No. 01-652

In the Supreme Court of the United States

CUSTER COUNTY ACTION ASSOCIATION, ET AL.,
PETITIONERS

v.

JANE F. GARVEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge final actions of the Federal Aviation Administration (FAA) and the Colorado Air National Guard approving the Colorado Airspace Initiative (CAI), which modified the FAA's designations of airspace that the Colorado Air National Guard uses for training its pilots. The questions presented are:

1. Whether the FAA's determination, made in consultation with the Secretary of Defense, that the CAI was necessary in the interest of national defense presents a nonjusticiable political question.

2. Whether the FAA satisfied the requirements of 49 U.S.C. 40103(b)(3) by determining that the CAI was necessary in the interest of national defense and articulating the reasons for its determination.

3. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, required the FAA and the Colorado Air National Guard to prepare, as part of their environmental review of the CAI, an environmental impact statement covering all designations of airspace for military use throughout the United States.

4. Whether the FAA's designation of airspace for military use to implement the CAI violates the Third Amendment's prohibition on quartering soldiers in a house during peacetime without the owner's consent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 256 F.3d 1024.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2001. The petition for a writ of certiorari was filed on October 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has given the Federal Aviation Administration (FAA) exclusive jurisdiction over navigable

airspace and broad authority to regulate the use of that airspace. See 49 U.S.C. 40103. Among her other responsibilities, the Administrator of the FAA may assign use of airspace and prescribe air traffic regulations. 49 U.S.C. 40103(b)(1) and (2). "[I]n consultation with the Secretary of Defense," the Administrator also is directed to "establish areas in the airspace [she] decides are necessary in the interest of national defense." 49 U.S.C. 40103(b)(3)(A). When she establishes such areas, the Administrator must "restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas." 49 U.S.C. 40103(b)(3)(B).

2. The Colorado Air National Guard is a reserve component of the United States Air Force that is based at Buckley Air National Guard Base, near Denver. The Colorado Air National Guard has participated in Air Force operations in Iraq, Colombia, and elsewhere. To be able to perform its mission, the Colorado Air National Guard must conduct frequent, realistic training exercises. Pet. App. 5, 59-60.

During the early 1990s, the Colorado Air National Guard—in consultation with state and federal agencies, elected officials, and members of the public—developed the Colorado Airspace Initiative (CAI) in order to provide sufficient airspace for realistic training with its jet fighters and to accommodate the needs of commercial aircraft using the new Denver International Airport. Pet. App. 4-5; see Pet. 3-4. As finally approved by the FAA, the CAI resulted in 14 changes to the boundaries of areas designated as being used by the Colorado Air National Guard for nonhazardous flight training and for access to training areas. See Pet. App. 5-7.

Pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the FAA also approved an Environmental Impact Statement (EIS), initially prepared by the Colorado Air National Guard, assessing the potential environmental effects of the CAI. The EIS comprehensively reviewed issues including noise, land use, safety, visual resources and aesthetics, biological resources, cultural resources, air quality, and socioeconomic impacts. See Pet. App. 50-51. The EIS addressed three alternative proposals in detail: the Colorado Air National Guard's preferred version of the CAI, a variation on the preferred version, and a "no-action" alternative under which there would be no change to existing airspace designations. See *id.* at 45-50 (discussing alternatives). The EIS indicated that the number of military flights would be reduced under either of the CAI alternatives, as compared to the no-action alternative. *Id.* at 45. Furthermore, the two CAI proposals had distinct environmental advantages over the existing airspace designations, particularly because they raised minimum flight altitudes for normal operations from ground level to levels of at least 300 to 500 feet above ground level. 8/97 EIS at xxvi.

In October 1997, the Colorado Air National Guard issued a Record of Decision adopting a modified version of its preferred CAI option. Pet. App. 59-91. The FAA then solicited public comment and held informal public meetings on whether to adopt the Colorado Air National Guard's final EIS and designate new Military Training Routes and Military Operations Areas in accordance with the CAI. See *id.* at 53-55.[1] Based on

[1] The CAI did not require the designation of Restricted Areas (which confine or segregate activities considered to be hazardous to nonparticipating aircraft) or Prohibited Areas (in which flight is

public comments and its own review of the CAI, the FAA required additional mitigation measures that reduced the airspace designated under the CAI and prohibited military operations between 10 p.m. and 7 a.m. See *id.* at 51-53. In a Record of Decision released in October 1999 (*id.* at 41-58), the FAA determined that the Colorado Air National Guard's EIS complied with applicable legal requirements, adopted the EIS, and determined to implement the requested airspace designations (as modified by the FAA).

