UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL BUSINESS AVIATION ASSOCIATION, INC.,

Plaintiff,

-against-

THE TOWN OF EAST HAMPTON,

Defendant.

No. _____

PLAINTIFF NATIONAL BUSINESS AVIATION ASSOCIATION, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The Town of East Hampton (the "Town") has hatched its latest scheme to deal with noise complaints coming from residents living near the local airport ("HTO" or "the Airport"). Faced with the knowledge that restrictions on public airports must be enacted according to federal statutory obligations, the Town seeks to evade those mandates through a close-and-reopen strategy. According to the Town's flawed theory, by rebranding the publicly owned Airport as "private" use after a 33-hour "closure," it can impose any noise and access restrictions it pleases without complying with federal statutory requirements. In fact, the Town has already adopted mandatory curfews and trip limits to take effect the day the Airport "reopens." *See* Declaration of James D. Herschlein ("Herschlein Decl.") Ex. F (Rules and Regulations for East Hampton Town Airport, effective May 19, 2022), at 21. The Town's maneuvering to escape federal obligations is not only patently unlawful, but violates the Permanent Injunction entered by this Court on August 7, 2017. *See* No. 15-2246 (E.D.N.Y.), ECF 87.

Plaintiff National Business Aviation Association, Inc. ("NBAA") seeks emergency relief to enjoin the Town's illegal scheme pending resolution of this action on the merits. By engaging in these machinations, the Town will irreparably harm NBAA by threatening the viability of its members' businesses, potentially forcing them to reduce their aircraft fleets and layoff pilots and other employees. Further, the Town's scheme is in direct violation of federal law—a conclusion the Second Circuit reached in this action nearly six years ago, *see Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133 (2d Cir. 2016), and crystallized by the Permanent Injunction entered by this Court (No. 15-2246 (E.D.N.Y.), ECF 87). Finally, the relief sought would serve the public interest by preventing unnecessary disruption to the national airport transportation system and potential safety risks. For these reasons, Plaintiff seeks a temporary

restraining order and a preliminary injunction to preserve the status quo and prevent the irreparable harm Plaintiff and others will suffer if the Town is allowed to close and reopen the Airport in continuing violation of the Permanent Injunction.

BACKGROUND

I. East Hampton Airport Serves Both National and Local Needs

The Airport has served the eastern end of Long Island since the 1930s. Currently, the Airport is a public use airport owned and operated by the Town. The Airport primarily serves the Towns of Southampton and East Hampton on the easternmost, southern coast of Long Island's Suffolk County, but its users come from far and wide. *See generally* Herschlein Decl. Ex. A (HR&A Advisors, Inc., *East Hampton Airport Economic Impact Analysis*, dated October 2021). Due to its location at the midpoint of the South Fork of Long Island, the Airport provides a critical transportation link that connects the far end of Suffolk County with New York City, the tristate area, and the rest of the United States.

Approximately 30,000 take-offs and landings occur at the 601-acre Airport annually. The Airport has two active runways; 62 hangars for parking, storing, and maintaining aircraft; and is served by two fixed-base operators ("FBOs") providing refueling and other aviation-related services. *See* Town of E. Hampton, Airport, http://ehamptonny.gov/311/ Airport. The Airport also has public service tenants, including the East Hampton Fire District Training Facility, the Aircraft Rescue and Firefighting facility, and the East Hampton Police. The aircraft served by the Airport have missions consistent with public use airports around the country, including: emergency medical, law enforcement, government, recreational, passenger transport, utilities, aerial cinematography, real estate sales, and electronic news gathering.

Nationally, the Airport is one of less than twenty percent of airports that the FAA identifies as "important to national air transportation," and included as part of the FAA's 2021–2025 National Plan of Integrated Airport Systems ("NPIAS"), a report provided to Congress. *See* FAA Report to Congress: National Plan of Integrated Airport Systems (NPIAS) 2021–2025, https://www.faa.gov/airports/planning_capacity/npias/current/. The NPIAS recognizes the Airport as a "regional general aviation" facility, meaning that it "[s]upport[s] regional economies by connecting communities to regional and national markets," and that it has "high levels of activity with some jets and multiengine propellor aircraft." FAA, General Aviation Airports: A National Asset, 12 (May 2012), http://www.faa.gov/airports/planning_capacity/ga_study/media/2012AssetReport.pdf.

