

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

WILLIAM TONG, in his official capacity as Attorney General for the State of
Connecticut

Applicant

v.

TWEED-NEW HAVEN AIRPORT AUTHORITY,
CITY OF NEW HAVEN

Respondents.

**APPLICATION TO THE HON. RUTH BADER GINSBURG FOR AN
EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

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September 24, 2019

Counsel for Applicant

Pursuant to Supreme Court Rule 13.5 and 28 U.S.C. § 2101(c), William Tong, in his official capacity as Attorney General for the State of Connecticut ("Applicant") respectfully moves for an extension of time of an additional sixty (60) days in which to file a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in *Tweed New Haven Airport Authority v. Tong*, No. 17-348 (L), No. 17-3918 (Con.). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The opinion for which Applicant intends to seek the writ, a copy of which is included with this Application as Exhibit A, was filed on July 9, 2019, so under the ordinary timing requirements in Rule 13.1, Applicant's petition is due on October 7, 2019. The petition would be due on December 6, 2019 with the additional sixty (60) days Applicant is requesting. In support of its request, Applicant states as follows:

1. The Second Circuit's decision presents substantial issues of law concerning standing and federal preemption that necessitate further consideration by the Solicitor General and Attorney General from the State of Connecticut. For example, the Second Circuit's decision allowing a political subdivision of a state to sue its creator state under the Supremacy Clause of the United States Constitution has furthered a split among the Circuit Courts. The Applicant respectfully requires additional time to determine the broader impact of the Second Circuit's holding in other cases and issues impacting the State of Connecticut. Given the circuit split on the standing issue, the decision requires further examination prior to the filing of a petition for certiorari.

2. The Second Circuit's decision also raises issues of state sovereignty and preemption of state statutes by federal statutes. The impact of the decision, particular upon the role of the state in regulating the location and size of airport facilities, requires further analysis, including policy and sovereignty considerations.

3. Connecticut Solicitor General Clare Kindall is currently responsible for supervising all appeals concerning the State of Connecticut in civil matters pending before Connecticut state appellate courts and the federal appellate courts. As part of those responsibilities, she is evaluating the impact of the Second Circuit's decision upon current and future appellate matters. She respectfully requests additional time in order to conduct that evaluation and, in the likely event that a petition for certiorari is filed, draft and refine an appropriate petition for the Court's consideration.

4. Applicant respectfully requests an additional sixty (60) days to better enable the Connecticut Solicitor General and other counsel from the Connecticut Office of the Attorney General to adequately prepare a petition that concisely presents all relevant legal issues to this Court for consideration.

For the foregoing reasons, Applicant hereby respectfully requests that Your Honor grant an extension of time up to and including December 6, 2019 for the filing of a petition for writ of certiorari in this case.

Respectfully submitted,

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September 24, 2019

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 29.5(b), I hereby certify that on September 24, 2019, I served the foregoing Application, pursuant to Rule 29.3, on counsel for Respondents by mail, first class postage prepaid, with courtesy copies sent by email, addressed to:

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September 24, 2019

EXHIBIT A

17-3481-cv (L)
Tweed-New Haven Airport Authority v. Tong

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In the
United States Court of Appeals
For the Second Circuit

August Term 2018

No. 17-3481-cv; 17-3918-cv

TWEED-NEW HAVEN AIRPORT AUTHORITY,

Plaintiff-Appellant,

CITY OF NEW HAVEN,

Intervenor Plaintiff-Appellant,

v.

WILLIAM TONG, *in his official capacity as Attorney General for the State of
Connecticut,*

*Defendant-Appellee.**

Appeal from the United States District Court
for the District of Connecticut
No. 15 Civ. 1731 (RAR), Robert A. Richardson, Magistrate Judge, Presiding.
(Argued: December 12, 2018; Decided: July 9, 2019)

Before: SACK, PARKER, and CHIN, *Circuit Judges.*

* The Clerk of Court is respectfully directed to amend the official caption as indicated above.

