No. 16-1070

IN THE
Supreme Court of the United States

TOWN OF EAST HAMPTON,
Petitioner,

v.

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

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF COMMITTEE TO STOP AIRPORT EXPANSION AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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April 5, 2017

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the Committee to Stop Airport Expansion and the International Municipal Lawyers Association move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Written consent of petitioner is being submitted contemporaneously with this brief, but respondents have withheld their consent.

The Committee to Stop Airport Expansion is an unincorporated association of residents living near the East Hampton Airport in the Town of East Hampton, New York. The Town owns the Airport. The Airport

is a small local facility that has no scheduled commercial service. It is intended to serve local recreational and transportation needs, including private recreational pilots, flight instruction, private charters, and a very small number of owner-operated jets and helicopters.

The noise generated by aircraft using the Airport—especially during East Hampton's "high" (summer) season—has been a continuous source of harm to the residents of the Town and the members of the Committee for more than 35 years. Noise damages the natural tranquility and beauty that characterize East Hampton (and many towns that are home to small local airstrips and airports).

The Committee has for decades been advocating for the Town's authority as proprietor of the Airport to enforce reasonable access restrictions to minimize the harmful effects of airport noise on the neighboring community. As engaged members of a community affected by the noise the Airport generates, the Committee has a strong interest in preserving the regulatory authority Congress reserved to proprietors of local airports outside the national aviation network.

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States

municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States and the United States Courts of Appeals, and in state supreme and appellate courts.

In this case, the Second Circuit held that federal law preempts East Hampton's reasonable restrictions on access to its airport because the Town did not follow procedures set forth in the Airport Noise and Capacity Act of 1990 ("ANCA") when imposing those restrictions. Petitioner ably demonstrates in its brief why the Second Circuit's decision in this case conflicts with this Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), why the court of appeals improperly invoked its equity jurisdiction, how that court misinterpreted ANCA, and how its decision dramatically expands federal regulation of local airports beyond Congress's intention. The Committee and IMLA support petitioner's arguments in full.

The Committee and IMLA write separately to expand upon a critical point and to address the implications of that point for the Court's decision on the petition. In enacting and implementing ANCA, Congress and the Federal Aviation Administration ("FAA") have legislated and regulated against the backdrop of a two-tiered system of airports and airport regulation. Federal oversight of airport-access and noise regulations has long focused on the minority of airports that handle national or international commercial service, receive federal funding, and are accordingly subject to appropriately rigorous oversight

by the FAA. Close federal supervision of access regulations at those airports ensures that the network of national, explicitly "federalized" airports can function as an integrated, seamless whole. The same approach has not prevailed with respect to the thousands of small airports, airstrips, and heliports that handle largely (or only) local service and recreational flight. As to the latter, the FAA regulates aviation safety and maintains exclusive federal control over air space. But the statutory "proprietor exception" to federal control of airport access, recognized by both Congress and this Court, preserves for municipal airport owners the authority to control access to their own airports for the purpose of protecting their local communities from noise.

Ignoring the distinction between airports within and outside of the national commercial network, as the Second Circuit did here, disregards the text and structure of ANCA, does nothing to further Congress's purpose of ensuring the smooth functioning of the national aviation network, and unduly restricts the "proprietor's" authority that federal law reserves to municipally owned airports that opt to remain outside the national aviation network or are not even eligible to join it. The result of "federalizing" every airstrip in the nation, if the Second Circuit's overreach is allowed to remain in place, will be to discourage local governments from developing and maintaining airport facilities they cannot adequately regulate. Local airports will continue to close. Local communities in turn will be deprived of the tourism and commerce those airports facilitate, as well as the benefits of private aviation.

The Committee to Stop Airport Expansion and the International Municipal Lawyers Association should be granted leave to file the attached *amicus* brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due.

of local airports outside the national, chiefly commercial, aviation network.

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

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intention. *Amici* support petitioner's arguments in full.