Locally, Airport operations and spending by passengers generate an estimated $19–$20 million in economic output, as well as 170–260 full time equivalent jobs for the Town. *See* Herschlein Decl. Ex. A at 33. For many local business owners and residents, including users of Plaintiff's aircraft, the Airport was an important feature in deciding where to locate their business or purchase their home. Declaration of Steve Brown ("Brown Decl.") ¶ 13. In addition, the Airport provides for the rapid movement of medical, law enforcement, and search-and-rescue personnel to and from the entire eastern end of Suffolk County. For example, the Airport was the site of more than half of the 93 medical evacuations from the Town from January 2019 through October 2021. *See* Herschlein Decl. Ex. B (Letter from Sgt. John J. Vahey, Executive Officer, Aviation Section, Suffolk County Police Department to East Hampton Town Board, dated Oct. 17, 2021), at 1.

II. The Airport Noise and Capacity Act

As this Court is aware, as a public airport proprietor, the Town is subject to the Airport Noise and Capacity Act of 1990 ("ANCA"), 49 U.S.C. §§ 47521–47533. *See Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 139, 144 (2d Cir. 2016) (explaining

that ANCA "appl[ies] to all public airport proprietors regardless of their funding eligibility" and accordingly HTO is not "free to operate as it wishes"). Accordingly, while an airport proprietor (such as the Town) may propose noise or access restrictions, it must do so in accordance with ANCA's requirements and in furtherance of the "intensive and exclusive nature of [f]ederal control" of aircraft noise. *See Northeast Airlines Inc. v. Minnesota*, 322 U.S. 292, 303 (1944).

Specifically, ANCA requires procedures and systems of review airport proprietors must follow before implementing noise and access restrictions on specified types of aircraft. *See* 49 U.S.C. § 47524(b)(1)–(4). For example, ANCA prohibits any access or noise restriction on Stage 2 aircraft (such as helicopters) unless an airport proprietor prepares, publishes, and makes available for comment, at least 180 days prior to the effective date of the proposed restriction, a cost-benefit analysis of the proposed restriction, a description of alternative restrictions, and a comparison of the costs and benefits of the proposed restriction with those of the potential alternatives. *See* 14 C.F.R. § 161.205(1)–(3). Further, airport proprietors must prepare a study, using federally prescribed methods, of both noise levels at the airport (including the surrounding areas) as well as the exposure of individuals to noise created by airport operations.

ANCA's mandates are consistent with the federal government's exclusive sovereignty over the airspace of the United States. Indeed, the congressional findings underpinning ANCA demonstrate that Congress viewed the act as a means of increasing national aviation capacity while accommodating reasonable local noise concerns if, and only if, those concerns were consistent with that national purpose. Congress found, among other things, that "aviation noise management is crucial to the continued *increase in airport capacity*" and that "community noise concerns have led to uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system." 49 U.S.C. § 47521(1)–(4) (emphasis added).

III. The Town's Previous Failed Attempts at Avoiding ANCA

To appease a small but vocal portion of the East Hampton community raising noise complaints, the Town has repeatedly tried to impose restrictions at the Airport without any regard for ANCA's requirements.

In 2015, the Town enacted restrictions designed to severely inhibit access to the Airport through the imposition of mandatory curfews and trip limits. The Town passed three local laws codifying these restrictions: "(1) a mandatory curfew on all aircraft traffic, (2) an "extended" curfew for certain "noisy" aircraft, and (3) a weekly one-round-trip limit on noisy aircraft." *See Friends*, 841 F.3d at 141; *see also* Town of East Hampton, N.Y., Code §§ 75-38, 75-39 (2015).

The Second Circuit ultimately struck down those local ordinances because of the Town's failure to comply with the procedural requirements of ANCA. *See Friends.,* 841 F.3d 133. After agreeing that the federal courts had equity jurisdiction to hear ANCA claims, the Court thoroughly rejected the Town's argument that ANCA's procedural requirements for implementing noise and access restrictions apply only to airport proprietors receiving federal funding. To the contrary, it found ANCA "appl[ies] to *all* public airport proprietors *regardless of their funding eligibility*." *Friends*, 841 F.3d at 149. The Second Circuit held that the statutory text and legislative history of ANCA confirmed that its procedures are "mandatory and comprehensive," and therefore preempt "local laws not enacted in compliance with them." *Id.* at 151–52. After remand, this Court entered the Permanent Injunction, No. 15-2246 (E.D.N.Y.), ECF 87, enjoining the Town from imposing certain noise and access restrictions unless and until it complies with the procedural requirements of ANCA.

