No. __-____

IN THE
Supreme Court of the United States

RICHARD JOSEPH, JULIET BETH BUCK,
ROGER BOURASSA, AND JAMES MARC LEAS,
Petitioners,

v.

CITY OF BURLINGTON, VERMONT,
GREATER BURLINGTON INDUSTRIAL CORPORATION,
AND FRIENDS OF THE VERMONT AIR GUARD, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Aviation Act of 1958 confers on the Federal Aviation Administration ("FAA") extensive authority to regulate aviation safety and operations, and aircraft noise. It also creates and funds programs through which the FAA, airport proprietors, and state and local governments can work together to address land-use incompatibility issues that arise between airports and their neighbors. The question presented is:

Does the Federal Aviation Act preempt all state and local general land-use regulation aimed at addressing off-site airport noise, as the Vermont Supreme Court and other state high courts have held, or does it preempt only those state and local general land-use regulations that conflict with federal law or intrude into a preempted field in their scope and effect, as the Second Circuit and several other federal courts of appeals and state high courts have held?

LIST OF PARTIES TO THE PROCEEDING

Petitioners Richard Joseph, Juliet Beth Buck, Roger Bourassa, and James Marc Leas were the appellants in the Vermont Superior Court, Environmental Division, and the appellants in the Vermont Supreme Court.

The City of Burlington, Vermont, was the appellee and cross-appellant in the Vermont Superior Court, Environmental Division, and the appellee in the Vermont Supreme Court.

The Greater Burlington Industrial Corporation and the Friends of the Vermont Air Guard, Inc. were interested parties in the Vermont Superior Court, Environmental Division, and interested parties in the Vermont Supreme Court.

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Petitioners Richard Joseph, Juliet Beth Buck, Roger Bourassa, and James Marc Leas respectfully petition the Court for a writ of certiorari to review the judgment of the Vermont Supreme Court.

INTRODUCTION

This case involves an effort by landowners to apply state law to ensure that off-airport measures are adopted to mitigate noise impacts from the anticipated deployment of new Air Force jets to the airport in South Burlington, Vermont. Petitioners did not request measures restricting or otherwise interfering with the Air Force's scheduling, take-offs, or landings, or impeding in any way the airport's use. Their request was simple: they sought a declaratory ruling that the state Act 250 land-use commission had jurisdiction over the City sufficient to order the City to adopt off-site noise-mitigation measures to abate the noise pollution of the new military jets. Possible measures might include adopting an effective and fair system of home purchase and resettlement, installing sound insulation in existing homes, or constructing land berms and walls.

In a sweeping decision going far beyond this Court's precedent, the Vermont Supreme Court held that the requested local measures were preempted by the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972. The court's far-reaching decision conflicts with the decisions of federal courts of appeals (including the Second Circuit) and other state supreme courts, which generally permit the application of general land-use regulations so long as they do not interfere with airport safety or operations. The decision below also cannot be squared with this Court's decision in *City of Burbank v. Lock-*

heed Air Terminal, Inc., 411 U.S. 624 (1973), which addressed local measures to abate airport noise.

In the intervening four decades since this Court in *City of Burbank* last considered the scope of preemption of local attempts to address airport noise under the Federal Aviation Act, airports have proliferated, air travel has become common-place, population growth has pushed residential areas closer to busy airports, and airport noise has become an ever greater problem. In response, state and local governments have increased their efforts to protect the public from the adverse health, safety, and welfare consequences of residential proximity to airports through zoning and environmental land-use regulations to balance the two uses. Unlike the aircraft flight curfew invalidated in *City of Burbank*, such ordinances do not directly interfere with aircraft traffic or operations. Rather, they are generalized land-use regulations that may require off-site noise-mitigation measures, control residential land-use patterns to keep homes away from airports, or prohibit the operation of airports or heliports altogether in a particular area.

Courts of appeals and state supreme courts have taken inconsistent approaches to determine whether the Federal Aviation Act preempts local land-use regulations aimed at combating or mitigating airport noise. Some courts, like the Vermont Supreme Court below, read *City of Burbank* to require categorical preemption of all state and local land-use regulation addressing airport noise. *See* App. 16a-19a. Others, including the Second Circuit, apply *City of Burbank* by assessing whether the purpose and effect of each regulation interferes with federal aviation regulation. Those conflicting approaches require resolution by this Court. This case provides an excellent vehicle

for this Court to clarify whether the Federal Aviation Act preempts general land-use regulations addressing airport noise.

OPINIONS BELOW

The opinion of the Vermont Supreme Court (App. 1a-22a) is reported at 2015 VT 41. The order of the Vermont Superior Court, Environmental Division (App. 23a-37a), is unreported.[1] The Jurisdictional Opinion of the Vermont District #4 Environmental Commission (App. 38a-49a) is unreported.[2]

JURISDICTION

The Vermont Supreme Court entered its judgment on March 6, 2015. On May 28, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including August 3, 2015. App. 88a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND RULES INVOLVED

Relevant provisions of (1) Vermont Act 250, 10 V.S.A. § 6001 *et seq.*, (2) Act 250's implementing rules, and (3) the Federal Aviation Act of 1958 and the Quiet Communities Act of 1978 are reproduced at App. 65a-87a.

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[1] *Available at* https://www.vermontjudiciary.org/GTC/Environmental/ENVCRTOpinions2010-Present/Burlington%20Airport%20Act%20250%20JO%2042-4-13%20Vtec.pdf.

[2] *Available at* http://www.nrb.state.vt.us/lup/jo/2013/4-231.pdf.

STATEMENT

A. Factual Background

Burlington International Airport ("BIA") in South Burlington, Vermont, is a commercial airport owned and operated by the City of Burlington. The Vermont Air National Guard ("VTANG") maintains a base adjacent to BIA, which is home to the VTANG's 158th Fighter Wing installation. The United States Air Force ("USAF") leases the base's land from the City and licenses the VTANG's use. The base occupies approximately 280 acres and consists of approximately 44 buildings. The base has no runways of its own; the VTANG instead uses BIA's commercial airstrips for take-off and arrival. Currently, VTANG flies and maintains 18 F-16 fighter jets at the base.

