

No.

In the Supreme Court of the United States

AVCO CORPORATION, PETITIONER

v.

JILL SIKKELEE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Aviation Act preempts the application of state-law standards of care in the entire field of aviation safety.

CORPORATE DISCLOSURE STATEMENT

Petitioner AVCO Corporation is wholly owned by Textron Inc. Textron Inc. has no parent corporation. T. Rowe Price Associates, Inc., owns 10% or more of Textron's stock; T. Rowe Price Associates, Inc., is a subsidiary of T. Rowe Price Group, Inc., a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

AVCO Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 822 F.3d 680. The order of the district court granting petitioner's motion for summary judgment in relevant part (App., *infra*, 57a-112a) is reported at 45 F. Supp. 3d 431. An earlier order of the district court granting defendants' motion for judgment on the pleadings (App., *infra*, 113a-134a) is reported at 731 F. Supp. 2d 429.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2016. A petition for rehearing was denied on June 7, 2016 (App., *infra*, 55a-56a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]

Relevant provisions of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, are reproduced in the appendix to this petition (App., *infra*, 135a-144a).

STATEMENT

This case presents a question of “paramount federal concern”: whether, and to what extent, the Federal Aviation Act preempts the application of state-law standards of care in the field of aviation safety. U.S. Br. at 1, *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir. 1993), 1992 U.S. 10th Cir. Briefs LEXIS 1. Before its decision in this case, the Third Circuit had held, consistent with decisions of the Second and Tenth Circuits, that the Federal Aviation Act preempts state-law standards of care in the entire field of aviation safety. In this case, however, the Third Circuit reversed course, rejecting the position of the Federal Aviation Administration in an invited amicus brief and holding that the Federal Aviation Act preempts state-law standards of care only in the more limited field of “in-air operations.” In so doing, it joined the

Ninth and Eleventh Circuits in applying state-law standards of care, rather than federal standards, to claims that an FAA-approved aircraft or engine was defectively designed. The Court should grant review to decide this extraordinarily important question.

A. Background

1. The aviation industry is “unique among transportation industries in its relation to the Federal Government.” S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). The federal government has regulated aviation safety since 1926, when Congress enacted the Air Commerce Act (1926 Act). See Pub. L. No. 69-254, 44 Stat. 568. The 1926 Act directed the Secretary of Commerce to create an aircraft registration scheme, and it authorized the Secretary to demand “full particulars of the design [of aircraft] and of the calculations upon which the design is based and of the materials and methods used in the construction.” *Id.* § 3(b), (f), 44 Stat. 569, 570.

Because of then-prevailing views about the scope of Congress’s power under the Commerce Clause, the 1926 Act required registration only for aircraft engaged in interstate or foreign air commerce. See 1926 Act § 11(a)(2), 44 Stat. 574; S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925).¹ At the same time, however, both Congress and the Department of Commerce recognized the need for uniform national standards governing aircraft design, and they encouraged States to adopt “uniform laws and regulations corresponding with the provisions of [the 1926 Act] and the rules and regulations that will be promulgated under

¹ In 1938, Congress extended the registration requirement to all aircraft engaged in air commerce. See Civil Aeronautics Act of 1938, Pub. L. No. 75-706, §§ 1(3), 610(a)(1), 52 Stat. 977, 1012.

it.” S. Rep. No. 2, *supra*, at 8; see Department of Commerce, Air Commerce Bulletin, vol. 1, no. 1, at 1 (July 1, 1929) (stating that, “[i]nasmuch as there can be but one standard of airworthiness, * * * it would seem obvious that State laws dealing with regulation should provide requirements identical with those of the Federal law”).

2. As civil aviation grew over the following decades, authority over air safety became so broadly diffused that, at one point, there were 75 different interagency groups working on aviation planning and policy. See S. Rep. No. 1811, *supra*, at 6, 9-10. Congress responded by enacting the Federal Aviation Act of 1958 (Act), Pub. L. No. 85-726, 72 Stat. 731. Congress recognized that, because the aviation industry’s “operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities[,] * * * the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.” S. Rep. No. 1811, *supra*, at 5. In the Act, Congress created the Federal Aviation Agency, now known as the Federal Aviation Administration (FAA), and consolidated in that agency “full responsibility” for “the promulgation and enforcement of safety regulations.” H.R. Rep. No. 2360, 85th Cong., 2d Sess. 1 (1958).

a. The Act directs the FAA to “promote safe flight of civil aircraft in air commerce” by comprehensively regulating the aviation industry. 49 U.S.C. 44701(a). Among other things, the Act specifically directs the FAA to issue “minimum standards required in the interest of safety * * * for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers.” *Ibid.*

