

No. 92972-6

IN THE SUPREME COURT OF  
WASHINGTON

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(Court of Appeals No. 72416-9-1)

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal  
Representative, Nancy A. Becker,

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondents.

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**SUPPLEMENTAL BRIEF OF APPELLANT/PLAINTIFF  
ESTATE OF DR. VIRGIL V. BECKER JR**

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## I. INTRODUCTION

Division One of the Court of Appeals acted in a doctrinal vacuum when it issued its published opinion affirming the summary judgment in favor of defendant Forward Technology Industries (FTI). The summary judgment precluded appellant Nancy Becker (Becker), as personal representative of her husband's estate, from proving to a jury that FTI assembled and sold a defective product, a component part of an aircraft engine, which caused the fatal airplane crash.

In a remarkable opening sentence, Division One began with a confession of doubt: "The scope of implied field preemption in aviation law is evolving and elusive." *Estate of Becker v. Forward Tech. Indus., Inc.*, 192 Wn. App. 65, 69, 365 P.3d 1273 (2015) (Appx. A). Division One found it equally "elusive" to determine whether an applicable parallel federal standard of care could be derived from the federal regulations that set performance standards which necessarily require an engine's component parts to function properly. *Id.* at 80.

The net effect: FTI is immune from liability because it is subject to no federal or state regulation or standard of care. State tort law has been preempted by "pervasive" federal regulation, but federal regulation is not so pervasive to provide any standard of care that applies to FTI's role in manufacturing defective carburetor floats.

Suddenly, pervasive seems not so persuasive.

Fortunately, this Court is not subject to the same “elusive” bubble as Division One. A recent and significant decision, which was issued after Becker’s petition for review was filed, rejects field preemption in aircraft product liability law,

In *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir., 2016) (Appx. B), the Third Circuit held that implied field preemption does *not* preempt state law tort claims, while recognizing that federal uniformity continues under implied conflict preemption. “The field of aviation safety. . . does not include product manufacture and design, which continues to be governed by state tort law, subject to traditional conflict preemption principles.” *Id.* at 709.

*Sikkelee* involves similar factual and legal issues: namely, whether federal aviation law preempts state standards of care involving a defective carburetor and whether a defendant is entitled to a summary judgment when there are no articulable federal standards of care under the Federal Aviation Regulations specifically applicable to a defective component part.

*Sikkelee* squarely contradicts Division One’s opinion. Federal law no longer is “evolving and elusive,” as Division One believed. To the

contrary, as explained in *Sikkelee*'s thoughtful and detailed analysis, aircraft product liability claims are not subject to implied field preemption.

Equally important, *Sikkelee* outlines the "perverse" consequences of using implied field preemption to immunize defendants from liability for defective aircraft component parts. As *Sikkelee* holds, state tort law steps in to fill the gap where federal regulations are silent; it supplements federal regulation and promotes aviation safety precisely because it does not conflict with any federal standards.

As discussed below, *Sikkelee* comports with principles of federalism, the purpose and intent of the 1958 Federal Aviation Act (the Act), the federal aviation regulations, and federal and Washington case law. This Court should reverse the summary judgment on federal preemption grounds and remand Becker's claims against FTI for trial based on Washington tort standards of care.

## **II. ISSUE PRESENTED FOR SUPPLEMENTAL BRIEF**

Should this Court follow the Third Circuit's opinion in *Sikkelee* and find that FTI has failed to overcome the strong presumption against federal preemption of Becker's Washington tort claims, in the absence of clear and manifest Congressional intent to preempt?

### III. STATEMENT OF THE CASE

Dr. Virgil Becker was killed in an airplane accident in Washington on July 27, 2008. Post-accident examination revealed that a component part of the aircraft's carburetor, the carburetor float, had two manufacturing defects: the sealed float leaked and filled with fuel, and the part was out of dimensional specification.<sup>1</sup> CP 547-550, 642-646, 812-813, 1276-1277. The failure of the carburetor float allowed unregulated fuel into the engine, causing it to flood and fail, resulting in the accident. CP 547-550, 642-646, 812-813, 1276-1277.<sup>2</sup>

The aircraft's engine was manufactured by Lycoming (AVCO), and the engine's carburetor was manufactured by Precision Airmotive (Precision), both of whom are certified by the Federal Aviation Administration (FAA) and must comply with the Federal Aviation Regulations (14 CFR *et seq.*).

FTI, a self-described expert in polymer welding and assembly, manufactured the defective carburetor float pursuant to its contract with Precision. CP 262, 342. FTI specifically built the welding machines and

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<sup>1</sup> An engine carburetor provides the appropriate fuel/air mixture to the engine, which is required for proper operation. If the mixture is too rich (too much fuel), the engine may flood and fail. If the mixture is too lean (not enough fuel), the engine may starve and fail.

<sup>2</sup> In undertaking its *de novo* review of the summary judgment for FTI, this Court should view the facts and reasonable inferences in the light most favorable to Becker, as the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.2d 886 (2008). Decisions involving preemption are also subject to *de novo* review. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845, 853 (2008).

tooling to manufacture the carburetor floats, which required special equipment and trained operators. CP 296, 297.

FTI manufactured and supplied to Precision tens of thousands of such carburetor floats. CP 571. Precision's purchase orders called upon FTI to "[m]anufacture" the carburetor floats in accordance with drawings and specifications. CP 298. This included assembly, welding, weld inspection, conducting a hermetic seal check, and certifying compliance with specifications. CP 298, 530-531.<sup>3</sup>

Before the underlying accident, there was a known and significant history of many FTI floats leaking and failing. CP 264, 369. So many, in fact, that FTI commonly referred to them as "leakers." CP 346, 379.<sup>4</sup>

FTI knew that its carburetor floats were for use on aircraft and could not be allowed to leak. CP 370, 379. Scott Olson, FTI's project engineer, testified at deposition, "[m]y concern was that we were making [Precision] bad parts. They were paying for bad parts. . . . It was a bad

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<sup>3</sup> FTI has sought to trivialize its significant involvement in the case, arguing that it was merely a welding company which did not design, manufacture or sell the carburetor floats to Precision. (FTI says it simply provided a "fee for service," relying entirely on Precision to ensure that FTI's products were safe for their intended use even though FTI's personnel knew they were defective; see FTI's Resp. Br. at 4-5.)

Such characterizations ignore the standards of review on summary judgment, which call for the evidence to be construed most favorably towards Becker, as the nonmoving party. It is up to the jury, as the trier of fact, to determine the appropriate inferences to be drawn from such evidence. *Ranger Ins. Co.*, 164 Wn.2d at 552.

<sup>4</sup> FTI defined "leaker" as "a float that is leaking at the weld." CP 361. FTI knew that a "leaker" did not meet the hermetically sealed standard that FTI was required to meet. CP 265.

situation.” CP 123-126. He conceded that FTI was selling defective floats to Precision. *Id.*<sup>5</sup> FTI further knew that Precision’s leak testing was inaccurate and unacceptable (leakers still passed) and that FTI had superior leak testing methods and equipment, which were not being used. CP 530, 644.

Becker filed suit against FTI and other defendants. CP 1-30, 54-82. FTI answered the complaint, but did not raise federal preemption as an affirmative defense. CP 31-47.

Nonetheless, in June 2012, FTI moved for summary judgment, arguing that federal regulations regarding aircraft fuel systems were so comprehensive and pervasive as to preempt Washington tort law under the doctrine of implied field preemption. CP 234. The trial court agreed with FTI and held that federal law preempted Washington tort standards of care. CP 666.<sup>6</sup>

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<sup>5</sup> FTI claims that Becker has “distorted” Olson’s testimony and taken it out of context. See FTI’s Resp. Br. at 7. But the proper “context” for such assertions presents an issue for the trier of fact, and cannot be determined on summary judgment. *Ranger Ins. Co.*, 164 Wn.2d at 552. Becker’s appellant’s opening brief and appellant’s reply brief in the Court of Appeals contain a more detailed discussion of the procedural history and statement of facts, and Becker incorporates them by reference in this supplemental brief.

<sup>6</sup> The trial court also disallowed Becker’s motion to amend to add punitive damages claims against FTI. CP 231-233. This appellate issue will become ripe for consideration should this Court follow *Sikkelee* and determine that Washington tort claims are not preempted, thereby reversing the summary judgment. This issue is best addressed by the trial court, particularly in light of further discovery since Becker’s initial motion for leave to amend, which new evidence provides additional support to sustain a punitive claim under Minnesota law.

Division One agreed with the trial court and addressed the “evolving and elusive” issue of implied field preemption, relying upon dicta in a recent Ninth Circuit opinion, *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009) and the federal district court opinion in *Sikkelee* to conclude that implied field preemption could apply to a specific area of aircraft safety if “pervasive regulations” govern that area. *Becker*, 192 Wn. App. at 75-76, 79, 80, fns. 32, 36<sup>7</sup>

The Third Circuit issued its landmark opinion in *Sikkelee*, reversing the district court, one month after Becker filed her petition for review with this Court. This supplemental brief is the first opportunity for Becker to address *Sikkelee*.

#### IV. ARGUMENT

##### A. This Court Should Follow *Sikkelee* By Declining To Preempt Becker’s Washington Tort Claims Against FTL.

The Third Circuit’s long-awaited opinion in *Sikkelee* makes no changes in existing law or practice, but merely clarifies existing law:

[O]ur holding does not effect a sea change. On the contrary, it simply maintains the status quo that has existed since the inception of the aviation industry, preserving state tort remedies for people injured or killed in plane crashes

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<sup>7</sup> The Ninth Circuit’s holding in *Martin* rejected implied field preemption. *Martin*, 555 F.3d, at 812. The (now reversed) district court opinion in *Sikkelee* is the only published opinion cited by Division One finding implied field preemption in aviation product liability without an accompanying regulation. *Becker*, 192 Wn. App. at 79, 80, fns. 32, 36, (citing *Sikkelee v. Precision Airmotive Corp.*, 45 F.Supp, 431, 446 (M.D. Pa. 2014)).

caused by manufacturing and design defects. That status quo leaves intact the traditional deterrence mechanism of a state standard of care, with attendant remedies for its breach.

*Sikkelee*, 822 F.3d at 707.

*Sikkelee* shows why conflict preemption, not field preemption, best achieves the necessary balance between federal and state regulations while promoting aviation safety, uniform national standards and accident victim compensation.

FTI has never contended that Becker's tort claims for its defective carburetor floats will impair FAA standards or regulations. FTI has premised its summary judgment exclusively on field preemption, not conflict preemption, a basis which *Sikkelee* has eviscerated for product defect claims.

**1. As *Sikkelee* Holds, Applying Washington Law To FTI's Defective Carburetor Floats Is Fully Consistent With The Congressional Intent In Enacting The Federal Aviation Act, Including The Act's Savings Clause.**

In *Sikkelee*, a pilot died in a crash of his Cessna 172. *Sikkelee*, 822 F.3d 680. The aircraft type, including the engine and carburetor, were the same as in this case. His widow sued various defendants (including AVCO and Precision) asserting state law product liability and negligence claims because of a malfunction or defect in the carburetor. *Id.*

The Third Circuit reversed the district court's determination on summary judgment that the widow's state law claims were preempted under implied field preemption. "[N]either the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims. Rather, subject to traditional principles of conflict preemption . . . , aircraft products liability cases like Appellant's may proceed using a state standard of care." *Id.* at 683.

The court emphasized the strong presumption against preemption in areas traditionally occupied by state laws, which are preempted only where Congress expresses a clear and manifest intent to make federal standards both supreme and exclusive. *Id.* at 690, (citing *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009)).<sup>8</sup>

After a lengthy review of the history of aviation and preemption, *Sikkelee* rejected the defendants' claim that aviation presents a special case, justifying a presumption in favor of preemption. "Consistent with the uniform treatment of aviation products liability cases as state law torts... the presumption against preemption applies in the aviation context." *Id.* at 691-692.

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<sup>8</sup> In Washington, "[t]he presumption against preemption is 'even stronger with state regulation regarding matters of health and safety,' in which states have traditionally exercised their sovereignty." *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 78-79, 896 P.2d 682, 689 (1995) (citation omitted). See, *Multi v. Boeing Aircraft Co.*, 25 Wn.2d 871, 887, 172 P.2d 249, 258 (1946) (acknowledging the application of common law to aviation torts before the enactment of the Act).

As *Sikkelee* further recognized, nothing in the Act or the applicable federal regulations changes this fact. The Act has no express preemption clause. To the contrary, the Act directs the Federal Aviation Administration (FAA) to establish “*minimum* standards” regarding the design and manufacture of aircraft and aircraft components. 49 U.S.C. § 44701(a). This statutory language, as found by *Sikkelee*, is “insufficient on its own to support a finding of clear and manifest congressional intent of preemption . . . .” *Id.* at 692.

The Act expressly preserves state tort remedies by way of a “savings clause”, which states that “[a] remedy under this part is in addition to any other remedies provided by law.” 49 U.S.C. §40120(c). The U.S. Supreme Court has observed that this statutory scheme permits states to retain their traditional regulatory power over aspects of aviation. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378–79, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

As *Sikkelee* observed, such a savings clause “belies [the defense] argument that Congress demonstrated a clear and manifest intent to preempt state law products liability claims altogether.” *Sikkelee*, 822 F.2d at 692-693; see also *Martin*, 555 F.3d at 808.

In addition, Congress enacted the General Aviation Revitalization Act (GARA) in 1994, establishing an 18-year statute of repose for state

products liability claims against certain aircraft manufacturers. 49 U.S.C. § 40101. GARA was intended to “strike a fair balance between manufacturers, consumers, and persons injured in aircraft accidents.” *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 213, 254 P.3d 778 (2011) (citation omitted).

Clearly, if such state law claims were preempted under implied field preemption there would be no need for such legislation. As noted in GARA’s legislative history, the statute is a “very limited Federal preemption of state law.” “And in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.” H.R. Rep. No. 103–525(II) (1994).<sup>9</sup> *Sikkelee* recognized that “GARA confirms that Congress understood and intended that Act to preserve such [state law] claims.” *Sikkelee*, 822 F.2d at 698.

In Washington “[t]here is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption.” *Inlandboatmen’s Union of the Pac. v. Dep’t of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992). Washington courts

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<sup>9</sup> Though analysis of the Act itself is the best determiner of Congressional intent, consideration of subsequent legislation can assist in determining the earlier Congressional intent. In fact, the U.S. Supreme Court has looked to (and found persuasive) subsequent legislative history to determine Congressional intent in the preemption context. See, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

have held that the establishment of federal minimums is insufficient to show Congressional intent to occupy a field. *Dep't of Labor & Indus. v. Lanier Brugh*, 135 Wn. App. 808, 818, 147 P.3d 588, 593 (2006). Washington requires affirmative regulation of an area to find field preemption; when regulations are silent as to specific relevant areas, there is no field preemption. *Id.* at 816; *see also, Becker v. U.S. Marine Co.*, 88 Wn. App. 103, 943 P.2d 700 (1997).

Like the defendants in *Sikkelee*, FTI has failed to meet its burden to establish clear and manifest Congressional intent to preempt Washington product liability law.

**2. *Sikkelee* Is Fully Consistent With Existing Decisional Law, Including The Ninth Circuit.**

*Sikkelee* thoroughly examined federal aviation precedent on the subject of implied field preemption for aircraft design and manufacture, and found no circuit split. “In sum, no federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or otherwise field preempted.” *Sikkelee*, 822 F.3d at 707.

*Sikkelee* explained that its earlier decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), which involved pilot warnings of in-flight turbulence to passengers, applied only to operating an aircraft — not to an aircraft’s design or manufacture. “This case presents the

question whether *Abdullah*, in which we held that federal law preempts the field of aviation safety, extends to state law products liability claims. We hold it does not.” *Sikkelee*, 822 F.3d at 683 (citations omitted).

*Sikkelee* analyzed other circuit decisions that purportedly described the field of aviation safety as being preempted, but found that “even those courts have carefully circumscribed the scope of those rulings,” and none so held for aircraft design or manufacture. *Id.* at 705-707.

Similar to Division One here, *Sikkelee* focused on Ninth Circuit decisional law in general and *Martin*, 555 F.3d at 806, in particular. But, unlike Division One, *Sikkelee* recognized and stressed that no Ninth Circuit case has held that aviation product liability claims are field preempted. *Sikkelee*, 822 F.3d at 706.

*Martin* held there were no pervasive regulations for the specific defective part at issue (airstairs), and state law was not preempted in that area. *Martin* 555 F.3d at 812.

Indeed, *Martin* specifically cautioned that the federal certification process should not be read so broadly as to preempt all state design and manufacturing claims not based on a violation of a specific federal regulation. *Martin*, 555 F.3d at 810-811. “In areas without pervasive regulations or other grounds for preemption, the state standard of care

remains applicable.” *Id.* at 811. The same is true with regard to carburetor floats.

