COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	DATE FILED September 3, 2025 12:00 PM FILING ID: 81B67EA21F1B4 CASE NUMBER: 2025CA836
Appeal from Boulder District Court Case No. 2024CV30221 The Honorable Stephen Howard, Senior District Court Judge	
Plaintiffs-Appellants: TOWN OF SUPERIOR, a municipal corporation of the State of Colorado, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BOULDER, COLORADO, a County government in the State of Colorado, v. *Defendants-Appellees*: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, COLORADO, as successors in interest to the Jefferson County Airport Authority, and ERICK DAHL in his official capacity as Airport Director of the Rocky Mountain Metropolitan Airport.	▲COURT USE ONLY▲
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APPELLANTS' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒ It contains 9,469 words (principal brief does not exceed 9,500 words; reply brief does not exceed 7,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒ For each issue raised by the appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐ In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

☒ I acknowledge that this brief may be stricken if it fails to comply with all of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Andrew D. Barr
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Appellants seek an affirmative injunction to abate a public nuisance. The district court dismissed this action, finding that federal law divested it of the power needed to order Appellee Jefferson County ("JeffCo") to stop harming Appellants and their residents. The district court generally cited federal aviation preemption cases to justify its conclusion, but it failed to clearly identify a Congressional act supporting preemption. For good reason: no such Congressional act exists. The district court erred.

Our Supreme Court held that "[i]nvoking some brooding federal interest," like aviation generally, "or appealing to a judicial policy preference[,] should never be enough to win preemption of a state law[.]" *Cnty. Commissioners of Boulder Cnty. v. Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 52 (quoting *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (plurality opinion)). Instead, courts "must point *specifically* to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* (emphasis added) (quoting *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). Simply put, only Congress may preempt state law. *Id*. But the district court failed to identify "a constitutional text or a federal statute" supporting its conclusion, and it instead

errantly rested on a "brooding federal interest" to dismiss Appellants' action. This ruling misapplied federal law.

First, federal law expressly *allows* airport proprietors – like JeffCo – to abate airport noise nuisances. To be sure, federal law preempts state and local governments, *using their police power*, from regulating airport noise. But JeffCo's police power is not at issue here. Dispositive for purposes of this appeal, both Congress via legislation that remains valid and enforceable to this day *and* the U.S. Supreme Court in a case that remains good law have spoken, and both agree that airport owners—like JeffCo—have the "proprietary power" to abate airport noise nuisances. Appellants seek an order requiring JeffCo to use only its proprietary power.

Second, Congress did not occupy the field of aviation noise regulation, and instead Congress allows airport proprietors to abate nuisances that emanate from their airports. Thus, JeffCo can abate the nuisances at issue in this case without standing as an obstacle to Congress's objectives.

Third, only conflict preemption remains, and neither the district court nor JeffCo identified any conflicting federal law. The district court references the Airport Noise and Capacity Act of 1990 ("ANCA"), but ANCA is purposefully and

narrowly drawn to apply only to aircraft *not* at issue here. As a result, Congress's intent is clear: federal law does not preempt the relief Appellants seek.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it found that unspecified federal law preempted Appellants' action, even though federal law expressly allows the relief Appellants seek and at least 20 airports across the country have materially identical restrictions at their airports?

STATEMENT OF THE CASE

I. SUMMARY OF THE DISPUTE

In March 2024, Appellants sought relief from pervasive noise and lead-based emissions plaguing their communities. CR, 1-21. Both jointly sued the Board of County Commissioners of the County of Jefferson Colorado, the owner and operator of the Rocky Mountain Metropolitan Airport ("Airport"), as well as the Airport's director in his official capacity. CR, 1-21.

JeffCo's Airport has unreasonably injured (and continues to unreasonably injure) Appellants' and their residents. CR, 1-2. At the Airport, piston-engine aircraft perform "touch-and-go" operations. CR, 6-7. These "touch-and-goes" deposit unsafe lead particulates on Appellants, burden them with pervasive and excessive noise, and create unreasonable health risks. CR, 6, 8-9. For that reason, both communities sought an injunction requiring JeffCo to abate this nuisance. CR,

3, 20. Appellants are located within one mile of the Airport, and they experience constant overflights. CR, 3-6.

II. THE AIRPORT'S EXTENSIVE TOUCH-AND-GO OPERATIONS

The Airport has considerable volume. CR, 5-6. In 2023, the Airport experienced 281,806 operations, averaging one operation every two minutes *for the entire year*.[1] CR, 5. JeffCo reported that 155,178 of these operations qualified as entirely "local" training flights, and most local training flights are "touch-and-goes" conducted by piston-engine aircraft during daylight hours. CR, 5-6. Piston-engine aircraft are typically "the smallest, most basic airplanes," and they use "avgas" which is the "only transportation fuel in the United States to contain lead." CR, 6-7. In summer 2023, the Airport commonly experienced over 1,500 operations per day. CR, 6. This equates to one operation each minute of daylight. *Id.*

Pertinent here, a "touch-and-go" occurs when an aircraft lands and takes off without coming to a full stop. CR, 9. When taking off, pilots depart the runway without turning until they are at least 500 feet above the ground. CR, 7. Nearly all piston-engine aircraft climb with full engine power to minimize the risk of a stall during takeoff (which could lead to a crash). CR, 7.

[1] By comparison, in 2023 Chicago Midway International Airport experienced 214,427 operations and Ronald Reagan Washington National Airport had 297,445 operations. *See* FAA Airport Data *available at* https://adip.faa.gov/agis/public/.

Here, when conducting touch-and-goes, piston-engine aircraft expose Appellants' residents to unreasonable amounts of lead-based-particulate emissions *and* extreme noise pollution. CR, 7, 9-10. Student pilots at the Airport ordinarily conduct several touch-and-goes during a single flight. CR, 9-10, 15. During an ordinary takeoff (*i.e.*, not a touch-and-go), an aircraft gets airborne earlier—and farther away from Appellants—because it needs less runway to takeoff. CR, 9. This occurs because the aircraft starts its takeoff at the beginning of the runway. *Id*. During these "normal" takeoffs, the aircraft overflies Appellants higher, quieter, and faster when compared to the same aircraft performing a touch-and-go.

During a touch-and-go, an aircraft gets airborne closer to the runway's end because it used a portion of the runway to complete a landing and decelerate. *Id.* Consequently, touch-and-goes cause piston-engine aircraft to traverse Appellants at a lower altitude than an ordinary takeoff. *Id*. During these low overflights, the aircraft are using full power to climb as quickly as possible. *Id*. This combination – low altitude, low speed, and maximum power – creates maximum and repeated unreasonable lead and noise exposure to residents.

