No. _____

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 The State Of Maine

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the issuance of a non-binding "No Hazard Determination" by the Federal Aviation Administration preempts the application of state law, despite the Determination's text stating it "does not relieve" an entity from compliance with state law.

PARTIES TO THE PROCEEDING

Petitioners Friends of Merrymeeting Bay ("FOMB"), Kathleen McGee, Ed Friedman, and Colleen Moore were the plaintiffs in the Superior Court proceedings and appellants in the appellate proceeding. Respondent Central Maine Power Company was the defendant in the Superior Court proceedings and appellee in the appellate proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Friends of Merrymeeting Bay is a nonprofit corporation incorporated in the State of Maine. It has no parent company or publicly held company owning 10% or more of its stock.

RELATED CASES

- Originally filed as *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. CV-20-19, Sagadahoc County Superior Court for the State of Maine. Transferred to the Maine Business and Consumer Court.
- *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. BCD-CV-20-36, Business and Consumer Court of Cumberland County for the State of Maine. Judgment entered January 15, 2021, included as Appendix B, unreported.

RELATED CASES – Continued

- *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. BCD-21-43, State of Main Supreme Judicial Court Sitting as the Law Court. Judgment entered January 11, 2022, included as Appendix A, unreported.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari from a judgment of the Supreme Judicial Court of Maine.

In a four-sentence opinion, the Supreme Judicial Court – intentionally or not – damaged the structure of the Federal Aviation Act. The Maine court did so by applying federal preemption to a "No Hazard Determination" ("NHD") – a non-binding guidance document issued by the Federal Aviation Administration. The court so held despite the text of the NHD which 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." The Supreme Judicial Court's ruling puts it squarely at odds with federal precedent from multiple Circuit courts that NHDs "have 'no enforceable legal effect.' "[1]

The decision below grants any federal agency the new power to preempt Maine state law with an otherwise unenforceable guidance document. That substantially expands the power of federal administrative agencies to the detriment of states.

And because NHDs are non-binding, the Federal Aviation Act previously relied on "cooperative federalism" to carry out its goals. That is to say, the Act relied

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[1] *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages voluntary cooperation with the regulatory framework and is legally unenforceable.").

on state and local law to effectuate the recommendations of an NHD. That cooperative federalism has been lost due to Maine's application of preemption. Now, no government entity can effectuate an NHD's advice in Maine.

This is problematic as the NHD functions only to ensure the FAA's minimum guidelines are met, thus their issuance as *recommendations* rather than requirements. Therefore, if an appropriate alternative exists which would both conform with state law and satisfy the federal agency's hazard guidelines, property owners and states are left without a remedy to obtain such an alternative.

Without action by this Court, property owners will be denied a remedy, significant damage will be done to a federal statute, and federal agencies will gain more power at the expense of states.

OPINIONS BELOW

The opinion of the Maine trial court and Supreme Judicial Court are unpublished, but are provided in the Appendix at pages App. 1-22.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on January 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1257(a), The Federal Aviation Act (49 U.S.C. §§ 1301 et seq.) and The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, § 2, cl. 2) are set forth in the appendix (App. 29-34).

INTRODUCTION AND STATEMENT OF THE CASE

Petitioners are four owners of property in the vicinity of Merrymeeting Bay, Maine. They filed this lawsuit in 2020, seeking to hold Defendant Central Maine Power Company ("CMP") liable under Maine's law of nuisance. The basis for Petitioners' claim was that CMP installed an unnecessary, high-powered system of ten lights on two electrical towers located at an entrance to the Bay. The ten lights each flash 60 times per minute when active, and are visible over an area of nearly four thousand square miles. (And because the ten lights do not flash in synch, the effective flash rate is much higher than sixty per second, often causing a strobe-like effect.) The flashing lights are more than a mere annoyance – they adversely impact Petitioners'

businesses; decrease the value of Petitioners' property; and interfere with Petitioners' enjoyment of their property.

Although the lights were new, towers in that location were not; two towers, supporting a power line crossing, had stood at the Chops Passage of the Kennebec River at Merrymeeting Bay, Maine, for more than eight decades. In 2018, CMP replaced and extended the towers by 23%, to a height of 240 feet. (That is still 160 feet shorter than the height that would trigger mandatory lighting of the towers.)

