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

PETITIONER'S REPLY BRIEF

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June 5, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Respondents do not dispute that under the court of appeals' decision, thousands of municipal airports that do not receive federal funds now have to submit virtually any restriction on airport access—even something as minor as a one-time curfew—to the FAA for approval. Nor do Respondents dispute that this process takes years and millions of dollars, no airport has successfully received FAA approval, no airport that does not receive federal funds has ever thought it needed to seek such approval, and the FAA has never suggested to any such airport that it violated ANCA by failing to do so. Thus, it is beyond dispute that the decision below will work a radical change in law. Before this revolution in federal aviation law takes hold, it should be reviewed by this Court.

There is nothing in the text of the statute to support allowing private injunction claims under ANCA or extending ANCA's coverage to airports that do not receive federal funds. And the FAA's only clear statements on the issue expressly refute this interpretation. There is accordingly no legal basis to allow the enormously harmful consequences here: "By authorizing far-reaching private litigation that Congress never intended—where Congress left room for different state and local approaches to airport noise—the Second Circuit has distorted the incentives of stakeholders and injected new uncertainty and unpredictability into an area where everyone involved benefits from

both."[1] Moreover, "[t]he 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," and as a result local airports are being forced to close.[2] This Court should grant certiorari.

ARGUMENT

I. RESPONDENTS FAIL TO SHOW HOW THE DECISION BELOW IS CONSISTENT WITH *ARMSTRONG* IN GRANTING EQUITY JURISDICTION FOR PRIVATE INJUNCTION CLAIMS

While Respondents argue about the importance of *Ex Parte Young* and equitable injunctions (BIO 21-23), they do not dispute that the test for whether equitable relief is available in connection with a federal statutory scheme is "Congress's 'intent to foreclose' equitable relief," and that this intent can be "express" or "implied." *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015). Nor do Respondents dispute that the sole-remedy provision here mirrors *Armstrong*. Thus, even accepting Respondents' arguments, this case raises the question *Armstrong* left open: whether a sole-remedy provision suffices to preclude equitable relief. Pet. 21. More important, this case presents a troubling expansion of equitable jurisdiction beyond even the position taken by the *Armstrong* dissent.

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[1] Brief for the City of New York as *Amicus Curiae* ("N.Y.C. Br.") 2.

[2] Brief of Committee to Stop Airport Expansion, *et al.*, as *Amici Curiae* ("Committee Br.") 5, 21.

First, the court of appeals undermined the most fundamental limitation on Spending Clause legislation by taking away the municipality's choice to forgo the funds and thereby not face restrictions. Pet. 16, 23-24. Respondents argue (BIO 25-26) that ANCA is not Spending Clause legislation, but while they purportedly rely on "the terms of the statute" (BIO 25), they cite nothing in the text to support this argument.[3] Indeed, the text refutes it by stating that "revenues controlled by the United States Government can help resolve noise problems and carry with them a responsibility to the national airport system." 49 U.S.C. § 47521(6). Respondents suggest (BIO 26 n.12) this is part of a "carrot and stick" approach, but that approach is not reflected in a statute that mentions only the carrot. Regardless, Congress exercises its Spending Clause power where, as here, "nothing suggests that Congress intended the [statute] to be something other than a typical funding statute." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 22 (1981). Indeed, as the Town explained (Pet. 24-25) and Respondents do not dispute, ANCA is structured just like the Medicaid Act, a prototypical Spending Clause statute.

Second, the indications of congressional intent to preclude private injunctive relief are far stronger here than in *Armstrong*. Pet. 15. ANCA provides judicial review and civil penalties for several sections, but

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[3] Respondents cite the statements of two senators (BIO 25) mentioning the Commerce Clause, but they recognize that another (BIO 26 n.12) mentioned the Spending Clause. Also, because *other* parts of ANCA not at issue here are mandatory with civil penalties for violations (rather than monetary incentives for compliance), 49 U.S.C. § 47531, any reference to the Commerce Clause might well have concerned these sections only.

excludes section 47524. Pet. 18; 49 U.S.C. §§ 47531, 47532. Respondents argue (BIO 29-30 n.16) that these provisions do not belie injunctive relief for the FAA, but even assuming that were true, a provision denying private plaintiffs the ability to go into court to challenge an FAA decision under section 47524, *see* 49 U.S.C. § 47532, strongly suggests that they cannot take the even more disruptive step of going into court to enforce section 47524 without an FAA decision. *See* N.Y.C. Br. 9-10.