III. JEFFCO'S BAD FAITH TORPEDOES EFFORTS TO INFORMALLY ABATE THE TOUCH-AND-GO NUISANCE

Appellants exhausted all reasonable measures available to resolve this nuisance. CR, 15. These efforts included participation in the Airport's "Community

Noise Roundtable." CR, 15-16. The Noise Roundtable was designed "to provide for and promote a regional, coordinated approach to collaborate on and address the noise impacts to the community surrounding the . . . Airport" and to consider "operational changes . . . for associated noise impacts." *Id*.

But the Noise Roundtable never took off given JeffCo's bad faith. For example, JeffCo's former airport director stated the Noise Roundtable was "useless" and a "waste of money." CR, 16. In JeffCo's view, at the Noise Roundtable "nothing gets done, it just makes people feel happy that they're part of the Roundtable and they get to bitch" while wasting "a couple hundred thousand dollars of taxpayer's money." *Id*. Regarding lead, JeffCo thought it did "not have to worry about" lead impacts on local children because Appellants "can't prove that it's coming from the airport." *Id.*[2] Unsurprisingly, the Noise Roundtable failed to implement any meaningful changes. *Id*.

Moreover, beyond participating in the Noise Roundtable for years, Appellants also repeatedly contacted JeffCo directly in an attempt to obtain relief for their residents. JeffCo refused to engage in *any* discussions with Appellants.

[2] The Colorado Department of Public Health and Environment published a report in 2024 establishing a connection between proximity to general aviation airports (like the Airport) and increased blood-lead levels in children. *Available at* https://cdphe.colorado.gov/lead/lead-health/data-and-studies. JeffCo's dismissal of health hazards to children caused by these touch-and-goes is misplaced.

IV. APPELLANTS FILE SUIT, AND THE DISTRICT COURT DISMISSES

Left with no alternative, Appellants filed a single-count, public nuisance complaint to protect their residents. CR, 18-20. They sought an order requiring JeffCo to abate the continuing nuisance it causes or allows by prohibiting "touch-and-go" operations conducted by piston-engine aircraft at the Airport. CR, 20. Appellants do not seek money damages.

Without a hearing, the district court dismissed Appellants' complaint. CR, 159-183 (motion), 190-250 (opposition), 260-272 (reply), 340-350 (order dismissing complaint). The district court found that "federal law preempts any limitation on aircraft flight operations, including noise or pollution, by any local or state government or individual." CR, 345. And because it found that "touch and go operations" are "flight operations," it also found that it could not affirmatively enjoin JeffCo because an injunction "would involve local regulation of aircraft operations, an issue preempted by the federal government." CR, 349. It did not clearly identify the congressional enactment justifying its ruling nor did it cite a single statute or case supporting its conclusion. CR, 340-350. This Court should reverse.

ARGUMENT

I. STANDARD OF REVIEW AND LEGAL STANDARD

A. Standard of Review

This Court reviews the dismissal order *de novo*. *Fuentes-Espinoza v. People*, 2017 CO 98, ¶ 20; *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1142–43 (10th Cir. 2010). This Court must "accept all allegations of material fact in the complaint as true, and [] view the complaint's allegations in the light most favorable to [Appellants]." *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 25. This standard applies to both issues raised by Appellants.

B. Preemption Legal Standard

The Supremacy Clause of the United States Constitution preempts state and local laws that "interfere with or are contrary to, *the laws of congress*." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (emphasis added). Two preemption principles broadly guide this Court's review. *Fuentes-Espinoza*, 2017 CO 98, ¶ 22. "First, Congress's purpose is the 'ultimate touchstone in every pre-emption case.'" *Id.* (citations omitted). Second, Colorado courts presume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (citations omitted). Distilled to its essence: Congress must clearly express its intent

to preempt a state-law cause of action. *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 34. Absent clear Congressional intent, a state law cause of action is *not* preempted. *Id*.

Here, because "nuisance abatement issues … have been deemed traditional *state* law matters implicating important state interests," preemption cannot apply absent a "clear and manifest" statement by Congress. *See id.* ¶¶ 34, 44 (collecting cases); *Brit. Airways Bd. v. Port Auth. of New York*, 558 F.2d 75, 83 (2d Cir. 1977) ("The task of protecting the local population from airport noise has . . . fallen to the agency, usually of local government, charged with operating the airport.").

Preemption comes in several forms. In general, "[c]ongressional intent to preempt state law in a given area of law can be explicitly set forth or can be implicit." *In re Marriage of Heupel*, 936 P.2d 561, 564 (Colo. 1997). "Three types of preemption may apply . . . (1) direct or conflict preemption, which occurs when a state statute directly conflicts with a federal statute; (2) statutory or express preemption, which occurs when a federal statute expressly states that it preempts state laws; and (3) field preemption, which occurs when federal law occupies a legislative field such that no room is left for state law to supplement it." *In re Marriage of Drexler & Bruce*, 2013 COA 43, ¶ 14; *Fuentes-Espinoza*, 2017 CO 98, ¶ 23. JeffCo bears the burden to show that preemption precludes Appellants' cause of action. *See Cook*, 618 F.3d at 1143-44 (holding that defendants "bear the burden

of showing that federal and state law conflict" and identify state law that "they believe are in conflict with [federal law]."). JeffCo has not, and cannot, meet its burden.

II. FEDERAL AVIATION LAW DOES NOT PREEMPT THE RELIEF APPELLANTS' SEEK

The district court found that federal law preempted relief. CR, 349-350. But it did not clearly articulate the basis for this finding. *Id*. Appellants thus discuss and rule out each basis for preemption. To this end, federal law does not (1) occupy the field, (2) expressly preempt abating a noise nuisance, (3) or conflict with the relief Appellants seek.

A. Congress Did Not Occupy the Field of Aviation Noise

A state law is preempted under principles of field preemption only if Congress expressed its intention that the federal government occupy a field of law exclusively. *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 37 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). Such intent "may be inferred when (1) Congress has adopted a framework of regulation that is so pervasive that Congress has left no room for states to supplement it or (2) a federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (citing *Fuentes-Espinoza*, 2017 CO 98, ¶ 25).

Congress has occupied the field (*i.e.*, completely preempted state law) in very few cases—none of which are pertinent here. *See Arizona v. United States*, 567 U.S. 387, 401 (2012) (immigration); *English v. Gen. Elec. Co.*, 496 U.S. 72, 82 (1990) (nuclear safety); *United States v. Locke*, 529 U.S. 89, 111 (2000) (oil tankers); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (natural gas); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 636 (2012) (locomotives). That's it.

Congress has not occupied the airport proprietor noise preemption field, and the U.S. Supreme Court has never so held. *E.g.*, *Brit. Airways Bd.*, 558 F.2d at 84 ("[T]he Supreme Court has refrained from holding that Congress has occupied the field of noise regulation to the exclusion of airport proprietors." (citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 (1973))). The opposite: Congress expressly *preserved* an airport proprietor's ability to abate airport noise nuisances in federal statute, *infra*, at II.B, a codification of the Supreme Court's finding in *Burbank* that airport proprietors have inherent power to control aspects of how their airport operates to avoid incurring liability. Neither the district court nor JeffCo expressly identified a case to the contrary. CR, 159-183 (motion), 260-272 (reply), 314-324 (order). Field preemption does not apply to this case.

