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No. 14-4193

In the United States Court of Appeals for the Third Circuit

JILL SIKKELEE, APPELLANT

v.

PRECISION AIRMOTIVE CORPORATION; PRECISION AIRMOTIVE LLC; BURNS INTERNATIONAL SERVICES CORPORATION; TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION; AVCO CORPORATION; KELLY AEROSPACE, INC.; KELLY AEROSPACE POWER SYSTEMS, INC.; ELECTROSYSTEMS, INC.; CONSOLIDATED FUEL SYSTEMS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (CIV. NO. 07-886) (THE HONORABLE MATTHEW W. BRANN, J.)

BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF APPELLEE AVCO CORPORATION

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STATEMENT OF THE ISSUE

The parties' briefs in this appeal raise several issues. *Amici* will focus on the issue that they believe is crucial: Whether the district court correctly held in this case that federal standards of care for aircraft design and manufacture preempt state standards of care.

INTEREST OF AMICI[1]

Atlantic Legal Foundation (ALF) is a nonprofit, nonpartisan public interest law firm, incorporated in Pennsylvania. ALF provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Among other things, the ALF's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science. ALF's leadership includes distinguished legal scholars and practitioners from across the legal community.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Textron Inc., the parent company of AVCO Corporation is a member of the New England Legal Foundation and has been a contributor to NELF for general operating expenses for several years. Textron's contributions have never been earmarked for a particular case, and it is not funding this brief.

NELF is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston, whose legal services are provided *pro bono*. NELF's membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small corporations and companies in New England and elsewhere in the United States. NELF has regularly appeared as *amicus curiae* in state and federal courts, including the United States Supreme Court, in cases raising issues of general economic and regulatory significance to both the national and the New England business communities.

This appeal is of great interest to *amici* because of the importance to the business community of balanced and uniform regulations that provide clear standards and responsibilities. *Amici* are concerned that duplicative, inconsistent, or contradictory state standards of care would be counterproductive and, in exposing businesses to multiple standards, can only have a deleterious impact on the ability of those businesses to function rationally, efficiently, and in the best interest of the public, especially when a comprehensive scheme of federal aviation safety regulations already exists. Federal preemption of state law with regard to aviation

safety serves the public interest by maintaining a clear and rational regulatory scheme for the aviation industry.

STATEMENT OF THE CASE

The final amended complaint in this action alleges that in 2005 David Sikkelee's single-engine aircraft lost power due to a design defect in its carburetor, resulting in a crash and his death. Appellant, David's widow, Jill Sikkelee, sued appellee AVCO Corp. (Avco) and its Lycoming Engines Division (Lycoming), which designed and manufactured the aircraft's engine.

The second amended complaint[2] asserts negligence and strict-liability claims under Pennsylvania law based on allegations that a replacement carburetor (not manufactured by Lycoming)[3] which was installed on the aircraft's engine in 2004 (more than 30 years after the engine was manufactured by Lycoming) violated applicable federal standards of care and was defective at the time of the accident, and that Lycoming failed to report information about the defect to the Federal Aviation Administration (FAA).

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[2] The procedural history of this case is tortuous, and is recited in detail in Judge Brann's decision dated September 10, 2014. App. A33.. We will merely summarize the most pertinent aspects of it.

[3] The carburetor was a replacement MA-4SPA carburetor manufactured by Marvel-Schebler, but "completely rebuilt or overhauled" by Kelly Aerospace, Inc., and Kelly Aerospace Power Systems, Inc. in 2004, using parts not manufactured or licensed by Lycoming. See AVCO Brief at 11-12.

Lycoming filed a motion for summary judgment, arguing that the FAA's issuance of a "type certificate" for the engine, *i.e.*, a certificate that the engine design satisfied the requirements of all applicable federal regulations[4], established compliance with the federal standards of care. The district court granted Lycoming's motion as to the claims alleging defective design of the carburetor, but denied it as to the claim alleging that Lycoming failed to report a known design defect to the FAA in violation of 14 C.F.R. § 21.3.

STATEMENT OF FACTS

Amici adopt the statement of facts in Appellees' brief.

SUMMARY OF ARGUMENT

In *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (1999), this Court held that federal law preempts the "entire field" of aviation safety. Under that decision, federal law establishes the applicable, and exclusive, standards of care for aviation safety. Abdullah squarely controls this appeal. Plaintiff's theory of liability here—that a jury should be allowed to second-guess the FAA's determination that Lycoming's design of the O-320 engine complied with the applicable federal standards of care—would turn Abdullah on its head and thwart Congress's clear intent to vest the FAA with exclusive regulatory authority for aircraft design and manufacture.

[4] The "type certification" process is a design approval process overseen by the FAA and is a prerequisite to manufacturing any aircraft, aircraft engine, or propeller.

The district court correctly held that plaintiff must plead violations of federal, rather than state, standards of care, consistent with *Abdullah* and consistent with Congress's clearly expressed intent in enacting the Federal Aviation Act. This Court held in *Abdullah* and recently reaffirmed in *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (2010), that federal law preempts the entire field of aviation safety. Regulations governing aircraft design and manufacture lie within the preempted field.

This Court in *Abdullah* correctly interpreted Congress's intent in passing the Federal Aviation Act. In the Act Congress conferred complete and exclusive authority over aviation safety on the FAA in order to create a uniform regulatory scheme in which the FAA's regulations are pervasive, and cover virtually all facets of air safety, including the design and manufacture of aircraft engines.

The federal government's interest in occupying the field of air safety regulation derives from the national and indeed international character of civil aviation. For this reason, the Act delegated to the FAA sole responsibility for promoting civil aviation and for ensuring the Nation's compliance with international agreements governing civil aviation. Dispersal of that authority to the 50 states and several territories would breed confusion, would impose barriers to commerce, and would make it more difficult for the aviation industry to meet the needs of the public and the Nation.

ARGUMENT

The district court correctly applied this Court's precedents in holding that the FAA's "type certification" standards are exclusive, and preempt claims based on state standards of care. The district court also correctly held that issuance of a type certificate for the engine at issue conclusively established Lycoming's compliance with those federal standards and thus precluded plaintiff's claims based on those standards.

I. FEDERAL SAFETY STANDARDS FOR AIRCRAFT DESIGN AND MANUFACTURE PREEMPT STATE STANDARDS OF CARE

In *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (1999), this Court held that "federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." 181 F.3d at 367. The district court correctly understood *Abdullah* as holding that federal law preempts the entire field of aviation safety, including aircraft design and manufacture. That holding of *Abdullah* is consistent with the text, purpose and history of the Act. If federal regulation of aviation safety is exclusive, as *Abdullah* correctly held, then a jury cannot override the federal agency's determination that an aircraft engine and its component parts complied with the applicable federal design safety regulations.