IV. The Town Develops a New Ploy to Avoid Its Obligations Under ANCA

With the expiration of certain federal grant requirements in September 2021, the Town Board saw another opportunity to impose noise and access restrictions at the Airport. It initiated

an "Airport Re-Envisioning Project" wherein it held a series of public workshops to—supposedly—receive input from community members and other stakeholders about the future of the Airport. But despite paying lip service to alternative options, the Town's intention from the get-go was clear—to impose restrictions at the Airport in order to reduce noise complaints.

In fact, as early as May 2021, the Town's outside counsel revealed its eventual plan at a Board Meeting: to "close [HTO] for a measurable amount of time and then we reopen it. Upon reopening, whether it's a public or private airport, we will have the ability to introduce new restrictions as a condition of opening *[to] avoid ANCA issues*." *See* East Hampton Town Board Work Session, May 11, 2021, https://www.youtube.com/watch?v=8vYV5ZNiIAc, at 7:30.

Six months later, the Town's outside counsel further confirmed the plan to "clos[e] the [A]irport after the grant assurances expire and the reopening of the [A]irport." Herschlein Decl. Ex. C, (Bill O'Connor, *HTO After Expiration of FAA Grant Assurances*, dated Oct. 19, 2021), at 8. He explained that, under this option, the Town would reopen with "implement[ed] restrictions," *i.e.*, the Town would "implement curfews with enhanced weekend hours," "restrict or create limits on airport use by commercial users (quotas, slots, rationing, lottery, etc.," "refuse permission for certain [] aircraft," and enforce other "noise-based restrictions." *Id.* at 19–20. Further, the Town planned to re-enact Chapter 75 of the Town Code as rules, not ordinances, because rules would be easier to modify in the future. Town of East Hampton, Board Work Session, New Airport: Proposed Revisions to Town Code Section 75 and Proposed Rules and Regulations (March 8, 2022), livestream at 11:30 am, https://www.youtube.com/watch?v=PRmb00J7eLk.

On December 10, 2021, suspecting what the Town was up to, the Supervisor of the Town of Southampton wrote to the Town Board that the Town's "preferred alternative is not full closure of the airport, but rather to simply wrest control of operations from the FAA in order to enact"

various "restrictions." Herschlein Decl. Ex. D (Letter from Jay Schneiderman, Supervisor, Town of Southampton, to Peter Van Scoyoc, Supervisor, Town of East Hampton, dated Dec. 10, 2021), at 2. The letter called the maneuver a "technical closure," intended to extinguish FAA assurances. *Id*. Similarly, news reports identified the Town's "goal" as "reduc[ing] noise." Christopher Walsh, *East Hampton Likely to Temporarily Close Airport*, East Hampton Star (Oct. 21, 2021), https://www.easthamptonstar.com/government/20211021/east-hampton-likely-to-temporarily-close-airport.

On January 20, 2022, the Town voted to deactivate and shutter the Airport to the public as of February 28, 2022. On February 17, 2022, after multiple parties sued the Town to stop its lawless conduct, the Town postponed the deactivation to May 17, 2022, allegedly to reopen a "new" "private use" airport on May 19, 2022. *See* Herschlein Decl. Ex. E (February 17, 2022 East Hampton Town Board Meeting Minutes, Resolution 2022-303), at 50–51. Throughout these changes the past four months, the Town reiterated its intent to implement noise and access restrictions.

On May 5, 2022, the Town officially adopted Rules and Regulations for East Hampton Town Airport, effective May 19, 2022. Under this regime, no operation may occur at the Town Airport unless such operation is permitted by the Town's Prior Permission Required ("PPR") framework. These restrictions include: limitations on the operations of "noisy" aircraft; operation-based restrictions (e.g., limitations on commercial operations); aircraft-based restrictions (e.g., a ban on large jets); time-based restrictions for all aircraft (e.g., curfews); and punitive landing fees for all but the smallest fixed-wing aircraft. The proposed rules implementing the restrictions are subject to enhancement "at any time."

The restrictions contemplated by the Town through the temporary closure ploy are nearly

identical to the ones struck down as illegal in the *Friends* decision. Evasion of ANCA's and statutory exclusive rights requirements—on top of the Permanent Injunction entered by this Court, which indisputably remains in effect—is the *raison d'être* of the Town's plan to close the Airport.

ARGUMENT

The Airport closure and the Town's proposed restrictions should be enjoined pending a decision on the merits. The Airport closure will not only irreparably harm Plaintiff, but challenge the Town's clear violations of the Permanent Injunction previously entered in this matter. Injunctive relief will preserve the status quo, benefitting both Plaintiff and the public at large. The interests of the limited number of Town residents allegedly affected by aircraft noise is outweighed by the closure and the harms it poses to the local economy and the environment.