B. Congress Did Not Expressly Preempt Airport Proprietor Noise Regulation—It Expressly *Allowed* It

To determine whether express preemption applies, courts use a two-step process. First, courts *must* presume "that Congress does *not* intend to supplant state law." *Arapahoe Cnty. Pub. Airport Auth. v. Centennial Exp. Airlines, Inc.*, 956 P.2d 587, 594 (Colo. 1998) (emphasis added) *rev'd on other grounds in Arapahoe Cnty. Pub. Airport Auth. v. F.A.A.*, 242 F.3d 1213, 1224 (10th Cir. 2001). Second, Courts must review the objectives of the statute in defining "the scope of the state law that Congress understood would survive." *Id.* In sum, "the existence of preemption turns on Congress's intent" and thus, courts must analyze express preemption using "the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008).

Congress has extensively legislated the airport regulation space. This includes the Airline Deregulation Act, the Federal Aviation Act, the Noise Control Act, and ANCA. These acts do not expressly preempt the relief Appellants seek; instead, the ADA expressly *authorizes* JeffCo to abate the nuisances at issue in this case.

1. Waiver

JeffCo has not clearly identified any basis for express preemption. Although it cited various statutes, it did not identify a federal statute expressly preempting an

airport proprietor from abating noise caused by its airport – the sole issue before the Court. CR, 159-183 (motion), 260-272 (reply). Instead, it generally cited distinguishable and inapt aviation case law. *Id.* Thus, JeffCo waived any argument regarding express preemption.

2. *Burbank* and the Airline Deregulation Act

i. The Supreme Court Recognizes Airport Proprietor Power.

Courts have long recognized that "the *police power* of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *E.g.*, *Chicago, B. & Q. Ry. Co. v. Ill.*, 200 U.S. 561, 592 (1906) (emphasis added). In *Burbank*, the U.S. Supreme Court recognized that airport proprietors, like JeffCo, retain a separate power: "proprietary power." This "proprietary power" is the simple recognition that an airport proprietor, like any other business owner, retains the inherent power to create rules for its airport to avoid incurring liability. 411 U.S. at 635 n.14; *see also Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1991), *as amended on denial of reh'g* (Jan. 9, 1992).

The U.S. Supreme Court has recognized that airport owners, like JeffCo, have the inherent power to "deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Burbank*, 411 U.S.

at 635 n.14. In *Burbank*, a private entity owned a commercial-service airport (the "proprietor" of the airport), and the municipality in which the airport was located enacted a legislative curfew on certain operations via ordinance (*i.e.*, exercise of the non-proprietor municipality's "police power"). *Id.* at 627-628. The Supreme Court held that Congress preempted the municipality's police-power ordinance. *Id.* at 639.

But the Supreme Court expressly *preserved* and *recognized* the airport proprietor's ability to regulate noise via its "proprietor power." *Id*. at 635 n.14 ("Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory"). Indeed, the Supreme Court stated that federal law "does not address responsibilities or powers of airport operators" and thus "[a]irport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id*. Simply put, federal law does "not affect the rights of a State or local public agency, *as the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport." *Id.* (emphasis added).

After *Burbank*, it is true that a local government cannot use its "police powers" to legislatively regulate aircraft noise. But an airport proprietor can use its

"proprietary powers" to achieve the same end—even if the proprietor is also a municipality. *Id*. (stating federal law does "not affect the rights of a State or local public agency, *as the proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport.").

In *Burbank*, the proprietor was a different entity than the municipality, meaning that the municipality could only act through its police power as it did not have any "proprietor power" at the airport. But here, JeffCo is both the proprietor and the municipality and thus it has both police powers *and* proprietary powers. Appellants seek an order requiring JeffCo to exercise its *proprietary* power only. This distinction is dispositive in the preemption analysis: *Burbank* makes clear that JeffCo can abate noise nuisances emanating from the Airport as the *proprietor* of the Airport. JeffCo's police powers are not at issue here.

ii. Congress Expressly Codifies Airport Proprietor Power.

In *Burbank*'s wake, the Airline Deregulation Act of 1978 ("ADA") was enacted to avoid the result identified in *Burbank*: a patchwork of local *police-power* regulations affecting commercial air transportation. *See* 49 U.S.C. § 41713, *et seq*. Inapposite here, the ADA preempts any effort by a local government via its police

powers to enact legislation that impacts an "air carrier's" (*i.e.*, an airline) "rates, routes, or services." *Id.*

At the same time, Congress codified the *Burbank* holding that an airport *proprietor* can regulate noise at its airport. The ADA preserves the authority of a "political subdivision of a State . . . that owns or operates an airport . . . [to] carry[] out its proprietary powers and rights," as set forth in *Burbank*. 49 U.S.C. § 41713(b)(3). Thus, since 1978, airport proprietors have enjoyed express congressional authorization to abate noise- or emission-based nuisances created at or by their airports as a byproduct of their *proprietary* powers (not their police powers). *See, e.g.*, *Alaska Airlines, Inc.*, 951 F.2d at 982. Make no mistake: "Congress has consciously delegated to state and municipal proprietors the authority to adopt rational regulations with respect to the permissible level of noise created by aircraft using their airports in order to protect the local population." *Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998); *Brit. Airways*, 558 F.2d at 83 ("The task of protecting the local population from airport noise [falls to the] local government[] charged with operating the airport.").[3]

[3] *Many* courts have so held. *See Greater Westchester Homeowners Assn. v. City of Los Angeles*, 603 P.2d 1329, 1337 (Cal. 1979) (holding that federal law did not preempt "noise disputes between airport owners . . . and property owners" or provide airport operators "immunity from traditional nuisance liability"); *Owen v. City of Atlanta*, 157 Ga. App. 354, 356 (1981) *aff'd* 282 S.E.2d 906 (1981) (rejecting notion that "preemption [was] a doctrine behind which an airport proprietor whose

Several compelling policy reasons justified Congress's decision to legislatively preserve the proprietor power. After all, because "the operator controls the location of the facility, acquires the property and air easements and is often able to assure compatible land use, [it] is liable for compensable takings by low-flying aircraft." *Brit. Airways*, 558 F.2d at 83 (internal citations omitted). For these reasons, "[t]he right of the proprietor to limit [its] liability by restricting the use of [its] airport has been thought a corollary of this principle." *Id.* And "[i]t is perhaps more important [] that the inherently local aspect of noise control can be most effectively left to the [airport] operator, as the unitary local authority who controls airport access." *Id.* Finally, "[i]t has always seemed fair to assume that the [airport] operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political." *Id.* Simply put, "the proprietor exception allows municipalities to promulgate 'reasonable,

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facility creates a 'nuisance' may hide"); *Chronister v. City of Atlanta*, 99 Ga. App. 447, 452 (1959) (finding airport owner subject to nuisance claim); *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 698 (7th Cir. 2005) (stating Congress intended to preempt only aviation "issues which reach far beyond a single local jurisdiction and which cannot sensibly be resolved by a patchwork of local regulations"); *Wood v. City of Huntsville*, 384 So. 2d 1081, 1084 (Ala. 1980) ("In the specific area of noise control, state and local governments [can] as proprietors of airports . . . establish reasonable noise levels by regulations"); *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988) ("Illinois has some role notwithstanding *Burbank* in governing the amount of noise and pollution" at airports).

nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level." *Nat'l Helicopter*, 137 F.3d at 88.

