

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:24-cv-00711

TOWN OF SUPERIOR, COLORADO, 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,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON,
COLORADO, as successors in interest to the Jefferson County Airport Authority; and DR.
STEPHANIE CORBO, in her official capacity as acting Airport Director of the Rocky
Mountain Metropolitan Airport,

Defendants.

**DEFENDANTS’ NOTICE OF REMOVAL
BASED ON FEDERAL QUESTION JURISDICTION**

**TO THE CLERK OF THE COURT, PLAINTIFFS, AND THEIR ATTORNEYS OF
RECORD:**

PLEASE TAKE NOTICE that defendants BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF JEFFERSON, COLORADO (“Jefferson County”), and DR. STEPHANIE
CORBO (collectively “Defendants”), by and through undersigned counsel, hereby removes this
case from the District Court of Boulder County, Colorado to this Court pursuant to 28 U.S.C.
§§ 1331, 1441, and 1446; the Airport and Airway Improvement Act, 49 U.S.C. § 47101, *et seq.*
 (“AAIA”); and the Airport Noise and Control Act, 49 U.S.C. § 47521, *et seq.* (“ANCA”).
Removal is authorized because the claim for public nuisance raised in the Complaint—although
purporting to be based on state law—actually raises a federal claim because it asks the Court to

address an area that is subject to the federal government’s extensive and pervasive control over aircraft operations at federally-funded airports such as the Rocky Mountain Metropolitan Airport (“RMMA” or the “Airport”). This includes, without limitation, efforts to require the Airport to cease permitting the operation of “touch-and-go” aircraft operations. *City of Tipp City v. City of Dayton*, 204 F.R.D. 388, 396 (S.D. Ohio 2001) (nuisance claim arose out of federal law, affording subject matter jurisdiction, as resolution of claim would require resolution of substantial question of federal law of whether defendant was in compliance with FAA requirements).

Plaintiffs Town of Superior’s (the “Town”) and the Board of County Commissioners of the County of Boulder, Colorado’s (“Boulder County”) (collectively, the “Plaintiffs”) public nuisance claim relates directly to the federal government’s pervasive control over the National Airspace System (“NAS”), as implemented through federal statutes, regulations, and policies, including the AAIA, the ANCA, and the regulations promulgated and enforced by the U.S. Federal Aviation Administration (“FAA”). *See generally* **Exhibit 1**, State Court Complaint for Injunctive Relief and Jury Demand (“Complaint”). Plaintiffs are using their Complaint and this action to force the Airport to cease or severely curtail its operations.

Separately, Plaintiffs’ claim is completely preempted by the AAIA and the ANCA, as well as the regulations promulgated and enforced by the U.S. Federal Aviation Administration to administer, implement, and enforce those statutes.

This Notice of Removal is timely under 28 U.S.C. § 1446 because it is filed within 30 days of the Complaint being filed in state court, which occurred on March 12, 2024.

STATEMENT OF FACTS

This case involves RMMA, a federally funded airport that commenced operations in 1960—which was decades before most of the residential areas around the Airport were developed. In addition to “general aviation” operations by jets and piston aircraft, the Airport features passenger jet service by JSX Airlines.

Plaintiffs’ Claim and Request for Relief

On March 12, 2024, Plaintiffs filed their Complaint in the Boulder County, Colorado District Court, Case No. 2024CV30221. In their Complaint, Plaintiffs seek preliminary and permanent injunctions requiring Jefferson County to ban “touch-and-go” aircraft operations at the Airport. Complaint ¶ 3; *see also id.* at p.20, Prayer for Relief (requesting a “preliminary injunction requiring Jefferson County to” ban “piston-engine aircraft performing ‘touch and go’ operations on Runway 30L and Runway 30R at Rocky Mountain Metropolitan Airport”). Touch-and-go operations are critical to the ability of a student or new pilot to learn how to fly properly and safely. According to the Complaint, “There are four flight schools located at the Airport and they utilize (or lease on an hourly basis) approximately 60 aircraft. Nearly all of these aircraft are piston-engine training aircraft.” *Id.* at ¶ 64. However, without touch-and-go operations at an airport, there is no training of the next generation of pilots.

Despite this, Plaintiffs claim that touch-and-go operations “deposit unsafe levels of lead particulates on Plaintiffs and expose Plaintiffs’ residents to repeated and excessive noise and thus create unreasonable health and safety hazards for their residents, constitute a public nuisance, and must be enjoined.” *Id.*

Plaintiffs further assert that “[e]xcessive and repetitive aircraft noise from piston-engine aircraft conducting touch-and-go operations on Runway 30R or Runway 30 create an unreasonable health and safety hazard for Plaintiffs’ residents.” *Id.* at ¶ 169. Plaintiffs add that “Jefferson County’s decision not to prohibit touch-and-go operations by piston engine aircraft that overfly Plaintiffs’ residents constitutes a continuing public nuisance because such operations—which materially increase each year—unreasonably damage the safety, health, and welfare of Plaintiffs’ residents.” *Id.* at ¶ 190.

Federal Control Over Aviation and Airports

Plaintiffs seek to require Jefferson County to ban touch-and-go operations at RMMA. This is a direct attack against the pervasive and preemptive system of federal laws, regulations and policies that comprehensively control operation of our country’s National Airspace System (“NAS”). Federal law has developed to protect the operation of airports from undue interference resulting from parochial interests. Specifically, the federal government enjoys plenary power over air transportation. As U.S. Supreme Court Justice Jackson famously observed:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. **They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.** The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. **It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.**

Nw. Airlines v. State of Minn., 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (emphasis added). Moreover, an airport sponsor such as Jefferson County is not responsible for deciding

which aircraft operate at the airport, or where those airplanes fly to or from. These are decisions that cannot be attributed to Jefferson County.

