14-4193

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

JILL SIKKELEE, Individually and as Personal Representative of the ESTATE OF DAVID SIKKELEE, deceased,

Plaintiff-Appellant,

against

PRECISION AIRMOTIVE CORPORATION; PRECISION AIRMOTIVE LLC, Individually and as Successor-In-Interest to Precision Airmotive Corporation; BURNS INTERNATIONAL SERVICES CORPORATION, Individually and as Successor-In-Interest to Borg-Warner Corporation, and Marvel-Schebler, a Division of Borg-Warner Corporation; TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, A Division of Avco Corporation; AVCO CORPORATION; KELLY AEROSPACE, INC., Individually and Joint Venturer and a Successor-In-Interest;

(Additional Caption on the Reverse)

On Appeal from the United States District Court for the Middle District of Pennsylvania

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

REPLY BRIEF

Lycoming asks this Court to become the first to hold that a type certificate immunizes a general aviation manufacturer for a design defect that caused an airplane to crash. Such a holding would undermine the highest goal of the FAAct: promoting safety. This is because, as Lycoming does not meaningfully dispute, manufacturers effectively control the certification process.

Unable to cite a single case holding that a type certificate limits a court's ability to grant a remedy to Sikkelee, Lycoming tries to carry its burden of proving preemption by shifting the debate to a higher level of abstraction. Lycoming cites cases dealing with seat belts and beverage service aboard commercial aircraft, airport noise regulations, the design of sea tankers, and malfunctioning medical devices, all in an effort to cobble together a syllogism: (1) Congress intended to preempt the field of "aviation safety," (2) aircraft designs relate to "aviation safety," so (3) claims arising from defective designs must be preempted—not only as to the standard of care, but also as to the remedy.

Lycoming's argument fails for two reasons. *First*, even if Lycoming proves its premises, its conclusion does not follow because type certification does not eliminate state law remedies. *See* Part I, *infra*. This Court has already held that the FAAct itself preserves those remedies. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 375-76 (3d Cir. 1999). Nothing about type certification calls for a different

result: the FAAct's type certification provisions express no preemptive intent; and the text and legislative history of the General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298 (1994), *reprinted in* 49 U.S.C. § 40101 note, establish that Congress intended general aviation manufacturers to face tort liability unless a plaintiff's claim is barred by a limited statute of repose.

Second, Lycoming's premise is false because the preempted field of aviation safety does not include general aviation designs. *See* Part II, *infra*. In enacting GARA, Congress affirmed that state law governs general aviation manufacturers' liability. General aviation design regulations likewise set forth only minimum standards, leaving gaps for state law to fill. Whatever the merits of Lycoming's arguments as they relate to the operation of aircraft, beverage service, or other aspects of in-air safety, they do not warrant preemption of design claims. This Court's cases do not suggest otherwise: whenever this Court has considered a claim relating to aircraft design, it has rejected preemption. *See Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 122 (2010) (claim for "operating an aircraft made defective by design features of the aircraft steps"). And this Court has never considered the import of GARA.

Finally, as an afterthought, Lycoming advances a state law argument that was not addressed below, on which it did not petition for review. That argument is not properly before the Court, and lacks merit. *See* Part III, *infra*.

ARGUMENT

I. A Type Certificate Does Not Eliminate Private Damages Remedies For Defective Designs.

1. This Court should not find preemption of state law unless Congress's intent is "clear and manifest." *Abdullah*, 181 F.3d at 366 (quotation marks omitted).[1] That is especially true with regard to remedies because it is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Consequently, Lycoming must not only show that the field of aviation safety is preempted, but also that permitting a state law remedy "would frustrate the objectives of federal law." *Abdullah*, 181 F.3d at 375 (quoting *Silkwood*, 464 U.S. at 256).

Lycoming argues that it has met its burden because permitting a jury to find a violation of federal regulations after the Administration has issued a type certificate would be tantamount to "second-guessing" the Administration's decision to certify the design. Lycoming Br. 45. This argument misapprehends the import of both type certification and tort liability.

[1] Lycoming argues that the presumption against preemption does not apply to aviation. Lycoming Br. 31 n.13. This Court held otherwise. *See Elassaad*, 613 F.3d at 127 (applying "a restrained approach in recognizing the preemption of common law torts in the field of aviation . . . in part because the Department of Transportation has neither the authority nor the apparatus required to superintend tort disputes") (quotation marks omitted); *Abdullah*, 181 F.3d at 366.

Type certification has been part of the FAAct since it was enacted in 1958, alongside a savings clause that expressly preserved civil damages remedies. *See* Pub. L. No. 85-726, § 1106, 72 Stat. 731, 798 (1958) (current version at 49 U.S.C. § 40120(c) ("A remedy under this part is in addition to any other remedies provided by law.")). These provisions' coexistence shows that type certification did not then, and does not now, strip accident victims of a remedy when certificated designs violate the law.