A. Conflict Preemption and Field Preemption

State laws can be precluded either by express preemption or by implied preemption. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1993).[5] Express preemption occurs when Congress expressly prohibits enforcement of any state law within the scope of the express preemption provision. Congress may indicate pre-emptive intent "through a statute's express language or through its structure and purpose." *Altria Group v. Good*, 555 U.S. 70, 129 S. Ct. 538, 540 (2008); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). *See Abdullah*, 181 F.3d 363, 367 (3d Cir. 1999).

Preemptive intent may be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field (field preemption"), or if there is an actual conflict between state and federal law ("conflict preemption"). *Altria Group v. Good*, 555 U.S. at 76-77; *Freightliner Corp. v. Myrick,* 514 U. S. 280, 287 (1995); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984); *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977). Conflict preemption occurs when there is an irreconcilable conflict between federal and state standards or when the imposition of a state standard in would frustrate the objectives of the federal law. *Silkwood,* 464

[5] Federal preemption is grounded in the "supremacy clause,"Article VI, cl. 2, of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." The Supremacy Clause gives Congress the power to preempt state law. *See Arizona v. United States*, 132 S. Ct. 2492, 2500-2501 (2012).

U.S. 238, 256; *Abdullah*, 181 F.3d at 366. Field preemption arises when Congress occupies an entire field of a substantive area of law, thus precluding any type of state interference in that field. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300 (1988) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)); *Abdullah*, 181 F.3d at 367. States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance, and intent to preclude can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *English*, 496 U.S. at 79.[6]

This case involves field preemption, which occurs when Congress has indicated "an intent to occupy a given field to the exclusion of state law." *Schneidewind*, 485 U.S. at 300. Such an intent "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States [or] where the federal interest in the field is sufficiently dominant." *Id*. "The 'purpose of Congress is the ultimate touchstone of pre-emption analysis.'" *Riegel v. Medtronic*,

[6] The three categories of preemption are not "rigidly distinct," and indeed, "field preemption may be understood as a species of conflict preemption." *English,* 496 U.S. at 79 n. 5; *accord Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 104 n. 2, (1992).

552 U.S. 312, 334 (2008), quoting *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U. S. 96, 103 (1963)). Congress may indicate pre-emptive intent through a statute's express language or through the statute's structure and purpose. See *Jones v. Rath Packing Co.*, 430 U. S. at 525 (1977).

B. Congressional Intent In Enacting The Federal Aviation Act Of 1958 Was To Create a Uniform Rules To Govern Civil Aviation

The purpose of Federal Aviation Act of 1958, as amended, Pub. L. No. 85-726, 72 Stat. 731, § 101(3), 72 Stat. 731, *codified at* 49 U.S.C. ch. 1 (Act), was to create a system of unified rules to "promote safety and efficiency." *City of Burbank v. Lockheed*, 411 U.S. 624 (1973) and the Act "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled." *Id*. at 639.

All of the circuits that have addressed the issue agree that the entire field of "air safety" is preempted. See *Abdullah*, *Elassaad v. Independence Air, Inc.*, 613 F.3d at 126-27, *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326-27 (10th Cir. 2010), *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 810 (9th Cir. 2009); *Greene v. B.F. Goodrich Avionics Sys. Inc.*, 409 F.3d 784, 794-95 (6th Cir. 2005); *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004); *Kohr v.*

Allegheny Airlines, Inc., 504 F.2d 400, 403-04 (7th Cir. 1974); *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969); *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960).

Congress recognized the uniquely national nature of aviation because aviation is the only transportation industry "whose operations are conducted almost wholly within federal jurisdiction[] and are subject to little or no regulation by States or local authorities." Congress asserted that "the federal government bears *virtually complete responsibility* for the promotion and supervision of this industry in the public interest." S. Rep. No. 85-1811, at 5 (1958) (emphasis added). Congress recognized the "indivisible" nature of aviation safety regulation, and therefore centralized authority in the FAA to issue national, uniform regulations. H. R. Rep. No. 85-2360, at 1-2, 7, 22, 27 (1958); S. Rep. No. 85-1811, at 1.

Numerous provisions of the Act confirm that Congress intended the FAA's regulation of aviation safety to be complete. Section 601 requires the FAA to regulate what occurs during flight, see, *e.g.*, Act § 601(a)(4)-(5); qualification of pilots, *id*. § 602; air carriers, *id*. §§ 604-605; air navigation facilities, *id*. § 606; flight schools, *id*. § 607. Of special note, the very first category of aviation safety regulation under the purview of the FAA is aircraft design, manufacture, inspection, and maintenance, *id*. § 601(a)(1)-(3). In short, Congress viewed the field of aviation safety as indivisible and intended that the FAA's regulations would occupy it completely.

Consistent with Congressional intent, the FAA has pervasively regulated the entire field of aviation safety. The federal regulations "address[ ] virtually all areas of air safety." *Air Transport Ass'n of America, Inc. v. Cuomo*, 520 F.3d 218, 224 (2d Cir. 2008) (per curiam), particularly with respect to the design and manufacture of aircraft. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 805 (1984).

In sum, the applicable regulations regarding the design, manufacture and maintenance of aircraft components at issue in this case, and federal agency approval thereof, are precise and pervasive, and thus any state standard of care is preempted.

While the Supreme Court has not had occasion to address this issue in the context of the Act and FAA regulations, the Court's rulings in the context of statutes governing maritime law, which have been characterized as "strikingly similar" to the Act (see, T. J. McLaughlin, M.P. Gaston & J.D. Hager, *Navigating the Nation's Waterways and Airways: Maritime Lessons for Federal Preemption of Airworthiness Standards*, AIR & SPACE LAWYER, vol. 23, no. 2, 5, 9 (2010)), are instructive. The Supreme Court addressed preemption in maritime law in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). The issue was whether the Ports and Waterways Safety Act of 1972, 33 U.S. Code § 1221, *et seq*. (PWSA), preempted attempts by states to require additional safety equipment. 435 U.S. at 155. The PWSA contained two pertinent provisions: Title I focused on traffic control at local ports (33 U.S.C. §§

1221-1227) and Title II focused on design and construction of oil tankers. See *Ray*, 435 U.S. at 152. Invoking implied field preemption, the Court held that Title II had a preemptive effect because "Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord." 435 U.S. at 168. The Court further explained that under Title II, the Department of Transportation (DOT) was required to determine the seaworthiness of all oil tankers by certifying their compliance with federal law. *Id*. at 166-69.[87]

Significantly, and contrary to the argument made by Appellant and *amicus* American Association for Justice in this case, the Supreme Court in *Ray* rejected the notion that Congress must have intended to permit states to impose higher standards by establishing only "minimum standards." 435 U.S. at 168 n.19. The Court pointed to the breadth of federal regulation and strong national and international policy reasons why "the Nation was to speak with one voice with respect to tanker-design standards." *Id.* at 166.