The Airport and Airway Improvement Act

Many of our nation’s airports, including RMMA, are federally funded through grants or other payments, *see* Complaint ¶ 36, which relieves local taxpayers and airport patrons from having to pay all of the considerable expenses that exist to construct, maintain, and operate an airport. The FAA gives these grants to airport sponsors so that they can build and improve airports to “maintain a safe and efficient nationwide” airport system. 49 U.S.C. §§ 47104(a), 47105(a); *see also id. at* § 47102(26) (defining “sponsor” as, among other things, “a public agency”).

However, such funding comes with strings attached. Among other things, the airports must comply with the so-called federal “Grant Assurances,” including the obligation to make the airport “available for public use on reasonable conditions and without unjust discrimination.” *Id.* § 47107(a)(1); *see also* Airport Improvement Program (AIP) Grant Assurances, 79 Fed. Reg. 18,755, 18,755 (Apr. 3, 2014) (noting that a “complete list of the current grant assurances can be viewed” at https://www.faa.gov/airports/aip/grant_assurances).

In 1982, Congress passed the AAIA, 49 U.S.C. §§ 47101-47134, which established the current Airport Improvement Program (“AIP”) and the National Plan of Integrated Aviation System (“NPIAS”). The AIP encompassed an explicit set of regulations and requirements for the dispersal of the Aviation Trust Fund, and sought to expand the benefactors of those funds to a larger number of airports.

In 1996, the FAA established a specific regulatory procedure for airport tenants and users to submit complaints of noncompliance (14 C.F.R. pt. 16), which has generated a body of

administrative decisions that elaborate upon the Grant Assurances’ requirements. The FAA also routinely generates letters to airports and their state/local government sponsors (e.g., Jefferson County), setting forth its interpretation of the Grant Assurances. The FAA may enforce an airport’s Grant Assurance-based obligations by several methods, but the FAA’s most effective enforcement tool is the threat or actual withholding of other AIP grants. *See* 49 U.S.C. § 47111. The FAA also can request an injunction in federal court and, if the misuse of revenue is at issue, pursue civil penalties of up to three times the diverted funds (in addition to reimbursement) as well as request that the U.S. Department of Transportation withhold all federal transportation grants from the airport’s sponsor. *See* 49 U.S.C. § 46106.

Grant Assurance 5 requires that the airport sponsor retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. *Platinum Aviation v. Blooming-Normal Airport Auth.*, 16-06-09, 2007 WL 9666187 (F.A.A.), *2 (Jun. 4, 2007). Grant Assurance 22(a) requires sponsors to “make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities.” *Palm Beach Cnty, Fla. v. FAA*, 53 F. 4th 1318, 1321 (11th Cir. 2022). This means that airports must be reasonably available to aeronautical activities and may not unjustly discriminate against one type of aeronautical activity.

Federally Funded Airports Cannot Ban Aeronautical Activities for “Safety” Reasons Without the FAA Making a Determination that Safety Requires the Prohibition

Plaintiffs mistakenly assume that Jefferson County could unilaterally decide to ban touch-and-go operations based on a perceived need to guard against unsafe aeronautical operations. However, this position ignores the fact that Jefferson County is constrained by its Grant Assurance obligations to unilaterally decide that touch-and-go operations are not safe. Rather, it is the FAA—

and only the FAA—that has the power to make such a determination, and it must be made based on a fully developed administrative record. *Aircraft Owners & Pilots Ass’n (AOPA) v. City of Pompano Beach, Fla.*, No. 16-04-01, 2005 WL 32722717 (F.A.A.) (Dec. 15, 2005) (Director’s Determination). In its decision, the FAA stated:

The term “aeronautical use” includes any activity which involves, makes possible or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations. **Activities within this definition include** stop-and-go operations, intersection take-offs, operation of gliders, touch-and-go **operations**, taxi-back activities, operation of helicopters (rotorcraft) and in some cases, engine run-ups. **These activities are considered aeronautical activities and, as such, must generally be accommodated on airports developed with federal assistance unless adequate justification acceptable to the FAA indicates the activity should not be accommodated on a particular airport.**

Id. *9 (emphasis added); *see also Timberview Helicopters, Inc. v. Okaloosa County*, No. 16-21-14, 2023 WL 2239104, *9 (F.A.A.) (Feb. 21, 2023) (Director’s Determination) (“The Director affirms that the FAA’s role in regulating aviation and aviation safety is extensive and essentially plenary in terms of the agency’s statutory, regulatory and policy responsibilities. FAA’s safety responsibility includes regulation of the safety of aircraft takeoffs and landings.”); *see also Luther Kurtz et al. v. City of Casa Grande*, No. 16-16-01, 2017 WL 11438603 (F.A.A.), *5 (Dec. 21, 2017) (Director’s Determination) (“FAA Order 5190.6B . . . states that the FAA is the final authority in determining what, in fact, constitutes a compromise of safety. As such, an airport sponsor that is contemplating the denial of a proposed on-airport aeronautical activity or access is encouraged to contact the local Airport District Office (ADO) or regional airports division. Those offices will then seek assistance from FAA Flight Standards and Air Traffic to assess the safety and efficiency of the proposed action and to determine whether unjust discrimination or an exclusive rights violation would result from the proposed restriction (FAA Order 5190.6B, p. 8-8). FAA Order

5190.6B also provides that any restriction, limitation, or ban on skydiving on the airport must be based on Grant Assurance 22 that states the airport sponsor may prohibit or limit aeronautical use for the safe operation of the airport (subject to FAA approval).”).