When Congress decided to preempt state remedies in aviation cases, it did so expressly. In the Airline Deregulatory Act (ADA), Congress barred states from enacting laws relating to commercial air carrier "price[s], route[s], or service[s]." 49 U.S.C. § 41713(b)(1). And in GARA, Congress preempted "any State law to the extent that such law permits a civil action . . . to be brought after the applicable limitation period." GARA § 2(d). These two amendments established exceptions to the general rule embodied in the FAAct's savings clause, and thus overcame the presumption against preemption.

GARA is particularly significant because when Congress enacted that statute, it stated its understanding of the limited preemptive scope of the FAAct and also weighed the preemption arguments that Lycoming now makes. Congress stated that "[t]he liability of general aviation aircraft manufacturers is governed by tort law," that "the public's right to sue for damages is ultimately grounded in the

experiences of the legal system and values of the citizens of a particular State," that "Congress has chosen to tread very carefully when considering proposals . . . that would preempt State liability law," and that "in cases where the statute of repose has not expired, State law will continue to govern fully, *unfettered by Federal interference*." H.R. Rep. No. 103-525(II), at 3-4, 7 (1994) (emphasis added).

Congress also considered Lycoming's arguments in favor of preemption, paying "close attention to the . . . 'cradle to grave' Federal regulatory oversight" of general aviation, as well as the fact that aircraft "are regulated to a degree not comparable to any other product," and to the industry's complaints regarding excessive liability. *Id*. at 5-6. The legislature concluded that these concerns justified "the unusual step of preempting State law in this one extremely limited instance," *i.e.*, the GARA statute of repose. *Id*. at 6. But Congress did not "seek[] to revise substantially a number of substantive and procedural matters relating to State tort law, as earlier [failed] legislative efforts would have done." *Id*. Instead, it left state law largely intact, striking "a fair balance between manufacturers, consumers, and persons injured in aircraft accidents." H.R. Rep. No. 103-525(I), at 3 (1994).

Based on the foregoing, this Court's precedents dictate a ruling in Sikkelee's favor. In *Abdullah*, this Court held that "Congress found state damage remedies to be compatible with federal aviation safety standards." 181 F.3d at 375. This case is

a fortiori from *Abdullah* because the Court there did not consider GARA—a statute that supports Sikkelee.

2. Nevertheless, Lycoming argues that a type certificate evidences the Administration's determination that a design meets federal standards, which courts cannot later revisit. *See* Lycoming Br. 43. Lycoming attempts to address the FAAct savings and insurance clauses, GARA, and ADA in a single paragraph (and footnote), arguing that as long as *some* state law claims remain available, its interpretation is "not inconsistent" with those statutory provisions. *See id*. 51 & n.20.

The type certification process cannot bear the weight that Lycoming places on it. For a start, the type certification provision contains no preemptive language. Instead, it provides that "[t]he Administrator . . . shall issue a type certificate . . . when the Administrator finds that the aircraft, aircraft engine, propeller, or appliance is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under section 44701(a) of this title." 49 U.S.C. § 44704. The section does not provide that the Administrator's findings are conclusive evidence of compliance in any later proceeding, nor specify that the issuance of a type certificate eliminates or mitigates the manufacturer's liability for damages.

That makes sense because type certification constitutes only an initial pre-production approval, based on the limited information available to the Administration before the design is manufactured. That information overwhelmingly comprises the manufacturer's representations that it has conducted, and the design has passed, the relevant tests. But if new information emerges—for example before or after a crash—proving that a design is in fact noncompliant, then the decision to issue a type certificate does not, and should not, insulate the manufacturer from liability for the violation. That is doubly true when, as here, the evidence shows that the manufacturer concealed the defect.

Put another way, there is no evidence anywhere, and Lycoming certainly does not cite any, that Congress or the Administration regard type certification as a permanent stamp of approval for a design. To the contrary, the regulations requiring manufacturers to investigate and report defects in certificated designs prove that the Administration acknowledges the potential for erroneous certification, and places the responsibility for addressing those errors on the manufacturer. *See* 14 C.F.R. § 21.3. Here, the Administration made Lycoming responsible for fixing its own design. *See* A384 n.3 (citing correspondence from the Administration to Lycoming regarding defects in this carburetor). In fact, Lycoming below conceded that "[i]f a violation of a federal standard of care is

established, a plaintiff may seek whatever damages are permitted by the applicable states' laws." ECF No. 111, at 9 n.2.