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1 Plaintiff-Appellant Tweed-New Haven Airport Authority (“Tweed”),
2 seeking to expand its primary runway, sued to invalidate a Connecticut statute
3 that had limited the runway’s length. *See* Conn. Gen. Stat. § 15-120j(c). Tweed
4 contended that the statute was preempted by the Federal Aviation Act, 49 U.S.C.
5 § 40101 *et seq.* The United States District Court for the District of Connecticut
6 (Richardson, *Magistrate Judge*), concluded that (1) Tweed lacked standing; and (2)
7 assuming Tweed had standing, the Federal Aviation Act did not preempt the
8 statute. We disagree. Accordingly, we reverse and remand for entry of judgment
9 in favor of Tweed.

10
11 **REVERSED and REMANDED.**

12
13 Hugh I. Manke, John C. King, Christopher
14 A. Klepps, Updike, Kelly & Spellacy, P.C.,
15 Hartford, Ct., *for plaintiff-appellant Tweed-*
16 *New Haven Airport Authority.*

17
18 John Rose, Jr., Corporation Counsel,
19 New Haven Office of the Corporation
20 Counsel, New Haven, Ct., *for intervenor*
21 *plaintiff-appellant Tweed-New Haven Airport*
22 *Authority.*

23
24 Drew S. Graham, Assistant Attorney
25 General, Hartford, Ct., *for defendant-appellee*
26 *William Tong, Attorney General of the State of*
27 *Connecticut.*

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1 BARRINGTON D. PARKER, *Circuit Judge*:

2 Tweed-New Haven Airport is located in the Town of East Haven and the
3 City of New Haven, Connecticut. The Airport is owned by the City of New
4 Haven and leased to and operated by Tweed-New Haven Airport Authority
5 (“Tweed”).¹ Tweed sued the then Connecticut Attorney General George Jepsen in
6 his official capacity² (the “State”), seeking a declaratory judgment that a
7 Connecticut statute (the “Runway Statute” or “Statute”) that limits the Airport’s
8 runway to its current length of 5,600 feet was invalid. *See* Conn. Gen. Stat. § 15-
9 120j(c). Tweed claimed that the Statute was preempted by federal laws governing

¹ Tweed is “a body politic and corporate” created through legislation by the state of Connecticut. *See* Conn. Gen. Stat. § 15-120i(a). While its originating statute describes Tweed as a “public instrumentality and political subdivision” of Connecticut, it “shall not be construed to be a department, institution or agency of the state.” *Id.* It has a fifteen-member board of directors, comprised of persons appointed by the mayor of New Haven, the mayor of East Haven, and the South Central Regional Council of Governments. *Id.* § 15-120i(b). If Tweed is terminated, its rights and property pass to the City of New Haven. *Id.* § 15-120i(e).

² Since the inception of the suit, the identity of the Connecticut Attorney General has changed from George Jepsen to William Tong. This change is reflected in the case caption.

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1 the regulation of air transportation, including the Federal Aviation Act
2 (“FAAct”), *see* 49 U.S.C. § 40101 *et seq.*

3 Following a bench trial in the United States District Court for the District of
4 Connecticut (*Richardson, M.J.*),³ the court concluded that Tweed lacked standing
5 to sue because its injury was not caused by the Statute and that, assuming Tweed
6 could establish standing, the Runway Statute was not preempted by the federal
7 laws to which Tweed cited. Because we conclude that Tweed has standing and
8 that the Runway Statute is preempted by the FAAct, we reverse.⁴

9 **BACKGROUND**

10 The Airport serves the New Haven area. It has a catchment area—the area
11 from which an airport expects to draw commercial air service passengers—in
12 excess of 1,000,000 people. The Airport’s primary runway, Runway 2/20, is
13 currently 5,600 feet long. The runway is one of the shortest commercial airport
14 runways in the country, and it is the shortest runway for an airport with a

³ The parties consented to proceed before a magistrate judge through the entry of final judgment. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73.

⁴ The salient facts are not in dispute and have been stipulated to by the parties. *See* Joint App’x 51-66.

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1 catchment area as large as Tweed's area. The Airport's catchment area is the
2 largest catchment area without nonstop flights to Orlando, and there are no
3 flights at the Airport to a number of East Coast cities such as Boston, Washington
4 D.C., and Atlanta.

5 In 2009, the Connecticut legislature, seeking to prevent the expansion of
6 Runway 2/20, passed the Runway Statute, which provides that "Runway 2-20 of
7 the airport shall not exceed the existing paved runway length of five thousand six
8 hundred linear feet." Conn. Gen. Stat. § 15-120j(c). The Runway Statute prevents
9 Tweed from extending Runway 2/20 past its current length.

