No. ________

In The
Supreme Court of the United States

WILLIAM TONG, in his Official Capacity as
Attorney General for the State of Connecticut,

Petitioner,

v.

TWEED-NEW HAVEN AIRPORT AUTHORITY,
CITY OF NEW HAVEN,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Tweed-New Haven Airport Authority ("Authority") is a public instrumentality and political subdivision of the State of Connecticut created by legislation to operate Tweed-New Haven Airport ("Airport"), which is located on the border of the City of New Haven ("City") and the Town of East Haven, Connecticut ("Town"). In 2009, the City, the Town and the Authority entered into an agreement limiting the length of a runway at the Airport to 5,600 linear feet. The agreement called for the state legislature to codify the runway length, which it did that same year by enacting Conn. Gen. Stat. § 15-120j(c) (the "Tweed-NH statute").

Six years later, the Authority and the City (collectively, "Respondents") brought a declaratory judgment action in federal court against the State claiming that the statute was preempted by various federal laws and therefore unconstitutional under the Supremacy Clause. The State filed a motion to dismiss challenging Respondents' standing on the grounds that political subdivisions are barred from suing their creator States under the Supremacy Clause. The Second Circuit held that the Authority had standing to sue the State under the Supremacy Clause, and that Connecticut's legislation limiting the length of the runway is preempted by the Federal Aviation Act because the statute "intrudes into the field of air safety." The questions presented are:

1. Does a political subdivision of a State have standing to sue its creator State under the Supremacy Clause of the United States Constitution?

QUESTIONS PRESENTED—Continued

2. Does the Federal Aviation Act preempt a state law limiting the length of an airport runway, thereby depriving a State from determining the size and nature of a local airport?

PARTIES TO THE PROCEEDING

George Jepsen, in his official capacity as Attorney General for the State of Connecticut, was the defendant in the district court proceedings and appellee in the court of appeals proceedings. Petitioner William Tong, in his official capacity as Attorney General of the State of Connecticut, was substituted as appellee in the court of appeals proceeding per order of the Second Circuit. Appendix ("App.") 2a. Respondents Tweed-New Haven Airport Authority and the City of New Haven were the plaintiff and intervening-plaintiff, respectively, in the district court proceedings and appellant and intervenor-appellant, respectively, before the court of appeals.

RELATED CASES

- *Tweed-New Haven Airport Authority v. Tong*, No. 17-3481-cv and No. 17-3918-cv, U.S. Court of Appeals for the Second Circuit, Judgment entered July 9, 2019. (App. 1a-23a).
- *Tweed-New Haven Airport Authority v. Jepsen*, Case No. 3.15cv01731 (RAR), U.S. District Court for the District of Connecticut, Judgment entered October 3, 2017. (App. 24a-67a).
- *Tweed-New Haven Airport Authority v. Jepsen*, Case No. 3.15cv01731 (RAR), U.S. District Court for the District of Connecticut, Ruling on Defendant's Motion to Dismiss entered December 9, 2016. (App. 68a-107a).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
RELATED CASES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	10
I. The Issue of A Political Subdivision's Standing To Sue Its Creator State Under The Supremacy Clause Warrants This Court's Resolution	13
A. The Second Circuit's Decision Deepens A Circuit Split As To Whether A Political Subdivision Can Sue Its Creator State Under The Supremacy Clause	13
B. This Case Is Of National Importance Because Granting Standing To Political Subdivisions That Sue Their Creator States Under The Supremacy Clause Undermines State Sovereignty	18

TABLE OF CONTENTS—Continued

Page

C. The Second Circuit's Decision Permitting Political Subdivisions To Sue Their Creator States Under The Supremacy Clause Conflicts With This Court's Precedents 22

II. The Second Circuit's Decision That the FAAct Preempts a State's Authority to Regulate Local Airports Involves an Issue of National Importance Meriting This Court's Review 28

CONCLUSION 32

APPENDIX

Tweed-New Haven Airport Authority v. Tong, No. 17-3481-cv and No. 17-3918-cv, U.S. Court of Appeals for the Second Circuit, Judgment entered July 9, 2019 .... 1a

Tweed-New Haven Airport Authority v. Jepsen, Case No. 3.15cv01731 (RAR), U.S. District Court for the District of Connecticut, Judgment entered October 3, 2017 .... 24a

Tweed-New Haven Airport Authority v. Jepsen, Case No. 3.15cv01731 (RAR), U.S. District Court for the District of Connecticut, Ruling on Defendant's Motion to Dismiss entered December 9, 2016 .... 68a

Tweed-New Haven Airport Authority Act, C.G.S.A. § 15-120g *et seq*. 88a

TABLE OF CONTENTS—Continued

Page

Supremacy Clause of the United States Constitution, Article VI, Clause 2 .... 108a

Connecticut Constitution, Article Tenth, § 1 .... 108a

Federal Aviation Act, 49 U.S.C.A. § 40103 .... 109a

14 C.F.R. § 139.1 .... 111a

TABLE OF AUTHORITIES

Page

CASES

Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) 8, 9

Alden v. Maine, 527 U.S. 706 (1999) 20, 21, 26

Board of Educ. v. Allen, 392 U.S. 236 (1968) 28

Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999) 16, 17

Burbank-Glendale-Pasadena Airport Authority v. City of Burbank, 136 F.3d 1360 (9th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998) .... *passim*