The Current Requirement to Provide and Use Leaded Fuel for General Aviation Aircraft

Aviation gasoline (avgas) is the aviation fuel most commonly used in piston-engine aircraft within the general aviation community. Avgas remains the only transportation fuel in the United States to contain lead. More than 222,600 registered piston-engine aircraft can operate on leaded avgas. The most common and reliable type of avgas is 100 octane Low Lead, also known as 100LL. This leaded fuel contains tetra-ethyl-lead (“TEL”), which is an additive used to prevent engine damage at higher power settings. Although the FAA does not have direct regulatory responsibility for aviation fuels, it provides the initial certification approval of the aircraft with the fuel it operates on, and it oversees aircraft operators to ensure use of the correct fuel.¹ In other words, unless and until the FAA certifies general aviation aircraft engines to use unleaded fuel, those aircraft are required to operate with leaded fuel.

“[The] FAA is working with critical government and industry partners to develop a multi-layered strategy to reduce and ultimately eliminate lead and its potential harmful effects from fuel for piston-engine aircraft”² In the meantime, however, the FAA has made it clear that airports cannot unilaterally refuse to offer or otherwise allow fueling of aircraft with leaded fuel:

¹ <https://www.faa.gov/about/initiatives/avgas#:~:text=Avgas%20remains%20the%20only%20transportation,Lead%2C%20also%20known%20as%20100LL.>

² <https://www.faa.gov/about/initiatives/avgas#:~:text=Avgas%20remains%20the%20only%20transportation,Lead%2C%20also%20known%20as%20100LL.>

What authorities does the FAA have to ensure airports continue serving/offering leaded avgas? Under what circumstances can airports decide to unilaterally stop selling leaded avgas? The FAA ensures that airports continue offering avgas through Grant Assurance 22, Economic Nondiscrimination. **A ban or restriction on the sale or use of 100LL avgas at a federally obligated airport is inconsistent with Grant Assurance 22, Economic Nondiscrimination (49 USC 47107(a)(1)) and conflicts with the self-service provision.** Any restriction on the sale or dispensing of any type of fuel, when there is demand/need or a fuel provider willing to provide the fuel, must be approved in advance by the FAA. Any such proposed restriction must be supported by a valid, FAA approved justification. Such justification cannot be unreasonable or unjustly discriminatory.³

In short, Jefferson County cannot unilaterally refuse to sell or allow to be sold leaded fuel at the Airport.

The Airport Noise and Capacity Act

In 1973, the Supreme Court held that the pervasive scope of federal regulation of the airways implied a congressional intention to preempt municipal aircraft noise restrictions based upon the police power. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-40 (1973) (upholding injunction barring municipal aircraft crews as subject to federal preemption).

The ANCA, *see* 49 U.S.C. §§ 47521, *et seq.*, generally prohibits “airport noise and access restrictions on the operation of stage 2 and stage 3 aircraft” unless those restrictions meet stringent statutory requirements. *See id.* § 47524. The ANCA also mandates that restrictions on Stage 3 aircraft be “reasonable, nonarbitrary, and nondiscriminatory.” *Id.* § 47524(c)(2)(A).

The FAA implements the ANCA through 14 C.F.R. Part 161, which sets out the process for analyzing and approving new noise restrictions, *see* 14 C.F.R. §§ 161.101, *et seq.*, and the penalties for failure to comply with ANCA. *See* 14 C.F.R. §§ 161.501-505.

³ https://www.faa.gov/sites/faa.gov/files/FAQs_FAA_UL_Fuel_Development.pdf (emphasis added).

Jefferson County is subject to ANCA generally and because of its Grant Assurance obligations. Grant Assurance 1(a) is titled “General Federal Requirements.” Grant Assurance 1(a) requires sponsors to “comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for [a] project including but not limited to . . . Title 49, U.S.C., subtitle VII, as amended.” *Id.* at 2. See *Palm Beach Cnty., Fla. v. FAA*, 53 F. 4th 1318, 1337-38 (11th Cir. 2022) (upholding FAA determination that airport’s restrictions on aircraft noise violated Grant Assurances). One practical impact of the above-referenced statutory and regulatory environment is that a federally-funded airport such as RMMA cannot (1) ban the use of leaded fuel, (2) impose restrictions on noise levels outside of what is permitted under the ANCA, or (3) ban certain aircraft operations, such as touch-and-go flights.

APPLICABLE STANDARD

The threshold requirement for removal under 28 U.S.C. § 1331 and 28 U.S.C. § 1441 is a finding that a contains a cause of action that is within the original jurisdiction of the district court. The key question is whether a complaint contains a claim that “aris[es] under the Constitution, laws, or treaties of the United States.” 28 U.S.C. §§ 1331, 1441.

The Supremacy Clause of the U.S. Constitution provides that the laws of the United States “shall be the supreme law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI, cl. 2. Pursuant to this provision, Congress has the power to enact statutes that preempt state law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 509 (1989). Congressional intent to preempt state law can be either express or implied. See, e.g., *Air Transp. Ass’n of Am. v. Cuomo*, 520 F.3d 218, 220-21 (2d

Cir. 2008) (per curiam). Express preemption is present when “a federal statute expressly directs that state law be ousted.” *Id.* at 220 (internal citation omitted). Implied preemption comes in two varieties, known as field preemption and conflict preemption. Conflict preemption arises when state law “actually conflicts with federal law,” *id.* at 220, such that it is not possible to comply with both and “state law stands as an obstacle to the accomplishment” of the congressional objective. *Hillsborough Cnty. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985) (internal citation omitted).

