

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

Sep 23, 2016, 3:14 pm

RECEIVED ELECTRONICALLY

No. 92972-6

---

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

Estate of Virgil Victor Becker, Jr., by its Personal Representative,  
Jennifer L. White,

*Petitioner,*

v.

Forward Technology Industries, Inc.,

*Respondent.*

---

*E* FILED  
OCT 04 2016  
WASHINGTON STATE  
SUPREME COURT

*by h*

---

BRIEF OF AMICUS CURIAE THE BOEING COMPANY

---

Eric B. Wolff, WSBA No. 43047  
Jeffery S. Clackley, WSBA No. 48133  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for  
*The Boeing Company*

 ORIGINAL

## **CORPORATE DISCLOSURE STATEMENT**

More than 10% of The Boeing Company's outstanding stock is owned by State Street Bank and Trust Company, which is a trustee of Boeing employee savings plans. State Street Bank and Trust Company is a subsidiary of State Street Corporation, a publicly-held company.

No party to the case authored any part of this brief, nor did any party or other person contribute funding for the preparation or submission of this brief.

## TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT .....	i
INTEREST OF AMICUS .....	1
INTRODUCTION .....	2
I. The proper test for field preemption is whether Congress pervasively regulated the area or federal interests dominate to the exclusion of state law.....	4
II. Congress and the FAA have preempted the field of aviation safety, as numerous courts have recognized.....	6
A. The Federal Aviation Act of 1958 and the FAA's authority.....	6
B. The comprehensive nature of the FAA's type certification of aircraft .....	8
C. The recognition of field preemption .....	10
III. Recognizing field preemption does not "immunize" manufacturers .....	12
IV. This Court should decline the invitation to follow <i>Sikkelee</i> .....	14
CONCLUSION.....	20

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Abdullah v. American Airlines, Inc.</i> , 181 F.3d 363 (3d Cir. 1999) .....	6, 7, 13, 15
<i>Air Transport Ass'n of America, Inc. v. Cuomo</i> , 520 F.3d 218 (2d Cir. 2008) (per curiam) .....	10
<i>Bennett v. Sw. Airlines Co.</i> , 484 F.3d 907 (7th Cir. 2007) .....	18
<i>Bieneman v. City of Chicago</i> , 864 F.2d 463 (7th Cir. 1988) .....	13, 18
<i>City of Burbank v. Lockheed Air Terminal Inc.</i> , 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973).....	5, 10
<i>Cleveland v. Piper Aircraft Corp.</i> , 985 F.2d 1438 (10th Cir. 1993) .....	19
<i>Estate of Becker v. Forward Technology Industries, Inc.</i> , 192 Wn. App. 65, 365 P.3d 1273 (2015).....	13
<i>Geier v. Am. Honda Motor Co., Inc.</i> , 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).....	19
<i>Greene v. B.F. Goodrich Avionics Systems, Inc.</i> , 409 F.3d 784 (6th Cir. 2005) .....	11
<i>Lu Junhong v. Boeing</i> , 792 F.3d 805 (7th Cir. 2015) .....	18
<i>Martin ex rel. Heckman v. Midwest Express Holdings, Inc.</i> , 555 F.3d 806 (9th Cir. 2009) .....	11, 18
<i>Montalvo v. Spirit Airlines</i> , 508 F.3d 464 (9th Cir. 2007) .....	6, 11, 13, 20

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>Ray v. Atlantic Richfield Co.</i> , 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978).....	passim
<i>Reigel v. Medtronic</i> , 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008).....	18, 19
<i>Sikkelee v. Precision Airmotive Corp.</i> , 822 F.3d 680 (3d Cir. 2016) .....	passim
<i>United States v. Christensen</i> , 419 F.2d 1401 (9th Cir. 1969) .....	6
<i>United States v. Locke</i> , 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).....	5, 12
<i>US Airways v. O'Donnell</i> , 627 F.3d 1318 (10th Cir. 2010) .....	10, 19
<i>Ventress v. Japan Airlines</i> , 747 F.3d 716 (9th Cir. 2014) .....	4, 11
 <b>STATUTES</b>	
49 U.S.C. § 44701(a)(1) .....	8
49 U.S.C. § 44701(a)(2)-(5) .....	7
49 U.S.C. § 44704(d).....	7
49 U.S.C. § 44711(a).....	7
Fed. Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (1958).....	passim
Ports and Waterways Safety Act of 1972, 46 U.S.C. § 391a(1) (1970 ed., Supp. V) .....	4
 <b>OTHER AUTHORITIES</b>	
14 C.F.R. § 21 .....	14