Furthermore, there is a specific provision dealing with injunctions, 49 U.S.C. § 47533, that expressly excludes section 47524 from its coverage. Pet. 16-17. Respondents argue (BIO 28) that section 45733's reference to section 47524 is just an acknowledgment that section 47524 contains exceptions, but there is nothing in the text to support this interpretation. Rather, the text states plainly that the FAA's right to injunctive relief applies "[e]xcept" as to section 47524. 49 U.S.C. § 47533.[4]

But even if section 47533 allowed the FAA—and only the FAA, with no mention of others—to seek injunctions to enforce section 47524, that further supports an intent to preclude *private* injunction claims. Respondents argue (BIO 29) that private injunctions

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[4] The regulations also do not provide for injunctions against noise restrictions for failure to comply with section 47524, but rather provide that the FAA can obtain an injunction only "to protect the national aviation system and related Federal interests." 14 C.F.R. § 161.501(a). While Respondents suggest (BIO 29 n.15) the FAA commentary is more expansive, it says the same thing. 56 Fed. Reg. 48661-01, 48690 (Sept. 25, 1991) ("The FAA may seek ... an injunction ... where an airport operator is imposing a restriction that threatens the national aviation system and related Federal interests.").

"would do no more than direct the offending airport back to the FAA." But in fact "private parties may destabilize the long-held expectations of state and local governments by hijacking the FAA's carefully calibrated role under ANCA and unleashing a new torrent of private litigation under the statute." N.Y.C. Br. 4.[5]

Third, the remedy of withholding federal funds would be superfluous if injunctive relief were available. Pet. 19. Respondents argue (BIO 34) that the funding remedy makes sense to avoid the expense of bringing a claim for injunctive relief. But they fail to explain why withholding funds is a less expensive endeavor, and given that withholding of funds requires completion of a detailed regulatory process, the opposite is the case. 14 C.F.R. §§ 161.503, 161.505.

Finally, Respondents contend (BIO 26) that their view is supported by "the federal agency charged with implementing ANCA, members of the aviation community who commented on the FAA's implementing regulations, every circuit court to consider the issue, and even one of the *amici* here." However, the only citation accompanying this sentence is to an *amicus* brief arguing that private parties *cannot* obtain injunctions, even if the FAA might in some cases. N.Y.C. Br. 10. Meanwhile, the FAA has never suggested that private parties (or even the FAA itself) can obtain an injunction to enforce ANCA; no circuit court aside from the instant one has addressed the issue, *see infra* at 8; and the only member of the aviation community they

[5] While Respondents note that ANCA (unlike the provision in *Armstrong*) is judicially administrable (BIO 24), they do not dispute that this is not dispositive, and they make no effort to distinguish several cases (Pet. 20) finding preclusion of additional remedies without lack of administrability.

cite is one brief in a Florida state court case. In short, for the 26-plus years since ANCA was enacted, there has been no indication that private injunctive relief was available to enforce the statute.

II. RESPONDENTS FAIL TO RECONCILE THE COURT OF APPEALS' HOLDING THAT ANCA PREEMPTS NOISE AND ACCESS RESTRICTIONS FOR ALL AIRPORTS WITH THE PLAIN LANGUAGE OF ANCA AND OTHER FEDERAL AVIATION LAW

Respondents argue (BIO 31) that compliance with section 47524 is mandatory, but the plain language of ANCA, its interpretation by the FAA, and aviation law generally belie Respondents' argument. Pet. 22-30. Respondents suggest (BIO 31) that section 47524 creates "commands," not "suggestions." But this is a false dichotomy: section 47524 actually creates *conditions* on eligibility for federal funds. That is why the only remedy is withholding those funds and why the statute refers to "noncomplying" airports and makes them ineligible for funding. *See* 49 U.S.C. §§ 47524(e), 47526. Indeed, Respondents do not dispute that the Medicaid statute is just as mandatory-sounding as ANCA. Pet. 24. So are other Spending Clause statutes. *See, e.g.*, 20 U.S.C. § 1232g(a)(1)(A).