As explained, federal law does not preempt, and it in fact expressly authorizes JeffCo to take affirmative action as an airport *proprietor* to abate nuisances emanating from its airport. *See id.* at 89 (affirming flight curfews because protecting residents from "undesirable heliport noise during sleeping hours is primarily a matter of local concern and for that reason falls within the proprietor exception."). The district court ignored JeffCo's proprietary power. Neither JeffCo nor the district court explained what post-*Burbank* and post-ADA law removed JeffCo's proprietary power. Nor can they, as none exists. *Infra*, at II.D (explaining how JeffCo can use its proprietary power). Given the ADA's express authorization, as well as *Burbank*, the district court's conclusion cannot stand.

3. The FAA Act Does Not Preempt Airport Proprietor Power to Regulate Noise

In 1958, Congress enacted the FAA Act, *see* 49 U.S.C. § 40101, *et seq*. The FAA Act played a central role in *Burbank*, 411 U.S. at 627, 635 n.14. In *Burbank*, the U.S. Supreme Court held that state and local governments, in their capacity as proprietor of the airport, could implement certain restrictions on operations at their airports. *Id.*; *supra*, at II.B.2.i. Given *Burbank*, Appellants need not explain more.

Neither the district court nor JeffCo claim – or can claim – the FAA Act preempts Appellants' relief.

But the FAA Act merits some discussion. It belies the district court's conclusion that unspecified federal law preempts injunctive relief. CR, 349; *infra* at II.E. In the FAA Act, Congress included a broad "savings" clause that expressly preserves state-law remedies: "A remedy under this part is in addition to *any other remedies provided by law*." 49 U.S.C. § 40120(c) (emphases added). This clause saves Appellants' request for injunctive relief to abate the nuisance from preemption. *E.g.*, *Aviation Cadet Museum, Inc. v. Hammer*, 283 S.W.3d 198, 200 (Ark. 2008) (relying on § 40120(c) to affirm "an injunction to enjoin [airport operator] from using its airport for purposes of allowing airplanes to land and depart therefrom"); *Emerald Dev. Co. v. McNeill*, 120 S.W.3d 605, 607-08 (Ark. Ct. App. 2003) (same); *Carter v. Cent. Reg'l W. Virginia Airport Auth.*, 2016 WL 4005932, at *24 (S.D.W. Va. July 25, 2016) ("[T]he savings clause has played a key role in the determination that part or all of a state law is not preempted by the [FAA Act]"). The FAA Act cannot expressly or impliedly preempt injunctive relief to force an airport proprietor to abate its own nuisance and, at the same time, preserve "any other remedies" under state law. *See Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630, 635 (Cal. 1984).

In short, the FAA Act expressly *preserves* the district court's ability to grant Appellants' pleaded relief, and the ADA recognizes JeffCo's power, as a proprietor, to regulate local noise. The district court erred.[4]

C. ANCA Does Not Preempt JeffCo's Proprietor Power To Regulate The Non-Stage Aircraft At Issue In This Case

Certain local airport noise restrictions, *none of which are applicable here*, could raise possible conflict preemption issues due to the Airport Noise and Capacity Act of 1990 ("ANCA"), Pub. L. No. 101–508, 104 Stat. 1388 (recodified at 49 U.S.C. §§ 47521–47534). The district court seemed to partially justify its order by referencing ANCA. CR, 346. It erred in doing so: ANCA expressly does <u>*not*</u> apply to the aircraft at issue in this case. ANCA applies to "staged" aircraft, whereas piston-engine aircraft—the only aircraft at issue in this case—are classified as "non-stage." Congress's careful line drawing in ANCA was an effort to preserve the long-established "proprietary exception" set forth in the ADA for all aircraft other than

[4] In 1968, Congress amended the FAA Act to give the Federal Aviation Administration ("FAA") responsibility to promulgate "such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom." *Aircraft Noise Abatement Act of 1968*, Pub. L. No. 90–411, 82 Stat. 395 (recodified at 49 U.S.C. § 44715)). This pre-*Burbank* and pre-ADA amendment does not impact *Burbank's* holding or the ADA's "proprietary power" exception to preemption and thus is not pertinent to this appeal.

those that are "staged" (*i.e.*, most jet-powered aircraft, none of which are at issue here).[5]

Conflict preemption[6] ordinarily occurs "when (1) compliance with both federal and state law is physically impossible, [ ] (2) state law penalizes what federal law requires, . . . or (3) state law directly conflicts with federal law. . . ." *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 38 (citations omitted). ANCA preempts "local laws not enacted in compliance with [it]." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 152 (2d Cir. 2016). Appellants are not seeking a "local law," the district court was not asked to order JeffCo to enact a "local law," and JeffCo can abate the nuisances without enacting a "local law." Conflict preemption is inapposite here.

Nevertheless, the district court seemed to believe that ANCA led to conflict preemption. But the district court failed to heed ANCA's plain text. In *Medtronic,*

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[5] Even then, Congress created procedural requirements to facilitate such restriction of Staged Aircraft. *See Friends of E. Hampton*, 841 F.3d at 154 ("In [49 U.S.C.] § 47524, Congress itself cabins airport operators' proprietary authority by mandating certain procedures for the enactment of local noise and access restrictions" applicable to staged aircraft.). But this aspect of ANCA is inapposite given that the only aircraft at issue in this case—non-stage-piston-engine aircraft—are expressly *not* subject to ANCA. 49 U.S.C. § 47524(a).

[6] Conflict preemption includes a separate branch, "obstacle" preemption, which does not apply to airport proprietor noise regulation. *See Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 38 (discussing "small number of cases" concluding that obstacle preemption existed).