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 31

City of New York v. Richardson, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973) 8, 9

City of San Juan Capistrano v. California Utilities Commission, 937 F.3d 1278 (9th Cir. 2019) 15

City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency, 625 F.2d 231 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980) 13, 14, 15

City of Trenton v. New Jersey, 262 U.S. 182 (1923) .... *passim*

Gomillion v. Lightfoot, 364 U.S. 339 (1960) .... *passim*

Lassen v. Arizona ex rel. Arizona Highway Dep't, 385 U.S. 458 (1967) 17

TABLE OF AUTHORITIES—Continued

Page

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985) 27

Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)....27

Palomar Pomerado Health Sys. v. Belshe, 180 F.3d 1104 (9th Cir. 1999)....15

Printz v. United States, 521 U.S. 898 (1997).....20, 21, 26

Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979)....15, 16

Romer v. Evans, 517 U.S. 620 (1996)....28

United States v. Los Angeles Tucker Truck Lines, Inc., 344 U.S. 33 (1952)....27, 28

Virginia Office for Prot. & Advocacy v. Stewart, 563 U.S. 247 (2011) 26, 27

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)....27

Williams v. Mayor of Baltimore, 289 U.S. 36 (1933)....*passim*

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009)....*passim*

CONSTITUTIONAL PROVISIONS

Connecticut Constitution, Article Tenth, § 1 .....2, 6, 24

Supremacy Clause of the United States Constitution, Article VI, Clause 2....*passim*

U.S. Const. amend. I 23

TABLE OF AUTHORITIES—Continued

Page

U.S. Const. amend. XV 26

STATUTES

28 U.S.C. § 1254(1) 1

Airline Deregulation Act, 49 U.S.C. § 41713 ....7, 8

Airport and Airway Improvement Act, 49 U.S.C. § 47101, *et seq* 7, 8

Conn. Gen. Stat. § 15-120g *et seq*. 27

Conn. Gen. Stat. § 15-120i(a) 5, 24

Conn. Gen. Stat. § 15-120j(c) ....*passim*

Federal Aviation Act, 49 U.S.C. § 40101, *et seq* 7

49 U.S.C. § 40103(a)(1)-(b)(1) 3-4, 31

REGULATION

14 C.F.R. Part 139, Federal Aviation Administration........................6, 29

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Connecticut, William Tong, in his official capacity, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65 (2d Cir. 2019) and reproduced at App. 1a-23a. The opinions of the District Court for the District of Connecticut are reproduced at App. 24a-67a and App. 68a-87a.

JURISDICTION

The Second Circuit Court of Appeals entered judgment on July 9, 2019. App. 20a-21a. On September 27, 2019, Justice Ginsburg extended the time for filing this Petition to December 6, 2019. Application No. 19A347. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Supremacy Clause of the United States Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (App. 108a).

Connecticut Constitution, Article Tenth, §1

§ 1. Delegation of legislative authority to political subdivisions. Terms of town, city and borough elective officers. Special legislation

Sec. 1. The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions. The general assembly shall from time to time by general law determine the maximum terms of office of the various town, city and borough elective offices. After July 1, 1969, the general assembly shall enact no special legislation relative to the powers, organization, terms of elective offices or form of government of any single town, city or borough, except as to

(a) borrowing power, (b) validating acts, and (c) formation, consolidation or dissolution of any town, city or borough, unless in the delegation of legislative authority by general law the general assembly shall have failed to prescribe the powers necessary to effect the purpose of such special legislation. (App. 108a-09a).

Federal Aviation Act, 49 U.S.C. § 40103

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may

> modify or revoke an assignment when required in the public interest. (App. 109a).

Conn. Gen. Stat. § 15-120j(c)

> (c) Notwithstanding the provisions of subsections (a) and (b) of this section, Runway 2-20 of the airport shall not exceed the existing paved runway length of five thousand six hundred linear feet. (App. 93a).

STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve two issues of exceptional national importance. The first question is whether political subdivisions of a State have standing to sue their creator States in federal court for violating the Supremacy Clause of the United States. The Second Circuit's decision deepens an existing split in the circuits on this issue by allowing a political subdivision to invoke the Supremacy Clause against its parent State. That decision contravenes this Court's precedents that bar a political subdivision from suing its parent State under various constitutional provisions because a political subdivision has been "created by a state for the better ordering of government, [and] has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa v. Pocatello Educ. Ass'n.*, 555 U.S. 353, 363 (2009) (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). *See also City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). This rationale

naturally extends to actions under the Supremacy Clause. Political subdivision suits against their creator States would undermine state sovereignty by allowing the former to sue their creator States in furtherance of federal interests.

The second question is whether the Federal Aviation Act preempts a state law limiting the length of an airport runway in the absence of any federally-mandated safety improvements that require lengthening of the runway. The Second Circuit's holding that the Act preempts a Connecticut statute limiting the length of a runway at Tweed-New Haven Airport improperly extends the Federal Aviation Act's reach beyond its Congressional purpose, and consequently deprives States of the power to determine the size and nature of their local airports. This Court should grant certiorari and reverse.