ARGUMENT

Under the Supremacy Clause, federal law preempts state law when Congress expressly or impliedly indicates an intention to displace state law, or when state law actually conflicts with federal law. *Wardair Can. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 6 (1986). Removal of the case is appropriate under 28 U.S.C. § 1441(a) because this Court would have had original subject matter jurisdiction over Plaintiffs’ claim pursuant to 28 U.S.C. § 1331 had Plaintiffs elected to file the action initially in federal court. This is because of the pervasive regulation of airport operations under the AAIA and the ANCA and the fact that if Jefferson County modifies its operation of the Airport pursuant to Plaintiffs’ demands, Jefferson County will violate federal Grant Assurances. Stated simply, a state court may not apply state nuisance law to prohibit or significantly restrict airport operations in a manner that violates the airport sponsor’s legal requirements under the AAIA and the ANCA.

I. REMOVAL IS PROPER BECAUSE OF THE FEDERAL GOVERNMENT'S EXTENSIVE CONTROL OVER AIRCRAFT NOISE REGULATION AND THE AVAILABILITY OF LEADED AVIATION FUEL.

The Supreme Court has recognized that federal question jurisdiction exists over claims asserted under state law if the state law claims implicate substantial federal questions. *Grable & Sons Metal Prods., Inc. v. Dante Eng'g & Mfg.*, 545 U.S. 308, 314–15 (2005). This doctrine “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law,” in part to promote the “uniformity that a federal forum offers on federal issues.” *Id.* at 312. According to the Supreme Court, the test for whether a federal court has federal question jurisdiction is not whether a federal statute provides a private right of action parallel to the state-law claim alleged by the plaintiff, but whether the “state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Id.* at 314. That is precisely the case here, given how Plaintiffs are directly challenging Jefferson County’s efforts to comply with its federal obligations under the AAIA and ANCA.

“While it is clear that federal courts have subject matter jurisdiction over claims which are created by a federal statute, the Supreme Court has also recognized that a case may arise under federal law ‘where the vindication of a right under state law necessarily turned on some construction of federal law.’” *City of Tipp*, 204 F.R.D. at 395 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983); *Merrill Dow Pharm. v. Thompson*, 478 U.S. 804, 808 (1986); *id.* at 395 (“the Court may have subject matter jurisdiction over Plaintiffs’ claims if they require resolution of a substantial question of federal law”)); *see also Long v. Bando Mfg. of*

America, Inc., 201 F.3d 754, 759 (6th Cir. 2000) (“[The Supreme Court] clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action, if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law, and if the resolution of that federal question is necessary to the resolution of the state law claim”).

“Aviation is unique among transportation industries” in that “it is the only one whose operations are conducted almost wholly within Federal jurisdiction . . . [t]hus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry.” Sen. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). The FAA is tasked with “develop[ing] plans and policy for the use of the navigable airspace and assign[ing] by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” 49 U.S.C. § 40103(b)(1).

In light of the federal government’s extensive control over aircraft noise regulation and the availability of safe and approved aircraft fuel, the federal interest in this case is substantial. As a result, the plaintiffs’ claims, although stated in terms of state law, “arise under” federal, which provides this Court with the requisite subject matter jurisdiction. This is what occurred in *City of Tipp City, supra*. The court denied a motion to remand a case that challenged airport noise. The court stated:

In light of the federal government’s extensive control over aircraft noise regulation, . . . the federal interest in this case is substantial. The Court, therefore, concludes that a *prima facie* showing has been made that Plaintiffs’ nuisance claim, although stated in terms of state law, “arises under” federal law, and that this Court has subject matter jurisdiction over same.

204 F.R.D. at 396 (emphasis added). Although the court found that the state law nuisance claim based on failure to implement FAA tower orders regarding noise abatement at the airport was not completely preempted by the Airline Deregulation Act [an argument not being made by Defendant here], the court held that the nuisance claim arose out of federal law, which afforded subject matter jurisdiction, as resolution of the state law claim would require resolution of a substantial question of whether law of whether defendant was in compliance with federal requirements. *See id.* at 394.

The *City of Tipp* court stated that “[a]lthough Defendant’s complete preemption argument is not persuasive, the Court feels compelled, due to the nature of Plaintiffs’ pleadings, to address whether their nuisance claim arises under federal law, thus rendering federal subject matter jurisdiction proper.” *Id.* at 394-95; *see also Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000) (the Supreme Court “clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action, if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law”). The *City of Tipp* court explained that the complaint “appears to raise a substantial question of federal law,” including the airport’s obligation to comply with FAA orders regarding the airport control tower. 204 F.R.D. at 395. The court added that: “In light of the federal government’s extensive control over aircraft noise regulation, . . . the federal interest in this case is substantial.” *Id.* at 396.

