No. 21-1346

In The
Supreme Court of the United States

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

Petitioners,

v.

CENTRAL MAINE POWER COMPANY,

Respondent.

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

REPLY BRIEF

WILLIAM B. MOST
Counsel of Record
DAVID J. LANSER
MOST & ASSOCIATES
201 St. Charles Avenue
Ste. 114, # 101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

BRUCE M. MERRILL
LAW OFFICES OF
BRUCE M. MERRILL, P.A.
225 Commercial Street
Ste. 501
Portland, ME 04101
(207) 775-3333
mainelaw@maine.rr.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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I. Introduction.

This petition is about whether the Federal Aviation Administration's (FAA) issuance of unenforceable No Hazard Determinations (NHDs) for Respondent's towers triggers federal preemption.

In opposition, Respondent's primary argument is that the Federal Aviation Act generally preempts state laws that conflict with air safety. But that general principle, does not solve the issue here, for at least two reasons.

First, because all parties agree the towers here are *outside* the air zone in which the FAA has enforceable jurisdiction.

And second, because the FAA explicitly required Respondent to comply with state and local law in the text of the NHDs.

Because of these two points, Respondent's defense of the Maine court's decision backs Respondent into confusing, internally-contradictory corners. For example, Respondent concedes that NHDs have "no enforceable legal effect," but then argues in the same paragraph that "as a practical matter, [they] are binding in force and effect." (Opp. at 13).

Why do they argue that self-contradiction? Because Respondents need to have it both ways. If the NHDs have enforceable legal effect, then Respondent's towers likely trigger NEPA and judicial review. (*See*

Opp. at fn. 4). But if the NHDs do not have enforceable legal effect, then there is no federal preemption, and state law applies. So Respondent argues that the NHDs are simultaneously enforceable and not enforceable – the Schrödinger's Cat of federal agency guidance.

But despite the facial implausibility of that position, the court below blessed that interpretation of the law. As a result, federal administrative agencies will be emboldened to use unenforceable advisory documents to pretermit a state's ability to apply their law. For that reason, Petitioner asks this Court to review the matter and grant certiorari.

II. Certiorari Should Be Granted Because the Court Below Applied FAA Field Preemption to Areas *Outside* Navigable Airspace.

Respondent correctly points out that the Federal Aviation Act generally occupies the field of airspace safety, and preempts state law.

But that does not mean the Act covers all airspace anywhere, such as the air inside houses or inside lungs. Instead, the law provides a process for evaluating whether structures may "interfer[e] with air commerce." 49 U.S.C. § 44718. This involves an assessment of whether they intersect with navigable airspace. 49 U.S.C. § 40102 ("[n]avigable airspace means airspace at and above minimum flight altitudes . . . including airspace needed for safe takeoff and landing.").

Here, the parties are in agreement that the towers at issue do *not* intersect the navigable airspace that triggers enforceable FAA requirements. As Petitioner's Complaint alleges, on January 27, 2020, Respondent's expert Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc. wrote an opinion letter 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." Respondent's brief notes that the Federal Aviation Act governs "structures affecting the navigable airspace" – but it never claims that the towers at issue here are in navigable airspace.

Thus, when Respondents claim that "federal courts have found state law preempted in the context of the FAA's no hazard determinations" (Opp. at 12), they are describing something very different than the facts here. They cite one case for that proposition – *Big Stone Broadcasting, Inc. v. Lindbloom*, 161 F.Supp.2d 1009 (D.S.D. 2001). But *Big Stone* involved a tower that "penetrat[ed] into the protected highway flight space" in South Dakota. *Id*. at 1012. Here, the parties are in agreement that the towers do not enter into navigable airspace. And so they do not trigger enforceable FAA jurisdiction. Notably, Respondent does not point to any case in which a court found that NHDs trigger federal preemption regarding structures *outside* navigable airspace.

By bringing the zone of federal preemption out of navigable airspace and closer to the ground, the

decision below risks federal preemption being applied to classically local decision making – like building codes, tree management, etc.

Additionally, the high-intensity, flashing lights that Respondent describes as the product of "an FAA safety standard" (Opp. at 18) were not suggested by the FAA at all for this specific project. They were a suggestion by *Respondent*, which the FAA then included in the NHDs. The towers had existed for decades without lights without any objection by the FAA. It was Respondent that devised the plan to add lights; not the FAA. In a series of revised NHDs, the FAA approved every suggestion Respondent proposed. But Respondent never formally submitted Petitioners' proposed safety measures to the FAA. Petitioners' safety measures could just as easily generate an NHD as Respondent's. Accordingly, potential replacement of the lights with other safety measures does not stand as an obstacle to any federal purpose.

Further, Respondent disputes Petitioners' point that there is now a loophole by which no government entity can enforce certain air safety recommendations in Maine. (Opp. at 15). But Respondent does not explain why this is not so. It concedes that the FAA's recommendations with regard to the towers at issue here are federally unenforceable. *Id*. at 13. And Respondent's field preemption argument means state and local actors cannot enforce those air safety recommendations either. So if neither federal nor state nor local actors can enforce the air safety measures, who is left? No one. If Respondent chose tomorrow to strip the

towers of all their air safety measures, and install none of the measures Petitioners propose, literally no one could stop them – unless this Court reverses the decision below.

III. Certiorari Should Be Granted Because There Cannot Be Conflict Preemption When the NHDs Explicitly Required Compliance with State Law.

In their opposition, Respondent raises the issue of conflict preemption, even though they agree that the Law Court below based its decision on field preemption, not conflict preemption. (Opp. at 17). But there is no conflict preemption issue here. Conflict preemption occurs when (1) "it is impossible for a private party to comply with both state and federal requirements," or (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

There is no conflict here because the NHDs explicitly directed Respondent to comply with state law. The text of the NHDs say that they do "not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." (App. 26). State law cannot stand as an obstacle to federal purposes when compliance with state law is an explicit federal purpose and directive.

IV. The Nature of the Decision Below Is Not a Reason to Deny Certiorari.

Respondent also argues that the Maine Law Court's decision does not "create[] great uncertainty if allowed to stand" because the Law Court's memorandum of decision is not precedential. (Opp. at 5-6).

Respondent is correct that under Maine's rules of appellate procedure, a memorandum of decision is not formally precedential. That does not mean, however, that the decision is without impact. As the Advisory Notes to the rule indicate, the "fact that a case merits a memorandum of decision does not suggest that the decision is not important or not relevant to future related proceedings." Me. R. App. ¶ 12 Advisory Notes, August 2004.

As a result, the Maine Law Court's holding (whether in a memorandum of decision or not) and the published Superior Court decision it affirmed still create similar problems of uncertainty related to the preemptive power of unenforceable federal agency advice.

CONCLUSION

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

Respectfully submitted,

WILLIAM B. MOST
Counsel of Record
DAVID J. LANSER
MOST & ASSOCIATES
201 St. Charles Avenue
Ste. 114, # 101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

BRUCE M. MERRILL
LAW OFFICES OF
BRUCE M. MERRILL, P.A.
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