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
14 C.F.R. § 25.....	passim
14 C.F.R. § 39.....	13
H.R. Rep. No. 85-2360 (1958) .....	7
Henderson and Eisenberg, <i>The Quiet Revolution in Products Liability: An Empirical Study of Legal Change</i> , 37 UCLA L. Rev. 479, 484 (1990) .....	17
Mouawad & Drew, <i>Airline Industry at Its Safest Since the Dawn of the Jet Age</i> , New York Times (Feb. 11, 2013) .....	10
S. Rep. No. 85-1811, 85th Cong., 2d Sess. (1958).....	7

## INTEREST OF AMICUS

The Boeing Company (“Boeing”) is the largest aircraft manufacturer in the United States and a leading aerospace company worldwide. Boeing’s new airplanes sold for commercial use are certified as airworthy under the standards of the Federal Aviation Administration (“FAA”). Boeing works extensively with the FAA to achieve type certification and to address issues that arise in the current fleet.

Boeing’s interest here is to respond to arguments by Petitioner (“Becker”) that, in Boeing’s view, are deeply misguided as to the federal regulatory process and what will advance the interests of aviation safety. Becker asks this Court to hold that States may regulate aircraft design so long as there is not a specific conflict with the FAA’s air safety regulations. Each state would be free to “fill the gap[s]” and “supplement” the FAA’s already extensive aircraft design regulations. Pet. Supp. Br. at 3. Those arguments misapprehend the preemptive force of federal law and precedent from the U.S. Supreme Court. Further, those arguments for state tort standards necessarily open the door to direct state regulation because preemption precedent treats tort standards as “regulation.” There cannot be 50 state aviation administrations regulating aircraft design. And it is precisely because Congress foreclosed state regulation of that sort that tort standards are also preempted.

## INTRODUCTION

The FAA's approval of an airplane's design, known as type certification, is a comprehensive, multi-disciplined analysis of each component and system that ultimately assesses and ensures the "airworthiness" of the airplane as a whole. Congress left no room in that closed regulatory system for the States to supplement the FAA's oversight. The only permitted cooperation with other sovereigns is at the international level. Becker, however, argues that "aircraft product liability claims are not subject to implied field preemption," and that the States are each permitted to "fill the gap[s]" and "supplement" FAA regulations so long as there is no direct conflict. Pet. Supp. Br. at 3. Becker is mistaken.

*First*, Becker ignores the settled test for field preemption. As explained in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978)—a case involving preemption of Washington law regulating the design of oil tankers—courts determine field preemption by assessing (1) the pervasiveness of federal regulation, or (2) the dominance of the federal interest. *Id.* at 157. The test is not a "balance" of federal and state interests along with interests in "accident victim compensation," as Becker asserts. Pet. Supp. Br. at 8.

*Second*, applying the settled test, Congress—through the FAA—has obviously preempted certain fields related to aviation safety, as

numerous cases hold. Aircraft design is a preempted field given the pervasiveness of federal regulation and the dominance of the federal interest. The only question is the limits of the preempted field.

*Third*, Becker's argument that recognizing field preemption creates "immunity" for manufacturers misunderstands the scheme Congress created. If Becker shows a violation of federal standards, state remedies are available. Nor will the FAA permit a manufacturer to continue a practice that the FAA concludes is unsafe. The FAA mandates changes in aircraft design and operation through airworthiness directives when safety issues arise. And there is no "immunity" for defects in manufacturing.