Amici write separately to expand upon a critical point and to address the implications of that point for the Court's decision on the petition. In enacting and implementing ANCA, Congress and the Federal Aviation Administration ("FAA") have legislated and regulated against the backdrop of a two-tiered system of airports and airport regulation. Federal oversight of airport-access and noise regulations has long focused on the minority of airports that handle national or international commercial service, receive federal funding, and are accordingly subject to appropriately rigorous oversight by the FAA. Close federal supervision of access regulations at those airports ensures that the network of national, explicitly "federalized" airports can function as an integrated, seamless whole.

The same approach has not prevailed with respect to the thousands of small airports, airstrips, and heliports that handle largely (or only) local service and recreational flight. The "proprietor exception" to federal aviation regulation, recognized by both Congress and this Court, preserves for municipal airport owners the authority to control access to their own airports for the purpose of protecting their local communities from noise. Ignoring the distinction between airports within and outside of the national aviation network, as the Second Circuit did here, unduly restricts the "proprietor's" authority that federal law reserves to municipally owned airports, without furthering any federal interest in ensuring the smooth functioning of the national network.

SUMMARY OF ARGUMENT

I. The Second Circuit's decision disregards the real-world differences between the interconnected network of airports that support national and international air commerce, on the one hand, and the many thousands of small, local, often private airports and airstrips that operate outside that network, on the other. Of the approximately 19,500 airports in this country, fewer than 3,400 are even eligible to receive federal grants or charge federally authorized passenger-facility fees. Federally funded public airports have chosen to be governed by a single set of rules so that the nation's airlines can efficiently provide service across all jurisdictions in response to market demands. The need for uniform access rules is not the same for the more than 16,000 private and small public airport facilities that do not even meet minimum requirements for federal funding.

In ANCA, Congress respected the practical differences between national airports that receive federal funding and are part of the national network and local airports that do not and are not. Airports that wish to be eligible to receive federal funding must comply with ANCA's requirements when enacting access restrictions to ensure uniformity. No such obligation is imposed on airports that receive no federal funding. The statute's congressional findings and legislative history demonstrate Congress's focus on national airports.

ANCA's text and structure demonstrate that the statute does not preempt reasonable access restrictions imposed by thousands of municipal airports across the country. In multiple places, the statute presumes the existence of restrictions adopted outside of ANCA's strictures and offers facility owners

the *option* of rescinding the restriction if the facility wishes to be eligible for federal funding. That option would make no sense if the restriction were a legal nullity at the outset, as the Second Circuit held.

ANCA also made no change to a preexisting statute in which Congress expressly *preserved* to municipal airport owners the authority they have traditionally enjoyed as "proprietors." That authority has long been understood to include reasonable noise and access restrictions. ANCA contains no indication, let alone the requisite clear statement, of congressional intent to preempt local authority preserved by the statutory proprietor exception.

II. The result of the Second Circuit's preemption holding, if allowed to remain in place, will be to discourage local governments from developing and maintaining airport facilities they cannot adequately regulate. The thousands of small airports outside the national network lack the resources necessary to comply with ANCA's substantial regulatory burdens. Those burdens include preparing detailed scientific studies that can cost millions of dollars.

Preventing local airports from controlling noise and access will discourage communities from developing and maintaining airports. Local airports will continue to close. As this case demonstrates, the noise disturbances these airports produce are significant. The Second Circuit's expansion of federal aviation law will put local communities to a Hobson's choice: accept all aircraft traffic, however noisy and disturbing, or forgo the commercial and recreational benefits of a local airport. That is precisely the outcome Congress has long sought to avoid by permitting proprietors of local airports that do not receive federal funding to impose reasonable access restrictions.