3. Petitioners and others sought judicial review of the final decisions of the Colorado Air National Guard and the FAA. The court of appeals denied the petition for review and affirmed the challenged orders. Pet. App. 1-40.

The court of appeals first considered petitioners' argument that the record evidence did not allow a conclusion that adoption of the CAI was necessary in the interest of national defense, which petitioners claimed was required under 49 U.S.C. 40103(b)(3)(A). See Pet. App. 9-10, 11-12. Citing this Court's decision in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), the court of appeals concluded that the political question doctrine precluded it "from second-guessing or interfering with the FAA's decision," made in consultation with the Secretary of Defense, that the CAI was necessary in the interest of national defense. Pet. App. 12. The court of appeals determined, however, that it was "free to review whether, in making that decision, the FAA

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prohibited for reasons of national security or welfare). See Pet. App. 6, 13; see generally 14 C.F.R. Pt. 73. The FAA establishes Restricted Areas and Prohibited Areas through formal rulemaking. See generally *Procedures for Handling Airspace Matters*, FAA Order 7400.2E, Pt. 5 (Dec. 7, 2000) (available at <http://www.faa.gov/atpubs/AIR/Index.htm>).

acted within the scope of its powers, followed its own regulations, and complied with the Constitution." *Ibid.*

The court of appeals then proceeded to evaluate petitioners' arguments on the issues it had identified as justiciable. Pet. App. 13-18. Initially, the court observed that 49 U.S.C. 40103(b)(3)—which authorizes the Administrator to "restrict or prohibit flight of civil aircraft"—arguably did not apply to the FAA's approval of the CAI, because none of the airspace designations contemplated by the CAI restricted or prohibited access by civil aircraft. Pet. App. 13; see also note 1, *supra*. The court did not rest on that point, however. Instead, the court concluded that, because the FAA's proceeding was not subject to the requirements of the Administrative Procedure Act (APA) for a formal agency rulemaking, see 5 U.S.C. 551 *et seq.*, the FAA was not required to make formal findings about necessity for national defense. Pet. App. 13-14. It was sufficient to satisfy Section 40103(b)(3)(A), the court concluded, that the record "amply demonstrates the FAA did, in fact, believe the [CAI] to be necessary in the interest of national defense, and articulated the reasons why." *Id.* at 14. The court also rejected petitioners' claims—not raised before this Court—that the FAA failed to comply with its own regulations and policies and unlawfully delegated its authority to the military. See *id.* at 14-18.

The court of appeals next rejected petitioners' challenges to the EIS. Pet. App. 20-35. As relevant here, petitioners argued that the Colorado Air National Guard and the FAA were required to evaluate not only the effects of the CAI, but also "the impact of the nationwide proliferation of military airspace and low-level military aircraft operations." *Id.* at 24 (internal quotation marks omitted). The court of appeals noted

that, under regulations promulgated by the Council on Environmental Quality to implement NEPA, different actions must be analyzed in the same EIS only if they are "connected" and, in particular, if they lack independent utility. *Id.* at 25-26; see 40 C.F.R. 1508.25(a)(1). The court explained that the record in this case did not suggest a nexus between the CAI and other military uses of domestic airspace, or that it was irrational to implement the CAI without regard to other military airspace designations or flight programs. For those reasons, the court concluded, a comprehensive, nationwide EIS was not required. Pet. App. 26.

Finally, the court of appeals rejected (Pet. App. 35-40) petitioners' claims that implementation of the CAI should be enjoined because it constituted a taking of private property without statutory authorization and a quartering of soldiers in violation of the Third Amendment. The claim of an unauthorized taking relied on petitioners' challenges under Section 40103(b)(3) and NEPA, and necessarily failed because the court had found that neither the FAA nor the Colorado Air National Guard exceeded their statutory authority. See *id.* at 35-37. The court of appeals determined that petitioners' Third Amendment claim was without support and "borders on frivolous," and noted that accepting it would require the United States military to obtain consent from all landowners over whose property its planes might fly. *Id.* at 38-39.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Nor does the decision below raise any issue of extraordinary importance. Review by this Court therefore is not warranted.