1. Respondent Tweed-New Haven Airport Authority and Intervenor-Respondent City of New Haven brought this declaratory judgment action against Petitioner, the Attorney General of Connecticut in his official capacity (the "State"), challenging as unconstitutional a Connecticut law limiting the length of the main runway at Tweed-New Haven Airport. Respondents alleged that the limitation violated multiple federal laws and was therefore preempted under the Supremacy Clause. App. 2a-3a.

Under its enabling statute, the Authority is considered to be a "public instrumentality and political subdivision of this State." Conn. Gen. Stat. § 15-120i(a);

App. 89a. The Authority is deemed to be performing "an essential public and governmental function." *Id*. The City of New Haven is a municipal corporation and a political subdivision of the State. Article Tenth, § 1, of the Connecticut Constitution ("The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions."). App. 108a.

The City owns the Airport property and leases it to the Authority, which operates the Airport. App. 26a. In the past decade, the Authority has operated the Airport at a loss, requiring $1,500,000 in annual subsidies from the State of Connecticut and $325,000 from the City of New Haven. App. 35a. Located on the border of the City and the Town, the Airport holds an operating certificate under 14 C.F.R. Part 139 of the Federal Aviation Administration ("FAA") regulations. App. 27a, 111a-13a.

In 2009, the Authority, the City and the Town entered a Memorandum of Agreement ("MOA") limiting Runway 2-20 to the existing paved runway length of 5,600 feet and calling for the Legislature to adopt a law stating the same. App. 36a. Later that same year, the Connecticut Legislature amended Conn. Gen. Stat. § 15-120j to include subsection (c), which states, in relevant part, that "Runway 2-20 of the airport shall not exceed the existing paved runway length of five thousand six hundred linear feet." Conn. Gen. Stat. § 15-120j(c), App. 93a.

2. In November 2015, merely six years after signing the MOA and requesting legislative action limiting the length of Runway 2-20 at the Airport, the Authority brought this declaratory judgment action in the United States District Court of the District of Connecticut against the State, claiming that the Tweed-NH statute was preempted by the Federal Aviation Act ("FAAct"), 49 U.S.C. § 40101, *et seq*., the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713, and the Airport and Airway Improvement Act ("AAIA"), 49 U.S.C. § 47101, *et seq*., and therefore violated the Supremacy Clause. Shortly thereafter, the district court granted the City intervenor-plaintiff status.

The State moved to dismiss the declaratory action on several grounds, including that the Authority, as a political subdivision of the State, lacked standing to sue its creator State. The district court denied the State's motion, holding that the Authority's status as a political subdivision of the State did not deprive it of standing to sue the State. App. 83a. The district court acknowledged *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), which held that the City of Trenton could not invoke the Fourteenth Amendment's Due Process Clause against New Jersey to prevent enforcement of a state law imposing licensing fees for diverting water from the Delaware River. App. 81a (citing *Trenton*, 262 U.S. at 192). The court further recognized *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933), which held that two Maryland cities could not maintain an action to prevent Maryland from exempting a railroad from

local taxes under the Equal Protection Clause. *Id*. (citing *Williams*, 289 U.S. at 38-40).

The district court nonetheless rejected the State's contention that, based on such precedent, the Second Circuit had adopted a *per se* rule barring political subdivisions from having standing to sue their creator States in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), and *City of New York v. Richardson*, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973). App. 81a-83a. After noting the existence of a conflict among the Fifth, Ninth and Tenth Circuits on the issue, the district court concluded that, in the absence of any direct ruling on the issue by this Court, it was "not convinced" that the plaintiff subdivision lacked standing to sue the State. App. 83a.

Following a hearing in which the district court considered evidence on the issue of Article III standing and preemption, the court issued a decision dismissing the action on the following grounds: (1) the Authority did not have standing because it failed to show injury-in-fact and a causal connection between the Tweed-NH statute and the Authority's alleged injuries; and (2) the FAAct, the ADA, and the AAIA did not preempt the Tweed-NH statute. App. 24a-67a.

3. The Second Circuit reversed, holding that the Authority had Article III standing to sue the State and that the Tweed-NH statute violated the Supremacy Clause because it was preempted by the FAAct. App. 1a-19a. The Second Circuit further upheld the district

court's conclusion that a political subdivision could sue its creator State for a Supremacy Clause violation. *Id*., App. 12a-14a.

a. On the political subdivision standing issue, the Second Circuit first recognized that political subdivisions are not allowed to sue States under the Fourteenth Amendment (or the Contract Clause) in accordance with *Williams* and *Trenton*, but then concluded that this Court's holding in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), had "put to rest" the notion that such entities were "broadly prevented" from suing States. App. 12a. The court based its interpretation on the statement in *Gomillion* that a "correct reading" of the *Williams* and *Trenton* line of cases shows that "the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases." App. 12a-13a. Pointing to the "unique federalism concerns" presented by a Supremacy Clause challenge brought by a political subdivision, the Second Circuit explained that "if the Supremacy Clause means anything, it means that a state is not free to enforce within its boundaries laws preempted by federal law." App. 13a. According to the court, political subdivision lawsuits under the Supremacy Clause are "one of the main ways of ensuring that this does not occur." *Id*.