Fighter jets are loud, particularly during take-off and arrival. To assess residential compatibility with airport noise, the Federal Aviation Administration ("FAA") calculates the environmental noise impacts of aircraft by averaging the noise level at a location over 24 hours a day, with a penalty for noise produced between 10pm and 7am, and reports this as the day-night average noise level ("DNL"). The FAA, in conjunction with the Federal Interagency Committee on Urban Noise, has determined that noise exceeding 65 dB DNL is "noncompatible" with residential use. 14 C.F.R. § A150.101(b) & Table 1. The operation of F-16s at BIA exposes almost 2,000 acres of land near BIA to noise levels that exceed 65 dB DNLs. An estimated population exceeding 4,500 (almost 2,000 households) lives on the exposed acreage. *See* USAF, *Final F-35A Operational Basing Environmental Impact Statement* BR4-24-26 (Sept. 2013) ("EIS"), *available at* http://documentcloud.org/documents/799815/f-35-final-eis-volume-1.pdf. In

comparison, the off-airport noise of civilian airplanes at BIA is "negligible" compared to that of military planes. Appellants' Vt. Sup. Ct. Br. 3. To address environmental noise impacts on surrounding homes, BIA adopted a Noise Compatibility Plan ("NCP") pursuant to the Federal Aviation Act. *See* 49 U.S.C. § 47504(c)(2), (6). That provision authorizes the FAA to approve of and fund airport NCPs to abate the noise of civilian and military aircraft. Such abatement may include noise-proofing private homes or purchasing homes for demolition. In October 2008, BIA undertook a program of purchasing and demolishing 120 homes within the high-noise zone of 65 dB DNL pursuant to its NCP.

On December 2, 2013, the USAF issued a Record of Decision documenting its decision to replace the 18 F-16s at VTANG with 18 F-35As. *See* App. 50a-64a. F-35As are significantly louder than F-16s. According to the EIS issued by the USAF in September 2013, each F-35A will produce instantaneous maximum noise readings 21 dB higher than the F-16 on take-off, 22 dB higher than the F-16 on arrival, and 25 dB higher than the F-16 on Low Approach and Go when the plane is 1,500 feet above ground level. *See* Appellants' Vt. Sup. Ct. Br. 2. The EIS states that each 10 dB increase in noise level represents a doubling in loudness, so a 20 dB increase means the human ear will perceive the sound as four times louder. Thus, according to the EIS, the F-35A will be perceived as more than four times louder than the F-16 in each deployment situation. Moreover, the replacement of the F-16s with 18 F-35As at BIA would cause an additional 289 acres to experience 65 dB DNL noise or above. Within that area, an additional 2,061 individuals in 997 households would

experience noise incompatible with residential use as compared to the current siting of the F-16s. *See* EIS at 2-32 & BR4-67, Tables 2-12 & BR3.10-2.

B. Statutory Background

Congress passed the Federal Aviation Act ("Act")[3] in 1958 to create the Federal Aviation Agency.[4] *See* FAA, A Brief History of the FAA, *at* http://www.faa.gov/about/history/brief_history/ (last visited July 31, 2015). The Act's purpose was "to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace." Pub. L. No. 85-726, Preamble, 72 Stat. 731, 731. To that end, the Act authorized the FAA to issue certificates verifying that certain types of aircraft were fit for safe operation, *see id.* §§ 603-609, 72 Stat. 776-80, and made it unlawful to fly an aircraft without a certificate of airworthiness, *see id.* § 610, 72 Stat. 780. Noise was not a factor in the determination of airworthiness. "[F]rom the start, the [Act] has contained a 'saving clause,' stating: 'Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'" *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (quoting § 1106, 72 Stat. 796) (ellipsis in original).[5]

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[3] The Act is codified, as amended, at 49 U.S.C. § 40101 *et seq.*

[4] In 1966, Congress integrated the Agency into the newly created U.S. Department of Transportation and renamed it the Federal Aviation Administration ("FAA"). *See* FAA, A Brief History of the FAA, *at* http://www.faa.gov/about/history/brief_history/ (last visited July 31, 2015).

[5] This provision was amended in 1994 to read: "A remedy under this part is in addition to any other remedies provided by

Congress first added a noise-control provision to the Act in 1968. *See* Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395 (adding a new § 611: "Control and Abatement of Aircraft Noise and Sonic Boom"); *see City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 629 n.5 (1973). The new § 611 sought to control aircraft noise at its source. It directed the Administrator of the FAA to "prescribe and amend standards for the measurement of aircraft noise and sonic boom," to "prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom," and to apply "such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any [airworthiness] certificate." § 1, 82 Stat. 395. *See* John J. Jenkins, Jr., Comment, *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?*, 59 J. AIR L. & COM. 1023, 1031 (1994).

Congress next passed the Noise Control Act of 1972, a general statute aimed at reducing noise pollution in several areas. The one provision dealing with aviation noise amended § 611 of the Federal Aviation Act to provide a role for the Environmental Protection Agency ("EPA") in "afford[ing] present and future relief and protection to the public health and welfare from aircraft noise and sonic boom." Pub. L. No. 92-574, § 7(b), 86 Stat. 1234, 1239 (codified as amended at 49 U.S.C. § 44715(a)). *See also City of Burbank*, 411 U.S. at 629 n.6. Specifically, the revised § 611 "provides that . . . EPA shall submit to FAA proposed regulations to provide such 'control and abatement of aircraft noise and sonic boom' as

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law." Act of July 5, 1994, Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1117 (codified at 49 U.S.C. § 40120(c)).

EPA determines is 'necessary to protect the public health and welfare.'" *Id.* at 630 (quoting § 7(b), 86 Stat. 1240 (amending § 611(c)(1)) (codified as amended at 49 U.S.C. § 44715(c)). This Court evaluated that provision in *City of Burbank*, concluding that the "pervasive nature of the scheme of federal regulation of aircraft noise" leads to the conclusion that local government regulations aimed at controlling airport noise by imposing flight curfews on jet aircraft are preempted. *Id.* at 633.