1. Petitioners claim that the court of appeals rendered "an expansive and unprecedented interpretation of the political question doctrine," Pet. 9, and in so doing ignored statutory provisions that authorize judicial review of decisions made under 49 U.S.C. 40103(b), see Pet. 11. In fact, the court of appeals narrowly held that while determining the necessity of Air National Guard flights in Colorado involved a nonjusticiable political question, the court did have jurisdiction to review whether the FAA's determination that the CAI was necessary was consistent with the Constitution, the FAA's statutory authority, and governing regulations. See Pet. App. 11-12. The court of appeals correctly applied this Court's decision in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and petitioners do not claim that there is a conflict with a decision of another court of appeals.

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). Accordingly, a case presents a nonjusticiable question if it involves, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. In *Gilligan*, students at Kent State University, following the protests and shootings there in 1970, sought "a judicial evaluation of the appropriateness of the training, weaponry and orders of the Ohio National Guard." 413 U.S. at 5-6 (internal quotation marks omitted). This Court explained that the plaintiffs had "overlook[ed] the explicit command of Art. I, § 8, cl. 16, which vests in Congress the power * * * '[t]o provide for organizing, arming, and disciplining the Militia,'" as well as the President's role in organization and discipline of the National Guard as Commander-in-Chief of the Armed Forces. *Id.* at 6-7. The Court held that judicial review of the National

Guard's training, weaponry, and orders would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Id.* at 7. The Court added that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" and that "ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Id.* at 10. Accordingly, the Court held that a nonjusticiable political controversy was presented. *Id.* at 10-11.

In this case, the Tenth Circuit correctly followed *Gilligan* and declined to second-guess the FAA's determination, made in consultation with the Department of Defense, that the CAI was necessary in the interest of national defense. That determination was a mixed question of fact, military judgment, and policy—whether particular military training is necessary in the interest of national defense. The court correctly refused to substitute its judgment for the judgment of the FAA on that question. Cf. *Aktepe* v. *United States*, 105 F.3d 1400, 1402-1404 (11th Cir. 1997) (suit for wrongful death and personal injuries resulting from alleged negligent conduct of naval training exercise presented nonjusticiable political question), cert. denied, 522 U.S. 1045 (1998).[2] Indeed, even as a statutory matter, there is no

[2] Petitioners suggest (Pet. 10) that the political question doctrine applies to "only a very narrow category of decisions made by the military itself." Under the Constitution, however, military decisions are always subject to civilian control. See *Gilligan*, 413 U.S. at 10. Thus, petitioners' distinction between the necessity determination made by the FAA in consultation with the Department of Defense and a decision made "by the military itself" is untenable.

reason to believe that 49 U.S.C. 46110—which authorizes judicial review of FAA orders—should be read to authorize judicial review of such a discretionary judgment by the FAA. Cf. 5 U.S.C. 701(a)(1) (excluding actions that are "committed to agency discretion by law" from judicial review under APA).

2. Petitioners next suggest (Pet. 13-22) that the court of appeals ruled that because 49 U.S.C. 40103(b)(3)(A) did not apply to the CAI, the FAA was not required to find that the airspace designations contemplated by the CAI were necessary in the interest of national defense. That holding, petitioners claim, was error. In fact, the court of appeals stated only that Section 40103(b)(3)(A) "[a]rguably * * * d[id] not apply" in this case. Pet. App. 13. The court's actual holding was that, if Section 40103(b)(3)(A) *did* apply, the FAA satisfied its mandate by determining, in consultation with the Department of Defense, that the CAI was necessary in the interest of national defense and by articulating its reasons for that determination. *Id.* at 14. The court of appeals' holding was correct.