10 The short length of the Airport's runway has sharply limited the
11 availability of safe commercial air service at Tweed. The length of a runway has a
12 direct bearing on the weight load and passenger capacity that can be handled on
13 any given flight. For example, at the time of trial, American Airlines, the one
14 commercial airline providing service to and from the Airport, was unable to
15 safely fill its planes to capacity and was required, depending on the weather, to
16 leave between four and nine seats empty.

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1 Tweed has been unable to attract new airline services. Tweed has
2 contacted approximately ten different airlines and has been unable to convince
3 them to operate out of the Airport. One airline, Allegiant Air, LLC, began an
4 economic analysis of the feasibility of bringing additional flights to the Airport
5 but concluded it would be pointless to continue with the analysis unless the
6 runway were extended.

7 Lengthening the runway would allow for the safe use of larger aircraft,
8 allow flights with no seating restrictions, allow more passengers on each
9 airplane, and allow service to more destinations. It would also allow Tweed to
10 attract more carriers and expand the availability of safe air service for its
11 customers.

12 As required by the Federal Aviation Administration (“FAA”), Tweed has
13 prepared a Master Plan for upgrading its airport, which includes extending the
14 runway.⁵ In 2002, the Master Plan—including the runway expansion—was

⁵A Master Plan is required by the FAA for each commercial airport within its jurisdiction, such as Tweed, and represents a blueprint for the long-term development goals of the airport’s facilities.

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1 approved by the FAA and by the State of Connecticut. However, in 2009, the
2 State changed its position and passed the Runway Statute.

3 Tweed, seeking to lengthen the runway, sued for prospective injunctive
4 relief, contending that federal law including the FAA Act preempted the Runway
5 Statute. The City of New Haven intervened as an additional plaintiff. The State
6 moved to dismiss on several grounds, including that Tweed lacked Article III
7 standing, that, as a political subdivision of the State of Connecticut, Tweed could
8 not sue the State, and that the Runway Statute was not preempted. The District
9 Court denied the State's motion.

10 At trial, the parties largely relied on a joint stipulation of facts. The District
11 Court ultimately concluded that (1) Tweed lacked standing to sue because it had
12 not shown an injury-in-fact and causation attributable to the Statute; and (2) even
13 if Tweed had standing, federal law (including the FAA Act) did not preempt the
14 Runway Statute. *See generally Tweed-New Haven Airport Auth. v. Jepsen*, No. 15-cv-
15 01731, 2017 WL 4400751, 2017 LEXIS 162356 (D. Conn. Oct. 3, 2017).

16 Tweed raises both these issues on appeal and the State contends, as it did
17 below, that Tweed cannot sue Connecticut because it is a political subdivision of

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1 the State. We review each of these questions *de novo*. *Montesa v. Schwartz*, 836 F.3d
2 176, 194 (2d Cir. 2016) (standing); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612
3 F.3d 97, 103 (2d Cir. 2010) (per curiam) (preemption).

4 DISCUSSION

5 I.

6 To establish Article III standing, a plaintiff must prove: “(1) injury-in-fact,
7 which is a ‘concrete and particularized’ harm to a ‘legally protected interest’; (2)
8 causation in the form of a ‘fairly traceable’ connection between the asserted
9 injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a
10 non-speculative likelihood that the injury can be remedied by the requested
11 relief.” *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106-107
12 (2d Cir. 2008) (emphasis omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S.
13 555, 560-61 (1992)). Each of these elements “must be supported adequately by the
14 evidence adduced at trial.” *Lujan*, 504 U.S. at 561 (internal quotation marks and

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1 citation omitted). Based on the facts at trial, we conclude that Tweed meets each
2 of these requirements.⁶

3 First, we have little difficulty concluding that Tweed suffered an injury-in-
4 fact. Where, as here, “the plaintiff is himself an object of the action (or forgone
5 action) at issue . . . , there is ordinarily little question that the action or inaction
6 has caused him injury, and that a judgment preventing or requiring the action
7 will redress it.” *Lujan*, 504 U.S. at 561-62. The Runway Statute directly targets
8 Tweed and prevents it from extending its runway.