Congress has enacted several noise control statutes and added one express preemption provision to the Federal Aviation Act since this Court decided *City of Burbank*. The Quiet Communities Act of 1978 was passed "[t]o promote the development of effective State and local noise control programs." Pub. L. No. 95-609, § 2, 92 Stat. 3079, 3079 (codified at 42 U.S.C. § 4913). The statute authorizes the EPA to "administer a nationwide Quiet Communities Program," 42 U.S.C. § 4913(c), which could include grants to state and local entities, technical assistance, joint research ventures, and training programs. *See* Kristin L. Falzone, Comment, *Airport Noise Pollution: Is There a Solution in Sight?*, 26 B.C. ENVTL. AFF. L. REV. 769, 785 (1999) (summarizing the statute). Significantly, the EPA can issue grants to local entities "for the purpose of . . . planning, developing, and establishing a noise control capacity in [the local] jurisdiction," "developing abatement plans for areas around major transportation facilities," and "evaluating techniques for controlling noise." 42 U.S.C. § 4913(c)(1)(B)-(D).

The Airline Deregulation Act of 1978 ("ADA") added an express preemption provision to the Federal Aviation Act. Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1708 (adding § 105, codified as amended at 49

U.S.C. § 41713). In general, the ADA was designed to enhance competition among airlines and to reduce regulation overall. To that end, the Act provides that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

The Aviation Safety and Noise Abatement Act of 1979 (codified as amended at 49 U.S.C. §§ 47501-47510) directed the Secretary of Transportation to establish a "single system of measuring noise" to define a national standard to regulate noise exposure caused by airports and aircraft. Pub. L. No. 96-193, § 102(1), 94 Stat. 50, 50 (codified as amended at 49 U.S.C. § 47502(1)). That included identifying "land uses which are normally compatible" with exposure to such noise. *Id.* § 102(3), 94 Stat. 50 (codified as amended at 49 U.S.C. § 47502(3)). Under those new standards, the Act makes federal funds available to airport operators to prepare "noise exposure maps" to detail the noise-exposure levels around the airport. *Id.* §§ 103-104, 94 Stat. 50-53 (codified as amended at 49 U.S.C. §§ 47503-47504). Operators are then encouraged to work with the surrounding communities to develop airport-compatible land uses based in part on the noise-exposure levels outlined in those maps. *Id.* § 104, 94 Stat. 51-53 (codified as amended at 49 U.S.C. § 47504). The resulting "Noise Compatibility Programs" might include such measures as preferential runway systems, restrictions on the types of aircrafts based on noise characteristics, and the construction of sound barriers. *Id.* The procedures for undertaking a noise study and creating a noise-compatibility program are set forth in 14

C.F.R. Part A150. That regulation makes clear that federally funded and approved noise-compatibility programs do not supplant state and local land-use planning regarding airport noise:

> The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations under Part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.

14 C.F.R. pt. A150 note a.

The Vision 100 – Century of Aviation Reauthorization Act authorized the use of federal funds for state and local governments, rather than airport proprietors, to establish compatible land-use planning and projects around large and medium hub airports that had never participated in the Part 150 program or had not updated their program in the past 10 years. Pub. L. No. 108-176, § 160(a), 117 Stat. 2490, 2511 (2003) (codified as amended at 49 U.S.C. § 47141),

Vermont's foundational environmental land-use statute, Act 250, 10 V.S.A. § 6001 *et seq.*, took effect on April 4, 1970. It requires all persons, including municipalities, to obtain a permit prior to the commencement of any development (as "development" is defined in the statute). *Id.* § 6081. Act 250 implementing rule 34(A) also requires persons to

seek an amended permit prior to undertaking a "material change" to any permitted development. NRB Rule 34(A). Both initial permits and amended permits may be issued only if the permitted development is found to satisfy the 10 Act 250 criteria. *See* 10 V.S.A. § 6086. Noise is implicated in three of those criteria: criterion 1 (air pollution); criterion 8 (aesthetics); criterion 10 (nonconformity with a municipal plan). *See id.* § 6086(a)(1), (8), (10). To ensure compliance with those criteria, Act 250 development permits often contain conditions intended to ensure noise mitigation. *See*, *e.g.*, *In re Chaves A250 Permit Reconsider*, 93 A.3d 69 (Vt. 2014) (upholding issuance of Act 250 permit for sand and gravel quarry near residential neighborhood in part because project included noise-mitigation measures). Since Act 250 was enacted, 71 permits and amendments have been issued to BIA, including 18 permit amendments addressing runways and taxiways.

C. Proceedings Below

In 2012, petitioners requested a Jurisdictional Opinion from the Vermont District #4 Environmental Commission concerning the proposed siting of 18 F-35A jets at BIA and the concomitant construction. In particular, petitioners asserted that F-35As generate substantially more noise than F-16s; that this increase in noise constitutes a material change to the permitted development; and that this material change triggers the requirement of an amended Act 250 permit. In their request, petitioners made clear that the land-use impacts they sought to address through the Act 250 permitting process were the "availability of housing" and the "quality of residential life" that would be affected by the City's efforts to mitigate the noise of the F-35As.

On March 21, 2013, the District #4 Coordinator issued Jurisdictional Opinion #4-231 denying Act 250 jurisdiction. App. 38a-49a. The order concluded that "the FAA has authority over air safety concerns and aircraft noise" and thus a regulation "that attempted to interfere with the movements and operation of aircraft" to address noise concerns would be "pre-empted under the Supremacy Clause" of the United States Constitution. App. 47a (internal quotation marks omitted).

Petitioners appealed to the Environmental Division of the Vermont Superior Court. The Environmental Division, proceeding *de novo*, rejected petitioners' assertion of Act 250 jurisdiction, concluding that the mere change in aircraft type did not constitute a change in use for purposes of Act 250. App. 33a-36a.

