA has made clear in its regulations:

> *Noise or access restrictions* means restrictions ... affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such as limits on the noise generated on either a single-event or cumulative basis; ... a restriction imposing limits on hours of operations; a program of airport-use charges ...; and any other limit on Stage 2 or Stage 3 aircraft that has the effect of controlling airport noise.

Id. In short, under the decision below, *every* airport must submit for FAA approval *every* restriction that has an effect on airport noise (through a curfew, airport-use charges, a limit on number of flights, or anything else). The sheer volume of airports would make this completely impractical, as the FAA would face countless requests for approvals.

Furthermore, that review process is extraordinarily onerous. It includes a detailed economic analysis of the effect of the restriction, including a cost-benefit analysis. 14 C.F.R. § 161.305(e)(2)(ii)(A). This would take years and cost potentially millions of dollars to perform. *See* Hollywood Burbank Airport, *Part 161 Update*, https://bobhopeairport.com/noise-issues/part-161-update (Part 161 study finished in 2009 by federally funded airport, which was the first ANCA application even deemed complete by the FAA, cost $7 million and was denied). This process is so difficult that not a single airport has *ever* had a Stage 3 restriction approved by the FAA. There is no plausible explanation for why small airports, including tiny private airstrips, should be forced to expend enormous

time and resources complying with the statute for changes as minor as closing an airstrip an hour early.

2. This would be an unprecedented departure from how aviation law has been interpreted—and regulation of airports has been conducted—since the FAA was founded. As discussed *supra* at 27-28, prior to the enactment of ANCA, all of the statutes Congress passed concerning FAA jurisdiction and control were limited to those airports that received federal funds. Moreover, in the 26 years since ANCA was enacted, there is no instance of a non-federally funded airport submitting regulations to the FAA for approval. Nor has the FAA ever objected to the failure to submit regulations for approval, notwithstanding that there must have been countless thousands of regulations enacted by small, non-federally funded airports.

Indeed, in 1998, the Second Circuit itself rejected an ANCA challenge to New York City's helicopter restrictions. *See Nat'l Helicopter*, 137 F.3d at 92. The Second Circuit held in that case that the proprietor exception set forth the correct test for preemption and that various noise-related regulations were not preempted by federal law. *Id.* at 89-91. In the district court, then-Judge Sotomayor similarly applied the proprietor exception despite 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). The Second Circuit here held *National Helicopter* not controlling on the ground that the opinion only briefly mentioned ANCA and this supposedly did not constitute a holding. App. 37a-39a. But regardless, there is no question that *National Helicopter* was the benchmark for the applicability of ANCA for almost 20 years, and that this new

approach represents a significant change in the law for municipalities like the Town, New York City, and other airport proprietors across the country.

The decision below dismissed the importance of these effects by suggesting that, "[t]o the extent the process is inherently burdensome, that decision was, in the first instance, Congress's." App. 40a. But "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quotation marks omitted). Thus, courts should not presume that Congress *sub silentio* dramatically enlarged the FAA's authority and the burdens on small airports. Rather, what Congress did—and everyone for 26-plus years believed it did—was to provide an incremental addition of FAA oversight over noise regulations at federally-funded airports, policed solely by use of federal funds.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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March 6, 2017

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket Nos. 15-2334-cv(L),15-2465-cv(XAP)

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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.

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August Term, 2015

(Argued: June 20, 2016

Decided: November 4, 2016)

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Before: JACOBS, CALABRESI, RAGGI, *Circuit Judges.*

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On cross appeals from an order of the United States District Court for the Eastern District of New York (Seybert, *J.*) granting in part and denying in part a motion for a preliminary injunction to bar enforcement

of three local laws limiting access to the town's airport operations, the defendant municipality challenges the court's determination that the enactment of one law, placing a numerical limit on weekly flights, was an unreasonable exercise of the town's reserved proprietary authority under the Airline Deregulation Act of 1978, *see* 49 U.S.C. § 41713(b)(3). Plaintiffs defend that decision, and challenge the partial denial of the preliminary injunction, arguing that federal preemption precludes enforcement of all three laws because they were enacted in violation of the procedural requirements of the Airport Noise and Capacity Act of 1990, *see* 49 U.S.C. §§ 47521–47534.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

KATHLEEN M. SULLIVAN (W. Eric Pilsk, Kaplan, Kirsch & Rockwell, LLP, Washington, D.C.; David M. Cooper, Quinn Emanuel Urquhart & Sullivan, LLP, New York, New York, *on the brief*), Quinn Emanuel Urquhart & Sullivan, LLP, New York, New York, *for Defendant-Appellant-Cross-Appellee*.

LISA R. ZORNBERG (Helen A. Gredd, Jonathan D. Lamberti, *on the brief*), Lankler Siffert & Wohl LLP, New York, New York, *for Plaintiffs-Appellees-Cross-Appellants*.

Lauren L. Haertlein, General Aviation Manufacturers Association, Washington, D.C., *Amicus Curiae in support of Plaintiffs-Appellees-Cross-Appellants*.

REENA RAGGI, *Circuit Judge*:

We here consider cross appeals from an order of the United States District Court for the Eastern District of New York (Joanna Seybert, *Judge*), granting in part and denying in part a motion for a preliminary

injunction to bar enforcement of three local laws restricting operations at a public airport located in and owned and operated by the Town of East Hampton, New York (the "Town" and the "Airport"). *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90 (E.D.N.Y. 2015). Plaintiffs, who sought the injunction, represent various aviation businesses that use the Airport and representative entities. The district court enjoined the enforcement of only one of the challenged laws—imposing a weekly flight limit—concluding that it reflected a likely unreasonable exercise of the Town's reserved proprietary authority, which is excepted from federal preemption by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(3).

The Town challenges the district court's rejection of this proprietor exception with respect to the weekly flight-limit law. Plaintiffs defend the district court's decision as to that law, and, on cross appeal, argue that enforcement of all three challenged laws should have been enjoined. Specifically, plaintiffs contend that none of the challenged laws falls within the ADA's proprietor exception to federal preemption because the Town failed to comply with the procedural requirements of the Airport Noise and Capacity Act of 1990 ("ANCA"), *see* 49 U.S.C. §§ 47521–47534, in enacting them. The Town counters that plaintiffs cannot invoke equity jurisdiction to enforce ANCA's procedural requirements, and that compliance with these procedures is not required because the Town is willing to forgo future federal funding for its airport.

We identify merit in plaintiffs' ANCA argument and resolve these cross appeals on that basis without needing to address the Town's proprietor exception challenge. Specifically, we conclude that plaintiffs (1)

can invoke equity jurisdiction to enjoin enforcement of the challenged laws; and (2) are likely to succeed on their preemption claim because it appears undisputed that the Town enacted all three laws without complying with ANCA's procedural requirements, which apply to public airport operators regardless of their federal funding status.

We affirm the district court's order insofar as it enjoins enforcement of the weekly flight-limit law, but we vacate the order insofar as it declines to enjoin enforcement of the other two challenged laws. In so ruling, we express no view as to the wisdom of the local laws at issue. We conclude only that federal law mandates that such laws be enacted according to specified procedures, without which they cannot claim the proprietor exception to federal preemption. Accordingly, we remand the case to the district court for the entry of a preliminary injunction as to all three laws and for further proceedings consistent with this opinion.

I. Background[1]

A. The East Hampton Airport

The Town of East Hampton, located approximately 100 miles east of New York City, is a popular summer vacation destination on the south shore of Long Island. Its year-round population of approximately 21,500 more than quadruples to approximately 94,000 in the months of May through September (the "Season").

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[1] Because discovery has not yet taken place, the stated background derives from plaintiffs' amended complaint and from the declarations submitted by the parties in litigating plaintiffs' preliminary injunction motion.

This results in increased traffic, including air traffic, and attendant noise.

The Town owns and operates East Hampton Airport (the "Airport"), which is a public use, general aviation facility servicing domestic and international flights. The Federal Aviation Administration ("FAA") has designated the Airport as a "regional" facility "significant" to the national aviation system. J.A. 117. Although the Airport provides no scheduled commercial service, it serves a range of private and chartered helicopters and fixed-wing aircraft. In 2014, the Airport supported 25,714 operations, *i.e.*, take-offs or landings, by such aircraft. On the busiest day of that calendar year, Friday, July 25, 2014, the Airport supported 353 operations between 3:04 a.m. and 11:08 p.m.

B. The Town's Efforts To Control Airport Noise

For more than a decade before the enactment of the laws at issue in this action, Town residents had expressed concern about Airport noise. Counsel for the Town, however, repeatedly advised the Town that federal law placed significant limitations on its ability to restrict Airport access to reduce noise.

1. Federal Limitations on Local Noise Regulation

a. The Town's Receipt of AIP Grants

The Town was advised that its obligation to comply with federal law derived, in part, from its receipt of federal funding under the Airport and Airway Improvement Act of 1982 (the "AAIA"), Pub. L. No. 97-248, 96 Stat. 671 (recodified at 49 U.S.C. § 47101 *et seq.*). The AAIA established the Airport Improvement Program (the "AIP"), which extends grants to airports that, in return, provide statutorily mandated assurances to

remain publicly accessible and to abide by federal aviation law and policy. *See* 49 U.S.C. §§ 47107(a)(1), 47108(a).

The Town's most recent AIP grant, received on September 25, 2001, was for $1.4 million to rehabilitate the Airport's terminal apron. In the grant agreement, the Town certified that for a period of twenty years—*i.e.*, through September 25, 2021—it would comply with certain specified assurances. *See Pacific Coast Flyers, Inc. v. County of San Diego*, FAA Dkt. No. 16-04-08, 2005 WL 1900515, at *11 (July 25, 2005) ("Upon acceptance of an AIP grant, the grant assurances become a binding contractual obligation between the airport sponsor and the Federal government."). These included assurances to make the Airport available "for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities," J.A. 61 (Grant Assurance 22(a)), and to "comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds . . . including but not limited to . . . Title 49 U.S.C., subtitle VII," *id.* at 53 (Grant Assurance 1(a)).

b. ANCA's Procedural Requirements for Local Laws Limiting Access to Public Airports

Subtitle VII (referenced in Grant Assurance 1(a), at Part B, Chapter 475, Subchapter II) encompasses the Airport Noise and Capacity Act of 1990 ("ANCA"), Pub. L. No. 101-508, 104 Stat. 1388 (recodified at 49 U.S.C. §§ 47521–47534). This statute, which is at the core of plaintiffs' preemption claim, (1) directs the Department of Transportation (which has delegated its authority to the FAA) to establish "a national

aviation noise policy," 49 U.S.C. § 47523(a), including "a national program for reviewing airport noise and access restrictions on operations of Stage 2 and Stage 3 aircraft," *id.* § 47524(a); and (2) outlines the requirements of that program. Acting under the authority delegated by the Department of Transportation, the FAA promulgated a national aviation noise policy through 14 C.F.R. Part 161, the "notice, review, and approval requirements," which "apply to *all airports* imposing noise or access restrictions." 14 C.F.R. § 161.3(a), (c) (emphasis added).

ANCA's requirements vary based on the type of aircraft at issue. "Aircraft are classified roughly according to the amount of noise they produce, from Stage 1 for the noisiest to Stage 3 for those that are relatively quieter." *City of Naples Airport Auth. v. FAA*, 409 F.3d 431, 433 (D.C. Cir. 2005).[2] In ANCA, Congress states that airport operators may impose noise or access restrictions on Stage 2 aircraft "only" upon 180 days' notice and an opportunity for comment. 49 U.S.C. § 47524(b).[3] Local restrictions on Stage 3

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[2] In 2005, the FAA promulgated an additional Stage 4 classification for aircraft that operate beneath the noise thresholds specified for Stage 3 and that are, therefore, protected by the same requirements. *See* Stage 4 Aircraft Noise Standards, 70 Fed. Reg. 38742, 38743 (July 5, 2005). In 2012, Congress enacted section 506 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112- 95, 126 Stat. 11, 105 (codified at 49 U.S.C. § 47534(a)), which provided for Stage 2 aircraft operations to be phased out by December 31, 2015.

[3] The relevant provision states that an airport restriction on Stage 2 aircraft may take effect

> only if the airport operator publishes the proposed restriction and prepares and makes available for public comment at least 180 days before the effective date of the proposed restriction–

aircraft "may become effective only if" they have either been "agreed to by the airport proprietor and all aircraft operators" or "submitted to and approved by the Secretary of Transportation after an airport or aircraft operator's request for approval." *Id.* § 47524(c)(1).

c. Federal Preemption of Local Police Power To Regulate Airport Noise

The Town was further advised that, even after expiration of the twenty-year AAIA compliance period—indeed, even if it had never accepted any AIP grants—the Airport would not be "free to operate as it wishes" because the federal statutory limitations applied regardless of whether an airport is subject to grant assurances. J.A. 239–240; *see also id.* at 273 (stating that "Town does not now have 'local control' and seeking FAA grants does not fundamentally change that legal reality," and that "[o]nly way to achieve local control is to close airport").

Such limitations were first acknowledged by the Supreme Court more than 40 years ago in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Referencing the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2, the Court there concluded that

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(1) an analysis of the anticipated or actual costs and benefits of the existing or proposed restriction;

(2) a description of alternative restrictions;

(3) a description of the alternative measures considered that do not involve aircraft restrictions; and

(4) a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.

49 U.S.C. § 47524(b).

"the pervasive nature of the scheme of federal regulation of aircraft noise"—manifested by the Federal Aviation Act of 1958, Pub. L. No. 85- 726, 72 Stat. 731, as amended by the Noise Control Act of 1972, Pub. L. No. 92- 574, 86 Stat. 1234, and FAA regulations promulgated thereunder—had completely preempted the states' traditional police power to regulate noise in that area. *Id.* at 633; *see id.* at 638 (reasoning that "pervasive control vested in [federal agencies] under the 1972 Act seems to us to leave no room for local curfews or other local controls").

d. The ADA Codifies a Proprietor Exception to Preemption

In *City of Burbank*, the Supreme Court specifically did not consider whether the same preemption that applied to local police power also applied to local proprietary authority. *See id.* at 635 n.14 (observing that "authority that a municipality may have as a landlord is not necessarily congruent with its police power"). Since *City of Burbank*, federal courts, including our own, have concluded that municipalities retain some proprietary authority to control noise at local airports, although that role is "extremely limited." *British Airways Bd. v. Port Auth. of N.Y. & N.J.* ("*Concorde II*"), 564 F.2d 1002, 1010 (2d Cir. 1977). We reasoned that, because an airport proprietor "controls the location of the facility, acquires the property and air easements and [can] assure compatible land use," it might be liable to other property owners for noise damage and, thus, has a right "to limit [its] liability by restricting the use of [its] airport." *British Airways Bd. v. Port Auth. of N.Y. & N.J.* ("*Concorde I*"), 558 F.2d 75, 83 (2d Cir. 1977) (citing *Griggs v. Allegheny Cty.*, 369 U.S. 84 (1962)). That right, however, is narrow,

vesting the proprietor "only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." *Id.* at 84. Moreover, such regulations must be "consistent with federal policy; other, noncomplementary exercises of local prerogative are forbidden." *Id.* at 84–85.