Inc. v. Lohr, the U.S. Supreme Court explained how courts should interpret preemptive statutes, and it noted that courts must "not go beyond [statutory] language to determine whether Congress intended the [law] to pre-empt at least some state law. . . ." 518 U.S. 470, 484–86 (1996). The Supreme Court also acknowledged that courts must heed the presumption that Congress did not intend to preempt state law absent clear expression to the contrary. *Id.* It noted that "Congress does not cavalierly pre-empt state-law causes of action," and thus courts use this anti-preemption presumption "to support a narrow interpretation" of preemptive statutes given federalism concerns. *Id.* (internal citations and quotation marks omitted). To complete the requisite analysis, courts determine Congressional purpose from the "language of the pre-emption statute" and the "statutory 'framework' surrounding it." *Id*. True, courts can view the "structure and purpose of the statute as a whole," assess congressional intent, and examine the surrounding regulatory scheme. *Id*. But a court's review must defer to the statute's text; indeed, the text is the only expression of Congressional intent. *Id.*; *Commonwealth Of Puerto Rico v. Franklin California Tax-free Tr.*, 579 U.S. 115, 125 (2016) (focusing on "plain wording" when considering express preemption).

ANCA does not legislatively overrule *Burbank*, it does not conflict with the ADA's "proprietor exception" in any way, and it does not apply to any of the piston-

engine aircraft at issue in this case. In ANCA, Congress restricted JeffCo's proprietary power to regulate noise as it relates to only "Stage[d] Aircraft": "The national aviation noise policy established under [49 U.S.C. §] 47523 . . . shall [establish] by regulation a national program for reviewing airport noise and access restrictions on the operation of *stage 2 and stage 3 aircraft*."[7] 49 U.S.C. § 47524(a) (emphasis added)). Congress intentionally did not limit an airport proprietor's ability to regulate non-stage aircraft in ANCA. *See* 49 U.S.C. § 47524.

Appellants intentionally limited their action to nuisances emanating from touch-and-go operations performed by *non-stage* "piston-engine aircraft." CR, 1-20. The FAA recognizes the precise aircraft at issue in this case are "nonstage." *See* FAA Order 5190.6B ("Order") at 13.4 ("The vast majority of small general aviation (GA) aircraft and many propeller-driven commuter aircraft flying in the United States are nonstage aircraft"). ANCA does not preempt JeffCo from abating nuisances caused by nonstage aircraft, and thus ANCA is inapposite and it cannot preempt relief. 49 U.S.C. § 47524(a) (stating that ANCA applies to Stage 2 and Stage 3 aircraft).

[7] The FAA has defined which aircraft qualify as "Stage 2" and "Stage 3" in 14 C.F.R. Part 36. The piston-engine aircraft at issue in this case are not listed as Stage 2 or Stage 3 in Part 36.

The district court agreed with Appellants that ANCA does not govern non-stage aircraft. CR, 346 ("[I]t is true that . . . 49 U.S.C. § 47524 [ ] provides a program for reviewing airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft."). But the district court then (and without basis or explanation) expanded ANCA to restrict airport proprietors from using their proprietary power to regulate non-stage aircraft. *Id.*[8] This was legal error. The district court cited no case to support its finding that ANCA preempted non-stage aircraft. CR, 346. In effect, the district court erased 50 years of legal precedent and judicially invalidated several federal statutes that preserved the *Burbank* "proprietary exception" by expanding ANCA beyond its plain language and finding preemption for "nonstage" aircraft. This result cannot stand.

The district court claimed to defend Congress's generalized intent to create a "national noise policy," but its order usurped Congress's lawmaking authority. *See Cotton Creek Circles, LLC v. Rio Grande Conservation Dist.*, 218 P.3d 1098, 1103 (Colo. 2009) ("It is not the role of the court to overrule a legislative policy

[8] The district court's statement that these Congressional findings "are not limited to stage 2 and stage 3 aircraft" is error. 49 U.S.C. § 47521 mentions two specific types of aircraft, "stage 2 and stage 3 aircraft." Congress could have regulated a more expansive set of "aircraft" in ANCA if it so intended. But Congress limited ANCA to stage 2 and stage 3 aircraft, a clear expression of its intent not to extend preemption to any other aircraft, a result entirely consistent with the proprietor exception codified in the ADA *which remains a valid law to this day*. 49 U.S.C. § 41713(b)(3).

determination when the underlying statutory language unambiguously directs us otherwise."). The district court effectively read "national noise policy" to displace all local airport proprietor control or regulation *despite Congress's longstanding decision to preserve an airport proprietor's ability to regulate noise at its airport*. *Supra*, at II.B; CR, 346.

In any event, ANCA's plain text makes the "national noise policy" a tangible and citable concept, not an amorphous wildcard basis for preemption. Congress required the FAA, not the district court, to make "a national program for *reviewing* airport noise and access restrictions on operations of *Stage 2 and Stage 3 aircraft*" – not non-stage aircraft. 49 U.S.C. § 47524(a) (emphasis added). The FAA promulgated this policy and established "notice, review, and approval requirements," and these requirements "apply to all airports imposing noise or access restrictions" on Stage 2 or Stage 3 aircraft. 14 C.F.R. § 161.3(a), (c); *see City of Naples Airport Auth. v. FAA*, 409 F.3d 431, 433 (D.C. Cir. 2005) ("Aircraft are classified roughly according to the amount of noise they produce, from Stage 1 for the noisiest to Stage 3 for those that are relatively quieter."). The "national noise policy" mentioned in ANCA does not justify *ad hoc* preemption. ANCA unambiguously does *not* reach non-stage aircraft, and it sets forth Congress's

decision to *preserve* the proprietary exception discussed in *Burbank*. *Supra* at II.B.2.i. The district court erred in finding otherwise.

The district court made several other curious ANCA-related findings. For example, it found ANCA preempted an injunction, without any support. CR, 346. It failed to identify "clear and manifest" language preempting an injunction—and no such language exists. CR, 346; *see Medronic*, 518 U.S. at 484–86. It also failed to grapple with the FAA Act's saving clause which remains valid law. This is error. Second, it did not discuss the presumption against preemption in any way, despite this being a mandatory part of the analysis. *See Suncor Energy USA, Inc.*, 2025 CO 21, ¶¶ 34, 44. Third, it failed to read ANCA – let alone all of the federal aviation statutes – as a whole. After all, other statutes expressly allow airport proprietors to regulate noise locally (*e.g.*, the ADA), and no legal authority shows that Congress, through ANCA, meant to displace the ADA, *Burbank*, or the proprietor exception. *Infra*, at II.D.; *see, e.g.*, *Aguayo v. U.S. Bank,* 653 F.3d 912, 920 (9th Cir. 2011) (noting that courts considering preemption must interpret "statutes as a whole" and "the whole law"). Fourth, it also spotted the elusive "elephant in a mousehole" when it found that 49 U.S.C. § 47533 preempted any noise restriction after 1990. CR, 346. ANCA has a provision that establishes a "grandfather" clause for noise restrictions that pre-dated ANCA, but it does not create a blanket ban on noise regulations post-

1990. 49 U.S.C. § 47533 ("[T]his subchapter does not affect [any] law in effect on November 5, 1990. . . ."). Taken together, the district court found that ANCA preempted Appellants' claim despite not engaging with any of the requisite presumptions, considerations, or analyses. It also outright ignored still-valid applicable federal aviation laws (*e.g.*, the ADA's express codification of the proprietor exception, 49 U.S.C. § 41713(b)(3)). All of this is error.