Petitioners then appealed to the Vermont Supreme Court, again arguing that the siting of F-35As at BIA will substantially increase the noise generated by VTANG operations and that the application of Act 250 to the City's decisions about how to mitigate that increased noise was not preempted. The court held that no amended Act 250 permit is required because the increased noise caused by the siting of the F-35As "is not a cognizable change triggering the need for an amended permit because regulation of noise is preempted by federal law." App. 15a-16a. In rejecting petitioners' assertion that a State – through a generally applicable land-use statute – can regulate the choice of mitigation measures adopted by a municipality to reduce the impact of airport noise, the court held that "Congress has occupied the entire field of regulation related to aircraft noise, and attempts by local governments to enforce their police powers to control noise . . . are preempted." App.

17a. The court recognized that there is "some room for some local land-use regulation of airports," App. 18a (citing *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210-12 (2d Cir. 2011)), but held that "any attempt to regulate . . . aircraft noise is preempted by federal law," App. 19a (citing *In re Commercial Airfield*, 752 A.2d 13, 15-16 (Vt. 2000)).

REASONS FOR GRANTING THE PETITION

I. STATE AND FEDERAL COURTS ARE DIVIDED ON WHETHER THE FEDERAL AVIATION ACT PREEMPTS ALL STATE AND LOCAL LAND-USE REGULATIONS THAT ADDRESS AIRPORT NOISE

A. The Vermont Supreme Court Below And The Minnesota And Colorado Supreme Courts Hold That All State And Local Land-Use Regulations Aimed At Mitigating Airport Noise Are Preempted By The Federal Aviation Act

In the decision below, the Vermont Supreme Court categorically rejected petitioners' claim that respondents must obtain an Act 250 permit prior to siting F-35As at BIA because "any action to regulate a change in use to the F-35A would amount to an attempt to regulate noise and be preempted." App. 18a. Petitioners sought Act 250 jurisdiction over the change in airport use to ensure that respondents employ adequate and effective "mitigation measures to reduce the impact of the noise" of the new aircraft. *Id.* Those mitigation measures would not implicate flight patterns, flight times, or runway use or configuration. Rather, they would involve off-site land-use projects such as requiring berms or additional landscaping, or altering the determination of how many

and which nearby homes should be purchased and razed, or whether affected homes should be offered sound-proofing measures as an alternative to the purchase-and-raze option. *See* Appellants' Vt. Sup. Ct. Br. 4, 22-26; Appellants' Vt. Sup. Ct. Reply Br. 1-5; Appellants' Vt. Sup. Ct. Printed Case 293-94 (giving as examples of proposed mitigation the City of Chicago's soundproofing/purchasing of homes affected by O'Hare Airport). Nonetheless, the court below held that the mere fact that those off-site mitigation measures would be aimed at reducing airport-noise impacts means they are preempted by the Federal Aviation Act. *See* App. 17a ("In other words, Congress has occupied the entire field of regulation related to aircraft noise, and attempts by local governments to enforce their police powers to control noise . . . are preempted.").

In so holding, the court treated any regulation relating to airport noise as automatically preempted, with no other analysis required. *See* App. 18a-19a. It thus created a separate category from all other land-use regulations, which it had treated differently in an earlier case. *See In re Commercial Airfield*, 752 A.2d 13, 16 (Vt. 2000) (holding that "the federal government has not pervasively occupied the field of land-use regulations relating to aviation" and looking to the purpose and effect of Act 250 jurisdiction to determine that it was not preempted by the FAA).[6] In *Commercial Airfield*, the court indicated that it would follow a two-step analysis: (1) finding automatic preemption of any regulation concerning air

[6] *Commercial Airfield* also involved a question of the jurisdiction of Act 250 to developments at an airport, but there was no allegation that the Act 250 process would address airport-noise issues.

safety or aircraft noise, and (2) applying the purpose-and-effect test to any other regulation. In this case, the court reached only the first step of its analysis because it found that the requested relief was directed at aircraft noise.

The court below based its broad preemption holding in large part on an expansive reading of this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), stating that "[t]he U.S. Supreme Court has recognized that pursuant to federal statute, the FAA and the [EPA] have full control over the regulation of aircraft noise." App. 16a. The court expressly rejected petitioners' assertion that the *City of Burbank* dissent makes clear that "there is jurisdiction to impose mitigation measures to reduce the impact of the noise" by "not[ing] that Justice Rehnquist's characterization of the holding in *City of Burbank* is not binding as it comes from the dissent." App. 18a. Rather than applying the analysis that it had previously used to consider whether land-use regulations were preempted, the court below held that the issue was closed by the fact that the regulation here would address aircraft noise:

> Necessarily, however, any attempt to now set permit requirements to respond to [the change in aircraft] is a control aimed at regulating the noise created by the F-35A. *Even imposing restrictions to mitigate the effects of noise, such as requiring berms or additional landscaping, would be a regulation of the noise*. Such regulation is beyond the scope of Act 250 because it is preempted by federal law.

App. 19a (emphasis added).

The Minnesota Supreme Court has adopted a similarly expansive view of the preemptive effect of the Federal Aviation Act over state and local land-use regulations addressing airport noise. *See State v. Metropolitan Airports Comm'n*, 520 N.W.2d 388 (Minn. 1994). In *Metropolitan Airports Commission*, the court held that the Act preempted the application of generally applicable noise standards to the operation of the Minneapolis-St. Paul International Airport. *Id.* at 393. In so holding, the Minnesota Supreme Court rejected the lower court's conclusion that the noise standards were not preempted "[b]ecause the state noise standards do not purport to control aircraft flight or operations and need not be so applied." *Id.* at 390. Instead, the state supreme court held that, "although the noise standards do not expressly require any direct control of aircraft operations," they are preempted because the State had failed to prove that the Metropolitan Airports Commission could comply with the noise standards "without substantially reducing aircraft operations at [the airport], converting the surrounding residential areas to nonresidential uses, or moving the airport." *Id.* at 392.