Congress codified the so-called "proprietor exception" in the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. § 41713(b)). At the same time that the ADA expressly preempts all state and local laws or regulations "related to a price, route, or service of an air carrier," *id.* § 41713(b)(1), it clarifies that such preemption does not limit "a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by [federally certified air carriers] from carrying out its proprietary powers and rights," *id.* § 41713(b)(3).

2. Litigation Challenging the Town's AIP Grants

In 2003, an unincorporated association of Town residents living near the Airport sued the FAA and Department of Transportation—but not the Town—in the Eastern District of New York, challenging the legality of post-1994 AIP grants to the Town on the ground that, in the absence of a "current layout plan," such grants violated the AAIA, specifically 49 U.S.C. § 47107(a)(16). The litigation concluded in an April 29, 2005 Settlement Agreement, wherein the FAA stipulated that it would not enforce Grant Assurance 22(a)—which provides for nondiscriminatory access to the Airport on reasonable terms—past December 31, 2014, unless the Town received additional AIP funding thereafter. The Settlement Agreement also provided,

however, that with three exceptions not relevant here, all other grant assurances, including Grant Assurance 1(a), requiring compliance with federal law, "shall be enforced in full." J.A. 43.

3. The FAA's Response to the 2011 Bishop Inquiry

On December 14, 2011, then–United States Representative Timothy Bishop, whose district included the Town, submitted questions to the FAA concerning the effect of the Settlement Agreement on the Town's ability to adopt noise and access restrictions at the Airport.

In an unsigned response, the FAA represented that after December 31, 2014, it would not "initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators . . . or seek specific performance of Grant Assurance[] 22a" unless and until the award of a new AIP grant to the Town. *Id.* at 391. The FAA further stated that its agreement not to enforce meant that, unless the Town wished to remain eligible for future federal grants, it was "not required to comply with the requirements under . . . (ANCA), as implemented by title 14 CFR, part 161, in proposing new airport noise and access restrictions." *Id.* Counsel for the Town received a copy of this communication from the FAA on February 29, 2012, remarking to an FAA attorney that news reports construing the FAA's response as relieving the Town from ANCA compliance "certainly c[ame] as a surprise." *Id.* at 389.

4. The Town's Enactment of the Challenged Legislation

By 2014, the Town had concluded that its decade-long attempt to develop voluntary noise-abatement

procedures for aircraft operators had failed, and that Airport noise was becoming increasingly disruptive.[4] Relying on the FAA's response to the Bishop inquiry, the Town decided to take official action.

In the late summer of 2014, the Town began to hold public meetings and to collect and analyze data with a view toward adopting regulations to address Airport noise. At an October 30 Town meeting, a joint citizen-consultant team presented the results of a "Phase I" study on Airport operations, which indicated that (1) helicopter noise generated the majority of complaints; (2) compliance with voluntary procedures—at 15.3%—was low; and (3) complaints peaked during the summer, on weekends, and in response to nighttime operations. A Phase II study by a private firm confirmed these conclusions and prompted a Phase III analysis of possible regulatory solutions. The results of the Phase III analysis, reported on February 4, 2015, indicated that three restrictions would address the cause of more than 60% of noise complaints while affecting less than 23% of Airport operations: (1) a mandatory curfew on all aircraft traffic, (2) an "extended" curfew for certain "noisy" aircraft, and (3) a weekly one-round-trip limit on noisy aircraft. Following a period of public comment, as well as communications with various industry constituencies, FAA officials, and members of New York's congressional delegation, the Town, on April 16, 2015, codified the three recommended restrictions on the Stage 2, 3, and 4 aircraft operations that are at issue in this case (the "Local

[4] In 2014, the Town received a record number of complaints about Airport operations. Town analysis indicated that between 2013 and 2014, helicopter operations at the Airport—considered particularly disruptive—rose by 47% from 5,728 to 8,396.

Laws"). *See* Town of East Hampton, N.Y., Code ("Town Code") §§ 75-38, 75-39 (2015).

The Local Laws establish: (1) a curfew prohibiting all such aircraft from using the Airport between 11:00 p.m. and 7:00 a.m. (the "Mandatory Curfew"); (2) an extended curfew on "Noisy Aircraft" starting at 8:00 p.m. and continuing through 9:00 a.m. (the "Extended Curfew");[5] and (3) a two-operations-per-week (*i.e.*, one round trip) limit on Noisy Aircrafts' use of the Airport during the Season (the "One-Trip Limit"). *See id.* § 75-38(B)–(C). The Local Laws address violations through escalating fines, enforcement costs, injunctive relief, and bans on Airport use. *See id.* § 75-39(B)–(E).

The Town does not dispute that, in enacting the Local Laws, it did not comply with ANCA's procedural requirements. Specifically, although the laws restrict Stage 2 aircrafts' Airport access, the Town did not conduct the requisite analysis set forth in 49 U.S.C. § 47524(b)(1)–(4),[6] much less make such analysis available for public comment at least 180 days before the laws took effect. Nor did the Town seek aircraft operator or FAA approval for laws restricting Stage 3 and Stage 4 aircrafts' Airport access, as required by 49 U.S.C. § 47524(c)(1).

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[5] The Town Code defines "Noisy Aircraft" as "any airplane or rotorcraft for which there is a published Effective Perceived Noise in Decibels (EPNdB) approach (AP) level of 91.0 or greater." Town Code § 75-38(A)(4)(a). The General Aviation Manufacturers Association, as *amicus curiae*, explains that this definition is inconsistent with federal noise standards insofar as both Stage 3 and Stage 4 aircraft, which satisfy the most demanding federal noise requirements, nevertheless constitute "Noisy Aircraft" under the Local Laws.

[6] *See supra* Part I.B.1.b note 3.

C. District Court Proceedings

On April 21, 2015, five days after the Local Laws were enacted, plaintiffs filed this declaratory and injunctive-relief action to prohibit enforcement of §§ 75-38 and 75-39 of the Town Code.[7] In their amended complaint, plaintiffs allege that the Local Laws (1) violate the ADA, AAIA, ANCA, and these statutes' implementing regulations, and, thus, are preempted under the Supremacy Clause; and (2) constitute an unlawful restraint on interstate commerce in violation of the Commerce Clause, *see* U.S. Const. art. I, § 8, cl. 3.

On April 29, 2015, plaintiffs moved for a temporary restraining order, relying exclusively on the preemption prong of their claim. They argued that the Local Laws violate (1) ANCA, *see* 49 U.S.C. § 47524, insofar as the Town failed to comply with that statute's procedural requirements for the adoption of local noise and access restrictions affecting Stage 2 and Stage 3 aircraft; (2) the AAIA, *see id.* § 47107, insofar as the Local Laws fail to comply with three of the Town's

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[7] On April 27, 2015, plaintiffs moved pursuant to Fed. R. Civ. P. 42 to consolidate this action with another one that some of them had filed against the FAA in January 2015, seeking a declaratory judgment that (1) the FAA is statutorily obligated to ensure Town compliance with grant assurances until September 25, 2021; and (2) the FAA's 2012 response to Rep. Bishop erroneously interpreted a settlement agreement to imply that the Town had no legal obligation to comply with certain grant assurances, or ANCA itself, after 2014. *See* Compl. at 25, *Friends of the E. Hampton Airport, Inc. v. FAA*, No. 2:15-CV-441 (JS) (E.D.N.Y. Jan. 29, 2015), ECF No. 1. The district court reserved judgment on the motion, which plaintiffs subsequently withdrew, and the action has been stayed pending this appeal.

2001 grant assurances; and (3) the ADA, *see id.* § 41713(b), because they are unreasonable.

The district court conducted a hearing on May 18, 2015, after which, with the parties' consent, it decided to treat the motion as a request for a preliminary injunction. The Town agreed to delay enforcement of the challenged laws until the court ruled on the motion.[8]

On June 26, 2015, the district court preliminarily enjoined the Town's enforcement of its One-Trip Limit law, but declined to enjoin enforcement of the Mandatory and Extended Curfew laws. In so ruling, the court observed, first, that neither the AAIA nor ANCA created a private right of action, and plaintiffs could not rely on the Supremacy Clause as an independent source of such an action.[9] Nevertheless, the district

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[8] The FAA also appeared at the hearing, seeking further time to consider whether to take a position on the merits of the case. At that time, FAA counsel maintained that the Town's characterization of the agency's response to Rep. Bishop as a "legal interpretation" was "disingenuous." J.A. 470. Counsel maintained that the FAA was only responding to a hypothetical and not waiving its right to enforce its own regulations. *See id.* at 470–71 (referencing contemporaneous email from FAA staff stating that news reports of its response to Rep. Bishop indicated that the response "is likely being misunderstood"). Insofar as the Town also cited a February 27, 2015 meeting with FAA representatives to support its arguments, FAA counsel stated that the agency had specifically advised the Town that it would be a "listening-only" meeting, at which the FAA would not give advice or render a legal opinion. *Id.* at 480.

We give these statements no weight because the FAA did not thereafter file any papers with or appear again in the district court, nor has it participated in any way in these cross appeals.

[9] Plaintiffs do not challenge these conclusions on appeal and, thus, we have no reason to address them.

court concluded that plaintiffs were entitled to invoke equity jurisdiction to enjoin the challenged laws to the extent the exercise of that jurisdiction was not explicitly or implicitly prohibited by Congress. The court located congressional intent to foreclose equitable enforcement of the AAIA in that statute's comprehensive administrative enforcement scheme. But "nothing in the text or structure" of ANCA supported a similar conclusion as to that statute. *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d at 105. Accordingly, the district court ruled that plaintiffs could invoke its inherent equity jurisdiction to bring a preemption claim based on ANCA, but not on the AAIA.

Second, the district court found that, absent a preliminary injunction, the Local Laws would cause plaintiffs to suffer irreparable harm.[10]

Third, the district court concluded that plaintiffs' preemption claim was likely to succeed on the merits with respect to the One-Trip Limit law, but not the Mandatory and Extended Curfew laws. In reaching that conclusion, the district court reasoned that ANCA did not necessarily preempt local laws enacted in violation of its procedures because the statute's enforcement provision mandated only the loss of eligibility for further federal funding and for imposition of certain charges.[11] Thus, an ANCA violation did

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[10] The Town does not challenge this finding on appeal and, thus, we have no reason to review it.

[11] On this point, the district court stated as follows:

> [U]nder Section 47526 of ANCA, entitled, "Limitations for noncomplying airport noise and access restrictions," the only consequences for failing to comply with ANCA's review program are that the "airport may not—(1) receive money under [the AAIA]; or (2) impose

not defeat the ADA's "proprietor exception" to preemption, and a municipal proprietor's restrictions on airport access remained permissible to the extent they were "reasonable, non-arbitrary and non-discriminatory." *Id.* at 109.[12] On the record presented, the district court determined that the Mandatory and Extended Curfew laws satisfied that standard, but that the One-Trip Limit law did not because it had a "drastic" effect on plaintiffs' businesses, and there was "no indication that a less restrictive measure would not also satisfactorily alleviate the Airport's noise problem." *Id.* at 111–12.

The parties timely filed these interlocutory cross appeals, which we have jurisdiction to review pursuant to 28 U.S.C. § 1292(a)(1).

II. Discussion

> a passenger facility charge under [49 U.S.C. § 40117]." 49 U.S.C. § 47524. This provision raises an obvious question. If Congress intended to preempt all airport proprietors from enacting noise regulations without first complying with ANCA, why would it also include an enforcement provision mandating the loss of eligibility for federal funding and the ability to impose passenger facility charges? The logical answer is that Congress intended to use grant and passenger facility charge restrictions to encourage, but not require, compliance with ANCA.

Id. at 108–09 (brackets in original).

[12] The district court offered "no opinion on whether the FAA has authority to enjoin the Local Laws on the basis that the Airport is still federally obligated and therefore would need to comply with ANCA's procedural requirements." *Id.* at 109 n.10 (citing 49 U.S.C. § 47533 (stating that ANCA does not affect Secretary of Transportation's authority to seek and obtain appropriate legal remedies, "including injunctive relief")).

A. Standard of Review

When, as here, a preliminary injunction "will affect government action taken in the public interest pursuant to a statute or regulatory scheme," the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction. *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (citations and internal quotation marks omitted). Although we review a district court's decision to grant or deny a preliminary injunction for abuse of discretion, *see Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011), we must assess *de novo* whether the court "proceeded on the basis of an erroneous view of the applicable law," *Chevron Corp. v. Naranjo*, 667 F.3d 232, 239 (2d Cir. 2012); *see Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006) (reviewing Federal Aviation Act preemption *de novo*); *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 134 (2d Cir. 2014) (reviewing jurisdiction *de novo*).

B. The Town's Challenge to Equity Jurisdiction

The Town contends that the district court erred in concluding that plaintiffs could invoke equity jurisdiction to enjoin the challenged laws as preempted by ANCA. On *de novo* review, we identify no error.

1. The Doctrine of *Ex parte Young* Supports Equity Jurisdiction in this Case

The Supreme Court has "long recognized" that where "individual[s] claim[] federal law immunizes [them] from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). The principle is most

often associated with *Ex parte Young*, 209 U.S. 123, 155–63 (1908), which held that the Eleventh Amendment does not bar federal courts from enjoining state officials from taking official action claimed to violate federal law. Since then, the Supreme Court has consistently recognized federal jurisdiction over declaratory-and injunctive-relief actions to prohibit the enforcement of state or municipal orders alleged to violate federal law. *See, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645–46 (2002) (authorizing suit by telecommunications carriers asserting federal preemption of state regulatory order); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (enjoining state statute barring certain foreign transactions in face of federal statute imposing conflicting sanctions); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. at 638–40 (upholding injunction barring municipal aircraft curfews as subject to federal preemption). Our own court has followed suit. *See, e.g.*, *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 221–22 (2d Cir. 2008) (granting airline trade organization declaratory and injunctive relief against preempted state regulatory statute); *United States v. State of New York*, 708 F.2d 92, 94 (2d Cir. 1983) (relying on "equitable power" recognized in *Ex parte Young* to uphold preliminary injunction against nighttime ban on airport use).

In such circumstances, a plaintiff does not ask equity to create a remedy not authorized by the underlying law. Rather, it generally invokes equity preemptively to assert a defense that would be available to it in a state or local enforcement action. *See, e.g.*, *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring) (invoking *Ex parte Young* involves "nothing more than the preemptive assertion in equity of a defense that would

otherwise have been available in the State's enforcement proceedings at law"); *Fleet Bank, Nat'l Ass'n v. Burke*, 160 F.3d 883, 888 (2d Cir. 1998) (noting that it is "beyond dispute that federal courts have jurisdiction over suits" that "seek[] *injunctive* relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail" (emphasis in original) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983))). A party is not required to pursue "arguably illegal activity . . . or expose itself to criminal liability before bringing suit to challenge" a statute alleged to violate federal law. *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 385 (2d Cir. 2015) (citations omitted).

Plaintiffs, who are here threatened with escalating fines and other sanctions under the Local Laws, thus seek to enjoin enforcement on the ground that the laws were enacted in violation of ANCA's procedural prerequisites for local limits on airport noise and access. Such a claim falls squarely within federal equity jurisdiction as recognized in *Ex parte Young* and its progeny.

