DISTRICT COURT, BOULDER COUNTY STATE OF COLORADO 1777 6th Street Boulder, Colorado 80302 (303) 441-3750	DATE FILED January 24, 2025 1:55 PM FILING ID: C5AA0CB63D97C CASE NUMBER: 2024CV30221
Plaintiff: 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:** 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▲**
Attorneys for Plaintiffs: Andrew Barr, #49644 Lindsay Aherne, #48391 John Wharton, #47776 GREENBERG TRAURIG, LLP 1144 15th Street, Suite 3300 Denver, Colorado 80202 (303) 572-6500 Andrew.Barr@gtlaw.com; AherneL@gtlaw.com; John.Wharton@gtlaw.com	Case No.: 2024cv30221 Division: 2

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants fail to meet their burden of demonstrating preemption and accordingly their motion to dismiss should be denied. Regarding Plaintiffs' lead-based claim, Defendants do not explain how the Clean Air Act preempts Plaintiffs' specific allegations, provide *any* authority supporting the notion that federal law insulates them from state nuisance liability in this context, or grapple with on-point cases finding that preemption does *not* apply.

Regarding Plaintiffs' noise-based claim, Defendants' argument fails because (1) the U.S. Supreme Court has held that airport proprietors, like Jefferson County, can use their "proprietary power" to "deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory," *Burbank v. Lockheed Air Terminal, Inc*., 411 U.S. 624, 635 n.14 (1973); (2) Congress *preserved* the right of a municipality "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); (3) Congress's most recent expression of intent regarding an airport proprietor's ability to limit aircraft noise—the Airport Noise and Capacity Act of 1990 ("ANCA")—expressly does *not* apply to "non-stage" aircraft such as the "piston-engine aircraft performing touch-and-go operations" at issue here; (4) in 2023 the FAA again acknowledged that an airport proprietor can limit piston-engine operations for noise or safety reasons compliant with federal law; and (5) *dozens* of airports report maintaining restrictions on touch-and-go operations, demonstrating that federal law does not prevent Defendants from abating this nuisance, (Exhibit A, Declaration of Andrew Barr, ¶ 5).[1] Defendants' motion should be denied.

BACKGROUND

Plaintiffs brought suit to protect their residents from the unreasonable injuries caused by

[1] This Court can judicially note public information not subject to debate. C.R.E. 201(b)(2).

piston-engine aircraft touch-and-go operations at the Rocky Mountain Metropolitan Airport ("Airport"). Plaintiffs allege that both the noise- and lead-based emissions from the piston-engine touch-and-go operations at the Airport are a public nuisance. Plaintiffs seek an injunction requiring Jefferson County, the "proprietor" and "sponsor" of the Airport, and Dahl, the Airport Director, to abate the nuisance. As discussed *infra*, precedent from the U.S. Supreme Court, Congress's intent set forth in legislation, and guidance from the Federal Aviation Administration *all* make clear that Defendants have the ability to abate the nuisance.

Defendants do not grapple with the specific claim raised by Plaintiffs. Instead, seemingly in an effort to align this case with their chosen authority, Defendants attempt to recharacterize the nature of Plaintiffs' lawsuit. Defendants argue that this case is about (or otherwise rely on cases regarding) the use of navigable airspace, commercial operations (*e.g.*, airlines), interstate operations, restrictions affecting jets, certification of or access to aviation fuel, and other inapposite issues. To be clear, Plaintiffs' lawsuit does not challenge the type or quantity of fuel sold at the Airport; nor do Plaintiffs seek to change which aircraft can operate, when such operations occur, or how frequently any particular aircraft operates at the Airport. Plaintiffs' lawsuit indisputably has no impact on interstate commerce, no impact on any "commercial" air operations, no impact on jets, and no impact on any air carrier's "rates, routes, or services." Plaintiffs are not asking Defendants to regulate the use of navigable airspace, make or change flight paths, alter any aspect of an aircraft's in-flight activities, or create noise standards for piston-engine aircraft. Defendants' efforts to recast this case are telling and underscore that Plaintiffs' actual claim—a nuisance suit related to piston-engine operations—is not preempted.