9 In addition, Tweed has established that it is injured by the threatened
10 enforcement of the Statute should Tweed attempt to extend the runway. The
11 State claims that standing is not available under this theory because Connecticut
12 has made no overt threat to enforce the Statute. Crediting this argument would
13 run afoul of the Supreme Court’s admonition not to put “the challenger to the
14 choice between abandoning his rights or risking prosecution.” *MedImmune, Inc. v.*

⁶ Only one party must have standing to seek each form of relief. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). Because Tweed and the City of New Haven seek the same relief, we do not separately discuss the standing of the City.

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1 *Genentech, Inc.*, 549 U.S. 118, 129 (2007) (internal quotation marks omitted). The
2 very purpose of the Declaratory Judgment Act was to avoid requiring a litigant to
3 confront this dilemma. *Id.*

4 When courts consider whether the threatened enforcement of a law creates
5 an injury for the purposes of standing, “an actual . . . enforcement action is not a
6 prerequisite to challenging the law”; a pre-enforcement challenge is sufficient.
7 *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); see *MedImmune*, 549
8 U.S. at 128-29; see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S.
9 229, 234 (2010). Where a statute specifically proscribes conduct, the law of
10 standing does “not place the burden on the plaintiff to show an intent by the
11 government to enforce the law against it. Rather, it [has] presumed such intent in
12 the absence of a disavowal by the government or another reason to conclude that
13 no such intent existed.” *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013). The
14 record in this case shows no such disavowal.

15 Second, Tweed has demonstrated that its injury is caused by the Runway
16 Statute. For standing purposes, a plaintiff is required only to show that the injury
17 “is fairly traceable to the challenged conduct of the defendant.” *Spokeo, Inc. v.*

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1 *Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547 (2016). Where, as here, a plaintiff is
2 threatened by the enforcement of a statute that specifically targets the plaintiff,
3 the requirement is met. *Lujan*, 504 U.S. at 561-62. The Runway Statute is a solid
4 barrier to extension of the Airport's runway. Nothing can happen while the
5 Statute is in place. Tweed's injury is, therefore, "fairly traceable" to the Statute.

6 The District Court concluded that, because other uncertainties stood in the
7 way of the completion of an extended runway, the causation element was not
8 satisfied. The District Court reasoned that because Tweed would have to obtain
9 additional funding, secure approvals from various regulators, and obtain
10 environmental and other permits, none of which was assured, there did "not
11 appear to be a direct causal relationship between the statute and the plaintiff's
12 alleged injury." *Tweed-New Haven*, 2017 WL 4400751, at *8, 2017 LEXIS 162356, at
13 *22-23.

14 As an initial matter, the uncertainties seized upon by the District Court
15 have no bearing on Tweed's fears of the Statute's enforcement, which is an
16 independent basis for Article III standing. Further, we disagree with the District
17 Court's analysis of the causation element of standing. A plaintiff is not required

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1 to show that a statute is the sole or the but-for cause of an injury. An injury can
2 be “fairly traceable” even when future contingencies of one kind or another
3 might disrupt or derail a project. The fact that a project’s ultimate completion
4 may be uncertain because a plaintiff must undertake additional steps, such as
5 obtaining funding, environmental permits, or additional carriers, does not defeat
6 standing. Nearly every project of any complexity involves contingencies or
7 uncertainties of some sort. The point of a standing inquiry is not to figure out
8 whether a plaintiff will likely achieve a desired result. The point is simply to
9 ensure that a plaintiff has a sufficient nexus to the challenged action in the form
10 of a personal stake in the litigation so that the case or controversy requirements
11 of Article III are met. *See Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016).

12 The Supreme Court has held that there is standing where “the challenged
13 action of the [government] stands as an absolute barrier” that will be removed “if
14 [the plaintiff] secures the . . . relief it seeks.” *Vill. of Arlington Heights v. Metro.*
15 *Hous. Development Corp.*, 429 U.S. 252, 261 (1977). There, a developer sought to
16 build a cluster of low- and moderate-income townhouses in the Village of
17 Arlington Heights. *Id.* at 254. The developer eventually sued the Village for

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1 denying its application for a zoning variance, alleging racial discrimination and
2 violations of the Fair Housing Act of 1968. *Id.* The Village argued that there was
3 no injury for standing purposes because contingencies stood in the way of final
4 completion of the project. *Id.* at 261 & n.7.