*Finally*, Becker implores the Court to rely upon *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), and issue a sweeping holding that there is no field preemption of "product liability claims," only direct conflict preemption. This Court should review the issues for itself, especially the views of the FAA. Rejecting field preemption across the board, as Becker invites, is legally incorrect and would not foster rational, uniform, and safe aviation regulation.<sup>1</sup>

---

<sup>1</sup> The FAA's brief to the United States Court of Appeals for the Third Circuit in *Sikkelee* can be found at 2015 WL 5665724. A petition for certiorari has been filed in the U.S. Supreme Court, No. 16-323.

**I. The proper test for field preemption is whether Congress pervasively regulated the area or federal interests dominate to the exclusion of state law**

Field preemption applies when (1) there is a “scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or (2) where federal law “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Ray*, 435 U.S. at 157 (quotation omitted); *see also Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir. 2014) (same).

The most applicable U.S. Supreme Court preemption decision for design regulation of aircraft is *Ray*, which involved Washington’s attempt to regulate the design of oil tankers operating in Puget Sound. As a matter of federal law, the Ports and Waterways Safety Act of 1972, 46 U.S.C. § 391a(1) (1970 ed., Supp. V), directed the Secretary of the Coast Guard to promulgate “comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation.” The Court found the Washington design regulations preempted because “Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.” *Ray*, 435 U.S. at 163. Further, the Court noted the dominant federal interest: “ship design and construction standards are

matters for national attention” and “could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another[.]” *Id.* at 166 n.15 (internal quotation omitted).

The U.S. Supreme Court re-affirmed *Ray*'s reasoning in *United States v. Locke*, 529 U.S. 89, 111, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). “Congress has left no room for state regulation of these matters,” *id.*, and “[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.” *Id.* at 111 (quoting *Ray*, 435 U.S. at 165).

With regard to aircraft, the U.S. Supreme Court applied the same test for field preemption and invalidated local noise regulations in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973). The Court emphasized that “Federal control is intensive and exclusive,” *id.* at 633 (internal quotation omitted), and that given the many different considerations the FAA was required to assess, “the interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.” *Id.* at 639.

Thus, the test for field preemption is settled. Becker, however, never even acknowledges the test found in *Ray*, *Locke*, *City of Burbank*,

and many other cases. Instead, Becker argues that this Court should issue a sweeping holding that there is no field preemption of products liability claims related to aircraft because that would be an appropriate “balance between federal and state regulations while promoting aviation safety, uniform national standards and accident victim compensation.” Pet. Supp. Br. at 8. That, quite simply, would be a refusal to follow the law. The test is: (1) is there pervasive federal regulation showing that Congress left no room for the States to supplement federal regulation, or (2) is the federal interest so dominant that the federal regulatory scheme should be assumed to preclude state regulation? There is no other test.

**II. Congress and the FAA have preempted the field of aviation safety, as numerous courts have recognized**

**A. The Federal Aviation Act of 1958 and the FAA’s authority**

The history of the creation of the FAA is recounted in several cases, including *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471-72 (9th Cir. 2007); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 368-70 (3d Cir. 1999); and *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969).

Congress created the FAA through the Federal Aviation Act of 1958 (the “Act”). See Pub. L. No. 85-726, 72 Stat. 731 (1958). The Act’s purpose was to “rest sole responsibility for supervising the aviation

industry with the federal government.” *Abdullah*, 181 F.3d at 368.

Congress recognized that, because the aviation industry’s “operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities, ... the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.” S. Rep. No. 85-1811, 85th Cong., 2d Sess., 5 (1958). The FAA was given “full responsibility ... for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations.” H.R. Rep. No. 85-2360 (1958), at 1; *see* Act § 301(a), 72 Stat. 744.