2. ANCA Does Not Limit Equity Jurisdiction

A federal court's equity power to enjoin unlawful state or local action may, nevertheless, be limited by statute. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. at 1385; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–74 (1996). The Town does not—indeed, cannot—argue that ANCA expressly precludes actions in equity relying on its statutory requirements. Instead, the Town relies on *Armstrong* to urge us to recognize ANCA's implicit foreclosure of equitable relief. The argument is not persuasive.

In *Armstrong*, the Supreme Court construed a different statute—part of the the Medicaid Act—implicitly to preclude healthcare providers from invoking equity to enjoin state officials from reimbursing medical service providers at rates lower than the federal statute required. The Court located Congress's intent to foreclose such equitable relief in two aspects of the statute. First, federal statutory authority to withhold Medicaid funding was the "sole remedy" Congress provided for a state's failure to comply with Medicaid requirements. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. at 1385 (citing 42 U.S.C. § 1396c); *see id.* (recognizing that "'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001))). Second, even if the existence of a provision authorizing the Secretary of Health and Human Services to enforce the statute by withholding funds "might not, *by itself*, preclude the availability of equitable relief," it did so "when combined with the judicially unadministrable nature of [the statutory] text." *Id.* (emphasis in original); *see id.* ("It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" (citation omitted)). In sum, "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." *Id.*

ANCA cannot be analogized to the Medicaid statute in either of the two ways prompting jurisdictional concern in *Armstrong*. First, as to the identification of

an exclusive remedy, there is no textual basis to conclude that the loss of federal funding is the only consequence for violating ANCA. The Town highlights—as the district court did—49 U.S.C. § 47526, which states that an airport may not receive AIP grants or collect passenger facility charges "[u]nless the Secretary of Transportation is satisfied" that, insofar as the airport imposes any noise or access restrictions, those regulations comply with the statute. The Town's assertion that this is the sole available remedy for violating ANCA, however, is defeated by § 47533, which states that, "[e]xcept as provided by section 47524 of this title, this subchapter does not affect . . . 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(3). As already noted, § 47524 provides only limited exceptions to the Secretary's authority to bring suit: as against local Stage 2 aircraft restrictions if the airport proprietor complies with § 47524(b)'s notice-and-comment process;[13] and as against local Stage 3 and 4 aircraft restrictions "agreed to by the airport proprietor and all aircraft operators" or approved by the FAA, *id.* § 47524(c). Thus, § 47533 confirms that Congress did not intend § 47526 to be the only means of enforcing ANCA's procedural requirements. The FAA can employ any legal or equitable remedy necessary to prevent airports from enacting or enforcing restrictions on (1) Stage 2 aircraft *without* utilizing the § 47524(b) process, and on (2) Stage 3 and 4 aircraft *without* securing either the § 47524(c) consent of all

[13] *But see City of Naples Airport Auth. v. FAA*, 409 F.3d at 434–35 (holding that FAA retains power *under AAIA* to withhold AIP funding for airport that imposes unreasonable Stage 2 aircraft restrictions).

airport operators or the FAA's own approval. The fact that Congress conferred such broad enforcement authority on the FAA, and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements. *See Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d at 222 (pre-enforcement challenge to pre-empted state law presented no "barriers to justiciability") (citing *Ex parte Young*, 209 U.S. at 145–47).

Further support for the conclusion that Congress did not intend for funding ineligibility to be the sole means of enforcing the § 47524(b) and (c) requirements can be located in the twenty-year compliance assurance that airport proprietors must give in return for AIP grants. Such grants, unlike Medicaid funding, involve one-time transfers. Thus, if, as the Town argues, the sole remedy for a proprietor's failure to comply with the § 47524 requirements for local laws is the loss of eligibility for future funding, the proprietor could (1) give a twenty-year assurance of compliance to obtain an AIP grant on one day and, (2) on the next day, promulgate non-ANCA-compliant laws, relinquishing eligibility for future grants. We cannot conclude that, in those circumstances, Congress intended to foreclose legal or equitable actions to enforce either the statutorily mandated assurances or ANCA's procedural prerequisites for local legislation. *See generally Corley v. United States*, 556 U.S. 303, 314 (2009) (stating that courts must construe statute "so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted)). Indeed, § 47533 makes plain that Congress did not so intend.

Second, unlike the Medicaid claim at issue in *Armstrong*, plaintiffs' ANCA-based challenge to the Town's Local Laws would not require application of a judicially unadministrable standard. In urging otherwise, the Town relies on 49 U.S.C. § 47524(c), the statutory section detailing various factors that can inform an FAA decision to approve local noise restrictions on Stage 3 aircraft. The Town argues that ANCA compliance is, thus, so much a matter of agency discretion as to signal Congress's intent that the FAA alone—not private individuals—should enforce the statute's terms. The argument fails because § 47524(c) sets forth a simple rule: that airports seeking to impose noise restrictions on Stage 3 aircraft must obtain either the consent of all aircraft operators or FAA approval. It is "difficult to imagine" more straightforward requirements. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. at 1385. A federal court can evaluate the Town's compliance with these obligations without engaging in the sort of "judgment-laden" review that the Supreme Court in *Armstrong* concluded evinced Congress's intent not to permit private enforcement of § 30A of the Medicaid Act.[14] *Id.* Indeed, at oral argument before this court, the Town acknowledged that this case does not implicate "the same kind

[14] While Stage 2 aircraft operations—addressed in § 47524(b)—were phased out by December 31, 2015, the same conclusion obtains with respect to that subsection. Under § 47524(b), airports must, more than 180 days before a restriction becomes effective, publish the proposed restriction and make available for public comment an analysis of the restriction's costs and benefits, including alternative measures that were considered. As with § 47524(c), judicial administration of subsection (b) is simple: if no such notice has been published for the requisite period, the proposed Stage 2 restriction violates ANCA.

of judicial administrability problem" as *Armstrong*. *See* Oral Argument, June 20, 2016, at 1:26:39–45.

In sum, because (1) the denial of eligibility for federal funding is not the exclusive remedy for an airport proprietor's failure to comply with ANCA's procedural requirements, and (2) those requirements plainly are judicially administrable, we conclude that Congress did not intend implicitly to foreclose plaintiffs from invoking equitable jurisdiction to challenge the Town's enforcement of Local Laws enacted in alleged violation of ANCA. Accordingly, the Town's jurisdictional challenge is without merit.

C. Plaintiffs' ANCA-Based Preemption Claim

Plaintiffs fault the district court's conclusion that they are unlikely to succeed on the merits of their preemption challenge to the Local Laws. They argue that ANCA's procedural requirements for local restrictions on airport access apply to all public airport proprietors regardless of their federal funding status. Thus, plaintiffs maintain, the Town's disavowal of future federal funding cannot insulate the Local Laws from ANCA's procedural requirements. And enactment of the Local Laws without such procedures cannot be deemed reasonable so as to support a proprietor exception to federal preemption under the ADA. We agree and, therefore, conclude that plaintiffs are entitled to a preliminary injunction barring enforcement of all three Local Laws.

1. ANCA's Text and Context Establish Procedural Requirements for Local Noise and Access Restrictions Applicable to All Public Airport Proprietors

In considering *de novo* whether ANCA's § 47524 procedural requirements for local noise and access

restriction laws apply to all public airport proprietors, or only to those receiving federal funding as the Town contends, we begin with the statute's text because "we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (brackets and internal quotation marks omitted). In deciding "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356 (2012) (internal quotation marks omitted), we consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 111 (2d Cir. 2015) (internal quotation marks omitted). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent . . . the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal quotation marks omitted). That is the case with respect to the relevant provisions of § 47524, which employ comprehensive and unmistakably limiting language in affording airport proprietors some authority to regulate noise.

Subsection (b) states that a local "airport noise or access restriction may include a restriction on the operation of stage 2 aircraft . . . *only if* the airport operator publishes the proposed restriction and prepares and makes available for public comment at least 180 days before the effective date of the proposed restriction" the analysis outlined therein. 49 U.S.C. § 47524(b) (emphasis added). Similarly, subsection (c) states that "an airport noise or access restriction on the operation of stage 3 aircraft . . . may become effective *only if* the restriction has been agreed to by the airport proprietor and all aircraft operators or has

been submitted to and approved by the [FAA] after an airport or aircraft operator's request for approval." *Id.* § 47524(c)(1) (emphasis added). The phrase "only if" is unambiguously limiting, identifying procedures that airport proprietors must follow in order to impose any noise or access restrictions on air operations.[15] At the

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[15] This language reflects the statute as it was re-codified in 1994, when Congress published a reorganized version of Title 49 "without substantive change." Section 1(a), Pub. L. No. 103-272, 108 Stat. 745 (1994). As originally enacted, the statute provided that "[n]o airport noise or access restriction shall include a restriction on operations of Stage 2 aircraft, *unless* the airport operator" complied with the statute's notice-and-comment requirements. ANCA § 9304(c), Pub. L. No. 101-508, 104 Stat. 1388-381 (1990) (emphasis added). It further established that "[n]o airport noise or access restriction on the operation of a Stage 3 aircraft . . . shall be effective *unless* it has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and approved by the [FAA] pursuant to an airport or aircraft operator's request for approval." *Id.* § 9304(b), 104 Stat. 1388-380–81 (emphasis added). The Supreme Court has "often observed" that similar language is unambiguously mandatory. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (construing as mandatory language in 42 U.S.C. § 1997e(a) stating that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until* such administrative remedies as are available are exhausted" (emphasis added)).

Because Congress made clear that the 1994 recodification of § 47524 did not effect any "substantive change"—a representation consistent with the absence of any material difference between the two versions of the statute—the same mandatory conclusion obtains notwithstanding the stylistic revisions. *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014) (internal quotation marks omitted). In any event, we "will not . . . infer[] that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Finley v. United*

same time, no statutory language cabins these procedural requirements to proprietors receiving or maintaining eligibility for federal funds. Thus, the plain statutory text is fairly read to mandate the identified procedural requirements for local noise and access restrictions on Stage 2 and 3 aircraft at *any* public airport. *See City of Naples Airport Auth. v. FAA*, 409 F.3d at 433–34 (stating that airports "must comply" with § 47524(b) to impose Stage 2 aircraft restrictions, and that "subsection (c)'s requirement of FAA approval is not tied to grants; grants or not, no airport operator can impose a Stage 3 restriction unless the FAA gives its approval").

Statutory context further compels this construction. First, the only textual limitation on the aforementioned procedural requirements is that referenced in § 47524(d), a "grandfather" provision that generally exempts local noise restrictions existing prior to ANCA's effective date.

Second, § 47527 shifts liability for "noise damages" from local airport proprietors to the federal government when "a taking has occurred as a direct result of the [FAA's] disapproval" of a proposed restriction. 49 U.S.C. § 47527. Insofar as the proprietor exception to federal preemption rests on an airport operator's potential liability for—and, thus, right to mitigate—noise damage "by restricting the use of his airport," *Concorde I*, 558 F.2d at 83 (citing *Griggs v. Allegheny Cty.*, 369 U.S. at 84), the federal government's assumption of that liability not only undermines the rationale for the exception, but also offsets the extent to which ANCA constrains local authority. Moreover,

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States, 490 U.S. 545, 554 (1989). There is no such clear expression here.

no language limits this federal acceptance of liability to airports whose proprietors have received or are eligible for AIP grants. Thus, the general assumption of liability under § 47527 reinforces the conclusion that Congress intended for the requirements of § 47524(b) and (c) to apply generally to all proprietors wishing to impose noise or access restrictions on Stage 2, 3, or 4 aircraft at public airports.

Third, § 47533(3) places no limits—and certainly no funding eligibility condition—on the FAA's statutory authority to enforce the § 47524(b) and (c) procedural requirements.

The Town nevertheless urges us to construe § 47524 in light of § 47526 and to conclude from that funding ineligibility provision that Congress's intent was to "encourage, but not require, compliance" with the former's procedures. Town's Br. 34 (citing *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d at 109). We are not persuaded. As explained *supra* at Part III.B.2, § 47526 provides for loss of funding eligibility as *a* consequence of noncompliance with § 47524 procedures. Nothing in § 47526 signals that funding ineligibility is the *only* consequence of such a procedural violation.[16] The same

[16] We do not think that the title of § 47526 ("Limitations for noncomplying airport noise and access restrictions") can fairly be read in the definitive (*i.e.*, "[*The*] Limitations for . . .") to support the Town's urged conclusion. Precedent instructs that a statute's title "cannot limit the plain meaning of the text," *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998), and that rule applies with particular force here where the quoted title was not part of the statute as originally enacted in 1990. Rather, it was added as part of the non-substantive 1994 recodification. *Compare* ANCA § 9307, 104 Stat. 1388-382, *with* 49 U.S.C. § 47526. "Congress made it clear" that this recodification "did not effect any 'substantive change.'" *Northwest, Inc. v. Ginsberg*, 134

conclusion obtains with respect to the funding ineligibility effected by § 47524(e) with particular reference to § 47524(c) violations.

In sum, ANCA's text and context unambiguously indicate Congress's intent for the § 47524 procedural mandates to apply to all public airport proprietors regardless of their funding eligibility.

2. Congress's Intent for ANCA Procedures To Apply Comprehensively and Mandatorily Is Confirmed by Statutory Findings, Legislative History, and Implementing Regulations

Even if text and context did not speak unambiguously to the question, statutory findings, legislative history, and implementing regulations would confirm the conclusion that § 47524(b) and (c) apply comprehensively and mandatorily to all public airport proprietors.

Congress promulgated ANCA based on findings that "community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system" and, therefore, "noise policy *must* be carried out at the national level." 49 U.S.C. § 47521(2)–(3) (emphasis added). Such findings, which are "particularly useful" in determining congressional intent, *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990); *accord WLNY-TV, Inc. v. FCC*, 163 F.3d 137, 142 (2d Cir.

S. Ct. at 1429. Indeed, the statute's original title, "Limitation on Airport Improvement Program Revenue," is as susceptible to the indefinite as the definite article, *i.e.*, "[*A*] Limitation on . . . " and, thus, cannot be construed to manifest Congress's intent that federal funding ineligibility be the sole consequence of a § 47524(b) or (c) violation.

1998)—and which themselves speak in mandatory terms—undermine the Town's argument that Congress intended for the § 47524(b) and (c) procedures to apply only to noise and access restrictions at some public airports, *i.e.*, those whose proprietors wished to maintain federal funding eligibility. It was by mandating local restriction procedures for all public airport proprietors that Congress could prevent "uncoordinated and inconsistent restrictions" "at the national level," while still allowing "local interest in aviation noise management [to] be considered in determining the national interest." 49 U.S.C. § 47521(1)–(4). Congress's recognition that "revenues controlled by the [federal] government can help resolve noise problems and carry with them a responsibility to the national airport system," *id.* § 47521(6), does not undermine this conclusion. Congress can certainly regulate commerce both by providing monetary incentives for voluntary compliance by some actors, while at the same time allowing for enforcement actions more generally. Nor are we persuaded by the Town's contention that the reference to "noise problems" in the quoted excerpt from § 47521(6) refers to noise restrictions, as opposed to problems created by airport noise. In any event, the finding states only that such revenue control "can *help* resolve" those problems, which comports with a view of funding eligibility as a means—but not the only means—of executing ANCA's policy objectives. *Id.* (emphasis added).

