No. 15-156

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**

## BRIEF IN OPPOSITION FOR RESPONDENT CITY OF BURLINGTON, VERMONT

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## QUESTION PRESENTED

Petitioners, local residents, object to the increase in takeoff and landing noise that is projected to result from the United States Air Force's decision to replace F-16 fighter jets currently housed at the Vermont Air National Guard Base, located adjacent to and on land leased from Burlington International Airport in Vermont, with newer F-35A fighter jets. Petitioners claimed that the city-owned Airport, which has no power to control the shift in military aircraft or regulate military aircraft landings, is obligated under Vermont land use law to obtain a permit amendment and to make expenditures to mitigate that noise. State environmental regulators concluded that Vermont law, which is triggered by new developments and material changes in use, was not implicated, and that decision was upheld by the state's environmental review court. The Vermont Supreme Court affirmed, unanimously, concluding that petitioners' claim was in any event foreclosed by *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34 (1973), where this Court held that Congress intended for the federal government to occupy the field with respect to regulation of aircraft noise. Was that decision correct?

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## INTRODUCTION

Petitioners seek this Court's review of a unanimous decision of the Vermont Supreme Court holding (in accord with prior rulings of the state trial court and environmental regulators) that the United States Air Force's decision to replace fighter jets operating pursuant to decades-old agreements, at a base located adjacent to a city-owned airport in Vermont, with a later-generation class of fighter jets did not trigger requirements of Act 250, a Vermont land use statute which requires a permit for certain private, municipal, or state actions deemed to constitute "development" within the meaning of the Act.

The court below concluded that the Federal Government's decision to change the type of military aircraft using the runway at the Burlington International Airport (BIA) does not constitute a "material change" to existing development under Act 250, and therefore the City of Burlington was not required to seek an amendment to its existing Act 250 land-use permit, which has never regulated noise from any type of plane – commercial or military – over the past 35+ years. The only activity at issue here is the Air Force's decision to change the type of military plane using BIA runways from F-16s to F-35A joint strike fighters. The City does not have control over the type of plane the Air Force bases in Burlington, and the project does not involve any activity on the part of the City of Burlington or any physical changes to BIA runways. Petitioners, who oppose the Air Force basing decision and have a separate appeal of the

federal government's basing decision pending in U.S. District Court, brought this case to attempt to compel the State of Vermont to assert regulatory authority over the federal activity by requiring changes to the airport's Act 250 permit. The Vermont Supreme Court concluded that the proposed federal activity was not a cognizable "change" to the airport's existing Act 250 permits under state law, because any attempt to trigger state regulatory review based purely on the change in noise generated by federal military aircraft using the airport was preempted under federal law.

This case is thus unlike most other airplane (and helicopter) noise preemption cases. It does not involve commercial aircraft, but rather turns solely on federal military activities. It also does not involve local or state actors attempting to impose local or state regulations on an airport or commercial carrier. Rather, this case stems from an attempt by F-35 opponents to force the State of Vermont to insert itself into an inherently federal activity by requiring the City to make changes to its state land-use permit in order to control noise from the F-35s, even after the State expressly disclaimed such authority under state law, and despite the fact that the City has no control over the federal activity.

The state court's decision that federal law preempted efforts to compel the City of Burlington to regulate noise from the Air Force jets is correct, and fully consistent with this Court's decision in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34 (1973), which held that state regulation of

aircraft noise is preempted. Petitioners' samplings of a wide diversity of cases involving aircraft or airports (many not involving noise regulation at all), do demonstrate that lower courts have sometimes found preemption, and sometimes not; but that demonstration fails to show a split of authority on the legal principles governing federal preemption of local regulation of aircraft noise. Instead they show the application of those federal preemption principles in a variety of factual situations. And even if Petitioners were able to tease out of the different *outcomes* courts have reached under highly diverse facts over the four decades since *Burbank*, there is no sign that any jurisdiction would reach a different result in the unusual circumstance of this case, which involves distinctly strong federal interests in the operations of military aircraft, and in which no state or local body asserts an interest in applying state or local law to control noise. Further review is not warranted.

## STATEMENT

1. In 1971, the Vermont Legislature enacted Act 250, "to protect Vermont's lands and environment by requiring statewide review of 'large-scale changes in land utilization.'" *In re Audet*, 2004 VT 30, ¶ 13, 176 Vt. 617 (mem.) (2004) (quoting *Comm. to Save Bishop's House, Inc. v. Med. Ctr. Hosp. of Vt., Inc.*, 137 Vt. 142, 151 (1979)); *see also In re Pilgrim P'ship*, 153 Vt. 594, 596 (1990) (noting one purpose of Act 250 is "to insure that lands and environment are devoted to

uses which are not detrimental to the public welfare and interests") (quotation omitted). Under Act 250, a "person" that proposes land "development" must obtain a permit. 10 V.S.A. § 6081(a). State and municipal entities are "persons" under the Act; federal entities are not. *Id.* § 6001(14)(A). "Development" for a municipal project is defined as "[t]he construction of improvements on a tract of land involving more than 10 acres that is to be used for municipal, county, or state purposes." *Id.* § 6001(3)(A)(v).

A permit is also required when a "substantial change" is made to a "preexisting" development. *Id.* § 6081. Under regulations implementing Act 250, when a development has already been issued a permit, an amendment to that permit may be required if a "material change" is made to the Project. *See* Natural Resources Board, Act 250 Rules, Rule 34(A), Pet. App. 82a. Under state law, a "material change" is a change which has a significant impact on any finding, conclusion, or term or condition of the permit, or which may result in a significant adverse impact under any of the ten substantive Act 250 criteria. *See* Pet. App. 13a-14a (citing Act 250 Rule 34(A)-(B), Pet. App. 82a).