Pursuant to that statutory directive, the FAA has issued a “comprehensive set” of design regulations, known

as “airworthiness standards.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805, 814 (1984); see 14 C.F.R. pts. 23, 25, 27, 29, 31, 33, 35. Of particular relevance here, Part 33 of Title 14 of the Code of Federal Regulations “prescribes the general design and construction requirements for reciprocating and turbine aircraft engines.” 14 C.F.R. 33.11. Those regulations cover every aspect of an engine’s design, from ignition and lubrication systems to fire protection and engine control. See 14 C.F.R. 33.11-33.39. The regulations also prescribe a detailed battery of tests and inspections that a manufacturer must conduct in order to demonstrate that an engine complies with the standards. See 14 C.F.R. 33.41-33.57. For example, an endurance test requires a manufacturer to operate the engine at specified settings in specified temperature conditions for specified lengths of time, totaling at least 150 hours, and then disassemble the engine to determine whether its components maintained conformity with their design. See 14 C.F.R. 33.49(a), 33.55(a)-(b).

b. The Act creates a multi-step certification process through which the FAA enforces its airworthiness standards. At the first step, type certification, the FAA ascertains that the aircraft or engine “is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under” Section 44701(a). 49 U.S.C. 44704(a)(1). An application for a type certificate consists of detailed drawings and specifications (known as the “type design”), as well as test reports and other supporting data to show that the aircraft or engine satisfies the FAA’s airworthiness standards. See 14 C.F.R. 21.21, 21.31. As part of the type-certification process, the FAA is authorized to inspect and test the aircraft or engine. See 14 C.F.R. 21.21(b), 21.33.

As the court of appeals recognized, “[t]his certification process can be intensive and painstaking.” App., *infra*, 5a. “[F]or example a commercial aircraft manufacturer seeking a new type certificate for a wide-body aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests.” *Ibid.* (citing *Varig Airlines*, 467 U.S. at 805 n.7). In an amicus brief supporting petitioner in the court of appeals, Boeing represented that the type-certification process for its 787-8 aircraft took eight years and involved over 1,000 test flights demonstrating compliance with over 25,000 test conditions. See Boeing & Airbus C.A. Br. 5-6.

At the second step of the certification process, production certification, the FAA must satisfy itself that the manufacturer has “a quality system that ensures that each product and article conforms to its approved design and is in a condition for safe operation.” 14 C.F.R. 21.137; see 49 U.S.C. 44704(c). And at the final step, airworthiness certification, the FAA determines whether a particular aircraft or engine is fit to enter service. See 49 U.S.C. 44704(d). An airworthiness certificate signifies that the aircraft as a whole “conforms to its type certificate and, after inspection, is in condition for safe operation.” 49 U.S.C. 44704(d)(1). It is unlawful to operate an aircraft without such a certificate. See 49 U.S.C. 44711(a)(1).

c. The FAA continues to oversee aircraft design after it issues the initial certifications. Holders of type certificates have an ongoing duty to report failures, malfunctions, or defects to the FAA. See 14 C.F.R. 21.3. The FAA must approve in advance all design changes that have an “appreciable effect on the weight, balance, structural strength, reliability, operational characteristics, or other

characteristics affecting the airworthiness of the product.” 14 C.F.R. 21.93(a); see 14 C.F.R. 21.97(a). All other design changes “may be approved under a method acceptable to the FAA before submitting to the FAA any substantiating or descriptive data.” 14 C.F.R. 21.95. The FAA possesses the authority to issue airworthiness directives mandating design changes if it discovers unsafe conditions. See 14 C.F.R. 21.99; 14 C.F.R. pt. 39. The FAA also regulates the manufacturers of aftermarket parts, which must obtain design and production approvals certifying that their parts are identical to previously approved parts or otherwise have been determined to satisfy relevant airworthiness standards. See 14 C.F.R. 21.303.

B. Facts And Procedural History

1. Petitioner designs and manufactures engines for general-aviation aircraft. In 1966, the FAA issued petitioner a type certificate for an engine with model number O-320-D2C (the “O-320 engine”). The O-320 engine incorporated a model MA-4SPA carburetor (the “MA-4 carburetor”) manufactured by Marvel-Schebler, a company unaffiliated with petitioner. The MA-4 carburetor was a component of the design for which petitioner obtained type certification. App., *infra*, 71a-72a.

Petitioner manufactured an O-320 engine in 1969 and then sold it to Beagle Aircraft, a British general-aviation manufacturer. Petitioner had no further contact with the engine. The engine sat in storage for nearly 30 years; in 1998, the engine was installed on a Cessna 172N aircraft. At that time, an overhauled MA-4 carburetor was installed on the engine. App., *infra*, 5a-6a, 68a-69a.