The pervasive nature of federal control over airport operations is demonstrated clearly by the FAA’s decision in *Aircraft Owners and Pilots*, *supra*, 2005 WL 32722717. There, the FAA ruled that the operator of the Pompano Beach Air Park airport **violated Grant Assurance 22 by failing to make the airport available to be used for, among other things, touch-and-go operations.** This decision stands for the arguments that it is the FAA not a city ordinance which

decides what is safe to occur at an airport, and that an airport violates federal obligations if it prohibits touch-and-go operations without a sufficient basis for doing so. The FAA is the decider of what safety requires—not the airport operator via city ordinance. It is a major conflict with the federal grant assurances for a city to pass an ordinance that declares a use of the airport (for stop and go activities) must be banned as unsafe. The FAA stated that it

considers it inappropriate to provide federal assistance to improve airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities. . . . The owner of any airport developed with federal assistance is required to operate the airport for the use and benefit of the public and to make the airport available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms and without unjust discrimination.

Id. at *8 (emphasis added).

Although “an airport may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public,” when “this is the case, **the FAA will make the final determination on the reasonableness of restrictions that deny or restrict use of the airport.**”

Id. (Emphasis added). “Restrictions imposed for safety and/or efficiency should have supporting justification from FAA Flight Standards and Air Traffic offices. It may be appropriate for FAA to initiate a safety analysis to assess any safety issues and to conduct an airspace study to determine the efficiency and utility of the airport when considering a proposed restriction.” *Id.* *9.

“The FAA is the final authority in determining what constitutes a compromise of safety. In addition, FAA will make the final determination on the reasonableness of an airport owner’s restrictions that deny or restrict use of the airport.” *Id.* “In making a final determination on safety, [the] FAA must determine whether or not the aeronautical activity being restricted can be safely

accommodated on the airport and, therefore, whether the proposed restriction meets the statutory requirements and/or the terms of surplus property deeds of conveyance. It may be necessary for FAA to address whether it is possible to accommodate an aeronautical activity with fewer restrictions than are contemplated.” *Id.*; see also *id.* at *18 (“Restrictions based on safety and/or efficiency require supporting justification from the appropriate Flight Standards and/or Air Traffic Offices”). See also *Luther Kurtz, supra*, 2017 WL 11438603 (F.A.A.), *21 (“By prohibiting use of an on-airport Parachute Drop Zone, the Respondent has unjustly discriminated against the Complainant and other aeronautical users”).

In *Aircraft Owners and Pilots*, the airport operator asserted that the prohibition on stop-and-go operations and intersection take-offs prevented inconsistent and potentially dangerous aircraft operations and ensured that pilots have sufficient runway length to complete their take-offs. *Id.* at *18. However, the FAA found that “the administrative record does not include supporting justification from FAA Flight Standards and/or Air Traffic to confirm that stop-and-go operations and intersection take-offs pose an inherent safety hazard or interfere with efficiency.” *Id.* at *19. The FAA added:

Without supporting justification from FAA Flight Standards and/or FAA Air Traffic, the FAA Airports Office cannot approve the access restrictions for either stop-and-go operations or intersection take-offs based on safety or efficiency reasons as being consistent with the terms and conditions of the 1947 and 1948 quitclaim deeds. FAA Flight Standards found no basis to restrict stop-and-go operations or intersection take-offs for safety reasons. The administrative record contains neither the evidence to support a restriction based on efficiency nor sufficient detail to justify requesting an airspace study from Air Traffic at this time.” *Id.* at *20.

As a result, the FAA found that “the restrictions on stop-and-go operations and intersection take-offs are not justified and cannot be enforced as safety and efficiency restrictions.” *Id.*

The same is true here. Jefferson County cannot respond to this lawsuit by merely prohibiting the touch-and-go operations targeted by Plaintiffs. Such a unilateral act by the Airport sponsor would subject Jefferson County to significant financial penalties from the FAA or worse. It is simply unreasonable to suggest that this case does not raise important federal legal issues that belong in federal court.

More recently, the FAA has stated:

It is inappropriate for an airport sponsor or manager to negotiate or impose conditions or flight patterns beyond the Federal requirements, or to assign personnel to conduct oversight and safety evaluations despite the FAA having determined that the operator is conducting its operations in accordance with applicable Federal regulations. If the operation does not meet FAA safety standards, Okaloosa’s exclusive remedy is to continue to bring that conduct to the attention of the FAA Regional Office or local FSDO, which will take the appropriate action. The record also showed no similar operational flight restrictions imposed on other similarly situated aeronautical operations or commercial operators that use DTS facilities.

Therefore, Okaloosa’s actions imposing local flight operational requirements on Timberview beyond what is federally required is unreasonable. This action is in addition to the Director’s findings of unreasonable access restrictions and practices identified in Sub-Issue 1. The Director further finds that Okaloosa is applying discriminatory terms and conditions in its lease terms and minimum standards against Timberview as well as unfair practices against other aeronautical users at the Airport. Therefore, the Director finds Okaloosa is in violation of Grant Assurance 22, *Economic Nondiscrimination*.

Timberview Helicopters, supra, 2023 WL 2239104 (F.A.A.), *17 (emphasis added); *see also HTX Helicopters, LLC v. Rhode Island Airport Corp.*, No. 16-21-10, 2022 WL 1719308, *1 (F.A.A.) (May 19, 2022) (Director’s Determination) (“The Director finds the Respondent in violation of Grant Assurance 22” because “the application of the indemnification clause by RIAC for a noise/nuisance lawsuit is unreasonable and unjustly denies [the aeronautical services provider] access to the Airport.”).

Here, federal jurisdiction is necessary to alleviate the unfair situation being imposed on Jefferson County by Plaintiffs: either violate the Plaintiffs' laws or violate federal Grant Assurances.