5 The Supreme Court, in language fully applicable here, rejected the view
6 that the existence of contingencies was a barrier to standing. *Id.* at 261. The Court
7 held that standing was not defeated because the developer “would still have to
8 secure financing, qualify for federal subsidies, and carry through with
9 construction.” *Id.* (footnote omitted). We are, the Court emphasized, “not
10 required to engage in undue speculation as a predicate for finding that the
11 plaintiff has the requisite personal stake in the controversy.” *Id.* at 261-62.

12 We have also held that, for standing purposes, it was enough that
13 plaintiffs alleged “diligent efforts” to secure funding and had made progress on
14 the project in question. *NAACP v. Town of Huntington*, 689 F.2d 391, 394 (2d. Cir.
15 1982). In *Town of Huntington*, a not-for-profit housing group sought to construct a
16 large multi-family housing unit. The group sued the town, alleging that its
17 zoning regulations violated federal law. *Id.* at 393. While the suit was pending,

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1 the funds appropriated for the project lapsed and the town moved to dismiss the
2 complaint on the ground that the lack of funding would render the requested
3 relief (invalidation of the ordinance) meaningless. We nevertheless found
4 standing because the group had shown diligent efforts to secure funding and had
5 shown “some reasonable prospect for future financing” and obtaining
6 governmental approvals if the statute was invalidated, which is all that is
7 required. *Id.* at 394. Tweed comfortably meets this test. It has shown more than
8 “diligent efforts” toward, and a reasonable prospect of, the project’s completion.

9 Third, as to redressability, there is no question that a favorable decision
10 will likely redress Tweed’s fear of the Runway Statute’s enforcement. *Cayuga*
11 *Nation v. Tanner*, 824 F.3d 321, 332 (2d Cir. 2016) (stating that redressability
12 requirement is met where the court could prevent enforcement of a preempted
13 law). A favorable decision will also likely redress Tweed’s current inability to
14 move forward with the runway extension and will remove the absolute barrier
15 the Statute imposes. *See W.R. Huff Asset Mgmt. Co.*, 549 F.3d at 106-107; *see also*
16 *Lujan*, 504 U.S. at 560-61. Accordingly, we hold that Tweed has established
17 Article III standing.

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II.

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Next, the State contends that Tweed cannot bring suit against Connecticut

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because it is a political subdivision of Connecticut. As support for this

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proposition, the State relies on *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933),

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and *City of Trenton v. New Jersey*, 262 U.S. 182 (1923). *Williams* involved a suit

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under the Equal Protection Clause and *Trenton* involved a suit under the Contract

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Clause and the Fourteenth Amendment. In both cases, the Supreme Court held

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that suits under those provisions were not permitted. *Williams*, 289 U.S. at 40; *City*

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of Trenton, 262 U.S. at 188.

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The view that subdivisions were broadly prevented from suing a state was

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put to rest in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). There, the Supreme Court

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considered a challenge under the Fourteenth and Fifteenth Amendments to

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Alabama's gerrymandering of the boundaries of the City of Tuskegee. *Id.* at 340.

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The Court rejected Alabama's assertion that a state's power over its political

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subdivisions was unrestricted by the Constitution: "Legislative control of

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municipalities, no less than other state power, lies within the scope of relevant

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limitations imposed by the United States Constitution." *Id.* at 344-45. The Court

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1 emphasized that the “correct reading” of *Williams* and *City of Trenton* is “that the
2 State’s authority is unrestrained by the particular prohibitions of the Constitution
3 considered in those cases.” *Id.* at 344. Significantly, none of those cases involved
4 the Supremacy Clause, which raises unique federalism concerns.

5 Hundreds of federal laws apply nationwide to states and their political
6 subdivisions. They impose various responsibilities and prohibitions on states and
7 political subdivisions that are intended by Congress to apply nationwide. If the
8 Supremacy Clause means anything, it means that a state is not free to enforce
9 within its boundaries laws preempted by federal law. Lawsuits invoking the
10 Supremacy Clause are one of the main ways of ensuring that this does not occur.