A. Legal Standard

To obtain a preliminary injunction, a plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The standards for a TRO and preliminary injunction are the same. *Pope v. Cnty. of Albany*, 687 F.3d 565, 570 (2d Cir. 2012). Irreparable harm is of paramount importance in the analysis, and "the moving party must show that injury is likely before the other requirements for an injunction will be considered." *Government Employees Insurance Company v. Tolmasov,* 21-CV-07058 (KAM), 2022 WL 1438602, at *3 (E.D.N.Y. May 3, 2022) (internal quotation marks and citation omitted); *see also Faiveley Transp. Malmo AB v. Wabtec Corp*., 559 F.3d 110, 118 (2d Cir. 2009).

B. The Airport's Closure Will Irreparably Harm Plaintiff's Members' Businesses

To demonstrate irreparable harm, a plaintiff must show "that absent a preliminary injunction [it] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Faiveley* 559 F.3d at 118 (2d Cir. 2009) (citations and modifications omitted).

It is well established that major disruption to a business—including potential bankruptcy and loss of goodwill—is irreparable harm entitling a plaintiff to equitable relief. *See, e.g.*, *Doran v. Salem Inn, Inc*., 422 U.S. 922, 932 (1975) (stating that an allegation of potential bankruptcy "sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless"); *Petereit v. S.B. Thomas, Inc*., 63 F.3d 1169, 1186 (2d Cir. 1995) ("Major disruption of a business can be as harmful as its termination and thereby constitute irreparable injury."), *cert. denied*, 517 U.S. 1119 (1996); *Register.Com, Inc. v. Domain Registry of America, Inc.*, No. 02 Civ. 6915(NRB), 2002 WL 31894625, at *18 (S.D.N.Y. Dec. 27, 2002) ("[I]rreparable injury occurs whenever the injury is 'incapable of being fully remedied by monetary damages,' such as lost sales and clients or damage to a business's reputation and goodwill.").

Monetary damages cannot compensate Plaintiff's members for the loss of goodwill, business reputation, customer acquisition and retention, and potential layoffs of longstanding employees that will result from the Town's proposed close-and-reopen plan. For many of Plaintiff's members, HTO is "an important destination and base of operations for many of NBAA's members" who collectively "conduct thousands of operations annually at HTO" and many of whom "fly in and out of HTO multiple times per day." Brown Decl. ¶ 12. Many NBAA members, including one who has "made over 1,000 flights to and from HTO, at times operating 15-20 flights

per day[,]" "depend on their ability to run multiple roundtrips over the weekends, particularly on Friday evenings and Monday mornings." *Id.* at ¶¶ 12, 14.

Therefore, the closure of the Airport will harm Plaintiff's members by halting these operations at HTO. "[T]he closure itself is an access restriction: for the duration of the closure, NBAA members will be unable to land at or depart HTO. NBAA members' aircraft positioned at HTO when it closes will be left stranded." Brown Decl. ¶ 20.

Further, even after the planned "reopening," the newly imposed curfews, noise, and trip restrictions will severely hamper Plaintiff's members' business operations. Plaintiff's members fly a multitude of aircraft, including "jet aircraft, helicopter aircraft, piston engine aircraft and turbo prop aircraft." Brown Decl. ¶ 4. Many of these aircraft have a noise signature of 91.0 EPNdB or higher in the FAA's Advisory Circular AC-36-1H, meaning they will be subject to the "Noisy Aircraft" restrictions under the Town's new proposed noise and access restrictions. Herschlein Decl. Ex. F at 21; Fed. Aviation Admin., Advisory Circular AC-36-1H (May 25, 2012), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_36-1H.pdf. Additionally, some of these aircraft are 50,000 pounds or heavier, which means "[they] will be prohibited from flying. . .into East Hampton altogether." Brown Decl. ¶ 23.

Other NBAA members, including individual aircraft operators, will be unable to perform "the FAA-mandated requirement of three takeoff and landings before sunrise and after sunset" at HTO, but will now "have to travel to other airports to comply with the FAA requirements." Brown Decl. ¶ 24; *see also* 14 C.F.R. § 61.57(b)(1) ("Except as provided in paragraph (e) of this section, no person may act as pilot in command of an aircraft carrying passengers during the period beginning 1 hour after sunset and ending 1 hour before sunrise, unless within the preceding 90

days that person has made at least three takeoffs and three landings to a full stop during the period beginning 1 hour after sunset and ending 1 hour before sunrise").