The Act directs the FAA to regulate essentially every facet of an aircraft’s useful life. 49 U.S.C. § 44701(a)(2)-(5). As relevant here, the Act mandates that the FAA regulate aircraft design. It is unlawful to operate a commercial aircraft without an FAA “airworthiness certificate.” 49 U.S.C. § 44711(a). An airworthiness certificate requires that the aircraft “conforms to its type certificate,” *i.e.*, the design that the FAA has approved. 49 U.S.C. § 44704(d). To obtain a type certificate for the aircraft, the manufacturer must satisfy thousands of FAA regulations and standards. The Court can find the formal regulations in 14 C.F.R. Part 25. As the FAA describes its regulations, it has “established a comprehensive set of regulatory standards governing such matters as flight performance,

structural characteristics, design, and construction,” and even “minor” changes “are still subject to approval by the FAA.” FAA Br., 2015 WL 5665724, at \*3-5, \*15.

The statutory command to the FAA is to establish “minimum standards required in the interest of safety for ... the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers.” 49 U.S.C. § 44701(a)(1). That is almost identical to the statutory command to the Secretary of the Coast Guard in *Ray*, and the U.S. Supreme Court expressly rejected any argument that the reference to “minimum standards” meant that the States could supplement because Congress clearly intended a national, uniform regulatory scheme for tanker design regulation. *Ray*, 435 U.S. at 168 n.19. Only “vessels having design characteristics satisfying federal law” are “privileged to carry tank-vessel cargoes in United States waters.” *Id.* Similarly, only aircraft holding FAA-issued airworthiness certificates, requiring adherence to the type-certified design, may operate in United States airspace.

**B. The comprehensive nature of the FAA’s type certification of aircraft**

For major new aircraft, type certification is a rigorous process that takes several years and thousands of compliance demonstrations under the regulations at 14 C.F.R. Part 25. For example, Boeing applied for

certification of the 787-8 in March 28, 2003, and type certification was not achieved until eight years later on August 26, 2011.

The requirements of Part 25 cover, among other things, the airplane's structure (*id.* §§ 25.301 *et seq.*), systems (*id.* §§ 25.901 *et seq.*), and all other features and performance characteristics. The airplane is analyzed and tested from the bottom up—beginning with components, through systems, to the structure, and culminating with the entire airplane. The regulations of Part 25 are an enduring set of requirements that have persevered and been built upon for over 50 years. For structural testing, as an example, demonstrating compliance has progressed to the use of full-scale replicas to test the maximum load on the wings and fatigue stress. The final phase is flight testing. The 787 flew over a thousand flights demonstrating compliance with over 25,000 test conditions. Certification is so thorough—and *comprehensive*—that virtually any change to an aircraft or its components is subject to FAA approval; even “minor” changes can only be made by way of an FAA-approved process. FAA Br., 2015 WL 5665724, at \*3-5, \*15.

The FAA's comprehensive oversight and standards are how the FAA ensures flight safety. And that comprehensive system of regulation and oversight has, along with manufacturer innovations, made commercial air travel the safest mode of transportation in human history. In the U.S.,

fatal commercial air travel accidents occur only one in every 45 million flights. Statistically, a passenger could fly commercially every day for an average of 123,000 years before being in an airplane accident. Mouawad & Drew, *Airline Industry at Its Safest Since the Dawn of the Jet Age*, *New York Times* (Feb. 11, 2013).

**C. The recognition of field preemption**

In the FAA's view, the pervasiveness of the regulations and the national interest in uniformity preempt the "field of aircraft safety" and "establish[ ] an all-encompassing federal regulatory framework ... setting safety standards for every facet of air safety and aircraft design." FAA Br., 2015 WL 5665724, at \*6-7. That has been the FAA's unwavering view across several different presidential administrations.

Given the comprehensiveness of the FAA's regulations and the dominant federal interest in regulating aviation, numerous courts have found field preemption with respect to the FAA's areas of regulation. As the U.S. Supreme Court observed, the Act "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled." *City of Burbank*, 411 U.S. at 639; *see, e.g., US Airways v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010); *Air Transport Ass'n of America, Inc. v. Cuomo*, 520 F.3d 218, 224 (2d Cir.