Around the same time, CMP attached ten high-powered, flashing lights to the towers. The lights, when active, flash 60 times per minute. No public hearings were held prior to the light installation, even though flashing lights are forbidden by local zoning codes.

Petitioners proposed alternative, less impactful, sets of air safety measures for the towers. CMP declined to adopt those alternative measures.

And, significantly for the legal question of this petition, CMP contacted the Federal Aviation Administration ("FAA") before installing the lights. The FAA issued a "No Hazard Determination" (NHD) regarding the towers. App. 23-28. NHDs are guidance documents that "have 'no enforceable legal effect.' " *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages

voluntary cooperation with the regulatory framework and is legally unenforceable").[2]

In the NHD regarding the Chops Point Towers, the FAA recommended – but did not require – that CMP install the CMP-proposed lights on the towers. The FAA only issued a non-binding recommendation because the towers do not meet the criteria for mandatory lighting under FAA regulations. (This is undisputed: CMP's expert agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport.")

The NHD was explicit, however, that it should not impact CMP's compliance with state or local laws. On its face, the NHD says 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." App. 26. Despite that, CMP installed the lights without complying with state law and in disregard of local zoning ordinances.

Because the lights were unnecessary, not mandated by the FAA, not in compliance with state and local law, and damaging to their interests, Petitioners brought a lawsuit for nuisance to protect their property rights.

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[2] Because NHDs are only "advisory in nature," they are categorically excluded from NEPA review. FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

CMP responded by filing a Motion to Dismiss Plaintiffs' Complaint on September 15, 2020. In that motion, CMP argued that Plaintiff's claims were barred by federal preemption pursuant to the Federal Aviation Act. (This was the point at which CMP raised the federal questions for which Petitioners seek this Court's review.)

The Maine trial court agreed with CMP, holding that the Federal Aviation Act preempted Plaintiffs' state law claims on the reasoning that the FAA's unenforceable recommendations carry the same preemptive effect as an agency order. App. 16-17. The Court acknowledged that "Plaintiffs are correct that the FAA's determinations are phrased as *recommendations*, and that the FAA does not claim enforcement authority for its 'no hazard' determinations." App. 16. (emphasis in original). Nevertheless, the trial court concluded that "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." App. 17.[3]

[3] The trial court also dismissed the aspects of Petitioners' claim regarding a radar system CMP installed on the towers. The trial court held that these aspects were preempted by the Telecommunications Act of 1996. App. 17-21. Petitioners did not appeal this part of the trial court's ruling, and so it is not before the Court here.

Petitioners appealed the trial court ruling to Maine's Supreme Judicial Court.[4] They pointed out that the trial court's order overstated the FAA's authority, was internally inconsistent regarding preemption, and relied explicitly on "intuition" not supported by logic. App. 13.

On January 11, 2022, Maine's Supreme Judicial Court issued a decision. In four sentences, the Supreme Judicial Court concluded that the trial court "did not err in concluding that FOMB's state law claims are preempted because they are based on CMP's compliance with FAA standards that occupy the field of aviation safety." App. 1.

The Supreme Judicial Court cited two cases for its conclusion, *Bieneman v. City of Chicago*, 864 F.2d 463, 471-73 (7th Cir. 1988) and *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488-89 (2013). Neither case addresses NHDs. And *Bieneman* concluded that the state law claims at issue were *not* preempted by the Federal Aviation Act.

The Supreme Judicial Court did not explain how its preemption conclusion can be reconciled with the NHD's explicit statement that it "does not" exempt an entity from "compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." *See id.*

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[4] Maine has no intermediate court of appeals. Most trial court decisions are appealed directly to Maine's highest court, the Maine Supreme Judicial Court.

Petitioners now ask this Court to review that decision.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Harms the "Cooperative Federalism" Structure of the Federal Aviation Act.