The Town's proposed Noisy Aircraft restrictions include a one-trip limit per day, in addition to the mandatory curfew for all aircraft prohibiting Airport use between 7:00 pm and 9:00 am on Friday–Sunday and 8:00 pm to 8:00 am on Monday–Thursday. *See* Herschlein Decl. Ex. F at 21. Many of Plaintiff's members have a business model that depends on transporting passengers who "fly from the greater New York City metropolitan area to East Hampton, by helicopter, on Thursday or Friday evening, and fly out on Monday morning." Brown Decl. ¶ 14. Put simply, the inability to conduct multiple roundtrips per day—or fly into HTO on Fridays after 7:00 pm and fly out on Mondays before 8:00 am whatsoever—constitutes a "[m]ajor disruption of [their] business[es] . . . and thereby constitute[s] irreparable injury." *Petereit*, 63 F.3d at 1186.

The harm to Plaintiff's members is not merely reduced profits, but a loss of goodwill and business reputation: the proposed landing fees ranging from $20 to $1,750 per landing based on aircraft weight will increase "the cost of operations per flight, resulting in increased fares", Brown Decl. ¶ 31, but "[e]ven if temporary, the [consequences] will harm some NBAA members' business reputation and client retention." *Id*. Under the proposed restrictions, when a flight is delayed due to weather or air traffic control, the pilot will have to "anticipate whether the arrival will occur after the curfew, resulting in a last-minute decision either to alter the flight plan and divert the flight to an unplanned airport, or incur a criminal charge and monetary fine. There are no good faith exemptions." Brown Decl. ¶ 32. The harm to the business reputation of Plaintiff's members from increased uncertainty, commute times, safety risks, and logistical challenges is simply not quantifiable—therefore warrants immediate injunctive relief. *See, Register. Com, Inc.*, 2002 WL 31894625, at *18.

C. Plaintiff Can Show a High Likelihood of Success on the Merits of Its Claims

To establish "a likelihood of success," Plaintiff need not prove to an "absolute certainty" that it will succeed, *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1984), *overruled on other grounds*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), but needs to show that it has "more than a fifty-fifty chance of succeeding on the merits of [its] claims." *RxUSA Wholesale, Inc. v. Dep't of Health & Human Servs.*, 467 F. Supp. 2d 285, 288–89 (E.D.N.Y. 2006), *aff'd*, 285 F. App'x 809 (2d Cir. 2008).

Here, Plaintiff is likely to succeed on its claim that the Airport closure violates federal law because the Town has—once again—flatly ignored the procedural requirements of ANCA, in violation of an injunction issued by this Court, in its attempt to adopt noise and access restrictions at HTO.

As the Second Circuit previously held, ANCA applies to noise and access restrictions at HTO, and a private party may bring a claim for equitable relief on the basis of this statute. *See, Friends*, 841 F.3d at 144–45; *see also Gov't Emps. Ins. Co.,* 2022 WL 1438602, at *4 (granting injunctive relief, finding that "this Court previously granted injunctive relief in favor of [Plaintiff] in substantially similar actions"). The Airport closure is improper for two reasons. First, the temporary closure itself requires ANCA compliance because it is intended as a noise and access restriction, just like the restrictions struck down in *Friends of the East Hampton Airport*. Second, the Town's plan to reopen the Airport with restrictions is unlawful because it is an attempted end-run around ANCA and the injunction. The Town's scheme—too clever by half—is impermissible under both the text and purpose of the statute. Plaintiff is likely to succeed on its claims— therefore enjoying odds far better than the "fifty-fifty chance" this circuit has held satisfies the requirement for entry of a TRO or preliminary injunction. *RxUSA Wholesale*, 467 F. Supp. 2d at 288–89.

1. The Closure Is a Noise and Access Restriction

The Town Board cannot credibly maintain that the closure (and subsequent reopening) is not designed to effectuate noise and access restrictions, which it could not do without this strategy. In this regard, the Town's scheme is a continuation of the same efforts by the Town rejected by the Second Circuit in 2016. The public record clearly demonstrates that the closure is happening to address noise complaints—Town is not coy about the purpose and effect of the temporary closure. As early and as publicly as May 2021, the Town's counsel advised that "ANCA should not apply if the Town closes the airport and decides to reopen in the future with restricted access." Herschlein Decl. Ex. G (Bill O'Connor, *East Hampton Airport Update*, dated May 11, 2021), at 4. The Town's counsel doubled down on this ruse in October 2021, explaining that, after a temporary closure, the Airport could reopen with "implement[ed] restrictions"—including curfews, limits on airport use by commercial users, aircraft bands, and other "noise-based restrictions." Herschlein Decl. Ex. C at 14, 19–20.