In *City of Burbank v. Lockheed, supra*, 411 U.S. at 633, the Supreme Court, referencing the Supremacy Clause, concluded that "the pervasive nature of the scheme of federal regulation of aircraft noise" had completely preempted the states' traditional police power to regulate noise in that area. The Court reasoned that "pervasive control vested in [federal agencies] under the 1972 [Noise Control] Act seems to us to leave no room for local curfews or other local controls." *Id.* at 638.

Similarly here, the pervasive control vested in the FAA with regard to lead in fuel and airport/aircraft noise leaves no room for the use of state and local laws to interfere with the federal regulation of fuel and noise. *See also Friends of the E. Hampton Airport, Inc., v. Town of E. Hampton*, 841 F.3d 133 (2d Cir. 2016) (airport users seeking preliminary injunction barring enforcement of town's local laws, which placed limit on weekly flights and established curfews prohibiting aircraft from using town's airport during nighttime hours, were likely to succeed on their preemption claim); *Pirollo v. City of Clearwater*, 711 F.2d 1006, 1008 (11th Cir. 1983) (preempting local ordinances "prohibiting night operations" and "prescribing air traffic patterns"); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1308, 1312 (9th Cir.1981) (preempting "curfew on aircraft flights").

In *Brown v. Alaska Air Grp., Inc.*, Case No. CV-11-0091-WFN, 2011 WL 2746251 (E.D. Wash. July 14, 2011), the court denied a motion to remand a case that had been removed because the plaintiff's claim for discrimination was preempted by the Air Carrier Access Act, 49 U.S.C.

§ 41705. The court held that removal was proper because the plaintiff’s claim for violation of the Washington state law against discrimination fell within an area so pervasively regulated by federal law that preemption conferred removal jurisdiction. Significantly, the court rejected the plaintiff’s argument that there was “no federal jurisdiction because there is no federal remedy under the ACAA,” stating:

Plaintiff fails to acknowledge the ACAA’s administrative remedy scheme that includes contacting a complaint resolution officer for immediate remedies, filing a complaint with the Secretary of Transportation who can initiate an investigation and enforce actions, and appealing any decision to federal court.

2011 WL 2746251, at *5 (citing 14 C.F.R. §§ 382.151–153; 49 U.S.C. §§ 41705 & 46101; 14 C.F.R. § 382.159; and 49 U.S.C. § 46110).

Similarly here, Plaintiffs’ nuisance claim is preempted by the AAIA and the ANCA, which pervasively regulate the manner in which airports may operate, including the provision of leaded fuel and the lack of local restrictions on aircraft noise.

II. PLAINTIFFS’ CLAIM IS ALSO COMPLETELY PREEMPTED BY FEDERAL LAW.

A separate ground for removal is the fact that Plaintiffs’ public nuisance claim is completely preempted by the AAIA and the ANCA.

In determining whether an action is removable under 28 U.S.C. § 1441, a court generally applies the well-pleaded complaint rule. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

One “corollary of the well-pleaded complaint rule developed in the case law . . . is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.” *Id.* at 63-64. “In such a case, even if the only claim in a complaint is a state law claim, if that claim is one that is ‘completely preempted’ by

federal law, federal subject matter jurisdiction exists and removal is appropriate.” *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir.1998) (internal citation omitted); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (a federal statute’s preemptive force may be “so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule.”) (cleaned up) (internal citation omitted).

Under the complete-preemption doctrine, “federal law does not merely preempt a state law to some degree; rather, it substitutes a federal cause of action for the state cause of action, thereby manifesting Congress’s intent to permit removal. Thus, if a plaintiff files suit in state court, ostensibly upon a state cause of action, and the defendant removes the case on the basis of complete preemption, the federal district court that is persuaded that plaintiff’s claim is completely preempted will re-characterize the plaintiff’s cause of action as a federal claim for relief, making removal proper on the basis of federal-question jurisdiction.” 14C Fed. Prac. & Proc. Juris. § 3722.2 (Rev. 4th ed.). “In this sense, the complete-preemption doctrine overrides such fundamental cornerstones of federal subject-matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint. However, since a claim that truly is created by federal law does appear on the face of the well-pleaded complaint, the complete preemption rule often is regarded as a corollary of, rather than an exception to, the well-pleaded complaint rule, although some courts also have referred to it as an exception to that rule.” *Id.* As the Tenth Circuit explained:

We read the term [complete preemption] not as a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather as a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress’s intent to permit removal.

Schmeling v. NORDAM, 97 F.3d 1336, 1342 (10th Cir. 1996). “Thus, complete preemption does not represent merely a difference in the scope of the preemption of a state cause of action by federal law; rather, it is a difference in kind. In concluding that a claim is completely preempted, a federal court finds that Congress desired not just to provide a federal defense to a state-law claim but also to replace the state-law claim with a federal law claim and thereby give the defendant the ability to seek adjudication of the claim in federal court. The general rule that only defendants may remove remains true for completely preempted claims.” 14C Fed. Prac. & Proc. Juris. § 3722.2 (Rev. 4th ed.).

In *City of Burbank v. Lockheed*, the Supreme Court, referencing the Supremacy Clause, concluded that “the pervasive nature of the scheme of federal regulation of aircraft noise” had completely preempted the states’ traditional police power to regulate noise in that area. 411 U.S. at 633. The Court reasoned that “pervasive control vested in [federal agencies] under the 1972 [Noise Control] Act seems to us to leave no room for local curfews or other local controls.” *Id.* at 638; *see also id.* at 633 (“It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption”).

Similarly here, the pervasive control vested in FAA with regard to lead in fuel and airport/aircraft noise—as well as the Grant Assurance obligation not to restrict Airport access to aircraft operations—leaves no room for the use of state and local laws to interfere with the federal regulation of fuel, noise and aircraft service at the Airport.