2008) (per curiam); *Greene v. B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784, 794-795 (6th Cir. 2005).

The Ninth Circuit has squarely held that there is field preemption with respect to aviation safety: “Here, the regulations enacted by the [FAA], read in conjunction with the [Federal Aviation Act] itself, sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress’ intent to preempt all state law in this field.” *Montalvo*, 508 F.3d at 471 (9th Cir. 2007). *Montalvo* involved an alleged negligent failure to warn about the danger of developing deep vein thrombosis. The court held that the failure to warn claim was preempted. The Ninth Circuit did not find preemption in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009)—a case involving allegedly defective air stairs—but that was only after applying the test for field preemption and finding an absence of pervasive regulation with respect to the design of air stairs. More recently, the Ninth Circuit applied the test for field preemption and held that employment retaliation and constructive termination claims are preempted given the pervasiveness of federal regulation of pilot qualifications. *Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014).

To reach the sweeping conclusion advocated by Becker here, this Court must necessarily conclude that the federal regulation of aircraft

design is not pervasive enough, *and* the federal interest not dominant enough, to warrant field preemption with respect to *any* type of products liability claim involving aircraft. Neither conclusion is defensible. It is illegal to operate an aircraft in U.S. airspace unless there is an FAA-issued airworthiness certificate, which means the aircraft conforms to its FAA-approved type design based upon pervasive FAA regulations. Just as in *Ray* and *Locke*, there is field preemption of aircraft design claims, and any sweeping conclusion that there is none should be easily rejected.<sup>2</sup>

### **III. Recognizing field preemption does not “immunize” manufacturers**

Becker argues that to find field preemption “would be to conjure judicially-created immunities which would thwart the purposes and objectives of Congress” and would allow component manufacturers to “manufacture defective products with impunity.” Pet. Supp. Br. at 17. Becker misunderstands how the federal scheme works.

---

<sup>2</sup> Becker’s various references to federalism and state interests never explain how any particular state’s interest in aircraft design—no different than oil tanker design—ought to prevail over that of other states, much less the national interest in uniformity in an area of interstate and international commerce. The U.S. Supreme Court noted the obvious need for national standards in *Ray*, and in *Locke* the Court rejected application of the traditional presumption against preemption. “The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.” *Locke*, 529 U.S. at 108. The same is true here.

Field preemption merely requires that any suit against a manufacturer apply a *federal* standard of care; state remedies, however, are preserved. *See Montalvo*, 508 F.3d at 468; *Abdullah*, 181 F.3d at 365; *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988). Thus, for example, Becker can assert negligence or even design defects if the premise of the claim is failure to comply with an applicable federal standard. Similarly, there is no immunity for a manufacturing defect claim alleging that a part was not manufactured correctly vis-à-vis federal regulations or the type design, or even that there was simply an error in manufacturing. The court below noted the absence of “any question regarding the viability of manufacturing defect claims brought against a certificate or PMA holder.” *Estate of Becker v. Forward Technology Industries, Inc.*, 192 Wn. App. 65, 70 n.2, 365 P.3d 1273 (2015).

But the principal means of addressing aviation safety is intensive FAA oversight, including the issuance of mandatory airworthiness directives when safety issues arise. 14 C.F.R. Part 39. Airworthiness directives are “legally enforceable rules” that “specify 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. §§ 39.3, 39.11; *see also id.* § 39.5 (providing that the FAA may issue an airworthiness directive when “[a]n unsafe condition exists in the product[]

and [t]he condition is likely to exist or develop in other products of the same type design”). Manufacturers may also respond to issues that emerge following type certification by sending service bulletins to notify customers of maintenance or other actions necessary to address the issues.

Holders of type certificates have an ongoing duty to report failures, malfunctions, or defects in their products to the FAA, *see* 14 C.F.R. § 21.3, and they may not alter a type design without FAA approval or an FAA approved process, *see* 14 C.F.R. §§ 21.95, 21.97(a). Similarly, holders of production certificates must allow the FAA to inspect their quality systems and must submit any changes for FAA review. *See* 14 C.F.R. §§ 21.140, 21.150(a).

