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VIA CM/ECF

Marcia M. Waldron, Clerk of Court  
U.S. Court of Appeals for the Third Circuit

Re: *Sikkelee v. Precision Airmotive Corp., et al.*, No. 14-4193

Dear Clerk Waldron,

Appellant Jill Sikkelee respectfully submits this response to the government's letter brief dated September 21, 2015. Sikkelee respectfully disagrees with the government's positions—but even granting them, this Court should reverse the judgment below.

**I. Federal Law Does Not Preempt State Law Claims In The Field Of General Aviation Design.**

The government argues that the preempted field of aviation safety includes general aviation design. Govt. Br. 6-7. None of its authorities support such broad preemption. Because the case against field preemption is laid out in Sikkelee's opening brief, this letter addresses only the government's new points.

1. The government urges deference, *id.* 8, but this Court will “not defer to an agency's legal conclusion that state law is preempted.” *Farina v. Nokia Inc.*, 625 F.3d 97, 126 (3d Cir. 2010). The Court can defer only to the agency's explanation of *how* state standards affect federal regulation. *Id.* Here, the government offers barely any explanation at all. Perhaps the government is quiet because for the entire history of regulated aviation, Sikkelee's rule has been the law, with no ill effects. General aviation is becoming safer—and recent accidents cannot be attributed to manufacturers' efforts to comply with state standards of care, but instead to malfeasance abetted by an increasingly porous federal regulatory system.

To justify preemption, the government contends only that “the federal government's presence in the field of aircraft safety is pervasive.” Govt. Br. 7. But that alone is insufficient; there must be evidence of intent to exclude state involvement. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717-18 (1985). Instead, the Federal Aviation Act contains contrary evidence: a savings clause. The government's argument also fails because even if federal aviation safety regulations are pervasive, general aviation design regulations are not. The government never discusses the substance of these regulations, which neither address how to fasten a carburetor bowl to a throttle body, nor specify an over-arching standard of care for design—in contrast with the detailed and comprehensive regulations governing the operation of aircraft. This point is critical: the federal regulations do not tell manufacturers what type of fuel metering system to use, or how to design the system; all of those choices are left to the manufacturer's discretion.

2. This Court cannot find field preemption “unless congressional intent to preempt is clear and manifest.” *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 396 (3d Cir. 2010). Thus, any persuasive analysis urging preemption must at least grapple with the General Aviation Revitalization Act's (GARA) legislative history, where Congress stated that against the backdrop

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of widespread tort claims against general aviation manufacturers, it had decided “to permit, in this exceptional instance, a very limited Federal preemption of State law,” and further stated that in every other circumstance, “State law will continue to govern fully, unfettered by Federal interference.” H.R. Rep. No. 103-525(II), at 4, 7 (1994). The government ignores this history altogether. The *only* thing the government says about GARA is that because some state tort suits can proceed based on federal standards of care, GARA still performs work even if state standards are preempted. Govt. Br. 13. But that misses the point: in 1994, *Congress itself* denied the government’s argument that the Federal Aviation Act had already preempted state law for general aviation design claims, and so its preemptive intent cannot be “clear and manifest.”

3. The government’s resort to precedent is also flawed. When considering preemption of generally applicable state laws (as opposed to targeted regulations), courts must “proceed cautiously, finding preemption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents.” *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015). The government cannot cite a case holding that general aviation design claims fall within the preempted field. It cites *Abdullah v. American Airlines*, 181 F.3d 363 (3d Cir. 1999), but that was not a design defect case, and the preemption analysis turned in substantial part on the uniquely comprehensive federal regulations governing the operation of commercial aircraft. Also, contrary to the government’s representation that Sixth, Ninth, and Tenth circuit precedents support it (Br. 8-9), these courts have rejected field preemption of design defect claims. *See Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 811-12 (9th Cir. 2009) (product defect claims relating to airstairs not preempted); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788-93 (6th Cir. 2005) (finding preemption of failure-to-warn claim, but applying state law to product defect claim); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444-46 (10th Cir. 1993) (no preemption for aircraft design; government’s contrary position rejected). In fact, *no* circuit court has agreed with the government, and this Court should not become the first.

## **II. The Government’s Type Certification Position Is Incorrect, But Nevertheless Warrants Reversal.**

Lycoming argued, and the district court held, that type certification conclusively establishes a design’s compliance with all applicable federal design requirements, and thus forecloses liability based on any of those requirements. Lyc. Br. 23-24; A47-48. The government rightly rejects that position. Govt. Br. 2, 10. Instead, it argues that principles of conflict preemption apply, so that “aspect[s] of an aircraft’s design that [were] *expressly approved* by the FAA as shown on the type certificate” or incorporated materials would result in preemption of a “state tort suit arguing for an alternative design,” but “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.* 10-11 (emphasis added). The government’s theory is not that every certified design is *ipso facto* compliant—indeed, it is not even that every type certification decision is correct—but instead that the express approvals in a type certificate bind the manufacturer, making it impossible to comply with the certificate and a state law claim requiring a different design.