That conclusion is consistent, moreover, with ANCA's legislative history. ANCA was adopted after Congress determined that voluntary financial and legal incentives established by the Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50 (recodified at 49 U.S.C. §§ 47501–47510), had proved insufficient to secure airport conformity to

federal aviation policy respecting noise. Notwithstanding these incentives, and the federal funding scheme established by the AAIA in 1982, Congress perceived that a "patchwork quilt" of local noise restrictions continued to stymie the airport development required for the nation's aviation. *See* 136 Cong. Rec. S13619 (Sept. 24, 1990) (statement of Sen. Ford).[17] Thus, it was to resolve a problem that persisted despite federal financial incentives that Congress enacted regulatory legislation permitting local noise and access restrictions at public airports "only if" the restrictions conformed to the procedural mandates of § 47524(b) and (c).

Indeed, many of the legislators who opposed ANCA's enactment objected to the statute's mandatory nature precisely because it meant that local noise restrictions not enacted under the specified procedures would be preempted by federal law. *See, e.g.*, 136 Cong. Rec. S15819 (Oct. 18, 1990) (statement of Sen. Durenberger) ("This [legislation] would have far reaching consequences for the millions of Americans living beneath the landing and takeoff flight paths of our Nation's

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[17] Senator Wendell H. Ford, the original sponsor of the legislation ultimately enacted as ANCA, explained as follows:

> No issue facing air transportation is more important than settling the noise debate. The greatest obstacle to expanding airports and increasing air carrier service is the opposition to aircraft noise and not the cost of building more runways and establishing more technologically advanced air traffic control. . . . Airports are now telling the airlines what kind of aircraft they can fly as a method of regulating noise. Some airports have enforced restrictions on the type of aircraft, the number of operations and the time of day for operations.

136 Cong. Rec. S13619 (Sept. 24, 1990).

airports. In many communities, the pending aviation noise legislation would effectively preempt existing local aviation noise controls."); *id.* at S15820 (statement of Sen. Sarbanes) ("[T]his legislation has far-reaching ramifications for cities and towns throughout the country. Many of these communities have already been through the long, and often painful process of developing comprehensive noise standards for their airports . . . balancing the economic development interests of those communities and the desire to provide a healthy environment free of noise pollution . . . ."). This belies the suggestion that in ANCA, Congress was, yet again, seeking only to give incentives for compliance by those seeking federal funding. Rather, it confirms mandated procedures applicable to all proprietors seeking to impose noise or access restrictions at public airports.

Finally, even if text, context, findings, and history did not speak so plainly, any ambiguity would be resolved by the FAA's interpretation of § 47524 to mandate procedural compliance regardless of funding status. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."). The FAA's Part 161 regulations state that "notice, review, and approval requirements set forth in this part apply to *all airports* imposing noise or access restrictions" affecting Stage 2 or Stage 3 airport operations. 14 C.F.R. §§ 161.3(c), 161.5 (emphasis added). They admit no exception for airports not maintaining federal funding eligibility. Rather, they employ comprehensive and mandatory language. *See id.* § 161.205(a) ("*Each* airport operator proposing a noise or access restriction on Stage 2 aircraft operations *shall* prepare

the [specified analysis] and make it available for public comment . . . ." (emphases added)), § 161.303(a) ("*Each* airport operator or aircraft operator . . . proposing a Stage 3 restriction *shall* provide public notice and an opportunity for public comment, as prescribed in this subpart, before submitting the restriction to the FAA for review and approval." (emphases added)). Further, the FAA regulations state, in no uncertain terms, that "the procedures to terminate eligibility for airport grant funds and authority to impose or collect passenger facility charges for an airport operator's failure to comply with [ANCA] . . . 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." *Id.* § 161.501(a) (emphasis added).

In sum, the statutory findings, legislative history, and implementing regulations accord with what we have identified as the plain meaning of ANCA's text. We therefore construe § 47524(b) and (c) to mandate procedures for the enactment of local noise and access restrictions by any public airport operator, regardless of federal funding status. Because these procedures are mandatory and comprehensive, we further conclude that local laws not enacted in compliance with them (which the Town concedes the Local Laws challenged in this case were not) are federally preempted. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1949–50 (2013) ("State law is pre-empted to the extent of any conflict with a federal statute." (internal quotation marks omitted)); *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 109–10 (2d Cir. 2016) (recognizing that such conflict occurs when, *inter alia*, "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks omitted)).

Accordingly, plaintiffs are likely to succeed on their preemption claim and are entitled to an injunction prohibiting the Town's enforcement of each of the three challenged Local Laws.

3. *National Helicopter* Warrants No Different Preemption Conclusion

National Helicopter Corp. of America v. City of New York, 137 F.3d 81 (2d Cir. 1998), relied on by the Town as well as the district court, does not warrant a different conclusion on preemption.

In that case, the parties cross appealed the partial grant and partial denial of an injunction barring New York City from restricting operations at Manhattan's East 34th Street Heliport. Plaintiff helicopter operator "National" argued that the "regulation of airports is a field preempted by federal law," *id.* at 84, while the City maintained that its restrictions represented a lawful exercise of its power as the Heliport's proprietor, *id.* at 88.[18]

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[18] Preliminary to ruling, the court provided a general outline of how the proprietor exception fits within the ADA's general preemption of local laws pertaining to airline operations:

> Congress preempted state and local regulations "related to a price, route or service of an air carrier" when it passed § 1305(a) of the Airline Deregulation Act, now recodified at 49 U.S.C. § 41713(b)(1) (1994). *Cf. id.* § 40101, *et seq.* (1994) (Federal Aviation Act); *id.* § 44715 (1994) (Noise Control Act); *id.* § 47521, *et seq*. (1994) (Airport Noise and Capacity Act) (acts implying preemption of noise regulation at airports).
>
> In enacting the aviation legislation, Congress stated that the preemptive effect of § 1305(a) did not extend to acts passed by state and local agencies in the course

The Town urges us to conclude from the fact that *National Helicopter* found certain of the challenged restrictions to fall within the proprietor exception despite the City's apparent failure to comply with ANCA procedures—that this court has necessarily, if not explicitly, decided that ANCA procedures do not

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> of "carrying out [their] proprietary powers and rights." *Id.*§ 41713(b)(3). Under this "cooperative scheme," Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population. *See Concorde I*, 558 F.2d at 83–84 (discussing the 1968 amendment to Federal Aviation Act and Noise Control Act legislative history in which Congress specifically reserved the rights of proprietors to establish regulations limiting the permissible level of noise at their airports); S. Rep. No. 96–52, at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 89, 101 (proclaiming that the Aviation Safety and Noise Abatement Act was not "intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise") . . . .
>
> Hence, federal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more "limited role for local airport proprietors in regulating noise levels at their airports." *City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991). Under this plan of divided authority, we have held that the proprietor exception allows municipalities to promulgate "reasonable, nonarbitrary and non-discriminatory" regulations of noise and other environmental concerns at the local level. *Concorde I*, 558 F.2d at 84 (regulations of noise levels); *see also Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 957 (S.D.N.Y. 1986) (permissible regulations of noise and other environmental concerns), *aff'd*, 817 F.2d 222 (2d Cir. 1987).

Id. at 88–89.

limit the scope of the ADA's proprietor exception to federal preemption, thereby foreclosing a contrary decision in this case. The argument is unpersuasive for several reasons.

First, "a *sub silentio* holding is not binding precedent." *Getty Petroleum Corp. v. Bartco Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) (internal quotation marks omitted); *see also United States v. Hardwick*, 523 F.3d 94, 101 n.5 (2d Cir. 2008) (explaining that government concession in prior appeal that certain evidence should not be considered in evaluating sufficiency did not bind later panel because first panel "did not independently analyze whether this was the proper course"); *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (*en banc*) (reasoning that court is not bound by earlier "statement of law . . . uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention").

Second, *National Helicopter* is distinguishable from this case in that the court there understood National "not [to] dispute the viability of the proprietor exception." *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d at 89. Rather, it understood National to argue that the exception did not apply because the City's challenged actions were taken under its police power rather than its proprietary authority. *See id.* In resolving *that* dispute favorably to the City, this court did not address whether and to what extent ANCA's procedural requirements cabined the reasonable exercise of a municipality's proprietary authority over airport noise, much less did it decide whether local restrictions imposed in the absence of ANCA procedures were federally preempted. Indeed, the court mentioned ANCA only in passing, at the end of

a string cite comparing the ADA with other "acts implying preemption of noise regulation at airports." *Id.* at 88.[19]

What the court did acknowledge, however, was that the role preserved for local airport proprietors in regulating noise levels is a "limited" one. *Id.* To the extent local restrictions must be "reasonable, nonarbitrary, and non- discriminatory," *id.* (internal quotation marks omitted), nothing in *National Helicopter* suggests that an airport proprietor can satisfy these criteria if he fails to comply with mandated procedures of federal law—such as ANCA—for the enactment of such restrictions. To the contrary, actions taken in violation of legal mandates are, by their nature, unreasonable and arbitrary. *See generally Austin v. U.S. Parole Comm'n*, 448 F.3d 197, 200 (2d Cir. 2006) (noting that committing "procedural error" effects result that is "unreasonable . . . and therefore . . . in violation of law"); *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) (observing that factual findings made without

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[19] We need not ourselves decide whether National's briefing might have been understood differently. *See generally* Plaintiff-Appellee-Cross-Appellant Br. 40, *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81 (2d Cir. 1998) (arguing for affirmance of injunction on alternative ground that ANCA "preempts restrictions on Stage 2 and Stage 3 aircraft that were imposed without following ANCA's required procedures and cost-benefit calculations"). We consider only whether the panel in *National Helicopter* in fact decided whether ANCA's procedural requirements inform the proprietor exception to ADA preemption. We conclude that *National Helicopter* did not decide that question.

In any event, consistent with our practice in such circumstances, we have circulated this opinion to all active members of this court prior to filing. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 & n.9 (2d Cir. 2009).

following regulations constitute error of law); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1368 (11th Cir. 2008) ("[A]n agency's failure to follow its own regulations and procedures is arbitrary and capricious.").

Accordingly, we conclude that *National Helicopter* does not support the conclusion that plaintiffs are unlikely to succeed on their preemption claim.

4. A Preemption Conclusion Does Not Transform Federal Aviation Law Contrary to Congress's Intent

The Town further argues that construing ANCA to preempt the challenged Local Laws would effectively "invalidat[e] the proprietor exception" to preemption expressly reserved by Congress in the ADA. Town's Reply Br. 28. Our ruling does no such thing.

In § 47524, Congress itself cabins airport operators' proprietary authority by mandating certain procedures for the enactment of local noise and access restrictions. By 1990, Congress had concluded that, at the same time that "local interest in aviation noise management shall be considered in determining the national interest," 49 U.S.C. § 47521(4), the exercise of proprietary authority could not be allowed to produce a patchwork of "uncoordinated and inconsistent" airport restrictions that impede the national transportation system, 136 Cong. Rec. S13619 (Sept. 24, 1990) (statement of Sen. Ford). Thus, ANCA's procedural requirements are properly understood to refine what can constitute a "reasonable" exercise of the proprietary authority reserved by the ADA. *See National Helicopter Corp. of Am. v. City of New York*, 137 F.3d at 88–89 (recognizing ADA to reserve "a complementary though more limited role for airport proprietors

in regulating noise levels at their airports" by promulgating "reasonable, nonarbitrary, and nondiscriminatory" regulations for "noise and other environmental concerns" (internal citations and quotation marks omitted)). Local laws not enacted in compliance with ANCA procedures cannot claim to be a reasonable exercise of such authority and, therefore, the federal preemption of such laws does not invalidate reserved proprietary authority contrary to Congress's intent.

Nor does such a preemption conclusion "dramatically enlarge the FAA's role in a manner that Congress never intended." Town's Reply Br. 31. Indeed, the Town has failed to demonstrate that events since ANCA's enactment have belied the FAA's prediction that the statute would not impose substantial burdens on small public airports. *See* Notice and Approval of Airport Noise and Access Restrictions, 56 Fed. Reg. 8644, 8661–62 (Feb. 28, 1992) (codified at 14 C.F.R. pt. 161). Insofar as the Town asserts that the reason only one proprietor has applied for FAA approval to impose noise restrictions on Stage 3 aircraft is because of the "agency's . . . vigorous opposition to *any* airport use restrictions," J.A. 240 (emphasis in original), the assertion is conclusory and hardly demonstrates that, if more applications were filed, the agency would arbitrarily withhold consent, or that courts would fail to correct any abuse. No more convincing is the Town's assertion that concerns of time and cost have resulted in only one airport successfully imposing restrictions on certain aircraft operations. *See id.* To the extent the process is inherently burdensome, that decision was, in the first instance, Congress's, and not a reason for courts to excuse a non-complying party from preemption. To the extent a party considers itself unduly

burdened by FAA implementation of ANCA's procedures, its remedy is an action to curb agency excess, not relief from preemption.

Thus, we reject the Town's contention that deeming local laws enacted in violation of ANCA's procedural mandates in § 47524(b) and (c) to be preempted would radically transform federal aviation law by invalidating the proprietor exception reserved in the ADA. Rather, we conclude that ANCA establishes what Congress thought were necessary procedures for a reasonable exercise of proprietary authority within the national aviation system.

The Local Laws at issue not having been enacted according to the procedures mandated in 49 U.S.C. § 47524(b) and (c), the Town cannot claim the protection of the proprietor exception from federal preemption. Because plaintiffs are thus likely to succeed on their preemption claim, they are entitled to a preliminary injunction barring enforcement of all three challenged Local Laws.[20] Accordingly, we affirm the challenged order to the extent it granted an injunction as to the One-Trip Limit Law, we vacate the order to the extent it denied an injunction as to the Mandatory and Extended Curfew Laws, and we remand the case for entry of a preliminary injunction as to all three laws and for further proceedings consistent with this opinion.

III. Conclusion

To summarize, we conclude as follows:

1. The district court properly exercised federal equity jurisdiction to hear plaintiffs' claim that

[20] In this appeal, the Town does not contest the other factors required for a preliminary injunction.

enforcement of the challenged Local Laws is barred by preemptive federal aviation law.

2. Federal law mandating procedures for the enactment of local laws restricting noise and access to public airports, *see* 49 U.S.C. § 47524(b) and (c), applies to public airports without regard to their eligibility for federal funding.

3. Because it is undisputed that the defendant Town enacted the Local Laws at issue without complying with § 47524 procedures, those Local Laws are federally preempted, and plaintiffs are entitled to a preliminary injunction barring their enforcement.

Therefore, the challenged district court order is AFFIRMED IN PART and VACATED IN PART, and the case is REMANDED to the district court for it to enter a preliminary injunction barring enforcement of all three laws and for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed 06/26/15]

15-CV-2246(JS)(ARL)

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.; and NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,
Plaintiffs,

against

THE TOWN OF EAST HAMPTON,
Defendant.

MEMORANDUM & ORDER

APPEARANCES

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SEYBERT, District Judge:

Plaintiffs, a group of airport users and aviation companies that frequently use the East Hampton Airport, bring this action against the Town of East Hampton, seeking declaratory and injunctive relief enjoining enforcement of Sections 75-38 and 75-39 of the Town of East Hampton Code, recently adopted town laws that impose access restrictions to the East Hampton Airport (the "Town Laws"). Plaintiffs argue that the Town Laws are invalid because: (1) they are preempted by federal statutes governing aviation and therefore violate the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2; and (2) they constitute an unlawful restraint on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3.