In 2004, Kelly Aerospace, an FAA-certified repair station, overhauled another MA-4 carburetor, which was later installed on the O-320 engine originally manufac-

tured by petitioner. As part of the overhaul, Kelly replaced a number of parts with ones it manufactured itself. Kelly was not licensed by petitioner; it produced the parts pursuant to an FAA aftermarket approval. Kelly conducted the overhaul in accordance with manuals and service bulletins issued by Precision Airmotive Corporation, which had acquired Marvel-Schebler's carburetor line. Kelly also noted compliance with one of petitioner's service bulletins, which indicated that instances of "leakage through the gasket between the bowl assembly and throttle body of the carburetor" had been reported and that such leakage was "accompanied by loose screws that attach the bowl and throttle body." D. Ct. Dkt. 234-10. The bulletin advised that the screws should be checked for tightness during inspection; if the screws were loose, the bowl should be disassembled from the throttle body and reassembled using new lockwashers. App., *infra*, 69a; D. Ct. Dkt. 234-6, at 8-9; D. Ct. Dkt. 234-10; D. Ct. Dkt. 459, at 127.

In 2005, respondent's husband was piloting the aircraft with the Kelly-overhauled replacement carburetor when it crashed shortly after takeoff. Respondent's husband died from injuries sustained in the crash. App., *infra*, 6a, 58a, 69a.

2. a. In 2007, respondent filed suit in the United States District Court for the Middle District of Pennsylvania against numerous defendants, including petitioner, Precision, and Kelly. Respondent asserted a variety of state-law claims, including claims for negligence and strict liability. In her complaint, respondent alleged that, as the result of a design defect, "vibrations from the engine loosened screws holding the carburetor's throttle body to its float bowl," which "allowed raw fuel to leak out of the carburetor into the engine and thereby caused the aircraft to crash." App., *infra*, 6a.

Defendants moved for judgment on the pleadings, arguing that respondent's claims—which alleged violations of state-law standards of care—were preempted by the Federal Aviation Act. The district court granted defendants' motion, holding that respondent's claims were preempted. App., *infra*, 113a-134a. In so holding, the district court relied on the Third Circuit's decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (1999). App., *infra*, 124a-133a.

Abdullah involved a common-law tort claim alleging that an airline had negligently failed to avoid turbulence and to provide adequate warnings of the turbulence. See 181 F.3d at 365. Reviewing the history and structure of the Federal Aviation Act, the Third Circuit explained that “Congress intended the [FAA] to exercise sole discretion in regulating air safety.” *Id.* at 369. Accordingly, the 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.” *Id.* at 367. In so holding, the Third Circuit disagreed with other courts of appeals that had held either that “federal law does not preempt state and territorial air safety standards” or that “federal law only preempts discrete aspects thereof.” *Id.* at 365.

In *Abdullah*, the Third Circuit additionally held that, “despite federal preemption of the standards of care, state and territorial damage remedies still exist for violation of those standards.” 181 F.3d at 365. The court reasoned that, in the Federal Aviation Act, Congress manifested its intent for state remedies to be available for violations of federally prescribed standards of care. See *id.* at 374-375 (citing 49 U.S.C. 40120(c)).

b. After the district court granted judgment on the pleadings, respondent filed an amended complaint asserting state-law design-defect and failure-to-warn claims

based on alleged violations of various FAA regulations. As the case progressed, the other defendants either were dismissed from the case or settled.

Petitioner then moved for summary judgment on the grounds, first, that the engine was not in a defective condition at the time of sale in 1969, and second, that petitioner did not manufacture the allegedly defective carburetor. The district court granted summary judgment in part and denied it in part. 876 F. Supp. 2d 479 (M.D. Pa. 2012). The court acknowledged that there was no evidence the engine was defective when it left petitioner's control in 1969, and thus granted summary judgment to the extent that "[respondent's] claims may be construed to allege a defect in the engine in 1969." *Id.* at 486. The court nevertheless concluded that petitioner could qualify as a "*de facto* manufacturer" of the replacement carburetor, explaining that petitioner's "invisible hands were undeniably present as it was [petitioner's] design directive which caused the allegedly defective carburetor to be produced and placed in the engine." *Id.* at 487-488.

c. The case was subsequently reassigned to a different judge. As the trial approached, the district court expressed concern about respondent's articulation of the applicable federal standards of care, and invited further summary-judgment briefing on this question. Petitioner again moved for summary judgment, arguing, as is relevant here, that the FAA's decision to issue a type certificate for the O-320 engine precluded respondent's claims based on violations of various FAA regulations.