Act 250 calls for a public, substantive evaluation of regulated development proposals. The Act provides for "a public, quasi-judicial process for reviewing and managing the environmental, social, and fiscal consequences of major subdivisions and development in

Vermont through land use permits."[1] No covered development may proceed unless the project is shown to satisfy ten substantive environmental and public policy-based criteria.[2] 10 V.S.A. § 6086(a). Among these criteria are several relating to noise. Based on this review, an Act 250 permit may contain reasonable requirements and conditions "as are allowable proper exercise of the police power." *Id.* § 6086. Act 250 is administered by the Natural Resources Board, a sub-agency of the Vermont Department of Environmental Conservation.

The Vermont Supreme Court has held that airport owners must secure an Act 250 permit before engaging in covered "development" activity, rejecting claims that federal law "occupied the field of land-use regulations relating to aviation," *In re Commercial Airfield*, 170 Vt. 595, 597 (mem.) (2000). The airport at issue in this case, the Burlington International Airport (BIA), holds numerous land-use permits and amended permits under Act 250. Pet. App. 24a. None

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[1] Vermont Natural Resources Board – Act 250 Factsheet, *available at* http://www.anr.state.vt.us/dec/permit_hb/sheet47.pdf.

[2] These criteria include a determination that the subdivision or development will not cause or adversely affect: (1) undue water or air pollution; (2) sufficiency of water; (3) burden on an existing water supply; (4) unreasonable soil erosion; (5) congestion or unsafe transportation conditions; (6) burden on municipal educational services; (7) burden on municipal or governmental services; (8) adverse effect on the scenic or natural beauty of an area, aesthetics, historic sites or rare and irreplaceable natural areas; (9) conformity with land use plans; and (10) conformity with local or regional plans.

of the airport's Act 250 permits, however, regulates commercial or military aircraft operations, or aircraft noise. Pet. App. 24a.

2. Throughout most of the history of aviation in the United States, regulations touching on aircraft operations have been understood to implicate uniquely strong federal interests. *See, e.g., Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."). Aircraft noise regulation, in particular, has long been understood to be a topic for federal law. In *Burbank*, 411 U.S. at 633, the Supreme Court held that a city ordinance imposing a curfew on jet aircraft flights was preempted due to the "pervasive nature of the scheme of federal regulation of aircraft noise." Among other things, the Court pointed to provisions of the Federal Aviation Act, as amended by the Noise Control Act of 1972, that set out a "comprehensive scheme of federal control of the aircraft noise problem," and under which the FAA and EPA were obligated to provide measures to control aircraft noise. *See id*. at 628-29 (discussing, inter alia, various provisions of 49 U.S.C. § 1431(b) (1970 ed., Supp. II); *id.* at 633 (noting that the Noise Control Act of 1972 "reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control

over aircraft noise, pre-empting state and local control").

Since *Burbank* articulated its strong rule of preemption of local regulation of aircraft noise, Congress has enacted numerous further provisions to address the recognized problem of airport noise, and has established an intricate program of noise-related airport planning. *See, e.g.*, Quiet Communities Act of 1978, 42 U.S.C. § 4913; Aviation Safety and Noise Abatement Act of 1979 (ASNA), 49 U.S.C. § 47501 *et seq*.; Airport Noise and Capacity Act of 1990, codified at 49 U.S.C. § 47521 *et seq*. Among other such programs, in the ASNA, Congress directed the Secretary of Transportation to "establish a single system of measuring noise" from aircraft operations and noise exposures, 49 U.S.C. § 47502; required identification of land uses that are "normally compatible" with various levels of noise exposure, *id.*; authorized airport operators to prepare "noise exposure maps," based on the system mentioned above, that detail the incompatible land uses near airports, *id*. § 47503, required airport operators to prepare a noise compatibility program for Secretarial approval that may include "restricting the use of the airport by a type or class of aircraft because of the noise characteristics of the aircraft," *id.* § 47504(a)(2)(B), and included entitlements to federal grants for measures by airport operators intended to reduce incompatible land uses, such as acquiring property in the too-noisy area, *id*.

§ 47504. Congress has not altered the preemption rule established in *Burbank*.[3]

3. BIA, a commercial airport owned by the City of Burlington, Vermont, is located on land within the City of South Burlington and has been the site of aircraft operations since 1920. Pet. App. 24a. The Vermont Air National Guard (VTANG) base is situated on 280 acres of land adjacent to the airport. Pet. App. 25a. For over 70 years, the City has leased land to the Air Force to allow the Air Force and VTANG to use BIA's runways to conduct military flight operations. *See* Pet. App. 24a. During the past 75 years, the VTANG has flown various planes out of BIA including F-51D Mustangs in the 1950s, F-94 Starfires in the 1960s, EB-57 Canberras in the 1970s, F-4 Phantoms in the 1980s, and F-16s since 1986.[4] Since passage of Act 250 in 1970, BIA has obtained numerous Act 250 permits and permit amendments, but none of the permits contain any conditions related to military aircraft usage, or noise from military or commercial aircraft. Pet. App. 24a.

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[3] In 1978, in the Airline Deregulation Act (ADA), Congress expressly preempted state and local regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1), while exempting state and local governments' authorities as airport owners "carrying out [their] proprietary powers and rights," *id.* § 41713(b)(3).

[4] For history of the 158th Fighter Wing of the VTANG *see* http://www.globalsecurity.org/military/agency/usaf/158fw.htm (last visited Sept. 30, 2015).

In the early 1980s, local citizens commenced administrative proceedings urging that the construction of improvements at the VTANG base associated with the replacement of EB-57 aircraft with F-4 fighter jets required environmental review and permitting under Act 250. The Vermont environmental regulatory agency ruled that Act 250 was inapplicable to the switch of aircraft at that time because the project had a "federal purpose" – namely facilitating military flight operations at the base and airport – and was not for state purposes within the meaning of Act 250. *See* Pet. App. 31a (discussing *Re: Vt. Air Nat'l Guard, Findings of Fact*, Declaratory Ruling No. 134, at 3 (Vt. Envtl. Bd. July 20, 1982)).