Those arguments are all the stronger because, as Sikkelee showed—and Lycoming does not meaningfully dispute—the type certification process is notoriously porous, thoroughly captured by the industry, and incapable of producing consistent results or protecting the public. *See* Opening Br. 9-14, 41-45. More than ninety percent of the work in the certification process is handled by the industry itself, and many applications receive little more than a spot check from regulators. *Id*. at 11-12. Multiple government reports generated over a period of decades have highlighted that the Administration's staff lacks the resources and the technical expertise to effectively evaluate applications, and the caseload and the degree of delegation are only growing. *Id*. at 9-14. The result has been a startling number of general aviation crashes, presenting strong evidence that the type certification process is not sufficient to ensure safety. *Id*. at 44-45.[2]

[2] Lycoming asserts that these crashes were due to pilot error. But the investigative report Sikkelee cited indicted the statistics upon which Lycoming relies. *See* Thomas Frank, *Unchecked Carnage: NTSB Probes Are Skimpy for Small-Aircraft Crashes*, USA Today (June 12, 2014), http://www.usatoday.com/story/news/nation/2014/06/12/unfit-for-flight-part-2/10405451/. The primary reason is that manufacturers are usually "party participants" to aircraft accident investigations, and steer those investigations away from finding fault with their components. *See* RAND Institute for Civil Justice, *Safety in the Skies, Personnel and Parties in NTSB Aviation Accident Investigations*, xxxiv-xxxv (2000), *available at* http://www.iprr.org/research/RandNTSBMasRept.pdf. In fact,

In light of the foregoing, it is wildly implausible that when Congress permitted manufacturers to act as designees in the certification process, it also intended to create a system permitting manufacturers to immunize themselves from tort liability. Certainly, one would expect that if Congress had intended that result, there would be some evidence in the statute or its legislative history to that effect.

Lycoming also cites no evidence that Congress or the Administration wished to deny a tort remedy to victims if the certification process fails to detect a design defect, which then causes an accident. Indeed, all available evidence supports the opposite conclusion. That is because type certification and tort remedies serve complimentary but distinct goals. Type certification is designed to ensure that manufacturers implement minimum standards. Tort remedies ensure that accident victims are compensated when those standards are not met. Tort law also creates additional incentives for compliance, but that only proves that tort law is consistent with the federal regulatory regime. *See, e.g.*, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 237 (1995) (Stevens, J., concurring) ("Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation . . . ."); *Lewis v. Lycoming*, 957 F. Supp. 2d 552, 559

Lycoming was a "party participant" to the investigation of the crash giving rise to this litigation, which revealed loose throttle body to bowl screws—and yet Lycoming never told the National Transportation Safety Board about the defect.

(E.D. Pa. 2013); *Pease v. Lycoming Engines*, No. 4:10-cv-00843, 2011 WL 6339833, at *14 (M.D. Pa. Dec. 19, 2011).

3. Lycoming attempts to evade these arguments by contending that "allowing juries to turn around and impose tort liability for violating federal safety standards when the [Administration] has already determined that those very same standards were met would effectively permit States to . . . impose a standard of care other than the federal standard." Lycoming Br. 45. In support, Lycoming cites *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 316 (2008), applying the express preemption clause in the Medical Device Amendments that prohibited states from establishing requirements that are "different from, or in addition to, any [federal] requirement."

Lycoming's analogy to *Riegel* fails. First, no express preemption clause supports Lycoming; instead, both of the FAAct's express preemption provisions (ADA and GARA) concededly do not bar Sikkelee's claim. Second, Sikkelee is not asking the courts to apply a "different" standard than the Administration—but instead the same one. As *Riegel* explained, federal law does "not prevent a State from providing a damages remedy for claims premised on a violation of [federal] regulations." 552 U.S. at 330. That is exactly the remedy Sikkelee seeks here.

Lycoming mistakenly argues that because Sikkelee urges a jury to reach a different *result* than the Administration about its design's compliance, she seeks to

impose a different *standard*. But the question for the jury in this case is not whether the Administration was correct to issue the type certificate based on the information Lycoming provided to it, but instead whether the design is compliant based on the information available today. There is no "second guessing" because Sikkelee does not challenge the Administration's certification decision. Instead, she seeks to prove a defect using a more complete record. *Cf. Jinhua Yang v. Boeing Co.*, No. 13 C 6846, 2013 WL 6633075, at *7 (N.D. Ill. Dec. 16, 2013) (rejecting the defendant's argument that "there can be no challenge to airworthiness that is independent of certification" because "a suit against an airplane manufacturer for product liability and negligence" is not "necessarily also a suit . . . for negligent certification").

Lycoming's skepticism of American juries is unfounded. Lycoming abandoned its argument that formulating jury instructions based on the federal regulations would be difficult—a point that Sikkelee flagged and refuted. Opening Br. 45-47. Instead, Lycoming makes a different claim: it never discusses the specific regulations at issue in this case; instead, it offers generalities about how juries lack the "substantial technical expertise" necessary "to apply performance-based standards to evolving technologies." Lycoming Br. 47.