The Supremacy Clause of the United States Constitution creates a clear rule that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, § 2, cl. 2. That principle is constrained, however, by the central constitutional framework of federalism, which ensures that both federal and state governments operate with sovereignty. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Here, neither the Federal Aviation Act (49 U.S.C. §§ 1301 et seq.) nor any other federal law relevant to this lawsuit includes a clause expressly preempting state law. And so, the Maine state laws at issue will only be preempted if such preemption is "implicitly contained in the [Act's] structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). That "implicit" preemption could take the form of field or conflict preemption.[5]

Field preemption applies only when "federal law so thoroughly occupies a legislative field 'as to make

[5] The Maine Supreme Judicial Court ruled based only on field preemption, not conflict preemption. [App. 1-2.]

reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992), *quoting Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In other words, in order to preempt state law, the federal law must "provide a full set of standards" that not only impose their own obligations under federal law, "but also confer a federal right to be free from any other" obligations. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 200 L.Ed.2d 854 (2018).

The Maine Supreme Judicial Court concluded that the trial court "did not err" in finding that the issuance of an NHD preempts Petitioners' claims because they "are based on CMP's compliance with FAA standards that occupy the field of aviation safety." App. 1-2.

Unfortunately, that decision directly undermines the structure and functioning of the Federal Aviation Act by making it impossible for *any* governmental entity to implement certain aeronautical recommendations in Maine.

That result flows from the fact that an NHD reflects the FAA's *recommendation*, not an enforceable order.[6] An NHD's value, therefore, lay in the fact that it did *not* entirely preempt state-law regulation. Instead, it invited a dialogue between a project sponsor, the state, municipalities, and the FAA. This has been

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[6] *See* Trial Court Order at App. 16. *See also Town of Barnstable Mass. v. FAA, supra*, 659 F.3d at 31 (D.C. Cir. 2011) (NHDs are guidance documents that "have 'no enforceable legal effect' ").

described as "cooperative federalism," and such cooperation was Congress' plan for the Federal Aviation Act. *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019). *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (congressional intent, as determined by the "structure and purpose of the statute as a whole" is the "ultimate touchstone" for preemption). Indeed, what Petitioners seek is to initiate that dialogue in order to find an alternative safety system that would adhere to both FAA regulations *and* state and local laws.

That is why the text of an NHD explicitly states that it does not interfere with the law of any "State, or local government body." App. 26; *see Carroll, supra*, 27 N.W.2d at 653 (an NHD "expressly warned the Danners that they still must comply with state and local laws."). As CMP noted in its brief below, the function of NHDs was that they had "real, practical effects," including whether "local authorities will issue permits, and so forth."

That *was* the function of NHDs. No longer, at least in Maine. Now that the Supreme Judicial Court has found NHDs trigger federal preemption, local authorities no longer have the ability to withhold permits, and state law has no impact. The cooperative federalism structure Congress intended has been done away with, because now the FAA cannot enforce the recommendations of an NHD, and state and local governments cannot have any say in either enforcement or the tailoring of suitable site-specific solutions.

And because the Supreme Judicial Court is the court of last resort in Maine, that cooperative federalism structure will be lost unless this Court addresses the issue.

B. The Decision Below Gives Any Federal Agency the Power to Preempt State Law With a Guidance Document.

It is undisputed that an NHD is a non-enforceable guidance document provided by the FAA.[7]

Thus, when the Supreme Judicial Court found federal preemption based on an NHD, it reached a new and radical conclusion: that a document containing unenforceable federal guidance triggers federal preemption and displaces a state's right to manage its own territory.

Such a holding, if allowed to remain in place, dramatically increases the power of federal agencies over states, expanding the federal administrative regime at the cost of federalism.[8]

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[7] *See* Trial Court Order at App. 16. *See also Town of Barnstable Mass. v. FAA, supra*, 659 F.3d at 31 (D.C. Cir. 2011) (NHDs are guidance documents that "have 'no enforceable legal effect' ").

[8] The decision below suggests that the State of Maine can no longer regulate broad swathes of activity, such as food safety (because the CDC recommends washing hands before preparing food), traffic enforcement (because the NHTSA recommends that passengers buckle up), or recreational fishing (because NOAA recommends the use of circle or barbless hooks). *See*, *e.g.*, *When and How to Wash Your Hands*, Centers for Disease Control and Prevention (Jun. 10, 2021); *Seat Belts*, National Highway Traffic

Such a precedent creates great uncertainty if allowed to stand, and calls for this Court's intervention.

CONCLUSION

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

Respectfully submitted,

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Safety Administration (July 15, 2021); and *Catch and Release Best Practices*, National Oceanic and Atmospheric Administration (Oct. 23, 2020).