**3. *Sikkelee* Applies Traditional Principles Of Conflict Preemption To Preserve The Strong Federal Interest In National Oversight By The FAA Over Aircraft Parts Including Fuel Systems And Their Component Parts.**

*Sikkelee* does not close the door on federal preemption in aviation tort claims. Rather *Sikkelee* recognized existing “traditional principles of conflict preemption” to resolve any conflicts between the FAA’s role in promoting aviation safety and state law standards of care. *Id.* at 696. State tort law is conflict preempted “‘where a particular state requirement threatens to interfere with a specific federal interest,’” (*Id.* at 704), or where manufacturers are unable to comply simultaneously with federal and state requirements. *Id.* at 703-704. “Thus, there may be cases where a manufacturer’s compliance with both the type certificate and a state law standard of care ‘is a physical impossibility,’ or would pose an obstacle to Congress’s purposes and objectives. In such cases, the state law claim would be conflict preempted.” *Id.* at 704 (internal citation omitted).

As *Sikkelee* pointed out, even the FAA, which filed a letter brief in the case, accepts “traditional conflict” jurisprudence as the proper means to preserve and protect the federal interest in uniform regulation. *Id.* at 699. In the FAA’s view, traditional conflict preemption addresses the

Congressional-struck balance “between protecting these [federal] interests in uniformity and permitting States to compensate accident victims.’ FAA Ltr. Br. p. 12.” *Id.* at 707.

FTI has not shown that Becker’s state product law claims pose an impossible conflict with an FAA-approved design for aircraft fuel systems, or that compliance with Washington tort law would undermine any related federal aviation regulations. Instead, FTI concedes express and conflict preemption do not apply. CP 243.<sup>10</sup>

Indeed, FTI goes so far as to say that there are no federal standards which apply to manufacturing defects in its component parts, and no regulations that require FTI, as an uncertificated contractor, to warn consumers about dangers, defects or safety issues with its product. This is not the substance of which traditional conflict preemption (or indeed preemption of any type) is made.

Since there are no federal regulations about how carburetor floats should be manufactured, welded or tested, the trial court should determine whether FTI’s defective float violates Washington product liability standards of care.

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<sup>10</sup> In responding to Becker’s motion for reconsideration, FTI contended it had no obligation to ensure that its component parts complied with federal airworthiness regulations, because it was not certified by the FAA. CP 1129-1142. FTI has never taken the position in this case that conflict preemption applies.

Preserving state tort remedies in the manufacturing context “leaves intact the traditional deterrence mechanism of a state standard of care, with attendant remedies for breach” and “is consistent with the Federal Aviation Act, FAA regulations, GARA, and decisions of the Supreme Court and our sister Circuits: promoting aviation safety.” *Id.* at 707-708.

**B. *Sikkelee* Articulates The “Perverse Effect” Of Implied Field Preemption In Manufacturing Defect Cases Which Immunizes Defendants Like FTI From Civil Liability For Their Tortious Conduct.**

As this case demonstrates, a blanket application of implied field preemption is not supported by public policy, which seeks to increase aviation safety and protect consumers, particularly for an uncertified aircraft component parts supplier like FTI who falls outside the federal regulatory system.

Under Division One’s opinion, FTI, as an unregulated component parts supplier, can continue to produce leaky carburetor floats, knowing they are unfit for their intended use on general aviation aircraft. FTI has no incentive to submit its floats to highly reliable and readily available testing because it is not subject to tort liability.

The evidence, which has yet to go to a jury, shows that FTI itself termed its floats “leakers,” admitting they were “bad parts” sold to Precision as part of a “bad situation”. CP 123-126. Notwithstanding these

compelling facts of FTI's responsibility for a defective carburetor float that leaked and rubbed on the carburetor bowl wall, causing the engine to lose power (CP 813, 1276), FTI seeks to escape liability (on summary judgment no less) by arguing that federal law occupies the "area" of an airplane engine's fuel system without populating this area with any corresponding federal standards of care.

This is the same "perverse" consequence about which *Sikkelee* has warned. 822 F.3d at 695. *Sikkelee* stressed the need for state tort law claims to provide relief to persons injured by defective aircraft parts that otherwise would be unavailable in the absence of particularized federal standards of care. "[W]e find it 'to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'"" *Id.* at 696 (citation omitted).

Indeed, to hold otherwise would be to conjure judicially-created immunities which would thwart the purposes and objectives of Congress. Sweeping immunity would arise whenever the FAA did not regulate a certain area such as carburetor component parts. Suppliers of component parts could manufacture defective products with impunity – unregulated by the FAA, and simultaneously beyond the reach of state law – whether relief is sought by an injured person, or by a FAA regulated certificate holder under a claim of contribution or indemnity.

This reasoning, and the results that (il)logically follow, are absurd. If implied field preemption shields an unregulated supplier such as FTI, a certificated manufacturer could not enforce a common law claim for subrogation, contribution, or indemnity, because the unregulated supplier would be effectively immune from suit, a result hardly within the scope of Congressional intent to promote and improve aviation safety.

As *Sikkelee* holds, this cannot be the law.

FTI has minimized its misconduct in producing the carburetor floats by arguing that it is Precision, as the federally regulated PMA (parts manufacturer approval) certificate holder, that has the responsibility to independently test every float it installs in a carburetor or sells as a replacement part. (FTI's Answer to Pet. for Review at 8.) Accordingly, FTI disclaims that it has any role or owes any obligation under Washington law, even when, as in this case, Precision files bankruptcy before trial.

FTI's finger pointing is not a defense to its own tortious conduct. Moreover, FTI's arguments regarding its role and its legal obligations clearly present questions of fact that fall squarely within the province of Washington judges and juries under Washington law.

If any party in this litigation should be governed by state law standards of care, it should be FTI, an unregulated entity which has "never

held” any FAA certificates (Resp. Br. at 8), and for which it disclaims any regulatory responsibilities under the federal regulations (*Id.* at 9, and at 36 fn. 19).

## V. CONCLUSION

Division One’s opinion affirming the summary judgment in favor of FTI is an outlier in aviation product liability law, and even more so after *Sikkelee*. To our knowledge, it is the only published appellate opinion in the country to use implied field preemption to create blanket immunity for tort claims involving defective aircraft component parts.

To make matters worse, an unregulated parts supplier has been able to invoke federal immunity as a benefit (namely a shield against any tort liability) without being subject to any of the burdens or responsibilities of federal regulation: a result hardly consistent with the Act’s policy to promote aviation safety.

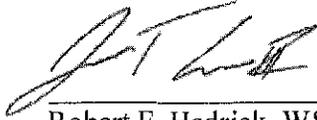
This Court should follow *Sikkelee* and allow Becker to pursue her factual and legal claims regarding FTI’s defective carburetor floats within the Washington judicial process. Since the FAA has never made any affirmative determinations regarding how carburetor floats are manufactured or tested, there is no reason to use federal preemption to insulate FTI from whatever liability it may have under Washington law to

provide fair compensation to wrongfully injured victims and to promote aviation safety.

Absent any clear and manifest expressions of Congressional intent, it would be ironic indeed if Washington is less protective of the important role of its tort law in our federal system than are the federal courts.

Respectfully submitted this 2nd Day of September, 2016.

AVIATION LAW GROUP, PS

By:   
\_\_\_\_\_  
Robert F. Hedrick, WSBA No. 26931  
James T. Anderson, WSBA No. 40494

Attorneys for Plaintiff/Appellant  
Estate of Virgil V. Becker, Jr.

**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that the foregoing and following documents were served upon the interested parties, on the date signed, and in the manner indicated, below, and were also filed with the Washington Supreme Court:

1. Supplemental Brief of Appellant with Appendices

Francis S. Floyd Floyd, Pflueger & Ringer, P.S. 200 West Thomas Street, Suite 500 Seattle, Washington 98119 <i>Attorneys for Defendant Forward Technologies Industries, Inc.</i>	<input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via E-mail <input type="checkbox"/> Via E-Service
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Signed this 2nd day of September, 2016, at Seattle, Washington

  
\_\_\_\_\_  
James T. Anderson

**Appendix A:**

*Estate of Becker v. Forward Tech. Indus., Inc.*  
192 Wn. App. 65, 365 P.3d 1273 (Wn. App. 2015)

192 Wash.App. 65  
Court of Appeals of Washington,  
Division 1.

ESTATE OF Virgil Victor BECKER,  
Jr., by its Personal Representative,  
Jennifer L. White, Appellant,

v.

FORWARD TECHNOLOGY  
INDUSTRIES, INC., Respondent.

No. 72416-9-I.

|

Dec. 28, 2015.

### Synopsis

**Background:** Personal representative of victim's estate brought action against contractor who assembled airplane's defective carburetor float, alleging state causes of action for strict liability, negligence, and breach of warranty premised on fatal airplane crash. The King County Superior Court, Monica Benton, J., granted contractor summary judgment. Plaintiff appealed.

**Holdings:** The Court of Appeals, Verellen, A.C.J., held that:

[1] Federal Aviation Act (FAA) and regulations adopted by the Federal Aviation Administration pervasively regulated the area of aircraft fuel systems, and thus implied field preemption precluded applying any state law standard of care for defects in the assembly and welding of airplane's carburetor float with respect to contractor;

[2] contractor did not waive preemption claim by failing to plead preemption as an affirmative defense; and

[3] trial court did not abuse its discretion in denying plaintiff's motion to file a third amended complaint to assert violations of federal law.

Affirmed.

### Attorneys and Law Firms

**\*\*1274** Robert Francis Hedrick, James T. Anderson III, Aviation Law Group PS, Seattle, WA, for Appellant.

Melissa O'loughlin White, Cozen O'Connor, Catherine Wright Smith, Howard Mark Goodfriend, Smith Goodfriend PS, Seattle, WA, for Defendant.

**\*\*1275** Francis Stanley Floyd, Douglas Kenneth Weigel, John Armen Safarli, Floyd Pflueger & Ringer PS, Seattle, WA, for Respondent.

### Opinion

VERELLEN, A.C.J.

**\*69** ¶ 1 The scope of implied field preemption in aviation law is evolving and elusive. But under recent Ninth Circuit case law, the key consideration is whether the area at issue is pervasively regulated.

¶ 2 This action arises from a fatal airplane crash linked to a defective carburetor float. The primary question on appeal concerns implied field preemption of state tort standards of care applicable to the contractor who assembled the float.

¶ 3 The Federal Aviation Act (FAA) broadly regulates the area of aviation safety.<sup>1</sup> The FAA's regulatory scheme requires manufacturers of airplane engines and their components to obtain certificates from the Federal Aviation Administration approving their design and manufacture. Here, Avco Corporation, a type certificate holder, built the airplane's engine. Precision Airmotive Corporation, a "parts manufacturer approval" (PMA) holder, built the carburetor and its component parts, including the float. Precision contracted with Forward Technology Industries (FTI) to assemble and weld the float's component parts. The FAA and related regulations do not require FTI to hold a certificate or permit for this work.

<sup>1</sup> 49 U.S.C. §§ 44701-44735.

¶ 4 In addition to suing Avco and Precision on a variety of theories, the Estate of Virgil Becker (Becker) sued FTI, alleging state causes of action for strict liability, negligence, and breach of warranty.

\*70 ¶ 5 This appeal raises the narrow question whether the FAA and regulations adopted by the Federal Aviation Administration pervasively regulate the area of aircraft fuel systems, thereby preempting any state standard of care for defects in the assembly and welding of the carburetor float as to claims against FTI, a noncertificated contractor.<sup>2</sup> We conclude the FAA and related regulations pervasively regulate the “area” of an airplane engine’s fuel system, including carburetors and their component parts. Therefore, implied field preemption bars the state tort standards of care alleged against FTI. Because Becker cites no compelling authority for an applicable parallel federal standard of care, the claims against FTI fail.

2 This appeal does not present any question regarding the viability of manufacturing defect claims brought against a certificate or PMA holder. *See, e.g., Godfrey v. Precision Airmotive Corp.*, 46 So.3d 1020, 1023 (Fla. Dist. Ct. App. 2010) (“[I]f FAA regulations require an airplane engine manufacturer to report known engine defects to the public, this disclosure requirement would necessarily include a duty to disclose a known defect in a carburetor or other part certified by the engine manufacturer for use with the engine that will cause the engine itself to fail.”); Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: “When Your Money is Gone, That is Permanent, Irreparable Damage to You,”* 42 STETSON L. REV. 457, 480 n. 169 (2013) (“Under FAA regulations, an engine manufacturer can be held liable for defects in the carburetor by virtue of being the type certificate holder of the engine.” (citing 14 C.F.R. §§ 21.11–21.55)).

¶ 6 We affirm the trial court’s order dismissing all claims against FTI.

#### FACTS

¶ 7 In July 2008, an airplane crashed in the Cascades near McMurray, Washington. The pilot, Brenda Houston, her daughter, Elizabeth Crews, and Dr. Virgil Becker all died in the crash.

¶ 8 Becker sued multiple defendants involved in the manufacture and care of the airplane. As to FTI, Becker alleged state law strict liability, negligence, and breach of warranty causes of action.

¶ 9 The Federal Aviation Administration issues a “type certificate” when it has found that an airplane is “properly \*71 designed and manufactured” and meets minimum federal safety standards.<sup>3</sup> The Federal Aviation Administration issued a type certificate to Avco, authorizing Avco to manufacture the airplane’s engine. A type-certificated product \*\*1276 (e.g., an engine) often includes component parts (e.g., a carburetor) purchased from outside suppliers. A certificate holder must establish procedures for ensuring the quality and conformity of all components integrated in the certificated product.<sup>4</sup> Once a type certificate is issued, the certificate holder may seek a production certificate authorizing the holder to manufacture a duplicate of the certificated product.<sup>5</sup> Avco obtained the type certificate by ensuring that the engine “conforms to its approved design and is in a condition for safe operation.”<sup>6</sup>

3 49 U.S.C. § 44704(a)(1); *Hetzer-Young v. Precision Airmotive Corp.*, 184 Ohio App.3d 516, 522, 921 N.E.2d 683 (2009) (the certification process ensures that “the aircraft meets the minimum standards for performance and safety” set forth by the Federal Aviation Administration).

4 14 C.F.R. § 21.137.

5 49 U.S.C. § 44704(c).

6 14 C.F.R. § 21.146(c).

¶ 10 The airplane’s engine included a carburetor built by Precision. The carburetor’s function is to deliver an appropriate mixture of fuel and air to the engine. Precision obtained a PMA from the Federal Aviation Administration that permitted Precision to build and supply carburetors and their component parts to Avco. As a PMA holder, Precision was required to ensure that “each PMA article conforms to its approved design and is in a condition for safe operation.”<sup>7</sup> Precision developed the plastic carburetor float which helps maintain the correct fuel level in the carburetor, and the Federal Aviation Administration approved it.

7 14 C.F.R. § 21.316(c).

¶ 11 Precision contracted with FTI to assemble and weld the float’s plastic component parts. Precision provided FTI with the float components. Using its own test

specification, \*72 Precision independently tested every float it installed in a carburetor or sold as a replacement part. FTI conducted its own testing of the floats and knew some floats did not pass Precision's testing. FTI knew Precision used the floats for airplane engines, but did not know that any defective floats were installed on airplanes.<sup>8</sup>

<sup>8</sup> Contrary to Becker's arguments, although FTI knew the floats it welded "were going onto aircraft engines" and some of the floats that FTI sold to Precision were defective, FTI did not know that those defective floats were being installed on aircraft engines. Appellant's Br. at 11; see Clerk's Papers (CP) at 125 ("[FTI] did not know ... that a certain amount of defective carburetor floats were out there in the field on aircraft engines."); CP at 1897 ("I did not know that [Precision was] selling those specific [defective] carburetor floats. I don't know what became of them once [Precision] delivered [them] to [its] customer[s].").

¶ 12 Becker's second amended complaint is limited to three state law causes of action against FTI based upon a state law standard of care.<sup>9</sup>

<sup>9</sup> Becker's strict liability claim alleged that FTI "created a defective and unsafe product ... in that the design, manufacture, assembly, testing, marketing, installing, selling and delivery of the subject product and/or components thereof were unreasonably dangerous" and that the design and construction of the carburetor float "was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR *et seq.*)." CP at 76-77. Becker's negligence claim alleged (1) the plane crash "was caused by the negligence, carelessness, and recklessness" of FTI, and that the carburetor float was "negligently, carelessly and recklessly designed, manufactured, assembled, tested, installed, marketed, sold, and delivered"; (2) FTI "negligently overhauled, rebuilt, supplied parts for, sold, and/or maintained" the carburetor float, and "failed to warn of known defects and/or unreasonably safe aspects" of the carburetor float; and (3) FTI "failed to issue proper and adequate warnings, guidelines, instructions, and cautions related to the maintenance and use" of the carburetor float; it was therefore "not reasonably safe." CP at 77-78. Becker's breach of warranty claim alleged FTI "warranted" that the carburetor float was "airworthy, of merchantable quality, fit

and safe for purposes for which [it] was designed, manufactured, assembled, tested, marketed, sold, maintained, overhauled, and rebuilt, and [was] free of defects[,] and that the guidelines, instructions, cautions and warnings pertaining to the use of the [carburetor float] were proper, sufficient, adequate and complete." CP at 78-79.