a. Certiorari is not warranted to review the court of appeals' statement that Section 40103(b)(3)(A) arguably did not apply, because that statement was dictum. Cf. *Smith* v. *Butler*, 366 U.S. 161 (1961) (writ improvidently granted when decision of the court below did not turn on issue on which certiorari was granted). Nor would it have been error if the court of appeals had rested its decision on that ground. Section 40103(b)(3)(A) provides that the FAA Administrator "shall * * * establish areas in the airspace" that she "decides are necessary in the interest of national defense." Section 40103(b)(3)(B) makes clear that the "areas" referred to in Section 40103(b)(3)(A) are areas in which the FAA "restrict[s] or prohibit[s] flight of civil aircraft that [it]

cannot identify, locate, and control with available facilities." 49 U.S.C. 40103(b)(3)(B). In other words, the "areas in the airspace" referred to in Section 40103(b)(3)(A) are Restricted Areas and Prohibited Areas designated under 14 C.F.R. Part 73. See note 1, *supra*. Because implementation of the CAI did not require the establishment or modification of any Restricted Area or Prohibited Area, see Pet. App. 13, Section 40103(b)(3) did not apply. Rather, the FAA acted pursuant to 49 U.S.C. 40103(b)(1), which broadly authorizes the agency to "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."[3]

b. The court of appeals also did not err when it held that the FAA adequately explained the basis for its approval of the CAI. See Pet. 19-22. As the court of appeals noted (Pet. App. 13), agencies generally are not required to make formal findings in support of their determinations unless a specific statutory directive requires them to do so. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417 (1971). Petitioners claim (Pet. 18, 21) to find such a statutory mandate in 49 U.S.C. 40103(b)(3) and 46105(b). As discussed above, Section 40103(b)(3) simply requires a decision by the Administrator, "in consultation with the Secretary of Defense," as to whether flight restrictions "are necessary in the interest of national defense." 49 U.S.C. 40103(b)(3)(A). It does not mandate formal findings. Section 46105(b) states that the Administra-

[3] Petitioners suggest (Pet. 17 n.2) that the applicability of aircraft separation rules within CAI airspace constitutes a restriction on civil aviation and triggered 49 U.S.C. 40103(b)(3). That argument ignores 49 U.S.C. 40103(b)(2), which authorizes the FAA to prescribe air traffic regulations without regard to whether there is a restriction on flight under Section 40103(b)(3).

tor's orders "shall include the findings of fact on which the order is based and shall be served on the parties to the proceeding and the persons affected by the order." Section 46105(b) is codified in Chapter 461 of Title 49, which establishes procedures for formal complaint proceedings, investigations, and enforcement actions, and addresses matters such as recording of proceedings, service of process, subpoenas, depositions, and witness fees. Consistent with the reference in Section 46105(b) to "the parties to the proceeding," the requirement of formal fact-findings is best read as being limited to adjudicatory proceedings, not informal decisions such as the FAA's approval of the CAI.

Even if Section 46105(b) did require the FAA to "include * * * findings of fact" in its Record of Decision in this case, however, the agency complied with that requirement. The FAA satisfies that requirement if the factual basis for its decision is set forth somewhere in the record, see, *e.g.*, *Holmes* v. *Helms*, 705 F.2d 343, 346 (9th Cir. 1983); *Gibson* v. *FAA*, 714 F. Supp. 233, 234 (E.D. Tex. 1989), and if a court can understand the basis of the agency's decision, see *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 306 F.2d 739, 742 (D.C. Cir. 1962). The court of appeals found (Pet. App. 14) that the FAA "articulated the reasons" why it believed the CAI to be necessary, which satisfied the requirement of Section 46105(b) if it applied.[4] That fact-based holding does not warrant this Court's review.

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[4] *D&F Afonso Realty Trust* v. *Garvey*, 216 F.3d 1191 (D.C. Cir. 2000), on which petitioners rely (Pet. 21-22 n.4), is not to the contrary. There, the court held that the FAA had "abandon[ed] * * * its own established procedure" and failed to provide a "reasoned analysis on the record." 216 F.3d at 1196-1197.

3. Petitioners next challenge (Pet. 22-26) the court of appeals' holding (Pet. App. 24-26) that the EIS in this case was not deficient for failing to address the nationwide impact of all military aircraft operations in military-use airspace. Petitioners contend (Pet. 23) that all such operations are "connected actions" that, under the Council on Environmental Quality's regulations implementing NEPA, should have been considered in the EIS. They rely specifically on 40 C.F.R. 1508.25(a)(1)(iii), which provides that "connected actions" include actions that "[a]re interdependent parts of a larger action and depend on the larger action for their justification."