Like the court below, the Minnesota Supreme Court based its holding on the "broad preemptive language of [*City of*] *Burbank*." *Id.* at 391. It first characterized the issue in *City of Burbank* expansively as "whether state regulation of aircraft noise is preempted by federal law." *Id.* at 390. It then quoted and relied on the broadest language from that decision. *See id.* ("[T]he Court struck down the curfew ordinance reasoning that the Noise Control Act 'reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control

over aircraft noise, pre-empting state and local control.'") (quoting 411 U.S. at 633); *id.* ("The Court reasoned that 'the pervasive nature of the scheme of federal regulation of aircraft noise' indicated Congressional intent to preempt the states in this area.") (quoting 411 U.S. at 633). Based on this over-reading of *City of Burbank*, the court held that the Federal Aviation Act preempts state land-use regulations aimed at mitigating airport noise, even if those regulations can be complied with via off-site land-use changes (e.g., converting residential uses to non-residential uses). *Id.* at 392-93.

The Colorado Supreme Court, sitting en banc, also has read *City of Burbank* to foreclose all state and local land-use regulation aimed at addressing airplane noise. *See Banner Adver., Inc. v. People*, 868 P.2d 1077 (Colo. 1994). In *Banner Advertising*, the court held that a section of the Boulder City Code prohibiting commercial signs towed by aircraft was preempted by the Federal Aviation Act. *Id.* at 1083. The court explained that "[t]he purposes behind the Boulder ordinance add further support to the conclusion that the ordinance is preempted by federal law," because "[t]he stated purpose for the Boulder ordinance is that the overflights of aircraft towing banners . . . are a source of noise" and "[t]he United States Supreme Court has ruled that a local government may not enact legislation that attempts to restrict airplane noise because that field is in the exclusive domain of the federal government." *Id.* (citing *City of Burbank*).

B. A Categorical Finding Of Preemption For Any Noise-Related Regulation Is Inconsistent With The Second Circuit's Analysis For Determining Whether Land-Use Regulations Are Preempted

The Second Circuit does not apply the categorical, two-step analysis used by the Vermont Supreme Court. In determining whether federal aviation law preempts a land-use regulation, the Second Circuit does not set aside any category of land-use regulation (such as the regulation of airport noise) as automatically preempted. It instead analyzes the purpose and effect of the law in question to determine whether it interferes with federal regulation of aviation.

In *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2d Cir. 2011), the Second Circuit held that "Congress intended to occupy the field of air safety," but noted that "concluding that Congress intended to occupy the field of air safety does not end our task." *Id.* at 210. Quoting *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992), it stated: "'The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted.'" 634 F.3d at 211 (quoting 505 U.S. at 107).

In *Goodspeed*, an airport sued for a declaratory judgment that it was not subject to Connecticut law and municipal regulations that required it to obtain a permit before cutting down trees in a protected wetland. The privately owned airport contended that some of the trees it wished to cut down fell within the definition of "obstructions to air navigation" under FAA regulations. *Id.* at 208. Thus, it argued, any state or municipal limit on removing those trees

was preempted by federal law. The court held that the permit requirement was a generally applicable environmental law that did not significantly interfere with any federal regulation and therefore was not preempted.

If this case had been heard in federal court instead of the Vermont state courts, Second Circuit precedent would have required the court to assess the purpose and effect of Act 250 as a general land-use regulation to determine whether its application to off-airport sound-mitigation projects interferes with federal regulation of aviation. As discussed below, courts that have applied similar analyses to land-use regulations involving noise controls have in many cases found those regulations not preempted. Yet, in Vermont state court, that case-specific analysis was never done. Once the state law at issue was identified as targeting airport noise, the court automatically held it to be preempted. That conflict between the Vermont Supreme Court and the Second Circuit alone warrants a grant of certiorari.

C. Numerous Federal Circuits And The New Jersey Supreme Court Have Rejected Preemption Challenges To General Land-Use Regulations Aimed At Mitigating Airport Noise

The existence of other court decisions disagreeing with the Vermont Supreme Court's approach also justifies this Court's plenary review. The Sixth Circuit's decision in *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996), illustrates how the application of standard preemption analysis leads a court to reject preemption challenges to general state and local land-use regulations aimed at addressing aviation noise. In *Gustafson*, the court upheld a city

ordinance prohibiting the operation of seaplanes on the surface of Lake Angelus. The ordinance was adopted, in part, to address noise concerns. *Id.* at 781. The *Gustafson* district court had "relied heavily" on *City of Burbank* in holding that the city's ordinance was preempted due to the "pervasive federal regulation of the field." *Id.* at 783-84. But the Sixth Circuit concluded that "the district court read *Burbank* much too broadly in finding it to be dispositive in the present case." *Id.* at 784.

In contrast to the *Gustafson* district court and the Supreme Courts of Vermont, Minnesota, and Colorado, the Sixth Circuit began its preemption inquiry by observing that "this court must 'start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless there [is a] clear and manifest purpose of Congress.'" *Id.* at 787 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alterations in original). The court then evaluated the Federal Aviation Act and implementing regulations in detail and concluded that "the designation of plane landing sites is not pervasively regulated by federal law, but instead is a matter left primarily to local control." *Id.* at 784.

The Sixth Circuit found further support for its limited view of the preemptive scope of the Federal Aviation Act in this Court's decision in *City of Burbank*. *See id.* at 787 ("This limitation on the preemptive impact of the FAA is also found in the Supreme Court's opinion in *Burbank*."). The Sixth Circuit quoted the dissent's observation that "'[a] local governing body could . . . use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within

its territorial jurisdiction by declining to grant the necessary zoning for such a facility.'" *Id.* (quoting 411 U.S. at 653 (Rehnquist, J., dissenting)). It then noted that "[t]he majority in *Burbank* did not disagree with this conclusion and indicated that its holding was limited to the regulation of aircraft noise." *Id.*

Finally, the Sixth Circuit noted that other courts had recognized the distinctions (1) between adopting direct noise-control regulations and adopting land-use regulations aimed at addressing noise; and (2) between regulating navigable airspace and controlling ground usage. It concluded that the Federal Aviation Act preempted the former types of regulation but not the latter. *See id.* at 789 (citing *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (per curiam); *Wood v. City of Huntsville*, 384 So.2d 1081 (Ala. 1980); *Harrison v. Schwartz*, 572 A.2d 528 (Md. 1990)). Thus, in concluding that general land-use regulation prohibiting the operation of seaplanes is not preempted even if it is aimed in part at addressing aviation noise, the Sixth Circuit properly read *City of Burbank* and applied the correct preemption analysis to uphold the city ordinance.