The district court granted petitioner's motion in relevant part. App., *infra*, 57a-112a. The court reasoned that, to the extent respondent was pursuing claims that petitioner had violated airworthiness standards applicable to aircraft engines, those standards "establish[] a requirement that applicants must satisfy in order to obtain a type

certificate, and it is the [FAA] alone [that] decides whether a certificate should be issued.” *Id.* at 96a (emphasis omitted). Permitting lay juries to determine whether an engine design violated those standards would “dethrone[] [the FAA] as the arbiter of whether the requirements set forth in the design and construction regulations have been met.” *Ibid.*²

3. The district court certified its order for interlocutory appeal, and the court of appeals granted respondent’s application to appeal. On appeal, respondent contended, *inter alia*, that, despite its earlier decision in *Abdullah*, the court of appeals should hold that the Federal Aviation Act preempts the application of state-law standards of care only in the field of aircraft operation. See Resp. C.A. Br. 51-57.

Before oral argument, the court of appeals invited the FAA to file an amicus brief expressing its view on the scope of field preemption under the Act. In that brief, the FAA reaffirmed its longstanding position that the Act “preempts the field of aviation safety with respect to substantive standards of safety.” FAA C.A. Br. 2 (Sept. 21, 2015); see FAA Br. at 1-2, *Cleveland, supra*. According to the FAA, “[t]he structure of the Federal Aviation Act confirms the federal government’s occupation of the field of substantive safety standards by establishing an all-encompassing federal regulatory framework and directing the Secretary to issue regulations setting safety standards for every facet of air safety and aircraft design.” FAA C.A. Br. 7. As a result, the FAA observed, “the federal government’s presence in the field of aircraft safety

² The district court permitted respondent to proceed with her claim that petitioner violated 14 C.F.R. 21.3 by failing to report known defects in the carburetor to the FAA. See App., *infra*, 108a-112a. That claim is not at issue in this petition.

is pervasive.” *Ibid.* The FAA concluded that “[t]he field preempted by the Federal Aviation Act thus extends broadly to all aspects of aviation safety and includes product liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care.” *Ibid.*

Consistent with the court of appeals’ earlier decision in *Abdullah*, the FAA went on to explain that, because the Act preserves “other remedies provided by law,” 49 U.S.C. 40120(c), “plaintiffs may seek to recover in a state-law tort suit against aircraft manufacturers alleged to have violated federal standards, as found in the statute and implementing regulations.” FAA C.A. Br. 10. At the same time, however, the FAA observed that, “because a manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate,” a plaintiff’s state-law tort suit would in many cases be precluded altogether by the FAA’s decision to issue a type certificate. *Id.* at 10-11.

4. Rejecting the FAA’s position, the court of appeals reversed and remanded. App., *infra*, 1a-54a. Purporting to “clarify the scope of *Abdullah*,” the court held that the Federal Aviation Act does not in fact preempt the entire field of aviation safety, but instead preempts only the limited field of “in-air operations.” *Id.* at 2a, 14a. Because aircraft design falls outside that field, the court reasoned, “aircraft products liability cases * * * may proceed using a state standard of care.” *Id.* at 2a.

Applying the presumption against preemption, the court of appeals asserted that Congress had not expressed a clear and manifest intent to preempt product-liability claims in the aviation context. App., *infra*, 16a-22a. The court primarily relied on two features of the Act. First, the court contended that the Act “says only that the FAA may establish ‘minimum standards’ for aviation

safety.” *Id.* at 20a (quoting 49 U.S.C. 44701). According to the court, that language was “insufficient on its own to support a finding of clear and manifest congressional intent of preemption.” *Ibid.* Second, the court highlighted the Act’s savings clause, which preserves “other remedies provided by law.” *Id.* at 20a-21a (quoting 49 U.S.C. 40120(c)). The court reasoned that the existence of the savings clause “belie[d]” an argument that the Act preempted state standards of care. *Id.* at 21a.

The court of appeals acknowledged the FAA’s view that the Act preempted the application of state-law standards of care in the field of aviation safety, but it rejected that view as unpersuasive. App., *infra*, 22a-28a. In particular, the court relied on “three fundamental differences between the regulations at issue in *Abdullah* and those concerning aircraft design.” *Id.* at 24a. First, the court asserted that the FAA’s design regulations merely “establish procedures for manufacturers to obtain certain approvals and certificates from the FAA” and do not “purport to govern the manufacture and design of aircraft.” *Ibid.* Second, the court contended that the FAA’s airworthiness standards are not as “comprehensive” as the standards at issue in *Abdullah*. *Id.* at 25a-26a (citation omitted). Third, the court observed that there is no catch-all provision “sound[ing] in common law tort” that “could be used to evaluate conduct not specifically prescribed by the regulations.” *Id.* at 26a.