¶ 13 FTI sought summary judgment, arguing that federal law preempts the state law standard of care for all of Becker's claims, that FTI is not liable under the Washington Product Liability Act, chapter 7.72 RCW, because it is not a product seller or manufacturer, and that Becker's negligence claim fails because the risk that leaky floats would \*73 end up in the field was unforeseeable. The trial court granted FTI summary judgment and dismissed all of Becker's claims, concluding that "federal aviation law and concomitant \*\*1277 federal regulations preempt state law standards of care."<sup>10</sup>

<sup>10</sup> CP at 666 (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir.2007)).

¶ 14 Becker filed a motion for reconsideration, arguing for the first time that FTI waived the federal preemption defense by failing to timely raise it. The trial court denied that motion. Becker also sought to file a third amended complaint as to all defendants, which the trial court granted except as to FTI.

¶ 15 After the trial court dismissed FTI on summary judgment, six defendants remained. Four of the six defendants were voluntarily dismissed before trial. In July 2013, Becker voluntarily dismissed Avco upon reaching a settlement during trial. One year later, on July 10, 2014, Becker also voluntarily dismissed the Estate of Brenda Houston, the last remaining defendant, by stipulated order. The trial court entered a final judgment on August 1, 2014. Becker filed a notice of appeal on August 28, 2014.

## ANALYSIS

### *Implied Field Preemption*

¶ 16 Becker contends the FAA and related regulations do not preempt state law standards of care in airplane product liability and negligence actions involving a defective carburetor float. We disagree.

¶ 17 We review a summary judgment order de novo, performing the same inquiry as the trial court.<sup>11</sup> We view the facts and all reasonable inferences in the light most \*74 favorable to the nonmoving party.<sup>12</sup> Summary judgment is proper if there are no genuine issues of material fact.<sup>13</sup>

<sup>11</sup> *McDevitt v. Harbor View Med. Ctr.*, 179 Wash.2d 59, 64, 316 P.3d 469 (2013).

<sup>12</sup> *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wash.App. 137, 147, 279 P.3d 500 (2012).

<sup>13</sup> *Lowman v. Wilbur*, 178 Wash.2d 165, 168–69, 309 P.3d 387 (2013).

¶ 18 Congress adopted the FAA to create a “uniform and exclusive system of federal regulation” in the area of aviation safety and commerce.<sup>14</sup> The FAA gave the Federal Aviation Administration the authority to establish minimum standards “for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers.”<sup>15</sup>

<sup>14</sup> *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).

<sup>15</sup> 49 U.S.C. § 44701(a)(1) (emphasis added).

[1] [2] [3] ¶ 19 Congressional intent is the touchstone of preemption.<sup>16</sup> We must assume that “Congress does not intend to supplant state law.”<sup>17</sup> “State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.”<sup>18</sup> The FAA has no express preemption clause, and FTI does not assert any implied conflict preemption. Therefore, only implied field preemption is at issue.<sup>19</sup>

<sup>16</sup> *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

<sup>17</sup> *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).

<sup>18</sup> *Wash. State Physicians Ins. Exch. & Ass'n v. Pilsons Corp.*, 122 Wash.2d 299, 327, 858 P.2d 1054 (1993).

<sup>19</sup> Two statutory amendments “added limited preemption provisions,” neither of which apply here. *Martin ex rel. Heckman v. Midwest Express Holdings,*

*Inc.*, 555 F.3d 806, 808 (9th Cir.2009). First, in 1978, the Airline Deregulation Act preempted any statutes or regulations “related to a price, route or service” of airlines. *Id.* (citing 49 U.S.C. § 41713(b)(1)). Second, in 1994, the General Aviation Revitalization Act adopted an 18-year statute of repose for product liability claims against airplane manufacturers. *Id.* (citing 49 U.S.C. § 40101).

[4] [5] [6] ¶ 20 Field preemption “exists when federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States \*75 to supplement it.’”<sup>20</sup> The comprehensiveness of federal law in a field and \*\*1278 “pervasiveness of the regulations” are “indication[s] of preemptive intent.”<sup>21</sup> Where an agency promulgates “ ‘regulations to carry out the purposes of a statute,’ ” we “ ‘must consider whether the regulations evidence a desire to occupy a field completely’ ” to the exclusion of state law.<sup>22</sup> The purpose of implied field preemption under the FAA is to advance the goal of uniform standards in the field of aviation safety and commerce.<sup>23</sup>

<sup>20</sup> *Montalvo*, 508 F.3d at 470 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 470–71 (quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 149, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986)).

<sup>23</sup> *Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir.2014).

¶ 21 In this setting, implied field preemption first turns on the critical question of the “area” of aviation safety at issue. Federal circuit courts “have generally analyzed FAA preemption by looking to the pervasiveness of federal regulations *in the specific area* covered by the tort claim or state law at issue.”<sup>24</sup> We then consider whether there are pervasive regulations governing the area at issue.<sup>25</sup>

<sup>24</sup> *Martin*, 555 F.3d at 809 (emphasis added).

<sup>25</sup> *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006–07 (9th Cir.2013).

[7] ¶ 22 The Ninth Circuit decision in *Martin ex rel Heckman v. Midwest Express Holdings, Inc.* is

instructive.<sup>26</sup> A woman fell from an airplane's stairs. She sued the airline and the airplane's manufacturer, alleging that the stairs were defectively designed because they had only one handrail. In determining the specific area at issue for purposes of field preemption, the Ninth Circuit analyzed airplane stairs in general, not merely handrails for stairs.<sup>27</sup> The *Martin* court concluded:

26 555 F.3d 806 (9th Cir.2009).

27 *Id.* at 811–12.

\*76 Airstairs are not pervasively regulated; the only regulation on airstairs is that they can't be designed in a way that might block the emergency exits. 14 C.F.R. § 25.810. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers' weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective.<sup>[ 28 ]</sup>

28 *Id.* at 812.

If “pervasive regulations” govern a specific area of aviation safety, implied preemption applies, but *only to that particular area*.<sup>29</sup> Because federal regulations did not establish any requirements for airplane stairs, the *Martin* court held that federal law did not preempt state tort claims involving airplane stairs.<sup>30</sup>

29 *Id.* at 810–11.

30 *Id.* at 812.

[8] ¶ 23 We conclude the specific area at issue here is the engine's fuel system, which includes the carburetor and its component parts. We also conclude airplane engine fuel systems are pervasively regulated. Unlike *Martin*, where federal regulations had “nothing to say about handrails, or even stairs at all,”<sup>31</sup> there are many federal regulations focused upon performance and safety standards for engine

fuel systems, including the carburetor and its component parts. These regulations include:

31 *Id.*

- 14 C.F.R. § 33.35(a) (“The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout \*77 the complete operating range of the engine under all flight and atmospheric conditions.”).
- 14 C.F.R. § 23.951(a) (“Each fuel system must be constructed and arranged to ensure fuel flow at a rate and pressure \*\*1279 established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.”).
- 14 C.F.R. § 23.955(a) (“The ability of the fuel system to provide fuel at the rates specified in this section and at a pressure sufficient for proper engine operation must be shown in the attitude that is most critical with respect to fuel feed and quantity of unusable fuel. These conditions may be simulated in a suitable mockup.”).
- 14 C.F.R. § 23.1093(a)(1)–(2) (“Each reciprocating engine air induction system must have means to prevent and eliminate icing. Unless this is done by other means, it must be shown that, in air free of visible moisture at a temperature of 30° F—(1) Each airplane with sea level engines using conventional venturi carburetors has a preheater that can provide a heat rise of 90° F, with the engines at 75 percent of maximum continuous power; [and] (2) Each airplane with altitude engines using conventional venturi carburetors has a preheater that can provide a heat rise of 120° F, with the engines at 75 percent of maximum continuous power.”).
- 14 C.F.R. § 23.1095(a) (“If a carburetor deicing fluid system is used, it must be able to simultaneously supply each engine with a rate of fluid flow, expressed in pounds per hour, of

not less than 2.5 times the square root of the maximum continuous power of the engine.”).

\*78 • 14 C.F.R. § 33.67(a) (“With fuel supplied to the engine at the flow and pressure specified by the applicant, the engine must function properly under each operating condition required by this part.”).

• 14 C.F.R. § 23.1099 (“Each carburetor deicing fluid system must meet the applicable requirements for the design of a fuel system.”).

• 14 C.F.R. § 25.1337(c) (“If a fuel flowmeter system is installed, each metering component must have a means for bypassing the fuel supply if malfunction of that component severely restricts fuel flow.”).

• 14 C.F.R. § 25.1337(f)(1)–(2) (“There must be means to measure fuel pressure, in each system supplying reciprocating engines, at a point downstream of any fuel pump except fuel injection pumps. In addition—(1) If necessary for the maintenance of proper fuel delivery pressure, there must be a connection to transmit the carburetor air intake static pressure to the proper pump relief valve connection; and (2) If a connection is required under paragraph (f)(1) of this section, the gauge balance lines must be independently connected to the carburetor inlet pressure to avoid erroneous readings.”).

• 14 C.F.R. § 25.951(a) (“Each fuel system must be constructed and arranged to ensure a flow of fuel at a rate and pressure established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.”).

• 14 C.F.R. § 25.951(b) (“Each fuel system must be arranged so that any air which is introduced into the system will not result in— (1) Power interruption for more than 20 seconds for reciprocating engines; or (2) Flameout for turbine engines.”).

\*79 • 14 C.F.R. § 25.951(c) (“Each fuel system for a turbine engine must be capable of sustained operation throughout its flow and pressure range with fuel initially saturated with water at 80° F and having 0.75cc of free water per gallon added and cooled to the most critical condition for icing likely to be encountered in operation.”).

These federal regulations reveal a pervasive regulation of a fuel system's delivery of the appropriate mixture of air and fuel necessary for the proper operation of the engine under any conditions. These regulations also set performance standards that necessarily require an engine's component parts to function properly. The lack of a specific regulation expressly directed to carburetor floats is of no consequence because the specific area at issue for purposes of implied field preemption is the engine's fuel system.<sup>32</sup>

<sup>32</sup> See *Sikkelee v. Precision Airmotive Corp.*, 45 F.Supp.3d 431, 446 (M.D.Pa.2014) (concluding that implied field preemption “of the field of aviation safety does not necessarily imply that there must be a regulation ‘at hand’ for [the defendant] to have violated” (boldface omitted)).

¶ 24 Because federal regulations pervasively regulate an airplane engine's fuel system, including its carburetor and component parts, implied field preemption precludes applying a state law standard of care to Becker's claims.

¶ 25 In several jurisdictions, even in those areas that are pervasively regulated, “the scope of field preemption extends only to the [state] standard of care.”<sup>33</sup> State law still governs “the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.”<sup>34</sup> A state remedy “may survive even if the standard of care is so preempted,” provided there is an applicable “parallel” federal standard of care.<sup>35</sup> Even if we follow the Ninth Circuit's approach that only state standards of care are subject to implied field preemption, it is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts.<sup>36</sup> “The FAA itself does not clearly establish a federal standard of care; the Code of Federal Regulations does, but only as applied to ‘aircraft \*81 operations.’”<sup>37</sup> Becker provides no authority or argument that the

assembly of a carburetor float is a part of airplane operations.

33 *Gilstrap*, 709 F.3d at 1007. In some jurisdictions, the scope of implied field preemption is even broader. See, e.g., *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir.2010) (holding that “federal regulation occupies the field of aviation safety to the exclusion of state regulations”); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir.2005) (holding that because federal aviation law preempts the field from state regulations, the plaintiff’s state law failure-to-warn claim was preempted by federal aviation law); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir.2004) (holding that because “Congress enacted a pervasive regulatory scheme covering air safety concerns,” “federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements.”); see also Alexander T. Simpson, *Standard of Care vs. Claim Preemption Under the Federal Aviation Act*, 27 No. 4 AIR & SPACE LAW. 4, 4 (2014) (“[F]ederal appeals courts have adopted different approaches regarding the reach of implied preemption under the Act as it relates to aviation safety.”); Jared L. Watkins & Evan Katin-Borland, *Recent Developments in Aviation Law*, 79 J. AIR L. & COM. 213, 214–15 (2014) (“There remains a split between federal circuit courts regarding federal preemption of products liability claims.”).

34 *Gilstrap*, 709 F.3d at 1006.

35 *Id.*

36 Additionally, in *Ventress*, the Ninth Circuit held that implied field preemption precludes a flight engineer’s state law claims of retaliation and constructive discharge because those claims would require factual determinations regarding pilot qualifications and medical standards for “airmen,” a field pervasively regulated under federal aviation law. *Ventress*, 747 F.3d at 719, 721–23. In a footnote, the court observed that “even if state remedies hypothetically remain available,” the flight engineer had failed to allege “a cognizable legal claim under any applicable federal standard.” *Id.* at 723 n. 7. In *Gilstrap*, with very limited discussion, the Ninth Circuit concluded that, although state standards of care were preempted, a disabled passenger’s state law claims that an airline failed to provide her adequate assistance to move through the airport could proceed to trial

based upon a federal standard of care under the federal Air Carrier Access Act. *Gilstrap*, 709 F.3d at 1007–08, 1010–11. In *Sikkelee*, a carburetor defect case, the court rejected deriving a federal standard of care from general federal aviation regulations, even if specific federal regulations leave gaps as to particular defects. “[C]onstruing and applying FAA safety regulations as federal standards of care in [aircraft product liability cases] will be arduous and impractical.” *Sikkelee*, 45 F.Supp.3d at 447 (alterations in original) (quoting *Pease v. Lycoming Engines*, 2011 WL 6339833, at \*23 (M.D.Pa.2011)). In a footnote, the court observed that “[d]eciding how federal regulations should translate into a standard of care has proven a bedeviling task in other contexts as well.” *Id.* n. 15 (citing *In re TMI*, 67 F.3d 1103, 1107 (3d Cir.1995) (“Although it is clear that federal law governs the standard of care for tort claims arising from nuclear accidents, it is more difficult to discern the precise contours of that federal duty.”)).

37 *Keum v. Virgin America Inc.*, 781 F.Supp.2d 944, 948–49 (N.D.Cal.2011) (quoting 14 C.F.R. § 91.13, the federal “careless or reckless” standard for aircraft operations).

\*\*1281 ¶ 26 Becker points to the FAA’s general airworthiness provisions, but cites no authority that the general concept of airworthiness or any specific federal standard of care applies to Becker’s state law manufacturing defect claims against FTI.<sup>38</sup> Becker cites no authority that the general reference to “the Federal Aviation Regulations (14 CFR *et seq.*)” in Becker’s second amended complaint provides a parallel federal standard of care for Becker’s state law manufacturing defect claims.<sup>39</sup> In addition, because the FAA does not create a federal cause of action for personal injury suits, it must “only contemplate tort suits brought under state law.”<sup>40</sup> Absent briefing supporting a specific parallel federal standard of care, we read Becker’s complaint as limited to state law claims based upon state standards of care.

38 See RAP 10.3(a)(6): *Regan v. McLachlan*, 163 Wash.App. 171, 178, 257 P.3d 1122 (2011) (“We will not address issues raised without proper citation to legal authority.”).

39 37 CP at 77, ¶ 74.

40 *Martin*, 555 F.3d at 808.

¶ 27 Therefore, on this briefing, we agree with the trial court that all of Becker’s claims against FTI fail. No one

disputes that Becker was able to pursue manufacturing defect claims against both Avco, the type certificate holder for the engine, and Precision, the PMA holder for the carburetor. But a hypothetical state remedy based on an unsupported federal standard of care does not warrant a trial as to FTI.

#### *Waiver of Federal Preemption Defense*

[9] ¶ 28 Becker contends FTI waived preemption by failing to plead preemption as an affirmative defense. We disagree.

\*82 [10] ¶ 29 Since 1975, Washington courts have recognized that if a failure to plead an affirmative defense under CR 8(c) “does not affect the substantial rights of the parties, the noncompliance will be considered harmless.”<sup>41</sup> This policy is to avoid surprise.<sup>42</sup> Any objection to a failure to plead an affirmative defenses is “waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense.”<sup>43</sup> And raising an affirmative defense for the first time in a motion for summary judgment has been recognized as harmless error.<sup>44</sup>

<sup>41</sup> *Mahoney v. Tingley*, 85 Wash.2d 95, 100, 529 P.2d 1068 (1975); *see also Hogan v. Sacred Heart Med. Ctr.*, 101 Wash.App. 43, 54–55, 2 P.3d 968 (2000); *Henderson v. Tyrell*, 80 Wash.App. 592, 624, 910 P.2d 522 (1996).

<sup>42</sup> *Bickford v. City of Seattle*, 104 Wash.App. 809, 813, 17 P.3d 1240 (2001).

<sup>43</sup> *Mahoney*, 85 Wash.2d at 100, 529 P.2d 1068.