4. Since 1986, F-16 fighter jets have been based at the Vermont Air National Guard Base, and have used one of BIA's runways. Pursuant to directives from Congress and the Secretary of Defense to develop the "Joint Strike Fighter Program," the Air Force is charged with developing the F-35A combat program, which employs a new generation of fighter aircraft to replace the F-16. Pet. App. 25a. The U.S. Government has identified the development and fielding of the F-35A as one of its "priority defense programs." Record of Decision (ROD) for the F-35A Operational Basing Environmental Impact Statement, Pet. App. 51a. Part of this obligation is to determine where these new jets should be based in order to best serve the national defense.

The Air Force controls the beddown decision "and also controls the scope of construction and improvements" wherever military jets beddown. Pet. App. 28a. The Air Force considered six different locations as possible sites for the F-35As, including the Burlington Air Guard Station. In considering various basing options for the F-35As, the Air Force sought "to efficiently and effectively maintain combat compatibility and mission readiness as the Air Force faces deployment across a spectrum of conflicts while also providing for homeland defense." Final United States Air Force F-35A Operational Basing Environmental Impact Statement, Vol. I at pp. i, 1-6 (September 2013) (hereinafter FEIS).[5] In connection with the F-35A siting decision, the Air Force, together with cooperating agencies, performed an environmental impact analysis in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*.

As part of this federal environmental review, the Air Force analyzed the noise impacts associated with the F-35 As, including evaluations of metrics such as Maximum Sound Level, Sound Exposure Level, Day-Night Average Sound Level, Onset-Rate Adjusted Day-Night Average Sound Level, as well as supplemental noise analyses that considered speech interference, sleep disturbance, potential for hearing loss, workplace noise, subsonic aircraft noise, and supersonic

[5] *Available at* http://www.158fw.ang.af.mil/shared/media/document/AFD-140527-005.pdf (last visited Sept. 30, 2015).

aircraft noise. FEIS, § 3.3 at 3-7 to 3-11. The Air Force undertook modeling to evaluate how the aircraft noise would affect communities in the potential basing sites, including the communities around the Burlington airport (FEIS, § BR 3.2).

In late 2013, the Air Force issued its Record of Decision (ROD) for the F-35A Operational Basing Environmental Impact Statement, reporting its decision "to base eighteen (18) F-35A aircraft with associated construction at Burlington Air Guard Station in Vermont to accommodate aircraft anticipated to start arriving in 2020." Pet. App. 52a-64a. The Air Force concluded that the Burlington Air Guard Station presented "the best mix of infrastructure, airspace, and overall costs to the Air Force." Pet. App. 53a. The Air Force noted that "Burlington's airspace and ranges can support projected F-35A training requirements and offer exceptional joint and coalition training opportunities." *Id*. It found that the existing National Guard contingent at Burlington had a "mature and highly successful active association" with the F-16s already based there, which would carry over to the F-35As, and that, unlike other alternatives that might involve relocating other fighter units, locating the F-35As at the Burlington Air Guard Station "will not disrupt the Air Force's ability to present essential combat capability to the Combatant commanders during the stand-up of this F-35A squadron." Pet. App. 53a-54a. Accordingly, the Air Force designated Burlington as the preferred site for the maintenance and operation of 18 F-35A jets,

which are expected to start arriving in 2020. Pet. App. 27a.[6] The beddown of the F-35As will entail five infrastructure improvements, all of which will occur entirely within existing Vermont Air National Guard buildings on its base. Pet. App. 26a.

The Air Force adopted specific mitigation measures that will govern the F-35A operations when using the runway at the Burlington International Airport, which include mandatory adherence to "all existing FAA . . . and local avoidance procedures . . . designed to reduce aircraft noise and overflights." FEIS at 2-49.[7] In addition, the Air Force stated that its assessment of noise would be ongoing, and that mitigation will be subject to an adaptive management program developed in accordance with the President's Council on Environmental Quality mitigation and monitoring guidance. ROD at 4-5.

5. Petitioners are individuals concerned about increased noise associated with the deployment of the F-35As at the Burlington Air Guard Station. Pet. 11. In 2012, Petitioners initiated a proceeding with the Vermont District Commission #4 District Coordinator asserting that Act 250 applied to the Air Force's

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[6] The Air Force considered deploying 24 F-35As but ultimately decided to deploy only 18. *See* FEIS at 2-1.

[7] Two of the Petitioners, Richard Joseph and Juliet Beth Buck, with others, have brought suit in federal district court challenging the adequacy of the Air Force's environmental review under federal law. *Zbitnoff v. James*, No. 5:14-cv-132 (D. Vt. filed June 30, 2014).

proposed siting of the F-35A and to the associated building improvements necessary to accommodate the jets. The Coordinator issued a decision on March 21, 2013, concluding that Act 250 did not apply to the project because, among other reasons, it had a federal purpose. Pet. App. 45a. Claims relating to increased aircraft noise, the Coordinator concluded, were preempted by federal law. Pet. App. 47a.

Reviewing the Coordinator's decision, the Environmental Division of the Vermont Superior Court agreed that Act 250 was inapplicable. The court concluded that "the proposed alterations to the [National Guard] base and the proposed siting of the F-35A jets at that base do not constitute development and therefore do not require an Act 250 permit," and that because "no physical change or change in use is proposed for the Airport runway, . . . amendment of the Act 250 permits for the runway [is] . . . not required." Pet. App. 36a.

The Superior Court held that Act 250 jurisdiction does not apply to the siting and improvements for the F-35As as either "development" or a "material change" to the existing infrastructure. Under the Vermont Natural Resources Board definition of "development," whether the F-35As would require a new permit depends on whether they are for a state or federal purpose. Finding that the jets will serve a purely federal purpose, the court determined that there was no "development" that would require a permit. Pet. App. 32a-33a. Similarly, the court rejected Petitioners' argument that the change in the type

of plane using BIA's runway constitutes a "material change" in the use of the runway explaining that "[t]he F-35A is simply another type of aircraft using the shared runway, and there is no evidence that prior Act 250 permit findings or conditions prohibit a change in aircraft type." Pet. App. 35a. As a result, because the basing constitutes neither "development" nor a "material change," the court concluded, as a matter of state law, that Act 250 did not apply. Pet. App. 36a.