The court of appeals reasoned that its holding that the Federal Aviation Act preempts the application of state-law standards of care only in the field of in-air operations was “solidified” by the General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat. 1552. App., *infra*, 28a. In GARA, Congress enacted a statute of repose that generally bars suits against aircraft manufacturers arising from general-aviation accidents eighteen

years after the aircraft was delivered or a new part installed. See 49 U.S.C. 40101 note, § 3(3). According to the court of appeals, “[b]y barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted.” App., *infra*, 29a.

Having held that state-law standards of care govern claims that an aircraft or engine was defectively designed, the court of appeals left open the possibility that some state-law tort suits would still be preempted “as a result of a conflict between state law and a given type certificate.” App., *infra*, 41a. But the court did not elaborate on how such conflict preemption would operate, leaving that issue for the district court on remand. *Ibid.*

5. The court of appeals subsequently denied rehearing. App., *infra*, 55a-56a. The district court has held in abeyance all further proceedings pending the Court’s resolution of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

The court of appeals’ holding that the Federal Aviation Act does not preempt the entire field of aviation safety deepens a preexisting circuit conflict, with the Second and Tenth Circuits holding that the Act preempts the entire field of aviation safety and the Ninth and Eleventh Circuits holding to the contrary. The court of appeals erred in changing course to align itself with the Ninth and Eleventh Circuits in this case. The Act creates a comprehensive scheme governing aviation safety, an area dominated by federal interests, and it leaves no room for supplementation by state-law standards of care. As the FAA itself has recognized, permitting States to impose their own standards of care governing aircraft design, as the court of appeals did here, threatens to undermine aviation safety and would give rise to the very disuniformity the

Act was intended to prevent. The Court should grant review to resolve this vitally important question.

A. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts of Appeals

The courts of appeals have reached divergent conclusions about the scope of field preemption under the Federal Aviation Act. Before this case, the Second, Third, and Tenth Circuits had held that the Act preempts state regulation in the entire field of aviation safety, and the First and Fifth Circuits had suggested the same conclusion. In this case, the Third Circuit discarded its previous view of the preempted field and joined the Ninth and Eleventh Circuits in holding that the Act does not preempt the entire field of aviation safety. And the Sixth Circuit has taken an internally contradictory approach that only deepens the inter-circuit confusion. This Court should grant certiorari and provide long-needed guidance concerning the preemptive scope of the Act.

1. The Second and Tenth Circuits have expressly held that the Federal Aviation Act preempts state regulation in the entire field of aviation safety.

a. In *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (2010), the Tenth Circuit held that the Federal Aviation Act occupies the entire field of aviation safety, jettisoning its own prior holding that aviation design-defect claims are not preempted. In *US Airways*, New Mexico attempted to enforce its state liquor-control law against an airline when a passenger who became intoxicated on a flight later caused a car accident. The airline resisted, arguing that the Act “occup[ied] the field of aviation safety to the exclusion of state regulation” and thus preempted the New Mexico law. *Id.* at 1321.

In its earlier decision in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (1993), the Tenth Circuit had rejected a manufacturer’s argument that the Act preempts state-law standards of care as applied to aviation design-defect claims, holding that the Act did not demonstrate Congress’s “clear and manifest intent to occupy the field of airplane safety.” *Id.* at 1444 (internal quotation marks omitted). In so holding, the Tenth Circuit heavily relied on this Court’s decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which stated that “Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.” *Id.* at 517. Because Congress had enacted an express preemption clause forbidding “state regulation of air rates and routes” in the Airline Deregulation Act of 1978, the Tenth Circuit concluded in *Cleveland* that Congress did not intend to preempt the entire field of aviation safety. 985 F.2d at 1447.

After *Cleveland*, however, this Court clarified that an “express pre-emption provision imposes no unusual, special burden against pre-emption.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted). In *US Airways*, the Tenth Circuit recognized that this Court in *Geier* had “rejected [the] reasoning” motivating its earlier *Cleveland* decision, and it thus considered the question of the preemptive scope of the Act on a clean slate. See 627 F.3d at 1326.