In sum, "[i]f the statutory language is unambiguous and the statutory scheme is coherent and consistent . . . the inquiry ceases." *Friends of the E. Hampton*, 841 F.3d at 147-48 (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (internal quotation marks omitted)). As for ANCA, "[t]hat is the case with . . . [49 U.S.C.] § 47524, which employ[s] comprehensive and unmistakably limiting language in affording airport proprietors *some authority to regulate noise*." *Id.* (emphasis added). The district court thus erred when it went beyond ANCA's unambiguous terms to dismiss Appellants' claim. *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 52 ("Invoking some brooding federal interest," like aviation generally, "should never be enough to win preemption of a state law." (quoting *Virginia Uranium, Inc.*, 587 U.S. at 767)). It had no legal basis to find that a "national noise policy," violently divorced from ANCA's plain text, preempted Appellants' action. *See id.*

ANCA does not preempt relief. JeffCo can abate the nuisance caused by the non-stage aircraft at issue in this case. CR, 1-20; *infra*, at II.D.

D. The Grant Assurances Do Not Preempt Relief

JeffCo's Grant Assurances do not preempt relief. Grant Assurances are a contract between the FAA and an airport "sponsor."[9] They do not – and cannot – preempt relief. *Supra*, at I.B (explaining the legal standard). After all, only Congress can preempt a state law, not an agency, which should end this line of inquiry before it even starts. *Id.* Nevertheless, the Grant Assurances allow JeffCo to abate the nuisance at issue here, further buttressing the validity of Congress's express preservation of the proprietor exception in the ADA. The district court seemed to agree, but it then found it could not order JeffCo to abate the nuisance. CR, 346.

In 1982, Congress enacted the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 47101, *et seq*. Under the AAIA, the FAA can, in certain circumstances, disqualify local governments from receiving future federal airport grants. *City of Naples Airport Auth.*, 409 F.3d at 432. The AAIA does not preempt

[9] An airport "sponsor" is the legal entity that accepts federal grant money to benefit an airport. 49 U.S.C. § 47102(26) (defining "sponsor" as "a public agency" or "a private owner of a public-use airport that submits . . . an application for financial assistance for the airport"). In this case, JeffCo is the "sponsor" of the Airport. JeffCo's status as "sponsor" does not affect its parallel role as "proprietor."

airport proprietary power in any way; it simply sets forth standards for receiving federal grant monies. *See* 49 U.S.C. § 47101, *et seq.*

Generally, when an airport accepts federal funds, it agrees to abide by 39 so-called "Grant Assurances" for 20 years. *See* Airport Improvement Program (AIP) Grant Assurances, 79 Fed. Reg. 18,755, 18,755 (Apr. 3, 2014) (noting that a "complete list of the current grant assurances can be viewed" at https://www.faa.gov/airports/aip/grant_assurances). This framework empowers the FAA to exert aspects of control over local airports for the duration of the grant. But the FAA does not have the ability to preempt anything—this power rests solely with Congress. As a result, the Grant Assurances are largely irrelevant to the question of preemption.

In any event, the FAA assists airport sponsors with Grant Assurance compliance. To do so, it publishes the "Airport Compliance Manual." *See* FAA Order 5190.6B ("Order"); 86 Fed. Reg. 68,719 (referring to as a previous Order version as the Airport Compliance Manual). This Order includes several different chapters to guide airports. Among these, the FAA wrote Chapter 13: "Airport Noise and Access Restrictions" ("Noise Chapter") which was updated in September 2023 (after ANCA and all other aviation laws discussed *supra* were in effect).

The Noise Chapter guides airports on federal noise and access duties. Order § 13.1. In it, the FAA clearly – and without any ambiguity – explains that JeffCo can regulate noise. *Id.* § 13.2(b)(2). According to the FAA, airport sponsors have "*authority to restrict access [to their airports] as a means of reducing aircraft noise impacts in order to improve compatibility with the local community*." *Id.* § 13.2(b)(7) (emphasis added). It follows that federal law and the Grant Assurances do not preempt or prevent JeffCo, in its proprietary capacity, from abating noise (which is precisely what Appellants seek). CR, 1-20. Instead, the FAA saddles JeffCo with the *primary responsibility* to "reduce the effect of noise on residents of the surrounding area." § 13.2(b)(2). To do so, JeffCo can choose to *inter alia* "restrict airport use." *Id.* To be sure, restrictions cannot "unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce." *Id.* But restrictions themselves are not *de jure* inappropriate.[10]

Finally, the Noise Chapter does not purport to preempt airport noise regulation – nor can it as it does not set forth *Congress's* intent. *Suncor Energy USA, Inc.*, 2025 CO 21, ¶ 52. But in it the FAA provides guidance on ways sponsors can

[10] The FAA also makes clear that any restriction must comply with ANCA. § 13.2 (b)(7). But as discussed *supra*, ANCA has no bearing on the restriction of non-stage aircraft like those at issue here.

minimize the impact of their airport on local communities. For example, and pertinent here, the FAA encourages airport sponsors to use avigation easements to reduce noise impacts. Order § 13.8(b). Here, JeffCo obtained several avigation easements for the Airport, but then it violated the terms of the easements and many of the easements were vacated in 2021. *Rock Creek Master Homeowners Ass'n, Inc. v. Jefferson Cnty.*, 2023 WL 12058760, at *1 (Colo. App. June 15, 2023) (vacating several avigation easements previously held by JeffCo in Appellants' jurisdictions). JeffCo continues to violate these now-vacated easements, and operations at the Airport continue to increase year over year. That JeffCo could not operate within the confines of the easements it obtained is not to be held against Appellants, it is evidence of the public nuisance at issue in this case. JeffCo has a legal obligation to control its asset—the Airport—without creating a nuisance to its neighbors. And the FAA agrees that JeffCo can abate the nuisance consistent with federal law.

The AAIA and Grant Assurances allow JeffCo to abate its "touch-and-go" nuisance. After all, touch-and-goes are "entirely local," and thus a restriction on them would not "create an undue burden on interstate commerce." Order § 13.15(a), (b). Similarly, JeffCo satisfies its "federal obligations" if the restriction equally applies to similarly situated airport users. Such is the case here: Appellants seek a uniform rule that applies equally to all airport users. The restriction would not

"unjustly discriminate against any user." *Id.*, § 13.2(b)(2). And again, a Grant Assurance violation does not equate to preemption, as only Congress, not the FAA, can define the bounds of federal preemption. *See generally Palm Beach Cnty. v. F.A.A.*, 53 F.4th 1318, 1321 (11th Cir. 2022) (discussing Grant Assurance violations extensively without any reference to preemption).