6. On appeal, the Vermont Supreme Court affirmed. The court first rejected Petitioners' claims that improvements required at Air Guard Station to enable basing of the F-35As was for "State purposes" within the meaning of Act 250's definition of "development," *see* 10 V.S.A. § 6001(3)(A)(v), explaining that "the improvements themselves – to house and manage military aircraft – have been undertaken by the federal government to be used by the federal government to make troops combat-ready for foreign missions and homeland defense." Pet. App. 10a. The court likewise rejected Petitioners' claim that physical alterations to buildings at the National Guard base amounted to a "substantial change to a preexisting development," concluding again that the installations so altered were not "development" under Act 250 because the "physical improvements on the base, which will be subjected to changes under the F-35A plan, are to prepare the base to house federally owned military aircraft and to train persons to use those aircraft." Pet. App. 13a.

Finally, the Vermont Supreme Court rejected Petitioners' claim that Act 250's requirements were triggered because F-35A use of a BIA runway amounts to a "material change" to a preexisting land use that is the subject of an existing Act 250 permit. Pet. App. 19a. The Court noted that none of the City's existing Act 250 permits "regulate aircraft operations or aircraft noise," and that no physical changes to the runway were contemplated, but that the sole asserted basis for a "material change" was increased noise from using F-35A aircraft. Pet. App. 15a.

The court did not reach the lower court's conclusion that such a change would not trigger Act 250 because the existing Act 250 permits did not preclude a mere change in the type of aircraft using the runway. Instead, it ruled that even if an increase in noise alone could trigger a permit requirement, such regulation of noise would be preempted under *Burbank*. The Vermont Supreme Court recognized that "*City of Burbank* left some room for some local land-use regulation of airports," citing with approval the Second Circuit's decision in *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210-12 (2d Cir. 2011). Pet. App. 18a. However, the court concluded that, in the circumstance here, "the sole cognizable change asserted between the use of the runway under the current Act 250 permit and the use by the F-35A is the increase in noise levels," so that Petitioners' suit was "aimed at regulating the noise created by the F-35A," and

was therefore "preempted by federal law." Pet. App. 19a.[8]

## REASONS FOR DENYING THE WRIT

The Vermont Supreme Court's unanimous decision refusing Petitioners' plea to impose state land use regulatory obligations on the City of Burlington purely because of the Air Force's independent decision to change the type of military plane using BIA runways does not warrant this Court's review.

That decision reflects a correct interpretation of both Vermont's state law and relevant federal law, including this Court's decision in *Burbank*. Whatever ambiguities Petitioners purport to discern in the *Burbank* opinion, it left no doubt that, on account of extensive federal activity in the field, airport noise regulation is a subject for preemption analysis. It also held that states and localities may not use traditional police powers to control the noise from the landings and takeoffs of particular aircraft. Although that decision did not consider the distinct issues presented by local regulation of military jet noise nor anticipate every particular aspect of this case, the Vermont Supreme Court's resolution was a faithful application

[8] In a concurring opinion, Justice Morse agreed that Act 250 did not apply, but expressed the view that parties suffering injury from aircraft noise might have other remedies under state law. Pet. App. 21a-22a.

of this Court's teaching. The Vermont Court has not held, as Petitioners suggest, that every general land use regulation motivated in part by noise is preempted. To the contrary, its conclusion was narrowly drawn, finding only that the change in military planes using BIA runways did not constitute a "material change" under state law because federal preemption precludes using any change in noise levels as the sole basis for requiring an amendment to the existing BIA permits.

Claims of a conflict between the Vermont Supreme Court's decision and the law in the Second Circuit – or any other court – are without merit. At the outset, Petitioners have not been able to point to any other preemption cases like this one, where the noise came from military jets and where a state court was asked to *expand* state law to impose obligations on an entity that was not responsible for the noise, let alone decisions that resolved such a conflict differently than did the court here. The Second Circuit's *Goodspeed* case, which Petitioners cite as "conflicting" was, in fact, cited *with approval* in the Vermont Supreme Court's decision here, *see* Pet. App. 18a, and the claim that the federal court would analyze noise regulation preemption in a different manner is simply speculation – because the only supposedly "conflicting" preemption decision of that court did not involve a state or local measure that had anything to do with noise. *See* pp.11-12, *infra*. Similarly, the allegedly "conflicting" Sixth Circuit decision in *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996)

provides no support for Petitioners' argument, as the court in that case expressly acknowledged that noise regulation preemption claims *should* be treated differently from other types of land use regulation, consistent with the Vermont Supreme Court's approach. *See* pp.12-13, *infra*.

Petitioners' effort to conjure some nationwide conflict warranting this Court's intervention fares no better. Petitioners' dragnet attempt to find cases that involve aviation and preemption yields a grab-bag of decisions, involving the commercial use of helicopters (indeed, a significant plurality), sea-planes, and banner-towing planes; many arise from small private airports, helipads, and landing strips; and many do not involve noise regulation or any claim of noise related preemption. None involve operations of military aircraft. In those contexts, that some cases find preemption and others do not is not surprising. These different outcomes do not support Petitioners' alleged "conflict" in legal standards, but rather demonstrate what is self-evident – preemption cases turn on the facts and circumstances of each case. Petitioners' selective citations show nothing more.

Far from disagreeing with one another, the lower court decisions cited by Petitioners both recognize that noise is an area of special concern and that there remains some room for general local land use regulation, as the Vermont Supreme Court acknowledged. Decisions that have been less receptive to preemption claims have highlighted (as did the dissent in *Burbank*) that local governments retain the power to

exclude objectionable airport uses altogether in some instances. But even those decisions less receptive to preemption claims have not held – nor even suggested – that states or municipalities are free to regulate airports based on the fact that a specific aircraft will be using the facility, particularly where, as here, the use turns on a purely federal decision regarding where to base military planes.