In *US Airways*, the Tenth Circuit held that the Act preempts the entire field of aviation safety. See 627 F.3d at 1326-1327. As a preliminary matter, the court explained that the presumption against preemption did not apply because “the field of aviation safety has long been dominated by federal interests.” *Id.* at 1325 (internal quotation marks omitted). On the merits of the preemption question, the court observed that the Act “was enacted to

create a ‘uniform and exclusive system of federal regulation’ in the field of air safety.” *Id.* at 1326 (quoting *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973)). The court cited both the language of the Act, which “explicitly directs the [FAA] to promulgate regulations for the ‘safe flight of civil aircraft in air commerce,’” *ibid.* (quoting 49 U.S.C. 44701(a)), and the Act’s legislative history, which emphasized the need to have “one agency of government, and one agency alone, be responsible for issuing safety regulations,” *ibid.* (quoting H.R. Rep. No. 2360, 85th Cong., 2d Sess. 22 (1958)). In holding that the Act preempts the entire field of aviation safety, the Tenth Circuit approvingly cited the Third Circuit’s earlier decision in *Abdullah*, which had also so held. See *id.* at 1327.

b. The Second Circuit reached the same conclusion in *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2011). That case involved a dispute over the application of state environmental laws to the removal of trees adjacent to an airport. See *id.* at 208-209. In considering whether the state laws were preempted, the Second Circuit remarked that it had previously stated in dicta that “Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field.” *Id.* at 210 (citing *Air Transport Ass’n of America, Inc. v. Cuomo*, 520 F.3d 218, 225 (2008) (per curiam)). The court adopted its previous dicta as the holding of the case, expressly joining its sister circuits in holding that the Act preempts the entire field. See *id.* at 210 & n.5 (citing, *inter alia*, *US Airways*, 627 F.3d at 1326, and *Abdullah*, 181 F.3d at 367-368). The court ultimately determined that the state laws at issue, which were “environmental laws that do not refer to aviation or airports,” did not implicate the preempted field. *Id.* at 210-211.

c. In an apparent effort to downplay the existence of a circuit conflict, the court of appeals in this case characterized *US Airways* and *Goodspeed Airport* as having “assess[ed] the scope of the field of aviation safety by examining the pervasiveness of the regulations in a particular area rather than simply determining whether the area implicated by the lawsuit concerns an aspect of air safety.” App., *infra*, 46a. That is simply wrong. In both cases, because the state laws at issue were laws of general applicability, the courts determined whether those laws implicated the field of aviation safety at all. See *Goodspeed Airport*, 634 F.3d at 211; *US Airways*, 627 F.3d at 1327-1328. But in each case, the court’s holding as to *federal* law was clear: federal law preempts the entire field of aviation safety. See *Goodspeed Airport*, 634 F.3d at 210; *US Airways*, 627 F.3d at 1327.

2. Two other courts of appeals have suggested that the Act preempts the entire field of aviation safety. In *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (2004), the Fifth Circuit determined that a failure-to-warn claim regarding the risk of developing deep-vein thrombosis was field- and conflict-preempted under the Act. See *id.* at 385. The court observed that Congress had directed the FAA to “promulgate air safety standards and regulations, including standards and regulations relating to aircraft design,” and further observed that, “[p]ursuant to its congressional charge to regulate air safety, the [FAA] has issued a broad array of safety-related regulations,” including airworthiness standards. *Id.* at 384. Because “Congress enacted a pervasive regulatory scheme covering air safety concerns that includes regulation of the warnings and instructions that must be given [to] airline passengers,” the Fifth Circuit determined that the plaintiff’s claim was preempted, although it did not explicitly delimit the scope of the preempted field. *Id.* at 385.

The First Circuit took a similar approach in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1989). In that case, a commercial pilot claimed that his employer could not subject him to drug testing that violated Rhode Island law. See *id.* at 1. The pilot's employer argued that the Act preempted state law, and the First Circuit agreed. See *id.* at 6-7. Like the Tenth Circuit in *US Airways*, the First Circuit rejected the argument that Congress's inclusion of an express preemption clause in the Airline Deregulation Act of 1978 indicated that Congress "meant to leave states free to regulate on all other issues anent air safety and pilot fitness." *Id.* at 3. The court proceeded to conclude that the Act's pervasive regulation of pilot qualifications demonstrated that "Congress intended to occupy the field of pilot regulation related to air safety." *Id.* at 4. In reaching that conclusion, the court suggested that the scope of the preempted field was much broader than simply pilot regulation, stating that "establishment of a single uniform system of regulation in the area of air safety was one of the primary object[s] sought to be obtained by passage of the Act." *Id.* at 5 (internal quotation marks omitted) (alteration in original).