ARGUMENT

I. THE SECOND CIRCUIT'S PREEMPTION HOLDING UPENDS THE LONG-ESTABLISHED AUTHORITY OF LOCAL AIRPORT OWNERS TO CONTROL THE USE OF THEIR AIRPORTS

A. The Purpose Of Preemptive Federal Regulation Of Airport Noise Is To Ensure Uniformity Among Airports That Serve National Commercial Air Traffic

1. The Second Circuit's decision to impose ANCA's burdens on all airports reflects a profound lack of appreciation for the realities of aviation in the United States. There are more than 19,500 airport facilities in this country. *See* FAA, *Report to Congress: National Plan of Integrated Airport Systems 2017-2021*, at 2 (2016) ("FAA Report").[2] The vast majority of those—about 14,400—are "private-use" facilities that are "closed to the public." *Id.* That leaves only about 5,100 airports that are open to the public. *See id.* And, of those 5,100 public-use airports, a substantial portion—approximately 1,800—do not meet the FAA's minimum criteria for eligibility to receive federal funding. *See id.*

That means there are more than 16,000 airport facilities in the country that are private or small public facilities that are ineligible to receive any of the federal funding to which ANCA refers.[3] Those

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[2] *Available at* https://www.faa.gov/airports/planning_capacity/npias/reports/media/NPIAS-Report-2017-2021-Narrative.pdf.

[3] These airports are not eligible to receive "Airport Improvement" funding. *See* 49 U.S.C. § 47526(1) (airport imposing noise restriction without ANCA compliance "may not . . . receive money under subchapter I of chapter 471 of [Title 49]"); *id.* §§ 47101-47142 ("Airport Improvement"); FAA, Overview: What

airports serve primarily local, unscheduled, and either private or chartered air traffic.

Of the approximately 3,300 public-use airports, only 382 are considered "primary" airports. *Id.* at 3. Primary airports are public airports that receive scheduled air carrier service and serve 10,000 or more passengers per year. *See id.* They include the major airports many Americans know by their initials (for example, JFK, DCA, LAX). Those few hundred primary airports accounted for well over 99% of all passenger boarding in the United States in 2015. *See id.* at 4.

2. Small local airports outside the national network are not the airports with which Congress was concerned when it enacted ANCA.[4] ANCA's congres-

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is AIP? ("[T]o be eligible for a grant, an airport must be included in the [National Plan of Integrated Airport Systems ('NPIAS')]."), https://www.faa.gov/airports/aip/overview/ (last visited Apr. 3, 2017); FAA Report 2 (only approximately 3,300 of the approximately 5,100 public-use airports are included in the NPIAS and eligible for federal grants). According to the FAA, many facility owners elect "not to pursue NPIAS inclusion because they prefer not to be bound by the rules that would accompany Federal funding." FAA, *Report to Congress: Evaluating the Formulation of the National Plan of Integrated Airport Systems (NPIAS)* 6 (Nov. 2015), *available at* http://www.faa.gov/airports/planning_capacity/npias/media/evaluating-formulation-npias-report-to-congress.pdf.

Likewise, these airports are ineligible to impose passenger-facility charges, a per-passenger fee the FAA permits some commercial airports to collect to "finance the allowable costs of" projects funded by federal grant money (among other purposes). 14 C.F.R. § 158.13; *see also id.* § 158.15(b)(1); 49 U.S.C. § 40117.

[4] This Court interprets statutes "not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014); *see also Natural Res. Def. Council, Inc. v. Tennessee Valley Auth.*, 459 F.2d 255, 257 (2d Cir. 1972) (Friendly, J.) (it is "error"

sional "Findings" demonstrate the problem the statute sought to solve. "[C]ommunity noise concerns," Congress found, "have led to uncoordinated and inconsistent restrictions on aviation *that could impede the national air transportation system*." 49 U.S.C. § 47521(2) (emphasis added). The phrase "national air transportation system" is not naturally read to refer to every airport, air strip, and heliport of whatever size in the United States. Rather, it refers to those airports that are interconnected by virtue of their common traffic.

The statute's history confirms that purpose. When Congress was debating an earlier version of the bill that became ANCA, Senator Wendell H. Ford, the bill's original sponsor, justified the law as a response to inconsistent rules that limited commercial airlines' ability to travel freely within the national network. "Airports," the Senator explained, "are now telling *the airlines* what kind of aircraft they can fly as a method of regulating noise." 136 Cong. Rec. S13,619 (daily ed. Sept. 24, 1990) (emphasis added). The result, he said, was "[d]elays and congestion" in the national network, of which "*airline passengers* are the victims." *Id.* (emphasis added).

