No. 16-323

In the Supreme Court of the United States

AVCO CORPORATION, PETITIONER

v.

JILL SIKKELEE

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

REPLY BRIEF FOR THE PETITIONER

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This petition for certiorari presents a straightforward legal question: whether the Federal Aviation Act preempts the application of state-law standards of care in the entire field of aviation safety. Respondent can hardly deny the exceptional importance of, and enormous federal interest in, that question—as the Federal Aviation Administration has itself asserted in expressing its long-standing view that the Act preempts state-law standards. Nor can respondent credibly deny that the courts of appeals have adopted divergent approaches to defining the scope of the field preempted by the Act.

Instead, respondent has filed a brief in opposition that, but for its orange cover, is scarcely distinguishable from a

brief on the merits. If anything, however, respondent's lengthy discussion of the merits underscores the need for this Court's intervention. And while respondent tacks on a desultory list of purported vehicle issues, none of those issues presents a barrier to the Court's review. This case presents the Court with an ideal opportunity to address a question of law that has important consequences for the safety of air travel in this country. The Court should grant the petition for certiorari or, at a minimum, call for the views of the Solicitor General.

1. In an unsubtle attempt to minimize it, respondent breezes past the circuit conflict on the question presented. See Br. in Opp. 18-20.

a. Respondent first contends (Br. in Opp. 18) that the courts of appeals uniformly hold that the Federal Aviation Act does not preempt state-law standards of care in design-defect cases. Remarkably, she bases that argument in large part on *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993). As explained in the petition (at 16), however, the Tenth Circuit subsequently abrogated *Cleveland* after concluding that this Court had invalidated its reasoning. See *US Airways, Inc.* v. *O'Donnell*, 627 F.3d 1318, 1326 (2010) (citing *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000)). As a result, the law in the Tenth Circuit now conforms to the position of the FAA: the Act preempts state-law standards of care in the entire field of aviation safety. See *id.* at 1326-1327. At a minimum, the decision below cannot be reconciled with the Tenth Circuit's decision in *US Airways*.

b. As for the other cases discussed in the petition, respondent contends (Br. in Opp. 19) that those cases are factually dissimilar and thus irrelevant. The salient question for certiorari purposes, however, is not whether other courts of appeals have decided a case with exactly the

same facts, but instead whether "it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013). There can be no serious doubt that both the Second and Tenth Circuits would have reached the opposite result on the facts presented here: both courts have unambiguously held that federal law preempts state standards of care in the *entire* field of aviation safety. See *Goodspeed Airport LLC* v. *East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206, 210 & n.5 (2d Cir. 2011); *US Airways*, 627 F.3d at 1326-1327. The First and Fifth Circuits have likewise indicated their view that the Act's preemptive field extends to cases such as this one. See *French* v. *Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Witty* v. *Delta Air Lines, Inc.*, 366 F.3d 380, 384-385 (5th Cir. 2004).

c. Respondent ignores not just the scope of the other courts of appeals' holdings, but also those courts' irreconcilable approaches to determining the preemptive scope of the Act. In defining the preempted field, the Third Circuit minted a novel "in-air operations" rule. See Pet. App. 14a. Adopting the same discredited approach as the Tenth Circuit in *Cleveland*, the Eleventh Circuit went even further and foreclosed field preemption altogether. See *Public Health Trust of Dade County* v. *Lake Aircraft, Inc.*, 992 F.2d 291, 295 (1993). The Ninth Circuit paradoxically determines the scope of the preempted field on a case-by-case basis, considering whether the FAA has "issue[d] pervasive regulations" with respect to the specific design feature at issue. *Martin ex rel. Heckman* v. *Midwest Express Holdings, Inc.*, 555 F.3d 806, 811 (2009) (internal quotation marks omitted). And respondent does not so much as cite the Sixth Circuit's cryptic decision in

Greene v. *B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784 (2005).

2. Respondent devotes the lion's share of her brief to the merits. See Br. in Opp. 20-31. We make just a few points in response here, and leave fuller responses to subsequent merits briefing if certiorari is granted.

a. Respondent does not actually defend the holding of the court of appeals, which rejected federal preemption for any standard of care except those regarding "in-air operations." Pet. App. 14a. That is understandable, because there is no support in the statute or the legislative history for the court of appeals' novel distinction. While respondent attempts to limit the damage from the court of appeals' decision by suggesting that its reasoning was limited to the context of general aviation, that is plainly incorrect. The court of appeals did not distinguish between general and commercial aviation, but instead between aircraft design (whether general or commercial) and "in-air operations." *Id.* at 2a, 14a. As petitioner's amici make clear, the resulting disuniformity in the law affects air travel for passengers, pilots, and manufacturers in general and commercial aviation alike.