<sup>44</sup> *See id.* at 100–01, 529 P.2d 1068.

¶ 30 Becker does not establish any surprise or prejudice affecting any substantial right. Neither in Becker's response to FTI's motion for summary judgment nor in oral argument of that motion did Becker object that federal preemption had not been pleaded or argue that Becker was surprised by the preemption argument. Becker offered the trial court extensive briefing on field preemption.<sup>45</sup> Becker did not raise the failure to plead preemption until Becker's motion to reconsider the order

granting summary judgment. Therefore, we conclude FTI did not waive its preemption defense.

<sup>45</sup> *See* CP at 278.

#### *Leave to Amend to Allege Violations of Federal Law*

¶ 31 Becker contends the trial court erred in denying Becker's motion to file a third amended complaint identifying specific federal regulations as to FTI. We disagree.

\*83 [11] [12] [13] ¶ 32 The decision to grant leave to amend the pleadings is within the trial court's discretion.<sup>46</sup> Absent an abuse of discretion, the trial court's decision will not be disturbed on appeal.<sup>47</sup> In determining whether prejudice would result, we may consider potential delay, unfair surprise, and the probable merit or futility of the amendments requested.<sup>48</sup>

<sup>46</sup> *Wilson v. Horsley*, 137 Wash.2d 500, 505, 974 P.2d 316 (1999).

<sup>47</sup> *Id.*

<sup>48</sup> *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154 (1997); *Karlberg v. Otten*, 167 Wash.App. 522, 529, 280 P.3d 1123 (2012).

\*\*1282 [14] [15] ¶ 33 In August 2012, the trial court denied Becker's motion to file a third amended complaint after FTI had already been dismissed from the case on summary judgment. “When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.”<sup>49</sup> Becker's motion to amend was untimely.<sup>50</sup> The litigation had been pending for nearly two years before the trial court dismissed FTI, and FTI had served discovery on Becker asking Becker to identify specific regulations that FTI violated. Under these circumstances, Becker's delay in alleging specific violations of federal regulations was a reasonable basis to deny Becker's motion.<sup>51</sup>

<sup>49</sup> *Doyle v. Planned Parenthood of Seattle–King County, Inc.*, 31 Wash.App. 126, 130–31, 639 P.2d 240 (1982).

50 See *Haselwood v. Bremerton Ice Arena*, 137 Wash.App. 872, 890, 155 P.3d 952 (2007).

51 See *id.* (trial court did not abuse its discretion in denying defendant leave to amend its pleadings after summary judgment was granted).

¶ 34 The trial court also denied Becker's motion to amend its second amended complaint to add a punitive damages claim against FTI. Because implied field preemption applies, we need not reach Becker's argument that the trial court should have allowed Becker to allege punitive damages in an amended complaint. We also decline to reach FTI's alternative arguments that it is not a product seller or manufacturer \*84 under Washington's Product Liability Act. And we decline to reach FTI's argument that this appeal is untimely.

[16] ¶ 35 Lastly, for the first time in its reply brief, Becker contends FTI lacks standing to assert the preemption defense because FTI claims it is not subject to federal regulations. The cases relied upon by Becker, *Miller v. Rite Aid Corp.*<sup>52</sup> and *W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters*,<sup>53</sup> relate to an express preemption clause contained in the Employee Retirement Income Security Act of 1974 (ERISA),<sup>54</sup> an entirely different setting than implied field preemption under the FAA and regulations adopted by the Federal Aviation Administration. Those opinions do not stand for the proposition that a noncertificated contractor under the FAA may not assert a preemption defense to state law manufacturing defect claims. Therefore, we reject Becker's

contention that FTI lacks standing to assert a preemption defense.

52 504 F.3d 1102, 1105 (9th Cir.2007) ("ERISA does not preempt the claims of parties who do not have the right to sue under ERISA because they are neither participants in nor beneficiaries of an ERISA plan.").

53 180 Wash.2d 54, 65, 322 P.3d 1207 (2014) ("[S]tate lien claims that apply to third parties are outside the scope of ERISA and thus not preempted.").

54 29 U.S.C. §§ 1001-1461.

### CONCLUSION

¶ 36 We conclude the FAA and related regulations preempt the standard of care for Becker's state law manufacturing defect claims against FTI. Because Becker cites no authority that an applicable parallel federal standard of care applies to those state law claims, nothing remains for the trial court to decide.

¶ 37 We affirm the dismissal of Becker's claims against FTI.

WE CONCUR: SCHINDLER and APPELWICK, JJ.

### All Citations

192 Wash.App. 65, 365 P.3d 1273, Prod.Liab.Rep. (CCH) P 19,759

**Appendix B:**

*Sikkelee v. Precision Airmotive Corp.*  
822 F.3d 680 (3d Cir. 2016)

822 F.3d 680

United States Court of Appeals,  
Third Circuit.

Jill SIKKELEE, Individually and as  
Personal Representative of the Estate  
of David Sikkelee, deceased, Appellant  
v.

PRECISION AIRMOTIVE CORPORATION;  
Precision Airmotive LLC, Individually and as  
Successor-In-Interest to Precision Airmotive  
Corporation; Burns International Services  
Corporation, Individually and as Successor-In-  
Interest to Borg-Warner Corporation, and Marvel-  
Schebler, a Division of Borg-Warner Corporation;  
Textron Lycoming Reciprocating Engine Division,  
A Division of Avco Corporation; Avco Corporation;  
Kelly Aerospace, Inc., Individually and Joint  
Venturer and a Successor-In-Interest; Kelly  
Aerospace Power Systems, Inc., Individually and  
as Joint Venturer and Successor-In-Interest  
a/k/a ElectroSystems, Inc. a/k/a Confuel Inc.;  
ElectroSystems, Inc., Individually and as Joint  
Venturer and as Successor-In-Interest a/k/a  
Consolidated Fuel Systems, Inc. a/k/a Confuel, Inc.;  
Consolidated Fuel Systems, Inc., a/k/a Confuel, Inc.

No. 14-4193.

Argued: June 24, 2015.

Filed: April 19, 2016.

#### Synopsis

**Background:** Deceased pilot's estate brought products liability action against engine manufacturer, asserting claims for defective design and failure to warn arising from pilot's fatal crash shortly after takeoff. The United States District Court for the Middle District of Pennsylvania, Matthew W. Brann, J., 45 F.Supp.3d 431, entered an order granting in part and denying in part manufacturer's motion for summary judgment. Order was certified for immediate appeal.

**Holdings:** The Court of Appeals, Krause, Circuit Judge, held that:

[1] presumption against preemption applied in aviation context, and

[2] Federal Aviation Act did not field preempt design defect claims.

Reversed and remanded.

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Before: CHAGARES, KRAUSE, and VAN ANTWERPEN, Circuit Judges.

#### OPINION

KRAUSE, Circuit Judge.

This case presents the question whether *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir.1999), in which we held that federal law preempts the field of aviation safety, extends to state law products liability claims. We hold it does not. In light of principles of federalism and the presumption against preemption, Congress must express its clear and manifest intent to preempt an entire field of state law. Here, none of the relevant statutes or regulations signals such an intent. To the contrary, the Federal Aviation Act, the General Aviation Revitalization Act of 1994, and the regulations promulgated by the Federal Aviation Administration reflect that Congress did not intend to preempt aircraft products liability claims in a categorical way. The District Court faithfully sought to apply our precedent, and while it concluded that state products liability claims are preempted by *Abdullah*, it also recognized the question was sufficiently unclear and important to certify its order for interlocutory review. Today, we clarify the scope of *Abdullah* and hold that neither the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims. Rather, subject to traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate, aircraft products liability cases like Appellant's may proceed using a state standard of care. For these reasons, we will reverse the District Court's entry of summary judgment in favor of Appellees and remand for further proceedings.

## I. Background

### A. Overview of Federal Aviation Regulation

Almost immediately after the airplane became a viable means of transportation, it \*684 became clear that certain aspects of aviation, such as air traffic control, required uniform federal oversight. *See* Air Commerce Act of 1926, ch. 344, 44 Stat. 568. Congress soon thereafter expanded federal control over aviation by enacting the Civil Aeronautics Act of 1938, which created the Civil Aeronautics Authority ("CAA") to oversee the regulatory aspects of aviation safety and to prescribe "minimum standards governing the design ... of aircraft, aircraft engines, and propellers as may be required in the interest of safety." Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 1007. The 1938 Act also authorized the CAA to issue so-called "type certificates," "production certificate[s]," and "airworthiness certificate[s]" if an airplane or airplane

part complied with the relevant safety regulations. *Id.* at 1007, 1009–10.

As the scope of federal involvement in regulating aviation expanded, so too did the number of governmental bodies regulating aviation, and by the 1950s, there had, at one point, been seventy-five different interagency groups with some responsibility in the field. S.Rep. No. 85–1811, at 6 (1958). To resolve this problem, Congress enacted the 1958 Federal Aviation Act, Pub.L. No. 85–726, 72 Stat. 731, to consolidate regulatory authority in a single entity: the Federal Aviation Administration ("FAA"). The Federal Aviation Act adopted verbatim from the Civil Aeronautics Act the statutory framework for the promulgation of minimum standards for design safety and the process for the issuance of certificates that indicated compliance with those regulations.<sup>1</sup>

<sup>1</sup> The only difference between these portions of the two Acts is that the Federal Aviation Act replaced the word "Authority"—referring to the Civil Aviation Authority created by the 1938 Act—with "Administrator," which refers to the appointed head of the Authority's successor organization, the Federal Aviation Administration. *See also* H.R. Rep. 85–2360, at 16 (1958) (reflecting that, except for certain enumerated changes, "TITLE VI. SAFETY REGULATION OF CIVIL AERONAUTICS [of the Federal Aviation Act] ... is a reenactment of existing law without substantial change").

Pursuant to the statutory framework established in the Civil Aeronautics Act and adopted by the Federal Aviation Act, aircraft engine manufacturers must obtain from the FAA (1) a *type certificate*, which certifies that a new design for an aircraft or aircraft part performs properly and meets the safety standards defined in the aviation regulations, 49 U.S.C. § 44704(a); 14 C.F.R. § 21.31; and (2) a *production certificate*, which certifies that a duplicate part produced for a particular plane will conform to the design in the type certificate, 49 U.S.C. § 44704(c); 14 C.F.R. § 21.137. Before a new aircraft may legally fly, it must also receive (3) an *airworthiness certificate*, which certifies that the plane and its component parts conform to its type certificate and are in condition for safe operation. 49 U.S.C. §§ 44704(d), 44711(a)(1).

The FAA issues a type certificate when it has determined that a product "is properly designed and manufactured,

performs properly, and meets the regulations and minimum standards prescribed under [49 U.S.C. § 44701(a)]. 49 U.S.C. § 44704(a)(1); *see also* 14 C.F.R. § 21.21. A type certificate includes the type design, which outlines the detailed specifications, dimensions, and materials used for a given product; the product's operating limitations; a "certificate data sheet," which denotes the conditions and limitations necessary to meet airworthiness requirements; and any other conditions or limitations prescribed under FAA regulations. *See* 14 C.F.R. §§ 21.31, 21.41; FAA, Order 8110.4C, change 5, Type Certification, ch. 3-3(a) (2011). This certification process can be intensive and painstaking; for example, a commercial aircraft manufacturer seeking a new type certificate for a wide-body aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 n. 7, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). A type certificate remains in effect "until surrendered, suspended, revoked, or a termination date is otherwise established by the FAA." 14 C.F.R. § 21.51. A manufacturer may make both "major" and "minor" changes to a type certificated design, 14 C.F.R. § 21.93, but must obtain the appropriate regulatory approval to do so, which for "major changes" requires the issuance of an amended or supplemental type certificate by the FAA, *see* 49 U.S.C. § 44704(b); 14 C.F.R. § 21.97; FAA Order 8110.4C, change 1, Type Certification, ch. 4-1(a), 4-2 (2011), and for "minor changes" requires the manufacturer to comply with a pertinent "method acceptable to the FAA," 14 C.F.R. § 21.95.

### B. Factual History

This case involves alleged manufacturing and design defects in a Textron Lycoming O-320-D2C engine ("the engine") manufactured in 1969 and installed "factory new" on a Cessna 172N aircraft ("the aircraft") in 1998. Lycoming holds both a type certificate and production certificate for the engine. The engine in the aircraft was overhauled in 2004 and installed with a MA-4SPA carburetor in accordance with Lycoming's type-certificated design.

David Sikkelee was piloting the aircraft when it crashed shortly after taking off from Transylvania County Airport in Brevard, North Carolina in July 2005. Sikkelee was killed as a result of serious injuries and burns he suffered

in the crash. His wife, Jill Sikkelee, the Plaintiff-Appellant in this case, alleges that the aircraft lost power and crashed as a result of a malfunction or defect in the engine's carburetor. Specifically, she contends that, "due to the faulty design of the lock tab washers as well as gasket set," vibrations from the engine loosened screws holding the carburetor's throttle body to its float bowl. J.A. 643. When properly functioning, a carburetor regulates the mixture of fuel and air that enters the engine's cylinders. According to Sikkelee, however, the manner by which the throttle body was attached to the float bowl in the Textron Lycoming O-320-D2C engine allowed raw fuel to leak out of the carburetor into the engine and thereby caused the aircraft to crash.

### C. Procedural History

Sikkelee initially filed a wrongful death and survival action in the Middle District of Pennsylvania in 2007 against seventeen defendants, asserting state law claims of strict liability, breach of warranty, negligence, misrepresentation, and concert of action. In 2010, the District Court granted defendants' motion for judgment on the pleadings, holding that Sikkelee's state law claims, which were premised on state law standards of care, fell within the preempted "field of air safety" described in *Abdullah. Sikkelee v. Precision Airmotive Corp.*, 45 F.Supp.3d 431, 435 (M.D.Pa.2014) (quoting *Abdullah*, 181 F.3d at 367). Sikkelee subsequently filed an amended complaint, continuing to assert state law claims, but this time incorporating federal standards of care by alleging violations of numerous FAA regulations.<sup>2</sup> Following \*686 certain settlements and motion practice, Sikkelee narrowed her claims against Lycoming to defective design (under theories of both negligence and strict liability) and failure to warn.<sup>3</sup>

<sup>2</sup> As summarized by the District Court, Sikkelee specifically alleged that Lycoming had violated, at least, the following regulations: Civil Air Regulations (CARs) §§ 13.100, 13.101, 13.104, 13.110 (1964); 14 C.F.R. §§ 21.2, 21.3, 21.14, 21.21, 21.303, 33.4, 33.15, 33.19, 33.35, 145.221(a) (2004). As described by the District Court, CARs were precursors to modern day Federal Aviation Regulations codified in Title 14 of the Code of Federal Regulations. *Sikkelee*, 45 F.Supp.3d at 440 n. 9 (citing a description of the history of aviation regulations found in

2 Kreindler, *Aviation Accident Law* § 9.01(1)-(2) (Matthew Bender)).

3 The case then took a detour to this Court to determine whether the Second or Third Restatement of Torts applied to products liability cases. In denying the petition for interlocutory appeal, we clearly indicated that the Third Restatement applied. *Sikkelee v. Precision Airmotive Corp.*, No. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012). At that point, the case was reassigned from Judge John E. Jones III to Judge Matthew W. Brann.

As the trial date approached, the District Court expressed concern that Sikkelee's proposed jury instructions using federal standards of care were "all but completely unable to assist the Court in ... formulating an intelligible statement of applicable law." *Sikkelee*, 45 F.Supp.3d at 437 (internal quotation marks omitted) (recounting its position on this point as first expressed in its Memorandum of November 20, 2013). On the one hand, the District Court asserted that, under *Abdullah*, it was bound to apply some federal standard of care and that compliance with the applicable design and construction regulations was the only identifiable, let alone articulable, federal standard. On the other hand, because it determined that the "FAA regulations relating to the design and manufacture of airplanes and airplane component parts were never intended to create federal standards of care," *id.* at 437 n. 4 (quoting *Pease v. Lycoming Engines*, No. 4:10-cv-00843, 2011 WL 6339833, at \*22 (M.D.Pa. Dec. 19, 2011) (Conner, J.)) (internal quotation marks omitted), the District Court found it to be "arduous and impractical" to fashion the regulations themselves into such standards, *id.* (quoting *Pease*, 2011 WL 6339833, at \*23) (internal quotation marks omitted). Faced with this conundrum, the District Court ordered Sikkelee to submit additional briefing on the question of the appropriate standard of care and, after review of that briefing, invited Lycoming to file a motion for summary judgment. *Id.* at 438.