The Grant Assurances do not aid JeffCo. Rather, the Noise Chapter confirms that JeffCo is permitted to abate the noise nuisance created by touch-and-go operations at the Airport consistent with federal law.

E. The District Court, via an Affirmative Injunction, May Order Jeffco to Abate the Nuisance

The district court seemed to invoke aviation law generally to find preemption: it did not "point specifically to 'a constitutional text or a federal statute' that does the [preemptive] displacing or conflicts with state law." *Id.*; *Puerto Rico Dep't of Consumer Affs.*, 485 U.S. at 503. This alone is reversible.

This flaw became apparent when discussing injunctive relief. The district court found its ability "to issue an injunction is a different issue than whether a proprietor can choose to limit noise or pollution." CR, 345. True enough – but not materially. It then concluded, incorrectly, that federal law preempted such a court order, and the proprietor exception did not apply. *Id*. The district court erred.

1. Colorado Courts Have Authority to Enjoin Nuisances

An injunction is discretionary equitable remedy designed "to prevent future harm." *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 80 (internal citations omitted). Colorado law vests trial courts "with *broad discretion* to formulate the terms of injunctive relief." *Id.* (emphasis added).

Colorado courts have always had the power to enjoin nuisances like the pollution at issue here. *Slide Mines v. Left Hand Ditch Co.*, 77 P.2d 125, 126 (Colo. 1938); *see Seigle v. Bromley*, 124 P. 191, 194 (Colo. Ct. App. 1912) ("An injunction will be issued to prevent the creation of a nuisance, as well as to stop a nuisance already created . . . ."). And in public nuisance actions, "the only remedy is injunctive relief." *People v. Cory*, 514 P.2d 310, 311 (Colo. 1973). In sum, Colorado courts have the unquestioned power to enjoin a public nuisance if the nuisance emanates from a party properly before it. 66 C.J.S. Nuisances § 147 (2025) ("The general jurisdiction of equity to restrain nuisances dangerous to public health has long been recognized"); 42 Am. Jur. 2d Injunctions § 6 (2025) ("Mandatory injunctions are commonly issued to compel, among other things, the removal or abatement of nuisances.").

2. Federal Law Does Not Preempt or Disturb this Power

Against this backdrop, the district court nevertheless held that it did not have the power to enjoin JeffCo. Without explanation, it concluded that federal law

preempted this power. CR, 345. Not so.

The district court relied on shaky, inapposite, non-binding, and outdated case law: *Northeast Phoenix Homeowners' Association v. Scottsdale Municipal Airport*, 636 P.2d 1269 (Ariz. Ct. App. 1981); *Village of Bensenville v. City of Chicago*, 306 N.E.2d 562 (Ill. App. Ct. 1973); and *Arapahoe County Public Airport Authority*, 242 F.3d at 1222 (discussing an air carrier ban). These cases have no bearing on the issue before the Court and are readily distinguishable. CR, 1-20.

In particular, relying on *Scottsdale Municipal Airport*, the district court incorrectly found that ANCA prohibits "a court order directing an airport proprietor to conduct flight operations in a particular way." CR, 345, 349. In *Scottsdale Municipal Airport*, homeowners sought (1) to enjoin a runway extension, (2) a court-imposed flight curfew, (3) to prohibit non-standard turns at the airport, and (4) a rule requiring aircraft to use the full runway when landing. 636 P.2d at 1272. An Arizona Appellate Court – not Congress – concluded in 1981 that "legislative or court action to impose curfews, prohibit certain types of turns or to dictate runway utilization infringes upon the FAA's charge." *Id.* at 1273. Congress enacted ANCA in 1990, confirming that *Scottsdale Municipal Airport* cannot inform an analysis of ANCA. Additionally, Congress's decision to preserve the proprietor exception set forth in

Burbank and codified in the ADA – by making ANCA only apply to "staged" aircraft – eliminates any persuasive power of *Scottsdale Municipal Airport*.

The case itself is also flawed. The court in *Scottsdale Municipal Airport* reasoned that "[t]he *Burbank* preemption holding applies not only to state and local legislation in this area, but also to judicially made rules and regulations governing airport and airline operations." *Id.* at 1275. But here, Appellants do not seek "judicially made rules and regulations," and they do not seek judicially "prescribe[d] regulations and rules relative to airport operations." *Id.* Instead, Appellants requested an affirmative injunction requiring JeffCo to abate the aviation-related nuisances it caused and that it has the legal authority, as an airport proprietor, to abate. CR, 2, 19-20. Federal law gives JeffCo the "primary" responsibility to abate this nuisance, *supra*, at II.D, and at least 20 other airports currently do what Appellants seek, CR, 208-212.[11]

What's more, *Scottsdale Municipal Airport* builds its holding on quicksand. First, *Scottsdale Municipal Airport* did not clearly rely on a federal statute or other expression of Congressional intent when finding preemption. 636 P.2d at 1273.

[11] For example, airports in Wasilla, AK; Bayport, NY; Cottonwood, AZ; Elko, NV; Baltimore, MD; Fullerton, CA; Atlanta, GA; Indianapolis, IN; Portland, OR; and San Diego, CA, all have placed restrictions on touch-and-go operations. A more fulsome list of airports that currently enforce restrictions on touch-and-go operations can be found at CR 208-212.

Second, it broadly relied on *Burbank*, but it did not cite a specific part of *Burbank* supporting its "no-injunction" holding (and none exists). *Id.* It is undisputed that *Burbank* considered police-power legislation, not an injunction, meaning *Burbank* did not mandate this result. *See generally id.*; *see also Main Elec., Ltd. v. Printz Servs. Corp.*, 980 P.2d 522, 526 n.2 (Colo. 1999) ("Dictum . . . is not controlling precedent.").

Third, it creates and then resolves a non-material distinction: approving damages against airports but not an injunction. *But see Scottsdale Mun. Airport*, 636 P.2d at 1277 (noting "inconsistency in the notion . . . injunctive relief in this area is precluded by the *Burbank* preemption doctrine, but [it] . . . does not preclude" damages). Neither *Burbank* nor a federal statute makes this distinction, and the FAA Act itself preserves "*all*" state-law remedies otherwise available. *Supra* at II.B.3.