Many other courts have analyzed the scope of federal preemption to find state land-use regulations not preempted. In *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005), for example, the Seventh Circuit upheld a city ordinance requiring a landowner to phase out the use of his land as a heliport within five years. In holding that the ordinance was not preempted, the court stated:

> The Clear Lake ordinance is a land use, or zoning, ordinance, not a flight pattern regulation. We are not convinced that Congress meant to take the siting of air fields out of the hands of local officials. The siting of an airfield – so long as it does not interfere with existing traffic patterns, etc. – remains an issue for local control.

Id. at 697. Distinguishing general land-use ordinances from those that impose curfews or otherwise interfere with air traffic patterns, the court pointed out that the latter "involve issues which reach far beyond a single local jurisdiction and which cannot sensibly be resolved by a patchwork of local regulations." *Id.* at 698; *see id.* ("It would be unmanageable – say nothing of terrifying – to have local control of flight routes or of flight times."). In contrast, the court noted, "[t]he situation before us involves a local land use issue, which is clearly left to local control." *Id.* at 699.

Similarly, in *Condor Corp. v. City of St. Paul*, the Eighth Circuit rejected a preemption challenge to the city's denial of Condor's application for a conditional-use permit to operate a heliport. The denial was based in part on the city's conclusion that it would not be able adequately to address the noise concerns of neighborhood groups opposed to the heliport. 912 F.2d at 218. In concluding that the zoning ordinance as applied to Condor was not preempted, the Eighth Circuit stated that "[w]e see no conflict between a city's regulatory power over land use, and the federal regulation of airspace." *Id.* at 219.

In an unpublished opinion, the Fourth Circuit affirmed a published district court decision that drew the same distinction between regulations aimed at controlling aircraft noise at its source, which are

preempted, and general land-use regulations aimed at mitigating airport noise, which are not. *See Faux-Burhans v. Board of Cnty. Comm'rs*, No. 88-3929, 1988 WL 97345 (4th Cir. Sept. 9, 1988) (judgment noted at 859 F.2d 149). The district court had upheld extensive local zoning restrictions on the operation of a private airfield that included limits on the number and type of aircraft that could use the field and the imposition of set-back requirements. *See Faux-Burhans v. County Comm'rs of Frederick Cnty.*, 674 F. Supp. 1172, 1174 (D. Md. 1987). The court reasoned that, unlike airport restrictions that had been held to be preempted by other courts, "[t]he ordinance in question does not regulate noise emissions or the actual conduct of flight operations within navigable airspace." *Id.* Rather, the court asserted, limitations imposed on the airport involved "all areas of valid local regulatory concern, none of which is federally pre-empted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace." *Id.* Finally, the district court concluded, "just as certainly, no federal law gives a citizen the right to operate an airport free of local zoning control." *Id.* In affirming the district court, the Fourth Circuit referred to the district court's "well-reasoned opinion." 1988 WL 97345, at *2.

As long ago as 1978, the New Jersey Supreme Court arrived at the same conclusion as the Eighth Circuit in *Condor*. In *Garden State Farms, Inc. v. Bay*, 390 A.2d 1177 (N.J. 1978), the court upheld a local zoning ordinance that prohibited the use of land within the municipality as a heliport. *Id.* at 1179. The court first noted that there were not "express statements of congressional intent . . . to preempt local regulation of the placement of . . . heliports,"

and then concluded that it could "discern no federal constitutional or statutory sources for implying a congressional intention to preempt this field." *Id.* at 1181. The court then cited *City of Burbank* in concluding that, "[w]hile it is clear that state and local authority over the 'operation and navigation of aircraft' is supplanted by . . . federal regulation, significant local power over ground operations of aircraft remains viable." *Id.* (citations omitted).

Courts that have struck down state and local regulations attempting to impose flight curfews or otherwise control aircraft operations also have recognized the distinction between such preempted regulations and general land-use regulations aimed at addressing noise that would not be preempted. For example, in 1981, the Ninth Circuit invalidated a California statute that directed airports to adopt aircraft flight curfews if aircraft noise exceeded certain preset levels. *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d at 1308. In concluding that the statute was preempted, the Ninth Circuit found that, just as in *City of Burbank*, "a governmental entity was attempting to impose a mandatory curfew on an unwilling airport proprietor." *Id.* at 1312. But the Ninth Circuit took care to distinguish the curfew at issue in that case (and other attempts directly to control the source of aircraft noise) from state and local regulations aimed at mitigating airport noise off-site. Those off-site mitigation regulations, the court stated, are not preempted:

> An object causing noise can be controlled directly, either by restricting its use or by prescribing noise emission standards. Quite independently of source control the effects of noise may be mitigated. Examples of such steps are

> compensating those adversely affected, using the zoning power to assure harmonious development, baffling existing noise, or resettling those affected by the noise.
>
> As we read *City of Burbank*, Congress has preempted only local regulation of the source of aircraft noise. Local governments may adopt abatement plans that do not impinge on aircraft operations.

Id. at 1313-14 (citation and footnotes omitted).

The Maryland Court of Appeals drew a similar distinction in striking down a conditional-use permit for a privately owned airport that included limitations on the frequency of take-offs of glider-towing aircraft and a curfew for the operation of those aircraft aimed at addressing neighbors' noise concerns. *See Harrison v. Schwartz*, 572 A.2d at 535. While concluding that "[l]ocal government may not adopt noise abatement plans that impinge on aircraft operations," the court also noted that "[a] zoning ordinance that does not regulate aircraft noise emissions or the actual conduct of flight operations may withstand a preemption argument." *Id.* at 534. *See also Wood v. City of Huntsville*, 384 So.2d at 1083 (upholding a nuisance action over a preemption challenge and stating that, "[w]hile it is true that Congress . . . has extensively and exclusively regulated use of the navigable air space in the United States, . . . state and local governments retain substantial control over some aspects of aviation, particularly ground usage") (citation omitted).