Simply put, Congress and the FAA have *preserved*—not preempted—an airport

proprietor's ability to abate noise- and emission-based nuisances caused by piston-engine aircraft. This defeats any effort by Defendants to meet their burden of showing preemption.

ARGUMENT

I. Legal Standard

When considering preemption, courts "start[] with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 516 (1992). Congress's intent is the "ultimate touchstone of pre-emption analysis." *Id*. Defendants "bear the burden of showing that federal and state law conflict" and must set forth the specific aspects of state law that "they believe are in conflict with [federal law]." *Cook v. Rockwell Int'l Corp*., 618 F.3d 1127, 1143-44 (10th Cir. 2010). Congress can preempt state law expressly or impliedly. *See Cipollone*, 505 U.S. at 516. To assess each theory of preemption, this Court must determine whether it was Congress's intent to foreclose Plaintiffs' ability to pursue its claim. If Congress's intention to preempt state law is not clear, preemption does not apply.

II. Preemption Does Not Bar Plaintiffs' Claim

Plaintiffs' claim is not preempted. Defendants cite myriad authority discussing preemption, but all in materially different contexts. After culling through Defendants' inapposite cases,[2] Defendants are, at best, left with only *Krueger v. Mitchell,* 112 Wis. 2d 88 (1983), a 40-

[2] Cases cited by Defendants do not demonstrate Congress's intent to preempt Plaintiffs' specific claim given that Plaintiffs' claim does not concern: "actual aircraft operation technique or scheduling," *Ne. Phoenix Homeowners' Ass'n v. Scottsdale Mun. Airport*, 636 P.2d 1269 (Ariz. Ct. App. 1981); "commercial flights," *Greater Westchester Homeowners Assn. v. City of Los Angeles*, 26 Cal.3d 86 (1979), *Vill. of Bensenville v. City of Chicago*, 306 N.E.2d 562 (Ill. Ct. App. 1973), and *Loma Portal Civic Club v. Am. Airlines, Inc.*, 61 Cal.2d 582 (1964); "regulation of navigable airspace," *U.S. v. City of New Haven*, 367 F. Supp. 1338 (D. Conn. 1973), *aff'd* 496 F.2d 452 (2d Cir. 1974); a non-airport-proprietor's legislative regulation of noise via its police

year-old case *that has never been adopted or endorsed by any other court*. The dearth of support for Defendants' position speaks for itself. Moreover, *Krueger* pre-dates ANCA. In ANCA, Congress made clear that noise-based restrictions imposed by airport proprietors that impact only non-stage-rated aircraft—like the aircraft at issue here—are *not* preempted. This obviates any relevance *Krueger* otherwise may have enjoyed. In short, if the key to analyzing preemption is divining Congress's intent, then Congress's most recent legislation ends the inquiry.

A. Plaintiffs' Lead-Based Claim is Not Preempted

Defendants cite no authority in support of their single-sentence suggestion that the Clean Air Act, 42 U.S.C. § 7573, expressly preempts the lead-based aspect of Plaintiffs' claim. (Motion at 6-7 and 9.) Indeed, Defendants offer no support or explanation for their argument that Plaintiffs' emission-based claim is preempted. Defendants have not properly raised or preserved the argument and thus this Court should not consider it.