That jargon obfuscates more than it explains. For a clear illustration of how a jury will evaluate compliance with federal aviation design regulations, consider

this very case. A key design regulation, 14 C.F.R. § 33.35(a) (formerly CAR § 13.110(a)), is all of thirty-five words:

> The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.

Sikkelee's claim is simple: Lycoming's engine design allows the screws that attach the throttle body to the carburetor bowl to loosen due to engine vibration. That creates a gap, which prevents the carburetor from producing an appropriate mixture of fuel. Thus, the engine loses power. That loss of power caused the crash that killed David Sikkelee. Determining whether the foregoing facts are true—and therefore whether Lycoming's engine complies with the regulation—will not require the jury to exercise complicated technical judgment.

Section 33.35(a) is not, by any means, unusual. Other design regulations are similarly succinct, and simply require that components of the engine function safely and properly. *See, e.g.*, 14 C.F.R. §§ 33.15 (formerly CAR §§ 13.100-101) (providing that experience and tests must establish the suitability and durability of engine materials); 33.19 (formerly CAR § 13.104) (providing that engine design and construction must minimize the development of unsafe conditions between

overhauls); 33.33 (providing that engines must function without inducing excessive stress in engine parts due to vibration).[3]

4. Lycoming argues that Sikkelee would unduly prioritize safety above the Administration's other goals, including "encouraging and developing civil aeronautics." Lycoming Br. 48. Lycoming fails to explain how compensating the victims of air crashes, thereby creating incentives for safer designs, conflicts with the development of civil aeronautics. Lycoming also concedes that safety "is the [Administration's] highest goal," *id.*, and does not dispute that tort remedies result in safer aircraft. Thus, tort remedies advance, rather than "frustrate," the objectives of the federal regime. *Abdullah*, 181 F.3d at 375.

Lycoming addresses these issues at a high level of abstraction, contending that unlike the jury, the Administration weighs the costs as well as the benefits of particular safety measures—and suggesting that this is somehow more consistent with the FAAct. Lycoming Br. 48. But that is simply wrong. The Administration has not excused Lycoming from regulatory compliance; and the pertinent regulations do not include a cost-weighing mechanism—they simply provide that designs must function properly. In any event, Lycoming has not argued or even

[3] To the extent that any of the terms are ambiguous, "expert testimony on various aspects of aircraft safety may be helpful to the jury." *Abdullah*, 181 F.3d at 371.

suggested that a properly designed fuel system and engine would cost more than its noncompliant design.

Lycoming argues next that permitting juries to adjudicate compliance with the federal regulations would result in a patchwork of inconsistent rulings. *Id*. 49. Not so. Juries will apply the same standards as the Administration. Lycoming also effectively concedes that the federal regulatory regime is itself a patchwork because Administration field offices reach inconsistent results. *Id*. 44 n.17. Lycoming's only response to that argument was to assert that the Administrator can remedy such inconsistencies. *See id*. But it cites no evidence that this is happening. Moreover, to the extent the Administrator issues guidance about the meaning of the federal standards, such guidance can be incorporated into jury instructions.

5. In an effort to address the argument that adopting its position would effectively immunize manufacturers, Lycoming argues that its rule permits claims unrelated to type certification. Lycoming Br. 50. For instance, Lycoming now concedes that Sikkelee can pursue her claim that Lycoming failed to report design defects in violation of 14 C.F.R. § 21.3. *Id.*

Lycoming attacks a straw man. Sikkelee never argued that Lycoming's position would result in categorical immunity for manufacturers from every type of claim. Instead, she argued that Lycoming's rule immunizes every manufacturer

from every claim based on a certificated design—a result that contravenes the entire universe of precedent on this question, as well as the central premise of GARA. That premise is that state law defective product claims relating to general aviation aircraft—defined to include *only* aircraft with type certificates, GARA § 2(c)—would remain intact, subject only to the "extremely limited" statute of repose. H.R. Rep. No. 103-525(II), at 6. Lycoming's rule inverts this premise by making immunity from suit the norm. Moreover, the claims that Lycoming would eliminate compose a large and important pool: they are the principal check on manufacturer malfeasance in the design process, and a critical complement to the overwhelmed Administration's efforts to ensure safety.[4]

II. General Aviation Design Defect Claims Lie Outside The Preempted Field.

The preceding Part sets forth the easiest path to reversal. But if this Court wishes to further clarify the scope of aviation preemption, it would be correct to hold that federal law does not preempt state law standards of care in general aviation design defect claims, in which case Sikkelee will amend her complaint to include state law violations.

[4] Lycoming's concession that Sikkelee's failure-to-report claim can proceed also undermines the remainder of its argument because in order to prove that Lycoming failed to report a design defect, Sikkelee must show that the certificated design is, in fact, defective.