b. Respondent incorrectly suggests (Br. in Opp. 20-22) that the presumption against preemption applies here. Federal law has provided the exclusive framework for the manufacture, maintenance, and operation of aircraft almost since the Wright brothers' first flight. See Pet. 22-24. Congress has made clear that the aviation industry is "unique among transportation industries in its relation to the Federal Government," in that "[its] operations are conducted almost wholly within the Federal jurisdiction." S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). Congress has emphasized its desire that the FAA be the "one agency of government * * * responsible for issuing safety regulations." H.R. Rep. No. 2360, 85th Cong., 2d

Sess. 22 (1958). And Congress has underscored that aircraft design standards should be "uniform" across the country. See S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925). Given the long history of federal presence in the area, it is unsurprising that at least one court of appeals has squarely rejected the applicability of the presumption in this context. See *US Airways*, 627 F.3d at 1325.[1]

c. Whether or not the presumption against preemption applies, there is significant evidence that Congress intended to preempt state-law standards of care for the design of aircraft and aircraft parts.

The unique nature of air travel, the need for uniform regulation across States, and the dangers posed by competing state standards all point in one direction: toward preemption. See Pet. 22-24. This Court has recognized—*in a decision respondent does not even cite*—that a "uniform and exclusive system of federal regulation" is required "if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973). As petitioner explained in the petition, the regulatory scheme created by the Act is at least as pervasive as others this Court has held to preempt a field of vehicle design. See Pet. 24 (citing *Kurns* v. *Railroad Friction Products Corp.*, 132 S. Ct. 1261, 1267-1269 (2012); *United States* v. *Locke*, 529 U.S. 89, 111 (2000); and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 161, 163 (1978)).

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[1] Respondent's reliance on the Act's savings clause (Br. in Opp. 21) is similarly unavailing. This Court has instructed that courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106-107. And petitioner's position, like the FAA's, is that federal law merely preempts state-law *standards of care*, leaving intact the state *remedies* that the savings clause operates to preserve.

Although respondent disparages the FAA's oversight of the Act's certification regime, see Br. in Opp. 5-8, the FAA responded to, and categorically rejected, respondent's arguments in its brief below. The FAA explained that "issuance of a type certificate * * * involves the analysis of vast amounts of information [by]," and "the decision to approve the type design ultimately rests with," the FAA. FAA C.A. Br. 13-15 (Sept. 21, 2015). "There is * * * nothing about the type certification process," the FAA continued, "that undermines the field preemptive scope of the Federal Aviation Act." *Id.* at 15.[2]

Respondent's claimed concern that federal preemption will immunize manufacturers from all claims against them is wildly overstated. See Br. in Opp. 23-24. Respondent confuses the question of the applicable standard of care with the availability of the underlying remedy: whatever standard of care applies, state remedies will remain available to compensate injured plaintiffs (subject to the preclusive effect of any FAA certification decisions).

Finally on this score, respondent insists that petitioner has failed to explain how the application of federal standards of care would work in this case. See Br. in Opp. 27-28. That is a peculiar objection. As the district court correctly noted (Pet. App. 63a-65a), if federal standards of care apply, it is respondent's burden as the plaintiff to identify the standard or standards of care she believes petitioner violated. And which federal standard governs; how it applies; and what effect it will have on the outcome

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[2] Respondent similarly underplays the extent of the FAA's oversight of the specific design feature at issue in this case. See Br. in Opp. 7. When the FAA approved petitioner's type design for the O-320-D2C engine in 1966, it had already considered the safety of the attachment method at issue in connection with other carburetor designs by the same supplier, and had authorized use of that method. See 30 Fed. Reg. 8034 (June 23, 1965).

of this case are logically subsequent questions that would arise only if the court of appeals' holding regarding the applicability of *state* standards is reversed.

Respondent argued below, and the court of appeals ultimately agreed, that federal law is so riddled with gaps that federal standards of care could not possibly apply to aviation design-defect claims. See Pet. App. 22a-28a. But respondent did not identify any such gaps below, and she again fails to do so here. Respondent can hardly fault petitioner for failing to identify which federal standard or standards apply to her case when she has never explained why the FAA's "comprehensive set" of design regulations would not fit the bill. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 (1984).

d. Respondent flippantly states that "[t]he best thing Lycoming's argument has going for it is that the FAA agreed in its post-argument letter brief to the Third Circuit that federal standards of care should govern a manufacturer's liability for aviation design defects." Br. in Opp. 28. The FAA's brief, which petitioner understands was formulated in consultation with the Solicitor General's Office, affirmed a position it has held for more than twenty years and across numerous administrations.[3] Especially in light of the extant circuit conflict, the court of appeals' rejection of the FAA's expert views surely warrants further scrutiny from this Court.

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[3] Contrary to respondent's argument (Br. in Opp. 29 n.6), the FAA's position in this case is not inconsistent with the position the government took in *Varig Airlines*. In that case, the government did not reject the concept of preemption of state-law standards of care; it simply pointed out that manufacturers have continuing safety-related responsibilities. See U.S. Reply Br. at 11 n.8, *Varig Airlines*, *supra* (Nos. 82-1349 & 82-1350).