Even if this Court considers the argument, it is well established that the Clean Air Act "does not completely preempt state pollution regulations" related to "airplane pollution." *Codoni v. Port of Seattle*, 2:23-CV-795-JNW, 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 to "be preclusive of all state regulation" regarding emissions from aircraft or aircraft engines). Because Congress preserved the states' ability to regulate emissions from airplane pollution, and because Plaintiffs do not seek to regulate the type of fuel sold at the

---

powers, *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981); review of an FAA finding that an airport rule was "unjustly discriminatory," *City of Santa Monica v. F.A.A.*, 631 F.3d 550 (D.C. Cir. 2011); operation of military aircraft, *In re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A*, 117 A.3d 457 (Vt. 2015); or a ban on "the total number of Stage 2 or Stage 3 aircraft operations" in violation of ANCA, *Kramer v. HTX Helicopters, LLC*, 2023 WL 4053898, *14 (R.I.Super. June 12, 2023).

Airport, 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) (finding nuisance action not preempted and holding that "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").

What's more, the Tenth Circuit has 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) (emphasis added). Courts recognize that this saving clause permits state enforcement of nuisance actions against both the emitter *and* entities, like Jefferson County, 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 Plaintiffs' claim.

B. Plaintiffs' Noise-Based Claim is Not Preempted

Defendants do not identify "an express congressional command" that they argue preempts Plaintiffs' noise-based claim and thus "express" preemption does not apply. Instead, Defendants appear to move under two theories of implied preemption: conflict preemption and field preemption. Although the two theories of implied preemption are distinct, in this case both fail for the same reason: Congress has *preserved* Defendants' ability to abate the very nuisance at issue. *E.g.*, *Kagy v. Toledo*, 126 Ohio App.3d 675, 684 (1998) (quoting American Jurisprudence 2d: "an airport that unreasonably interferes with the use and enjoyment of adjacent

property can constitute a nuisance even though the airport is operating in compliance with federal and state law").[3] Accordingly, both implied preemption theories are discussed together.

i. The Supreme Court Has Found That Defendants Can Abate the Nuisance

It is settled law that airport proprietors like Jefferson County can exercise their "proprietary 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. True, a municipality cannot use its "police powers" to legislatively regulate aircraft noise. But an airport proprietor can use its "proprietary powers" to achieve the same end. Here, Jefferson County has police *and* proprietary powers and thus it cannot hide behind preemption.

In *Burbank*, a private entity owned a commercial-service airport located in Burbank, California. The municipality enacted a legislative curfew on certain operations pursuant to its police powers. The Supreme Court found that the legislation was preempted because proliferation of local legislation affecting commercial "air transportation" would create a patchwork of asymmetrical restrictions that could "severely limit the flexibility of FAA in controlling air traffic flow." *Id.* at 639. The Supreme Court noted that federal law "does not

[3] *See Greater Westchester*, 26 Cal.3d at 102 (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 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).

address responsibilities or powers of airport operators" and thus it concluded that even though "[s]tate and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft," "[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*. at 635 and n.14. The Supreme Court explained that 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). Accordingly, *Burbank* establishes the baseline rule that Jefferson County can abate the nuisance consistent with federal law. As a result, implied preemption does not prohibit Plaintiffs' claim *unless* Congress's intent has entirely shifted post-*Burbank*. No such change has occurred.

ii. Congress Expressly Preserved Defendants' Ability to Abate the Nuisance

In the wake of *Burbank*, Congress passed the Airline Deregulation Act of 1978 ("ADA"). Congress's intent in enacting the ADA was to legislatively avoid the problem identified in *Burbank*—a patchwork of local police-power regulations affecting commercial air transportation. 49 U.S.C. § 41713 *et seq*. Not pertinent here, the ADA preempts any effort by a local government to enact legislation that impacts an "air carrier's" (*i.e.*, an airline) "rates, routes, or services."[4] *Id*. That said, and pertinent here, Congress legislatively *preserved* 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). And thus, at least as of 1978, Congress's intent echoed what the Supreme Court stated in *Burbank*: airport

[4] Plaintiffs' claim does not impact "commercial air transportation" or an "air carrier."

proprietors may take steps to abate noise- or emission-based nuisances created at their airports.