The Second Circuit next cited a series of Supreme Court cases that "repeatedly entertained suits against a state by a subdivision of the state, including cases under the Supremacy Clause." App. 13a-14a. The court distinguished its holdings in *Aguayo* and *Richardson* barring political subdivision suits against States

brought under the Fourteenth Amendment as "present[ing] considerations different from those we consider here." App. 14a n.7. The court thus joined the Fifth and Tenth Circuits and held that "a subdivision may sue its state under the Supremacy Clause." App. 14a.

b. Regarding preemption, the Second Circuit focused exclusively on the FAAct, noting initially that it had previously held that the Act "impliedly preempts the entire field of air safety" and that "FAAct preemption applies to airport runways." App. 15a. The court then ruled that the Tweed-NH statute was preempted because of the law's "direct impact on air safety" and because its length restriction constituted "a total barrier to improvements that could make Tweed [Airport] safer and more modern." App. 15a-17a. The court found support for its holding in the FAA's "direct and significant" involvement with Tweed Airport based on the FAA's approval of Tweed's Airport Layout Plan. App. 18a. The court therefore concluded that the Tweed-NH statute "intrudes into the field of air safety." App. 19a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's holding that a political subdivision may sue its State under the Supremacy Clause has deepened a split among the circuits regarding the legal relationship between States and their subdivisions. Although consistent with holdings

by the Fifth and Tenth Circuits, which allow such suits, the Second Circuit's decision is directly contrary to that of the Ninth Circuit, which does not. Thus, the court's decision has added to the existing uncertainty on the issue of whether a political subdivision is ever permitted to sue its creator State under any provision of the United States Constitution.

The Second Circuit's decision has the practical effect of enlisting political subdivisions against their creator States to pursue the federal government's interest in enforcing federal law as the supreme law of the land. Allowing such suits to proceed would undermine the political organization of state government by turning the State against itself and consequently interfere with state sovereignty. As a result, this case presents an issue of national importance.

The Second Circuit not only wrongly based its decision on this Court's precedent in *Gomillion*, but also ignored this Court's holding in *Ysursa* that "a political subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Ysursa*, 555 U.S. at 363 (quoting *Williams*, 289 U.S. at 40). Moreover, the Second Circuit improperly relied on holdings from this Court that are inapplicable because either political subdivision standing was not at issue or the plaintiffs were individuals rather than political subdivisions.

Regarding the second issue, the Second Circuit's broad holding that the FAAct preempts Connecticut's

limitation of the length of the runway at the Airport improperly transfers the power to determine the size and nature of a local airport from the State to the federal government. The court's conclusion that the Airport could be made safer with a longer runway due to occasional passenger and baggage weight limitations on flights could apply to any airport in the country. It overlooks that the Airport is already deemed safe by the FAA, complies with FAA safety standards, and "is possible to operate in a safe and commercially reasonable manner." App. 62a. The court's decision interprets the FAAct beyond its intended reach, and thereby bars Connecticut and potentially other States and localities nationwide from asserting any control over the scope and nature of their airports.

This case affords the Court an ideal vehicle for resolving the two issues presented: the underlying facts are undisputed, App. 26a-38a, and Petitioner clearly raised, and both the district court and the Second Circuit decided, the issues presented in this case. *See* App. 12a-14a; App. 81a-87a.

I. The Issue of A Political Subdivision's Standing To Sue Its Creator State Under The Supremacy Clause Warrants This Court's Resolution.

A. The Second Circuit's Decision Deepens A Circuit Split As To Whether A Political Subdivision Can Sue Its Creator State Under The Supremacy Clause.

There is a circuit split on the issue of whether a political subdivision has standing to bring an action against its parent State for violating the Supremacy Clause. The Ninth Circuit forbids such suits, while the Second Circuit has now joined the Fifth and Tenth Circuits in allowing such suits to proceed to the merits to determine whether federal law displaces the state law.

1. The Ninth Circuit has a broad *per se* rule denying standing to political subdivisions seeking to sue their parent States under the Supremacy Clause or any other constitutional grounds.

The Ninth Circuit first established its *per se* rule in *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039 (1980). In *South Lake Tahoe*, a California city sought injunctive and declaratory relief against a state regional planning agency for taking property without compensation in violation of the Fifth Amendment, discriminating against similarly situated property owners in violation of the Fourteenth Amendment, and operating in conflict with a federal

statute in violation of the Supremacy Clause. *Id*. at 232. Based on this Court's precedent forbidding political subdivisions from challenging state statutes on Fourteenth Amendment grounds, the Ninth Circuit held that the city could not challenge the state planning agency's plans and ordinances on any of the constitutional grounds alleged. *Id*. at 233-34 (citing *William*s, 289 U.S. at 40 and *Trenton*, 262 U.S. at 188).