Congress's specific concern was thus the effects of inconsistent regulation—what Senator Ford called a "patchwork quilt of local noise restrictions," *id.*—on the operation of national "airlines" within the national system. There is no evidence of any concern with the regulations municipal proprietors impose on local and recreational flights, and the history reflects no intent to "federalize" every airstrip and airfield in the United States (including those with no "airlines" or

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to interpret statutes "without adequately considering the history of the statute and the evil it was designed to cure").

"passengers"). Rather, Congress's purpose in passing ANCA was to ensure consistent regulation for the overwhelming majority of consumer travelers and the national and international airlines that travel among the nation's major airports.

3. Congress's focus on the national network of airports, and its lack of concern in this context with small local airports outside of that network, makes sense. Disparate regulatory regimes governing traffic within the national network would disrupt air travel. Some noise regulations limit the type of aircraft that may operate (take-off or land) at a given airport and at what times they may do so. Within the national network, major air carriers fly a range of aircraft across state lines at all times of day and night, and they calibrate their service to meet the needs of air travelers efficiently and cost-effectively. It is important that those carriers be able to operate free from idiosyncratic local curfews and flight restrictions—a jet permitted to take off from Los Angeles on a transcontinental redeye is the same jet that must be permitted to land in New York the next morning.

More generally, the major airlines must be permitted to vary their scheduling, frequency, and equipment decisions across the national network so that they can efficiently provide the public with timely and cost-effective service. *Cf.* 136 Cong. Rec. S13,619 (daily ed. Sept. 24, 1990) (uniform regulation avoids "[d]elays and congestion") (statement of Sen. Ford). Because those airlines fly across jurisdictions as a matter of course, the existence of inconsistent regulations would mean that the strictest local regulations would, in effect, apply nationally (or that localities with strict rules would be deprived of service).

Those concerns are not implicated at the more than 16,000 airports that operate outside the national network, do not receive federal funding, and do not collect passenger-facility fees. With rare exceptions, those airports do not serve "airlines" and do not handle the sort of high-volume scheduled, interstate service that requires consistent federal rules. A curfew at the East Hampton Airport—or any other similarly minor airport outside the national network—poses no threat to efficient air commerce or to further development of the national aviation network or the airports that serve it.

B. The Imposition Of ANCA Burdens On Small Local Airports Cannot Be Squared With The Statutory Structure Or The FAA's Implementation Of It

The court of appeals held that ANCA's procedural requirements were mandatory for all airports in the United States primarily on the basis of two words ("only if") in one provision of the statute. *See* Pet. 24. That approach led the court to misunderstand the structure of ANCA and related statutes.[5] ANCA's statutory scheme, and the FAA's implementation of it, foreclose the conclusion that airports that do not receive federal funding or impose passenger-facility fees are required to comply with ANCA's onerous procedural processes. *See* Pet. 22-25.

1. Multiple provisions of ANCA contemplate the existence of airports that choose not to follow the

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[5] Statutes must be interpreted "with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("[T]he court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

statute's procedures when imposing noise and access restrictions (and thus are not eligible to receive federal grants or impose passenger-facility fees). For example, 49 U.S.C. § 47524(e) provides that airports operating under a noise restriction adopted outside of ANCA's procedures will be "eligible" to receive funding and to impose passenger-facility fees if the restriction has been:

> (1) agreed to by the airport proprietor and aircraft operators;
>
> (2) approved by the Secretary [under ANCA's procedures] as required by subsection (c)(1) of this section; *or*
>
> (3) rescinded.

49 U.S.C. § 47524(e) (emphasis added). The statute lists "rescind[ing]" a restriction as one of three options available to an airport proprietor that adopted a restriction outside ANCA's procedures. And the provision forces the proprietor to select among those options only if it wishes to be "eligible" to receive federal funding and impose passenger-facility charges. *Id.*

That language is inconsistent with the Second Circuit's holding that ANCA imposes an unbending *prohibition* on restrictions adopted outside of ANCA. *See* Pet. 23. If the Second Circuit were correct that all restrictions adopted without following ANCA's burdensome processes are unlawful, the statute would be incoherent: it would be meaningless to offer the proprietor the choice whether to rescind the restriction.

