No. 21-1346

In The
Supreme Court of the United States

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,

Petitioners,

v.

CENTRAL MAINE POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Aviation Act and its detailed regulatory scheme preempts a state law nuisance action seeking to impose liability for the use of airspace safety measures that the Federal Aviation Administration included as an express condition for issuing a no hazard determination concerning the construction of two 240-foot tall utility towers.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent Central Maine Power Company hereby states that Central Maine Power Company's common stock is owned by Avangrid, Inc., through wholly owned subsidiaries Avangrid Networks, Inc. and CMP Group, Inc. Avangrid, Inc. is a publicly held corporation listed on the NYSE (NYSE:AGR). Iberdrola, S.A., a corporation (sociedad anónima) organized under the laws of the Kingdom of Spain, directly owns 81.5% of outstanding shares of Avangrid, Inc. common stock. The shares of Iberdrola, S.A. are listed in the Madrid, Bilbao, Barcelona and Valencia stock exchanges. Iberdrola, S.A. has an American Depositary Receipts program (OTCMKTS: OBDRY). No other entities or individuals own 10% or more of the common stock of Central Maine Power Company.

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INTRODUCTION

The Maine Supreme Judicial Court, sitting as the Law Court,[1] concluded that the Federal Aviation Act ("Act") preempts Petitioners' state law nuisance action premised on implementation of airspace safety measures that the Federal Aviation Administration ("FAA") included as an express condition for issuing a "determination of no hazard to air navigation" relating to construction of two utility towers. The Law Court's decision, which is non-precedential, correctly preserves the FAA's exclusive authority over airspace safety.

Congress, in adopting the Act, established a detailed regulatory scheme that occupies the field of airspace safety. Under the Act and its implementing regulations, anyone proposing to construct a tower over 200 feet tall must provide notice to the FAA and the FAA must conduct an aeronautical study to determine whether the structure will create a hazard to air navigation. Pursuant to this regulatory scheme, the FAA may make any no hazard determination conditional on the use of safety measures, which, for structures over 200 feet high, includes lighting.

Petitioners seek to hold Central Maine Power Company ("CMP") liable under state common law for implementing safety measures that the FAA stipulated as a condition for the no hazard determinations it issued for CMP's utility towers. Their suit, if

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[1] When acting in its appellate capacity, the Maine Supreme Judicial Court is referred to as the "Law Court." Me. Stat. tit. 4, § 57.

successful, would compel CMP to remove the safety lighting it installed on the towers pursuant to the FAA's condition.

Thus, rather than disrupting the relationship between federal and state law, the Law Court's decision properly preserves the supremacy of federal law governing airspace safety. Numerous federal courts have held that the Act occupies the field of airspace safety, and the Law Court's application of field preemption to the FAA's no hazard determinations is consistent with this precedent. Further, the Law Court's decision appropriately recognizes that, if litigants could avail themselves of state common law to impose liability for compliance with the FAA's conditional no hazard determinations, state law would stand as an obstacle to the Act's purposes. The Law Court properly found that the Act preempted Petitioners' nuisance action, foreclosing the possibility that a private party could be held liable under state law for complying with FAA safety measures.

Petitioners have failed to identify any serious question deserving this Court's review.

STATEMENT OF THE CASE

In 2019, CMP replaced two utility towers that support power lines across the Kennebec River, in Maine, as the river flows into Merrymeeting Bay. The new towers, approximately 240-feet tall, are outfitted with safety lights that flash to alert aircraft to the presence

of the towers. In response to concerns from residents about having continuously flashing lights, CMP equipped the towers with an Active Aircraft Detection Lighting System (the "Radar System") that triggers the lighting only when aircraft are nearby, thus limiting the flashing. (App. 4).