The Town's true motivation is not a mystery to any stakeholder. On December 10, 2021, the Supervisor of the Town of Southampton wrote to the Town's Board "recogniz[ing]" that the Town's "preferred alternative is not full closure of the airport, but rather to simply wrest control of operations from the FAA in order to enact" "restrictions" and to "minimize[e] noise impacts to residents." Herschlein Decl. Ex. D at 1. The December 10 letter also described this maneuver as a "technical closure" intended to extinguish FAA assurances. *Id*. Similarly, news reports described the Town's "goal" in pursuing the temporary closure as "reduc[ing] noise and pollution." Christopher Walsh, *East Hampton Likely to Temporarily Close Airport*, East Hampton Star (Oct. 21, 2021), https://www.easthamptonstar.com/government/20211021/east-hampton-likely-to-temporarily-close-airport.

When a closure's purpose and effect is to implement the precise types of noise and access restrictions covered by ANCA, the Court cannot allow it to serve as an escape hatch from federal mandates. *See Friends*, 841 F.3d at 149 (rejecting Town's argument that noise and access restrictions escape ANCA because of federal funding status). While not all closures of an airport may violate ANCA, a noise-motivated closure—without ANCA compliance—is a statutory violation. Here, the Town has been clear that its motivation in closing the Airport is to avoid the application of ANCA. The Town's close-and-reopen plan is mere theatrics to try to circumvent federal legislation, not to mention a Permanent Injunction enjoining the Town from imposing these very restrictions without ANCA compliance.

2. Restrictions Imposed via a "Temporary Closure" Must Comply with ANCA

Additionally, the restrictions the Town has implemented at HTO via the "temporary closure"—curfews, noise, and trip restrictions—are precisely the types of conditions that must be enacted according to the procedures specified in ANCA. As the Second Circuit previously ruled, ANCA "mandate[s] procedures for the enactment of local noise and access restrictions by any *public airport operator*, regardless of federal funding status." *Friends*, 841 F.3d at 151 (emphasis added). Nothing in the text or legislative history of ANCA suggests that public airport proprietors can escape its strictures by closing and then reopening an airport.

In fact, in enacting the statute, Congress asserted that "aviation noise management is crucial to the continued *increase* in airport capacity" and that "community noise concerns have led to uncoordinated and inconsistent restrictions on aviation *that could impede the national air transportation system*." 49 U.S.C. § 47521(1)–(4) (emphasis added). In other words, Congress' goal in enacting ANCA was not simply to wrest control of airport regulations from state and local governments, but to affirmatively promote the development of the air transportation in the United

States. That Congressional intent manifested in ANCA would be thwarted if an airport proprietor could simply escape scrutiny through a temporary closure. Such an action would diminish not only the capacity of the airport, but also of national air transportation system as a whole.

As a matter of logic, the Town's theory of ANCA is also not credible. Under that theory, an airport proprietor can ignore ANCA if it closes an airport *for any period of* time in contemplation of imposing its desired noise and access restrictions. Taken to its extreme, that would mean that a public proprietor could be required to comply with ANCA one morning, close during lunchtime, and then reopen in the afternoon without any obligation to meet the mandates of the statute. Congress plainly did not intend to imply this loophole in the text of ANCA.

Thus, the intent of the statute—in addition to common sense—prevents the Town's attempt to impose restrictions without observing the requirements of ANCA.

3. The Town Did Not Even Attempt to Comply with ANCA's Requirements for Imposing Noise and Access Restriction on Stage 2 and 3 Aircraft

ANCA establishes procedures and systems of review by which airport proprietors can implement noise and access restrictions on certain aircraft. *See* 49 U.S.C. § 47524(b)(1)–(4). ANCA prohibits *any* access or noise restriction on Stage 2 aircraft (for example, helicopters like Plaintiff's) unless an airport proprietor prepares, publishes, and makes available for comment, at least 180 days prior to the effective date of the proposed restriction, a cost-benefit analysis of the proposed restriction, a description of alternative restrictions, and a comparison of the costs and benefits of the proposed restriction with those of the potential alternatives. *See* 14 C.F.R. § 161.205(1)–(3). As part of this analysis, the airport proprietor must prepare a study, using the federally prescribed methods, of noise levels at the airport (including the surrounding areas), and the exposure of individuals to noise created by airport operations. The procedures for enacting restrictions on Stage 3 aircraft—which are quieter—are stricter still. A Stage 3 restriction must