Respondents suggest (BIO 1, 33) that federal aviation law already creates field preemption. But the case they cite held that "[w]e do not consider here what limits, if any, apply to a municipality as a proprietor." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973). And while preemption

over *airspace* has long been within the FAA's exclusive authority, preemption over proprietary *airports* has not. Pet. 26-28; N.Y.C. Br. 5. In any event, Congress has confirmed that exact limit on preemption in the Airline Deregulation Act of 1978 ("ADA"). 49 U.S.C. § 41713(b); Pet. 25-26.

Respondents argue (BIO 33 n.21) that their argument entails no implied repeal of the ADA by ANCA because the ADA "simply endorsed the general concept of a proprietor's exception." But whether deemed general or specific, the ADA carved out the exercise of "proprietary rights and powers" as not preempted. The court of appeals' interpretation of ANCA would change that dramatically by making virtually all airport restrictions preempted, even if they are an exercise of proprietary rights and powers. Respondents do not argue that the stringent limits on implied repeals (Pet. 26) are satisfied here. To the extent Respondents suggest generally that Congress intended ANCA to be a substantial change in aviation law, they cite nothing for the idea that this would include a change in the law of preemption. Moreover, Respondents' lone citation for the importance of ANCA (BIO 11) concerned a quotation in an article focusing on ANCA's phase-out of certain noisy aircraft, 49 U.S.C. § 47528, not ANCA's section 47524 conditions.

Respondents rely (BIO 13, 32) upon two other circuit court decisions that supposedly support their view, but both are inapposite. *City of Naples Airport Authority v. FAA*, 409 F.3d 431 (D.C. Cir. 2005), concerned an airport proprietor that was challenging an FAA decision to withdraw eligibility for funding. *Id.* at 432. To be sure, the court stated that "subsection [47524](c)'s requirement of FAA approval is not tied to grants." *Id.* at 434. But this offhand remark, in dicta, without

explanation, certainly does not constitute a holding, let alone one suggesting a consensus on the issue. *City of Mukilteo v. United States Department of Transportation*, 815 F.3d 632 (9th Cir. 2016), is also far afield, as it concerned a challenge to the FAA's decision not to require an environmental impact statement. *Id.* at 634. It says nothing about whether ANCA applies to airports that forgo federal funding.

Respondents also rely upon the FAA's views (BIO 12 n.4, 31 & n.18), but the FAA's only clear statements on the issue (Pet. 28-29) are its statement (in response to Congressman Bishop's questions) that the Town need not comply with ANCA if it forgoes federal funding and its brief stating that ANCA applies to federally funded airports. Respondents ignore the latter and note only that the former is "unsigned" (BIO 16) and not legally binding (BIO 18), but Respondents do not dispute that the Bishop response came from an FAA official and thus represents the FAA's considered view. Respondents cite various regulations (BIO 31 n.18), but not a single one references airports that do not receive federal funds. And to the extent the FAA's views are not definitive, the solution would be for this Court to invite the Solicitor General to file a brief here expressing the views of the United States.

Finally, Respondents rely (BIO 31-32 & n.19) on legislative history. But their only response to the sponsoring congressman, a senator, and a hearing report clearly stating that ANCA concerns eligibility for funding (Pet. 29-30) is to claim (BIO 31 n.19) that these cites are "highly curated." However, the snippets of legislators' statements Respondents cite (BIO 9-10, 25-26, 31 n.19) are not only "curated," but say *nothing* about whether ANCA covers airports that do not receive federal funding.

III. RESPONDENTS FAIL TO CONFRONT THE ENORMOUS, HARMFUL CONSEQUENCES FROM FEDERALIZING ALL THE NATION'S AIRPORTS

Respondents do not dispute that the court of appeals' interpretation of ANCA would mean federalizing every public airport in the country. This change alone would be enormous, as it concerns over 1,800 public airports that do not receive federal funds. Pet. 31. Moreover, it would be extremely onerous for those airports because (as Respondents also do not dispute) ANCA would apply to virtually every restriction that has an effect on airport noise (Pet. 32), and seeking FAA approval would take years, cost millions, and has never been successful (Pet. 32; Committee Br. 16-18).[6]