Federal preemption and FAA oversight do not create “immunity” for manufacturers that deviate from the FAA’s safety regulations. If regulations are violated, there can be civil tort liability as well as regulatory liability to the FAA, which can command immediate change to a design or practice by way of an airworthiness directive, as well as impose fines. Unsafe designs and practices are never “immune.”

**IV. This Court should decline the invitation to follow *Sikkelee***

Becker relies heavily on the recent decision in *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016). *Sikkelee* held that design defect claims may proceed under state standards of care unless

there is a direct conflict with federal law such that compliance with both state and federal law is impossible. The same court had previously found broad preemption in the field of aviation safety in a case involving in-air operations, *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). The two decisions, read together, are incompatible in their depiction of Congress's intent and the exclusiveness of the FAA's authority. The Third Circuit's decision in *Sikkelee* rejected the long-held views of sister circuits and the FAA and is an outlier in this field. This Court should decline the invitation to follow *Sikkelee* as some kind of "landmark" decision, Pet. Supp. Br. at 7, for multiple reasons.

*First*, the decision has several mistaken depictions of the FAA's regulations. For example, the court says that the FAA's design regulations are "procedural" and not "substantive" and merely set a "baseline" for obtaining type certification. *Sikkelee*, 822 F.3d at 694. That depiction is not defensible. The regulations in 14 C.F.R. Part 25 require thousands of *substantive* design and performance standards. For example, they specify how much load the structure must be able to bear. *See* 14 C.F.R. §§ 25.301-305. That there is a *process* to show compliance does not make the standards *procedural*. In any event, calling the substantive standards in Part 25 a "baseline" in no way shows that Congress intended 50 States to

each supplement those standards. The FAA can set both “minimum” standards and exclusive standards, as noted above. *Ray*, 435 U.S. at 161.

*Sikkelee* also reasoned—directly opposing the FAA—that the FAA’s design regulations are *not* a “comprehensive system of rules and regulations,” dismissing them as merely “discrete, technical specifications.” *Sikkelee*, 822 F.3d at 694. Again, it is not defensible to say 14 C.F.R. Part 25 is not comprehensive, and the “technical” nature of certain regulations in no way diminishes their importance or comprehensiveness. Aircraft are safe because of strict compliance with thousands of “technical specifications.” The court should have deferred to the FAA’s brief regarding the nature of the FAA’s regulatory scheme, though the comprehensiveness of the regulations is easily observed by simply reviewing 14 C.F.R. Part 25.

*Second*, *Sikkelee* seemed to reject preemption in part because it could not find a federal standard of care that it thought was suitable for litigation. The court opined that the FAA’s design regulations do not present a standard of care similar to a tort-type standard. *Sikkelee*, 822 F.3d at 695. Federal law need not mimic state law in order to preempt; that gets the Supremacy Clause backward. Preemption derives from the intent of Congress as reflected in the pervasiveness of the regulatory scheme and the dominance of the national interest. That the FAA’s regulations do not

readily offer something like the design defect tests that courts created mostly in the 1970s is not a basis for rejecting preemption. The FAA ensures safe aircraft design through thousands of technical specifications, not from generalized “consumer expectations” or “risk-utility” tests.

*Third, Sikkelee* reasoned as though Congress was somehow aware and approved of lawsuits similar to modern design defect claims, as the court’s opinion makes much of a tiny smattering of “aviation tort” cases before 1958. *Id.* at 690-91. Congress, however, surely did not anticipate in 1958 the aggressive design defect lawsuit wave that arrived in the 1970s. *See* Henderson and Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479, 484 (1990) (“[C]ourts generally were reluctant, until the mid-1970s, to impose liability for harm caused by product designs that performed exactly as they were intended to perform.”).