CMP installed the radar-activated lighting system following review and approval by the FAA. On March 12, 2018, after CMP provided public notice of intent to construct the towers as required by the FAA, the FAA conducted a review and issued a "determination of no hazard to air navigation" with respect to the towers. The no hazard determination explained that the FAA had conducted an aeronautical study, which "revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation *provided the following condition(s) . . . is (are) met*: *As a condition to this Determination, the structure is to be marked/lighted* in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system – Chapters 4,8(MDual),&12."[2] (App. 5, 24 (emphasis added)). Subsequently, CMP submitted a revised proposal incorporating the Radar System, which would allow for reduced frequency of flashing lights. In response, on March 25, 2020, the FAA issued a new determination of no hazard, again conditioned on the marking of the

[2] The FAA Advisory Circular is referred to herein as the "FAA Safety Lighting Standards," and is available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_70_7460-1L_with_chg_1.pdf.

towers and the utilization of a lighting system in accordance with FAA Safety Lighting Standards. (App. 4-5).

Petitioners, three individuals who reside in the vicinity of the towers plus a non-profit conservation group, filed a complaint in Maine Superior Court asserting state law nuisance claims. As is relevant here, Petitioners sought to hold CMP liable for implementing the lighting mechanism specified as a condition of the FAA's no hazard determination, alleging that the flashing lights on the towers constitute an actionable nuisance because they have a negative effect on enjoyment of their property and the economic value of properties around Merrymeeting Bay.

The Superior Court granted CMP's motion to dismiss the nuisance claim. (App. 9-17). The court reasoned that the claim was barred by both field preemption and conflict preemption. As to field preemption, the Superior Court concluded, first, that the Act preempts the field of airspace safety and, second, that a nuisance claim premised on the use of lighting that the FAA stated was a condition for the issuance of its no hazard determination would necessarily invade that field by negating the agency's safety recommendations. (App. 13). As to conflict preemption, the Superior Court concluded that "punish[ing] a party for following the FAA's safety standards and explicit recommendations surely creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (App. 14; *see* App. 17).

On appeal, the Law Court affirmed the Superior Court's ruling in a non-precedential memorandum of decision. (App. 1-2). The Law Court concluded that "the court did not err in concluding that [Petitioners'] state law claims are preempted because they are based on CMP's compliance with FAA standards that occupy the field of aviation safety." (*Id.*).

REASONS FOR DENYING THE PETITION

I. The Law Court's decision has no precedential weight.

This Court should deny the petition because the Law Court issued its decision via a memorandum of decision that carries no precedential weight. The Maine Rules of Appellate Procedure provide that "[d]ecisions of the Law Court may be reported by several methods, including a signed opinion, a per curiam opinion, or a memorandum of decision." Me. R. App. P. 12(c). The Rules specifically provide that "[a] memorandum of decision decides an appeal but does not establish precedent and will not be published as an opinion of the Court in the Maine Reporter." *Id.* The Advisory Notes explain that, because a memorandum of decision "has no precedential value," it "should not be cited as precedent in legal briefs or memoranda or in judicial opinions in unrelated proceedings." Me. R. App. P. 12 advisory notes, August 2004. In this case, the Law Court chose to issue its decision via a memorandum of decision. (App. 1). Petitioners' argument that

the Law Court's "precedent creates great uncertainty if allowed to stand" (Pet. at 12) thus fails at the outset: it is not even precedent.

II. Petitioners have identified no significant question regarding the merits of the Law Court's holding that field preemption bars Petitioners' state law nuisance claim.

Even if the Law Court's decision had precedential value, it creates no uncertainty because it correctly recognizes the supremacy of federal law. The Supremacy Clause provides that federal law "shall be the supreme Law of the land; and the Judges in every state shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Congress therefore "has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Preemption applies equally to all forms of state law, including state tort law. *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001). The Court recognizes three categories of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

The Law Court's conclusion that field preemption bars Petitioners' state law nuisance claim is consistent with federal precedent and the structure of the Act.[3]

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[3] Petitioners erroneously suggest that the Law Court's decision was based solely on field preemption, and not conflict preemption. Petition, at 8 n.5. As discussed below, the court in

Numerous courts have recognized that the Act preempts the field of airspace safety given Congress' intent to vest the FAA with exclusive authority over airspace safety, and the Law Court's decision properly applies this straightforward principle. The Law Court's decision did not damage the Act or upset the balance established by the Constitution's federalist structure; to the contrary, it ensured that aviation safety standards authorized by Congress are not undermined by state common law.