In its ruling on that motion, the District Court concluded that the federal standard of care was established in the type certificate itself. Reasoning that the FAA issues a type certificate based on its determination that the manufacturer has complied with the pertinent regulations, the District Court held that the FAA's issuance of a type certificate for the Textron Lycoming O-320-D2C engine meant that the federal standard of care had been satisfied as a matter of law. *Id.* at 451-43, 456. The District Court

therefore granted Lycoming's summary judgment motion, in part, on that basis. *Id.* at 456. The District Court denied summary judgment, however, on Sikkelee's failure to warn claims, which were premised on Lycoming's alleged violation of 14 C.F.R. § 21.3 for failure to "report any failure, malfunction, or defect in any product, part, process, or article" that Lycoming manufactured.<sup>4</sup> *Id.* at 459-60 (quoting 14 C.F.R. § 21.3(a) (2004)).

4 Upon receiving a report that a product has malfunctioned or contains a defect, the FAA may issue a legally enforceable airworthiness directive that specifies "inspections you must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition." 14 C.F.R. § 39.11; *see also* 14 C.F.R. §§ 39.3, 39.5. Any further operation of an aircraft in contravention of an airworthiness directive is a violation of federal law. 14 C.F.R. §§ 39.7, 39.9.

\*687 Recognizing that its grant of partial summary judgment raised novel and complex questions concerning the reach of *Abdullah* and the scope of preemption in the airlines industry, the District Court certified the order for immediate appeal, and we granted interlocutory review.

## II. Jurisdiction and Standard of Review

[1] [2] The District Court had diversity jurisdiction under 28 U.S.C. § 1332(a), and we have jurisdiction under 28 U.S.C. § 1292(b) to review the order certified by the District Court for interlocutory appeal. We review the District Court's order granting summary judgment de novo. *Azur v. Chase Bank, USA, Nat'l Ass'n*, 601 F.3d 212, 216 (3d Cir.2010). We also review questions of preemption de novo. *Farina v. Nokia Inc.*, 625 F.3d 97, 115 n. 20 (3d Cir.2010).

## III. Discussion

[3] [4] [5] [6] [7] The doctrine of preemption is a necessary but precarious component of our system of federalism under which the states and the federal government possess concurrent sovereignty, subject to the limitation that federal law is "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consistent with this principle, Congress has the power to enact legislation that preempts state law. *See Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2500-01, 183 L.Ed.2d 351 (2012). At

the same time, with due respect to our constitutional scheme built upon a “compound republic,” with power allocated between “two distinct governments,” The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); *see also* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring), there is a strong presumption against preemption in areas of the law that States have traditionally occupied, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 240 (3d Cir.2009) (explaining that, “[w]hen faced with two equally plausible readings of statutory text, [courts] have a duty to accept the reading that disfavors preemption” (internal quotation marks omitted)). For that reason, all preemption cases “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (quoting *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240) (internal quotation marks omitted). Congressional intent is the “ultimate touchstone” of a preemption analysis. *Id.* Thus, when confronted with the question of whether state claims are preempted, as we are here, we look to the language, structure, and purpose of the relevant statutory and regulatory scheme to develop a “reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic*, 518 U.S. at 486, 116 S.Ct. 2240; *see also Bruesewitz*, 561 F.3d at 243–44 (recognizing that divining congressional intent regarding preemption requires considering a law’s “structure and purpose,” underlying “object and policy,” and, where relevant, legislative history (internal quotation marks omitted)).

[8] [9] [10] Congress may exert its supremacy expressly preempting state law, but it may also do so implicitly, which we have recognized in limited circumstances in the doctrine of “field” preemption. *See Oneok, Inc. v. Learjet, Inc.*, — U.S. —, 135 S.Ct. 1591, 1595, 191 L.Ed.2d 511 (2015). For that doctrine to apply, “we must find \*688 that federal law leaves no room for state regulation and that Congress had a clear and manifest intent to supersede state law” in that field. *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir.2010) (quoting *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir.2009)) (alteration and internal

quotation marks omitted). Where Congress expresses an intent to occupy an entire field, States are foreclosed from adopting any regulation in that area, regardless of whether that action is consistent with federal standards. *Oneok*, 135 S.Ct. at 1595.

[11] In addition to field preemption, federal law may supersede state law through conflict preemption. This occurs when a state law conflicts with federal law such that compliance with both state and federal regulations is impossible, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 131 S.Ct. 2567, 2577, 180 L.Ed.2d 580 (2011), or when a challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law,” *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330, 131 S.Ct. 1131, 179 L.Ed.2d 75 (2011) (internal quotation marks omitted).

In this case, we are asked to analyze the extent to which federal aviation law preempts state tort law, specifically, products liability claims for defective design. We do not write on a blank slate, but rather, against the backdrop of our decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir.1999).

#### A. *Abdullah*

In *Abdullah*, we considered the preemptive effect of federal in-flight seatbelt regulations on state law negligence claims for a flight crew’s failure to warn passengers that their flight would encounter severe turbulence. *Id.* at 365. One of the plane’s crew members had illuminated the fasten seatbelt sign in accordance with the federal regulations, but none of the crew had given the passengers an additional verbal warning of expected turbulence. *Id.* at 365, 371 & n. 11. When the turbulence hit, the plaintiffs suffered serious injuries. *Id.* at 365. After the jury found American Airlines liable and awarded the plaintiffs damages, the district court ordered a new trial, holding that the Federal Aviation Act preempted the territorial standards for aviation safety, and thus, that the jury should not have been instructed on a territorial standard of care. *Id.* at 365–66. We affirmed, explaining that the Federal Aviation Act and federal regulations “establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions.” *Id.* at 365. Although we held that federal law preempts state law standards of care in the field of air safety, we also held that it preserves state

law remedies. *Id.* at 364. As such, within the field of air safety, *Abdullah* instructs that plaintiffs may bring state law causes of action that incorporate federal standards of care. *Id.* at 365.

Our analysis in reaching this conclusion focused on the text and legislative history of the Federal Aviation Act, which was adopted primarily to promote safety in aviation and gave the FAA broad authority to issue safety regulations. *Id.* at 368–69. We observed that the FAA, in exercising this authority, “has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Id.* at 369 (footnotes omitted). We then reviewed several cases from the Supreme Court and our sister Circuits that had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise, *City of \*689 Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); pilot regulation, *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir.1989); and control of flights through navigable airspace, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75, 84 (2d Cir.1977). *Abdullah*, 181 F.3d at 369–71. We paid special heed to 14 C.F.R. § 91.13(a), which proscribes “operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another,” and observed that it provided a catch-all standard of care. *Id.* at 371.<sup>5</sup> Thus, we concluded that state law standards of care within the “field of aviation safety” were preempted, and we instructed that “a court must refer ... to the overall concept that aircraft may not be operated in a careless or reckless manner” in addition to any specific regulations that may be applicable. *Id.*

<sup>5</sup> The full text of this regulation reads: “Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.” 14 C.F.R. § 91.13(a).

Importantly for our purposes, although we stated in broad terms that the Federal Aviation Act preempted the “field of aviation safety,” *id.*, the regulations and decisions we discussed in *Abdullah* all related to in-air operations, *see* 14 C.F.R. § 1.1 (“Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose ... of air navigation including the piloting of aircraft...”), and the catch-all standard of care that we held a court

“must refer to” applied only to operating, not designing or manufacturing, an aircraft. *See* 14 C.F.R. §§ 1.1, 91.13.

We confirmed the limits of our holding in *Abdullah* a decade later in *Elassaad*, 613 F.3d at 121, where we clarified that a flight crew’s oversight of the disembarkation of passengers after an airplane came to a complete stop at its destination was not within the preempted field of aviation safety. By drawing a line between what happens during flight and what happens upon disembarking, we made clear that the field of aviation safety described in *Abdullah* was limited to in-air operations. *Id.* at 127–31 (“[T]he [Federal Aviation Act’s] safety provisions appear to be principally concerned with safety in connection with operations associated with flight.” (emphasis added)). *Abdullah* thus does not govern products liability claims like those at issue here.<sup>6</sup> Indeed, as discussed further below, products liability claims are not subject to the same catch-all standard of care that motivated our field preemption decision in *Abdullah*; the design regulations governing the issuance of type certificates are not as comprehensive as the regulations governing pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules discussed there; and our post-*Abdullah* case law cautions us against interpreting the scope of the preempted field too broadly. *See Elassaad*, 613 F.3d at 131.

<sup>6</sup> Appellees point to our passing reference in *Elassaad* that the certification and airworthiness requirements for aircraft parts concern aspects of air safety. 613 F.3d at 128. The certification process, however, had no relevance to the pertinent issues in *Elassaad*, so this statement constituted dicta. *See In re Nat’l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 583–84 n. 18 (3d Cir.2014).

This conclusion is consistent with other courts that have interpreted *Abdullah*. For example, the Ninth Circuit, which had previously adopted *Abdullah*’s conclusion that the Federal Aviation Act preempts state law standards of care in the field of aviation safety, has held that products liability does *not* fall within that preempted field. *\*690 Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809–11 (9th Cir.2009) (Kozinski, J.). Even the district courts that believed *Abdullah* compelled them to extend the preempted field to products liability claims, including the District Court in this case, have noted that such a holding was at odds with the federal regulatory scheme governing aviation design and manufacturing. *See*

*Sikkelee*, 45 F.Supp.3d at 460 (“Yet having endeavored to reconcile *Abdullah* with the federal regulatory scheme that governs aviation design and manufacturing, this Court—either by way of its own error or that of the precedents it has followed—has reached holdings that it imagines have little to do with Congressional intent.”); see also *Pease*, 2011 WL 6339833, at \*22–23 (stating that *Abdullah*’s reasoning is overbroad).

Having concluded that *Abdullah* does not control here, we must now determine whether Congress intended the Federal Aviation Act to preempt products liability claims.

#### B. Whether the Presumption Against Preemption Applies

[12] Typically, our preemption analysis begins with the presumption that Congress does not preempt areas of law traditionally occupied by the states unless that is its clear and manifest intent. *Wyeth*, 555 U.S. at 565, 129 S.Ct. 1187. In this case, Appellees argue that the presumption against preemption should not apply in the aviation context given the history of federal involvement in the field. That argument turns, however, on a selective view of history.

In general, products liability claims are exemplars of traditional state law causes of action. See *Medtronic*, 518 U.S. at 491, 116 S.Ct. 2240. Indeed, state law governed the earliest products liability claims in this country. See, e.g., *Curtain v. Somerset*, 140 Pa. 70, 21 A. 244, 244–45 (1891) (applying Pennsylvania law); *Thomas v. Winchester*, 6 N.Y. 397, 407–11 (N.Y.1852) (applying New York law); see also Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 Colum. L.Rev. 699, 732–44 (1936) (discussing distinctions between the early products liability law of the various States).

More specifically, even aviation torts have been consistently governed by state law. In *The Crawford Bros. No. 2*, 215 F. 269 (W.D.Wash.1914), which appears to be the earliest tort case involving an aircraft, the court considered the effect of the “legal code of the air” that had been proposed by the International Juridic Committee on Aviation on a salvage claim related to an airplane crash in Puget Sound. *Id.* at 269–70. The court posited that, if the code had become law, “it would be important to consider its provisions in determining what was reasonable and proper in a cause involving air craft in a common-law action,” much like with rules governing water craft. *Id.* at 270. The court ultimately dismissed the suit for lack of

jurisdiction, as neither the proposed legal code of the air nor maritime law provided for jurisdiction, and instructed that such questions “must be relegated to the common-law courts.” *Id.* at 271. The decision in *Crawford Bros.* thus recognized that, absent specific legislation, the common law governed aviation tort claims.

Years later, after Congress passed the 1926 Air Commerce Act but before the current type certification regime was imposed, Judge Buffington authored what appears to be this Court’s first decision involving an aviation-related tort claim, *Curtiss–Wright Flying Service v. Glose*, 66 F.2d 710 (3d Cir.), cert. denied, 290 U.S. 696, 54 S.Ct. 132, 78 L.Ed. 599 (1933). There, a widow brought suit against the Curtiss–Wright Flying Service, an early airline, after her husband was killed in a plane crash as a result of negligent operation. \*691 *Id.* at 711. We analyzed the claims under common law negligence standards, see *id.* at 712, as no specific legislation or regulation governed those claims. Of course, because that decision preceded *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), our analysis turned on federal, rather than state, common law, but the distinction is not important for our purposes here. Rather, our decision reflects that despite the emergence of federal statutes governing aviation, the common law continued to apply to aviation torts.

Since then, in the absence of applicable statutory or regulatory provisions, we have consistently applied state law to tort claims arising from airplane crashes. Only a month before the Federal Aviation Act was enacted, we were faced with a case involving three claims of defective design against an aircraft manufacturer after its plane broke apart in midair. *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 603–04 (3d Cir.), cert. denied, 358 U.S. 910, 79 S.Ct. 236, 3 L.Ed.2d 230 (1958). In concluding that the aircraft manufacturer did not negligently design the plane, we did not exclusively rely on the Civil Aeronautics Board’s certification of the relevant design, but rather methodically considered each design defect claim under a common law negligence standard, using the type certificate as but a part of that overall analysis. *Id.* at 605–07; see also *Nw. Airlines v. Glenn L. Martin Co.*, 224 F.2d 120, 124 (6th Cir.1955), cert. denied, 350 U.S. 937, 76 S.Ct. 308, 100 L.Ed. 818 (1956) (confirming the district court’s decision to leave the question of a manufacturer’s negligent design to the jury for determination of whether the pertinent state standard of ordinary care was met).

We have done the same in the years since the Federal Aviation Act replaced the Civil Aeronautics Act, *see, e.g., Paoletto v. Beech Aircraft Corp.*, 464 F.2d 976, 978–82 (3d Cir.1972) (applying a state standard of care to claims for strict liability, negligence, and breach of warranty arising from an airplane crash caused by the collapse of the plane's right wing); *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236–37 (3d Cir.1964) (rejecting defendant's argument that approval by the Civil Aeronautics Administration of an airplane's propeller system was conclusive of compliance with the standard of care), as have other Courts of Appeals, *see, e.g., Martin*, 555 F.3d at 808; *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908 (7th Cir.2007); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 426 (5th Cir.2001); *In re Air Crash Disaster*, 86 F.3d 498, 522–23 (6th Cir.1996); *Pub. Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 293–95 (11th Cir.1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1441–47 (10th Cir.1993); *In re N-500L Cases*, 691 F.2d 15, 27–28 (1st Cir.1982); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 452–53 (2d Cir.1969); *Banko v. Cont'l Motors Corp.*, 373 F.2d 314, 315–16 (4th Cir.1966).

Consistent with the uniform treatment of aviation products liability cases as state law torts, we expressly held in *Elassaad* that the presumption against preemption applies in the aviation context.<sup>7</sup> *See* 613 F.3d at 127 (“When considering preemption of an area of traditional state regulation, we begin our analysis by applying a \*692 presumption against preemption.... [I]t is appropriate to use a restrained approach in recognizing the preemption of common law torts in the field of aviation.” (quoting *Holk*, 575 F.3d at 334) (internal quotation marks omitted)); *Abdullah*, 181 F.3d at 366 (“[We] have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.”). Appellees' attempts to set the presumption aside are therefore unavailing.

<sup>7</sup> The Tenth Circuit rejected the application of the presumption against preemption in the air operations context on the ground that “the field of aviation safety has long been dominated by federal interests.” *See U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325 (10th Cir.2010) (internal quotation marks omitted). For the reasons discussed above, we respectfully disagree.

With this presumption in mind, we must determine whether Congress expressed its clear and manifest intent

to preempt aviation products liability claims. We do so by reviewing the text and structure of the Federal Aviation Act, and, to the extent necessary and relevant to this statute, examining subsequent congressional action that sheds light on its intent. *See Medtronic*, 518 U.S. at 485–86, 116 S.Ct. 2240. We also consider relevant regulations that have been issued pursuant to the valid exercise of the FAA's delegated authority, which can have the same preemptive effect as federal statutes. *See Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir.2008).

## C. Indicia of Congressional Intent

### 1. The Federal Aviation Act

[13] As we have explained, although the federal government has overseen certain aspects of aviation, such as air traffic control and pilot certification, since the early days of flight, *see* Air Commerce Act of 1926, ch. 344, 44 Stat. 568, there was little question when the Civil Aeronautics Act was adopted in 1938 that common law standards governed tort claims arising from plane crashes, *see, e.g., Curtiss-Wright Flying Serv.*, 66 F.2d at 711–13 (applying the common law standard for negligence). It is therefore significant that the Federal Aviation Act, which succeeded the Civil Aeronautics Act and remains the foundation of federal aviation law today, contains no express preemption provision. In fact, it says only that the FAA may establish “minimum standards” for aviation safety, 49 U.S.C. § 44701—statutory language the Supreme Court has held in other contexts to be insufficient on its own to support a finding of clear and manifest congressional intent of preemption, *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *see also Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 n. 19, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Abdullah*, 181 F.3d at 373–74; *Cleveland*, 985 F.2d at 1445.