The courts have consistently held that actions are not "connected" under that regulation if they have independent utility. *E.g.*, *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 579-580 (9th Cir. 1998); *South Carolina* v. *O'Leary*, 64 F.3d 892, 899 (4th Cir. 1995); *Town of Huntington* v. *Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988). Actions are independent, not connected, if they "could exist without the other, although each would benefit from the other's presence." *Northwest Resource Info. Ctr., Inc.* v. *National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995) (quoting *Sylvester* v. *U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989)). The court below applied that accepted test and determined as a factual matter that the CAI had independent utility. Pet. App. 25-26. Although petitioners disagree with the court's conclusion (Pet. 24-25), their factual arguments do not raise any legal issue that warrants this Court's review, nor do they show that the justifications supporting implementation of the CAI (*i.e.*, training requirements and the opening of the Denver International Airport) de-

pended on approval of all other military airspace proposals across the Nation.

4. Finally, petitioners claim that approval and implementation of the CAI violated the "philosophical underpinnings" of the Third Amendment. Pet. 26. The Third Amendment provides, in relevant part, that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner." U.S. Const. Amend. III. The court of appeals correctly rejected petitioners' constitutional claim, and its holding is not in conflict with the decision of any other court.

Congress long ago declared navigable airspace to be a public highway, thereby superseding the common law notion that ownership of land also includes ownership of the airspace above it. See *United States* v. *Causby*, 328 U.S. 256, 260-261 (1946). Accordingly, even assuming for purposes of argument that the protection of the Third Amendment might under some circumstances extend beyond a "house," the Amendment does not guarantee petitioners the right to exclude military aircraft from navigable airspace. See Pet. App. 39.

Petitioners nevertheless argue (Pet. 28) that the Third Amendment is implicated insofar as the CAI authorizes low-level flights that are outside navigable airspace. In particular, they speculate (Pet. 27-28) that, under the CAI, pilots might fly below the minimum safe flying altitudes specified by the FAA in 14 C.F.R. 91.119. The court of appeals correctly rejected that argument, explaining (Pet. App. 16-18) that Colorado Air National Guard pilots are in fact required to comply with Section 91.119 and, in any event, the FAA has authority under 49 U.S.C. 40109(b) to grant exemptions from its generally applicable safety requirements. Petitioners do not make any argument that the court of appeals erred in holding that the CAI designates only

navigable airspace for military use, and this holding forecloses petitioners' Third Amendment argument.

Petitioners purport (Pet. 29-30) to find support for their Third Amendment claim in *Arnhold* v. *United States*, No. 4:88 CV 934 WLH (88-0934C(3)) U.S. Dist. LEXIS 17904 (E.D. Mo. June 13, 1989), an unpublished district court decision. That case involved a claim under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for property damage caused by sonic booms from military aircraft. No such tort claims are involved in this case.

Nor do Fourth Amendment principles support petitioners' constitutional claim. In *NORML* v. *Mullen*, 608 F. Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), on which petitioners rely (Pet. 29), the district court ruled that helicopter surveillance violated the Fourth Amendment because law enforcement personnel were not "just surveying open fields, but [were] deliberately looking into and invading peoples' homes and curtilage." 608 F. Supp. at 957. There is no such surveillance here. Furthermore, this Court held shortly after *NORML* was decided that surveillance of a home's curtilage from an aircraft within navigable airspace does not violate the Fourth Amendment. *California* v. *Ciraolo*, 476 U.S. 207 (1986); see also *Florida* v. *Riley*, 488 U.S. 445 (1989).

The court of appeals' rejection of petitioners' Third Amendment claim does not leave property-owners who endure frequent, highly disruptive overflights "at the mercy of advancing technology." Pet. Br. 29 (quoting *Kyllo* v. *United States*, 121 S. Ct. 2038, 2044 (2001)). Such owners may bring a claim for compensation under the Takings Clause. See *United States* v. *Causby*, *supra*. The availability of a Fifth Amendment remedy

in proper cases further confirms that petitioners' tortured reading of the Third Amendment is incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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