Petitioners' claims of the "far-reaching" importance of this case, and asserted need to address an alleged "conflict" are, put mildly, vastly overstated. Although airplane noise is itself an issue addressed at airports and communities across the nation, there is no evidence that federal preemption law has left States and localities hamstrung to address those noise issues. Nor is there any evidence that the fact-specific decision reached by the Vermont Supreme Court here would have any impact on the application of the principles of preemption as expressed in *Burbank* by other courts around the U.S. – let alone the type of dramatic impact alleged by Petitioners. In fact, the state of case law demonstrates ample room for the general application of local land use laws and shows that the federal government has taken a cooperative (and sometimes generous) approach in helping communities and airport operators thoughtfully address these complex issues.

For many of these same reasons, even if there were any genuine division of decisional authority on matters of airport noise regulation, this case would be a poor vehicle for this Court to settle the law. The

balance between federal and local interests is quite different when national defense and homeland security are involved, and, unlike in almost every other reported case, the airport owner here, the City of Burlington, is not the proponent or beneficiary of the noise-generating flight activities. The Air Force has exclusive authority to determine which planes to base at the Burlington Air Guard Station. And separate proceedings against the federal parties, who are the appropriate subject of Petitioners' challenge, are ongoing. Indeed, although the Vermont Supreme Court – correctly – sustained Burlington's federal preemption defense, it could have reached the same result by relying exclusively on a correct interpretation of Vermont land use law, as the lower court did. There is no need for this court to grant further review.

## I. The Vermont Supreme Court's Decision Correctly Applied This Court's Controlling Precedent To The Facts Of This Case And Does Not Conflict With Any Decision Of The Second Circuit Or Any Other Federal Or State Court

There is nothing "sweeping" about the Vermont Supreme Court's decision, *cf.* Pet. 1, which declined Petitioners' request to interpret state law as conditioning "approval" of takeoffs and landings of noise-generating military aircraft as a "development" *by the City of Burlington*, which should warrant imposition of noise-control obligations *on the City*. Nor can the

Vermont Supreme Court's case law governing the relationship between land use regulation and federal aviation regulation, and noise regulation in particular, plausibly be described as "going far beyond this Court's precedent." Pet. 1.

Petitioners' most persistent claim of "error" on the part of the Vermont Supreme Court and other courts on its "side" of the supposed conflict – that the court adopted a "two-step" approach to preemption questions, whereby noise regulation is treated differently from other forms of land use regulation – is frankly puzzling. It is not the Vermont Supreme Court's decision that "created a separate category [for noise regulation preemption and those involving] all other land-use regulations," Pet. 14, it was this Court's decision in *Burbank,* which itself relied on a raft of federal statutes evincing Congress's decision to occupy the field of noise regulation. Given what this Court said and held in *Burbank*, it would have been error for the Vermont Supreme Court not to have analyzed noise regulation separately, and the Vermont Supreme Court's two-step approach faithfully applies this Court's decision in *Burbank*.

The Vermont Supreme Court's two-step approach also does not conflict in any way with the Second Circuit's case law. The Second Circuit has not applied, or even hinted at, the allegedly conflicting "unitary" approach Petitioners ascribe to it, where local measures aimed at aircraft noise and other forms of land use regulation are both subject to precisely the same type of purpose/effect preemption analysis.

Such a rule would effectively treat the *Burbank* holding on preemption of noise regulation as having no independent effect. The Second Circuit's *Goodspeed* case is the only authority Petitioners cite for the assertion that "the Second Circuit does not set aside any category of land-use regulation (such as the regulation of airport noise) as automatically preempted," Pet. 18 (citing *Goodspeed*, 634 F.3d at 210). But *Goodspeed* involved a state regulation that had *literally nothing to do with aircraft noise*, and the Court's decision does not address the preemption of aircraft noise regulation. In that case, the court concluded that a state regulation which restricted tree removal by an airport was not preempted. Indeed, as the Second Circuit opinion makes clear, the preemption assertion rejected in *Goodspeed* was utterly insubstantial: although the airport claimed a federal exemption from a "generally applicable" environmental law, it turned out that there was no federal interest in the Airport's proposed actions:

> Goodspeed Airport is not licensed by the FAA; it is not federally funded, and no federal agency has approved or mandated the removal of the trees from its property. Indeed, in its response to a formal inquiry from the district court in this case, the federal government disclaimed any authority to order the trees' removal.

634 F.3d at 211.

Contrary to Petitioners' suggestion, the Second Circuit simply had no occasion to address *Burbank* or the relative merits of the supposedly contending one- and two-step preemption approaches to preemption of noise regulations. But *see* Pet. 2 (asserting that "Others, including the Second Circuit, apply *City of Burbank*" differently than did the decision here).[9]

There is also no basis to believe that the Vermont Supreme Court would have decided a case presenting the *Goodspeed* facts differently than did the Second Circuit – *i.e.*, finding preemption in a case where there was "no federal interest." In fact, the Vermont Supreme Court decision below expressly endorsed the Second Circuit's *Goodspeed* ruling, and the Vermont court's earlier *Commercial Airfield* decision held clearly that federal law does not preempt all application of Act 250 to airports. Pet. App. 18a; 170 Vt. at

[9] The Second Circuit decision recognized that applying principles of field preemption requires a court to first determine whether the law is "within the scope of the preempted field." *Goodspeed*, 634 F.3d at 211. That is exactly what the Vermont Supreme Court did in this case – first, the court looked to *Burbank* for the proposition that Congress intended to occupy the field of aircraft noise regulation, and then it determined that the requirements that are triggered by a rule conditioning permission of aircraft takeoffs and landings on reducing noise effects is "noise regulation" within the preempted field. Petitioners' disagreement with the Vermont Supreme Court's sensible conclusion on that point are meritless, *see infra*, and appear to rest on the view that *Burbank*'s description of the preempted field was too broad or that the Court was wrong to announce a rule of field preemption at all.