This Court's decision in *Abdullah* is consistent with the Supreme Court's view of the preemptive effect of the PWSA. Both the FAA and the PWSA create a comprehensive scheme of regulation of instruments of transportation that have direct impact on interstate and foreign commerce and implicate international agreements to which the United States is a party. See McLaughlin, Navigating the Nations

Waterways and Airways: Maritime Lessons for Federal Preemption of Airworthiness Standards, 23 No. 2 The Air & Space Lawyer at 5. It is no stretch to surmise that if the Supreme Court were to decide an aviation safety case, it would find that the PWSA and FAA have closely analogous enabling statutes affirmatively requiring that a designated federal agency establish all necessary standards to ensure the sea or airworthiness of approved vessels or aircraft. The first federal act regulating aviation, the Air Commerce Act of 1926, 44 Stat. 568 (1926), was derived directly from the statutory framework governing marine vessels. McLaughlin, *id*. at 9. The PWSA's seaworthiness certification provisions and the FAA's airworthiness or type certification provisions are both mandatory, comprehensive, and designed to ensure safety. Finally, as with certification of tankers under the PWSA, the FAA is generally required to recognize airworthiness certificates issued by other countries. McLaughlin, *supra*, at 10.

C. This Circuit's Precedent Holds That Federal Law Occupies The Field Of Aviation Safety, Including Design And Manufacture Of Aircraft

This Court first addressed federal preemption of claims concerning aviation safety in *Abdullah*, which involved personal-injury claims against American Airlines brought by passengers injured as a result of in-flight turbulence. *Abdullah*, 181 F.3d at 365. The passengers alleged that the flight crew had acted negligently by failing to avoid the turbulence and to issue adequate warnings. *Id*. The jury found for

plaintiffs, applying state and territorial standards of care. The trial court granted the defendants' motion for a new trial, holding that federal law occupies the field of aviation safety and that it had therefore erred at trial by applying state law standards of care. *Id*. at 365-366. This Circuit affirmed, holding "that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the *entire field* from state and territorial regulation." *Abdullah*, 181 F.3d at 367 (emphasis added).[7, 8]

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[7] Appellant argues that the holding of *Abdullah* does not apply to the design or manufacture of aircraft or aircraft components. See Appellant's Br. 50-51. *Elassaad* foreclosed that argument by recognizing that the design and construction of aircraft are part of the preempted field when it specifically included the regulations in 14 C.F.R. part 23 (prescribing safety standards for aircraft with 19 or fewer seats, which includes the airplane which David Sikkelee was flying) within the preempted field. 613 F.3d at 128 n.9. Appellant's reading of the cases leads to the anomalous conclusion that regulations governing in-flight food or beverage service are more pertinent to flight safety than regulations prescribing standards for aircraft design and construction because design and construction do not occur, literally, while the airplane is "in flight."See *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1328 (10th Cir. 2010) (state regulation of alcohol service is preempted).

[8] This Court in *Abdullah* held that the entire field of aviation safety is preempted. Appellant attempts to avoid *Abdullah* by characterizing the pertinent language as *dictum*. *See* Appellant's Br. 50-51 & n.30. The opinions in both *Abdullah* and *Elassaad* explicitly refer to the pertinent passages of *Abdullah* as a holding. See, *e.g.*, *Abdullah*, 181 F.3d 363 at 367 "[W]e *hold* that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." (emphasis added, citations omitted) and *Elassaad*, 613 F. 3d at 125 ("We *held* that there was 'implied preemption of the entire field of aviation safety . . . .'")(citation omitted, emphasis added) and 613 F.3d at 126 ("Again, *Abdullah*'s primary *holding* was that federal law preempted 'the entire (continued...)

Elassaad further defined the preemptive scope of federal regulation in the field of air safety. In *Elassaad*, the plaintiff, who was injured while disembarking from an aircraft, asserted common-law negligence claims against the airline. *Id*. at 122. The district court held that, under *Abdullah*, federal law established the standard of care. *Id*. at 123-124. This Court reversed, reasoning that although *Abdullah*'s "primary holding," that "federal law preempted 'the entire field of aviation safety'" *id*. at 126-27 (quoting *Abdullah*, 181 F.3d at 365), preemption was limited to "in-air safety," and that "the disembarkation process" was not within the preempted field. *Elassaad* at 126-127).

Of relevance to the case at bar, this Court in *Elassaad* noted that "regulations detail[ing] certification and 'airworthiness' requirements for aircraft parts" – the category of regulations at issue here – were among the "regulations . . . concern[ing] aspects of safety that are associated with flight" and thus within the preempted field identified in *Abdullah*. *Elassaad* at 128. *Ellassaad* is in no way inconsistent with *Abdullah*, and the key aspect of *Abdullah* was left in place: If a particular regulation

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[8](...continued)
field of aviation safety.'")(citation omitted, emphasis added). *Elassaad*, 613 F.3d at 126 (emphasis added) (internal quotation marks omitted). As a last gasp, Appellant argues that this language in *Elassaad* is itself dictum because *Elassaad* did not involve product liability claims against general aviation manufacturers. Appellant does not explain why this distinction makes a difference with respect to the relevance of one of *Abdullah*'s main holdings to *this* case, which does involve manufacture of general aviation aircraft.

touches on the "operation [of an aircraft] for the purposes of air navigation," it preempts state standards of care. *Elassaad*, 613 F.3d at 130.

Shortly before *Elassaad* was decided, the Ninth Circuit took a different approach to preemption in *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 806 (9th Cir. 2009). In that case, a pregnant woman slipped and fell down the stairs while exiting an airplane, causing injury to her and the fetus. The Ninth Circuit held that the Act did not preempt all claims relating to air safety and that state standards are preempted only when a federal agency issues "pervasive regulations" in a particular area of flight safety, such as passenger warnings. *Id*. at 811. The Ninth Circuit agrees with this Circuit's holding in *Elassaad*, but the Ninth Circuit's analysis does not depend on the whether the aircraft is "in flight," but rather on the pervasiveness and preciseness of the regulations. See *Martin*, 555 F.3d at 810.

In this case, under this Circuit's test, the Ninth Circuit's test, and the criteria used by other circuits, a court would reach the same result, because the applicable regulations regarding the design, manufacture and maintenance of aircraft components and federal agency approval thereof are precise and pervasive. The regulations regarding aircraft engines and components, airframes, wings and other similar parts of the aircraft itself relate to the essence of airworthiness of the airplane and thus any state standard of care is preempted.

D. Regulation of Aviation Safety Requires National Uniformity

The federal interest in aviation safety derives from the uniquely national (and indeed international) nature of aviation.

By its nature, aviation requires a unique degree of national coordination. As Justice Jackson observed "air is an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) He recognized that federal control over aviation is "intensive and exclusive" because planes "move only by federal permission. . .under an intricate system of federal commands." *Id*. The Supreme Court has recognized that the federal interest in aviation "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *City of Burbank*, 411 U.S. at 639.

Exclusive federal control is also required to comply with the numerous international treaties with respect to aviation to which the United States is a party. The Convention on International Civil Aviation specifies conditions under which the aircraft of one signatory nation can enter the airspace of another. See Convention on International Civil Aviation, art. 33, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.[9]

[9] The International Civil Aviation Organization lists over 50 multilateral (continued...)