The Ninth Circuit has applied its rule to airport authorities seeking to sue a state entity under the Supremacy Clause. In *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998), the court addressed whether a political subdivision could bring an injunctive action against a state municipality and a state agency based in part on an alleged violation of the Supremacy Clause. *Id.* at 1361-62. Specifically, the plaintiff airport authority sought to expand its airport terminal and parking facilities at Burbank Airport. *Id.* at 1361. A California state law authorized the defendant City of Burbank to review the acquisition of land for such expansion. *Id*. The airport authority brought a declaratory judgment action against the city claiming that its review power violated the Supremacy Clause, the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. *Id*. The Ninth Circuit upheld the district court's dismissal of the plaintiff's action for lack of standing because it had previously established "a broad, per se rule" that political subdivisions of the State may not challenge the constitutionality of a state

statute. *Id.* at 1362, 1364 (citing *South Lake Tahoe*, 625 F.2d at 233).

More recently, the Ninth Circuit has explained that in determining whether to apply its *per se* rule in a case involving political subdivision standing, the court has "relied only on the identity of the parties, not the procedural context in which those claims are raised." *City of San Juan Capistrano v. California Utilities Commission*, 937 F.3d 1278, 1281 (9th Cir. 2019). As a result, the court will deny standing as long as the suing entity is a political subdivision of the State and the action brought is against the State. *Id*. (citing *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999)).

2. The Fifth and Tenth Circuits—like the Second Circuit here—recognize political subdivision standing for actions brought against their creator States under the Supremacy Clause.

a. The Fifth Circuit has granted standing to a political subdivision that sued its parent State for enforcing a state statute that allegedly violated the Supremacy Clause. In *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979), a Texas school district and several taxpayers challenged the constitutionality of a state statute that required certain districts to take part in a federally subsidized breakfast program. *Id.* at 1059-60. Specifically, the school district sued state education officials, claiming that the state statute violated the Supremacy Clause because it conflicted with the authorizing statutes and

regulations of the federal program, which did not mandate participation by any school, district or State. *Id*.

The Fifth Circuit held that the school districts could sue Texas under the Supremacy Clause. *Id*. at 1071. In its decision, the court acknowledged a long line of cases from this Court (including *Trenton*) holding that a municipality could not sue its creator State under various constitutional provisions. *Id*. at 1067-68. But the court viewed such cases not as "standing" cases, but rather as "substantive interpretations of the constitutional provisions involved" that do not comprehensively bar a municipality from asserting standing to sue its creator State. *Id*. at 1068. The court further distinguished such precedent as upholding the principle that "the Constitution does not interfere with the internal political organization of states" and therefore not as decisions about municipalities' standing to sue States. *Id*. at 1069. As a result, the Fifth Circuit found that the school districts had standing and ultimately held that the state program did not violate the Supremacy Clause. *Id*. at 1071, 1073.

b. The Tenth Circuit has also allowed political subdivisions to bring an action against their creator States under the Supremacy Clause, but only in the narrow instance where the court considered the plaintiff to be "substantially independent" from the State. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999).

In *Branson*, school districts and students sought to prevent implementation of an amendment to the Colorado Constitution that altered the management of the State's land trust for public schools. *Branson*, 161 F.3d at 625-27. The plaintiffs claimed that the amendment violated a federal enabling act passed when the State entered the Union and therefore violated the Supremacy Clause. *Id*. at 625. The Tenth Circuit affirmed after concluding that "[a] political subdivision has standing to sue its political parent on a Supremacy Clause claim." *Id*. at 630.

In reaching its standing decision, the Tenth Circuit recognized that this Court had denied constitutional challenges by cities against their parent States in *Williams* and *Trenton*, but distinguished such cases as disallowing challenges only to constitutional provisions concerning "individual rights, as opposed to collective or structural rights." *Id*. at 628-29. Ultimately, however, the court determined that the plaintiff school districts were "substantially independent" from their creator State and therefore entitled to sue the State under the Supremacy Clause. *Id*. at 629. The Tenth Circuit based its conclusion on *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458 (1967), in which this Court recognized standing in a suit that appeared to be between two state agencies because the plaintiff was "a substantially independent state officer" who was acting in the capacity of a trustee. *Id*. (citing *Lassen*, 385 U.S. at 459 n.1).

B. This Case Is Of National Importance Because Granting Standing To Political Subdivisions That Sue Their Creator States Under The Supremacy Clause Undermines State Sovereignty.

The Second Circuit's decision allowing political subdivisions to sue their State under the Supremacy Clause undermines state sovereignty by interfering with a State's ordering of government, endowing local political subdivisions of the State with powers and duties that conflict with state law, and placing the burden of cost of such lawsuits on a State's treasury.

This Court in *Trenton* and *Williams* established the relationship between States and their political subdivisions wherein the latter are clearly subject and subordinate to the will of the former. In denying Trenton's Fourteenth Amendment Due Process challenge against New Jersey, this Court held that a municipality was merely a "creature of the state exercising and holding powers and privileges subject to the sovereign will," and that "the state may withhold, grant or withdraw powers and privileges as it sees fit." *Trenton*, 262 U.S. at 187. Similarly, in *Williams*, where this Court denied an equal protection challenge brought by two Maryland cities against a state receivership, the Court held that "a municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams*, 289 U.S. at 40; *Ysursa*, 555 U.S. at 363. These principles apply

with equal force to a subdivision challenge under the Supremacy Clause.