597. And there likewise is no basis for interpreting the *Goodspeed* decision's silence on the question of noise regulation preemption as disagreement with the approach adopted by the Vermont Supreme Court here, as Petitioners suggest. Noise regulation just was not relevant to the holding in *Goodspeed*.

In fact, one scours the petition in vain for any decision that *does not* take the approach of treating noise regulation preemption as a distinctive and "separate" inquiry from other types of land use regulation. Rather, consistent with the Vermont Supreme Court decision and the plain import of *Burbank*: every decision cited by Petitioners that involves noise regulation analyzes it under the *Burbank* preemption rubric; many, like *Commercial Airfield* and *Gustafson,* 76 F.3d 778, that *do not* involve noise regulation, nonetheless recognize that a distinctive analysis applies to noise regulation; and some (like the Second Circuit decision in *Goodspeed*) that do not involve preemption challenges to noise regulation are understandably silent as to how such noise preemption cases would be analyzed.

No more availing are Petitioners' claims that the Vermont Supreme Court has embraced a rule that "cannot be squared with" or "goes far beyond" this Court's decision in *Burbank*. Pet. 1. As outlined above, the Vermont court's application in this case is entirely consistent with this Court's precedent. Petitioners alleged that the Vermont Supreme Court (and other courts) have "over-reached" simply because those decisions take the entirely unsurprising view

that the dissenting opinion in *Burbank* (and its description of the majority's opinion), "is not binding," and instead rely on what Petitioners characterize as the "broadest language" appearing in the *Burbank* majority opinion. *See* Pet. 16 (discussing *State v. Metro. Airports Comm'n*, 520 N.W.2d 388 (Minn. 1994). This alleged "evidence" of an over-reach is revealing of Petitioners' true dispute – they appear to simply disagree with the majority opinion in *Burbank* and believe that the Court's four-decades old decision went too far in finding local regulation of aircraft noise preempted, or in relying on "field preemption," rather than some narrower doctrine, to strike down the ordinance at issue in that case. While Petitioners may disagree with the ruling, this disagreement does not suggest that the Vermont Supreme Court improperly applied this Court's opinion nor does it provide evidence of any type of confusion in lower courts over how to apply the *Burbank* ruling.

In point of fact, this Court's *Burbank* opinion is fairly read precisely as the Vermont Supreme Court read it – as settling that "the pervasive nature of the scheme of federal regulation of aircraft noise" established "exclusive" federal authority, leaving "no room" for curfews or other "local controls," including "noise regulations" passed by "cities and states." 411 U.S. at 634, 639. Indeed, that is how the Sixth Circuit's allegedly "conflicting" decision in *Gustafson* read it. That court explained that under *Burbank*, the federal government "has full control over aircraft noise, preempting state and local regulations"; that "the

Court in *Burbank* determined that aircraft noise was so comprehensively and strictly regulated by the federal government that it precluded enforcement of state or local laws on the same subject," *Gustafson*, 76 F.3d at 783-84; and that Congress "intended to occupy the field" of noise control, *id*. at 784.

It is Petitioners who are over-reading and over-reaching. The Vermont Supreme Court's decision did not, as Petitioners insist, "sweeping[ly]" hold or suggest that every general zoning or land use regulation that is motivated in part by noise considerations is preempted or that municipalities cannot undertake voluntary mitigation measures. Pet. 1. The court expressly affirmed that federal law leaves "room for some local land-use regulation of airports," Pet. App. 18a, citing as authority for that proposition both the Second Circuit's decision in *Goodspeed* and its own prior *Commercial Airfield* decision. That decision, in upholding application of Act 250 to an airport, explained that "although the federal government has preempted certain aspects of aircraft and airport operation, *it has not preempted land use issues such as zoning and environmental review*." 170 Vt. at 596 (emphasis added).

Petitioners' claims of a sweeping rule are in fact an attack on the Vermont Supreme Court's sensible and fact-specific determination that while Act 250 may be "a general land use regulation," Pet. 19, what Petitioners seek here is clearly "noise regulation." In the court's view, an "attempt to now set permit requirements to respond to this 'change' [in military

aircraft noise level] is a control aimed at regulating the noise created by the F-35A." Pet. App. 19a. First, as the Vermont Supreme Court's opinion highlights, this case is hardly like a general zoning rule whose enactment was motivated in part by noise considerations; the only basis for imposing regulation (on Burlington) here is *the noise* that the new military aircraft would generate and the only measures Petitioners seek to impose responded to their offending noise concern.

Nor does the fact that Petitioners would allegedly limit their "condition" requests to off-site mitigation establish that they were not seeking regulation of noise, as they contend. The very premise of Petitioners' claim here is that the City must obtain *permission* from the State of Vermont, through Act 250, to legally allow the noise associated with the Air Force's independent decision to base F-35As at BIA. In bringing this suit, Petitioners did not ask the Vermont courts to "*appl[y Act 250] to sound-mitigation projects*," Pet. 19 (emphasis added); it asked the State to take regulatory authority over aircraft noise – to exercise its police power to regulate the noise generated by the F-35s' use of a BIA runway. That Petitioners might be willing to accept "conditions" short of a ban (and setting aside the fact that neither the State – nor the City – have the power to prevent this change in aircraft) does not mean that the court erred

in recognizing that Petitioners sought noise regulation.[10]

Petitioners urge a rule, derived in part from the *dissenting* opinion in *Burbank*, that would draw a bright line between local measures that regulate aircraft noise "directly" and "at their source," by restricting takeoffs and landings, and those which restrict noise generally but allow implementation of local (or state) regulation through indirect means. But Petitioners' effort to limit the application of *Burbank* in no way indicates that the Vermont court's application of *Burbank* was incorrect, and there is a difference between "going beyond" *Burbank* and going beyond what the Court's decision could or, in Petitioners' view, should have held. And the Vermont Supreme Court's effort to read and apply this Court's