Presently before the Court are: (1) Plaintiffs' motion for a preliminary injunction enjoining enforcement of the Town Laws pending resolution of this action and a related action against the Federal Aviation Administration ("FAA"), *Friends of the East Hampton Airport*, *Inc*., *et al. v. F.A.A*., *et al*., No. 15-CV-0441 (E.D.N.Y.) (the "FAA Action"), (Docket Entry 19); and (2) Plaintiffs' letter motion to consolidate this action and the FAA Action for all purposes pursuant to Federal Rule of Civil Procedure 42, (Docket Entry 14). For the following reasons, Plaintiffs' motion for a preliminary injunction is GRANTED IN PART and DENIED IN PART, and the Court RESERVES JUDGMENT on Plaintiffs' motion to consolidate pending the filing of

the FAA's response to the Complaint in the FAA Action.

BACKGROUND[1]

I. The Parties

Plaintiffs represent a wide spectrum of airport users and aviation companies that frequently use the East Hampton Airport (the "Airport"). Plaintiff Friends of the East Hampton Airport, Inc. ("FOEHA") is a non-profit corporation that "represents the interests of those who seek to keep the Airport open to all types, kinds, and classes of aircraft activities and flying services." (Compl. ¶ 12.) Plaintiffs Analar Corporation ("Analar"), Associated Aircraft Group, Inc. ("AAG"), HeliFlite Shares LLC ("HeliFlite"), and Liberty Helicopters, Inc. ("Liberty") are air carriers that are federally authorized to provide helicopter charter services to clients throughout the East Coast. (Compl. ¶¶ 13-14, 17-18.) In addition to providing charter services, AAG and HeliFlite manage "fractional aircraft ownership program[s]," which involve selling partial ownership or leasehold interests of a helicopter to private individuals who wish to operate their own helicopter using AAG and HeliFlite as managers. (Compl. ¶¶ 14, 17.) Plaintiff Eleventh Street Aviation LLC ("Eleventh Street") is an air carrier that is federally authorized to operate aircraft for private use. (Compl. ¶ 15.) Plaintiff Helicopter Association International, Inc. ("HAI") is a Delaware "trade association that represents and serves the interests of helicopter operators around the world." (Compl. ¶ 16.) According to the Complaint,

[1] The following facts are drawn from the Complaint in this action and the parties' affidavits and evidence submitted in connection with Plaintiffs' motion for a preliminary injunction. Any factual disputes will be noted.

HAI's "members include one or more providers of helicopter services" at the Airport. (Compl. ¶ 16.) Plaintiff Sound Aircraft Services, Inc. ("Sound") is a fixed-base operator at the Airport. (Compl. ¶ 19.) Sound leases property at the Airport from the Town of East Hampton and provides fuel and other on-site services to aircraft and passengers that use the Airport. (Compl. ¶ 19.)

Defendant the Town of East Hampton (the "Town") is the easternmost town on Long Island, New York, situated approximately 100 miles east of New York City. It is a popular seaside resort community during the summer. The Town owns and operates the Airport, a public-use airport located in the Town.

II. The Town Laws

For years, Town residents have opposed development of the Airport and have complained about aircraft noise. (*See* Cantwell Decl., Docket Entry 38-1, ¶¶ 8-10.) In recent years, the complaints have escalated due to a marked increase in helicopter operations at the Airport, many of which are private charter flights taken by individuals traveling from New York City to the East End of Long Island.[2] (*See* Cantwell Decl. ¶ 11; MacNiven Decl., Docket Entry 38-4; Saltoun Decl., Docket Entry 38-5.) To alleviate this perceived noise problem, on April 16, 2015, the Town adopted Sections 75-38 and 75-39 of the Town of East Hampton Code, local laws imposing three access restrictions to

[2] According to the Town, helicopter traffic increased by fifty percent last year. (*See* Cantwell Decl. ¶ 11.) On the busiest day last year, July 25, 2014, there were 353 operations at the Airport. (*See* Cantwell Decl. ¶ 11.) Forty-four operations occurred between 2:00 p.m. and 3:00 p.m. that day. (*See* Cantwell Decl. ¶ 11.) The first operation occurred at 3:04 a.m.; the last operation occurred at 11:08 p.m. (*See* Cantwell Decl. ¶ 11.)

the Airport. *See* Town of E. Hampton Res. 2015-411, 2015-412, 2015-413, *to be codified at* TOWN OF E. HAMPTON CODE §§ 75-38, 75-39.[3] The access restrictions are as follows: (1) a mandatory curfew prohibiting all aircraft from using the Airport between 11:00 p.m. and 7:00 a.m. (the "Mandatory Curfew"); (2) an extended curfew prohibiting "Noisy Aircraft" from using the Airport from 8:00 p.m. to 9:00 a.m. (the "Extended Curfew"); and (3) a weekly limit prohibiting "Noisy Aircraft" from using the Airport[4] more than two times per week during the "Season"—*i.e.*, the months of May, June, July, August, and September[5] (the "One-Trip Limit"). *See* TOWN OF E. HAMPTON CODE § 75-38(B)-(C). "Noisy Aircraft" is defined as "any airplane or rotorcraft for which there is a published Effective Perceived Noise in Decibels (EPNdb) approach (AP) level of 91.0 or greater." TOWN OF E. HAMPTON CODE § 75-38(A)(4)(a).

Violations of the Town Laws are deemed criminal offenses punishable by a sliding scale of monetary fines for the first three violations—$1,000; $4,000; and $10,000, respectively—and prohibition from the Airport for a period of up to two years for a fourth violation. *See* TOWN OF E. HAMPTON CODE § 75-39(B). Under the Town Laws, the Town may also seek court

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[3] The full text of the Resolutions adopting the Town Laws may be found at http://easthamptontown.iqm2.com/citizens/Default.aspx.

[4] The Town Laws define "Use of the Airport" in relevant part as "either one arrival (landing) at, or one departure (takeoff) from, the Airport." TOWN OF E. HAMPTON CODE § 75-38(A)(6).

[5] The original version of the Town Laws did not include a definition for the term "Season." However, the Town Board later adopted a definition at a Town Board meeting on May 7, 2015. *See* Town of E. Hampton Res. 2015-569.

injunctions, restraining orders, and monetary fines against any person or entity with an ownership interest in a violating aircraft. *See* TOWN OF E. HAMPTON CODE § 75-39(E).

Plaintiffs seek a preliminary injunction enjoining enforcement of the Town Laws on the ground that they violate, and are therefore preempted by: (1) the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. § 47101, *et seq*., which governs the process through which airport proprietors can obtain federal funding for the planning and development of public-use airports; and (2) the Airport Noise and Capacity Act of 1990 ("ANCA"), 49 U.S.C. § 47521, *et seq*., which governs the manner in which individual airports may adopt noise and access restrictions on certain types of aircraft. Some of the Plaintiffs claim that they will be irreparably harmed by the Town Laws because compliance will cause incalculable damages and severe economic losses that "threaten[s] [their] continued existence." (Pls.' Br., Docket Entry 32, at 8.) The Town responds, *inter alia*, that neither federal statute preempts the Town Laws and that the adoption and enforcement of the Town Laws constitutes a valid exercise of its proprietary rights in the Airport.

III. Relevant Airport History

The last twenty-four years of the Airport's history are marked by several key events, disputes, and agreements. From 1983 to 2001, the Town received several federal grants for airport development under the Airport Improvement Program ("AIP"). (Compl. ¶ 60.) The AIP, which was authorized by Congress when it enacted the AAIA, is the nation's current federal grant program for airport development. Under the AIP, the Secretary of Transportation, through the Federal Aviation Administration ("FAA"), provides monetary

grants to public agencies and airport proprietors for the planning and development of public-use airports.

Under the AAIA, the Secretary may approve a grant application only if the airport proprietor agrees to certain written assurances regarding airport operations, which are set forth in Section 47107(a) of the AAIA. *See* 49 U.S.C. § 47107(a). The Secretary is responsible for ensuring compliance with these assurances, *see* 49 U.S.C. § 47107(g), and is authorized to approve grant applications only if the airport proprietor's assurances are "satisfactory to the Secretary," 49 U.S.C. § 47107(a). Accordingly, the Secretary, through the FAA, has promulgated a more thorough set of standardized grant assurances with which a recipient of AIP funding must comply (the "Grant Assurances"). (*See* Compl. Ex. A.)

"Upon acceptance of an AIP grant, the grant assurances become a binding contractual obligation between the airport sponsor and the Federal government." *Pac. Coast Flyers*, *Inc. v. Cnty. of San Diego*, FAA Docket No. 16-04-08, 2005 WL 1900515, at *11 (July 25, 2005). Under the terms of the Grant Assurances, each Grant Assurance remains in full effect for twenty years from the date the airport proprietor accepts federal funds, with the exception of Grant Assurances 23 and 25, which remain in effect as long as the airport operates as an airport. (Compl. Ex. A at 36[6].)

The Town last accepted an AIP grant in 2001 in the amount of $1,410,000 for rehabilitation of the Airport's terminal apron. (Compl. ¶ 61.) Shortly thereafter, the Committee to Stop Airport Expansion (the "Committee"), an unincorporated association of residents living

[6] Page numbers of the exhibits to the Complaint in this action referenced herein refer to the page numbers generated by the Electronic Case Filing system.

near the Airport, commenced several legal proceedings in an attempt to halt development of the Airport. In 2003, the Committee sued the FAA and the Department of Transportation in this District, challenging the legality of AIP grants to the Town dating back to 1994 (the "Committee Action"). *See Comm. to Stop Airport Expansion, et al. v. Dep't of Transp., et al.*, No. 03-CV-2634. In short, the Committee alleged that the Airport's prior AIP grants were improper because the FAA approved them in the absence of a current airport layout plan, which the AAIA requires before the FAA may award an AIP grant. (*See* Comm. Action Compl. ¶¶ 89-96 (citing 49 U.S.C. § 47107(a)(16) ("The Secretary of Transportation may approve a project grant application under [the AAIA] only if the Secretary receives written assurances, satisfactory to the Secretary, that . . . the airport owner or operator will maintain a current layout plan of the airport . . . .").) According to the Committee, the Airport's 2001 layout plan, which the FAA approved, was not current because several projects undertaken at the Airport since 1989 were not reflected in the 2001 layout plan. (*See* Comm. Action Compl. ¶¶ 93-94.) The Committee Action sought to vacate the 2001 layout plan and to enjoin the award of any additional AIP grants so long as the Town lacked a current and valid airport layout plan. (*See* Comm. Action Compl. ¶¶ 52, 57-88.)

In 2005, the Committee and the United States Government executed a settlement agreement resolving the Committee Action, as well as other actions the Committee commenced in other forums (the "2005 Settlement Agreement"). (Pilsk Decl., Docket Entry 38-6, Ex. 3.) Under Paragraph 7 of the 2005 Settlement Agreement, the FAA agreed that, with respect to the Airport, Grant Assurance 22(a) (and three other grant assurances not relevant to this case) "[would]

not be enforced [by the FAA] beyond December 31, 2014." (Pilsk Decl. Ex. 3 ¶ 7.) Grant Assurance 22(a), entitled "Economic Nondiscrimination," states: "[The airport sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport." (Compl. Ex. A at 45.)

The 2005 Settlement Agreement further provided that, aside from the four referenced Grant Assurances, "[a]ll other grant assurances with respect to any grant awarded to East Hampton Airport . . . shall be enforced in full." (Pilsk Decl. Ex. 3 ¶ 7.) Finally, the 2005 Settlement Agreement provided that if the Town was awarded any additional AIP grants after the effective date of the 2005 Settlement Agreement (April 29, 2005), then all Grant Assurances "shall be enforced in full" in connection with that new funding. (Pilsk Decl. Ex. 3 ¶ 7.)

The Town was not a party to the 2005 Settlement Agreement. Additionally, although this Court so-ordered the parties' stipulation dismissing the Committee Action, the Court did not so-order the 2005 Settlement Agreement, nor did the stipulation of dismissal incorporate by reference the terms of the 2005 Settlement Agreement. (*See* Comm. Action, Docket Entry 38.)

In December 2011, then-U.S. Representative Timothy Bishop ("Bishop") submitted a list of questions to the FAA probing the legal effect of the Town's Grant Assurances on its ability to enact noise and access regulations at the Airport. (Pilsk Decl. Ex. 2.) The FAA responded in an unsigned writing in 2012 (the "Bishop Responses"). (Pilsk Decl. Ex. 1.) The Bishop Responses stated that due to the 2005 Settlement Agreement, the

FAA would not, as of December 31, 2014, "initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators . . . or seek specific performance of Grant Assurances 22a, 22h, and 29," unless and until the FAA awarded a new AIP grant to the Town. (Pilsk Decl. Ex. 1 at 1.)

In addition, although the 2005 Settlement Agreement made no mention of ANCA, the Bishop Responses stated that "[t]he FAA's agreement not to enforce also mean[t] that unless the town wishe[d] to remain eligible to receive future grants of Federal funding, it [was] not required to comply with [ANCA] . . . in proposing new airport noise and access restrictions." (Pilsk Decl. Ex. 1 at 1.)

Congress passed ANCA in 1990, directing the Secretary to "establish[ ] by regulation a national aviation noise policy" that (1) "considers . . . the phaseout and nonaddition of stage 2 aircraft," 49 U.S.C. § 47523(a), and (2) "establish[es] by regulation a national program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft," 49 U.S.C. § 47524(a).[7] Under Section 47524(b) of ANCA, an "airport noise or access restriction" may not "include restriction on the operation of stage 2 aircraft" unless and until the airport operator publishes the proposed restriction and other information for public comment at least 180 days before the effective date of the proposed restriction. 49 U.S.C. § 47524(b). Under Section 47524(c), a restriction affecting a Stage 3 aircraft is effective only if it "has been agreed to by the airport

[7] The FAA has classified aircraft into "Stages," according to how much noise they produce, from "Stage 1" being the noisiest to "Stage 4" being the quietest. See 14 C.F.R. § 36.1(f).

proprietor and all aircraft operators" or has been "approved by the Secretary." 49 U.S.C. § 47524(c). Under ANCA, the only consequences for failing to comply with Section 47524 are that the airport "may not (1) receive money [under the AAIA]; or (2) impose a passenger facility charge under [49 U.S.C. § 40117]." 49 U.S.C. § 47526.