In the concurrence to the Ninth Circuit's decision in *Burbank*, Judge Kozinski identified the federalism concerns that apply to political subdivision suits against parent States raised under the Supremacy Clause. "Supremacy Clause claims do differ from other constitutional claims." *Burbank*, 136 F.3d at 1364-65 (Kozinski, J., concurring). Whereas most "constitutional claims pit the individual against the power of the government, . . . Supremacy Clause claims protect the interest of the federal government against encroachment by the states." *Id*.

The plaintiffs in *Burban*k contended that political subdivisions, though lacking individual rights under the Constitution, should be able to bring a federal preemption claim against their parent State to further federal interests. *Id*. The concurrence questioned whether Congress—notwithstanding the Supremacy Clause—could "conscript state instrumentalities to aid in destruction of the state's laws." *Id*. at 1365. Rather, such a scenario could create a conflict in the responsibilities designated to state officials:

> Suppose Congress passes a statute and empowers the state's Attorney General to bring suit to set aside any state law inconsistent therewith. Since the Attorney General's responsibility is to enforce the laws of the state, is it consistent with his duties to task him with having some of those laws set aside? Or, what if Congress bestows that

> power on a member of the Governor's cabinet, such as the Secretary of Transportation? Can Congress drive a wedge between the Governor and a member of his cabinet by giving that official federal powers that conflict with his responsibilities as the Governor's political appointee?

Id. at 1365. Citing *Printz v. United States*, 521 U.S. 898, 928 (1997), the concurrence noted that "there is a plausible argument that Congress may not interfere with the functioning of state officials and instrumentalities by endowing them with powers and duties that conflict with their responsibilities under state law." *Id*.

Permitting a political subdivision to enforce federal law against its creator State runs counter to this Court's repeated recognition of the central importance of state sovereignty in our federal system. For example, in *Printz*, this Court held that state officials could not be commandeered to enforce a federal program (the Brady Handgun Act) pursuant to the Commerce Clause. *Printz*, 521 U.S. at 935. Central to the Court's decision was the concern that States "remain independent and autonomous within their proper sphere of authority," and that their officers not be "dragooned" into enforcing federal law. *Id*. at 928. The Court also sought to protect States from bearing the cost of administering the federal program. *Id*. at 929.

Similar concerns are echoed in *Alden v. Maine*, 527 U.S. 706 (1999), where the Court barred the federal government from forcing States to defend private suits for money damages in their own courts without their

consent. In *Alden*, the plaintiff state officials sued the State in state court for violating federal law (the Fair Labor Standards Act). *Id*. at 711. In reaching its decision, this Court recognized a potential threat to state sovereignty:

> A power to press a State's courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the states.

Id. at 749.

The Second Circuit's decision weakens state sovereignty in precisely the manner envisioned by the Ninth Circuit in *Burbank* and by this Court in *Printz* and *Alden*. Enlisting a political subdivision to enforce federal law against its own State literally "turn[s] the State against itself" by potentially setting any state-created subdivision in opposition to the State's will. *Alden*, 527 U.S. at 749; *see also Trenton*, 262 U.S. at 187; *Williams*, 289 U.S. at 40. That is what transpired here: the Connecticut Legislature, which created the Authority, expressed the State's will by passing a statute limiting the length of the runway at the Airport—at the Authority's and the City's request no less—only to have both turn around and sue the State for a violation of federal law based on that statute.

C. The Second Circuit's Decision Permitting Political Subdivisions To Sue Their Creator States Under The Supremacy Clause Conflicts With This Court's Precedents.

The Second Circuit contravened this Court's precedents in holding that political subdivisions have standing to sue their parent States for violating the Supremacy Clause. The court ignored controlling precedent in *Ysursa*, and wrongly relied on *Gomillion*. Its reliance upon this Court's decisions that either did not squarely address the issue of political subdivision standing or involved plaintiffs that were not themselves political subdivisions is unavailing.

1. This Court has long recognized the principles governing the inferior relationship between political subdivisions and their States. In *Trenton*, the Court stated that a political subdivision is a "creature of the state exercising and holding powers and privileges subject to the sovereign will," and that "the state may withhold, grant or withdraw powers and privileges as it sees fit." *Trenton*, 262 U.S. at 187. In *Williams*, the Court held that a political subdivision "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams*, 289 U.S. at 40.

Recently, this Court reaffirmed these principles in *Ysursa*, holding that States "may withhold, grant or withdraw powers and privileges as it sees fit" from political subdivisions. *Ysursa*, 555 U.S. at 362 (quoting *Trenton*, 262 U.S. at 187). In *Ysursa*, an Idaho law

allowed public employee payroll deductions for union dues but not for union political activities. *Id*. at 355. The plaintiff union employees sued several state officials in their official capacities, alleging that applying the law at the local governmental level violated the Free Speech Clause. *Id*. The Ninth Circuit struck down the law, holding that the State could not restrict local payroll deductions for union dues because the State did not subsidize or incur any costs in the administering of that program. *Id*. at 356-57. The court further equated the State's relationship over local government entities to a State's limited regulatory power over a private utility. *Id*. at 357-58.