1. As Sikkelee's opening brief explained, this Court's precedents support the argument that aviation field preemption does not extend to design defect and products liability claims. Two cases, in particular, are helpful. First, in *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 122 (2010), this Court found no preemption of the state standard of care when a passenger was injured while disembarking on the aircraft's stairs and sued alleging, in part, that the aircraft was "made defective by design features of the aircraft steps." Second, in *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 169 (3d Cir. 2006), this Court held that it had no appellate jurisdiction because a type certificate holder's defense to a state law claim under GARA was not "comparable to an immunity from suit." The Court did so without even noting the possibility of preemption of the state law claims.[5]

To be sure, whether aircraft engine design falls within the preempted field remains an issue of first impression in this Circuit. But it is telling that when this Court considered a state law claim relating to the design of an aircraft—in *Elassaad*—it found against preemption.

[5] Lycoming notes that the manufacturer in *Robinson* had not argued that type certification rendered it immune. Lycoming Br. 53. That fact can only support Sikkelee: if manufacturers are not even *making* this argument, that is probably because it is clearly wrong. Indeed, Lycoming itself did not argue for immunity until its most recent summary judgment motion, after previously conceding that Sikkelee had a remedy if she proves a violation of federal design regulations.

Lycoming takes a more wooden view of this Court's precedents. It argues that *Abdullah* held that "federal law preempts the *entire* field of aviation safety, including aircraft design and manufacture." Lycoming Br. 26-27. It also cites *Elassaad's* statement that *Abdullah*'s "primary holding" was that the field of "in-air safety" was preempted, as well as its citation to manufacturing regulations while describing the in-air safety regime. *Id*. 28-29.

Abdullah and *Elassaad* contain language that, in a vacuum, could possibly be read as broadly as Lycoming wishes. However, this Court never actually *held* that aircraft engine design falls within the preempted field; and, there is strong reason to believe that this Court did not mean for its holdings to sweep in claims like Sikkelee's.

Both *Abdullah* and *Elassaad* involved claims against air carriers, not manufacturers. Consequently, neither case considered or even mentioned GARA—the key statute that distinguishes general aviation manufacturer claims from all others. As the Supreme Court explained in *Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009), when Congress is "aware[] of the prevalence of state tort litigation" and enacts an express preemption provision that stops short of preempting the plaintiff's claim, that "is powerful evidence that Congress did not intend" for the federal regulatory regime "to be the exclusive means" of ensuring safety. That is precisely the import of GARA: Congress recognized a long history of state tort

litigation against general aviation manufacturers, and expressly preempted only an "extremely limited" subset of it. H.R. Rep. No. 103-525(II), at 6. Courts that have considered GARA have thus refused to find the broad statements in *Abdullah* and *Elassaad* controlling in cases like this one. *See Lewis v. Lycoming*, 957 F. Supp. 2d 552, 558 (E.D. Pa. 2013); *Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185-KES, 2006 WL 1084103, at *22 (D.S.D. Apr. 20, 2006). As Sikkelee explained in detail—without any meaningful response from Lycoming—the result in *Abdullah* would have been different if this Court had considered GARA instead of the ADA when deciding whether Congress had preempted the field of aviation safety. Opening Br. 53-54.

The regulations at issue in *Abdullah* and *Elassaad* were also more comprehensive than the design regulations at issue here. Both cases considered 14 C.F.R. § 91.13, a catch-all, over-arching federal standard of care prohibiting careless or reckless operation of an aircraft. It is undisputed that § 91.13 does not apply to the design and manufacture of aircraft, which weighs against preemption here, as it did in *Elassaad*, 613 F.3d at 129-30. There is no regulatory counterpart to § 91.13 that establishes an over-arching federal standard of care for design and manufacture.

Lycoming argues that the FAAct contains another catch-all, 49 U.S.C. § 44701(a)(5), which requires the Administration to prescribe regulations that "the

Administrator finds necessary for safety in air commerce and national security." Lycoming Br. 42. But just because the Administration *can* enact further regulations does not signal that federal law exclusively defines the standard of care. If anything, the Administration's refusal to issue a catch-all standard for aircraft design signals that it does not wish to preempt all design claims—especially since the Administration relies upon the manufacturers themselves to investigate and report design defects. Lycoming also trips over its own argument: if § 44701(a)(5) preempts the field of general aircraft design, then this Court could not have decided against preemption in *Elassaad*. After all, this catch-all provision permits the Administration to issue design regulations relating to aircraft stairs—and it did so in 14 C.F.R. § 25.810(e).

Lycoming nevertheless argues that *Abdullah* and *Elassaad* are not limited to the operation of aircraft, relying principally on *Elassaad*'s fleeting reference to design regulations as relating to in-air safety. Lycoming Br. 29 (citing 613 F.3d at 128 n.9). That reliance is misplaced: Lycoming attempts to use a sentence of dictum from a case that rejected preemption to justify the opposite result in a case in which Congress clearly intended to preserve state claims.