The Act authorizes the FAA to accept foreign airworthiness certifications if the certifying nation is "in compliance with its obligations under international law for the safety oversight of civil aviation." 49 U.S.C. § 44701(e)(1), (3). In addition, the United States is a party to more than 70 bilateral Open Skies Agreements (as at January 12, 2015), see U.S. Department of State, Bureau of Economic and Business Affairs, "Open Skies Partners," available at http://www.state.gov/documents/organization/206046.pdf (last visited Mar. 16, 2015); these bilateral agreements give the signatory nations reciprocal rights for their airlines to use the airspace and airports of the other signatory.

The United States' obligation to implement international aviation agreements and the FAA's authority to do so are evidence that Congress "demanded national uniformity regarding [air] commerce." *United States v. Locke*, 529 U.S. 89, 103 (2000).

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[9](...continued)
conventions and protocols applicable to civil aviation; the United States is a signatory to the vast majority. See International Civil Aviation Organization, Multilateral Air Law Treaties available at http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (last visited Mar. 16, 2015).

CONCLUSION

The district court's order granting Lycoming's motion for summary judgment should be affirmed.

March 18, 2015

Respectfully submitted,

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***Jill Sikkelee v. Precision Airmotive Corporation, et al.*, No. 14-4193**

Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)

Martin S. Kaufman, a member of the bar of this Court, certifies as follows:

This brief *amicus curiae* of Atlantic Legal Foundation and New England Legal Foundation complies with the type-volume limits set forth at Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, and contains **4,381** words, excluding the parts of the brief exempted by the rule, as determined by WordPerfect X5, the computer program used to prepare this brief.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6); it has been prepared in proportionately spaced typeface using WordPerfect X5 in 14-point Times New Roman font.

The text of the electronic copy of this brief filed using this Court's CM/ECF system is identical to the text in the paper copies filed with the Clerk; and

The electronic copy of this brief filed using this Court's CM/ECF system was scanned for viruses using AVG Antivirus 2015 and no viruses were detected.

Dated: March 18, 2015

s/ Martin S. Kaufman

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CERTIFICATE OF SERVICE

Martin S. Kaufman, counsel *amici curiae* Atlantic Legal Foundation and New England Legal Foundation and a member of the Bar of this Court, certify that, on March 18, 2015, a copy of the foregoing brief was filed with the Clerk through the Court's electronic filing system. I further certify that, on March 18, 2015, hard copies of the foregoing brief were sent, by third-party commercial carrier for delivery overnight, to the Clerk and the following counsel by electronic mail:

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I further certify that all parties required to be served have been served.

Dated: March 18, 2015

s/ Martin S. Kaufman

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No. 14-4193

In the United States Court of Appeals for the Third Circuit

JILL SIKKELEE, APPELLANT

v.

PRECISION AIRMOTIVE CORPORATION; PRECISION AIRMOTIVE LLC; BURNS INTERNATIONAL SERVICES CORPORATION; TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION; AVCO CORPORATION; KELLY AEROSPACE, INC.; KELLY AEROSPACE POWER SYSTEMS, INC.; ELECTROSYSTEMS, INC.; CONSOLIDATED FUEL SYSTEMS, INC., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(CIV. NO. 07-886) (THE HONORABLE MATTHEW W. BRANN, J.)

BRIEF OF THE GENERAL AVIATION MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AVCO CORPORATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

The General Aviation Manufacturers Association (GAMA) represents over 80 of the world's leading manufacturers of general aviation airplanes, rotorcraft, engines, avionics, components, and related services. In addition to building nearly all of the general aviation airplanes flying worldwide today, GAMA member companies also operate fleets of airplanes, fixed-based operations, pilot/technician training centers, and maintenance facilities worldwide.

From its start in 1970, GAMA has been devoted to one primary purpose: to foster and advance the general welfare, safety, interests and activities of general aviation. GAMA submits this brief because it believes that the arguments made by Appellant undermine the fundamental principle that is essential to the safety and economic underpinnings of the general aviation industry in this country, i.e. uniform regulation at the national, not State level.

It submits this brief with the consent of all parties and in support of the position of the Appellee, Avco Corporation.

SUMMARY OF ARGUMENT

When this Court issued its decision in *Abdullah v American Airlines, Inc*., 181 F. 3d 363 (3d Cir. 1999), it held that the 1958 Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731, (codified as amended at 49 U.S.C. §§ 40101-49105) (1958 Act) preempted the standards for the entire "field" of "air safety." 181 F. 3d

at 367. It based this holding on a careful review of that statute's legislative history and numerous prior holdings of the Supreme Court recognizing that aviation must be regulated uniformly. Based on the foregoing, the *Abdullah* court recognized that the only way to achieve uniform aviation safety standards is through exclusive federal regulation of the entire "field" of "air safety."

Appellant claims that the safety of general aviation products is not subject to this preemptive scheme. However, she cites to no case or any portion of the legislative history of the 1958 Act to support that claim. Neither Congress nor the Supreme Court have ever entertained the notion that general aviation products are not a core component of the "field" of "air safety" and/or not subject to the same requirement for uniform federal regulation as every other aspect of that preempted field.

Appellant must know that such an argument has no support. Accordingly, she seems to set up a straw man argument which claims that the district court's decision is contrary to *Abdullah* because it "immunizes" a manufacturer from suit even when there is an alleged violation of federal standards. Appellant then cites to the legislative history of the General Aviation Revitalization Act (GARA)[1] to demonstrate that Congress did not intend manufacturers of aviation products to be "immunized" from suit.

[1] P.L. 103-298, § 1-4, 108 Stat. 1552; Nov. 20, 1997, P.L. 105-102, § 3(e), 111 Stat. 2215

Contrary to what Appellant claims, the district court's decision in the case at bar does not contradict either *Abdullah* or GARA and certainly did not "immunize" the defendant from suit. The district court's decision simply recognized that *Abdullah's* core holding would be violated if lay juries were allowed to second guess a determination of the FAA that a product met applicable safety standards. However, the district court did not preclude a remedy if it could be established that the defendant breached its obligation under 14 C.F.R. §21.3 to report in-service malfunctions to the FAA. That holding does not contradict *Abdullah* or GARA.

GARA was enacted as an amendment to the 1958 Act. Its legislative purpose was to limit claims by imposing an 18 year statute of repose on bringing a civil claim. Nothing in GARA undoes any part of the regulatory scheme established by the 1958 Act, including its delegation to the FAA of exclusive responsibility to determine the safety of general aviation engines and their component parts.

Contrary to what Appellant argues, the federal system for regulating aviation safety, does not authorize or empower lay juries to second guess FAA safety determinations. As was held in *Abdullah,* and recognized by Congress and the Supreme Court, uniform regulation and preservation of the "delicate balance between safety and efficiency" "requires" exclusive regulation by the federal

government. Appellant's arguments on appeal completely disregard all of the foregoing and should be rejected by this Court.