11 In the years following *Gomillion*, the Supreme Court has repeatedly
12 entertained suits against a state by a subdivision of the state, including cases
13 under the Supremacy Clause. *See Va. Office for Prot. & Advocacy v. Stewart*, 563
14 U.S. 247, 252-53 (2011) (considering suit by independent state agency against its
15 state for violation of federal law alleged to conflict with state law); *Nixon v. Mo.*
16 *Mun. League*, 541 U.S. 125, 130-31 (2004) (considering Supremacy Clause
17 challenge by municipalities and utilities against state statute); *Lawrence Cty. v.*

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1 *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 258 (1985) (considering Supremacy Clause
2 challenge by county against state statute); *accord Bd. of Educ. v. Allen*, 392 U.S. 236
3 (1968); *see also Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (state constitutional
4 amendment preventing local anti-discrimination ordinances violated the Equal
5 Protection Clause); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 (1982)
6 (state statute prohibiting a local busing desegregation plan violated the
7 Fourteenth Amendment).⁷ In light of this authority, we hold that a subdivision
8 may sue its state under the Supremacy Clause. In reaching this conclusion we
9 join the Fifth and Tenth Circuits. *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979);
10 *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). *But see*
11 *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir.
12 1998) (holding a political subdivision lacks standing to sue its own state under
13 the Supremacy Clause).

⁷ We have held that a political subdivision does not have standing to sue its state under the Fourteenth Amendment. *See Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). Those cases provide no aid to the State as Tweed is not seeking to assert its own rights under the Fourteenth Amendment, which presents considerations different from those we consider here.

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III.

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Tweed next contends that the Runway Statute is preempted by the FAAct.⁸

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We agree. The FAAct “was enacted to create a uniform and exclusive system of

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federal regulation in the field of air safety [It] was passed by Congress for

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the purpose of centralizing in a single authority . . . the power to frame rules for

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the safe and efficient use of the nation’s airspace.” *Air Transp. Ass’n of Am., Inc. v.*

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Cuomo, 520 F.3d 218, 224-25 (2d Cir. 2008) (internal quotation marks omitted).

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With these objectives in mind, we have held that the FAAct impliedly preempts

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the entire “field of air safety.” *Goodspeed Airport LLC v. E. Haddam Inland Wetlands*

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& *Watercourses Comm’n*, 634 F.3d 206, 210-11 (2d Cir. 2011). Accordingly, “[s]tate

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laws that conflict with the FAA[ct] or sufficiently interfere with federal regulation

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of air safety are . . . preempted.” *Fawemimo v. Am. Airlines, Inc.*, 751 F. App’x 16,

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19 (2d Cir. 2018) (summary order). Our court has been clear as can be that FAAct

⁸ Tweed also contends that the Runway Statute is preempted by the Airline Deregulation Act and the Airport and Airway Improvement Act. Because we conclude that the Runway Statute is preempted by the FAAct, we make no determination concerning preemption under these other statutes.

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1 preemption applies to airport runways. *Air Transp. Ass'n*, 520 F.3d at 224-25
2 (FAAct preemption “extends to grounded planes and airport runways”).

3 Our next inquiry is whether the Runway Statute falls within the scope of
4 that preemption. “The key question is thus at what point the state regulation
5 sufficiently interferes with federal regulation that it should be deemed
6 pre-empted[.]” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 107 (1992). We
7 straightforwardly conclude that the Runway Statute falls well within the scope of
8 the FAAct’s preemption because of its direct impact on air safety.

9 The Airport has the 13th shortest runway out of the 348 airports where
10 commercial service is provided. Furthermore, the State has conceded that “the
11 length of the runway has a direct bearing on the weight load and passenger
12 capacity that can be safely handled on any given flight.” Joint App’x 55. Because
13 of the Statute, “[w]eight penalties are imposed on [existing] aircraft [at the
14 Airport] for safety reasons.” *Id.* The Statute has limited the number of passengers
15 that can safely occupy planes leaving the Airport by preventing planes from
16 taking off at maximum capacity. For these safety reasons, carriers are forced to
17 cut back on an ad-hoc basis the number of passengers that can safely be carried,

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1 the amount of baggage they can bring with them, and the total weight of luggage
2 that can be loaded.