[14] Further, the Federal Aviation Act contains a “savings clause,” which provides that “[a] remedy under this part is *in addition* to any other remedies provided by law.”<sup>8</sup> 49 U.S.C. § 40120(c) (emphasis added). The Supreme Court observed that this statutory scheme permits states to retain their traditional regulatory power over aspects of aviation. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378–79, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (noting that the Federal Aviation

Act's savings clause permitted the States to regulate intrastate airfares and enforce their own laws against deceptive trade practices prior to the 1978 enactment of the Airline Deregulation Act, which *did* expressly preempt state laws relating to the rates, routes, or services of an air carrier). While the inclusion of the savings clause "is not inconsistent" with a requirement that courts apply federal standards of care when adjudicating state law claims, *Abdullah*, 181 F.3d at 374–75, it belies Appellees' argument that Congress demonstrated a clear and manifest \*693 intent to preempt state law products liability claims altogether.

<sup>8</sup> There is no question that state law provides remedies for products liability claims. *See, e.g., Tinscher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328 (2014).

Whereas Appellees must show a clear and manifest congressional intent to overcome the presumption against preemption, they instead have mustered scant evidence and, at best, have demonstrated ambiguity. For example, they discuss § 601 of the Federal Aviation Act, which empowers the FAA to promulgate regulations "to promote safety of flight of civil aircraft in air commerce by prescribing ... minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety." Federal Aviation Act of 1958, Pub.L. No. 85–726, § 601(a)(1), 72 Stat. 731, 775. Yet, that provision, along with § 603, which provides the statutory framework for the issuance of type certificates, was adopted verbatim from the 1938 Civil Aeronautics Act, *id.* § 603; *see* H.R.Rep. No. 85–2360, at 16 (1958), which clearly did not preempt state law products liability claims, *see supra*, Part III.B. Neither the Federal Aviation Act nor subsequent amendments substantially changed this statutory framework. *See* Revision of Title 49, United States Code Annotated, "Transportation," Pub.L. No. 103–272, 108 Stat. 745 (1994); *see also* H.R.Rep. No. 103–180, at 343–44 (1993) (discussing changes to the statutory provisions governing the issuance of type certificates as words "added for clarity" and "omitted as surplus").

Appellees thus present no evidence from the Federal Aviation Act's text or extensive legislative history that plausibly suggests Congress intended these same provisions to have a different meaning in the 1958 Act than they had in the 1938 Act. Simply put, if Congress had wanted to change the preemptive effect of the type certification process, it would have done so—or at least

given some indication of that intention. It did not. The Federal Aviation Act itself therefore does not signal an intent to preempt state law products liability claims.

## 2. Federal Aviation Regulations

The federal aviation design regulations are likewise devoid of evidence of congressional intent to preempt state law products liability claims. The FAA, in the letter brief it submitted as amicus curiae in this case, takes the position that the Act and these regulations so pervasively occupy the field of design safety that, consistent with *Abdullah*, they require state tort suits that survive a conflict preemption analysis to proceed under "federal standards of care found in the Federal Aviation Act and its implementing regulations." Letter Br. of Amicus Curiae Fed. Aviation Admin. 11 ("FAA Ltr. Br.").<sup>9</sup>

<sup>9</sup> At our request, the FAA submitted a letter brief specifically to address the scope of field preemption, the existence and source of any federal standard of care for design defect claims, and the role of the type certificate in determining whether the relevant standard of care had been met. For the reasons set forth below, we are not persuaded by the FAA's position on field preemption and the applicable standard of care. However, we do find persuasive its views on the relevance of the type certification process to a conflict preemption analysis. *See infra* Part III.D.2.

[15] We do not defer to an agency's view that its regulations preempt state law, but we do recognize that agencies are well equipped to understand the technical and complex nature of the subject matter over which they regulate and thus have a "unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth*, 555 U.S. at 576–77, 129 S.Ct. 1187 (quoting \*694 *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)) (internal quotation marks omitted); *see also Farina*, 625 F.3d at 126. We therefore consider the FAA's "explanation of state law's impact on the federal scheme" governing aircraft design and manufacture, but "[t]he weight we accord [its] explanation ... depends on its thoroughness, consistency, and persuasiveness." *Wyeth*, 555 U.S. at 577, 129 S.Ct. 1187 (citing *United States v.*

*Mead Corp.*, 533 U.S. 218, 234–35, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *Farina*, 625 F.3d at 126–27 & n. 27. Specifically, its views as presented in an amicus brief are “‘entitled to respect’ only to the extent [they] ha[ve] the ‘power to persuade.’” See *Gonzales v. Oregon*, 546 U.S. 243, 255–56, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (quoting *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161); see also *Farina*, 625 F.3d at 126–27.

Here, three fundamental differences between the regulations at issue in *Abdullah* and those concerning aircraft design, along with the agency’s inability to specifically identify or articulate the proposed federal standard of care, lead us to disagree with this aspect of the FAA’s submission. First, the regulations governing in-flight operations on their face “prescribe [ ] rules governing the operation of aircraft ... within the United States.” 14 C.F.R. § 91.1(a); see also 14 C.F.R. § 121.1(e) (prescribing rules governing “[e]ach person who is on board an aircraft being operated under this part”). In contrast, the manufacturing and design regulations prescribe “[p]rocedural requirements for issuing and changing—(i) Design approvals; (ii) Production approvals; (iii) Airworthiness certificates; and (iv) Airworthiness approvals” and “[r]ules governing applicants for, and holders of” such approvals and certificates. 14 C.F.R. § 21.1(a). That is, these regulations do not purport to govern the manufacture and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA, see generally 14 C.F.R. § 21, and in the context of those procedures, to “prescribe[ ] airworthiness standards for the issue of type certificates,” 14 C.F.R. § 33.1(a) (aircraft engines) (emphasis added); see also 14 C.F.R. §§ 23.1(a), 25.1(a), 27.1(a), 29.1(a), 31.1(a), 35.1(a). Of course, the issuance of a type certificate is a threshold requirement for the lawful manufacture and production of component parts and, at least to that extent, arguably reflects nationwide standards for the manufacture and design of such parts. But the fact that the regulations are framed in terms of standards to acquire FAA approvals and certificates—and not as standards governing manufacture generally—supports the notions that the acquisition of a type certificate is merely a baseline requirement and that, in the manufacturing context, the statutory language indicating that these are “minimum standards,” 49 U.S.C. § 44701, means what it says.

Second, the standards that must be met for the issuance of type certificates cannot be said to provide the type of “comprehensive system of rules and regulations” we determined existed in *Abdullah* to promote in-flight safety “by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Abdullah*, 181 F.3d at 369 (footnotes omitted). Rather, many are in the nature of discrete, technical specifications that range from simply requiring that a given component part work properly, e.g., 14 C.F.R. § 33.71(a) (providing that a lubrication system “must function properly in the flight altitudes and atmospheric conditions in which an aircraft is expected to operate”), to prescribing particular specifications for certain aspects (and not even all aspects) of that component part, e.g., \*695 14 C.F.R. § 33.69 (providing that an electric engine ignition system “must have at least two igniters and two separate secondary electric circuits, except that only one igniter is required for fuel burning augmentation systems”). The regulation governing the fuel and induction system at issue in this case, for example, specifies that this part of the engine “must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.” 14 C.F.R. § 33.35(a) (emphasis added). As the District Court observed, the highly technical and part-specific nature of these regulations makes them exceedingly difficult to translate into a standard of care that could be applied to a tort claim.

Third, the regulations governing in-flight operations “suppl[y] a comprehensive standard of care,” *Abdullah*, 181 F.3d at 371, that could be used to evaluate conduct not specifically prescribed by the regulations, i.e., that a person must not “operate an aircraft in a careless or reckless manner so as to endanger the life or property of another,” 14 C.F.R. § 91.13(a). We recognized in *Abdullah* that § 91.13(a) sounds in common law tort, making it appropriate and practical to incorporate as a federal standard of care in state law claims concerning in-flight operations and rendering existing state law standards of care duplicative (if not conflicting with them outright). *Abdullah*, 181 F.3d at 371, 374. Neither the FAA nor Appellees have pointed us to any analogous provision for aircraft manufacture and design, nor have we identified one.<sup>10</sup>

10 Although Appellees suggest 49 U.S.C. § 44701(a)(5) and CAR §§ 13.100–101, 13.104 (1964) as candidates for an equivalent to § 91.13(a), neither states a workable standard of care. The first simply describes what types of regulations the FAA is authorized to promulgate by directing the agency to prescribe “regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security.” 49 U.S.C. § 44701(a)(5). The second establishes “standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.” CAR § 13.0 (1964). Neither provision purports to, nor could, practically function as a general standard of care for products liability claims.

[16] We therefore agree with the District Court that neither the Federal Aviation Act nor the associated FAA regulations “were [ever] intended to create federal standards of care” for manufacturing and design defect claims. *Sikkelee*, 45 F.Supp.3d at 437 n. 4 (internal quotation marks omitted) (describing the District Court’s reasoning in its earlier memorandum responding to proposed jury instructions and citing *Pease*, 2011 WL 6339833, at \*22–23). However, the District Court proceeded from that accurate premise to a faulty conclusion (the one urged by Appellees), i.e., that because there is no federal standard of care for these claims in the statute or regulations, the issuance of a type certificate must both establish and satisfy that standard. Not so. In light of the presumption against preemption, absent clear evidence that Congress intended the mere issuance of a type certificate to foreclose all design defect claims, state tort suits using state standards of care may proceed subject only to traditional conflict preemption principles.

Besides preserving principles of federalism, this conclusion avoids interpreting the Federal Aviation Act in a way that would have “the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation.” \*696 *Medtronic*, 518 U.S. at 487, 116 S.Ct. 2240. Conversely, were we to adopt Appellees’ position, we would be holding, in effect, that the mere issuance of a type certificate exempts designers and manufacturers of defective airplanes from the bulk of liability for both individual and large-scale air catastrophes. While Appellees answer that “failure to report defects” claims could still proceed under state

law, as the District Court permitted here, even Appellees acknowledge that, at best, only some “percentage of claims that are theoretically available would be left under [their] interpretation....” Oral Arg. at 35:01, 42:54 (argued June 24, 2015).<sup>11</sup>

11 An audio recording of the oral argument is available online, at <http://www2.ca3.uscourts.gov/oralargument/audio/14-4193JillSillelev.PrecisionAirmotiveCorp.mp3>.

In short, like the manufacturer in *Medtronic*, Appellees would have us adopt the position that “because there is no explicit private cause of action against manufacturers contained in the [Act], and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective [aircraft parts].” *Medtronic*, 518 U.S. at 487, 116 S.Ct. 2240. Like the Supreme Court in *Medtronic*, however, we find it “to say the least, ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.’” *Id.* (quoting *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)).

These observations lead us to conclude that the Federal Aviation Act and its implementing regulations do not indicate a clear and manifest congressional intent to preempt state law products liability claims; Congress has not created a federal standard of care for persons injured by defective airplanes; and the type certification process cannot as a categorical matter displace the need for compliance in this context with state standards of care.

### 3. GARA

Our conclusion is solidified by the General Aviation Revitalization Act of 1994 (“GARA”), Pub L. No. 103–298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 note). In that statute, Congress created a statute of repose that, with certain exceptions, bars suit against an aircraft manufacturer arising from a general aviation accident brought more than eighteen years after the aircraft was delivered or a new part was installed.<sup>12</sup> 49 U.S.C. § 40101 note § 3(3). GARA was adopted to limit the “long tail of liability” imposed on manufacturers of general aviation aircraft. *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948,

951 (9th Cir.2008) (quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir.2001)).

12 “General aviation aircraft” is defined in GARA as any aircraft with a maximum seating capacity of fewer than 20 passengers that was not engaged in scheduled passenger-carrying operations at the time of the accident. 49 U.S.C. § 40101 note § 2(c). In other words, general aviation is distinct from larger-scale commercial aviation.

[17] By barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted. Indeed, GARA's eighteen-year statute of repose would be superfluous if all aviation products liability claims are preempted from day one. Because we must “interpret a statute so as to ‘give effect to every word of a statute wherever possible,’” *Shalom Pentecostal Church v. Acting Sec’y U.S. Dep’t of Homeland Sec.*, 783 F.3d 156, 165 (3d Cir.2015) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)), GARA reinforces what is now apparent: Federal law does not preempt state design defect claims. Rather, Congress left state law \*697 remedies in place when it enacted GARA in 1994, just as it did when it enacted the Civil Aeronautics Act in 1938 and the Federal Aviation Act in 1958.

Appellees argue that GARA would not be entirely superfluous because general aviation manufacturers would “remain subject to state tort remedies for actual violations of federal aviation safety standards,” Appellee's Br. 51, such as the failure to disclose defects discovered after a type certificate has been issued or the failure to comply with an airworthiness directive, Oral Arg. at 35:20, 37:00. Those kinds of claims, however, are already expressly exempted in § 2(b)(1) from GARA's statute of repose.<sup>13</sup> In sum, if GARA and its § 2(b)(1) carveout are to serve their stated purpose, the state law claims to which GARA's statute of repose applies must not be preempted.

13 In full, this exception provides that GARA's statute of repose does not apply  
if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component,

system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered.

49 U.S.C. § 40101 note § 2(b)(1). This provision would exempt from the statute of repose claims that are based on a manufacturer's misrepresentations and omissions with regard to a type certificate or the continuing airworthiness of a plane or its component part, such as a manufacturer's failure to comply with a type certificate or failure to report required information to the FAA.

[18] Our interpretation of the Federal Aviation Act is only bolstered by GARA's legislative history. We are mindful, of course, that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material,” as legislative history can be “murky, ambiguous, and contradictory.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). Here, however, the legislative history is none of those things. GARA's legislative history states explicitly what is implied by the statutory text: Aviation products liability claims are governed by state law. *See* H.R.Rep. No. 103–525, pt. 2, at 3–7 (1994). The House Report begins by stating that “[t]he liability of general aviation aircraft manufacturers is governed by tort law” that “is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.” *Id.* at 3–4. In enacting GARA, Congress “voted to permit, in this exceptional instance, a very limited Federal preemption of State law,” that is, only where GARA's statute of repose has run are state law claims preempted. *Id.* at 4–7. “[I]n cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.”<sup>14</sup> *Id.* at 7.

14 Appellant notes that, as indicated in the House Report accompanying GARA, prior legislative efforts to explicitly federalize aviation tort law failed to get off the ground. H.R.Rep. No. 103–525, pt. 2, at 6 & n. 11 (referencing failed bill H.R. 5362, 102d Cong. (1992)); *see* Appellant's Br. 9. For example, H.R. 5362 would have explicitly preempted state tort claims against aircraft manufacturers arising out of

general aviation accidents, put in place substantive legal rules for such actions (e.g., applying principles of comparative responsibility in such cases), and imbued federal courts with original, concurrent jurisdiction to adjudicate such claims. Although Appellant seems to be suggesting that such proposed bills reflect Congress's belief at the time that the field of aviation products liability was not preempted—and, thus, remains so today absent legislation to the contrary—we take no confidence in the reading of tea leaves left behind by failed legislative efforts. For, while on rare occasion the Supreme Court has described legislative inaction as “instructive” but “not conclusive,” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) (internal quotation marks omitted), it far more often, and with good reason, has emphasized its “reluctan[ce] to draw inferences from Congress[s] failure to act,” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (declining to “rely on Congress[s] failure to act”).

\*698 Appellees attempt to discount GARA's significance, arguing that the views of Congress in 1994 “form a hazardous basis for inferring the intent” of the 1958 Congress that enacted the Federal Aviation Act. Appellee's Br. 41 (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960)). It is true that “the weight given subsequent legislation and whether it constitutes a clarification or a repeal is a context- and fact-dependent inquiry,” *Bd. of Trs. of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*, 802 F.3d 534, 546 (3d Cir.2015), but there are circumstances where its consideration is appropriate. Indeed, the Supreme Court relied on precisely this type of analysis in determining congressional intent in the preemption context in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). There, the Court considered the question of whether state law actions for punitive damages were subject to field preemption under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2284. *Silkwood*, 464 U.S. at 241, 104 S.Ct. 615. The Atomic Energy Act itself was silent on the preemption of state tort claims, but, when it was subsequently amended by the Price–Anderson Act, Pub.L. No. 85–256, 71 Stat. 576 (1957), the accompanying Joint Committee Report reflected an assumption that state law would apply in the absence of subsequent legislative action. *Id.* at 251–54, 104 S.Ct. 615. The Supreme Court found this legislative history to

be persuasive in concluding that Congress did not intend to foreclose state remedies for those injured by nuclear accidents by way of field preemption. *Id.* at 256, 104 S.Ct. 615.

More recently, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, — U.S. —, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015), the Supreme Court held that disparate impact claims were cognizable under the 1968 Fair Housing Act (“FHA”), relying in part on the “crucial[ly] importan[t]” fact that Congress had adopted amendments to the Act in 1988 that assumed the existence of such claims. *Id.* at 2519–20. Because the amendments would make sense only if disparate impact liability existed under the FHA, the Court reasoned that the most logical conclusion was that Congress presupposed the existence of disparate impact claims under the FHA as it had been enacted in 1968. *Id.* at 2520–21.