Lycoming further contends that it would be illogical for this Court to hold that regulations relating to alcoholic beverage service on commercial flights fall within the preempted field of aviation safety, while design regulations do not. *Id.*

(citing *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1328 (10th Cir. 2010)). That argument is wrong because GARA applies to design claims but not to beverage service. Also, the beverage service regulation, 14 C.F.R. § 121.575—like the seat belt regulation at issue in *Abdullah*, *see* Opening Br. 17, 51-52—is far more detailed than the regulation relating to engine fuel system design. The latter does not specify the type of fuel system that must be used (*e.g.*, carburetion versus fuel injection), or the specific mixture of fuel to be delivered. In the vernacular of field preemption, the engine design regulations are far less "pervasive" than the regulations governing operation of aircraft.

The Ninth Circuit generally follows this Court's precedents in aviation safety cases and relied on a similar analysis to limit field preemption. In *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013), the court applied *Abdullah* to hold that federal aviation "regulations are pervasive as to *when* and *where* air carriers must provide . . . assistance" to disabled passengers, and therefore have preemptive effect. *Id*. at 1007. But those regulations "say nothing about *how* airline agents should interact with passengers," so that state law standards apply to claims relating to the "how." *Id*. at 1007-08.

Similarly, in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009), the Ninth Circuit found against preemption when a woman fell down the stairs on an aircraft. The court reasoned that unlike certain

aspects of aviation, "[a]irstairs are not pervasively regulated" because only one regulation applies to them, and that regulation leaves the key safety questions unresolved. *Id*. at 812. The court held that "[b]ecause the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective." *Id*.

This case is analogous to *Martin* and *Gilstrap*. Here, as in *Martin*, a single regulation governs the design of the fuel system. And as in *Martin* and *Gilstrap*, that regulation does not explain *how* a manufacturer should design a fuel system. The regulation of fuel systems is therefore not sufficiently pervasive to preempt state standards.[6]

2. Lycoming argues that independent of this Court's precedents, the FAAct itself preempts the field of aviation design and manufacturing. It cites a number of broad statements referring to the extensive and indivisible nature of federal aviation regulation.

Lycoming's argument is unpersuasive for several reasons. First, Lycoming does not account for GARA and GARA's legislative history, which stresses the continuing vitality of state law standards specifically in the area of design claims.

[6] Lycoming argues that the Administration's choice to regulate using "performance based standards" as opposed to rules "is thoroughly understandable." Lycoming Br. 37-38. True, because that choice gives the states flexibility to enforce their laws without creating a conflict with federal law.

See Part I, *supra*. Second, the FAAct empowers the Administration to enact minimum safety standards for aircraft design but does not preclude other sovereigns from enacting complimentary standards. Lycoming responds that Section 604 of the FAAct, 72 Stat. 776, likewise provides for "minimum standards" for air carrier operation certificates, and yet the operation of flights is fully preempted. Lycoming Br. 34.

As an initial matter, Sikkelee disputes the premise that Congress intended to preempt all claims relating to the operation of air carriers when it enacted the FAAct. Indeed, personal injury claims continue after the ADA was enacted. Lycoming's comparison is also superficial because states did not traditionally regulate the operation or the licensing of air carriers, so the presumption against preemption does not apply to Section 604. On the other hand, state tort law has always applied to aircraft component design, and thus cannot be displaced without a clear statement from Congress.

Lycoming concludes this section of its brief with a grab-bag of cases confirming the Administration's dominion over aviation safety. Lycoming Br. 34-35. But only one of those cases discusses a products liability claim like Sikkelee's—and rather than find preemption, it applied state law to decide the claim. *See Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788-93 (6th Cir. 2005) (applying Kentucky law standard to products liability claim for a

defective helicopter gyroscope). A host of cases have recognized the Administration's generally robust authority to regulate air safety while nevertheless holding that product liability and design defect cases are not preempted. *See, e.g.*, *Pub. Health Trust of Dade Cnty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-95 (11th Cir. 1993); *Lewis v. Lycoming*, 957 F. Supp. 2d 552, 558-59 (E.D. Pa. 2013); *Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 634 (N.D. Tex. 2011); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 835-36 (E.D. Tex. 2006); *Lucia v. Teledyne Cont'l Motors*, 173 F. Supp. 2d 1253, 1269-70 (S.D. Ala. 2001); *Sunbird Air Serv., Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 362-63 (D. Kan. 1992); *Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396, 1398-1400 (D. Haw. 1990); *Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 135-37 (Tex. App. 2011).