The fact that Plaintiffs style their claim as one for public nuisance under state law does not change the fact that this case is completely preempted by federal law. In *Illig v. Union Elec. Co.*, owners of servient estates filed a state court action alleging that a public utility lacked the right to

install or use power lines on their properties after a railroad had abandoned its easement over the properties. *See* 334 F. Supp. 2d 1151, 1152 (E.D. Mo. 2004). The case was removed and the court denied the plaintiff's motion for remand. *Id.* The court stated that the plaintiffs' arguments for remand were "belied by the Supreme Court holding that 'a case arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law." *Id.* at 1154 (citing *Franchise Tax Bd.*, 463 U.S. at 9). The court added:

Plaintiffs are seeking inverse condemnation or in the alternative ejectment, but this turns on whether defendant has a right to have its utility lines on their property. "Even though state law creates [a cause of action], its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."

Before plaintiffs can prevail on their state law claims, federal questions such as Trailnet's rights under the Trails Act and whether those rights include licensing to defendant must be answered. This court has original jurisdiction to hear and resolve those federal issues.

Id. (citing *Franchise Tax Bd.*, 463 U.S. at 13) (emphasis added).

Similarly here, Plaintiffs are seeking an injunction based on their claim for public nuisance, but their "claimed right to relief under state law requires resolution of a substantial question of federal law," *accord Illig*, 334 F. Supp. 2d at 1154—namely, whether Plaintiffs can utilize nuisance law to pursue the federally unlawful objective of terminating or significantly reducing Airport operations by challenging the use of leaded fuel and the noise emanating from the Airport.

Under "the complete-preemption doctrine, a narrow class of claims are "necessarily federal" so that they are removable to federal court." 14C Fed. Prac. & Proc. Juris. § 3722.2 (Rev. 4th ed.) "In these cases, federal law does not merely preempt a state law to some degree; rather, it substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's

intent to permit removal. Thus, if a plaintiff files suit in state court, ostensibly upon a state cause of action, and the defendant removes the case on the basis of complete preemption, the federal district court that is persuaded that plaintiff's claim is completely preempted will re-characterize the plaintiff's cause of action as a federal claim for relief, making removal proper on the basis of federal-question jurisdiction." *Id.*

That is precisely the case here. Plaintiffs' claims are completely preempted because it is necessary for the Court to consider the impact of the Plaintiffs' claims on the federal requirements that the Airport provide leaded fuel and operate without local restrictions on aircraft noise.

In *Metropolitan Life*, a former employee filed suit against his former employer and insurer alleging state law claims for breach of contract, retaliatory discharge and wrongful termination of disability benefits. *See* 481 U.S. at 60-61. The Supreme Court held that removal was proper because the state law contract and tort claims were preempted by ERISA and were removable under the well-pleaded complaint rule. *See id.* at 66-67. The Supreme Court stated:

As we have made clear today in *Pilot Life Ins. Co. v. Dedeaux*, [481 U.S. 41, 54 (1987)], “[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.”

Id. at 64-65 (emphasis added). The Court added that the suit, “though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress,” and therefore “‘arise[s] under the . . . laws . . . of the United States,’ 28 U.S.C. § 1331, and is removable to federal court by the defendants, 28 U.S.C. § 1441(b).” *Id.* at 67.

Similarly here, the policy choices contained in the AAIA and the ANCA and their implementing regulations relating to operation of aircraft and airports would be completely

undermined if homeowners unhappy to be next to an airport are able to use state public nuisance law to force the airport to either shut down or significantly reduce operations.

In *Brown v. Alaska Air Grp., Inc.*, the court denied a motion to remand a case that had been removed because the plaintiff's claim for discrimination was preempted by the Air Carrier Access Act ("ACAA"), 49 U.S.C. § 41705, *et seq.* See 2011 WL 2746251, at *5. The plaintiff in *Brown* alleged that the air carrier unlawfully discriminated against her by failing to provide a requested wheelchair. Among other things, the plaintiff alleged that her treatment by the airline violated Washington's law against discrimination, specifically R.C.W. 49.60.215. See *id.* The *Brown* court held that removal was proper because the plaintiff's claim for violation of the Washington state law against discrimination fell within an area so pervasively regulated by federal law that preemption conferred removal jurisdiction. Significantly, the court rejected the plaintiff's argument that there was "no federal jurisdiction because there is no federal remedy under the ACAA," stating:

Plaintiff fails to acknowledge the ACAA's administrative remedy scheme that includes contacting a complaint resolution officer for immediate remedies, filing a complaint with the Secretary of Transportation who can initiate an investigation and enforce actions, and appealing any decision to federal court.

Id. (citing 14 C.F.R. §§ 382.151–153; 49 U.S.C. §§ 41705 & 46101; 14 C.F.R. § 382.159; and 49 U.S.C. § 46110).