What Congress surely *did* contemplate was whether there should be state or federal *regulation*, and Congress created a closed, exclusive, comprehensive system of *federal* regulation. It is illegal to operate an aircraft without an FAA-approved airworthiness certificate, and aircraft designs are subject to FAA approval. Because there can be no state regulation, the application of state design defect standards is also preempted because those standards are just a different form of regulation.

Standards imposed through products liability actions and direct regulation are equivalent. *See Reigel v. Medtronic*, 552 U.S. 312, 332, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) (Steven, J., concurring in part and in the judgment). States can no sooner regulate aircraft design through products liability lawsuits than they can through their own aviation administrations. *Sikkelee* does not even discuss how it is opening the door to direct state regulation of aircraft design.

*Finally, Sikkelee* claims support from various other cases, but its appraisal of those opinions leaves much to be desired. For example, the court says that *Bennett v. Sw. Airlines Co.*, 484 F.3d 907 (7th Cir. 2007), “clearly indicated” that state law applies in a products liability action challenging aircraft design. *Sikkelee*, 822 F.3d at 707. *Bennett*, however, involved a removal question, not choice of law. And it expressly noted that uniform federal law may be the only “tolerable” answer for “safety devices.” *Bennett*, 484 F.3d at 911. The Seventh Circuit has elsewhere said that a court in a tort suit cannot “gainsay” the FAA’s compliance determinations on airplane design. *See Lu Junhong v. Boeing*, 792 F.3d 805, 810 (7th Cir. 2015); *see also Bieneman*, 864 F.2d at 471 (noting that “federal law preempts the regulation of safety in air travel”). As already noted, *Sikkelee*’s depiction of the Ninth Circuit’s decision in *Martin* as holding “that products liability does not fall within [the field of aviation

safety],” *Sikkelee*, 822 F.3d at 689-90, is not a fair reading. *Martin* only held that there was no field preemption because *air stairs* were not pervasively regulated; it held nothing as to “products liability” as a whole.

*Sikkelee* is actually aligned with an older decision that, until *Sikkelee*, had been regarded as erroneous, especially in light of more recent U.S. Supreme Court cases. The decision in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), also rejected the views of the FAA and held that there was not field preemption of a design defect claim. The court relied heavily on the absence of an express preemption clause and the existence of a savings clause with respect to state “remedies.” *Id.* at 1442-43. But after *Cleveland*, the Court in *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), held that express preemption provisions do not foreclose implied preemption. The U.S. Supreme Court had also not clarified that state tort standards should be treated the same as direct regulation. *See Reigel*, 552 U.S. at 332 (Steven, J., concurring in part and in the judgment).

The Tenth Circuit in *O'Donnell*, 627 F.3d at 1326, noted that *Geier* abrogated the reasoning of *Cleveland*, and went on to hold: “Based on the FAA’s purpose to centralize aviation safety regulation and the comprehensive regulatory scheme promulgated pursuant to the FAA, we

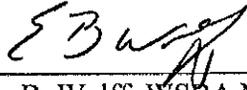
conclude that federal regulation occupies the field of aviation safety to the exclusion of state regulations.” *O'Donnell* correctly follows Supreme Court precedent and the intent behind the Federal Aviation Act, as does the Ninth Circuit’s decision in *Montalvo*, among several others. Those decisions should be followed, not *Sikkelee*.

### CONCLUSION

The Court should reject Becker’s invitation to hold that products liability claims are not subject to field preemption.

DATED: September 23, 2016

PERKINS COIE LLP

By: 

Eric B. Wolff, WSBA No. 43047

EWolff@perkinscoie.com

Jeffery S. Clackley, WSBA No. 48133

JClackley@perkinscoie.com

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for *The Boeing Company*

CERTIFICATE OF SERVICE

I, *Sherri Parsons* hereby certify that I filed the foregoing with the Supreme Court and served same upon the following counsel of record via U.S. Mail and email.

