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

JEFFREY J. ELLIS
QUIRK & BAKALOR, PC
1325 Franklin Avenue
Garden City, NY
(212) 319-1000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

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. 4

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. 4

B. The FAA's Certification Of Aircraft Engines And Their Component Parts Falls Within The Preempted Field Of Air Safety. 8

II. GARA CANNOT BE READ AS INTENDING TO UNDO THE REGULATORY SCHEME CREATED BY THE 1958 ACT. 9

III. THE "DELICATE BALANCE BETWEEN SAFETY AND EFFICIENCY" WHICH THE FAA WAS CREATED TO PRESERVE IS INTENDED TO PROMOTE TECHNOLOGICAL ADVANCES THAT IMPROVE SAFETY 18

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Abdullah v American Airlines, Inc., 181 F. 3d 363 (3d Cir. 1999)..... 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 21, 25

Air Evac EMS, Inc. v. Robinson, 486 F. Supp. 2d 713 (M.D. Tenn. 2007) 17, 22

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948).....21

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 5, 8, 10

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)..... 5, 6, 7, 8, 13, 14, 25

Cleveland v. Piper Air Craft Corp., 985 F.2d 1438 (10th Cir. 1993)... 11, 13, 14, 15, 16, 19, 22

Delaware & Hudson Railway Co. v. *Knoedler Manufacturers, Inc.*, No. 13-3678, 2015 WL 127374, at *6 (3d Cir. Jan. 9, 2015).....21

Geier v. American Honda Motor Co., 529 U.S. 861 (2000)..... 15, 22

Kurns v. *A.W. Chesterton Inc.*, 620 F.3d 392 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1261 (2012).....21

Morales v. TWA, 504 U.S. 374 (1992)..... 11, 12

Ray, Governor of Washington v. Atlantic Richfield, 435 U.S. 151 (1978) 22

Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947).....5, 8

Riegel v. *Medtronic, Inc.*, 552 U.S. 312 (2008).....22

United States v. Price, 361 U.S. 304, 4 L. Ed. 2d 334, 80 S. Ct. 326 (1960).....10

US Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. N.M. 2010) 14

Statutes

1958 Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731, (codified as amended at 49 U.S.C. §§ 40101-49105)..... 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 18

49 U.S.C. § 1348(a) 8

49 U.S.C. App. 1421(a) 16

49 U.S.C. App. 1423(a) 16

49 U.S.C. App. 1505 16

Airline Deregulation Act of 1978, P.L. No. 95-504, 92 Stat. 1705 11, 12, 13, 17, 18

General Aviation Revitalization Act , P.L. 103-298, § 1-4, 108 Stat. 1552; Nov. 20, 1997, P.L. 105-102, § 3(e), 111 Stat. 2215..... 2, 3, 9, 12, 13, 17, 18

Other Authorities

H. Rep. No. 103-525(II), 103rd Cong., 2d Sess., 1 10

H. Rep. No. 2360 , 85th Cong., 2d Sess. 9

Regulations

14 C.F.R. §21.3 3

14 C.F.R. 21.231 16

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

JEFFREY J. ELLIS
QUIRK & BAKALOR, PC
1325 Franklin Avenue
Garden City, NY
(212) 319-1000

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

S/ Jeffrey J. Ellis

JEFFREY J. ELLIS
QUIRK & BAKALOR, PC
1325 Franklin Avenue
Garden City, NY
(212) 319-1000

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.

Date: March 18, 2015

S/ Jeffrey J. Ellis

JEFFREY J. ELLIS
QUIRK & BAKALOR, PC
1325 Franklin Avenue
Garden City, NY
(212) 319-1000

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.

Date: March 18, 2015

s/ Jeffrey J. Ellis

JEFFREY J. ELLIS
QUIRK & BAKALOR, PC
1325 Franklin Avenue
Garden City, NY
(212) 319-1000