iii. AAIA/Grant Assurances Allow Defendants to Abate the Nuisance

Congress then enacted the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. § 47101 *et seq.* As a general matter, when an airport proprietor accepts federal money for improvements at its airport, it agrees to abide by 39 so-called "Grant Assurances" for 20 years from the date the money was received. This allows the federal government to exert additional control over the local asset (the airport) for the duration of the grant period. To help airport proprietors (called "airport sponsors" in the context of Grant Assurances) comply with the Grant Assurances and remain eligible for future federal money, the FAA publishes the "Airport Compliance Manual." *See* FAA Order 5190.6B ("Order").[5] Contrary to Defendants' arguments, in the FAA's September 2023 update to the Order, the FAA provides two distinct ways Defendants can abate the nuisance consistent with the Grant Assurances.

Noise Restrictions: Chapter 13 of the Order governs "Airport Noise and Access Restrictions." In Chapter 13, consistent with *Burbank*, the FAA states that airport sponsors (like Jefferson County) are "primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area [which can] include ... ***restrictions on airport use*** that do not 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." Order at 13.2(b)(2) (emphasis added). Airport proprietors have "***authority to restrict access as a means of reducing aircraft noise impacts in order to improve compatibility with the local community***." *Id.* at 13.2(b)(7) (emphasis added). "The

[5] After *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Order is due limited deference regarding Congressional intent, statutory interpretation, or legislative mandates.

responsibility for determining the acceptable and permissible land uses and the relationship between specific properties and specific noise contours rests with the local authorities." *Id*. at Ch. 13, p. 13-15 (Table 1). FAA determinations regarding compatible land uses do not substitute "for those determined to be appropriate by local authorities in response to locally determined needs and values in achieving noise compatible land uses." *Id*. Here, given that "land acquisitions, easements, noise abatement procedures, and sound insulation," *id*. at 13.8(b), have proven inadequate to protect the local community—indeed, this Court vacated several avigation easements that previously benefited the Airport, (Barr Decl. at ¶¶ 3-4)—"a ***restriction is the only remaining option that could provide noise relief***," Order at 13.8(a) (emphasis added).[6]

Only *after* Defendants exercise their proprietary authority to implement a noise restriction—as expressly permitted by the FAA in the Order—can the FAA choose to "evaluate whether the restriction places an undue burden on interstate or foreign commerce or the national aviation system, and whether the restriction affects the sponsor's ability to meet its federal obligations." Order at 13.6. Here, touch-and-goes are "entirely local" and thus a restriction on them would not "create an undue burden on interstate commerce." *Id*. at 13.15(a), (b). Similarly, the sponsor's "federal obligations" are satisfied as the restriction would apply equally to all similarly situated airport users—no operator of a piston-engine aircraft would be permitted

[6] Defendants have violated (and continue to violate) several avigation easements benefiting certain of Plaintiffs' residents. The violating operations have only increased, notwithstanding that several of the easements were vacated by this Court. (Barr Decl., Exs. A, B.) Defendants' concession that they needed the easements, coupled with their subsequent decision to continue (and increase) operations in violation of this Court's order and without the benefit of the easements, *de jure* constitutes a nuisance. *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 220 Cal. App.3d 1602, 1610 (Cal. Ct. App. 1990), *modified* (June 18, 1990) (holding that an airport proprietor can be subject to noise-based nuisance liability *unless* it acquires and complies with an "avigation easement over plaintiff's property").

to perform touch-and-goes—and thus the restriction would not "unjustly discriminate against any user." *Id*. at 13.2(b)(2). The AAIA and Grant Assurances do not preempt Plaintiffs' claim.[7]