[10] Similar notions frequently influence decisions about preemption: the dissent in *Burbank* argued that the greater "police power" to prevent airport development altogether *for noise reasons* should entitle them to impose more targeted regulations, and the majority (*see* 411 U.S. at 635 n.14) expressly left open the possibility that airport *proprietors* might be allowed to curtail takeoffs or landings, presumably because they would be held liable for noise-related harm. *See ATA v. Crotti*, 389 F. Supp. 58, 64 (N.D. Cal. 1975). But that line of reasoning has no traction here. Neither the State, through the permitting authority, nor Burlington, has the power to refuse permission for these operations nor is Burlington the promoter or sponsor or beneficiary of the challenged noise-generating activities. In fact, Petitioners' suit seeks what the proprietor exception sought to prevent: imposition of costly obligations on an airport owner for impacts that are not, as a matter of federal law, its responsibility.

precedent fairly, and its refusal to treat it as limited to its facts, does not mean that the two decisions "cannot be squared." Pet. 1.

Indeed, the implications of this more "narrow" reinterpretation of *Burbank* can be seen in Petitioners' discussion of *Metropolitan Airports Commission*, another decision Petitioners fault for "over-reading" *Burbank*. In that case, the Minnesota Supreme Court held that *Burbank* preempted application of municipal "noise standards" (not zoning regulations) to an airport, noting that "although the noise standards do not expressly require any direct control of aircraft operations," they could not be complied with "without substantially reducing aircraft operations at [the airport], converting the surrounding residential areas to nonresidential uses, or moving the airport." *Metro. Airports*, 520 N.W.2d at 392.

On Petitioners' account, *Burbank* teaches that localities troubled by aircraft noise are categorically prohibited from imposing curfews on particular flights, but they remain free to respond to the same problem by adopting a noise standard that would require a substantial curtailment of airport operations or a relocation of an entire international airport. That is not a necessary or even plausible interpretation of the *Burbank* rule. And the Vermont Supreme Court did not err by refusing to adopt it.

## II. There Is No Conflict Of Decisional Authority Requiring This Court's Intervention

Petitioners' claims of a broad and sharply developed conflict as to the standards governing preemption of noise regulation do not withstand even casual scrutiny. As has already been discussed, Petitioners' most prominent claim of "conflict" involves the Second Circuit's *Goodspeed* decision. *See* Pet. 19 (arguing that this "conflict . . . alone warrants a grant of certiorari"). But that case, which *does not involve noise regulation* preemption (or noise regulation of any sort), was cited with approval by the Vermont Supreme Court's decision, and plainly does not conflict with the Vermont Supreme Court's decision.

The petition's *second* most prominent allegation of "disagree[ment] with the Vermont Supreme Court[ ]," Pet. 19, involves *Gustafson*, 76 F.3d 778, which held that a village ordinance banning the landing, docking and mooring of *seaplanes* was not preempted. In reaching that conclusion, the Sixth Circuit "contrast[ed] . . . the pervasive scheme of federal regulation of aircraft noise found in *Burbank*" with the paucity of federal legislation addressing seaplanes, and highlighted that "aircraft noise [is] so comprehensively and strictly regulated by the federal government that it preclude[s] enforcement of state or local laws on the same subject." *Id*. at 783; *see also id*. at 788-89 ("The federal government, rather than 'preempting the field,' has not entered the field and exerts no control over the location of seaplane landing sites. . . . If federal preemption were found in the

present case, a 'governmental vacuum' would occur because the federal government does not regulate the location of seaplane landing sites, and state and local governments would be shorn of their regulatory authority."). To be sure, the Sixth Circuit did say that "the district court read *Burbank* much too broadly," but it later elaborated that the "district court erred in finding that *Burbank* was dispositive of the present case, [because the Lake Angelus ordinance did] *not involve regulation of aircraft noise*."[11] *Id.* at 784, 787.

These featured cases turn out to lead a long parade of decisions that do not conflict with, or have anything in common with, the Vermont Supreme Court's decision. Thus, in addition to seaplanes, at least five of Petitioners' supposedly conflicting authorities involve helicopters and heliports, *see Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); *Garden State Farms, Inc. v. Bay*, 390 A.2d 1177 (N.J. 1978). Another involves local regulation of planes that tow banner advertising; and several involve private airfields. *See Banner Adver., Inc. v. People*, 868 P.2d 1077 (Colo. 1994); *Faux-Burhans v. Board of Cnty. Comm'rs*, No. 88-3929,

[11] Indeed, while the court correctly rejected the suggestion that any general zoning law enacted in part for concern about noise would be preempted, it qualified that assertion, explaining "once an airport is operating, it may be that only the FAA can regulate the resulting noise problem, but the right to choose not to have an airport in the first place on the basis of aircraft noise is local and is not preempted." *Gustafson*, 76 F.3d at 791 n.10.

1988 WL 97345 (4th Cir. Sept. 9, 1988); *Goodspeed*, 634 F.3d 206; *Harrison v. Schwartz*, 572 A.2d 528 (Md. 1990). And only one involves preemption challenges to state or local aircraft noise regulation, *see San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981) (holding preempted municipal airport curfew aimed at reducing noise).[12] A large number do not even discuss or even cite *Burbank*. *Condor Corp.*, 912 F.2d 215; *Bay*, 390 A.2d 1177.

The point here is not merely that the decision below is "distinguishable" from these cases "based on its facts." As opinion after opinion that Petitioners cite make clear, these differences are fundamental to the courts' federal preemption analyses. The *Banner* court did not make a noise-related preemption holding; it held the local law preempted because "it is clear that Congress impliedly intended to monopolize the field of regulating banner towing by aircraft." *Id.* at 1085. (Cases that involve air carriers implicate the broad, *express* preemption clause Congress enacted in

[12] The 34-year-old Ninth Circuit decision added dictum adverting to the power of local governments to "adopt abatement plans that do not impinge on aircraft operations." 651 F.2d at 1314. But the Supreme Court of Vermont's decision did not hold, nor do Petitioners maintain, that all abatement efforts are preempted noise regulation. And, indeed, the City of Burlington has developed a comprehensive Noise Compatibility Plan, under which it has implemented, and will continue to implement, specific noise abatement activities around BIA. *See* Vermont Noise Compatibility Program Status, http://www.faa.gov/airports/environmental/airport_noise/part_150/states/?state=Vermont (last visited Sept. 30, 2015).

the Airline Deregulation Act, *see supra* n.2, while cases that involve helicopters and seaplanes do not.)