D. Commentators Have Recognized The Confusion Over The Preemptive Scope Of The Federal Aviation Act After *City of Burbank*, Further Indicating That This Court's Guidance Is Needed

Several commentators have explored the issues raised by the unresolved scope of federal preemption over general state and local land-use laws, in particular with respect to laws and regulations addressing noise concerns of nearby residents. *See*, *e.g.*, Luis G. Zambrano, Comment, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise*, 66 J. AIR L. & COM. 445, 461 (2000) ("Over the last fifty years, courts have attempted to determine how to balance the power of the Federal government to regulate commerce through its statutory framework, and municipalities' police power to regulate aircraft noise on its citizens' behalf."); Falzone, 26 B.C. ENVTL. AFF. L. REV. at 789 ("Much of the confusion surrounding the regulation of airport noise pollution is the product of a difficult balance between state and federal powers."). *See also* Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 657-58 (2012) ("Courts are divided on how far beyond *Burbank*'s preemption of aircraft noise regulation to extend the berth of implied field preemption under the federal aviation statutes.") (discussing and citing aircraft-safety and pilot-training cases); J. Scott Hamilton, *Allocation of Airspace as a Scarce National Resource*, 22 TRANSP. L.J. 251, 282 (1994) ("[I]t is interesting to note 20 years after the Court's supposedly definitive answer in *Burbank*, the holding has been questioned in a number of recent cases.").

II. THE VERMONT SUPREME COURT ERRED IN HOLDING THAT ALL STATE AND LOCAL LAND-USE REGULATION AIMED AT ADDRESSING AIRPORT NOISE IS PREEMPTED BY THE FEDERAL AVIATION ACT

"The Supremacy Clause provides that 'the Laws of the United States' (as well as treaties and the Constitution itself) 'shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015) (quoting U.S. Const. art. VI, cl. 2) (ellipsis in original). Congress thus can preempt state law through federal legislation. This Court has explained that such preemption can occur in one of three ways. First, Congress can preempt state law through express language in a statute. *See id.* at 1595. Second, even when Congress has not expressly stated its intent to preempt state law, "conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" *Id.* (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989)). Finally, under this Court's theory of field preemption, "Congress may have intended 'to foreclose any state regulation in the *area*,' irrespective of whether state law is consistent or inconsistent with 'federal standards.'" *Id.* (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012)) (emphasis added in *Oneok*), thereby prohibiting States from taking action in the field that the federal statute preempts. As this Court has made clear, though, "[i]n preemption analysis, courts should assume that

'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

The Federal Aviation Act does not expressly preempt state and local general land-use regulations aimed at controlling noise. In *City of Burbank*, this Court made clear that "[t]here is, to be sure, no express provision of pre-emption in the [Noise Control Act of 1972]." 411 U.S. at 633. Since the Court decided *City of Burbank* in 1973, Congress has added only one express preemption provision to the Act. That provision, which was aimed at deregulating airline routes and rates, prohibits state and local governments from enacting any law or regulation "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1); it does not expressly preempt regulations aimed at addressing airport noise.

Similarly, this case does not implicate conflict preemption. The case was resolved after a denial of jurisdiction by the state district environmental commission. Thus, there has been no Act 250 analysis and no formulation of mitigation measures that might be attached to an Act 250 permit. Therefore, there could have been no finding that any particular permit condition conflicts with any provision of the Federal Aviation Act. *See*, *e.g.*, *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666-67 (2003) (plurality) (declining to find conflict preemption of a state prescription rebate program

because, "[a]t this stage of the proceeding, the severity of any impediment that Maine's program may impose on a Medicaid patient's access to the drug of her choice is a matter of conjecture").

Finally, Congress has not so occupied the field of aircraft and airport noise control as to preempt *all* generally applicable land-use regulations aimed at addressing airport noise. *City of Burbank* held that Congress had regulated in the field of aircraft noise so as to preempt state and local attempts to control the times at which aircraft can take-off and land. *See* 411 U.S. at 638 ("[T]he pervasive control vested in EPA and in FAA under the [Noise Control Act of 1972] seems to us to leave no room for local curfews or other local controls."). That holding followed from the need for a unified national approach to flight scheduling. *See id.* at 639 ("If [the Court] were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow.").

But that holding does not extend to the situation here, in which petitioners merely ask that local land-use measures be taken to mitigate the expected noise from use of the F-35As.

Field preemption should not be lightly implied, and the scope of such preemption should be carefully circumscribed. *See*, *e.g.*, *Oneok*, 135 S. Ct. at 1599 (the Court "must proceed cautiously, finding pre-emption only where detailed examination convinces [it] that a matter falls within the pre-empted field"). In determining whether a state regulatory scheme is preempted by a federal statute, "[t]he key question is . . . at what point the state regulation sufficiently

interferes with federal regulation that it should be deemed pre-empted." *Gade*, 505 U.S. at 107; *see id.* at 105-07 (explaining that field preemption analysis should consider both the purpose of state laws and their effect on the regulated field). And a facial challenge to a general permitting process such as this can prevail only if there is no possible set of conditions under which the state permitting process can avoid preemption. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987).

The structure of federal law concerning aircraft noise demonstrates that the preempted field of noise regulation is quite narrow. Since *City of Burbank*, Congress has added several provisions to the Federal Aviation Act making clear that federal regulation of airport noise supplements, rather than supersedes, state and local land-use regulations. One stated purpose of the Quiet Communities Act of 1978, for example, is "[t]o promote the development of effective State and local noise control programs." 42 U.S.C. § 4913. The statute authorizes the EPA to "administer a nationwide Quiet Communities Program," *id.* § 4913(c), under which the EPA can issue grants to local entities "for the purpose of . . . planning, developing, and establishing a noise control capacity in [the local] jurisdiction," "developing abatement plans for areas around major transportation facilities," and "evaluating techniques for controlling noise," *id.* § 4913(c)(1)(B)-(D).