Safety Restrictions: Entirely separate from noise abatement, Defendants can implement restrictions based on "safety." Order at 14.1 *et seq*. "Any restriction proposed by an airport sponsor based upon safety and efficiency, including those proposed under Grant Assurance 22(i), must be adequately justified and supported." *Id*. at 14.3. The FAA expressly states Defendants can restrict touch-and-goes for safety reasons so long as the restriction is "justified," *id.* at 14.8, which Defendants acknowledge, (Motion at 5). True, any proposed *safety*-based restriction ultimately requires FAA approval before implementation, *id*. at 14.3[8], but no such pre-approval applies to *noise*-based restrictions, *id*. at 13.6. Regardless, the sponsor is the only entity that can propose a safety-based restriction in the first instance and Defendants cannot hide behind the FAA's approval process as a reason not to act at all; instead, Defendants must propose and "justify" any *safety*-based restriction to the FAA.

Just like *Burbank* and the ADA, the Order confirms that the AAIA and Grant Assurances do not preempt Plaintiffs' claim.[9]

---

[7] The FAA reiterates ways a proprietor can mitigate "noise problems," including "capacity limits based on noise" and "restrictions based upon" noise, in FAA Advisory Circular AC 150/5020-1 Noise Control and Compatibility Planning for Airports at Ch. 3, section 2.

[8] The FAA has sole authority to determine aviation *safety* matters and thus a sponsor cannot substitute its judgment regarding safety for that of the FAA. The same is not true regarding noise. *E.g.*, Order at 13.3; *Burbank*, 411 U.S. at 636; 49 U.S.C. § 41713(b)(3).

[9] Defendants' argument that they cannot abate the nuisance due to the Grant Assurances further fails because (1) nuisance claims regularly proceed against grant-obligated airports, *e.g.*, *F-35A*, 117 A.3d at 468; (2) Defendants cannot voluntarily enter into a contract and then use that contract to shield them from third-party nuisance liability; and (3) Defendants' rights as a "proprietor" of the Airport do not disappear when they become the "sponsor" via acceptance of federal grants. Similarly, a purported threat on Defendants' ability to receive future federal airport grants—the possible outcome of losing any hypothetical administrative action brought in

iv. ANCA Allows Defendants to Abate the Nuisance

Most recently, Congress enacted ANCA. 49 U.S.C. § 47521, *et seq*. Prior to ANCA it was well established that airport proprietors could exercise their proprietary powers (*e.g*., noise standards or curfews) to restrict both jet-powered and piston-powered aircraft. In ANCA, Congress established a "national aviation noise policy" that established "a national program for reviewing airport noise and access restrictions *on the operation of stage 2 and stage 3 aircraft*." *Id*. § 47524(a) (emphasis added). Aircraft that are "Stage 2" or "Stage 3" are expressly set forth as such in 14 C.F.R. Part 36. *Id*. § 47522(2). Here, Plaintiffs' action is specifically limited to the nuisance created by touch-and-go operations by "piston-engine aircraft." As the FAA recognizes, these aircraft are "nonstage." Order at 13.4.[10] As a result, the aircraft at issue in this case are *not* covered by ANCA and *not* addressed in Congress's "national aviation noise policy."

Congress's intent in enacting ANCA is clear: "Stage 2" and "Stage 3" aircraft (*i.e.*, jets) are subject to national standards for noise-based emissions, while "non-stage" aircraft can still be regulated by airport proprietors consistent with pre-ANCA law (*e.g.*, ADA and *Burbank*).

* * * * * * *

ANCA does not apply to "non-stage," piston-engine aircraft. Pre-ANCA law, including *Burbank*, ADA, AAIA, and the Grant Assurances, all preserve an airport proprietor's ability to abate noise- and emission-based nuisances stemming from piston-engine aircraft operations.

---

the future by the FAA—does not give Defendants license to maintain a public nuisance.

[10] Defendants claim without explanation that "many" piston-engine aircraft are "stage rated," (Motion at 4), but they do not explain the basis for this statement, nor do they claim that the piston-engine aircraft at issue in this case are "stage rated." Appendix 7 of FAA Advisory Circular 36-1H addresses "aircraft noise data for U.S. certificated propeller driven small airplanes." These "propeller driven small airplanes"—the piston-engine aircraft at issue here—*are not assigned stage ratings*, unlike many "turbojet" (Appendix 3) and "transport category" (Appendix 6) aircraft. This confirms that the pertinent aircraft are "nonstage."