ARGUMENT

I. THE FAA'S CERTIFICATION THAT A GENERAL AVIATION PRODUCT MEETS APPLICABLE SAFETY STANDARDS FALLS WITHIN THE PREEMPTED FIELD OF AIR SAFETY AND IS NOT SUBJECT TO SECOND GUESSING BY LAY JURIES DECIDING TORT CLAIMS.

The Appellant wants this Court to narrowly interpret *Abdullah's* preemption holding to not include the FAA's certification of general aviation aircraft engines. That interpretation, however, ignores the preemption analysis used in *Abdullah* as well as the case law and legislative history factored into that analysis. When the foregoing is reviewed, it becomes quite obvious that type certification was created to be an exclusively federal endeavor with the FAA as the final arbiter of whether a product meets applicable safety requirements.

A. *Abdullah* Correctly Holds That Congress Intended The FAA To Exclusively Regulate All Aspects Of Air Safety And Did Not Intend To Allow Lay Juries To Second Guess The FAA's Safety Determinations.

The legislative history of the 1958 Act, the statute that created the FAA and the current aviation regulatory system, is devoid of any statement that Congress intended to carve out tort claims as a non-preempted area wherein lay juries would be given final authority to decide on a case by case basis whether aviation safety

standards have been satisfied. That type of dual regulation would be completely contrary to the intent of Congress in enacting the 1958 Act and the holdings of the Supreme Court interpreting the requirements of that statute's preemptive scheme.

Abdullah cites to numerous preemption holdings of the Supreme Court to guide its analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) are specifically noted to hold that when determining whether preemption exists, "the purpose of Congress is the ultimate touchstone." 181 F.3d at 366. In light of same, the *Abdullah* Court carefully reviewed the legislative history of the 1958 Act. In so doing, it noted that the Senate had specifically acknowledged the exclusively federal nature of how aviation is regulated:

> "aviation is unique among transportation industries in relation to the Federal Government -- it is the only one whose operations are conducted almost wholly within the federal jurisdiction, and subject to little or no regulation by the States or local authorities."

181 F.3d at 368 (citing S. Rep. No. 1811, 85th Cong., 2d Sess., pg. 5 (1958)).

Abdullah then noted that the Supreme Court had also extensively reviewed the legislative history of the 1958 Act in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). After doing so, *Burbank* specifically held that "the Federal Aviation Act of 1958 **requires** a **delicate balance between safety and efficiency**" and that 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**." 411 U.S. at 638, 639. (emphasis added)

Burbank not only sets out two "**requirements**" for any aviation preemption analysis of the 1958 Act but also states that unless these requirements are "**fulfilled**," Congressional objectives cannot be achieved. Appellant essentially disregards both of these "requirements."

Appellant does not and cannot establish how allowing a potentially infinite number of juries to second guess FAA safety and type certification decisions would not risk upsetting the "delicate balance between safety and efficiency" that Congress wanted to preserve when it passed the 1958 Act. Appellant also does not and cannot establish how empowering lay juries in every state to second guess FAA certification and safety decisions time and again could ever be deemed to fall within the "uniform and exclusive" system of federal regulation that Congress created the FAA to achieve.

As Appellee correctly points out, the FAA's type certification process is highly complex and detailed.[2] It is therefore not surprising that the district court in the case at bar found that the Appellant was unable to draft jury instructions that even remotely simulated the factors that go into the FAA's type certification determination. As the Court below stated, Plaintiff's counsel was "completely

[2] See Appellee's Br., pgs. 4-9.

unable to assist the Court" in developing proposed jury instructions that would utilize the federal certification standards followed by the FAA. The district court further stated that Plaintiff had even made the "incredible suggestion that the Court could . . . deliver Pennsylvania pattern instructions on negligence." Dkt. 456, at 6.

Even if it were possible for a jury to recreate the process by which the FAA determines type certification, a lay jury will always lack the experience and technical expertise of the FAA. That is why Congress created the FAA and vested it with the exclusive authority needed to preserve the "delicate balance between safety and efficiency." Moreover, and contrary to what Appellant argues, that "delicate balance" and the need for uniform regulation was not limited just to commercial flights.

Abdullah held that "**all aspects of air safety**" are preempted. In so holding, *Abdullah* cited to both the minority and majority opinions in *Burbank*. It did so because even though the four justice minority opinion authored by Justice Rehnquist disagreed with the majority as to whether the airport noise claim at issue was preempted, the minority specifically noted its agreement with the majority that federal law preempts "**all aspects of air safety**." *Burbank*, 411 U.S. at 644; see also, *Abdullah*, 181 F3d at 369, 370. As was noted therein:

> "The 1958 Act was **intended** to consolidate in one agency in the Executive Branch the control over aviation that had previously been diffused within

> that branch. **The paramount substantive concerns of Congress were to *regulate federally all aspects of air safety,*** *see, e.g.*, 49 U.S.C. § 1348(a)."

411 U.S. at 644 citing to S. Rep. No. 1811, 85th Cong., 2d Sess., 5-6, 13-15.

Burbank clearly recognized that Congress "***intended***" that the FAA "***regulate federally <u>all aspects</u> of air safety.***" Since *Cipollone, Rice, et al.* all hold that the intent of Congress is the "ultimate touchstone" for determining whether preemption applies, there can be no doubt that Congress intended that the FAA be the exclusive regulator for **<u>all aspects</u>** of aviation safety.

B. The FAA's Certification Of Aircraft Engines And Their Component Parts Falls Within The Preempted Field Of Air Safety.

It seems self-evident that the FAA's certification of aircraft engines clearly is an important "aspect" of aviation safety. The House Report which accompanied the passage of the 1958 Act specifically confirms this conclusion. *Abdullah* even quotes a portion of that report to support its holding that one of the purposes of the 1958 Act was to give

> ". . . the Administrator of the new Federal Aviation Agency . . . **full responsibility and authority for** the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of **safety** regulations." H.Rep. No. 2360, reprinted in 1958 U.S.C.C.A.N. 3741."

181 F. 3d at 368, 369.

In the case at bar, it is relevant to note that the full quote from the aforesaid House Report makes it clear that the FAA's "full responsibility" for "safety" extended also to "***the design and operation of civil aircraft***". H.Rep. No. 2360, reprinted in 1958 U.S.C.C.A.N. 3741.

The foregoing clearly establishes that the 1958 Act was intended to give the FAA ***full responsibility*** and ***exclusive authority*** over ***all aspects of aviation safety***, ***including aircraft design*** and operation. When it is further considered that the Supreme Court held in *Burbank* that ***uniformity*** and the ***delicate balance between safety and efficiency require exclusive federal control,*** it becomes self-evident that juries cannot be allowed to second guess FAA determinations that a product meets applicable safety standards. That conclusion is entirely consistent with the holding of *Abdullah* and in no way contradicted by the statutory purpose of GARA or any other federal aviation legislation.