3. Lycoming concedes (at 35) that the Supreme Court has never held that the FAAct preempts state standards of care in aviation manufacturing and design cases, and it attempts to draw an analogy between the FAAct and the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 424 (1972) (codified as amended at 33 U.S.C. §§ 1221-1232b). Lycoming cites *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), which found preemption of state design requirements for oil tankers. Lycoming Br. 35. That 1978 case is distinguishable. First, the PWSA does not include a savings clause, or a counterpart to GARA,

which contemplates state law claims relating to aviation designs. The legislative history of the PWSA likewise had clear indications of intent to preempt. *See Ray*, 435 U.S. at 166.

Second, the statute, regulations, and reasoning in *Ray* did not address common law tort liability for defective designs. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) ("[N]either Title II of the PWSA nor the holding in either *Ray* or *Locke* purported to preempt possible common-law claims."). Instead, they addressed only whether states could bar ships from operating in the navigable waters of the United States via positive regulations. *Ray*, 435 U.S. at 164. This case involves no such prohibition.

Third, the PWSA addressed a particular problem—oil tankers in national and international waters—that calls out for federal involvement. General aviation is different. General aviation aircraft are smaller and less sophisticated than commercial carrier aircraft. Opening Br. 55-56. Many general aviation flights, *e.g.*, recreational flights, take off from and land at the same or nearby airfield. And aside from a handful of private jets, very few general aviation flights involve international travel. The federal interest diminishes accordingly.

4. Lycoming argues that even if federal regulations are not sufficiently pervasive to warrant field preemption, the dominant federal interest in aviation

safety does so. Lycoming Br. 38. It stresses the national and international aspects of civil aviation.

This argument cannot be correct. If a general federal interest in aviation triggered field preemption, then no state standards would apply to any aspect of aviation. That position has never been accepted. Indeed, states have for decades vindicated the rights of accident victims in general aviation crashes—which is why GARA was enacted in the first place. Moreover, Lycoming's authorities overwhelmingly refer to federal control over airspace and air traffic—not design—and are therefore distinguishable. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973). And Lycoming's argument is especially muted vis-à-vis the design of general aviation aircraft, which do not have a strong interstate or international presence.

III. Lycoming's State Law Argument Is Not Properly Before The Court And Lacks Merit.

Lycoming finally argues that under Pennsylvania state law, it owes no duty of care to Sikkelee because it cannot be deemed the "manufacturer" of the engine that killed David Sikkelee. Lycoming Br. 54-60. This argument is not properly before the Court, and in any event, it lacks merit.

In this interlocutory appeal from the district court's September 10, 2014 order, this Court "may not reach beyond the certified order to address other orders made in the case." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205

(1996). It must limit its review to questions that are "fairly included within the certified order." *Id*. Lycoming concedes that "the order certified for interlocutory review did not address the validity of plaintiff's claims under Pennsylvania law." Lycoming Br. 54 n.22. Actually, Lycoming's state law argument is not remotely included within the certified order.

Lycoming first raised the state-law argument that it is not a manufacturer in a summary judgment motion in 2011. *See* ECF No. 223 (Aug. 8, 2011). The district court rejected that argument on July 3, 2012, applying the Restatement (Second) of Torts. *See* A370-407. Lycoming sought reconsideration and permission to appeal. The district court denied reconsideration, and this Court denied Lycoming's petition for appeal, while predicting that Pennsylvania would apply the Restatement (Third). *See Sikkelee* v. *Precision Airmotive Corp.*, No. 12-8081, 2012 WL 5077571 (3d Cir. Oct 17, 2012). Lycoming thus sought reconsideration a second time, which was denied after full briefing. *See* A409-38 (June 3, 2013). Lycoming *again* sought reconsideration, thus "[t]esting the limits of [the district court's] Local Rule 7.10 (permitting motions for reconsideration) and arguably overstepping the bounds of tactfulness." A440 (July 9, 2013). The district court again rejected Lycoming's argument, deeming it unpersuasive, unsupported by authority, and at odds with positions Lycoming previously had taken. *See* A440-41.

The case then proceeded along the pretrial track. Seven months later, when the district court had difficulty formulating jury instructions, it invited Lycoming to file a new motion for summary judgment, limited to the argument that Sikkelee loses under the federal standards, including because type certification renders Lycoming immune. A125 (docket entry 478). That motion was granted in substantial part, and that order—alone—was certified for appeal. No state law or factual issues were included. Indeed, when Lycoming cross-petitioned to attempt to knock out Sikkelee's remaining claim, it did not even attempt to advance its state law argument. Now, Lycoming admits that it was originally incorrect to argue that Pennsylvania would embrace the Restatement (Third) of Torts, because the Pennsylvania courts have in fact rejected that position. *See* Lycoming Br. 55 n.23. Thus, the last time the district court rejected Lycoming's claim under the correct standard was almost *three years* ago.