Respondent contends that the FAA's brief was unpersuasive because the FAA did not explain "how state law affects the regulatory scheme." Br. in Opp. 28 (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 576 (2009)). In so contending, however, respondent appears to confuse conflict and field preemption. In a conflict-preemption case such as *Wyeth*, it makes sense for an agency to explain how state law would "affect" the regulatory scheme. In a field-preemption case, however, the issue is not whether state law conflicts with federal law, but rather whether "the pervasiveness of the federal regulation precludes supplementation by the States [or] the federal interest in the field is sufficiently dominant." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The FAA has unambiguously expressed its views on the latter issue.

e. Finally as to the merits, and contrary to respondent's argument (Br. in Opp. 24-27), the General Aviation Revitalization Act of 1994 (GARA) has no bearing on the question presented here. As a preliminary matter, this Court has made clear that it is inappropriate to rely on subsequent lawmaking to infer the intent of a previous Congress. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994).

More fundamentally, GARA answers a distinct question. Congress enacted GARA to provide "[r]elief from most of the 'tail' of liability for previously manufactured aircraft." H.R. Rep. No. 103-525, pt. 1, at 4 (1994). GARA imposes a repose period that extinguishes tort claims against general aviation manufacturers after eighteen years. But GARA says nothing about which standard of care governs such claims. Preempting state standards of care would impose a uniform standard on aviation manufacturers, while leaving untouched the other mechanisms of state tort law—including statutes of repose, veil-piercing standards, and theories of causation. Notably, the

FAA agrees: in its brief below, the FAA explained that GARA did not affect the analysis of the preemptive scope of the earlier-enacted Federal Aviation Act. See FAA C.A. Br. 13.

3. Almost as an afterthought, respondent suggests that this Court should deny review because of purported vehicle defects. See Br. in Opp. 31-35. None exists.

a. Respondent curiously calls the question of which standard should govern tort liability for aircraft manufacturers a "discrete corner" of the law that is not worth the Court's time. Br. in Opp. 32. The same could be said, however, whenever the Court grants review on the preemptive scope of a particular federal statute. It is hardly a vehicle problem that a case presents a clean legal question, stripped of case-specific distractions, that the Court can resolve for all future cases presenting the same question. And as petitioner's amici have highlighted, the particular question presented here is exceptionally important to the entire aviation industry and the flying public.

b. Respondent suggests that the resolution of the question presented will have no impact on the ultimate disposition of her claims. See Br. in Opp. 32-33. But the district court did not find that the parts at issue are "defective under any standard," as respondent asserts. *Id.* at 33. Petitioner's earlier summary-judgment motion principally concerned the discrete question whether petitioner could be liable in tort even though it was not the manufacturer of the replacement carburetor; the district court held that it could. See 876 F. Supp. 2d 479, 493-494 (M.D. Pa. 2012). Notably, the district court also determined that there were genuine issues of material fact that precluded summary judgment. *Id.* at 494. Petitioner's ultimate liability under federal standards of care thus remains to be established.

To be sure, if respondent fails to prove wrongdoing at trial, it will render irrelevant the question of whether federal or state standards of care should apply. But this Court routinely considers preemption questions at the summary-judgment stage rather than after final judgment. See, *e.g.*, *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1598-1599 (2015); *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1427-1428 (2014); *Dan's City Used Cars, Inc.* v. *Pelkey*, 133 S. Ct. 1769, 1777-1778 (2013). And that is for good reason. If petitioner's liability should be tested under a federal standard of care, petitioner and respondent alike are best served by knowing that now. The alternative—litigating this case to final judgment, only to learn post-judgment that the legal standard should have been different—risks significant delay and expense, especially when the calculation of whether to continue litigating is naturally affected by the applicable standard.[4]

c. Finally, the court of appeals' discussion of the effect of the FAA's decision to certify the design at issue does not moot the question presented. See Br. in Opp. 33-35. The court of appeals observed in passing that the issuance of the type certification would not, as a matter of *conflict* preemption, establish that petitioner had satisfied a *state-law* standard of care. See Pet. App. 41a. But the court obviously did not address the effect of type certification in the event a *federal* standard of care were to apply as a result of *field* preemption. That question is logically subsequent to the question of which standard applies. If this Court grants review and holds that the Federal Aviation Act preempts state-law standards of care, it could either address any question concerning the effect of type

[4] For much the same reason, the fact that respondent has a discrete claim under 14 C.F.R. 21.3 (based on an alleged failure to report defects to the FAA), see Br. in Opp. 32, has no bearing on whether the Court should grant review.

certification itself or leave that question to the court of appeals on remand.

* * * * *

In short, there is no impediment to this Court's considering, and resolving, the question presented. In light of the clear circuit conflict, the FAA's views, and the exceptional importance of the issue, the Court should grant the petition for certiorari or, at a minimum, call for the views of the Solicitor General.

Respectfully submitted.

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