II. GARA CANNOT BE READ AS INTENDING TO UNDO THE REGULATORY SCHEME CREATED BY THE 1958 ACT.

As clearly demonstrated in Point I, the district court's decision is wholly consistent with the core holding of *Abdullah*, the legislative history of the 1958 Act and the holdings of the Supreme Court interpreting that statute's preemptive scheme. Nonetheless, Appellant argues that Congress' passage of GARA should be read to require a wholly different conclusion.

In essence, Appellant argues that GARA undoes the 1958 Act's preemptive scheme so as to empower juries with the ultimate authority to determine, on a claim by claim basis, whether a general aviation product meets applicable safety standards. In making this argument, Appellant ignores the Supreme Court's maxim that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Cipollone v. Liggett Group*, 505 U.S. 504, 520 (U.S. 1992) citing to *United States v. Price*, 361 U.S. 304, 313, 4 L. Ed. 2d 334, 80 S. Ct. 326 (1960). Appellant also ignores the fact that there is nothing in GARA's statutory provisions to indicate a Congressional intent to undo key provisions of the 1958 Act.

GARA's stated purpose was simply to establish an "18 year statute of repose for a civil action against aircraft manufacturers." *See*, See H. Rep. No. 103-525(II), 103rd Cong., 2d Sess., 1. Nothing in GARA's statutory provisions or legislative history indicates that it was in any way intended to undo "the delicate balance between safety and efficiency" intended by the 1958 Act or, alter the FAA's exclusive regulatory authority over all aspects of aviation safety, including the certification and design of aviation products.

Appellant's argument that GARA should be interpreted to limit the broad preemptive scope of the 1958 Act completely disregards the principles of statutory construction which this Court addressed at length in *Abdullah*. Like in the case at

bar, the *Abdullah* court was also faced with an argument that a statute passed subsequent to the 1958 Act should be interpreted to re-define the 1958 Act's preemptive scope.

In *Abdullah*, it was argued that the Airline Deregulation Act of 1978 (1978 ADA), P.L. No. 95-504, 92 Stat. 1705 should be interpreted to redefine the preemptive scope of the 1958 Act; 181 F.3d at 372, 373. That argument is remarkably similar to the argument made by the Appellant in the case at bar. *Abdullah*, however, rejected that argument along with the primary case cited to support this claim, *Cleveland v. Piper Air Craft Corp.*, 985 F.2d 1438 (10th Cir. 1993). *Id.*

Abdullah explained that the 1978 ADA's preemption of "any law, rule, regulation, standard . . . relating to rates, routes, or services of any air carrier" was not intended to undo the 1958 Act's preemption of "all aspects of their safety." *Id.* *Abdullah* cited to well-accepted rules of statutory construction and stated that "the meaning of a statute is found in the evil (problem) which it is designed to remedy". 181 F.3d at 373. It then stated that the aforesaid preemption provision of the 1978 ADA was "enacted to ensure that states would not undo Federal deregulation with regulation of their own," and not to undo the 1958 Act's preemption of all aspects of aviation safety. *Id.*

As the Supreme Court explained in *Morales v. TWA*, 504 U.S. 374 (1992),

"Prior to 1978, the Federal Aviation Act of 1958 . . . gave the Civil Aeronautics Board (CAB) authority to regulate interstate airfares and to take administrative action against certain deceptive trade practices."

504 U.S. U.S. at 378-379.

Morales explained that because Congress found that the federal controls put in place by the 1958 Act were hindering "efficiency, innovation, and low prices," it passed the 1978 ADA to deregulate this area from federal controls. *Id*. In light of the limited purpose for which the 1978 ADA was enacted, *Abdullah* correctly recognized that the ADA's preemption provision should be interpreted only to preclude States from attempting to impose economic regulations of their own. 181 F.3d at 373. In other words, there was no basis to interpret a provision in a statute that has absolutely nothing to do with aviation safety as revising the previously enacted federal scheme for regulating that area.

Appellant's citation to GARA is much like the citation to the 1978 ADA in *Abdullah*. Both statutes were enacted long after Congress passed the 1958 Act and neither statute was intended to impact the exclusively federal regulation of all aspects of air safety that was specifically addressed in the 1958 Act. The problem that GARA was enacted to address was simply the extraordinarily long time period for bringing claims against aviation manufacturers. As with the 1978 ADA, Congress never addressed aviation safety in GARA.

If Congress had intended to undo any aspect of the regulatory scheme for aviation safety when it passed GARA, it clearly understood how to do so since the 1978 ADA had specifically deregulated federal control over economic aspects of air carrier operations. The fact that GARA did not enact a similar deregulation provision with respect to the safety of general aviation aircraft and products certainly indicates that, contrary to what Appellant argues, it did not intend to do so and GARA should not be interpreted to infer such an intent.

In considering the foregoing, it also should be considered that the basic argument which Appellant makes about juries not being preempted from overruling FAA certification decisions essentially mirrors the holding of the Tenth Circuit in *Cleveland v. Piper Aircraft Corp*., 985 F.2d 1438 (10th Cir. 1993). Indeed, the brief of the Appellant and the *amicus brief* of the American Association for Justice both cite to *Cleveland* to support their argument.[3]

Like the case at bar, *Cleveland* involved a negligent design claim against a general aviation manufacturer which the manufacturer claimed to be preempted by the FAA's certification of the aircraft and the exclusively federal regulatory scheme established by the 1958 Act. 985 F.2d at 1440, 1443. *Cleveland* rejected these arguments and held that the 1978 ADA should be interpreted to define the entire scope of aviation preemption and *Burbank* interpreted only to require

[3] See pgs. 11 and 18 of the AAJ amicus brief and p. 55 of Appellant's brief.

preemption of aircraft noise claims. 985 F.2d at 1443. *Abdullah*, however, explained in great length why these holdings in *Cleveland* were clearly erroneous. 181 F.3d at 372-375.

With respect to the foregoing, it is also important to note that the Tenth Circuit has also cited to *Abdullah* when it re-visited its decision in *Cleveland* and held that its finding of no preemption in that case was incorrect. In so holding, the Tenth Circuit cited also to the Supreme Court's decision in *Burbank* and stated,

> "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. **The FAA was enacted to create a 'uniform and exclusive system of federal regulation' in the field of air safety** . . ." (emphasis added)

US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. N.M. 2010).

Since the design and certification issues addressed in *Cleveland* are virtually identical to the issues raised in the case at bar, *Cleveland's* post-GARA refutation by the Tenth Circuit in *U.S. Airways* and by this Court in *Abdullah* is significant. A case that is remarkably similar to the case at bar is now acknowledged to be wrongly decided because *Cleveland* failed to acknowledge that *Burbank* preempts the entire field of air safety and not just aircraft noise. What is equally significant to note is that the FAA supported a finding of preemption in *Cleveland* because like *Burbank*, it recognized all aspects of aviation safety, including aircraft design and certification, to be preempted.