A. The Law Court's decision is consistent with uniform federal precedent recognizing that the Act occupies the field of airspace safety.

Under the field preemption doctrine, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, 567 U.S. at 399. Field preemption applies when federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (cleaned up).

Courts have consistently recognized that the Act preempts the field of airspace safety. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634

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fact affirmed the Superior Court's order on both grounds. *See infra*, Part III.

(1973); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74-75 (2d Cir. 2019); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1327 (10th Cir. 2010); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470-74 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3d Cir. 1999); *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 3-4 (1st Cir. 1989); *Bieneman v. City of Chicago*, 864 F.2d 463, 471-73 (7th Cir. 1988); *Air Line Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960). The Law Court is simply the most recent to apply this uncontroversial principle. (App. 1-2 (citing *Bieneman*, 864 F.2d at 471-73 (observing that "federal law preempts the regulation of safety in air travel" and that common law liability cannot be premised on compliance with federal safety standards))). As the Law Court rightly concluded, the Act creates an extensive regulatory framework governing airspace safety, including safety measures for tall structures that may obstruct the use of navigable airspace, precluding enforcement of state laws in this field.

The Act provides that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). In adopting the Act, Congress declared its intent to place "full responsibility and authority for . . . promulgation and enforcement of safety regulations" for aviation in the FAA. H.R. Rep. No. 2360, 85th Cong., 2d Sess.1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741; *see* S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958) (noting that aviation is "subject to little or no regulation by States or

local authorities"). As pertinent here, the Act authorizes the Secretary of Transportation to review structures affecting air commerce. 49 U.S.C. § 44718. Under the Act, persons must provide public notice of proposed construction of a structure if notice "will promote (1) safety in air commerce; [or] (2) the efficient use and preservation of the navigable airspace." *Id.* § 44718(a). Subsequently, if the Secretary determines that construction "may result in an obstruction of the navigable airspace," then the Secretary must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace. . . ." *Id.* § 44718(b)(1). The Secretary must then issue a report disclosing any adverse impacts on the "safe and efficient use of the navigable airspace" caused by the structure. *Id.* § 44718(b)(2).

The FAA has promulgated extensive regulations implementing these requirements. *See* 14 C.F.R. § 77.1 *et seq*. Under these regulations, any construction that will extend more than 200 feet above ground level requires notice to the FAA and an aeronautical study. *Id.* §§ 77.9(a), 77.25(a). "The purpose of an aeronautical study is to determine whether the aeronautical effects of the specific proposal and, where appropriate, the cumulative impact resulting from the proposed construction or alteration when combined with the effects of other existing or proposed structures, would constitute a hazard to air navigation." *Id.* § 77.25(b). Following the study, the FAA must issue a determination whether the structure would present a hazard to air navigation. *Id.* § 77.31(a). The FAA may make any no

hazard determination conditional, and may include "[m]arking and lighting recommendations, as appropriate." *Id.* § 77.31(d)(1), (4).

The FAA's regulatory standards "are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration," *id.* § 77.25(c), including the FAA Safety Lighting Standards, which set "forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation," FAA Safety Lighting Standards at i. The FAA Safety Lighting Standards set forth "minimum standards in the interest of safety, economy, and related concerns." *Id.* § 2.3. They provide that structures exceeding 200 feet in height "should be marked and/or lighted," *id.*, unless an aeronautical study concludes otherwise, stating that "to provide an adequate level of safety, obstruction lighting systems should be installed, operated, and maintained in accordance with the recommended standards" set forth therein, *id.* § 2.3.

In light of the consistent case law recognizing that the Act occupies the field of airspace safety as well as the legal framework created by the Act and its implementing regulations governing structures affecting the navigable airspace (including the use of safety lighting), the Law Court's holding that field preemption bars Petitioners' nuisance claim based on the use of safety lighting on CMP's towers is unexceptional. As the Seventh Circuit has observed, "a state may not use common law procedures to question federal decisions

or extract money from those who abide by them." *Bieneman*, 864 F.2d at 473.