On January 29, 2015, Plaintiffs FOEHA, Analar, HAI, HeliFlite, and Liberty filed the FAA Action, principally alleging that the FAA exceeded its statutory authority and violated its statutory obligations when it agreed in the 2005 Settlement Agreement not to enforce Grant Assurance 22(a). *See Friends of the E. Hampton Airport*, *Inc*., *et al. v. F.A.A.*, *et al*., No. 15-CV-0441 (E.D.N.Y.). The FAA Action seeks declaratory and injunctive relief that: (1) the FAA is statutorily obligated to ensure that the Town complies with Grant Assurance 22(a) until September 2021, *i.e*., twenty years from the date the Town last accepted an AIP grant; (2) neither the 2005 Settlement Agreement nor the FAA's interpretation of the 2005 Settlement Agreement in the Bishop Responses can restrain the FAA from carrying out its statutorily imposed duties under the AAIA to enforce the Grant Assurances; and (3) the Bishop Responses' one-sentence statement about ANCA, *i.e.*, that the Town purportedly need not comply with ANCA, is contrary to law. (FAA Action Compl. ¶¶ 82–114, Prayer for Relief.)[8]

By the time the FAA Action was filed, the Town already began its efforts to enact noise regulations at the Airport. According to the Town, prior to receiving

[8] The Committee has filed a motion to intervene in the FAA Action, which was fully briefed on June 12, 2015. This motion will be the subject of a future, separate order.

the Bishop Responses, it felt constrained by its understanding that Grant Assurance 22(a) limited its ability to enact noise and access restrictions until 2021. (*See* Def.'s Opp. Br., Docket Entry 38, at 4; Zornberg Decl., Docket Entry 36, Ex. A.) However, after receiving the FAA's statement in the Bishop Responses that it would not enforce Grant Assurance 22(a) beyond 2014, the Town began exploring ways to alleviate the perceived noise problem at the Airport. Over the course of 2014 and early 2015, the Town reviewed old flight data, collected new data, commissioned new noise studies, and hired consultants to assist the Town. (*See* Cantwell Decl., Ex. 1.)

On February 27, 2015, Town representatives met with senior FAA officials to discuss proposed access restrictions. (Cantwell Decl. ¶ 21.) They briefed the FAA on the range of noise controls the Town was considering and expressed that the Town was relying on the statements in the Bishop Responses that the FAA would not enforce Grant Assurance 22(a) beyond 2014 and that the Town need not comply with ANCA. (Cantwell Decl. ¶ 22.) On April 16, 2015, following a public hearing, but apparently without the approval of the FAA, the Town adopted the Town Laws.

IV. Plaintiffs' Claims and Procedural History

Plaintiffs then commenced this action on April 21, 2015. As noted, Plaintiffs claim that the Town Laws are preempted by ANCA and the AAIA and constitute an unlawful restraint on interstate commerce in violation of the Commerce Clause. On April 27, 2015, Plaintiffs filed a letter motion to consolidate this action with the FAA Action for all purposes pursuant to Federal Rule of Civil Procedure 42. (Docket Entry 14.)

On April 29, 2015, Plaintiffs filed a motion for a temporary restraining order enjoining enforcement of the Town Laws pending resolution of this action and the FAA Action. (Docket Entry 19.) On May 18, 2015, the Court held a hearing on Plaintiffs' motion for a temporary restraining order, during which the Court and the parties agreed that the Court should construe Plaintiffs' motion as one for a preliminary injunction. (*See* Docket Entry 51.) The Town agreed to delay enforcement of the Town Laws until today, June 26, 2015, so that the Court would have sufficient time to consider the matter.

Plaintiffs' motion for a preliminary injunction relies solely on their preemption claims. They specifically contend that the Town Laws are preempted by ANCA because the Town did not comply with ANCA's procedural requirements for adopting noise and access restrictions affecting Stage 2 and Stage 3 aircrafts. (*See* Compl. ¶¶ 72-74.) With respect to the AAIA, Plaintiffs contend that the Town Laws are preempted by Section 47107 of the AAIA because the laws violate three of the Town's Grant Assurances: (1) Grant Assurances 19(a), entitled "Operation and Maintenance," which states that the airport "shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation," (Compl. Ex. A. at 44-45); (2) Grant Assurance 22(a), which, as noted above, requires the airport sponsor to "make the airport available as an airport for public use on reasonable terms," (Compl. Ex. A. at 45); and (3) Grant Assurance 23, entitled "Exclusive Rights," which prohibits the airport sponsor from permitting any "exclusive right for the use of the airport by any person," (Compl. Ex. A at 47.)

DISCUSSION

The Court will first address Plaintiffs' motion for a preliminary injunction before turning to their motion to consolidate.

I. Plaintiffs' Motion for a Preliminary Injunction

A. Legal Standard

Generally, "[t]o obtain a preliminary injunction, the moving party must demonstrate '(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (quoting *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010)). However, where, as in this case, "'the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" *Metro. Taxicab Bd.*, 615 F.3d at 156 (quoting *Cnty. of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008)).

Additionally, in this Circuit, a more exacting standard—one which requires the movant to demonstrate a "clear" or "substantial" likelihood of success on the merits—applies in two situations. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010) (collecting cases). *First*, "[a] heightened 'substantial likelihood' standard" applies where the requested injunction: "(1) would provide the plaintiff with 'all the relief that

is sought' and (2) could not be undone by a judgment favorable to defendants on the merits at trial." *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 90 (2d Cir. 2006) (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34-35 (2d Cir. 1995)). *Second*, a "mandatory" injunction, that is, one that "alter[s] the status quo by commanding some positive act," as opposed to a "prohibitory" injunction, which "seeks only to maintain the status quo pending a trial on the merits," "should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" *Tom Doherty Assocs.*, 435 F.3d at 34 (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

Citing *Sussman v. Crawford*, 488 F.3d 136 (2d Cir. 2007), the Town urges the Court to apply the heightened likelihood of success standard here. (Def.'s Opp. Br. at 6.) In *Sussman*, the plaintiffs sought to *compel* the United States Military Academy at West Point to allow a demonstration during a graduation ceremony. 488 F.3d at 137. In this case, however, the requested injunction would *prohibit*, rather than compel government action, because the injunction would only enjoin enforcement of the Town Laws. *See Mastrovincenzo*, 435 F.3d at 90 ("On its face, the injunction clearly prohibits, rather than compels, government action by enjoining the future enforcement of § 20-453 against plaintiffs."); *Davis v. Shah*, No. 12-CV-6134, 2012 WL 1574944, at *5 (W.D.N.Y. May 3, 2012) ("[T]he Court views the injunction being sought as prohibitory, rather than mandatory, since it merely seeks to restore and maintain the relationship that existed between the parties prior to the enactment of the challenged statute.").

Additionally, in contrast to *Sussman*, where an injunction would have permitted the plaintiffs to hold a large protest, thus rendering the dispute moot after entry of an injunction, the requested injunction here would not create a "particularly drastic or irreversible change in the status quo." *Mastrovincenzo*, 435 F.3d at 90. Instead, an injunction would simply restore and maintain the situation that existed prior to adoption of the Town Laws. The ultimate question of whether the Town may impose access restrictions to the Airport could still be resolved on the merits in the Town's favor. *See id.* (holding that an injunction did not "effect[ ] a particularly drastic or irreversible change in the status quo" because "the ultimate question of whether New York City [could] impose . . . licensing requirements on vendors of clothing painted with graffiti remain[ed] ripe for resolution on the merits, and the injunction did not irreversibly affect the rights of the parties"). Accordingly, since the requested injunction is prohibitory and would merely preserve the status quo, Plaintiffs are not required to meet the more exacting likelihood of success standard.

B. Private Enforcement of the AAIA and ANCA

Before addressing the requirements for a preliminary injunction, the Court first considers whether Plaintiffs may proceed against the Town based on the Town's alleged violations of ANCA and the AAIA. As noted, Section 47524 of ANCA imposes certain procedural requirements before an airport proprietor can adopt an "airport noise or access restriction" affecting Stage 2 and Stage 3 aircrafts. 49 U.S.C. § 47524(b), (c). Under Section 47107(a) of the AAIA, the Secretary of Transportation, through the FAA, is authorized to award airport improvement grants, but only if the airport proprietor provides the Secretary with Grant

Assurances regarding airport operations. 49 U.S.C. § 47107(a). There is no dispute that the Town did not comply with ANCA's procedural requirements before adopting the Town Laws even though they affect operations of Stage 2 and Stage 3 aircrafts, and Plaintiffs argue that the Town Laws violate Grant Assurances 19(a), 22(a), and 23. The Supremacy Clause of the United States Constitution provides that federal statutes preempt contrary state and local laws. *See Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 137 F.3d 81, 88 (2d Cir. 1998) ("*National Helicopter II*") ("The Supremacy Clause of the United States Constitution invalidates state and local laws that 'interfere with or are contrary to, the laws of congress.'" (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S. Ct. 1124, 1130, 67 L. Ed. 2d 258 (1981)). Accordingly, Plaintiffs seek to enforce the Supremacy Clause by striking down the Town Laws and giving effect to ANCA's procedural requirements and the Town's Grant Assurances under the AAIA.

The Town urges the Court to deny Plaintiffs' request for an injunction on the ground that neither ANCA nor the AAIA creates a private right of action. (Def.'s Br., Docket Entry 38 at 11-12.) That ANCA and the AAIA do not create private rights of action is beyond dispute. Courts have uniformly held that private parties have no right to sue in federal court to enforce the provisions of ANCA or the AAIA. *See*, *e.g.*, *McCasland v. City of Castroville*, 514 F. App'x 446, 448 (5th Cir. 2013) ("As several circuit courts have held, and as Plaintiffs appear to concede, 49 U.S.C. § 47107 and its predecessor statute do not create a private right of action for parties aggrieved by alleged discrimination."); *W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225 & n.4 (2d Cir. 1987) (holding that 49 U.S.C. § 2210(a), the previous codification of Section

47107(a), did not create an private right of action); *Northwest Airlines*, *Inc. v. Kent, Mich.*, 955 F.2d 1054, 1058-59 (6th Cir. 1992) (same); *L-3 Commc'ns Integrated Sys.*, *L.P. v. City of Greenville*, No. 11-CV-2294, 2012 WL 3941766, at *2 (N.D. Tex. Sept. 5, 2012) ("The AAIA regulations do not provide for a private right of action and therefore cannot serve as an independent basis for jurisdiction."); *Horta*, *LLC v. City of San Jose*, No. 02-CV-4086, 2008 WL 4067441, at *4 (N.D. Cal. Aug. 28, 2008) (suggesting that "Congress did not intend to create a private right of action for ANCA violations" because "ANCA contains its own enforcement mechanism, to be administered by the Secretary of Transportation"); *Airborne Tactical Advantage Co.*, *LLC v. Peninsula Airport Comm'n*, No. 05-CV-0166, 2006 WL 753016, at *1 (E.D. Va. Mar. 21, 2006) ("Courts interpreting § 47107 have uniformly held that airport users have no right to bring an action in federal court claiming a recipient airport's violation of the § 47107 grant assurances . . . ."); *Tutor v. City of Hailey*, No. 02-CV-0475, 2004 WL 344437, at *8 (D. Idaho Jan. 20, 2004) ("[N]o implied private right of action exists under ANCA."); *E. Hampton Airport Prop. Owners Ass'n*, *Inc. v. Town Bd. of Town of E. Hampton*, 72 F. Supp. 2d 139, 147 (E.D.N.Y. 1999) ("Section 47107 [of the AAIA] does not give rise to a private right of action."). Plaintiffs do not dispute this long line of precedent. Thus, ANCA requires certain procedural hurdles prior to the enactment of noise and access restrictions on Stage 2 and Stage 3 aircrafts, and the AAIA requires the recipient of airport improvement funds to comply with the AAIA's Grant Assurances, but neither statute permits Plaintiffs to sue to enforce compliance in federal court.

Plaintiffs therefore seek to sue directly under the Supremacy Clause. However, the Supremacy Clause

also does not supply a private right of action. As the Supreme Court recently clarified in *Armstrong v. Exceptional Child Center*, *Inc*., 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015), the Supremacy Clause merely "creates a rule of decision . . . . It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." Thus, the Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Id.* (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107, 110 S. Ct. 444, 449, 107 L. Ed. 2d 420 (1989)).

Nevertheless, this is not to say that federal courts lack equitable jurisdiction to enjoin the implementation of preempted state legislation: "[F]ederal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id*. at 1384; *see also id.* ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity . . . ."); *Shaw v. Delta Air Lines*, *Inc*., 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 2899 n.14, 77 L. Ed. 2d 490 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."). Accordingly, Plaintiffs may be able to invoke this Court's equity jurisdiction to enjoin the allegedly preempted Town Laws regardless of whether ANCA, the AAIA, or the Supremacy Clause creates a private right of action. *See Armstrong,* 135 S. Ct. at 1391 (Sotomayor, J., dissenting) ("[The Court has] thus long entertained suits in which a party seeks

prospective equitable protection from an injurious and preempted state law without regard to whether the federal statute at issue itself provided a right to bring an action." (collecting cases)).

But, as *Armstrong* counsels, even "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." 135 S. Ct. at 1385 (holding that private Medicaid providers could not sue to enforce Section 30(A) of the Medicaid Act because Congress "implicitly preclude[d] private enforcement of § 30(A)"); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74, 116 S. Ct. 1114, 1132, 134 L. Ed. 2d 252 (1996) ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.").

Here, in this Court's view, Congress intended to foreclose equitable enforcement of the AAIA's Grant Assurances. A fair reading of the AAIA indicates that Congress intended to place authority for the enforcement of the AAIA's Grant Assurances exclusively in the hands of the Secretary of Transportation through a comprehensive administrative enforcement scheme. For starters, Section 47107(a) authorizes the Secretary to approve a grant application "if the Secretary receives written assurances, *satisfactory* to the Secretary." 49 U.S.C. § 47107(a) (emphasis added). If the FAA awards a grant, the Grant Assurances then "become a binding contractual obligation between the airport sponsor and the Federal government." *Pac. Coast Flyers, Inc.*, 2005 WL 1900515, at *11. The Secretary is then responsible for ensuring compliance with the Grant Assurances. *See* 49 U.S.C. § 47107(g). And to ensure compliance, Congress mandated that

the Secretary "prescribe requirements for sponsors that *the Secretary considers necessary*." 49 U.S.C. § 47107(g) (emphasis added). Additionally, Section 47122 states that the Secretary "may take action the Secretary considers necessary to carry out [the AAIA], including conducting investigations and public hearings, prescribing regulations and procedures, and issuing orders." 49 U.S.C. § 47122(a). Based on all of these elements of the AAIA, which place the responsibility of Grant Assurance compliance squarely with the Secretary, the Court finds that Congress at least implicitly precluded federal courts from exercising equity jurisdiction to enforce the AAIA's Grant Assurances.

The Court's holding today does not leave an airport user without adequate recourse, however. The FAA's enforcement regulations permit a party "directly and substantially affected" by an airport sponsor's alleged noncompliance with a Grant Assurance to file a formal complaint with the FAA. 14 C.F.R. § 16.23(a). If the pleadings demonstrate a "reasonable basis for further investigation," the FAA investigates the allegations, after which the Director of the Office of Airport Safety and Standards issues an "initial determination." 14 C.F.R. §§ 16.29(a), 16.31(a). If the Director dismisses the complaint, the interested party can file an administrative appeal to the Associate Administrator for Airports, who examines the existing record and issues a final decision without a hearing. 14 C.F.R. §§ 16.31(c), 16.33(a)(1). This final decision is then appealable, but only to a federal court of appeals. 49 U.S.C. § 46110(a); 14 C.F.R. § 16.247(a).

The FAA's administrative grant enforcement procedure is not insignificant. Indeed, "[c]ourts interpreting § 47107 have uniformly held that airport users have no right to bring an action in federal court claiming

a recipient airport's violation of the § 47107 grant assurances until that claim has been raised with the FAA." *Airborne*, 2006 WL 753016, at *1 (collecting cases); *see also Nw. Airlines, Inc. v. Cnty. of Kent, Mich.*, 955 F.2d 1054, 1059 (6th Cir. 1992) (holding that "all claims against the defendants under the AAIA were properly dismissed for failure to exhaust administrative remedies").