3 Additionally, the Runway Statute has sharply limited the types of planes
4 that can use the runway. Modern jet passenger planes of the types used across
5 the country cannot safely use the Airport. This localized, state-created limitation
6 is incompatible with the FAA's objective of establishing "a 'uniform and
7 exclusive system of federal regulation' in the field of air safety." *Air Transp. Ass'n*,
8 520 F.3d at 224 (quoting *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624,
9 639 (1973)). If every state were free to control the lengths of runways within its
10 boundaries, this Congressional objective could never be achieved.

11 The inflexibility of the ban imposed by the Runway Statute also counsels in
12 favor of preemption. The Runway Statute's restriction on runway development is
13 absolute—it is a total barrier to improvements that could make Tweed safer and
14 more modern. Courts in this Circuit have held that the FAA preempts
15 significantly less rigid statutes that merely place limitations rather than total bans
16 on runway modification. For example, in *Tweed-New Haven Airport Authority v.*
17 *Town of East Haven* ("*Tweed I*"), the court held that a state regulation that required

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1 regulatory approval before the runway safety areas could be constructed was
2 preempted. 582 F. Supp. 2d 261, 268-69 (D. Conn. 2008). Similarly, in *Town of*
3 *Stratford v. City of Bridgeport*, the court held that a statute that required an airport
4 to obtain approval of the town in which it is located before it can undertake a
5 federally mandated runway safety project was preempted. No. 10-cv-394, 2010
6 WL 11566477, at *6, 2010 LEXIS 65975, at *21-23 (D. Conn. June 18, 2010). Those
7 statutes merely required state or city approval for improvements to an airport's
8 runway. Unlike those cases, the Runway Statute prohibits runway expansion
9 entirely. The Statute's interference with the field of air safety is, therefore, even
10 greater than was the case with other statutes courts have held to be preempted by
11 the FAA Act.

12 Finally, we have noted that FAA Act preemption is less likely to apply "to
13 small airports over which the FAA has limited direct oversight." *Goodspeed*, 634
14 F.3d at 211-12. Tweed is not such an airport. On the contrary, the FAA's
15 involvement with Tweed and its runway project has been direct and significant.
16 The Airport is federally regulated and exists within the Tweed-New Haven
17 Airport Layout Plan ("ALP"), which is approved by the FAA. The FAA

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1 maintains full control over any modification to the ALP, including runway
2 length. The Airport is classified by the FAA as a primary commercial service
3 airport and is required to hold an operating certificate under FAA regulation 14
4 C.F.R. Part 139. A Master Plan is required of all Part 139 airports, and Tweed's
5 Master Plan, which includes extending the length of the runway up to 7,200 feet,
6 was approved by the FAA as far back as 2002. This level of federal interest and
7 involvement is further indication that the Runway Statute is preempted.

8 In response to all of this, the State maintains that implied preemption is not
9 warranted because the Runway Statute "does not prevent Tweed from complying
10 with any federally-mandated safety standards." Appellee's Br. at 56-57. But the
11 State confuses different branches of implied preemption law: conflict preemption
12 and field preemption. Conflict preemption exists when a state law "actually
13 conflicts with federal law," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), in other
14 words, where "state law stands as an obstacle to the accomplishment" of
15 Congress's intent, *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707,
16 713 (1985). This case involves field preemption, not conflict preemption. Field
17 preemption exists where "Congress intended the Federal Government to occupy

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1 [a field] exclusively.” *Air Transp. Ass’n*, 520 F.3d at 220. And as we have seen,
2 Congress intended the FAA Act to occupy the entire field of air safety including
3 runway length.

4 The State next asserts that the FAA Act does not preempt the Runway Statute
5 because here, unlike in *Tweed I*, no federal mandate requires that Tweed extend its
6 runway. *See* Appellee’s Br. at 58. This characterization misses the point.
7 Preemption analysis does not turn on whether the airline safety activity is
8 mandated by the federal government; the dispositive question is whether the
9 Runway Statute intrudes into the field of air safety. We conclude that it does and
10 does so directly. For these reasons, we hold that the Runway Statute is preempted
11 by the FAA Act.

12 **CONCLUSION**

13 The judgment of the lower court is **REVERSED** and the case is
14 **REMANDED** for entry of judgment in favor of Tweed.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

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Catherine O'Hagan Wolfe