James T. Anderson, III  
[anderson@aviationlawgroup.com](mailto:anderson@aviationlawgroup.com)  
Robert Francis Hedrick  
[hedrick@aviationlawgroup.com](mailto:hedrick@aviationlawgroup.com)  
Aviation Law Group, PS  
1420 5th Avenue, Suite 3000  
Seattle, WA 98101

*Attorney for Estate of  
Virgil Victor Becker, Jr.*

Francis S. Floyd  
[ffloyd@floyd-ringer.com](mailto:ffloyd@floyd-ringer.com)  
John Safarli  
[jsafarli@floyd-ringer.com](mailto:jsafarli@floyd-ringer.com)  
Amber L. Pearce  
[apearce@floyd-ringer.com](mailto:apearce@floyd-ringer.com)  
Floyd, Pflueger & Ringer, P.S.  
200 W. Thomas Street, Suite 500  
Seattle, WA 98119

*Attorney for Forward Technology  
Industries, Inc.*

DATED this 23rd day of September, 2016 at Seattle, Washington.

  
*Sherri Parsons*

RESTRICTED92071073.1

## OFFICE RECEPTIONIST, CLERK

---

**To:** Parsons, Sherri (Perkins Coie)  
**Cc:** anderson@aviationlawgroup.com; hedrick@aviationlawgroup.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; apearce@floyd-ringer.com; Wolff, Eric B. (Perkins Coie); Clackley, Jeffery S. (Perkins Coie); Wood, Julia (Perkins Coie); Bilger, Sue (Perkins Coie)  
**Subject:** RE: Estate of Virgil Victor Becker, Jr., by its Personal Representative, Jennifer L. White, Petitioner v. Forward Technology Industries, Inc., Respondent (Supreme Court No. 92972-6)

Received 9-23-16

### Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/)

Looking for the Rules of Appellate Procedure? Here's a link to them:

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

**From:** Parsons, Sherri (Perkins Coie) [mailto:SParsons@perkinscoie.com]  
**Sent:** Friday, September 23, 2016 2:47 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** anderson@aviationlawgroup.com; hedrick@aviationlawgroup.com; ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; apearce@floyd-ringer.com; Wolff, Eric B. (Perkins Coie) <EWolff@perkinscoie.com>; Clackley, Jeffery S. (Perkins Coie) <JClackley@perkinscoie.com>; Wood, Julia (Perkins Coie) <JDWood@perkinscoie.com>; Bilger, Sue (Perkins Coie) <SBilger@perkinscoie.com>  
**Subject:** Estate of Virgil Victor Becker, Jr., by its Personal Representative, Jennifer L. White, Petitioner v. Forward Technology Industries, Inc., Respondent (Supreme Court No. 92972-6)

Dear Clerk of the Court,

Attached please find Motion of the Boeing Company for Leave to File *Amicus Curiae* Brief and Request for Separate Oral Argument Time and Brief of *Amicus Curiae* The Boeing Company to be filed in this case on behalf of The Boeing Company.

Estate of Virgil Victor Becker, Jr., by its Personal Representative, Jennifer L. White, Petitioner v. Forward Technology Industries, Inc., Respondent  
Supreme Court No. 92972-6  
Court of Appeals No. 69355-7-1

Filed by:

Eric B. Wolff, WSBA 43047  
Jeffery S. Clackley, WSBA 48133  
Perkins Coie LLP  
1201 Third Avenue, Suite 4900

Seattle, WA 98101  
[EWolff@perkinscoie.com](mailto:EWolff@perkinscoie.com)  
[JClackley@perkinscoie.com](mailto:JClackley@perkinscoie.com)  
Telephone: 206.359.3124

Do not hesitate to contact me if you have any questions.

**Sherri Parsons | Perkins Coie LLP**

Legal Secretary to Tom McLaughlin, Kristine Kruger, Eric Wolff, Peter George and Cindy Clark

1201 Third Avenue Suite 4900

Seattle, WA 98101-3099

D. +1.206.359.8024

F. +1.206.359.9024

E. [SParsons@perkinscoie.com](mailto:SParsons@perkinscoie.com)

**PERKINSCOIE**

---

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.