Simply put, Defendants cannot hide behind preemption and must abate the nuisance.

C. ANCA Shows Congress's Intent *Not* To Preempt Plaintiffs' Claim

Despite ANCA not applying to the "non-stage" aircraft at issue here, *see* Order at 13.4, ANCA underscores Congress's intent for this preemption analysis. It cannot be disputed that when enacting ANCA, Congress *could* have determined that *any* noise or access restriction at an airport was prohibited by federal law—regardless of what type of aircraft it affected—and accordingly preempted anything that touched upon noise or access restrictions at an airport. But Congress quite clearly chose not to. Instead, Congress decided that noise and access restrictions at airports are prohibited (and thus preempted) only insofar as they affect "Stage 2" and "Stage 3" aircraft. 49 U.S.C. § 47524(a). Congress's decision *not* to preempt a proprietor's ability to restrict "non-stage" aircraft on the basis of noise—consistent with *Burbank*, the ADA, AAIA, and Grant Assurances—must be seen as the paramount expression of Congressional intent in this context. In fact, if this Court were to accept Defendants' argument, it would necessarily be forced to ignore Congress's careful line-drawing and judicially expand ANCA's scope—as well as the scope of federal preemption—in direct conflict with Congress's intent.

III. Defendants' Remaining Arguments Are Equally Unavailing

Defendants additionally argue that Plaintiffs' claim is preempted due to (1) the FAA Act, 49 U.S.C. § 40102 *et seq*., and (2) the "FAA's exclusive authority over flight operations at the Airport." None of these arguments satisfy Defendants' burden to show preemption.

Moreover, to the extent Defendants argue that *dicta* from the *Abair* case is preclusive here, they are incorrect. (Motion at 10, Ex. 1.) The *Abair* case concerns inverse condemnation, monetary damages, jet operations, and physical invasions of real property. In contrast, this case

concerns Defendants' proprietary power to abate a nuisance stemming from the Airport. As the authority presented *supra* demonstrates, federal law does not preempt Plaintiffs' claim.

A. The FAA Act Does Not Preempt Plaintiffs' Claim

The FAA Act was enacted in 1958 and was a central aspect of the *Burbank* decision. 411 U.S. at 627. Defendants do not explain which post-*Burbank* amendment to the FAA Act changes *Burbank's* express finding that the FAA Act did *not* impact an airport proprietor's ability to "deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory." *Id*. at 635 n.14. Nor can they. *See F-35A*, 117 A.3d at 468 (holding FAA Act "does not preempt common-law actions against municipally owned airports based on excessive noise or emissions that result in a public nuisance").

Moreover, to the extent Defendants' argument is based on Plaintiffs' request for equitable relief, that argument also fails. The FAA Act contains 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) (emphasis added).[11] The savings clause confirms that Plaintiffs' claim (and request for injunctive relief) is not preempted by the FAA Act. *Aviation Cadet Museum, Inc. v. Hammer*, 373 Ark. 202, 203 (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*, 82 Ark. App. 193, 195-97 (2003) (same); *Carter v. Cent. Reg'l W. Va. Airport Auth*., No. 2:15-CV-13155, 2016 WL 4005932, at *24 (S.D.W. Va. July 25, 2016) ("the 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]"); *Abdullah v. American*

[11] The FAA Act's savings clause applies to all "Air Commerce and Safety" statutes, codified at 49 U.S.C. §§ 40101 – 46507, which includes the ADA's proprietary-exception provision.