Similarly, 49 U.S.C. § 47526, entitled "Limitations for noncomplying airport noise and access restrictions," is specifically addressed to—and thus presumes the existence of—airports that "impos[e] an airport

noise or access restriction not in compliance with" ANCA's procedural process. Such airports "may not . . . receive" federal funding or "impose a passenger facility charge." 49 U.S.C. § 47526(1)-(2). This provision, too, lacks common-sense meaning under the Second Circuit's logic. If restrictions adopted by airports outside the national network are void *ab initio*, it is illogical to legislate for the contingency in which those restrictions are being imposed—they never could be.

The Second Circuit erroneously understood the deprivation of funding described in § 47526 as one available "remedy" (Pet. App. 22a) intended to "enforce" ANCA's procedural requirements. Properly understood, ANCA's applicability to an airport depends on that airport's eligibility for federal funding, and the mutual agreement of the FAA and the airport proprietor for the airport to receive federal funding and be integrated into the national network. When the law is read as "an harmonious whole," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), it presents airports with a choice: either (1) join the national aviation network and comply with ANCA's procedural requirements or (2) remain outside the network and remain free to exercise the authority, protected by the proprietor exception, to impose reasonable noise restrictions outside of ANCA's ambit.[6]

2. The Second Circuit also failed to appreciate the significance of the statutory proprietor exception to federal preemption. Congress enacted ANCA against the backdrop of preexisting federal aviation

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[6] *See* John J. Jenkins Jr., *The Airport Noise and Capacity Act of 1990: Has Congress Finally Solved the Aircraft Noise Problem?*, 59 J. Air L. & Com. 1023, 1042 (1994) ("compliance with the provisions of the ANCA is not mandatory").

law that expressly preserves the traditional authority of airport proprietors to regulate airport operations. Twelve years before ANCA's enactment, Congress expressly carved out the "proprietary powers and rights" that local governments possess over government-owned airports from the preemptive force of the federal aviation laws. *See* 49 U.S.C. § 41713(b)(3) (preemptive effect of the federal aviation laws "does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights").

The so-called "proprietor exception" traces its roots to this Court's 1973 decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). There, this Court held that federal aviation regulation preempted a curfew for jet aircraft imposed by a local government exercising its police power. *See id.* at 638-39. At the same time, it recognized that federal preemption of flight restrictions enacted by state and local governments acting as regulators does not necessarily preclude a local government from exercising authority "as the proprietor of an airport." *Id.* at 635-36 n.14. Congress codified the proprietor exception five years later. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4(a), [sec. 105(b)(1)], 92 Stat. 1705, 1708 (codified, as amended, at 49 U.S.C. § 41713(b)(3)).

Courts long have understood the proprietor exception to authorize curfews and traffic-volume limitations of the sort at issue here. *See*, *e.g.*, *National Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88-91 (2d Cir. 1998) (upholding noise restrictions at Manhattan heliport under the statutory proprietor exception); *Santa Monica Airport Ass'n v. City of*

Santa Monica, 659 F.2d 100, 104-05 (9th Cir. 1981) (upholding municipal proprietor's noise regulations under *City of Burbank*). The proprietor exception codified in § 41713 thus expressly preserves the ability of airport owners to enforce reasonable restrictions on the use of airports they own.

Nothing in ANCA indicates that it supersedes the proprietor exception or withdraws any portion of the authority Congress protected in 1978. *See North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015) ("repeals by implication" are "disfavored"). In fact, ANCA is altogether silent with respect to preemption. That, combined with the fact that it regulates in a field "traditionally occupied by" States and local governments as airport proprietors, means that the Act should be construed to have preemptive effect only insofar as Congress's purpose is "clear and manifest." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). If, in addition to offering airport proprietors the option to comply with ANCA and be eligible to receive federal funding, Congress intended to *bar* municipalities from exercising the proprietary authority it expressly protected in § 41713(b), it would have said so clearly. *See id.*; *see also Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (where Congress has enacted an "express pre-emption provision" elsewhere in a statutory scheme, its "silence" in another part "is powerful evidence" against preemption).