Here, the FAA, which has exclusive regulatory authority over the airspace of the United States pursuant to the Act, has issued comprehensive regulations requiring public notice regarding the construction of towers that exceed 200 feet above ground level; CMP duly provide public notice relating to the construction of its towers; and the FAA then conducted an aeronautical study relating to these towers, issuing a no hazard determination that was expressly conditioned on CMP's implementation of safety lighting. (App. 23-27). Petitioners' nuisance suit would intrude upon this comprehensive regulatory approval framework by creating state tort liability based on the airspace safety measures that the FAA deemed necessary for the issuance of a no hazard determination.

At its core, Petitioners' position is that private litigants should be allowed, by means of a state law tort action, to force CMP to disregard the safety recommendations issued by the FAA following the aeronautical study conducted pursuant to the Act. There is no question that the FAA's review of CMP's proposed towers was statutorily mandated and resulted in the FAA issuing a determination that CMP should use lights to prevent aviation accidents. Nevertheless, Petitioners want state courts to hold CMP liable for installing those lights. The preemption issue is therefore obvious: application of state tort law in this context would directly impinge upon the FAA's oversight of airspace safety under the Act. The Law Court therefore

correctly affirmed the Superior Court's decision to grant CMP's motion to dismiss on these grounds. (App. 1-2, 10-13).

B. The Law Court's decision does not harm the structure of the Act.

Notwithstanding the consistent case law recognizing that the Act occupies the field of airspace safety and vests the FAA with exclusive authority in that area, Petitioners argue that the Law Court's decision damaged the structure of the Act. Petitioners contend that the Act created a scheme of cooperative federalism in the field of aviation safety, noting that a no hazard determination has "no enforceable legal effect" and states that it "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." (Pet. at 1). Not only is Petitioners' argument contradicted by the comprehensive nature of the Act's regulatory framework and Congress' stated intent, as discussed above, but Petitioners also mistake the significance of the FAA's determinations.

Following this Court's holding that state law is preempted to the extent it would intrude upon federal authority over airspace safety, *see City of Burbank*, 411 U.S. at 633-34, federal courts have found state law preempted in the context of the FAA's no hazard determinations. *See Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp. 2d 1009, 1015-1020 (D. S.D. 2001). As the *Big Stone* court recognized, the Act's broad

legislative scheme, its legislative history, and the detailed regulations adopted pursuant to that scheme all lead to the conclusion that the Act preempts the field of airspace safety and that state law cannot supplant no hazard determinations. *Id.*

Given the broad preemptive effect of the Act and its implementing regulations, it is irrelevant that no hazard determinations have "no enforceable legal effect" in that the FAA does not have the power to enforce such determinations by prohibiting construction that it deems dangerous to air navigation. *See Aircraft Owners and Pilots Ass'n v. Fed. Aviation Admin.*, 600 F.2d 965, 966-67 (D.C. Cir. 1979).[4] Although the FAA relies upon "moral suasion" to induce compliance with no hazard determinations, those determinations still have "substantial practical impact" and, as a practical matter, are binding in force and effect. *Id.* at 967; *see White Indus., Inc. v. Fed. Aviation Admin.*, 692 F.2d 532, 533 n.1 (8th Cir. 1982); *Air Line Pilots Ass'n Int'l*, 446 F.2d at 241. The issuance of no hazard determinations affects whether lenders will lend money, insurers will provide insurance, local authorities will issue permits, and so forth. *See BFI Waste Sys. of N. Am., Inc. v. Fed. Aviation Admin.*, 293 F.3d 527, 532 (D.C. Cir. 2002). Consider one example: if CMP erected the towers without the safety requirements specified by the FAA and

[4] The "no enforceable effect" language originated with the FAA's argument, first made fifty years ago (and rejected by every court to have considered it) that its hazard determinations are not judicially reviewable. *See Air Line Pilots Ass'n Int'l v. Dep't of Transp.*, 446 F.2d 236, 240 (5th Cir. 1971).

a plane struck the towers, CMP would face liability for failing to follow the FAA's recommendations. *See*, *e.g.*, *McCauley v. United States*, 470 F.2d 137, 138 (9th Cir. 1972). Accordingly, regardless of the FAA's power to enforce no hazard determinations, such determinations must preempt state common law tort claims that would impose liability for following the FAA's airspace safety recommendations.