Airlines, Inc., 181 F.3d 363, 365 (3d. Cir. 1999) (same). The FAA Act cannot impliedly preempt Plaintiffs' claim while expressly preserving "any other remedies" "that a party may have under state law." *Elsworth v. Beech Aircraft Corp.*, 37 Cal.3d 540, 549 (1984).

Rather than identify any specific conflict between the FAA Act and Colorado public-nuisance law, Defendants provide a lengthy quote from a 1983 (pre-ANCA) Wisconsin case discussing a "noise nuisance action" under a prior version of the FAA Act. (Motion at 11 (quoting *Krueger*, 112 Wis. 2d at 101-02).) In *Krueger*, an individual sued a private airport's owners for nuisance and sought to prevent construction of a new runway. 112 Wis. 2d at 91. The court found that "under the amended [FAA] Act airport proprietors continue to have the primary responsibility for regulating and controlling the noise level of the particular airport" and that "airport proprietors are amenable to nuisance actions alleging that such control decisions result in unreasonable noise levels." *Id.* at 98-99. Then *Krueger* diverged from all other courts and held that the FAA Act preempted a request for injunctive relief. *Id*. at 102. But the *Krueger* court failed to explain what "Congressional intent" made equitable relief "absolutely inconsistent" with the FAA Act and accordingly its outcome is faulty and unpersuasive. *See Hammer*, 373 Ark. at 203 (rejecting argument that FAA Act preempts injunctive relief)[12]; *McNeill*, 82 Ark. App. at 197 (same); *People ex. rel. Birkett v. City of Chicago*, 329 Ill. App. 3d 477, 488, *aff'd in part* 202 Ill.2d 36 (2002) (declining to follow *Krueger*). Notably, to Plaintiffs' knowledge, in the 40 years since *Krueger* was decided, no court has adopted its reasoning or result (Defendants have not cited any such cases), likely because there is no statutory basis to

[12] Defendants argue that *Hammer*, 373 Ark. at 203, a case that enjoined certain aeronautical operations pursuant to the FAA Act's saving clause, is "distinguishable because the air strip there was a private airfield." (Motion at 11 n.9.) If cases related to private airfields are irrelevant under the FAA Act, then *Krueger* cannot be considered for the same reason.

treat damages and equitable relief differently under the FAA Act.

B. The FAA's Authority Over Flight Operations Is Not Implicated

Defendants' argument that Plaintiffs' claim is preempted by the FAA's right to control in-flight operations is both overbroad and beside the point. *E.g.*, *Codoni*, 2024 WL 4882015, *13 (stating courts have "emphasized the importance of delineating the pertinent area of regulation with specificity" in a preemption analysis). Plaintiffs do not seek to regulate in-flight operations and this case has no impact on in-flight operations. If Plaintiffs prevail, any operator who wants to use the Airport can, at whatever time it chooses, using whatever aircraft it desires.

Instead, Plaintiffs seek an order requiring Defendants to abate the nuisance caused by piston-engine touch-and-go operations by using their proprietary powers as permitted by *Burbank* and federal statute. Defendants already prohibit an aeronautical activity from occurring at the Airport (parachuting) and dozens of other airports—including airports that have an air traffic control tower, (*see* Motion at 10)—currently restrict touch-and-go operations consistent with federal law. (Barr Decl. at ¶ 5.) The FAA's authority to regulate in-flight operations is not implicated, at all, by this action. Defendants' argument fails.

CONCLUSION

This Court should find that Plaintiffs' claim is not preempted and deny the Motion.

DATED this 24th day of January, 2025.

Respectfully submitted,

/s/ Andrew Barr

Andrew Barr (49644)
John A. Wharton (47776)
Lindsay Aherne (48391)
GREENBERG TRAURIG, LLP
1144 15th Street, Suite 3300
Denver, CO 80202
Andrew.Barr@gtlaw.com
WhartonJ@gtlaw.com
AherneL@gtlaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2025, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS** was electronically filed with the Clerk of the Court using the electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ *Karen R. Loveland*