3. The FAA's implementation of ANCA confirms that the statute does not automatically preempt access restrictions imposed by proprietors of airports outside the national network that do not elect to receive federal funding. The FAA's regulations implementing ANCA provide that airports that opt not to comply with ANCA's procedural requirements

will not be eligible for federal grants and will not be permitted to impose passenger-facility fees. *See*, *e.g.*, 14 C.F.R. § 161.505(b)(4)(i)-(ii) (if an airport proprietor's restriction is found in formal proceedings to violate ANCA, "the FAA will issue an order that" "[t]erminates eligibility for new airport grant agreements and discontinues payments of airport grant funds" and "[t]erminates authority to impose or collect a passenger facility charge"); *accord id.* §§ 161.501(a), 161.505(a).

The court of appeals identified nothing in the FAA's regulations that interprets ANCA to permit enforcement against airport proprietors that neither receive federal grants nor collect passenger-facility charges. On the contrary, the FAA informed East Hampton in the Bishop Responses that, "unless [it] wishe[d] to remain eligible to receive future grants of Federal funding, it [was] not required to comply with [ANCA] . . . in proposing new airport noise and access restrictions." Pet. 4 (first alteration added). The Second Circuit nevertheless held that *private* litigants may, through an expansive reading of equity jurisdiction (*see* Pet. 12-21), assert an enforcement power the FAA has itself disclaimed. That decision cannot be reconciled with the FAA's implementation of ANCA or with the statute's text and structure.

II. IGNORING THE DIFFERENCES BETWEEN AIRPORTS WITHIN THE NATIONAL NETWORK AND SMALLER AIRPORTS OUTSIDE IT UNDERMINES LOCAL AUTONOMY AND PRODUCES NEGATIVE CONSEQUENCES FOR LOCAL COMMUNITIES

A. Small Airports Outside The National Network Lack The Resources To Comply With ANCA's Onerous Requirements

Major airports within the "national air transportation system," 49 U.S.C. § 47521(2), generally receive federal grants and collect passenger-facility charges, and therefore are obligated to comply with ANCA. Due to their size and the federal funding they receive, those airports possess the resources to undertake the studies ANCA requires. By contrast, the thousands of smaller airports throughout the country lack the resources to complete the onerous procedural steps the statute and the FAA's implementing regulations prescribe.

The FAA regulations implementing ANCA require (eligible) airports to publish notice of all proposed Stage 3 aircraft regulations, to solicit and review comments, and to notify airport tenants, community groups, and state and local government agencies. *See* 14 C.F.R. § 161.303. Stage 3 aircraft are the quietest of the stages of aircraft referred to in ANCA.

As part of the substantive consideration of a Stage 3 aircraft restriction, the regulations require the airport to complete "an analysis" of the proposed restriction that, to name just a few elements, includes:

- a detailed analysis of the noise issue containing "[t]echnical data" describing the "fleet mix, runway use percentage, and

day/night breakout of operations," *id.* § 161.305(e)(2)(i)(A)(1)(ii)(C);

- an environmental impact analysis, *id.* § 161.305(c);
- an economic "cost-benefit analysis" showing "that the estimated potential benefits of the restriction have a reasonable chance to exceed the estimated potential cost of the adverse effects on interstate and foreign commerce," *id.* § 161.305(e)(2)(ii)(A)(1); and
- an estimate of the restriction's impact on "real estate values," "future construction cost (such as sound insulation) savings," "airport revenues," and a "quantification of the noise benefits, such as number of people removed from noise contours and improved work force and/or educational productivity," *id.* § 161.305(e)(2)(ii)(A)(1)(ii)(D).