This Court reversed, holding that the First Amendment does not prevent a State from barring its political subdivisions from allowing payroll deductions for political activities. *Id*. Most significantly, the Court rejected as irrelevant the Ninth Circuit's focus on state funding of local payroll deductions to determine if the law was valid, "given the relationship between the State and its political subdivisions." *Id*. at 364. Noting *Trenton*, the Court stated that political subdivisions are "merely . . . department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit." *Id*. at 362 (quoting *Trenton*, 262 U.S. at 187). In *Ysursa*, the State of Idaho simply was exercising its authority over its political subdivisions. *Id*.

Relying on *Williams*, the *Ysursa* Court further observed that a subdivision "created by a state for the better ordering of government, has no privileges or

immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Id*. at 363 (quoting *Williams*, 289 U.S. at 40). As a result, the Court dismissed the Ninth Circuit's utility company analogy, concluding that the relationship between a State and a political subdivision is not equivalent. *Id*. at 363-64 (citing *Trenton*, at 185). Having established the broad scope of state power over its political subdivisions, this Court held that the State was not required to assist political speech by allowing a government payroll deduction program for political activities. *Id*. at 364.

The Second Circuit in its decision overlooked *Ysursa*'s reaffirmation of the state sovereignty principles affirmed in *Trenton* and *Williams.* Decided almost fifty years after *Gomillion*, *Ysursa* should govern when an instrumentality of the State seeks to sue its creator.

Under Conn. Gen. Stat. § 15-120i(a), the Authority is explicitly a "political subdivision of the state," and, as such, "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *See Williams*, 289 U.S. at 40; *see also Trenton*, 262 U.S. at 187 (a political subdivision "remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."). The City is a political subdivision of the State as well. *See* Article Tenth, § 1, of the Connecticut Constitution. App. 108a. The "sovereign will" of the State of Connecticut—which created the Authority, has subsidized the operation of the Airport with millions of dollars over the past decade, and can terminate

the Authority's existence with a simple act of its Legislature—is not to have the runway length at Tweed-New Haven Airport exceed 5,600 linear feet. *See* Conn. Gen. Stat. § 15-120j(c). App. 93a. Under long-standing precedent from this Court, the Authority and the City are barred from invoking the federal constitution in opposition to Connecticut's will. *See Ysursa*, 555 U.S. at 363 (citing *Williams*, 289 U.S. at 40).

2. Contrary to the Second Circuit's decision, *Gomillion* does not "put to rest" the notion that political subdivisions are "broadly prevented" from suing States, App. 12a, let alone resolve whether political subdivisions have standing to sue States under the Supremacy Clause. The petitioners in *Gomillion* were individuals, not political subdivisions and, consequently, this Court did not address whether a political subdivision has standing to sue its creator State for a Supremacy Clause claim. Accordingly, though *Gomillion* explains that state power over political subdivisions is limited by certain provisions in the Constitution, it does not stand for the principle that political subdivisions are among the parties that can bring actions to enforce such limitations.

As *Gomillion* highlights, the constitutional limitations on state power are not undermined if standing is denied to political subdivisions. Individual plaintiffs meeting Article III standing requirements who bring actions against a State alleging constitutional violations can accomplish the same objective. Thus, in *Gomillion*, individual plaintiffs sued to prevent state

abrogation of the right to vote under the Fifteenth Amendment. Had the City of Tuskegee first sued the State of Alabama and been denied standing as a political subdivision, the State would have been no less constrained from violating the Constitution. Rather, individual plaintiffs harmed by redistricting that caused their disenfranchisement could have brought the lawsuit against the State.

The same is true in the Supremacy Clause context of this case. Just as it was unnecessary for the City of Tuskegee to bring a case against Alabama to prevent the State from violating the Fifteenth Amendment rights of its citizens, it is equally unnecessary for the Authority or the City to sue the State of Connecticut to prevent a violation of the Supremacy Clause arising from enforcement of the Tweed-NH statute. Instead, to the extent there was a safety concern, the FAA could bring an action to enforce compliance with federal safety standards or simply act on its operating certificate. That would satisfy the Second Circuit's concern of ensuring that "a state is not free to enforce within its boundaries laws preempted by federal law," App. 13a, while avoiding the interference with state sovereignty described by the Ninth Circuit in *Burbank* and by this Court in *Printz* and *Alden*.

Further holdings from this Court after *Gomillion* cited by the Second Circuit as precedent in support of political subdivision standing under the Supremacy Clause are distinguishable from this case. App. 13a-14a. In *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011) ("*VOPA*"), the Court allowed a suit

brought by one state agency to proceed against another under a very rare set of circumstances, not present in this case. The *VOPA* plaintiff was considered to be "an independent state agency" under Virginia law with express authorization to sue state officials to enforce a federal right on behalf of disabled individuals. *Id*. at 251-52, 260-61. By contrast, the State of Connecticut has not authorized the Authority to bring legal actions against the State to enforce a federal right. *See* Conn. Gen. Stat. § 15-120g *et seq*., App. 88a-107a. In *VOPA*, the Court did not analyze political subdivision standing beyond Eleventh Amendment concerns. As a result, *VOPA* is inapposite.