Consistent with the Supreme Court's approach and our recent guidance in *Board of Trustees of IBT Local 863 Pension Fund*, we may pay heed to the significance of subsequent legislation when it is apparent from the facts and context that it bears directly on Congress's own understanding and intent. Here, the Federal Aviation Act itself neither states nor implies an intent to preempt state law products liability claims, and GARA confirms that Congress understood and intended that Act to preserve such claims. Thus, despite Appellees' exhortations, we cannot infer a clear and manifest congressional purpose to preempt these claims where the indicia of congressional intent, including in this case the assumptions underlying subsequent \*699 legislation, point overwhelmingly the other way.

#### D. Relevant Preemption Precedent

We turn next to Appellees' contention that the Supreme Court's preemption jurisprudence compels us to find that federal law occupies the entire field of aircraft design and manufacture and that the issuance of a type certificate conclusively demonstrates compliance with the corresponding federal standard of care. Appellees argue that: (1) the Court has accorded broad field preemption to analogous statutory regimes governing oil tankers and locomotives; (2) the Court has given broad preemptive effect to analogous premarket approval processes in the medical device context; and (3) other Courts of Appeals have recognized preemption of the field of aviation safety.

For its part, the FAA argues that the mere issuance of a type certificate does not preempt all design defect claims concerning the certificated part but that specifications expressly embodied in a type certificate may, in a given case, preempt such claims under traditional conflict preemption principles. We address Appellees' arguments below and conclude that the case law of the Supreme Court and our sister Circuits supports the application of traditional conflict preemption principles but not preemption of the entire field of aviation design and manufacture.

### 1. Field Preemption in Analogous Statutory Regimes

Although they acknowledge that the Supreme Court has not addressed whether the Federal Aviation Act preempts the field of aviation design and manufacture, Appellees argue on the basis of other Supreme Court precedent that we should affirm the reasoning of the District Court. First, Appellees point to the Supreme Court's observation in *City of Burbank*, 411 U.S. at 639, 93 S.Ct. 1854, that the Federal Aviation Act "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled" as evidence that the Supreme Court has concluded the FAA occupies the entire field of aviation safety. That begs the question, however, of the scope of the field in question. In *City of Burbank*, the Court held only that Congress had preempted the field of aircraft noise regulation. *Id.* at 633, 638–40, 93 S.Ct. 1854. Even in interpreting the express preemption clause of the Airline Deregulation Act,<sup>15</sup> the Court has taken a cautious approach, holding that plaintiffs' claims under state consumer protection statutes are preempted but that related state law claims for breach of contract are not. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223, 227–33, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales*, 504 U.S. at 391, 112 S.Ct. 2031. The Supreme Court also has observed in dicta that state tort law "plainly appl[ies]" to aviation tort cases and that Congress would need to enact legislation "[i]f federal uniformity is the desired goal with respect to claims arising from aviation accidents." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 273–74, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The Court's few pronouncements in the area of aviation preemption, in other words, offer little support for the broad field preemption Appellees seek.

15 The Airline Deregulation Act, Pub.L. No. 95–504, § 105(a)(1), 92 Stat. 1705, 1708 (1978), expressly preempted state law claims "relating to rates, routes, or services of any air carrier." In light of nonsubstantive amendments by Congress, today's iteration of the express preemption clause precludes state law claims "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

Appellees next compare aircraft to oil tankers and locomotives, urging that the broad scope of field preemption recognized \*700 by the Supreme Court in those industries should extend as well to aircraft design defect claims. As Appellees point out, the Supreme Court has found field preemption of oil tanker design, operation, and seaworthiness under Title II of the Ports and Waterways Safety Act and concluded state regulations that impose additional crew training requirements and mandate standard safety features on certain boats fall within this preempted field. *United States v. Locke*, 529 U.S. 89, 109–14, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000); *Ray*, 435 U.S. at 158–68, 98 S.Ct. 988. Appellees also refer to decisions that have found field preemption of design defect claims in the railroad context, *see Kurns v. R.R. Friction Prods. Corp.*, — U.S. —, 132 S.Ct. 1261, 1267–68, — L.Ed.2d — (2012); *Del. & Hudson Ry. Co. v. Knoedler Mfrs., Inc.*, 781 F.3d 656, 661–62 (3d Cir.2015).

We do not find either of these analogies apt. As to tankers, the Supreme Court subsequently distinguished *Ray* and *Locke* on the grounds that both cases invalidated state regulations that created positive obligations, and neither of those cases "purported to pre-empt possible common law claims," *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002), such as the aviation tort claims at issue here. As to locomotives, the Supreme Court and our own Court were bound to find such design defect claims preempted by the Supreme Court's ninety-year-old precedent in *Napier v. Atlantic Coast Line Railway Co.*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926), which held that the Locomotive Inspection Act preempts "the field of regulating locomotive equipment used on a highway of interstate commerce," including "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 607, 611, 47 S.Ct. 207.

Far more apropos in the transportation industry is the Supreme Court's conflict preemption approach in the context of automobiles and boats, for just as the Federal

Aviation Act directs the FAA to “prescrib[e] minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers,” 49 U.S.C. § 44701(a)(1), the National Traffic and Motor Safety Act of 1966 (“NTMSA”) empowers the National Highway Traffic Safety Administration to “prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment,” 49 U.S.C. § 30101(1), and the Federal Boat Safety Act of 1971 (“FBSA”) authorizes the Secretary of Transportation to issue regulations “establishing minimum safety standards for recreational vessels and associated equipment,” 46 U.S.C. § 4302(a)(1).<sup>16</sup> Moreover, like the Federal Aviation Act, the NTMSA and FBSA both contain savings clauses. 49 U.S.C. § 30103(e); 46 U.S.C. § 4311(g).

<sup>16</sup> Appellees argue that the Federal Aviation Act’s mandate that the FAA Administrator establish “minimum” standards in both Section 604 (pertaining to operations) and Section 601(a) (pertaining to aircraft design and manufacture) justifies the extension of *Abdullah* field preemption to both areas. Appellees’ Br. 34 (citing §§ 101(3), (10), (21); 601(a)(1)-(5)). In *Abdullah*, however, we observed that the reference to “minimum standards” did not *preclude* a finding of field preemption; we did not hold that it required or even supported it. See *Abdullah*, 181 F.3d at 373–74.

In assessing implied preemption under these statutory schemes, the Supreme Court has found that the statutory language and applicable regulations support not field preemption, but rather a traditional conflict preemption analysis. In the automobile context, for example, the Court held that a federal regulation governing air bag usage implicated a significant federal regulatory objective—maintaining \*701 manufacturer choice—and therefore preempted a state law tort claim, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 875, 886, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), while another regulation governing seatbelt usage did not reflect a similarly significant federal objective and thus did not preempt state law claims, *Williamson*, 562 U.S. at 336, 131 S.Ct. 1131.

Similarly, in *Sprietsma*, the Court held that the Federal Boat Safety Act did not preempt the field of “state common law relating to boat manufacture,” but nonetheless applied a conflict preemption analysis to determine whether petitioner’s tort law claims were

preempted by the Federal Boat Safety Act (“FBSA”) or the Coast Guard’s decision not to promulgate a regulation requiring propeller guards on motorboats. 537 U.S. at 60–70, 123 S.Ct. 518. The Court held that the Coast Guard’s decision not to regulate did not preclude “a tort verdict premised on a jury’s finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent’s particular type of motor” because the Coast Guard’s decision “does not convey an ‘authoritative’ message of a federal policy against propeller guards.” *Id.* at 67, 123 S.Ct. 518.<sup>17</sup>

<sup>17</sup> We recognize that, unlike the Federal Aviation Act, the NTMSA and the FBSA also contain express preemption clauses. 49 U.S.C. § 30103(b)(1); 46 U.S.C. § 4306. Despite these clauses, however, the Supreme Court still conducted a conflict preemption analysis in *Geier* and *Sprietsma* rather than a field preemption analysis because it determined that, while an express preemption clause may indicate some congressional desire to “subject the industry to a single, uniform set of federal safety standards,” the presence of a savings clause simultaneously “reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries ... enforce[] safety standards [and] ... provid[e] necessary compensation to victims.” *Geier*, 529 U.S. at 867–71, 120 S.Ct. 1913; see also *Sprietsma*, 537 U.S. at 62–65, 123 S.Ct. 518. Because the Court has been willing to apply conflict rather than field preemption even in situations where an *express* preemption clause is at play, conflict preemption appears especially apt in a case like this one where there is no such clause to counsel in favor of field preemption.

In sum, the Supreme Court’s preemption cases in the transportation context support that aircraft design and manufacture claims are not field preempted, but remain subject to principles of conflict preemption.

## 2. Type Certification As Support for Field Preemption

Appellees also assert that because type certificates represent the FAA’s determination that a design meets federal safety standards, allowing juries to impose tort liability notwithstanding the presence of a type certificate would infringe upon the field of aviation safety as defined in *Abdullah* and would fatally undermine uniformity in the federal regulatory regime. Appellees’ Br. 44–45

(quoting *City of Burbank*, 411 U.S. at 639, 93 S.Ct. 1854). In support of this argument, Appellees rely on *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008), in which state tort claims were deemed preempted by an express preemption clause where the plaintiff challenged the safety of a medical device that had received preapproval from the Food and Drug Administration. *Id.* at 330, 128 S.Ct. 999. Although there is no express preemption clause here, Appellees posit that the FAA's type certification process should be accorded a similar field preemptive effect.

The FAA, on the other hand, argues that type certification is relevant only to an analysis under "ordinary conflict preemption principles."<sup>18</sup> FAA Ltr. Br. 2. \*702 Thus, according to the FAA, "[i]t is ... only where compliance with both the type certificate and the claims made in the state tort suit 'is a physical impossibility[ ]'; or where the claim 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' that the type certificate will serve to preempt a state tort suit." *Id.* at 10 (first quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43; then quoting *Geier*, 529 U.S. at 873, 120 S.Ct. 1913). This, the FAA contends, strikes the right balance in the interests of federalism because:

<sup>18</sup> Even with regard to those claims not preempted by conflict preemption, the FAA contends that a federal standard of care should apply. FAA Ltr. Br. 11. For the reasons set forth above, we have rejected that contention. See *supra* Part III.C.2.

to the extent that a plaintiff challenges an aspect of an aircraft's design that was expressly approved by the FAA as shown on the type certificate, accompanying operating limitations, underlying type certificate data sheet, or other form of FAA approval incorporated by reference into those materials, a plaintiff's state tort suit arguing for an alternative design would be preempted under conflict preemption principles ... because a manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate.

*Id.* at 10-11. On the other hand, "to the extent that the FAA has not made an affirmative determination with respect to the challenged design aspect, and the agency has left that design aspect to the manufacturer's discretion, the claim would not be preempted." *Id.* at 11.<sup>19</sup>

<sup>19</sup> A type certificate thus would not create such a conflict in the FAA's view where unilateral changes are permissible without preapproval or where an allegation of negligence arises after the issuance of a type certificate, such as claims related to a manufacturer's maintenance of an aircraft, issuance of service bulletins to correct an issue that has come to the manufacturer's attention, or failure to conform its manufacturing process to the specifications in the type certificate. See FAA Ltr. Br. 10-11, 12-13 n. 2.

We have no need here to demarcate the boundaries of those tort suits that will be preempted as a result of a conflict between state law and a given type certificate, nor which FAA documents incorporated by reference in a type certificate might give rise to such a conflict. While the parties responded to the FAA's submission by arguing for the first time in supplemental submissions whether the alleged design defect at issue in this case is a design aspect that was expressly incorporated into the type certificate for the Textron Lycoming O-320-D2C engine and what significance that might have for conflict preemption, we will leave those issues for the District Court to consider on remand. See, e.g., *Miller v. Mitchell*, 598 F.3d 139, 148 (3d Cir.2010) (remanding consideration of an issue discussed in supplemental briefing on appeal but not addressed by the district court in the first instance). For today, we hold only that, consistent with the FAA's view, type certification does not itself establish or satisfy the relevant standard of care for tort actions, nor does it evince congressional intent to preempt the field of products liability; rather, because the type certification process results in the FAA's preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict preemption principles. See *Wyeth*, 555 U.S. at 576-77, 129 S.Ct. 1187 (according "some weight" to an agency's "unique understanding" of "state law's impact on [a] federal scheme" insofar as its views are "thorough[ ], consisten[t], and persuasive[ ]"); accord *Farina*, 625 F.3d at 126-27.

[19] Indeed, when confronting an analogous preapproval scheme for pharmaceutical labeling, the Supreme Court has held \*703 that, where manufacturers are unable to simultaneously comply with both federal and state requirements, state law design defect claims are conflict preempted, not field preempted. See *Mut. Pharm. Co. v. Bartlett*, — U.S. —, 133 S.Ct. 2466, 2473, 186

L.Ed.2d 607 (2013); *PLIVA*, 131 S.Ct. at 2577. Before a new drug may legally be distributed in the United States, both its contents and its labeling must be preapproved by the FDA. 21 U.S.C. §§ 355(a), (b)(1)(F). In a series of recent preemption cases, the Court has distinguished between brand-name drugs and their generic equivalents, determining that at least some state law tort claims may be brought against brand-name drug companies because such companies have the ability to make some *unilateral* changes to their labels without additional regulatory preapproval, *Wyeth*, 555 U.S. at 572–73, 581, 129 S.Ct. 1187, but such claims against generic drug manufacturers cannot survive a conflict preemption analysis because the generic manufacturers are bound by federal law to directly mimic their brand-name counterparts, *Barilett*, 133 S.Ct. at 2473, 2480; *PLIVA*, 131 S.Ct. at 2577–81.<sup>20</sup> Ultimately, where a party cannot “independently do under federal law what state law requires of it,” the state law is conflict preempted. *PLIVA*, 131 S.Ct. at 2579.

<sup>20</sup> In the case of a new brand-name drug, FDA approval can be secured only by submitting a new drug application (“NDA”), which must include full reports of clinical investigations, 21 U.S.C. § 355(b)(1)(A), relevant nonclinical studies, 21 C.F.R. § 314.50(d) (2), “any other data or information relevant to an evaluation of the safety and effectiveness of the drug product obtained or otherwise received by the applicant from any source,” 21 C.F.R. § 314.50(d) (5)(iv), and “the labeling proposed to be used for such drug,” 21 U.S.C. § 355(b)(1)(F). The FDA approves an NDA only if it determines that the drug in question is safe for use under its proposed labeling and the drug’s probable therapeutic benefits outweigh its risk of harm. 21 U.S.C. § 355(d); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 140, 120 S.Ct. 1291. In contrast, a manufacturer of generic drugs can piggyback off of a previously-approved brand-name drug, but is required by federal law to match the preapproved brand-name analogue’s labeling and composition *exactly*. 21 U.S.C. § 355(j)(2)(A).

The same considerations apply to the case before us. The FAA’s preapproval process for specifications embodied or incorporated into a type certificate, which precludes a manufacturer from making at least “major changes”<sup>21</sup> to a design aspect \*704 without further preapproval, means a manufacturer may well find it impossible to simultaneously comply with both a type certificate’s specifications and a separate—and perhaps more stringent—state tort duty. Thus, there may be cases

where a manufacturer’s compliance with both the type certificate and a state law standard of care “is a physical impossibility,” *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142–43, 83 S.Ct. 1210, or would pose an obstacle to Congress’s purposes and objectives. In such cases, the state law claim would be conflict preempted. For, even if an alternative design aspect would improve safety, the mere “possibility” that the FAA would approve a hypothetical application for an alteration does not make it possible to comply with both federal and state requirements: As the Supreme Court observed in *PLIVA*, if that were enough, conflict preemption would be “all but meaningless.” 131 S.Ct. at 2579.

<sup>21</sup> As previously described, a company may not manufacture, much less produce, an aircraft part until its proposed design, to the extent described in its application, has been approved by the FAA in a type certificate. *See supra*, Part I.A. Once approved, there are two basic mechanisms by which a change can be made, depending whether the change is a “major change” or “minor change.” *See* 14 C.F.R. § 21.93. For “major changes,” a manufacturer cannot alter its design without obtaining preapproval and an amended type certificate from the FAA. *See* 49 U.S.C. § 44704(b); 14 C.F.R. § 21.97. Even where a manufacturer identifies and reports a defect, it may not unilaterally make a major change to its preapproved design; instead, the FAA must either preapprove such a change or issue an airworthiness directive that provides legally enforceable instructions to make the product safe. *See supra*, Part I.A. “Minor changes,” on the other hand, “may be approved under a method acceptable to the FAA before submitting to the FAA any substantiating or descriptive data.” 14 C.F.R. § 21.95. Importantly, “[t]he FAA permits a wide latitude in the approval process for minor changes to type design,” FAA, Order 8110.4C, change 5, Type Certification, ch. 4–1 (2011), allowing, for example, for manufacturers holding a certain, separately-applied-for authorization from the FAA (a so-called “technical standard order authorization”) to “make minor design changes ... without further approval by the FAA,” 14 C.F.R. § 21.619(a). Under the regulations, then, it appears that “major changes” to the design aspects expressly set forth in or incorporated into a type certificate require preapproval, whereas “minor changes,” depending on the “method acceptable to the FAA,” 14 C.F.R. § 21.95, may not.