The FAA then reviews the analysis and determines whether the proposed restriction is justified by "substantial evidence." *Id.* § 161.317(c), (d).[7]

The requirements are as demanding as they appear. In the nearly three decades since ANCA's enactment, the FAA has *never* approved a restriction on Stage 3 aircraft. Over the same period, the agency has approved just *one* restriction on louder Stage 2 aircraft—for which ANCA does not even mandate substantive FAA approval (only procedural

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[7] The nature of the information the FAA requests in its Part 161 studies provides additional evidence that those rules are not intended to apply to small local airports. For example, there would be no reason to require a local airstrip serving recreational pilots and the occasional charter to assess the impact of its noise or access restrictions on "interstate *and foreign* commerce." 14 C.F.R. § 161.305(e)(2)(ii)(A)(1) (emphasis added).

compliance with a notice-and-comment process). *Compare* 49 U.S.C. § 47524(c) (Stage 3 restrictions must be "approved by the Secretary") *with id.* § 47524(b). In the one case in which the FAA determined that an airport successfully complied with ANCA's procedural requirements (at a cost of more than $1 million in, among other things, noise studies and legal fees[8]), the FAA nevertheless challenged the restriction as failing to comply with a condition of the airport's receipt of a federal grant. Litigation continued another four years before the airport ultimately prevailed. *See City of Naples Airport Auth. v. FAA*, 409 F.3d 431 (D.C. Cir. 2005).

Complying with ANCA would impose an extraordinary financial burden on local communities. In 2000, the Bob Hope (Hollywood Burbank) Airport began to study a mandatory nighttime curfew to reduce noise at the airport. Nine years—and more than $7 million—later, the study became the first Stage 3 study to be designated "complete" by the FAA. *See* Hollywood Burbank Airport, Part 161 Update, https://bobhopeairport.com/noise-issues/part-161-update/ (last visited Apr. 3, 2017). Despite that designation, however, the agency ultimately denied the application, finding that "substantial evidence" did not justify the nighttime curfew.[9]

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[8] *See Court Upholds Florida Airport's Right to Ban Stage-2 Jets*, airportnoiselaw.org (Aug. 10, 2001) (reporting that "[t]he Airport Authority has now spent about $1.1 million in its efforts to ban Stage 2 jets," including "legal fees, multiple noise studies and every other expense related to the Stage 2 jet ban"), http://airportnoiselaw.org/news/aug-10.html.

[9] *See* Letter from Catherine M. Lang, Acting Assoc. Admin. for Airports, FAA, to Dan Feger, Exec. Director, Burbank-Glendale-Pasadena Airport Auth. (Oct. 30, 2009), *available at*

Minor airports outside the national network—such as the Airport in this case—lack the resources to devote millions of dollars to study noise restrictions the impacts of which are wholly local and that fall within the heartland of the localities' authority as proprietors.

B. Preventing Proprietors Of Local Airports From Adopting Reasonable Operating Restrictions To Protect Their Local Communities From Noise Will Stifle The Development Of Local Airports

Because ANCA compliance is prohibitively expensive for local airports outside the national network, the Second Circuit's decision would functionally prevent those airports from exercising the authority Congress reserved in the proprietor exception. The result would be to chill airport development across the nation.

The noise issues that local communities, including East Hampton, have undertaken to address are frequently severe. When East Hampton was evaluating the noise issue underlying this case, it commissioned a study that found that, in 2013 alone, aircraft noise would have exceeded the volume limits in the Town's general noise ordinance 31.8 *million* times.[10] The Town's ordinance, East Hampton Code § 185-3, bars noise projected across property lines that exceeds 65 dBA during the day or 50 dBA at night (with

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https://www.faa.gov/airports/environmental/airport_noise/part_161/media/Burbank_10_30_09.pdf.