And it is critically important, though entirely unsurprising, that none of the cases in the petition involve noise attributable to *military aircraft* or any other issues arising from the interaction of local police powers and federal defense and homeland security imperatives. Although the Vermont Supreme Court rejected the claim raised in the petition based on generally applicable noise regulation preemption law, much of Petitioners' case was dismissed based on the uniquely federal purposes implicated here, and there is no question that the "traditional state-federal balance" that informs typical preemption analysis does not apply to the siting of military aircraft. It would be anomalous, for example, if the Airline Deregulation Act's broad preemption provision, *supra*, n.2, which applies to civilian aviation, somehow gave localities *greater* power to interfere with flight operations needed for national defense. *See* Pet. 8-9.

And as discussed above, this case is fundamentally unlike the many ones the petition cites, which pit an airline or airport seeking to overturn what it perceives to be burdensome local regulation against a government asserting its power to enforce local policies. *See, e.g.*, *Metro. Airports*, 520 N.W.2d 388. Here, private parties are seeking to impose obligations that state regulators charged with enforcing Act 250 and the state Environmental Court have expressly disclaimed the ability to impose, on purely state law grounds. And it is of course fundamentally different

from cases under Act 250, where individual developers are held to account for adverse impacts associated with the development projects they seek to initiate. Petitioners seek to hold Burlington responsible under state law for impacts that result from federal activities that the City did not promote or benefit from and is without authority to prevent.

## III. This Case Does Not Implicate Any Broadly Important Question Of Federal Law And Would Be A Poor Vehicle For Addressing The Scope Of Preemption Of State And Local Laws Addressing Aircraft Noise

Petitioners' claim regarding the precedential importance of this case is also overstated and there is no basis to conclude that this case would be an appropriate vehicle for the Court to further address issues regarding aircraft noise preemption. In fact, it is Petitioners' proposal that would have substantial precedential impact by applying the noise criteria of local land use regulation to a federal military basing decision.

Although Petitioners describe the impact of this case as "far-reaching," Pet. 1, they have failed to demonstrate how the Vermont Supreme Court's fact-bound determination would have any material impact on the issues of aircraft noise regulation around the nation. Indeed, the decision below, rests squarely on the intersection between Vermont state land use law and regulations and *Burbank* noise regulation

preemption, and therefore will have little legal effect beyond Vermont. And even within the State, issues remotely like these have arisen once every several decades (or twice, if the issue is broadened to include aviation preemption generally). Nor have Petitioners shown an actual conflict between the Vermont Supreme Court and its regional federal court of appeals such that the Court must intervene to avoid the risk of inconsistent decisions.

Without evidence of decisional conflict compelling this Court's attention, Petitioners instead broaden the alleged "importance" of this case dramatically, focusing on a general policy concern with airport noise. This effort is equally unavailing. Although airport noise is, as all recognize, a serious and complex issue, Petitioners present no evidence that federal preemption law has left States and localities unable to effectively and comprehensively address those noise issues. Indeed it is highly unlikely, for reasons evident from the petition and discussed here, that a decision revisiting *Burbank,* or even limiting *Burbank* along the lines Petitioners favor, would have any significant practical effect on this alleged problem. The "confusion" over local regulation of noise-related issues simply is not borne out by the cases cited by Petitioners, and they certainly do not summon a host of decisions in which *Burbank* preemption (whether correctly applied or not) has proven an obstacle to municipal efforts to reduce aircraft noise. (*Metro. Airports,* 520 N.W.2d 388 and *Gianturco*, 651 F.2d 1306, are the only cases cited; Petitioners

concede that the latter was decided correctly, *see* Pet. 24, and they are surely wrong about the Minnesota Supreme Court's decision, *see supra*). There is, thus, a fundamental disconnect between the asserted "important" problem they highlight and many of the decisions they cite, whose only common characteristic is that they *do not* involve airplane noise or *Burbank* preemption.

Finally, even if there was a genuine, well-defined decisional conflict on any of the various preemption matters addressed in the decisions Petitioners stitch together, this case would plainly not be a fit vehicle for taking up the issue. As has been emphasized already, the central facts here are distinct in ways that are legally material from those of any typical aircraft noise or aviation preemption dispute. Thus, while Petitioners exclaim this case to be an "ideal" opportunity to address important policy implications raised by increases in *commercial air traffic*, *see* Pet. 34 (citing exclusively FAA data on commercial aircraft), the present case, in fact, has nothing to do with civilian air traffic, but rather stems from federal decisions regarding *military aircraft*. The federal interests implicated in this case are therefore *sui generis*, and quite unlike the issues raised in prior cases cited by Petitioners.

Moreover, unlike other cases, the state government whose law was held preempted here has never taken the position that its law even applies to this case. On the contrary, Vermont courts and regulators have consistently concluded, on state law as well as

federal preemption grounds, that Petitioners' claim is not cognizable. Indeed, while the Vermont Supreme Court rejected Petitioners' claim as federally preempted, obviating the need to decide the state law issue, it could simply reaffirm the lower state court's judgment on the originally articulated state law grounds, in the event of an adverse decision or remand from this Court, ultimately resulting in the same outcome in this matter. Thus, even if there was need for further clarification on the issue of federal preemption of noise regulations – and there is no compelling evidence that such additional involvement by this Court is necessary – this case provides a poor factual and procedural setting for addressing that issue.

## CONCLUSION

For the reasons outlined above, the petition should be denied.

Respectfully submitted,

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