As for Appellees' reliance on *Riegel*, we agree that the FAA's type certification process resembles the " 'rigorous' " preapproval process for certain medical devices under the Federal Food, Drug, and Cosmetic Act (FDCA), Pub.L. No. 75-717, 52 Stat. 1040 (1939) (amended 1976). *Riegel*, 552 U.S. at 317, 128 S.Ct. 999 (quoting *Lohr*, 518 U.S. at 477, 116 S.Ct. 2240). Not unlike type certification, this approval process involves copious submissions and exhaustive review, and the FDA grants approval only if a device is deemed both safe and effective. *Id.* at 317-19, 128 S.Ct. 999. In addition, just as aircraft manufacturers may not make major changes to or deviate from their type certificates without the FAA's sign-off, certain medical device manufacturers may not deviate from a federally sanctioned design without first obtaining supplemental approval from the FDA. See 21 U.S.C. § 360e(d)(6)(A)(i); *Riegel*, 552 U.S. at 319, 128 S.Ct. 999. However, unlike the Federal Aviation Act, the statute governing medical devices includes an express preemption clause that forbids states from imposing "requirements" that are "different from, or in addition to" federal requirements placed on medical devices. 21 U.S.C. § 360k(a)(1); *Riegel*, 552 U.S. at 316, 128 S.Ct. 999. Because the Supreme Court's preemption analysis in *Riegel* hinged on its interpretation of this express preemption clause, the case provides no support for the general proposition that states may not regulate devices governed by a federal statutory scheme.

Moreover, in an important respect, *Riegel* cuts against a finding of field preemption in this case, particularly when read in conjunction with the Court's prior medical device decision in *Lohr*. Together these cases reflect a narrow, rather than sweeping, approach to analyzing the preemptive contours of a federal premarket approval scheme. In *Lohr*, finding that the "overarching concern" of the federal statutory and regulatory scheme was ensuring "that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest," the Court preserved state common law requirements "equal to, or substantially identical to, requirements imposed under federal law." 518 U.S. at 497, 500-01, 116 S.Ct. 2240 (internal quotation marks omitted). Subsequently, in *Riegel*, although the Court held that state design defect claims were preempted where they imposed additional safety requirements on medical device manufacturers in violation of the express preemption clause, the Court left *Lohr* intact and took care to note that state duties that " 'parallel,' rather than add to, federal requirements" are not preempted

by the statute. 552 U.S. at 330, 128 S.Ct. 999. Here, confronted with a similarly exhaustive preapproval process governing aircraft manufacture and design and no express preemption clause, we see no justification for going further than the Supreme \*705 Court elected to go in *Riegel* or *Lohr* by deeming categorically preempted even those state requirements that may be consistent with the federal regulatory scheme as embodied in the FAA's type certificates. We thus read *Riegel* not to bestow field preemptive effect on type certificates, but rather to counsel in favor of narrowly construing the effect of federal regulations on state law—much like the conflict preemption analysis undertaken in *Bartlett* and *PLIVA*.

### 3. Aviation Preemption Precedent in the Courts of Appeals

With a dearth of support for the proposition that the field of aircraft design and manufacture is preempted, Appellees attempt to muster support from select language in the opinions of other Courts of Appeals. Their efforts are unavailing.

Appellees observe that various Courts of Appeals have described the entire field of aviation safety as preempted, but, on inspection, even those courts have carefully circumscribed the scope of those rulings. The Second, Ninth, and Tenth Circuits all assess the scope of the field of aviation safety by examining the pervasiveness of the regulations in a particular area rather than simply determining whether the area implicated by the lawsuit concerns an aspect of air safety. See *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir.2013) (inquiring as to "whether the particular area of aviation commerce and safety implicated by the lawsuit is governed by pervasive federal regulations" (quoting *Martin*, 555 F.3d at 811) (alteration and internal quotation marks omitted)); *Goodspeed Airport L.L.C. v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210-11 (2d Cir.2011) ("[C]oncluding that Congress intended to occupy the field of air safety does not end our task.... [T]he inquiry is twofold; we must determine not only Congressional intent to preempt, but also the scope of that preemption. 'The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted[.]'" (second alteration in original) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992))); *U.S. Airways, Inc. v.*

*O'Donnell*, 627 F.3d 1318, 1329 (10th Cir.2010) (“Based on the pervasive federal regulations concerning flight attendant and crew member training and the aviation safety concerns involved when regulating an airline’s alcoholic beverage service, we conclude that NMLCA’s application to an airline implicates the field of airline safety that Congress intended federal law to regulate exclusively.”).<sup>22</sup>

<sup>22</sup> Thus, although described as field preemption, these two-part tests define the relevant “field” so narrowly as to result in an analysis that resembles conventional conflict preemption. See *Williamson*, 562 U.S. at 330, 131 S.Ct. 1131 (asking “whether, in fact, the state tort action conflicts with the federal regulation” (citation and internal quotation marks omitted)). Indeed, in *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 103–04, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality opinion), on which the Second Circuit relied in *Goodspeed* to articulate its test, the Supreme Court rested its plurality opinion on conflict preemption rather than field preemption. See *Goodspeed*, 634 F.3d at 209 n. 4, 210–11 (recognizing that the categories of preemption “are not rigidly distinct,” but that, while field preemption may be considered a “subset of conflict preemption,” courts often recognize field preemption and conflict preemption as separate doctrinal categories (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990))).

Notably, several district courts have also rejected field preemption in the aviation context and thereafter considered whether conflict preemption applies. See, e.g., *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02–4185, 03–5011, 03–5063, 2006 WL 1084103, at \*23 (D.S.D.2006); *Monroe v. Cessna Aircraft Co.*, 417 F.Supp.2d 824, 836 (E.D.Tex.2006); *Holliday v. Bell Helicopters Textron, Inc.*, 747 F.Supp. 1396, 1400 (D.Haw.1990).

\*706 In any event, to date, the Courts of Appeals have held that aviation products liability claims are not preempted, although they have taken a variety of different approaches to reach that result. See *Martin*, 555 F.3d at 812; *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788–89, 794–95 (6th Cir.2005); *Pub. Health Trust*, 992 F.2d at 294–95; *Cleveland*, 985 F.2d at 1442–47. The Ninth Circuit has held that the entire field of aviation safety is preempted, *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468–69 (9th Cir.2007), but that products liability claims are not within that preempted field, drawing a line

between areas of law where the FAA has issued “pervasive regulations”—such as passenger warnings, *id.* (concluding that state law negligence claims for failure to warn passengers of medical risks accompanying long flights are preempted), and pilot qualifications, *Ventress v. Japan Airlines*, 747 F.3d 716, 721–23 (9th Cir.), *cert. denied*, — U.S. —, 135 S.Ct. 164, 190 L.Ed.2d 118 (2014) (holding state law claims implicating pilot qualifications and medical standards fall within the preempted field of aviation safety because “unlike aircraft stairs, [they] are pervasively regulated”)—and other areas where the FAA has not—such as products liability claims for allegedly defective airstairs, *Martin*, 555 F.3d at 808–11.

The Tenth and Eleventh Circuits, in addressing products liability claims, have held that not only are those claims governed by state law, but also that the entire field of aviation safety is not preempted. See *Pub. Health Trust*, 992 F.2d at 295; *Cleveland*, 985 F.2d at 1447. While the basis for their broader holdings is now in doubt,<sup>23</sup> both of those Circuits still hold that aviation products liability claims are governed by state law. The Sixth Circuit’s approach is most difficult to decipher: In a single opinion, it relied on *Abdullah* for the proposition that “federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation” yet also applied Kentucky tort law to a design defect products liability claim involving a navigational instrument. *Greene*, 409 F.3d at 788–89, 794–95. The most logical reading of *Greene* is that it holds products liability claims not to be preempted, as any other interpretation would render futile its extensive analysis of the design defect claim under state law. See *Martin*, 555 F.3d at 811; *McWilliams v. S.E., Inc.*, 581 F.Supp.2d 885, 888–92 (N.D. Ohio 2008).

<sup>23</sup> The Tenth and Eleventh Circuits both relied in part on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), and the canon of *expressio unius est exclusio alterius* to conclude that because products liability claims were outside the scope of the ADA’s express preemption clause, they were not preempted. Although this employment of *expressio unius* has been called into question by more recent Supreme Court authority, see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872–73, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), courts in the Eleventh Circuit continue to apply *Public Health*’s broad holding, see *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253–55 (11th Cir.2003); *Psalmund*

v. *Delta Air Lines, Inc.*, No. 1:13-cv-2327, 2014 WL 1232149, at \*3 (N.D.Ga. Mar. 25, 2014); *North v. Precision Airmotive Corp.*, No. 6:08-cv-2020, 2011 WL 679932, at \*4-5 (M.D.Fla. Feb. 16, 2011).

The fate of *Cleveland* is less certain. In *O'Donnell*, the Tenth Circuit reversed course and held that the field of aviation safety is preempted. *O'Donnell*, 627 F.3d at 1322. Several district courts, including the District Court here, have stated without explanation that *Cleveland* has been abrogated by *O'Donnell*. See, e.g., *Sikkelee*, 45 F.Supp.3d at 448 n. 16. While *O'Donnell* narrowed *Cleveland*'s holding, it did not purport to overturn *Cleveland*'s application to products liability claims, but rather concluded that it "does not dictate the outcome in this case." 627 F.3d at 1326. Thus, *Cleveland*'s holding that products liability claims are not preempted still appears to be the law of the Tenth Circuit.

\*707 Even those Courts of Appeals that have not directly addressed the issue have adopted approaches to aviation preemption that suggest they would reach a similar result. The Seventh Circuit has clearly indicated its understanding that state law applies to aviation products liability claims. See *Bennett*, 484 F.3d at 908-09 ("Defendants' early theory that federal law occupies the field of aviation safety and thus 'completely preempts' all state law has been abandoned.... Illinois tort law supplies the claim for relief. On that much all parties agree. For decades aviation suits have been litigated in state court when the parties were not of diverse citizenship."). And the Fifth Circuit has found field preemption only of the narrower field of passenger safety warnings, *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir.2004), and otherwise has applied state law to aviation products liability claims, e.g., *McLennan*, 245 F.3d at 425-26.

In sum, no federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or otherwise field preempted, and Appellees have been unable to identify a single decision from any court, other than the District Court here, that has held the mere issuance of a type certificate conclusively establishes a defendant's compliance with the relevant standard of care.

#### E. The Parties' Policy Arguments

In addition to their legal arguments, the parties present various policy arguments in support of their respective positions. While we are not unsympathetic to those arguments, they carry no sway in face of clear evidence of

congressional intent and the guidance we draw from the Supreme Court's preemption jurisprudence. Nonetheless, for the sake of completeness, we address those arguments briefly here.

First, in support of field preemption and a federal standard of care, Appellees and their amici warn that allowing state tort law to govern design defect claims will open up aviation manufacturers to tremendous potential liability and the unpredictability of non-uniform standards applied by juries throughout the states. See, e.g., Br. of Amicus Curiae Gen. Aviation Mfrs. Ass'n 18-24. Even if we accepted the premise that members of the aviation manufacturing industry would suffer more harm from exposure to tort liability than any other manufacturer that sells its products in all fifty states, this policy argument could not lead us to find field preemption without the requisite congressional intent. And as even the FAA acknowledges, "[a]lthough allowing a defendant to be held liable for a design defect in an engine that has received a type certificate from the FAA is in some tension with Congress's interest in national uniformity in safety standards with oversight by a single federal agency, Congress struck a balance between protecting these interests in uniformity and permitting States to compensate accident victims." FAA Ltr. Br. 12.

Nor are we moved by Appellees' predictions of the dire consequences to aircraft and component manufacturers of permitting products liability claims to proceed under state tort law, for our holding does not effect a sea change. On the contrary, it simply maintains the status quo that has existed since the inception of the aviation industry, preserving state tort remedies for people injured or killed in plane crashes caused by manufacturing and design defects. That status quo leaves intact the traditional deterrence mechanism of a state standard of care, with attendant remedies for its breach. Thus, while perhaps contrary to certain policies identified by Appellees and their amici, our holding furthers an overriding public policy and one we conclude is consistent with the Federal Aviation Act, FAA regulations, GARA, and decisions of the Supreme Court and our \*708 sister Circuits: promoting aviation safety. See 49 U.S.C. §§ 40101(a)(1)-(3), 44701(a).

On the other side of this debate, in arguing that type certificates should have no significance for conflict preemption, much less field preemption,

Appellant contends that FAA preapproval of particular specifications provides no assurance of safety because the FAA delegates ninety percent of its certification activities to private individuals and organizations, known as designees, which can include the manufacturers themselves. U.S. Gov't Accountability Office, GAO-05-40, *Aviation Safety: FAA Needs to Strengthen the Management of Its Designee Programs* 3 (2004); see also *Junhong v. Boeing Co.*, 792 F.3d 805, 808 (7th Cir.2015) ("Instead of sending a cadre of inspectors to check whether every aircraft design meets every particular of every federal rule and policy, the FAA allows [manufacturers] to do some of the checking [themselves]."). We too have recognized that designees receive inconsistent monitoring and oversight from the FAA, and many have some association with the applicant, so that in essence "[s]ome manufacturers are able to grant themselves a type certificate." *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 166 (3d Cir.2006); see also *Varig Airlines*, 467 U.S. at 818 n. 14, 104 S.Ct. 2755 (expressing concern that the staff of the FAA "performs only a cursory review of the substance of the overwhelming volume of documents submitted for its approval" (alteration, internal quotation marks, and citation omitted)). Even the FAA acknowledges that, "[i]n light of its limited resources," the agency designates outside organizations to perform some of the FAA's work in preparing a type certificate. FAA Ltr. Br. 14. From these alleged "flaws" in the review process, Appellant argues that the agency preapproval of specifications in the type certificate amounts to an unreliable self-policing regime that should play no role in even conflict preemption.

This very same argument, however, was raised in *Bartlett* and failed to carry the day. While the dissenters decried that granting "manufacturers of products that require preapproval ... *de facto* immunity from design-defect liability" would force the public "to rely exclusively on imperfect federal agencies with limited resources," *Bartlett*, 133 S.Ct. at 2495 (Sotomayor, J., dissenting), the majority held that because generic drug manufacturers are required to directly mirror the preapproved labels of their brand-name counterparts and are thus "prohibited from making any unilateral changes" to their labels, state law design defect claims were foreclosed by "a straightforward application of pre-emption law," *id.* at 2471, 2480. Although the resource limitations and extent

of outsourcing of parts of the review process highlight the need for the FAA's vigilant oversight, the FAA still makes the ultimate decision to approve the particular design specifications sought in a type certificate. 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21. Thus, the reasoning of the *Bartlett* majority, 133 S.Ct. at 2473, 2480, and the consideration we must give to the FAA's views under separation of powers principles, see *Wyeth*, 555 U.S. at 576-77, 129 S.Ct. 1187, lead us to conclude that the FAA's preapproval process for aircraft component part designs must be accorded due weight under a conflict preemption analysis.

In sum, the parties' policy arguments notwithstanding, the case law of the Supreme Court and our sister Circuits confirm our conclusion: We are dealing with an area at the heart of state police powers, and we have no indication of congressional intent to preempt the entire field of aviation design and manufacture. We therefore decline the invitation to create a circuit split and to broaden the scope of \*709 *Abdullah's* field preemption to design defects when the statute, the regulations, and relevant precedent militate against it.

#### IV. Conclusion

We conclude that the District Court erred in granting summary judgment on Sikkelee's design defect claims on the basis of field preemption. The field of aviation safety we identified as preempted in *Abdullah* does not include product manufacture and design, which continues to be governed by state tort law, subject to traditional conflict preemption principles. Accordingly, we will vacate and remand for further proceedings consistent with this opinion.<sup>24</sup>

<sup>24</sup> Appellees should address to the District Court in the first instance their argument that Sikkelee's claims fail as a matter of Pennsylvania law. Given the basis for its judgment, the District Court had no need to reach that question and it is not fairly encompassed within the order certified for this interlocutory appeal. See *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir.2000) (declining to consider on interlocutory appeal issues unaddressed by the district court below).

#### All Citations

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Dear Clerk:

Please find attached Appellant Estate of Virgil V. Becker Jr.'s Supplemental Brief for filing with the Washington Supreme Court.

Case Name: ESTATE OF VIRGIL V. BECKER JR., by its Personal Representative Nancy A. Becker, Petitioner, v. FORWARD TECHNOLOGY INDUSTRIES, INC., Respondent.

Case Number: Supreme Court No. 92972-6, Court of Appeals No. 72416-9-1

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The appendix attached to the Petition does not exceed 50 pages.

Respectfully,

**James T. Anderson**

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