have either FAA approval or the unanimous consent of all operators affected by the restriction. *See* 49 U.S.C. § 47524(c)(1); 14 C.F.R. §§ 161.101, 161.301(c). Further, the FAA may not approve applications for Stage 3 restrictions unless there is "substantial evidence" that the proposed restriction is (i) reasonable, nonarbitrary, and nondiscriminatory; (ii) does not create an unreasonable burden on commerce; (iii) is consistent with maintaining the safe and efficient use of navigable airspace; (iv) does not conflict with a law or regulation of the United States; (v) has received adequate opportunity for public comment; and (vi) does not create an unreasonable burden on the national aviation system. 49 U.S.C. § 47524(c)(2). Proprietors seeking restrictions on Stage 3 aircraft must complete detailed studies that address these statutory requirements. *See* 14 C.F.R. §§ 161.305, 161.9(a).

Despite the fact that the temporary closure will result in noise and access restrictions on Stage 2 and Stage 3 aircraft, the Town did not even attempt to comply with the procedural requirements imposed by ANCA. It did not prepare, publish or make available for comment its proposed restrictions; it did not conduct a cost-benefit analysis of any of its proposed restrictions; nor did it receive approval from the FAA or the unanimous consent of all operators affected by the restrictions. In light of this violation of federal law, it is highly likely that Plaintiff will succeed on the merits of its ANCA claim.

D. Granting Injunctive Relief Is Equitable and Serves the Public Interest

A party moving for injunctive relief must show that "the balance of hardships tips in the plaintiff's favor," and "that the public interest would not be disserved by the issuance of [the] injunction." *Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010) (internal quotation marks omitted). While allowing the Town to close the Airport may benefit the small number of private residents who are advocating for it, the balance of equities falls dramatically in favor of the

injunctive relief sought here and preservation of the status quo: allowing the Airport to continue to operate and service aircraft for the public as it has been doing for eight decades.

The balance of hardships tips in Plaintiff's favor. For Plaintiff, an injunction now is the only way to prevent the unquantifiable losses to its goodwill, business reputation, clientele, and operations that would ensue were the Town permitted to go ahead with its unlawful plan. For the Town, an injunction merely preserves the status quo. The Town will not "suffer harm proportionate to [Plaintiff's members'] loss of business as a result of a *status quo* injunction." *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.,* 992 F.2d 430, 435 (2d Cir. 1993); *see also, Government Employees Insurance Company,* 2022 WL 1438602, at *9 (granting injunctive relief, finding that the balance of equities favored Plaintiff where the only consequence to Defendants if successful on the merits is that the actions "to which they are entitled will be delayed"). Here, the balance of equities tips decidedly in favor of Plaintiff.

The public interest is also furthered by granting injunctive relief. Courts will stay government action purportedly in the public interest when, on closer examination, the circumstances prove otherwise and there are "no concrete or persuasive examples of how the public interest would be harmed by the injunction." *Yunus v. Robinson,* 2019 WL 168544, at *3, *24 (S.D.N.Y. Jan. 11, 2019). Even assuming *arguendo* that the Town's scheme was in the public interest, the only harm to the public of granting emergency relief would be the continuation of the status quo that has existed for eight decades. But the Town's scheme is not in the public interest; it is in the interest of a select few in an enclave of the East Hampton area. Meanwhile, the vast majority of the public—businesses, other residents of East Hampton who commute by air, residents of surrounding communities like Montauk and West Hampton whose air and surface traffic will increase, and the public at large who will face the economic and environmental

consequences of redirected air traffic—suffer.

The public interest favors injunctive relief because there is a strong public interest in the enforcement of pre-existing court orders; and blocking the Town's flagrant disregard of this Court's Permanent Injunction undoubtedly serves that interest. Indeed, "[t]he public interest requires not only that Court orders be obeyed but further that *Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders*." *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (emphasis added); *see also In re Swartout*, 554 B.R. 474, 480 (Bankr. E.D. Cal. 2016) ("In short, the public interest favors compliance—not disobedience—with court orders."). Courts have held that the public interest in the enforcement of court orders is implicated even where the public has no direct interest in a dispute. *See, e.g., United States v. Visa U.S.A., Inc.*, No. 98 CIV. 7076(BSJ), 2007 WL 2274866, at *4 (S.D.N.Y. Aug. 7, 2007) ("Although the public does not have a direct interest in the outcome of the instant litigation, the public has a strong interest in ensuring that parties comply with court orders."); *New Pac. Overseas Grp. (USA) Inc. v. Excal Int'l Dev. Corp.*, No. 99 CIV. 2436 (DLC), 2000 WL 802907, at *3 (S.D.N.Y. June 21, 2000) (same).