Respondents suggest (BIO 35-36) that these airports will not be greatly affected because they generally cannot accommodate Stage 2 and 3 aircraft, which are subject to section 47524. However, the FAA statement they cite says only that "larger urban areas ... are more likely to be served by Stage 2 and Stage 3 aircraft." 56 Fed. Reg. 48661-01, 48698. Also, as a factual matter, Respondents are incorrect: Stage ratings concern noise

[6] Respondents claim (BIO 1) that "Petitioner recently announced plans to comply with ANCA," but in fact the Town simply passed a resolution to provide a small and limited budget for a law firm to provide advice because the Town "wishes to exhaust all options." Town of E. Hampton Res. 2017-572 (May 18, 2017), http://easthamptontown.iqm2.com/Citizens/FileOpen.aspx?Type=30&ID=13570&MeetingID=1794. Regardless, Respondents' assertion (BIO 1) that the case may become moot is absurd: the Town has not sought FAA approval, and the process would take years and millions of dollars, so there is absolutely no chance that the process would be complete before this appeal is decided.

level, not size of aircraft[7]; many airports that do not receive federal funding have long runways[8]; and many helicopters have Stage 2 and 3 ratings[9] and can land at almost any small heliport (like those in New York City).

Furthermore, contrary to Respondents' contention (BIO 4, 34-35), the court of appeals' decision would apply to private airports, a radical shift in law given there are over 14,400 such airports (in addition to the 1,800-plus public airports that do not take federal funds). Respondents identify nothing in ANCA drawing a distinction between public and private airports. And the regulation they cite (BIO 12 n.4) defining "private use" airports, 14 C.F.R. § 157.2, applies to Part 157, not Part 161 (the one covering ANCA). Part 161 defines airport broadly as "any area of land or water, including any heliport, that is used or intended to be used for the landing and takeoff of aircraft." 14 C.F.R. § 161.5. While Respondents claim (BIO 12 n.4) that "the FAA has consistently interpreted ANCA as not affecting private-use airports," they cite only a single letter to an airport, where the FAA treated the private status of the airport as simply one "factor[]" in deciding ANCA was inapplicable to the particular restrictions at issue. Letter to Director, Hawaii Dep't of Transportation, (July 6, 1992), https://www.faa.gov/airports/env

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[7] FAA Advisory Circular 36-1H, *Noise Levels for U.S. Certificated and Foreign Aircraft* ("FAA Circular") 1-2 (May 25, 2012), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%2036-1H.pdf.

[8] For instance, a private airport near the Town, Calverton Executive Airpark, has a runway of over 10,000 feet, more than twice as long as the longest runway at the Town's airport.

[9] FAA Circular, Appendix 10, 11.

ironmental/airport_noise/part_161/media/West_Maui_7_6_92.pdf.

Respondents also suggest (BIO 35) that a private airport can avoid the ANCA process simply by making agreements with aircraft operators. But this applies only to Stage 3, not Stage 2, aircraft. 49 U.S.C. § 47524(b), (c). Regardless, any such agreement must be subject to public notice and comment, 14 C.F.R. §§ 161.103(a), 161.107(b), and must be executed by all aircraft operators who currently operate or will operate within the next 180 days, *id.* § 161.101(a). The kind of unilateral imposition Respondents posit of "whatever access terms the owner specifies" thus would not satisfy ANCA.

The result is a massive shift in aviation law. Respondents provide no explanation for why, under its interpretation, *none* of the thousands of airports not receiving federal funds has submitted a restriction for FAA approval in 26-plus years. Indeed, prior to this case, the established law was that ANCA did not preempt such regulations absent FAA approval. *See Nat'l Helicopter Corp. of America v. City of New York*, 137 F.3d 81, 92 (2d Cir. 1998). Respondents argue (BIO 32 n.20) that *National Helicopter* did not have a clear holding on ANCA, but the issue was fully briefed in both the district court and court of appeals and both courts declined to hold that ANCA preempted New York City's exercise of proprietary power to enact noise restrictions—a decision treated for two decades as settled law. In contrast, *Naples* concerned an airport seeking federal funding, and not a single court (apart from the court of appeals below) has cited its offhand remark in dicta about ANCA not being tied to grants. The Second Circuit's massive change, which

Congress did not intend and the FAA has disapproved, warrants this Court's review.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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