However, the Court recognizes that this case is complicated by the fact that the FAA agreed in the 2005 Settlement Agreement not to enforce Grant Assurance 22(a). (Pilsk Decl. Ex. 3 at 5.) On its face, this agreement appears to violate the Secretary's statutorily mandated duty to ensure compliance with the AAIA. The FAA's own decisions and determinations support this conclusion. *See Platinum Aviation & Platinum Jet Ctr. BMI v. Bloomington-Normal Airport Auth.*, FAA Docket No. 16-06-09, 2007 WL 4854321, at *15 (Nov. 28, 2007) ("[The] FAA can neither bargain away the rights of access to public-use taxiways and movement areas nor waive the grant assurances of the Respondent. [The] FAA is required to enforce the federal statutes to protect the federal interest in the Airport. The Part 16 process ensures respondents comply with their agreements with the federal government to protect and serve the public interest."); *In re Compliance with Fed. Obligations by the City of Santa Monica, Cal.*, FAA Docket 16-02 08, 2008 WL 6895776, at *26 (May 27, 2008) ("The FAA may not by agreement waive its statutory enforcement jurisdiction over future cases."). Thus, the Court is sorely tempted to issue a ruling that the FAA is statutorily obligated to enforce the Town's Grant Assurances notwithstanding its agreement not to enforce in the 2005 Settlement Agreement. However, the Court will not rule on the scope of the FAA's duties without first providing the

FAA an opportunity to be heard. Currently, the FAA's response to the Complaint in the FAA Action is due on July 8, 2015. After the FAA responds, the Court may order additional briefing and/or schedule a hearing to address this issue. In the meantime, Plaintiffs may, if they wish, file a complaint with the FAA regarding the Town's alleged failure to comply with its Grant Assurances.

Finally, the Court will entertain Plaintiffs' preemption claim with respect to ANCA. With respect to ANCA, Plaintiffs simply seek a declaration and injunctive relief that ANCA expressly preempts any noise or access restriction on a Stage 2 or Stage 3 aircraft unless the airport proprietor follows ANCA's procedural requirements. This claim does not raise the same jurisdictional concerns as Plaintiffs' AAIA claims. There is nothing in the text or structure of ANCA indicating that Congress intended to preclude a federal court sitting in equity from entertaining Plaintiffs' preemption challenge, nor is there an administrative enforcement proceeding that would permit Plaintiffs to pursue their claim. The Court will now turn to the requirements of Plaintiffs' motion for a preliminary injunction.

C. Irreparable Harm

"A showing of irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999)). Accordingly, "'the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quoting *Freedom*

Holdings, *Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005)). To meet the irreparable harm requirement, Plaintiffs "'must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.'" *Faiveley*, 559 F.3d at 118 (quoting *Grand River*, 481 F.3d at 66). "'Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances.'" *Id*. (quoting *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005)).

"A 'substantial loss of business,' particularly where there is a threat of bankruptcy, constitutes irreparable injury sufficient to satisfy this standard." *Nat'l Helicopter Corp. of Am. v. City of N.Y.*, 952 F. Supp. 1011, 1018 (S.D.N.Y. 1997) ("*National Helicopter I*") (quoting *Doran v. Salem Inn*, *Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561, 2568, 45 L. Ed. 2d 648 (1975)), *aff'd in part*, *rev'd in part, Nat'l Helicopter II*, 137 F.3d 81 (2d Cir. 1998). "Major disruption of a business can be as harmful as its termination and thereby constitute irreparable injury." *Petereit v. S.B. Thomas*, *Inc*., 63 F.3d 1169, 1186 (2d Cir. 1995) (remanding with instructions that the plaintiffs "may show that the lost profits . . . are of such magnitude as to threaten the viability of their businesses"). Additionally, "[t]he threat that a business will suffer a significant loss of 'good will'—a matter not easily quantified—is particularly suited to a claim for injunctive relief." *Nat'l Helicopter I*, 952 F. Supp. at 1018.

Plaintiffs argue that they will suffer irreparable harm absent an injunction because the Town Laws will: (1) "cause severe economic harm" that will "threaten

the continued existence of some Plaintiffs"; and (2) "cause incalculable and irreversible damage to Plaintiffs' goodwill, relationships, market share, and reputation." (Pls.' Br. at 8-11.) Plaintiffs have submitted various affidavits from executives and high-ranking employees to support these allegations. (*See* Renz Decl., Docket Entry 22; Jungck Decl., Docket Entry 23; Vellios Decl., Docket Entry 24; Herbst Decl., Docket Entry 25; Carlson Decl., Docket Entry 28; Ashton Decl., Docket Entry 29.) A review of these affidavits demonstrates that at least some Plaintiffs have demonstrated irreparable harm absent an injunction.

The majority of the aircrafts that many of the Plaintiffs use for their charter services to the Airport are subject to the Town Laws' Noisy Aircraft definition. (Renz Decl. ¶ 20 (six of Analar's seven helicopters); Ashton Decl. ¶ 15 (all ten of AAG's helicopters); Carlson Decl. ¶ 18 (HeliFlite's entire fleet); Vellios Decl. ¶ 11 (all eleven of Liberty's helicopters). Thus, it cannot be seriously argued that the Town Laws, particularly their One-Trip Limit, will not cause substantial business losses that might threaten Plaintiffs' existence. For example, according to Analar's president, Michael Renz, flights to and from the Airport account for fifty-five percent of Analar's revenue, and over seventy percent of its passengers fly to and from the Airport. (Renz Decl. ¶¶ 9, 11.) He estimates that sixty-five percent of Analar's flights will be prohibited under the Town Laws. (Renz. Decl. ¶ 20.)

Moreover, as noted, in addition to providing charter services, AAG and HeliFlite manage "fractional aircraft ownership programs," which involve selling partial ownership or leasehold interests of a helicopter to private individuals who wish to operate their own helicopter using AAG and HeliFlite as managers. (Compl.

¶¶ 14, 17.) According to AAG's president, its prospective fractional owners have delayed purchasing shares and some of its existing fractional owners have delayed renewing their shares pending the outcome of this matter. (Ashton Decl. ¶ 28.) In this Court's view, this would result not only result in lost revenue, but also damage to AAG's reputation and good will with its present and prospective clients. HeliFlite likely faces the same predicament. (Carlson Decl. ¶¶ 26-27.) Similarly, three of Analar's seven helicopters are owned by third-party individuals with personal travel needs to and from the Airport, some of who have advised Analar that they will sell their helicopters if the Town Laws go into effect. (Renz Decl. ¶¶ 21, 24.) This undoubtedly would constitute a major business disruption because Analar would not only lose its management business, but also the use of those helicopters for other customers. Additionally, some Plaintiffs believe that they will have to reduce their fleets and terminate many of their employees, including highly-skilled pilots. (*See* Renz Decl. ¶¶ 17, 25; Vellios Decl. ¶ 20; Ashton Decl. ¶ 24.) In a highly-specialized industry, the loss of operating equipment and pilots could be difficult to replace.

In sum, the Town Laws undoubtedly will impose on some of the Plaintiffs substantial business losses, major operational disruptions, and losses of good will that could be difficult to quantify. Plaintiffs have therefore demonstrated irreparable harm absent an injunction.[9]

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[9] Additionally, the Court notes that money damages may not be available to at least one Plaintiff, Liberty, which is a New York corporation. Money damages are unavailable for its preemption claims. As previously noted, the AAIA, ANCA, and the Supremacy Clause do not create private causes of action. (*See supra* pp. 20-22.) Nor is a claim available for violations of the AAIA or

D. Likelihood of Success on the Merits

Having found irreparable harm absent an injunction, the Court now turns to the merits of this case. As noted, the Supremacy Clause provides that federal statutes preempt contrary state and local laws. *See Nat'l Helicopter II*, 137 F.3d at 88 ("The Supremacy Clause of the United States Constitution invalidates state and local laws that 'interfere with or are contrary to, the laws of congress.'" (quoting *Chicago & N.W. Transp. Co.*, 450 U.S. at 317, 101 S. Ct. at 1130). Plaintiffs contend that the Town Laws are invalid because ANCA "expressly preempts local proprietors from imposing any noise or access restrictions on any aircraft classified by the FAA as a 'Stage 2' or 'Stage 3' aircraft unless the proprietor has first complied with ANCA's stringent requirements." (Pls.' Br. at 14 (emphasis omitted).) Alternatively, Plaintiffs argue that the laws are preempted because they unreasonable, arbitrary, and discriminatory. (Pls. Br. at 21-25.)

ANCA under 42 U.S.C. § 1983. *See Scott Aviation, Inc. v. DuPage Airport Auth.*, 393 F. Supp. 2d 638, 647 (N.D. Ill. 2005) (holding that a plaintiff may not base a Section 1983 claim upon a violation of the AAIA); *Tutor*, 2004 WL 344437, at *10 n.4 (same, but for ANCA). And although Plaintiffs' Commerce Clause claim might support a money damages award under 42 U.S.C. § 1983, *see Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991) (recognizing that Commerce Clause claims are actionable under 42 U.S.C. § 1983), these damages clearly would be limited to those incurred in connection with an unconstitutional restraint on interstate commerce, *see Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007) (stating that the "[D]ormant Commerce Clause . . . limits the power of local governments to enact laws affecting interstate commerce"). Thus, being a New York corporation, Liberty likely would not be entitled to money damages under the Commerce Clause.

The Town responds that ANCA does not expressly preempt local noise regulations. Rather, the Town reads ANCA to provide airport proprietors with a choice: comply with ANCA's requirements or lose eligibility for federal airport improvement grants. (Def.'s Br. at 14-15.) As long as an airport proprietor's noise regulation is reasonable, non-arbitrary, and non-discriminatory, the Town contends, such regulation constitutes a valid exercise of the airport proprietor's proprietary rights in the airport. (Def.'s Br. at 14-15.)

As discussed below, the Court agrees with the Town that ANCA does not expressly preempt all airport proprietors from adopting access restrictions before complying with ANCA's procedural requirements. However, for the reasons explained below, the Court also finds that on the record before it, Plaintiffs have demonstrated that the One-Trip Limit is not reasonable.

1. Whether ANCA Preempts the Town Laws

Under the Airline Deregulation Act ("ADA"), Congress has expressly preempted state and local regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1)). However, Congress also expressly stated that the ADA's preemptive effect does not apply to regulations passed by state and local authorities in the course of "carrying out [their] proprietary powers and rights." 49 U.S.C. § 41713(b)(3). "Under this 'cooperative scheme,' Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population." *Nat'l Helicopter II*, 137 F.3d at 88 (collecting cases and legislative history).

Thus, "federal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more 'limited role for local airport proprietors in regulating noise levels at their airports.'" *Id.* (quoting *City and County of San Francisco v. F.A.A.*, 942 F.2d 1391, 1394 (9th Cir. 1991)). Known as the "proprietor exception," it permits a local municipality, acting in its proprietary capacity, as opposed to its police power, to adopt "'reasonable, nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level." *Id.* (quoting *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75, 84 (2d Cir. 1977)); *see also Glob. Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 727 F.2d 246, 248 (2d Cir. 1984) ("[S]tates and localities retain power in their capacity as airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports."). The rationale for the proprietor exception is that since airport proprietors are liable for compensable takings from excessive aircraft noise, *British Airways*, 558 F.2d at 83 (citing *Griggs v. Allegheny Cnty.*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962)), fairness dictates that they should have the power to limit their liability by restricting access to their airports, *see id.* ("The right of the proprietor to limit his liability by restricting the use of his airport has been thought a corollary of this principle.").

Plaintiffs do not dispute the existence of the proprietor's exception. Rather, they contend that when Congress enacted ANCA in 1990, it "displac[ed] local proprietors' authority to unilaterally impose restrictions." (Pls.' Br. at 15.) The Court disagrees. Plaintiffs are correct that ANCA directed the Secretary of Transportation to "establish[ ] by regulation a national program for reviewing airport noise and access restrictions on

the operation of stage 2 and stage 3 aircraft." 49 U.S.C. § 47524(a). However, under Section 47526 of ANCA, entitled, "Limitations for noncomplying airport noise and access restrictions," the only consequences for failing to comply with ANCA's review program are that the "airport may not—(1) receive money under [the AAIA]; or (2) impose a passenger facility charge under [49 U.S.C. § 40117]." 49 U.S.C. § 47524. This provision raises an obvious question. If Congress intended to preempt all airport proprietors from enacting noise regulations without first complying with ANCA, why would it also include an enforcement provision mandating the loss of eligibility for federal funding and the ability to impose passenger facility charges? The logical answer is that Congress intended to use grant and passenger facility charge restrictions to encourage, but not require, compliance with ANCA. Indeed, in *National Helicopter II*, the Second Circuit affirmed a decision rendered by then-District Judge Sonia Sotomayor in which she applied the proprietor exception to uphold various noise regulations imposed by the City of New York on Manhattan's East 34th Street Heliport notwithstanding the fact that the plaintiff in that case presented the same ANCA-preemption argument that Plaintiffs assert here. *See Nat'l Helicopter II*, 137 F.3d at 88; *Nat'l Helicopter I*, 952 F. Supp. at 1023. Accordingly, in line with *National Helicopter II*, this Court holds that ANCA did not displace the proprietor exception.[10]

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[10] The Court does note that the Airport is federally obligated since it accepted federal funds in 2001, and ANCA expressly states that it "does not affect . . . 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. The Court offers no opinion on whether or not the FAA has authority to enjoin the Town Laws on the basis that the

2. Whether the Town Laws Are Reasonable, Non-Arbitrary, and Non-Discriminatory

Even though ANCA does not expressly preempt the Town Laws, to be constitutional under the proprietor exception, the laws still must be reasonable, non-arbitrary, and non-discriminatory. *Nat'l Helicopter II*, 137 F.3d at 88 ("[T]he proprietor exception allows municipalities to promulgate 'reasonable, nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level." (quoting *British Airways*, 558 F.2d at 84)). Regulations of noise "must avoid even the appearance of irrational or arbitrary action." *Id.* at 89.

For ease of reference, the Town Laws impose the following three access restrictions: (1) the Mandatory Curfew, which prohibits all aircraft from using the Airport between 11:00 p.m. and 7:00 a.m.; (2) the Extended Curfew, prohibiting "Noisy Aircraft" from using the Airport from 8:00 p.m. to 9:00 a.m.; and (3) the One-Trip Limit, a weekly limit prohibiting Noisy Aircraft from using the Airport more than two times per week during the months of May, June, July, August, and September. *See* TOWN OF E. HAMPTON CODE § 75-38(B)-(C).

Plaintiffs argue that the Town Laws are unreasonable, arbitrary, and discriminatory on three grounds: (1) "the Town justified [the Town Laws] with deeply flawed data that are noncompliant with federal regulations," (Pls.' Br. at 22-23); (2) "The Town's 'Noisy Aircraft' standard is unreasonable because it is so extreme and excessive" and "is also arbitrary and discriminatory," (Pls.' Br. at 23-24); and (3) the Town Laws "are

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Airport is still federally obligated and therefore would need to comply with ANCA's procedural requirements.

unreasonable and conflict with federal law because they create potential safety problems," (Pls.' Br. at 24-25). The Court will first address Plaintiffs' arguments regarding safety and the Town's data since both arguments are applicable to all three access restrictions.