Lycoming argues that this Court has jurisdiction because the state law issue is "'material to' the certified order and 'subsumed by'" it because if Lycoming is not a "manufacturer," then this Court need not decide the import of type certification. Lycoming Br. 54 n.22 (citing *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990), and *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 157 n.1 (3d Cir. 1998)). Lycoming's reasoning is flawed because its state law argument is plainly independent from its preemption arguments—indeed, that is

why Lycoming advances the argument as an "alternative" ground to affirm the judgment below. Lycoming Br. 54.[7]

The cases Lycoming cites are distinguishable. In *Mathews*, this Court *declined* to exercise jurisdiction over whether the district court previously had properly certified a class, determining that this issue was "not included in or subsumed by the certified order." *See* 161 F.3d at 157 n.1. *Cinematronics*, an out-of-circuit bankruptcy case decided before *Yamaha*, is also unpersuasive. There, the court found jurisdiction when a bankruptcy court had determined that certain claims were "core" claims, and the district court decided, on that basis, that the bankruptcy court could conduct a jury trial in those claims so that withdrawal of a bankruptcy reference was improper. *See* 916 F.3d at 1447. In adjudicating the withdrawal of the reference, the court of appeals recognized that it was not possible to decide the appeal without considering the bankruptcy court's order as well. *Id*. at 1449.

Because the preemption and state law issues in this case are separate, the Court need not reach—indeed it is "barred from reviewing"—Lycoming's state law claims. *Mathews*, 161 F.3d at 157 n.1.

[7] Even if Lycoming were correct that the existence of a duty is a prior question, this Court has rejected the argument that antecedent questions are up for grabs on interlocutory review. For example, this Court does not review the district court's jurisdiction in interlocutory review of a merits order. *See Griswold v. Coventry First LLC*, 762 F.3d 264, 269-70 (3d Cir. 2014).

Moreover, as the district court repeatedly held, Lycoming's argument is meritless. The essence of Lycoming's argument is that because a different entity, Kelly Aerospace, overhauled the carburetor in 2004 pursuant to Lycoming's design and instructions, Lycoming has no responsibility for the defects in its design. This makes no sense. As the overhaul was conducted pursuant to Lycoming's specifications, and because Lycoming exercised such substantial control over the overhaul and design of the carburetor (not to mention designed and manufactured the engine requiring the carburetor), a jury could clearly determine that Lycoming is liable.

Notably, Sikkelee's claims against Lycoming are based on a design defect and failure to warn and report, *not* defective manufacture. The defective design installed by Kelly Aerospace was Lycoming's approved design. That design called for the use of the defective carburetor during the overhaul, and Kelly Aerospace admittedly followed Lycoming's instructions and type certificate in this regard. Lycoming Br. 33. Moreover, the design could not be changed without Lycoming's approval, so that "it is only Lycoming—and no one else in the chain of production—that can alter its carburetor design to make it safer." A434. The Administration also required Lycoming, as holder of the type certificate, to resolve MA-4SPA carburetor issues related to design. *See* A384 n.3.

On these facts and many others, including expert testimony, Judge Jones

held that Lycoming was the *de facto* manufacturer of the carburetor. A388. Judge Brann held that because of Lycoming's involvement in the overhaul and design, it could be held liable as a non-manufacturing designer. A425. Whatever the label, the district court's analysis was correct under state law. *See Pridgen v. Parker Hannifin Corp.*, 916 A.2d 619, 623 (Pa. 2007) (explaining that, were it not for GARA repose, the original type certificate holder "might indeed be liable for design defects in replacement parts and/or the aircraft systems within which such components function" because the certificate holder "sit[s] at the top of the aviation food chain with respect to all components comprising the type certificated engine"); *Walton v. Avco Corp.*, 610 A.2d 454, 458-59 (Pa. 1992) (finding liability for defective products without appropriate warnings); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 383 (Pa. 2014) (explaining that an "entity engaged in the business of selling a product" has a "non-delegable duty . . . to make and/or market the product . . . free from a defective condition unreasonably dangerous to the consumer" when, as here, the product is sold to the consumer in substantially the condition dictated by the manufacturer's design). The district court also correctly reasoned that under the four-factor test established in *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000), *every* factor supports Sikkelee's argument that Lycoming owes her a duty. A432-35.

CONCLUSION

The judgment of the district court should be reversed in relevant part.

Respectfully submitted this 13th day of April, 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 6,974 words (based on the Microsoft Word 2011 for Mac word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Virustotal.com. No computer virus was found.

Dated April 13, 2015 /s/ John D. McClune
KATZMAN, LAMPERT & MCCLUNE

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2015, a true and correct copy of the foregoing was served via this Court's CM/ECF.

Dated April 13, 2015 /s/ John D. McClune
KATZMAN, LAMPERT & MCCLUNE