In *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004), and *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), which both involved political subdivision challenges to state entities brought under the Supremacy Clause, the Court did not analyze political subdivision standing. Likewise, in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), in which a school district brought an action under the Equal Protection Clause to challenge a state law prohibiting busing of school students outside their districts, this Court did not directly address political subdivision standing. In weighing the precedential import of *Seattle School District*, the Ninth Circuit correctly determined that it "does not constitute binding authority with respect to standing." *Burbank*, 136 F.3d at 1363 (citing *United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)) ("[T]his Court is not bound by a prior exercise of jurisdiction in a case

where it was not questioned and it was passed *sub silentio*.").

The principle in *Tucker Truck* should apply to all three cases above, as well as *Romer v. Evans*, 517 U.S. 620 (1996), and *Board of Educ. v. Allen*, 392 U.S. 236 (1968), both of which lack an analysis of political subdivision standing. *Romer* and *Allen* are additionally inapplicable here since both cases involved individual plaintiffs.

II. The Second Circuit's Decision That the FAAct Preempts a State's Authority to Regulate Local Airports Involves an Issue of National Importance Meriting This Court's Review.

This Court's review is warranted because the Second Circuit has effectively held that the federal government alone has the power to decide whether to transform any airport from a small airport to a major hub, regardless of whether a State wishes to keep the airport small based on local concerns, such as limiting noise pollution. The Second Circuit found that the Tweed-NH statute falls within the FAAct's preemptive scope because smaller runways are occasionally unsafe for certain types of planes containing certain amounts of people and baggage. But the same could be said of *any other* State's decision to keep a runway short. Every short runway is safe for some planes but would also be safe for larger planes if it were lengthened. To hold that the decision to lengthen runways is therefore

a safety concern within the meaning of the FAAct is to transform the quintessentially local issue of airport size into a federal issue to be resolved by federal regulators. This Court should not countenance that result.

1. The Second Circuit's linkage of runway length to air safety due to occasional baggage and passenger weight limitations is not a concern unique to the Airport. Hundreds of airports nationwide of varying runway lengths confront this common issue. Depending on the type of aircraft serving and weather conditions affecting a given runway, FAA weight limitations could restrict passenger and baggage capacity on a particular flight and result in a fine for noncompliance—known in the airline industry as a "payload hit." But that does not mean that the airports or the runways located within them are unsafe.

This case provides an apt example. Notwithstanding the occasional payload hit to the air carrier servicing the Airport, the FAA has not identified any safety issue involving the runway that requires a federally-mandated safety response. App. 32a-33a ("There is no current or pending FAA enforcement action against the authority for noncompliance with any FAA standard applicable to 49 U.S.C. Part 139 airports."). Even the Authority's own aviation expert witness testified that regularly scheduled service can be provided to the Airport in a safe and commercially reasonable manner at its current runway length. App. 61a-62a.

The Second Circuit's conclusion that the Tweed-NH statute "is a total barrier to improvements that could make Tweed [Airport] safer" and that it "intrudes into the field of air safety" is thus misguided. App. 17a, 19a. First, the Airport is already safe, as far as the FAA is concerned, as confirmed by the Authority's own expert. Second, under the court's reasoning, any airport in the country where an air carrier adjusted its passenger and baggage capacity due to weather conditions would be deemed unsafe and would remain so unless the runway at that particular airport was lengthened. That reasoning is clearly flawed. Third, the fact that neither a small local airport, like Tweed-New Haven in Connecticut, nor a small, regional airport, like Westchester County Airport in New York, has runways long enough to accommodate a Boeing 767 does not make either airport unsafe. Rather, it simply means that air carriers offer potential customers different types of aircraft capable of traveling shorter routes of service.

2. The Second Circuit's decision deprives the State of Connecticut of any input into whether the Airport remains a local airport or eventually becomes a major hub of regularly scheduled commercial air service. There are many factors that would be considered by the state and local governments prior to determining whether to undertake any type of airport expansion. These factors could include: the airline service needs of State citizens, the cost/benefit of such a project, the environmental impact on surrounding wetlands and watercourses, local concerns of limiting nuisances such as increased traffic congestion and noise pollution, as

well as weighing the potential diversion of customers from other State airports. Based on the Second Circuit's holding, the federal government alone now has the power to decide whether to expand an airport, regardless of the aforementioned state and local considerations.

The preemptive reach of the FAAct cannot be so intended. None of the state and local considerations above falls under the subject matter encompassed by the FAAct, which governs the "airspace of the United States" and authorizes the FAA Administrator to develop plans and policies "to ensure the safety of aircraft and the efficient use of airspace." 49 U.S.C. § 40103(a)(1)-(b)(1). App. 109a. As notably stated by the United States Secretary of Transportation upon passage of the 1968 amendment to the FAAct, "[t]he Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 649-50 (1973) (Rehnquist, J., dissenting) (citations omitted). Instead, state and local governments should make such a decision, which could have a critical impact on state and local economies and their citizenry.

Accordingly, this case raises an issue of national importance and merits this Court's review. The Second Circuit's decision denies state and local governments the power to determine the size and nature of local airports, a holding that will have mischievous consequences nationwide.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

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