The decision in *Cleveland* notes that the FAA had filed an amicus brief in that case and stated that Congress had set forth a federal "intent to occupy the field of air safety." 985 F.2d at 1444. Although *Cleveland* rejected the position espoused by the FAA, *id*., the views expressed by the FAA as to whether a defective design claim was preempted should be considered by this Court. Not only is *Cleveland's* rationale for rejecting the FAA's arguments no longer good law but the Supreme Court has stated, in the context of another product/preemption holding, that an agency's view of the preemptive impact of a technical and complex statutory scheme which it is required to implement should be given weight by a reviewing court. *Geier v. Am. Honda Motor Co.*, 592 U.S. 861, 883 (2000) .

Contrary to what Appellant has incorrectly argued in the case at bar, the FAA explained in the *amicus brief* which it filed in *Cleveland* that "the federal government is the sole and exclusive arbiter of safe aircraft design. . ." 1991 U.S. 10th Cir. Briefs 2065; 1992 U.S. 10th Cir. Briefs LEXIS 1. That brief not only cites to much of the same legislative history and case law cited in *Abdullah* but also articulates the reasons why the FAA's issuance of a type certificate should not be second guessed by a jury.

The FAA's detailed explanation in *Cleveland* as to why lay juries should not be permitted to intrude into the certification process is as relevant today as it was when it was set forth more than twenty years ago:

> "The (1958 Act's) statutory scheme establishes an all-encompassing federal regulatory framework, one that indicates an affirmative congressional intent to occupy the field of air safety. First, **the statute delegates to a federal agency the power to set standards governing the adequacy of every facet of aircraft design, materials, workmanship, construction, and performance**. *49 U.S.C. App. 1421*(a). **It does not refer to supplemental regulation by the states**, nor is there any gap in the federal regulatory framework that would indicate Congress contemplated interstitial state regulation.
>
> Second, **the certification of a civil aircraft is based on a complete assessment of each and every factor relevant to safety**. The FAA is empowered to fully investigate any aspect of a proposed aircraft design. *49 U.S.C. App. 1423*(a). It may hold hearings to gather additional information or order any tests reasonably necessary to evaluate the plane's safety. *Ibid.* **It is further authorized to draw upon the expertise of the National Aeronautics and Space Administration or any other research or technical agency of the United States in assessing the merits of the proposed design**. *49 U.S.C. App. 1505.* **The federal design certification process thus entails an exhaustive inquiry into design safety**. Consequently, a federal design type certification may not issue until the FAA or its designee n.1 determines, after a highly technical, specialized, and expert review, that the aircraft is safe to fly. *49 U.S.C. App. 1423*(a).
>
> > n.1 The FAA may delegate to manufacturers the authority to determine whether a design meets pertinent airworthiness standards if the manufacturer: (1) already holds design type and production certificates for the same category of aircraft, and (2) it has a staff qualified to conduct necessary tests and inspections. See *14 C.F.R. 21.231* et seq.

See, 1991 U.S. 10th Cir. Briefs 2065; 1992 U.S. 10th Cir. Briefs LEXIS 1 at *10-13.

The FAA reiterated these same views 13 years after GARA was enacted. In *Air Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713 (M.D. Tenn. 2007), the State of Tennessee sought to regulate the type of equipment used in air ambulance helicopters. The plaintiff helicopter operator instituted an action in federal court seeking to enjoin the State from doing so. It claimed that Tennessee was prohibited from intruding in a field that was wholly preempted and subject only to regulation by the FAA.

In making its argument, Air Evac specifically noted that the safety of the helicopter was not subject to challenge because the FAA had issued a type certificate for same. After extensive briefing and hearings, the district court granted the injunction. The court cited to *Abdullah* to support that conclusion but also cited to a statement that was submitted to the Court by the FAA's Director of Flight Standards. The Court noted and upheld his statement that "only the FAA" has "responsibility for matters concerning aviation safety, **including the certification** and operation of aircraft." 486 F. Supp. 2d at 715.

In light of the foregoing, there is no credible basis for Appellant to argue that a statute passed more than 35 years after the enactment of the 1958 Act should be interpreted to undo an important aspect of the regulatory scheme which the earlier statute promulgated. As with the 1978 ADA, nothing in GARA's statutory provisions seeks to undo any aspect of the FAA's regulation of "***all aspects of air***

safety." To suggest otherwise requires one to ignore the absence of any deregulatory language in GARA. The absence of same cannot be deemed inadvertent. When Congress intended to deregulate the 1958 Act's federal economic control over air carrier rates, routes and services, it specifically set forth that deregulatory purpose in the 1978 ADA's statutory provisions. When it is further considered that a case virtually identical to the one at bar was refuted by the Tenth Circuit, *Abdullah* and the FAA after GARA was enacted, it should be held that GARA cannot be used to accomplish something that its statutory provisions never even address.

III. THE "DELICATE BALANCE BETWEEN SAFETY AND EFFICIENCY" WHICH THE FAA WAS CREATED TO PRESERVE IS INTENDED TO PROMOTE TECHNOLOGICAL ADVANCES THAT IMPROVE SAFETY.

Technological advancement and aviation safety have come a long way since Daedalus gave Icarus wings made of wax and feathers and told him not to fly too close to the sun. The technological and safety advancements achieved in aviation in the relatively short period of time since Wilbur and Orville Wright made their first flight in what we would now describe as a general aviation aircraft are truly remarkable.

The modern technology which provides the foundation for these advances is developed and financed by the aviation industry. An exclusively federal system of

regulation which preserves the balance between safety and efficiency promotes both technological and safety advances. The inefficient and non-uniform system proposed by Appellant impedes both of those mutually dependent goals.

Aviation safety is not improved by allowing lay juries to second guess FAA safety determinations. As Congress noted when it cited to the holding of *Cleveland*, one manufacturer's survey of 203 manufacturing and/or design defect claims that had been filed against it found that the NTSB had not supported even one of those claims but nonetheless, the cost of defense had averaged over $530,000![4]

Needless to say, the cost to defend and resolve an action more than twenty years later has increased dramatically. The total sums that would be expended if Appellant's arguments were accepted would be staggering. Those sums would obviously be unavailable to fund research and technological development. Moreover, additional funds would be needed to determine whether a jury's verdict required a product to be recalled, modified or made subject of some type of user and/or maintenance advisory. Of course, any such actions would require FAA approval and cause even more money to be spent to do so.

Additionally, and as the case at bar demonstrates, litigation and appeals can take many years to finally resolve. What is a manufacturer supposed to do during

[4] *See*, Hearing Before the Subcommittee on Aviation of the Committee on Public Works and Transportation, (October 27, 1993) 103rd Cong., 1st Sess., XV, fn 1.

the pendency of this process? If the manufacturer believes that other products can build off a technical advancement that the FAA previously certified but that product is now the subject of a pending tort claim, the manufacturer would obviously need to wait until that claim was resolved before trying to incorporate the existing technology into even more advanced designs. As technological advancement and improved safety remain on hold while the litigation continues, a manufacturer would also have to consider that irrespective of the decision of the jury in that case, another jury might reach a completely contrary decision. Thus, a manufacturer could never truly know whether its technological advances and approved designs should be built upon when developing new products or instead, completely abandoned because they are far too expensive to explain and defend in cases where lay juries are the ultimate decision-makers.