Fourth, *Scottsdale Municipal Airport* relies on *Luedtke v. Milwaukee County*, 521 F.2d 387 (7th Cir. 1975), which was overruled by *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988). *Bieneman* illustrates why the district court and the *Scottsdale Municipal Airport* court erred. 864 F.2d at 472 (overruling "*Luedtke* to the extent it holds that all *common law remedies* for airport noise and pollution have

been preempted by federal law." (emphasis added)).[12] A mandatory injunction, like Appellants seek here, is the remedy of choice to abate nuisances. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc*., 527 U.S. 308, 321 (1999) (recognizing that injunctions have long been a common law remedy); 49 U.S.C. § 40120(c) ("A remedy under this part is in addition to any other remedies provided by law."). Noise regulation of piston-engine aircraft is precisely the type of nuisance "within [JeffCo's] control as proprietor under *Burbank.*" *Supra*, at II.D (discussing the Noise Chapter). Moreover, *Luedtke* does not address the proprietor power, and it considered an injunction "to initiate condemnation proceedings." *Luedtke*, 521 F.2d at 389.[13]

The district court, as well as *Scottsdale Municipal Airport* and *Luedtke*, conflated distinguishable aviation law and failed to ground its analysis in any

[12] *Bieneman* directly reached damages only. But no dispositive difference exists from an injunction, as both *Bieneman* and *Scottsdale Municipal Airport* seem to recognize. *Bieneman* expressly relied on the FAA Act savings statute, *see supra*, at II.B.3, which did not and does not distinguish between damages and injunctive relief. *Id.* at 471 ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); 49 U.S.C. § 40120(c) ("A remedy under this part is in addition to any other remedies provided by law."). And no federal statute prohibits an airport affirmative injunction to abate noise nuisances. At most, Congress, through ANCA, regulated it (for certain, inapplicable Staged Aircraft). *Supra*, at II.C.

[13] An injunction seeking initiation of condemnation proceedings and inverse condemnation damages are effectively a distinction without a difference. This casts further doubt on *Scottsdale Municipal Airport's* rationale.

expression of Congress—which is the "ultimate touchstone in every pre-emption case." *Fuentes-Espinoza*, 2017 CO 98, ¶ 22. Acts of Congress – not decisions of intermediate courts – are the only bases for federal preemption. *Id*. And *Scottsdale Municipal Airport* addressed airport access and judicial power to exercise a *police power*. In contrast, Appellants seek a narrow affirmative injunction to require JeffCo to exercise its *proprietary power*, something preserved and codified by federal aviation law. Federal law does not preempt JeffCo from doing so.

F. Conclusion

Congress has expressly recognized an airport proprietor's ability to abate noise nuisances. *Supra* at II.B; 49 U.S.C. § 41713(b)(3). Since *Burbank*, the U.S. Supreme Court has recognized JeffCo's power to abate noise nuisances. *Supra*, at II.B. It issued *Burbank* against the FAA Act's backdrop, *supra* at II.B.3, and thus the FAA Act does not preempt JeffCo from abating noise, *id.* Congress itself then codified *Burbank's* proprietary power in the ADA. 49 U.S.C. § 41713(b)(3); *supra* at II.B.2.ii. Of course, Congress later limited a non-pertinent aspect of this power in ANCA, but ANCA – as the district court recognized – does not apply to non-stage aircraft like those at issue in this case. CR, 346; *supra* at II.D. In other words, Congress left the proprietary exception of the ADA undisturbed. Neither JeffCo nor the district court identified any basis to find conflict preemption. CR, 340-350. And

neither the AAIA nor the Grant Assurances preempt airport proprietary power. Simply put, federal law does not preempt an airport proprietor's ability to regulate noise or emissions emanating from piston-engine touch-and-go operations. On that note, at least 20 airports currently restrict touch-and-go maneuvers, the relief sought here, and aviation has not screeched to a halt, airport users have not overturned the restriction on any basis (much less preemption), and the airport proprietors have limited their liability for aircraft-related nuisances. CR, 208-212.

Finally, Congress has not preempted the district court's long-held power to issue mandatory injunctions to abate public nuisances in this particular context. The district court erred finding otherwise: Federal law expressly confirms JeffCo's power to abate these noise issues.

III. THE CLEAN AIR ACT DOES NOT PREEMPT RELIEF

A. JeffCo Waived Any Argument Based on the Clean Air Act

Before the district court, JeffCo argued that the Clean Air Act, 42 U.S.C. § 7573, expressly preempts Appellants' claims if they seek to abate lead-based pollution. CR, 168. The district court did not expressly resolve this argument. CR, 340-350. Nor did JeffCo properly support it in its motion to dismiss, as JeffCo offered little support or explanation for this argument. CR, 168. But even if not waived, this argument is not well taken, and Appellants opposed this argument. *E.g.*, CR, 194-195.

B. The Clean Air Act Does Not Preempt Appellants' Claim

The Clean Air Act "does not completely preempt state pollution regulations" related to "airplane pollution." *Codoni v. Port of Seattle*, 2024 WL 4882015, *13 (W.D. Wash. Nov. 25, 2024); *Cal. v. Dep't of the Navy*, 624 F.2d 885, 889 (9th Cir. 1980) (holding that Congress did not intend § 7573 of the Clean Air Act to "be preclusive of all state regulation" regarding emissions from aircraft). Congress preserved the states' ability to regulate airplane pollution emissions, and Appellants do not seek to regulate the fuel sold at the Airport; thus, preemption does not apply. *Id.*; *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1263 (10th Cir. 2022) (stating "the CAA does not provide an exclusive federal cause of action for suits against private polluters, nor does it completely displace all state law in that area" in nuisance action); CR, 1-20.

The Tenth Circuit has also recognized that "[t]he purpose of the [CAA] is to control and improve the nation's air quality through a combination of state and federal regulation." *Ariz. Pub. Serv. Co. v. EPA.*, 562 F.3d 1116, 1118 (10th Cir. 2009). To this end, the Clean Air Act contains an express saving clause: "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Courts recognize that this saving

clause permits state enforcement of nuisance actions against both the emitter and entities, like JeffCo, who "knowingly" "promot[e]," "market[]," and "sell[]" the substance alleged to cause the nuisance. *Suncor,* 25 F.4th at 1264.

The Clean Air Act does not preempt relief. After all, the Colorado Supreme Court just held that the CAA did not preempt public and private nuisance claims directed at abating global greenhouse gas emissions. *See generally Suncor Energy USA, Inc.*, 2025 CO 21. Given the global reach of greenhouse emissions, it is hard to see how the complaint, even liberally construed as seeking the abatement of localized lead-based particles over Boulder County and the Town of Superior, could be preempted. CR, 1-20. Regardless, the Clean Air Act does not preempt Appellants' claim.

CONCLUSION

Appellants respectfully request that this Court reverse the district court's order and remand the case for further proceedings.

* * * * *

Respectfully submitted this 3rd day of September, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2025, a true and correct copy of the foregoing was filed and served via the Colorado Courts E-Filing system on all counsel of record.

/s/ Karen R. Loveland