[10] *See* Young Envtl. Sciences & Noise Pollution Clearinghouse, *East Hampton Airport Phase I Noise Analysis Interim Report*, Slide 30 (Oct. 30, 2014), *available at* http://www.htoplanning.com/docs/Town%20Documents/141030%20Phase%20I%20Noise%20Analysis%20Interim%20Report%20from%20Young.PPTX.

slightly higher allowances in commercial areas). The ordinance does not apply to aircraft noise, *see id.* § 185-4(L), because federal law preempts regulation of aircraft in the air,[11] but the study demonstrates that air traffic generates pervasive noise, at levels the Town considers unacceptably and unlawfully loud.[12]

East Hampton is not unique. In 1996, New York City, acting as the proprietor of the 34th Street Heliport in Manhattan, adopted a set of noise and access restrictions intended to address the "generally high noise levels associated with the Heliport." *National Helicopter Corp. of Am. v. City of New York*, 952 F. Supp. 1011, 1018, 1028-29 (S.D.N.Y. 1997) (Sotomayor, J.). It acted under the proprietor exception and did not observe ANCA's procedural requirements.

The Second Circuit upheld most of the restrictions as a valid exercise of the proprietor exception—including many restrictions that resemble those in this case. *See National Helicopter*, 137 F.3d at 89-91 (approving weekday and weekend curfews, weekend access restrictions, and volume limitations). The court held that the City's "desire to protect area residents from significant noise intrusion during the weekend when most people are trying to rest and relax at home" provided an "ample justification for the application of the proprietor exception." *Id.*

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[11] *See Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1315 (8th Cir. 1981) ("[F]ederal control of the navigable airspace is exclusive and comprehensive.").

[12] In 2014, the Town received almost 24,000 complaints from residents through its automated system, and it received thousands more via email, phone, letter, and in-person testimony at town meetings. *See* Pet. 5.

at 90. In declining over 19 years to alter ANCA or the proprietor exception in response to *National Helicopter*, Congress has "effectively ratified" that decision. *Brown & Williamson*, 529 U.S. at 156.

Regulations such as those governing the 34th Street Heliport are critical to the coexistence of airports and local communities. Under the Second Circuit's decision in this case, however, ANCA strips local airport proprietors of the ability to control operations at their airports and to protect surrounding neighborhoods from excessive noise at unreasonable times of the day or week, unless the localities can afford to complete multi-million-dollar studies. If that decision stands, airport development will be stifled and local airports will close.

That concern is not hypothetical. The City of Santa Monica recently won approval to close its municipal airport—an effort it decided to undertake after years of thwarted attempts to impose reasonable access restrictions.[13] Another City-owned Manhattan heliport narrowly escaped the same fate. Noise concerns related to the Downtown Manhattan Heliport in Battery Park nearly moved the City Council to ban helicopter tours altogether.[14] The heliport remained open only because the operator

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[13] *See* Santa Monica Municipal Airport, *Santa Monica Airport (SMO) History* (describing thwarted regulatory attempts), https://www.smgov.net/departments/airport/history.aspx (last visited Apr. 3, 2017); Dan Weikel & Dakota Smith, *Santa Monica Airport Will Close in 2028 and Be Replaced by a Park, Officials Say*, L.A. Times (Jan. 28, 2017, 5:40 PM), http://www.latimes.com/local/lanow/la-me-santa-monica-airport-20170128-story.html.

[14] *See* Yannic Rack, *Council Mulls Ban on Helicopter Tours*, Downtown Express (Nov. 20, 2015), http://www.downtownexpress.com/2015/11/20/council-mulls-ban-on-helicopter-tours/.

and the City were able to reach a deal that addressed the noise issue by reducing traffic at the heliport by 50%.[15]

If the Second Circuit's preemption decision stands, local governments—long empowered to shape the character and atmosphere of their communities—will instead be left to choose between closing their airports and forfeiting the various benefits of local aviation recreation, tourism, and commerce, or tolerating any and all noise at the expense of the community's character and tranquility. Nothing in federal law requires that outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[15] *See* Stephen Nessen, *Not Everyone Is Cheering Limits on Helicopter Tours*, WNYC News (Feb. 1, 2016), http://www.wnyc.org/story/cutting-tourist-helicopter-rides-half-divides-new-yorkers/.

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