Similarly here, Plaintiffs' claims for public nuisance are preempted by the AAIA and the ANCA, which pervasively regulate the manner in which airports may operate, including the provision of leaded fuel and the lack of local restrictions on aircraft noise. See, *e.g.*, *Friends of the E. Hampton Airport*, 841 F.3d at 147-54 (airport users seeking preliminary injunction barring enforcement of town's local laws, which placed limit on weekly flights and established curfews

prohibiting aircraft from using town's airport during nighttime hours, were likely to succeed on their preemption claim); *Pirollo*, 711 F.2d at 1008 (preempting local ordinances "prohibiting night operations" and "prescribing air traffic patterns"); *Gianturco*, 651 F.2d at 1308, 1312 (preempting "curfew on aircraft flights"); *Price v. Charter Twp. of Fenton*, 909 F. Supp. 498, 505 (E.D. Mich.1995) (preempting ordinance that "limit[ed] the frequency of flights of certain [noisy] airplanes"); *Blue Sky Ent., Inc. v. Town of Gardiner*, 711 F. Supp. 678, 695 (N.D.N.Y.1989) (preempting town law which, among other things, "attempted to regulate the noise generated by aircraft taking-off and landing at the airports"); *United States v. City of Blue Ash*, 487 F.Supp. 135, 135, 137 (S.D. Ohio 1978) (preempting ordinance requiring departing planes to make "Noise Abatement Turns").

The fact that Plaintiffs style their claim as one for public nuisance under state law does not change the fact that this case is completely preempted by federal law. In *Illig v. Union Electric Co.*, owners of servient estates filed a state court action alleging that a public utility lacked the right to install or use power lines on their properties after a railroad had abandoned its easement over the properties. See 334 F. Supp. 2d 1151, 1152 (E.D. Mo. 2004). The case was removed and the court denied the plaintiff's motion for remand. The court stated that the plaintiffs' arguments for remand were "belied by the Supreme Court holding that 'a case arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law." *Id.* at 1154 (citing *Franchise Tax Bd.*, 463 U.S. at 9 (1983)).

Similarly here, Plaintiffs are pursuing a claim for public nuisance but their "claimed right to relief under state law requires resolution of a substantial question of federal law"—namely, whether Plaintiffs can utilize public nuisance law to pursue the federally unlawful objective of

terminating or significantly reducing Airport operations by challenging the use of leaded fuel and the noise emanating from the Airport. “[I]n certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues.” *Grable & Sons, supra*, 545 U.S. at 312 (citing *Hopkins v. Walker*, 244 U.S. 486, 490-91 (1917)). Having federal jurisdiction lie over such issues “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law,” to promote the uniformity a federal forum offers. *Id.*

The Plaintiffs’ claims are also completely preempted by federal law because of their effort to eliminate or significantly restrict the Airport operations relating to pilot training. It is widely known that there is a significant pilot shortage in the United States. See “US airlines about to be hit with ‘tsunami’ of pilot retirements,” CNN.com (April 19, 2023);⁴ “Airlines are trying to combat the pilot shortage . . .,” Business Insider (April 24, 2023).⁵ The only way that shortage can be cured is robust training opportunities for prospective pilots. It is not enough for Plaintiffs to argue that student pilots can train at airports other than RMMA. What if all airports in a community had that same policy? The hugely negative impact on the FAA and national policy of recruiting and training more pilots would be fully expected and harmful.

In addition, the federal Clean Air Act, 42 U.S.C. § 7571 *et. seq.*, gives the U.S. Environmental Protection Agency (“EPA”) express preemption over aircraft emissions, and particularly section 7573:

⁴ <https://www.cnn.com/2023/04/19/business/pilot-shortage-retirement-tsunami/index.html>.

⁵ <https://www.businessinsider.com/airline-strategies-for-addressing-the-pilot-shortage-in-the-us-2023-4>.

No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.

Furthermore, the FAA authority to regulate fuel additives under 49 U.S.C. § 44714—that it will exercise during the transition to unleaded fuel—prohibits EPA from changing aircraft fuel emissions standards if it adversely affects safety):

The Administrator of the Federal Aviation Administration shall prescribe—

(1) standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions the Administrator of the Environmental Protection Agency decides under section 231 of the Clean Air Act (42 U.S.C. § 7571) endanger the public health or welfare; and

(2) regulations providing for carrying out and enforcing those standards.

Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1195.

Thus, the Plaintiffs cannot use the argument that safety requires the ban on touch-and-go flights in order to justify requiring Defendants to prohibit such aeronautical operations.

CONCLUSION

The above case law makes clear that the County’s ability to control noise, lead and aircraft operations raises important federal issues and renders Plaintiffs’ claim one under federal law. Additionally, the claim is completely preempted by federal law. For those reasons, the County removes the case now pending in the Boulder County District Court to this Court.

Notice to Court and Parties

Copies of all documents filed or served upon Defendant in the state court action are attached hereto as **Exhibits 1-6**, as 28 U.S.C. § 1446(a) requires. In addition, pursuant to D.C. COLO. L Civ. R 81.1(b), the County has attached as **Exhibit 7** the register of actions from the

Colorado Courts' E-Filing System for the state court action. After the filing of this Notice of Removal, pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal will be served on counsel for Plaintiffs and filed with the Clerk of the District Court, Boulder County, Colorado.

Respectfully submitted this 14th day of March, 2024.

/s/ M. Roy Goldberg

M. Roy Goldberg

STINSON LLP

1775 Pennsylvania Avenue N.W., Suite 800

Washington, D.C. 20006

Telephone: (202) 728-3005

Email: roy.goldberg@stinson.com

Nathaniel T. Vasquez

STINSON LLP

1144 Fifteenth Street, Suite 2400

Denver, CO 80202

Telephone: (303) 376-8424

Email: nathaniel.vasquez@stinson.com

*Attorneys for Defendants Board of County
Commissioners of the County of Jefferson,
Colorado and Dr. Stephanie Corbo*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 14, 2024, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system. Any other counsel of record will be served in accordance with the Federal Rules of Civil Procedure.

/s/ M. Roy Goldberg

M. Roy Goldberg