1. Sikkelee agrees with the government that Lycoming misapprehends the import of type certification. But although the government correctly determines that type certification is not conclusive evidence of compliance, it does so without acknowledging the flaws in the process

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that undermine Lycoming's position even further. For instance, the government describes type certification as "exhaustive" and "iterative." Govt. Br. 14. The record belies that claim: the O-320-D2C engine took only 18 days to certify. *See* Type Certificate Data Sheet No. E-274, at 3, *available at* <http://tinyurl.com/prckhr9>. Indeed, while the FAA was issuing letters to Lycoming in 1971 and 1972 noting the increasing frequency of fuel leaks from O-320 engines (before Lycoming had even attempted any corrective action), Lycoming obtained additional certifications for new variants of the same engine using the same carburetor—each of which took less than a month to issue. *Id.* The government notes that applications can be voluminous. Govt. Br. 14. But that is irrelevant because, as the Supreme Court has explained, the FAA conducts only a "spot check" of those voluminous materials. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 817 (1984). That check is inadequate: as Sikkelee's opening brief explained, the FAA often lacks the resources and expertise to evaluate what it sees, so it must rely on self-interested manufacturers. Thus, the government's assertion that "no matter what role a manufacturer plays in the type-certification process, the decision to approve the type design ultimately rests with the FAA," Govt. Br. 15, was rightly rejected by this Court in *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 166 (3d Cir. 2006), which acknowledged that "[s]ome manufacturers are able to grant themselves a type certificate." *See also* FAA, Organization Designation Authorization Procedures, Order No. 8100.15B, at 2-2 (2013) (some manufacturers can issue their own supplemental type certificates). Treating such approval as conclusive (as opposed to rebuttable) evidence of compliance would allow manufacturers to self-certify themselves out of liability—a result that has no analogue in any other regulated field, and would undermine Congress's objective of maximizing safety. The government properly refuses to embrace that conclusion, and this Court should do the same.

2. The government's position regarding conflict preemption, however, is unprecedented and incorrect. No court other than the court below has ever assigned *any* preclusive effect to a type certificate, and no court has ever held, based on conflict preemption principles, that a type certificate bars a state law remedy for a noncompliant design. Moreover, the government itself has never made this argument before—even though both type certification and tort law are at least as old as the Federal Aviation Act itself.

Conflict preemption is a particularly poor fit for this case because (assuming that federal standards preempt state ones)\* Sikkelee's amended complaint *only* seeks to enforce federal law, not any potentially conflicting state standard. Federal law requires that manufacturers: (1) ensure that their designs comply with federal regulations at all times; and (2) obtain a type certificate before mass producing any design. Sikkelee alleges that Lycoming violated the first duty by designing a non-compliant engine. Thus, the issue here is not whether some state law duty conflicts with these federal duties (the premise of *every* conflict preemption case), but instead whether Lycoming's compliance with its secondary obligation to obtain a type certificate somehow excuses it from fulfilling its primary obligation to ensure compliance. As the government recognizes, the answer to this question is "no." *See* Govt. Br. 11-12 (reiterating that

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\* On the other hand, if the Court rejects field preemption, then its reasoning would equally support rejecting the government's conflict preemption argument. Thus, if the Court holds that Congress intended to permit state regulation in this area, it would necessarily also agree that state juries can assess liability, so that a type certificate would not be conclusive.

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“the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator” and reiterating Congress’s desire to “hold[] manufacturers accountable for compliance,” including for certified designs).

To the extent the government’s position is that principles of conflict preemption might bar Sikkelee from obtaining a remedy even if she proves a violation of a federal regulation, this Court rejected that argument in *Abdullah*. There, applying conflict preemption principles, this Court held that “it is evident . . . that Congress found state damage remedies to be compatible with federal aviation safety standards.” *Abdullah*, 181 F.3d at 375. Nothing about the issuance of a type certificate undermines the force of that holding, and neither the government nor Lycoming argues that Congress intended type certificates to preempt state remedies. Indeed, all evidence is to the contrary: Congress enacted the Federal Aviation Act’s type certification provisions without including any preemptive language, and simultaneously enacted a savings clause preserving all state remedies. When Congress enacted GARA—which only applies to type certificated designs—it again recognized the availability of state remedies for defective designs.

The theoretical underpinning for the government’s reliance on conflict preemption principles is that the “manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate,” such that any claim advocating a contrary design would conflict with that federal requirement. Govt. Br. 10-11. This theory was featured in cases involving prescription drug labels, which hold that when federal law makes it impossible for a manufacturer to change its warning label (as it does for generic drug manufacturers), state law standards requiring a stronger label are preempted, *see PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011)—but when the manufacturer has any power to alter the label (as brand-name manufacturers do), there is no preemption, *see Wyeth v. Levine*, 555 U.S. 555 (2009). The drug cases are distinguishable for the reason stated above: they involve conflicts between state and federal labeling standards, and not merely the availability of state remedies for violations of the federal standard.