Petitioners cannot point to any federal precedent to the contrary; instead, they rely on cases that do not address preemption at all. In *Town of Barnstable v. Federal Aviation Administration*, the D.C. Circuit considered whether the FAA's lack of authority to enforce no hazard determinations meant that petitioners lacked standing to challenge the determinations; ultimately, the court found that the petitioners had standing because the wind project as a practical matter could not be built if it was determined to be a hazard by the FAA. 659 F.3d 28, 31-34 (D.C. Cir. 2011). In *Michigan Chrome & Chemical Co. v. City of Detroit*, the Sixth Circuit concluded that plaintiffs' taking claim was not ripe because the FAA's no hazard determination was not the equivalent of a final agency action. Nos. 92-1694, 93-1916, 1993 WL 432834, *6 (6th Cir. 1993). These cases are simply inapposite. It is one thing to observe that the FAA's lack of enforcement power might affect a party's standing or the ripeness of a takings claim. It is quite another to say that state law can be used to hold parties liable in tort for utilizing the safety measures set forth as a condition of a no hazard determination.

Moreover, Petitioners overstate the effect of according preemptive effect to the FAA's no hazard determination in this case. By preempting state law claims that would negate the FAA's safety recommendations, the Law Court did not bar the State of Maine or municipalities from imposing requirements that would not adversely affect airspace safety. Both the State and municipalities therefore remain free to withhold permits for projects that would violate other state or local laws. It is in this sense that the no hazard determination leaves CMP subject to "any law, ordinance, or regulation of any . . . State or local body." (App. 26).

Further, Petitioners' claim that the Law Court's decision makes it "impossible for *any* governmental entity to implement certain aeronautical recommendations in Maine" is simply wrong. (Pet. at 9). This case did not involve state or local laws requiring conformity with federal law or imposing stricter standards than imposed by federal law; instead, this case involved an attempt to impose, via state law, liability for compliance with federal safety standards. *Cf. Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019) (concluding that the Act does not preempt state laws imposing heightened safety standards).

Moreover, the Law Court's decision does not hinder collaborative dialogue between federal and local governments. The State and municipalities, as well as other interested parties, may participate in the FAA's review process to suggest alternative safety measures that would address local concerns. 5 U.S.C. § 555(b). The Law Court's decision simply means that the

private litigants in this case cannot leverage state law to override FAA standards.

Petitioners have identified no sound basis to conclude that the Law Court's decision undermines the structure of the Act. To the contrary, the Law Court's decision properly affords the Act its full force and effect. The Act precludes litigants from using state law to displace no hazard determinations issued by the FAA pursuant to its exclusive authority over airspace safety.

C. The Law Court's decision does not distort federal-state relations.

Petitioners overstate the effect of the Law Court's decision by suggesting that it broadly displaces state law in a variety of contexts. Contrary to Petitioners' claim, the Law Court did not conclude that guidance issued by any federal agency "triggers federal preemption and displaces a state's right to manage its own territory." (Pet. at 11). Because of the Act's broad assertion of federal authority over airspace safety, the Law Court's holding that the FAA's no hazard determinations preempt state law does not mean that federal agency recommendations in other contexts have similar preemptive effect. The Law Court's decision does not support the conclusion that guidance from the Centers for Disease Control, National Highway Traffic Safety Administration, or National Oceanic and Atmospheric Administration preempts state law. Unlike in the context of airspace safety, Congress has never

asserted exclusive federal authority over food safety, traffic enforcement, or recreational fishing. The Law Court's decision thus has no bearing on the preemptive effect of federal recommendations regarding these disparate issues. Following the Law Court's decision, the State of Maine retains the authority to manage its own territory.

III. Because the Law Court's decision can be affirmed based on conflict preemption, this case does not provide an appropriate vehicle to address Petitioners' field preemption arguments.