With respect to safety, Plaintiffs contend that the Town Laws' curfews are unsafe because they impose financial and injunctive penalty provisions that could influence pilot decisions in an unsafe manner and also divert air traffic to nearby airports that are unable to handle an increased demand. (Pls.' Br. at 24-25.) However, on the record before the Court, there is no evidence that the mandatory curfews would force any pilot to operate his or her aircraft in an unsafe manner. Plaintiffs' argument is purely speculative. Plaintiffs also cite to an FAA decision in which the FAA found that a mandatory curfew imposing financial penalties and injunctions was unsafe, and therefore unreasonable, because it "'reache[d] into the cockpits of individual aircraft and interact[ed] with safety parameters affecting critical . . . decisions' by pilots." (Pls.' Br. at 24 (quoting *FAA Decision on 14 CFR Part 161 Study – Proposed Runway Use Restriction at LAX* (Nov. 7, 2014) (alterations and ellipsis in original)).[11] However, in this case, the Town Laws include an exception for operational or medical emergencies. *See* TOWN OF E. HAMPTON CODE § 75-38(E).[12] In this

[11] The FAA's LAX decision is available at: http://www.faa.gov/airports/environmental/airport_noise/part_161/media/Final-Determination-LAX-Part%20161-Application-20141107.pdf.

[12] Specifically, Section 75-38 states:

> The restrictions of this section 75-38 shall not apply to any aircraft operational emergency, any medical emergency operation, whether by public or private aircraft, or to any operation by a government-owned aircraft,

regard, the Court notes that the FAA has been aware that the Town intended to impose curfews at the Airport since at least the end of February this year. If at any time the FAA believed that the curfews were unsafe, it could, and still can, attempt to regulate the Town Laws based on safety concerns.

Plaintiffs also argue that the Town Laws are unconstitutional because the Town justified the Town Laws based on flawed data not compliant with federal regulations. Specifically, Plaintiffs contend that the FAA has established a single metric—yearly day-night noise exposure level expressed in decibels ("DNL")—and "requires its use by all airports to justify any efforts to reduce airport noise by restricting aircraft access." (Pls.' Br. at 22.) Plaintiffs are correct that the FAA has established the DNL metric with respect to submissions under ANCA and the Airport Noise and Safety Act of 1979 ("ANSA"), 49 U.S.C. § 47502, *et seq.* *See*, *e.g.*, *Aircraft Owners & Pilots Ass'n v. City of Pompano Beach*, FAA Docket 16-04-01, 2005 WL 3722717, at *28 (Dec. 15, 2005). However, here, the question is whether the Town acted appropriately under the proprietor exception, not ANCA or ANSA. In adopting the Town Laws, the Town considered formal complaints submitted through the Airport's formal complaint log, which yielded over 23,000 complaints. The Court recognizes that a large portion

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> including, without limitation, police, emergency services, and military operations. In the case of an aircraft emergency or medical emergency operation, the operator shall submit a sworn statement to the Airport Manager within 24 hours of such operation attesting to the nature of the emergency and reason for the operation.

TOWN OF E. HAMPTON CODE § 75-38(E)

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. Indeed, courts have affirmed the FAA's use of complaint data "as empirical data of a noise problem." *Helicopter Ass'n Int'l*, *Inc. v. F.A.A.*, 722 F.3d 430, 436 (D.C. Cir. 2013).

Having found no evidence that the Town Laws are unsafe and that Plaintiffs have failed to demonstrate that the Town lacked sufficient noise data, the Court turns to the Mandatory Curfew. Aside from its argument that the Town relied on flawed data, Plaintiffs do not specifically argue that the Mandatory Curfew is unreasonable, arbitrary, or discriminatory. Accordingly, the Court will not preliminarily enjoin the Mandatory Curfew, a decision which is in line with precedent in this Circuit. *See Nat'l Helicopter II*, 137 F.3d at 89 (affirming district court's decision to uphold weekday and weekend curfews because "[t]he protection of the local residential community from undesirable heliport noise during sleeping hours is primarily a matter of local concern and for that reason falls within the proprietor exception").

The Court now turns to the access restrictions applicable to "Noisy Aircraft." Plaintiffs first argue that the definition of "Noisy Aircraft" is "unreasonable because it is so extreme and excessive." (Pls.' Br. at 23.) In support of this argument, Plaintiffs submit expert declarations and other affidavits alleging that the Noisy Aircraft definition includes certain aircraft that a generally viewed as quiet. (*See* Shaffer Decl., Docket Entry 20, ¶ 36; Jungck Decl. ¶ 5; Brown Decl., Docket Entry 27, ¶ 22.) The Court disagrees with Plaintiffs. As noted, Noisy Aircraft is defined as

"any airplane or rotorcraft for which there is a published Effective Perceived Noise in Decibels (EPNdb) approach (AP) level of 91.0 or greater." TOWN OF E. HAMPTON CODE § 75-38A(4)(a). The 91 EPNdb threshold appears to be a valid indicator of noise as it affects individuals. As the FAA has explained:

> EPNL is a single number measure of the noise of an individual airplane flyover that approximates laboratory annoyance responses . . . . The EPNL computation process effectively yields a time integrated annoyance level.

See FAA, Advisory Circular 36-4C, Noise Standards: Aircraft Type and Airworthiness Certification ¶ 192(a).[13] Even if not all aircrafts are EPNdb certified, as Plaintiffs claim, this does not render the Noisy Aircraft definition arbitrary or discriminatory. For starters, Plaintiffs do not identify how many aircraft are not EPNDb certified. Additionally, the Noisy Aircraft definition *is* based on noise, as opposed to restrictions based on weight or size, which courts have found to constitute unreasoned discrimination because they do not regulate based on noise. *See*, *e.g.*, *Nat'l Helicopter II*, 137 F.3d at 91 ("In this case, the City placed restrictions on certain aircraft because of their size—not the noise they make—despite evidence that larger helicopters are not necessarily noisier than smaller ones. A regulation purporting to reduce noise cannot bar an aircraft on any other basis."). Thus, Plaintiffs have not demonstrated that the 91 EPNdb threshold for Noisy Aircraft is arbitrary or discriminatory, at least at this stage of the litigation. The Court therefore will not preliminarily enjoin the Extended Curfew that

[13] The Advisory Circular is available at: http://www.faa.gov documentLibrary/media/Advisory_Circular/AC36-4C.pdf.

applies to Noisy Aircraft, for the same reasons stated with respect to the Mandatory Curfew.

However, the Court will preliminarily enjoin the One-Trip Limit as applied to Noisy Aircraft. This measure is drastic, considering the effect it poses on some of Plaintiffs' businesses, and there is no indication that a less restrictive measure would not also satisfactorily alleviate the Airport's noise problem. Accordingly, on the record before it, the Court will preliminarily enjoin the One-Trip Limit as not reasonable. In making this ruling, the Court has considered the fact that the Town's complaint data originated from a small percentage of the Town's residents.

E. Balance of Hardships

"The balance of hardships inquiry asks which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *Goldman, Sachs & Co. v. N. Carolina Mun. Power Agency No. One*, No. 13-CV-1319, 2013 WL 6409348, at *8 (S.D.N.Y. Dec. 9, 2013) (internal quotation marks and citation omitted). Here, the balance of hardships tips in the Town's favor with respect to the Mandatory Curfew and Extended Curfew, as the Town's desire to protect its residents during sleeping hours clearly outweighs the inconvenience Plaintiffs may experience by having to minimize their flight schedules. However, with respect to the One-Trip Limit, the balance tips in Plaintiffs' favor in light of the fact that the One-Trip Limit will have a drastic impact on their businesses, and there is no indication in the Town's papers that a less restrictive measure would not also satisfactorily alleviate the Town's noise problem. Accordingly, Plaintiffs' motion for a preliminary injunction is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to the Town Laws' One-Trip

Limit and is DENIED with respect to the Mandatory Curfew and Extended Curfew.

II. Motion to Consolidate

Plaintiffs also seek to consolidate this action and the FAA Action for all purposes. The Court, in its discretion, RESERVES JUDGMENT on this motion pending the filing of the FAA's response to the Complaint in the FAA Action.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction enjoining enforcement of the Town Laws (Docket Entry 19) is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to the One-Trip Limit and is DENIED with respect to the Mandatory Curfew and Extended Curfew. The Court RESERVES JUDGMENT with respect to Plaintiffs' motion to consolidate (Docket Entry 14) pending the filing of the FAA's response to the Complaint in the FAA Action.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: June 26, 2015
Central Islip, NY

APPENDIX C

United States Code
Title 49. Transportation
Subtitle VII. Aviation Programs
Part B. Airport Development and Noise
Chapter 475. Noise
Subchapter II. National Aviation Noise Policy

49 U.S.C. § 47521. Findings

Congress finds that—

(1) aviation noise management is crucial to the continued increase in airport capacity;

(2) community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system;

(3) a noise policy must be carried out at the national level;

(4) local interest in aviation noise management shall be considered in determining the national interest;

(5) community concerns can be alleviated through the use of new technology aircraft and the use of revenues, including those available from passenger facility charges, for noise management;

(6) revenues controlled by the United States Government can help resolve noise problems and carry with them a responsibility to the national airport system;

(7) revenues derived from a passenger facility charge may be applied to noise management and increased airport capacity; and

(8) a precondition to the establishment and collection of a passenger facility charge is the prescribing

by the Secretary of Transportation of a regulation establishing procedures for reviewing airport noise and access restrictions on operations of stage 2 and stage 3 aircraft.

49 U.S.C. § 47524. Airport noise and access restriction review program

(a) General requirements.—The national aviation noise policy established under section 47523 of this title shall provide for establishing by regulation a national program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft. The program shall provide for adequate public notice and opportunity for comment on the restrictions.

(b) Stage 2 aircraft.—Except as provided in subsection (d) of this section, an airport noise or access restriction may include a restriction on the operation of stage 2 aircraft proposed after October 1, 1990, only if the airport operator publishes the proposed restriction and prepares and makes available for public comment at least 180 days before the effective date of the proposed restriction—

(1) an analysis of the anticipated or actual costs and benefits of the existing or proposed restriction;

(2) a description of alternative restrictions;

(3) a description of the alternative measures considered that do not involve aircraft restrictions; and

(4) a comparison of the costs and benefits of the alternative measures to the costs and benefits of the proposed restriction.

(c) Stage 3 aircraft.—(1) Except as provided in subsection (d) of this section, an airport noise or access restriction on the operation of stage 3 aircraft not in effect on October 1, 1990, may become effective only if the restriction has been agreed to by the airport proprietor and all aircraft operators or has been submitted to and approved by the Secretary of Transportation after an airport or aircraft operator's request for approval as provided by the program established under this section. Restrictions to which this paragraph applies include—

(A) a restriction on noise levels generated on either a single event or cumulative basis;

(B) a restriction on the total number of stage 3 aircraft operations;

(C) a noise budget or noise allocation program that would include stage 3 aircraft;

(D) a restriction on hours of operations; and

(E) any other restriction on stage 3 aircraft.

(2) Not later than 180 days after the Secretary receives an airport or aircraft operator's request for approval of an airport noise or access restriction on the operation of a stage 3 aircraft, the Secretary shall approve or disapprove the restriction. The Secretary may approve the restriction only if the Secretary finds on the basis of substantial evidence that—

(A) the restriction is reasonable, nonarbitrary, and nondiscriminatory;

(B) the restriction does not create an unreasonable burden on interstate or foreign commerce;

(C) the restriction is not inconsistent with maintaining the safe and efficient use of the navigable airspace;

(D) the restriction does not conflict with a law or regulation of the United States;

(E) an adequate opportunity has been provided for public comment on the restriction; and

(F) the restriction does not create an unreasonable burden on the national aviation system.

(3) Paragraphs (1) and (2) of this subsection do not apply if the Administrator of the Federal Aviation Administration, before November 5, 1990, has formed a working group (outside the process established by part 150 of title 14, Code of Federal Regulations) with a local airport operator to examine the noise impact of air traffic control procedure changes at the airport. However, if an agreement on noise reductions at that airport is made between the airport proprietor and one or more air carriers or foreign air carriers that constitute a majority of the carrier use of the airport, this paragraph applies only to a local action to enforce the agreement.

(4) The Secretary may reevaluate an airport noise or access restriction previously agreed to or approved under this subsection on request of an aircraft operator able to demonstrate to the satisfaction of the Secretary that there has been a change in the noise environment of the affected airport that justifies a reevaluation. The Secretary shall establish by regulation procedures for conducting a reevaluation. A reevaluation—

(A) shall be based on the criteria in paragraph (2) of this subsection; and

(B) may be conducted only after 2 years after a decision under paragraph (2) of this subsection has been made.

(d) Nonapplication.—Subsections (b) and (c) of this section do not apply to—

(1) a local action to enforce a negotiated or executed airport noise or access agreement between the airport operator and the aircraft operators in effect on November 5, 1990;

(2) a local action to enforce a negotiated or executed airport noise or access restriction agreed to by the airport operator and the aircraft operators before November 5, 1990;

(3) an intergovernmental agreement including an airport noise or access restriction in effect on November 5, 1990;

(4) a subsequent amendment to an airport noise or access agreement or restriction in effect on November 5, 1990, that does not reduce or limit aircraft operations or affect aircraft safety;

(5)(A) an airport noise or access restriction adopted by an airport operator not later than October 1, 1990, and stayed as of October 1, 1990, by a court order or as a result of litigation, if any part of the restriction is subsequently allowed by a court to take effect; or

(B) a new restriction imposed by an airport operator to replace any part of a restriction described in subclause (A) of this clause that is disallowed by a court, if the new restriction would not prohibit aircraft operations in effect on November 5, 1990; or

(6) a local action that represents the adoption of the final part of a program of a staged airport noise or access restriction if the initial part of the program was adopted during 1988 and was in effect on November 5, 1990.

(e) Grant limitations.—Beginning on the 91st day after the Secretary prescribes a regulation under subsection (a) of this section, a sponsor of a facility operating under an airport noise or access restriction on the operation of stage 3 aircraft that first became effective after October 1, 1990, 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. § 47526. 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.

49 U.S.C. § 47531. Penalties

A person violating section 47528, 47529, 47530, or 47534 of this title or a regulation prescribed under any of those sections is subject to the same civil penalties and procedures under chapter 463 of this title as a person violating section 44701(a) or (b) or any of sections 44702-44716 of this title.

49 U.S.C. § 47532. Judicial review

An action taken by the Secretary of Transportation under any of sections 47528-47531 or 47534 of this title is subject to judicial review as provided under section 46110 of this title.

49 U.S.C. § 47533. Relationship to other laws

Except as provided by section 47524 of this title, this subchapter does not affect—

(1) law in effect on November 5, 1990, on airport noise or access restrictions by local authorities;

(2) any proposed airport noise or access restriction at a general aviation airport if the airport proprietor has formally initiated a regulatory or legislative process before October 2, 1990; or

(3) the authority of the Secretary of Transportation to seek and obtain legal remedies the Secretary considers appropriate, including injunctive relief.