In any event, general aviation manufacturers closely resemble brand-name manufacturers because they can alter their designs with little to no input from the FAA. Minor changes can be made unilaterally, subject to subsequent FAA evaluation (exactly like the label changes in *Wyeth*). *See* FAA, Designated Engineering Representative (DER) Handbook, Order 8110.37E, at 12, 24 (2011) (explaining that the manufacturer decides whether a change is minor—subject to FAA disapproval—and the DER can make minor changes “without prior authorization” by the certification authority). Even many so-called “major” changes are easy to make: manufacturers with the appropriate delegations can make the changes themselves; and in other cases, while the FAA may nominally be involved, the approval process will be perfunctory, and success will be assured. The O-320 type certificate is illustrative: it has been revised 22 times to authorize 60 variants of the engine (the essential feature of each is four cylinders, in an opposed configuration with a displacement of 320 cubic inches). Lycoming has also certified 32 variants of a fuel-injected version of the O-320. *See* Type Certificate Data Sheet No. 1E12, *available at* <http://tinyurl.com/nwcdmpa>. The vast majority of these 92 variants were approved in less than a month, some in less than a week. It is thus clear that general aviation manufacturers have a degree of control that closely parallels that of brand-name drug manufacturers, who are not entitled to impossibility preemption. *Compare Wyeth*, 555 U.S. at 571 (rejecting *Wyeth*’s impossibility preemption argument because *Wyeth* had not provided “clear evidence that the FDA would not have approved” a label change, had *Wyeth* attempted one) *with PLIVA*, 131 S.

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Ct. at 2577-78 (explaining that generic drug manufacturers are so powerless to obtain regulatory approval to alter their labels that no manufacturer had even attempted to do so before).

3. If this Court accepts the government's rule—which it should not—it should still reverse. First, Lycoming has never argued that its type certificate prohibits it from designing a compliant engine; it has argued that the certificate renders the design compliant in all respects (Lyc. Br. 24)—an argument that the FAA rejects. By failing ever to raise the government's theory, Lycoming waived it, and it is not before this Court. *See Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A)*, 768 F.3d 284, 300 (3d Cir. 2014) (holding that the Secretary of Labor could not “as *amicus*, resurrect on appeal issues waived by Participants”); *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 382 n.2 (3d Cir. 2012). What is properly before this Court is the government's telling rejection of Lycoming's actual argument.

Second, neither the type certificate nor the incorporated materials “expressly approve[]” the use of lock washers to attach the throttle body to the carburetor bowl. Govt. Br. 10. The type certificate data sheet identifies the carburetor model, but it never makes an “affirmative determination with respect to the challenged design aspect,” *id.* 11, *i.e.*, the lock washer. *See* Type Certificate Data Sheet No. E-274, at 2. To the best of Sikkelee's knowledge, no other incorporated document requires the use of lock washers either; certainly, the federal regulations do not. That degree of granularity matters under the government's proposed rule, which limits preemptive effect to “express[] approv[als]” and “affirmative determinations.” *Id.* 10-11. Clearly, what the government is attempting to do is protect design features that somebody at the FAA actually considered and blessed. But it is a fair bet that no FAA employee spent even a minute thinking about the use of lock washers before certifying the O-320-D2C engine (or indeed any affected O-320 variant). To adopt that defective design feature, Lycoming did not even amend the type certificate; it issued an engineering change order in 1965 specifying that the screws and safety wire would be replaced with screws and lock washers. *See* ECF No. 234-12 (under seal). The name and part number for the carburetor remained the same, *id.* at 1, and the only form of FAA approval was the signature of a DER employed by Lycoming, alongside fourteen other Lycoming employees from different divisions of the company, *id.* at 3. Such in-house approvals cannot insulate Lycoming from liability. Indeed, the FAA has issued guidance stating that DERs are “subject to general tort law,” and emphasizing that the agency “cannot shelter or protect DERs from the consequences of their findings.” FAA, Designated Engineering Representative (DER) Handbook, Order 8110.37E, at 15 (2011).

Equally important, Lycoming's type certificate does not force it to continue producing a noncompliant design. If Lycoming wishes to change the carburetor design to use safety wire or other feasible alternatives, it can make that change under its delegated authority, without necessarily amending the certificate. *See* FAA Order No. 8110.4C, at 65, § 3.2(c)(2). Even if FAA approval was required for some reason, Lycoming is sure to get it. After all, the FAA sent Lycoming at least 45 reports urging it to resolve this very problem. Because Lycoming cannot provide “clear evidence that the [FAA] would not have approved” a design change, there is no “impossibility.” *Wyeth*, 555 U.S. at 571. Also, Lycoming has certified 34 variants of its O-320 engine that do not use the affected carburetor—two using a different carburetor (on certificate E-274), and 32 using fuel injection (on certificate 1E12). Analogizing to the drug label cases: if the FDA approved 92 variants of the same label, 34 of which were compliant, it would not be “impossible” for the manufacturer to use those. Under the government's rule, Sikkelee prevails.

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Respectfully submitted,

/s/ Tejinder Singh

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