Similarly, the Aviation Safety and Noise Abatement Act of 1979 envisioned a dual role for federal and state regulators to address the problem of airport noise. The Secretary of Transportation was directed to establish a unified system of measuring airport noise and to identify land uses that are normally compatible with exposure to such noise. *See* Pub.

L. No. 96-193, § 102, 94 Stat. 50 (codified as amended at 49 U.S.C. § 47502). The Act makes federal funds available to airport operators to prepare "noise exposure maps" to detail the noise-exposure levels around the airport and encourages operators to work with the surrounding communities to develop airport-compatible land uses based in part on the noise-exposure levels outlined in these maps. *See id.* §§ 103-104, 94 Stat. 50-53 (codified as amended at 49 U.S.C. §§ 47503-47504). The procedures for undertaking a noise study and creating a noise-compatibility program are set forth in 14 C.F.R. Part A150. That regulation makes clear that federally funded noise-compatibility programs do not supplant state and local land-use planning regarding airport noise:

> The designations contained in this table do not constitute a Federal determination that any use of land covered by the program is acceptable or unacceptable under Federal, State, or local law. The responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities. FAA determinations under Part 150 are not intended to substitute federally determined land uses for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses.

14 C.F.R. Pt. A150 note a.

Those provisions contemplate a role for state and local planning to complement federal regulation of noise and demonstrate that Congress did not intend to occupy the field of airport noise regulation to

the exclusion of state and local land-use planning aimed at addressing the impact of airport noise on surrounding communities. *Cf. California Coastal Comm'n*, 480 U.S. at 584 ("It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as with federal law, an intention to pre-empt all state regulation of unpatented mining claims in national forests."). Thus, even though the purpose of the Act 250 permitting requirements in this case concerns noise reduction, those permitting requirements are not necessarily preempted. Many possible permitting conditions would not sufficiently interfere with federal laws and regulation to be preempted. The court below accordingly erred in holding that any permitting requirement under Act 250 was preempted.

III. WHETHER ALL STATE AND LOCAL LAND-USE REGULATION AIMED AT ADDRESSING AIRPORT NOISE IS PREEMPTED BY THE FEDERAL AVIATION ACT IS AN IMPORTANT ISSUE WARRANTING THIS COURT'S ATTENTION, AND THIS CASE PROVIDES AN IDEAL VEHICLE FOR ADDRESSING THE ISSUE

Airport noise, in particular how to protect area residents from harmful exposure to airport noise while accommodating the growing demand for aircraft travel, has long been a problem in the United States. As the FAA noted in 1998, "[a]ircraft noise is a serious problem for communities around airports." 63 Fed. Reg. 27,876, 27,876 (May 21, 1998). *See also* Zambrano, 66 J. AIR L. & COM. at 445.

Airport noise is not just inconvenient; it is unhealthy. A comprehensive review of the literature

confirms that exposure to transportation noise correlates with "[p]otentially serious health outcomes" including "heart disease and hypertension" from both sleep disturbances and daytime exposure. *See*, *e.g.*, Hales Swift, *A Review of the Literature Related to Potential Health Effects of Aircraft Noise*, PARTNER Project 19 Final Report at 62 (July 2010), *available at* http://web.mit.edu/aeroastro/partner/reports/proj19/proj19-healtheffectnoise.pdf. Similarly, a 2013 study found "that aircraft noise . . . is statistically significantly associated with higher relative rate of hospitalization for cardiovascular diseases among older people residing near airports." Andrew W. Correia et al., *Residential Exposure to Aircraft Noise and Hospital Admissions for Cardiovascular Diseases: Multi-Airport Retrospective Study*, BMJ 2013;347:f5561 doi: 10.1136/bmj.f5561, at 6 (Oct. 8, 2013), *available at* http://dash.harvard.edu/bitstream/handle/1/11879535/3805481.pdf?sequence=1. *See also* Falzone, 26 B.C. ENVTL. AFF. L. REV. at 769-70 ("Airport noise pollution is a widespread and growing problem in the United States. . . . Since the introduction of commercial jets in 1958, the noise problem generated from airport operation has become increasingly widespread, affecting millions of Americans. For some, the noise emitted from aircraft is merely an unwanted nuisance that intrudes on their everyday life. For others, however, aircraft noise is a factor that has been found to cause psychological and physiological damage to health and well-being.") (footnote omitted). As population pressures around existing airports increase, the role of state and local land-use regulations in preventing the development of incompatible uses near airports and to protect existing residential uses from harmful noise exposure becomes increasingly important.

At the same time, the aviation industry is an ever more important component of the Nation's economy. As of 2008, the aviation industry contributed approximately $640 billion annually to the United States economy. *See* Rachel Girvin, FAA, Office of Env't & Energy, *Addressing Airport Community Noise Impacts: FAA's Current Efforts and Future Plans* 1 (July 2008), *available at* http://www.faa.gov/about/office_org/headquarters_offices/apl/research/science_integrated_modeling/media/FAANoiseProjects_Plans_Girvin.pdf. The industry generated about 9 million domestic jobs in 2008 with wages totaling approximately $314 billion. *See id.* The FAA forecasts that the aviation industry will double its passenger traffic and triple the amount of cargo it transports between 2000 and 2025. *See id.* Accommodating that growth will require increased airport capacity, which will necessarily implicate state and local land-use regulations aimed at addressing harmful noise in surrounding neighborhoods.

The ongoing confusion over the scope of federal preemption of state and local land-use regulation under the Federal Aviation Act warrants this Court's attention, and this case provides an ideal vehicle for providing further guidance. Petitioners sought a general jurisdictional order establishing the applicability of the Act 250 permitting process to the siting of F-35As at BIA for the purpose of determining what off-site mitigation measures should be adopted. The Vermont Supreme Court rejected petitioners' request solely based on its conclusion that "any action to regulate a change in use to the F-35A would amount to an attempt to regulate noise and be preempted." App. 18a. Thus, the issue is cleanly presented and dispositive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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