3. By contrast, in this case, the Third Circuit joined the Ninth and Eleventh Circuits in holding that the Federal Aviation Act does not preempt the entire field of aviation safety. The Eleventh Circuit has expressly rejected the preemption of state-law standards of care as applied to claims that an aircraft component was defectively designed. In *Public Health Trust of Dade County v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993), the defendant argued that the Act preempted the state-law claims of a pilot who alleged that the design of a helicopter seat aggravated the injuries he sustained in a crash. See *id.* at 292. The Eleventh Circuit disagreed and held that the Act does not preempt design-defect claims. See *id.* at 295.

Like the Tenth Circuit in *Cleveland*, it relied on a negative implication from the express preemption clause in the Airline Deregulation Act. See *ibid.*

In *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (2009), the Ninth Circuit determined that the Federal Aviation Act did not preempt state-law standards of care with respect to the particular design-defect claim in that case. See *id.* at 812. In arguing for preemption, the manufacturer relied on a previous Ninth Circuit decision that had held that the “entire field of aviation safety” is preempted. *Id.* at 809 (quoting *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (2007)). In *Martin*, however, the Ninth Circuit disagreed, holding that whether the Act preempts state-law regulation of aviation safety depends on the pervasiveness of the specific regulations promulgated by the FAA. See *id.* at 811. Because the FAA had not promulgated “pervasive” regulations concerning the aircraft stairs at issue in that case, the court concluded that the state-law standard of care remained applicable. See *id.* at 811-812.

While they have all held that the Act does not preempt the entire field of aviation safety, the Third, Ninth, and Eleventh Circuits have adopted completely different approaches to evaluating the Act’s preemptive scope. In this case, the Third Circuit took an entirely novel approach, holding that the Act preempts only the more limited field of “in-air operations.” See App., *infra*, 14a-15a, 24a-26a. That approach appears to have been driven by the court’s need to justify its departure from its earlier decision in *Abdullah*. By contrast, the Eleventh Circuit has concluded that Congress’s inclusion of an express preemption provision in the Airline Deregulation Act of 1978 precludes *all* field preemption under the Act. See *Public Health Trust*, 992 F.2d at 295. And the Ninth Circuit determines whether a particular design-defect claim is

preempted by evaluating whether the FAA has “issue[d] pervasive regulations in [the] area.” *Martin*, 555 F.3d at 811 (internal quotation marks omitted).

4. For its part, the Sixth Circuit has contributed an idiosyncratic rule on field preemption under the Act. In *Greene v. B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784 (6th Cir. 2005), the plaintiff brought both manufacturing-defect and failure-to-warn claims arising from a helicopter crash. See *id.* at 787. With respect to the failure-to-warn claim, the Sixth Circuit held, consistent with the decisions of the Second and Tenth Circuits, that “federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation.” *Id.* at 794-795. Without elaboration, however, the Sixth Circuit applied state-law standards of care to the plaintiff’s manufacturing-defect claim. See *id.* at 788-789. In light of the Sixth Circuit’s decision and the other decisions discussed above, there can be no serious dispute that there is a circuit conflict concerning the scope of field preemption under the Federal Aviation Act.

B. The Court Of Appeals’ Decision Is Erroneous

In this case, the court of appeals erred by holding that the Federal Aviation Act does not preempt the application of state-law standards of care in the entire field of aviation safety. The court’s arbitrary distinction between “in-air operations” and other aspects of aviation safety has no basis in the Act. In drawing that distinction, the court of appeals grievously misunderstood both the Act and its implementing regulations.

1. a. Under the doctrine of field preemption, federal law preempts state law if Congress “indicate[s] an intent to occupy a given field to the exclusion of state law.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The requisite 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.* at 300. And it is well established that, because “state regulation can be * * * effectively exerted through an award of damages,” federal law may preempt “state common-law duties and standards of care.” *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261, 1269, 1270 (2012) (omission in original) (internal quotation marks and citation omitted).

b. By its very nature, air travel transcends state boundaries. As Justice Jackson eloquently explained, “[a]ir as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water,” and “[l]ocal exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.” *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (concurring opinion). Even before the enactment of the Federal Aviation Act, this Court recognized the special character of air travel and thus the need for uniform national regulation: “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.” *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948).

Congress has long recognized the uniquely federal nature of civil aviation. For almost a century, Congress has consistently taken the position that the laws and regulations governing aviation safety must be “uniform” across the United States. See, *e.g.*, S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925). In light of the federal (and, indeed, international) nature of air travel, Congress expressed the view that the aviation industry is “unique among trans-

portation industries in its relation to the Federal Government,” in that “[its] operations are conducted almost wholly within the Federal jurisdiction.” S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958).

c. In the Federal Aviation Act, Congress pervasively regulated the entire field of aviation safety, necessarily precluding supplementation by state common-law standards of care. Congress directed the FAA to regulate every significant aspect of aviation safety, including aircraft design, pilot qualifications, and safety of in-air operations. See Act §§ 601(a), 602, 604, 72 Stat. 775-778. As is relevant here, Congress directed the FAA to promulgate “minimum standards” of aircraft design and construction “required in the interest of safety,” 49 U.S.C. 44701(a)(1), and created a comprehensive certification regime to enforce those standards, see 49 U.S.C. 44704.