Manufacturers in an industry which the Supreme Court has recognized to be more extensively regulated at the federal level than any other should not have to bear the extraordinary litigation costs that other less federally regulated industries do not incur. These expenditures do not increase safety, but instead thwart investment into research and the development of new technologies that will enhance safety.

The Supreme Court has long recognized the uniquely federal nature of aviation. At a time when aircraft were still almost all powered by propellers and

travel by air an adventure experienced by a relative few, it stated in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) that aviation was "different" than other transportation industries and needed to be regulated exclusively at the federal level:

> "We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth of surface-bound transportation . . . air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, *uniform* and *exclusive* regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past."

333 U.S. at 105, 106 (*cited in Abdullah*, 181 F.3d at 370, n. 10) (emphasis added).

Despite the uniquely federal nature of aviation regulation, the Appellant argues that manufacturers of aviation products should be afforded less certainty and legal protection than manufacturers of less federally regulated products. In this regard, it is relevant to note that the Supreme Court has dismissed product defect claims involving (1) locomotives (*Kurns* v. *A.W. Chesterton Inc.*, 620 F.3d 392, 398 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1261 (2012); *see also Delaware & Hudson Railway Co.* v. *Knoedler Manufacturers, Inc.*, No. 13-3678, 2015 WL 127374, at *6 (3d Cir. Jan. 9, 2015) (explaining that, but for preemption, railroads might have "to change equipment when a train crosses state lines"); (2) inadequate safety restraints for automobiles in a claim directly analogous to the claim asserted

in *Cleveland* (*Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000); (3) a defective design of a maritime tanker (*Ray, Governor of Washington v. Atlantic Richfield*, 435 U.S. 151 (1978)); and claims involving myriad medical devices (See, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008), et. al.).

If, as Congress and the Supreme Court have said, aviation is more inherently federalized than any of the foregoing, then as the FAA stated in *Cleveland* and *Air Evac*, manufacturers should not be required to expend the extraordinary amounts of money and time needed to try to convince a lay jury that the issuance of a type certificate by the FAA's technical experts means exactly what Congress intended it means, i.e. the product meets all applicable safety standards.

As the eight year course of litigation in the case at bar amply demonstrates, defending a claim that has no legal basis needlessly causes all involved to expend money and time that can be spent far better elsewhere. From GAMA's perspective, that money and time would be far better spent working with the FAA to achieve both increased safety and efficiency. That statement is not a hollow claim. GAMA has formally committed to work with the FAA to improve both the safety and efficiency of general aviation products.

GAMA has formally executed *"The FAA and Industry Guide to Product Certification"* in an effort to formalize the best way to advance "the delicate

balance between safety and efficiency"[5] that the FAA was created to promote. That 117 page document wholly supports the FAA's mission to do so and specifically notes:

> "This process will result in a more effective use of FAA and Industry resources, particularly through the use of FAA Designees with oversight focused on critical safety areas. Also, by reducing the time and cost of product certification, safety enhancements through new technology and design innovation can be more rapidly integrated into aviation products"[6]

The numerous FAA technical requirements and the expertise of all the government and industry participants involved in the certification process make it abundantly clear that no jury could ever duplicate either the process or expertise that goes into making any type certificate determination.

In noting the foregoing it is also relevant to note that although the FAA believes that the use of "FAA Designees" and "working with industry partners" is the best way to achieve the goal of increased safety and efficiency, the FAA has also noted on its website that "Safety" is "First, Last and Always."[7] GAMA fully supports that goal.

GAMA submits, however, that adopting Appellant's argument that aviation products should not be given the same preemption protection afforded to less federally regulated products like locomotives, automobiles, tankers and medical

[5] See, www.faa.gov/aircraft/air_cert/design_approvals/media/CPI_guide_II.pdf
[6] *Id*. at p. 1
[7] www.faa.gov/about/history/brief_history/#safety

devices will not improve aviation safety. Not only are lay juries ill equipped to duplicate the expertise and policy considerations that factor into every FAA certification determination but allowing juries to even attempt to do so would necessarily result in an inherently non-uniform and unpredictable system. In a field where predictability and uniformity are the hallmarks of safety, the unpredictability and non-uniformity of inherently diverse jury findings would leave manufacturers and users of that product struggling to determine whether the product should be continued in use, re-called and/or subject to a whole new certification review.

Having noted the foregoing, GAMA and its members do not dispute that a violation of a safety standard imposed on an aviation manufacturer should allow a party damaged as a result of same to be compensated. In that regard, the district court's decision in the case at bar does not preclude the availability of a State law remedy if Plaintiff can establish that the manufacturer violated its regulatory obligation under 14 C.F.R. §21.3 to report a known defect. That conclusion however is far different than allowing a jury to overrule a finding by the FAA that the product in question meets all applicable safety standards.

CONCLUSION

Although Congress and the Supreme Court have long recognized that the "delicate balance between safety and efficiency" in aviation requires exclusive federal regulation,[8] this Court's landmark decision in *Abdullah v American Airlines, Inc*., 181 F. 3d 363 (3rd Cir. 1999) correctly recognized that this principle also extended to the manner in which common law tort claims were resolved. *Abdullah* held that the entire "field" of "air safety" is preempted and that claims related to same are subject to resolution only by reference to the standards for air safety promulgated by the Federal Aviation Administration (FAA). In the case at bar, the Appellants essentially ask this Court to undo these holdings.

The inefficiency and uncertainty of allowing lay juries to be the final arbiter of the FAA's aviation safety determinations is self-evident and not limited just to claims involving general aviation products. If a jury is empowered to overturn the FAA's determination that a product meets applicable standards then a precedent will be established that can open the door to a lay jury being able to overturn the FAA's certification of pilots, mechanics, airports and even air carriers.

GAMA and its members believe that the type of system advocated by Appellant has far reaching negative implications both for its members and aviation safety as a whole. GAMA further believes that such a result is contrary to well

[8] *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 639 (1973)

established precedent and the longstanding intent of Congress to promote both safety and efficiency by an exclusively federal regulatory system that respects and defers to the FAA's safety determinations. Accordingly, GAMA respectfully requests this Court to reject Appellant's argument in all respects.

Respectfully submitted,

s/ Jeffrey J. Ellis

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BAR MEMBERSHIP CERTIFICATE

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit and remain a member in good standing of the Bar of this Court.

Date: March 18, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14- point type and contains 5,884 words (based on the Microsoft Word 2013 word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify pursuant FRAP 29(c)(5) that no party's counsel has authored any portions of this amicus brief nor has a party or a party's counsel contributed money that was intended to fund the preparation or submission of this brief.

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using Kapersky Endpoint Security. No computer virus was found.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2015, a true and correct copy of the foregoing was served via this Court's CM/ECF.

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