Even if Petitioners had presented a substantial question regarding the Law Court's holding that the Act preempts state law in the field of airspace safety, this case is not a proper vehicle to decide that question. Petitioners make no argument regarding conflict preemption, which provided separate and independent grounds for the Law Court's decision. Not only did the Law Court hold that the Act "occup[ies] the field of aviation safety," but the Law Court also held that preemption applies "because [Petitioners' claims] are based on CMP's compliance with FAA standards." (App. 1-2). For support, the Law Court cited *Mutual Pharmaceutical Co. v. Bartlett*, 470 U.S. 472 (2013), a conflict preemption case. (App. 2). The Law Court's decision could therefore be affirmed on the basis of conflict preemption, without addressing Petitioners' field preemption arguments, because a state law nuisance action would directly conflict with the Act.

Conflict preemption applies "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see Arizona*, 567 U.S. at 399-400. In determining whether a state statute hinders the achievement of federal policy, courts must first ascertain Congress' objectives and then decide whether a conflict exists. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

In this case, regardless of the scope of field preemption under the Act, allowing CMP to be held liable under state law for complying with an FAA safety standard would plainly stand as an obstacle to the federal policy of promoting airspace safety. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (finding preemption where state law limited the availability of an option that the federal agency considered essential to ensure its objectives). As described above, the FAA's mandatory review process led to a determination that CMP's towers would not create a safety hazard on the condition that CMP installed safety lighting on the towers. Petitioners' use of state common law to impose liability on CMP for installation of that lighting would directly interfere with Congress' intent to promote air safety because, should the nuisance claim succeed, CMP would be compelled to remove the safety measures that the FAA recommended pursuant to the Act's regulatory scheme. As the Maine Superior Court recognized below, "[t]o punish a party for following the FAA's safety standards and explicit

recommendation surely creates an obstacle to the full purposes and objectives of Congress." (App. 14).

The Law Court correctly affirmed the Superior Court on this point, noting that Petitioners' state law claim would impose liability for "compliance with FAA standards" and citing *Bartlett*. (App. 1-2). In that case, state law required a manufacturer to modify its pharmaceutical warnings while federal law forbade the manufacturer from taking that remedial action. 470 U.S. at 486. This Court held that conflict preemption applies when "federal law forbids an action that state law requires," *id.*, and further held that the conflict was not ameliorated by the fact that the manufacturer could have chosen to stop selling its product, *id.* at 488-89. The same principles apply here because Petitioners' state law claim would prohibit safety measures that, under federal law, are conditions for the issuance of a no hazard determination.

The Law Court's decision is further supported by *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, the plaintiff, who had been injured in a car accident, sought to hold the car manufacturer liable for failing to equip his vehicle with an airbag. *Id.* at 865. The National Transportation Safety Board had promulgated standards permitting, but not requiring, airbags in vehicles manufactured prior to 1987. *Id.* at 875-81. The Court concluded that conflict preemption precluded the "no airbag" action, because the purpose of federal regulatory standards was to promote safety by providing manufacturers with a range of choices among different passive restraint devices, which would

then bring about a mix of different devices that would lower costs, encourage technological development, and win consumer acceptance. *Id.* at 875, 878-79. As the Court noted, if state law could impose liability for taking the very approach to vehicle safety that the federal government was promoting, state law would directly undermine those federal safety standards and thereby stand as an obstacle the federal purpose. *Id.* at 871, 881. This is precisely what a state law nuisance action would accomplish here.

As with field preemption, the fact that the FAA does not claim enforcement authority for its no hazard determination makes no difference. As the Maine Superior Court correctly reasoned, the "FAA relies on other means to obtain compliance, and the federal statutory and regulatory scheme for managing air safety maintains its preclusive effect." (App. 16). State law could be used to enforce the FAA's safety recommendation: "[F]or instance, a party could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations." (App. 16-17 (emphasis in original)). On the other hand, "a common law action brought in state court is subject to conflict preemption when the injury described is a defendant's adherence to FAA guidance. A holding to the contrary would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (App. 17).

In short, a tort action sounding in state common law that would impose liability for compliance with FAA safety standards stands in direct conflict to the

Act's purpose. It is hard to conceive of something that is more of an obstacle to the purpose of the federal scheme – protecting airspace safety – than allowing a state to require removal of the very safety measures that result from the federal process. Given this separate and independent grounds for affirmance, this case does not provide a useful vehicle for considering Petitioners' field preemption arguments.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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