The reality is that shuttering HTO, even temporarily, followed by a host of restrictions, will cause a cascade of inconveniences, senseless harms, and outright dangers. The Town's plan—if not enjoined by a temporary restraining order and preliminary injunction—will cause the following four public harms.

First, it will divert traffic to nearby airports unequipped to handle the increased demand in air traffic, turning "[o]ne flight operation" into "two or more flight operations," as the Town of Southampton rightly fears. Herschlein Decl. Ex. D at 2. "[T]he noise related impacts would undoubtedly shift to other areas" of Long Island, with passengers traveling on "already congested

roads" or ironically creating even "more helicopter traffic." *Id*.

Second, the temporary closure thwarts federal interests. Federal policy reflects a clear preference for "centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation's airspace." *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224 (2d Cir. 2008). Allowing the Town to subvert the procedural requirements of ANCA would undermine this uniformity. *See* 49 U.S.C. § 47101(b)(1) ("It is a goal of the United States to develop a national intermodal transportation system that transports passengers and property in an efficient manner.").

Third, HTO confers considerable economic benefits on nearby communities that would be impaired if the Airport were to close, even temporarily. According to the findings of a recent study performed by NYU's Wagner Center in collaboration with Appleseed (an economic consulting firm), the "real value [of the Airport] is rooted in the support the [A]irport provides to East Hampton's leisure and hospitality industries, and in particular to its second-home sector." Herschlein Decl. Ex. H (NYU Wagner Rudin Ctr. for Transp. Policy & Mgmt. with Appleseed, *East Hampton Airport*, dated May 2021), at 5. A full 25 percent of the 12,000 workers employed in the Town work in tourism-related industries—more than double the percentage of workers employed in such positions in Suffolk County as a whole. *See* Herschlein Decl. Ex. I (EBP US, *Contribution of the East Hampton Airport to the East Hampton/Southampton Economy*, dated Dec. 14, 2020), at 8. And Airport users spend approximately $48 million annually, supporting 650 local jobs in the Town of East Hampton alone. *See* Herschlein Decl. Ex. H at 10.[1] As these studies show,

[1] Another recent economic impact study, published in late 2020, concluded that "the overall contribution of the airport to the [] area economy in 2019 includes 872 jobs that pay workers $34.9 million in labor income, $49 million in value added and $77.5 million in output (total business revenues)." Herschlein Decl. Ex. I at 4.

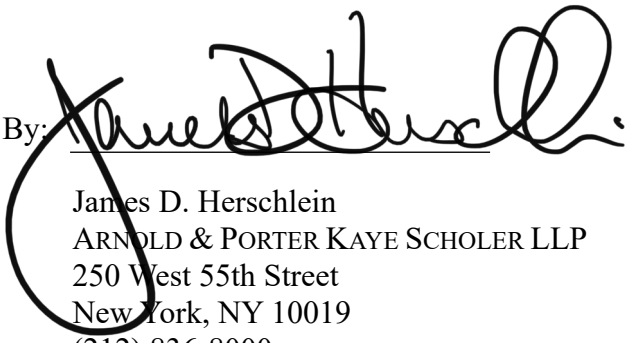
a temporary closure followed by restriction at the Airport poses the risk of materially impairing the economy of eastern Long Island.

Finally, in the event of a natural disaster or catastrophe striking the southern shore of Long Island, the Airport would serve as a critical staging area. "I certainly hope that we are never faced with a large-scale evacuation from a natural disaster or radiological emergency," the Town of Southampton pleads in its December 10 letter to the Board. Herschlein Decl. Ex. D at 3. "However, if we did, the airport could play a major role in responding to such an event." *Id.* Indeed, over 60% of medical evacuations from East Hampton occur from HTO. *See* Herschlein Decl. Ex. B at 2. Pilots far prefer an airport as compared to other potential landing zones, because airports are known obstacle-free areas that do not require complex arrangements with other first responders to use safely and efficiently. *Id.* Should emergency relief not be granted, the Town and its surrounding communities could lose critical emergency services that would endanger its citizens and residents.

CONCLUSION

For the foregoing reasons, the Court should enjoin the Town Board from taking any action to close the Airport until it adjudicates the merits of Plaintiff's motions for civil contempt and a preliminary injunction.

Dated: May 14, 2022

By: 

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