Notably, this Court has already recognized the pervasive nature of federal regulation under the Act. In *City of Burbank*, the Court considered whether the Act, as amended by the Noise Control Act of 1972, preempted the field of aviation noise regulation. The Court held that it did. See 411 U.S. at 633. The Court observed that “[t]he Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground.” *Id.* at 638-639 (citations omitted). The Court concluded that “[t]he 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.” *Id.* at 639.

Critically for present purposes, there can be no doubt that Congress intended to create a “uniform and exclusive system of federal regulation” for aviation safety, including aircraft design. 411 U.S. at 639. Embracing the Administration’s recommendation that “one agency of government, and one agency alone, be responsible for issuing

safety regulations,” H.R. Rep. No. 2360, *supra*, at 22, Congress emphasized that the Act gave the FAA “full responsibility and authority for * * * the promulgation and enforcement of safety regulations.” S. Rep. No. 1811, *supra*, at 1. In consolidating authority in the FAA, moreover, Congress specifically recognized the “indivisible” nature of aviation safety regulation. See *id.* at 11.

The Act thus created a “cradle to grave” system of regulatory oversight that has produced “an industry whose products are regulated to a degree not comparable to any other.” H.R. Rep. No. 525, 103d Cong., 2d Sess., pt. 2, at 5-6 (1994). Even the heavily regulated pharmaceutical industry is “not subject to anywhere near the degree of Federal supervision over the lifespan of the product.” *Id.* at 6 n.10. Federal oversight of aircraft design is unquestionably pervasive.

d. The scheme created by the Act is at least as pervasive as others that this Court has held to preempt an entire field of vehicle design. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court held that the Ports and Waterways Safety Act, which directed the Coast Guard to establish “minimum standards of design, construction, alteration, repair, maintenance, and operation” of oil tankers and to enforce those standards through mandatory inspections, indicated Congress’s intent to create “uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.” *Id.* at 161, 163 (citations omitted); see *United States v. Locke*, 529 U.S. 89, 111 (2000). And in *Kurns*, *supra*, the Court held that the Locomotive Inspection Act preempted a plaintiff’s design-defect and failure-to-warn claims related to locomotive design. See 132 S. Ct. at 1267-1269.

2. The court of appeals erred by holding that the Act does not preempt the entire field of aviation safety.

a. As an initial matter, the court of appeals erred by applying the presumption against preemption. As this Court has made clear, the presumption is not triggered when “the State regulates in an area where there has been a history of significant federal presence.” *Locke*, 529 U.S. at 108. As in *Locke*, Congress has legislated in the field of aircraft design since the beginning of the civil aviation industry. See pp. 3-7, *supra*. And when Congress enacted the Federal Aviation Act in 1958, it specifically recognized that the aviation industry’s “operations * * * are subject to little or no regulation by States or local authorities.” S. Rep. No. 1811, *supra*, at 5. There is therefore a long history of federal presence—and indeed predominance—in the area of aviation safety regulation.

Regardless whether the presumption against preemption applies, moreover, none of the statutory provisions cited by the court of appeals undermines the conclusion that Congress intended for the FAA to exercise exclusive authority to prescribe standards for aircraft design. The court highlighted the fact that Congress directed the FAA to promulgate “minimum standards.” App., *infra*, 20a (quoting 49 U.S.C. 44701). In *Ray*, however, this Court rejected the view that Congress’s use of the phrase “minimum standards” necessarily indicates an intent to recognize “state authority to impose higher standards.” 435 U.S. at 168 n.19. Instead, where “it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement,” field preemption is appropriate even though the standards are “minimum standards.” *Ibid*.

Here, as in *Ray*, Congress instructed the FAA to promulgate and enforce national standards. And the history of aviation regulation renders the court of appeals’ conclusion that Congress intended for States to impose

their own, more stringent standards completely implausible. See pp. 3-4, *supra*. Indeed, the legislative history suggests an alternative explanation for the phrase “minimum standards.” That phrase was included in the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 601, 52 Stat. 1007, after a study commission appointed by President Roosevelt advocated that “[t]he ultimate purpose [of legislation] should be a *minimizing*, in the degree consistent with public safety, of detailed control over the work of responsible manufacturers” and that “all governmental regulation should be held to the *minimum* compatible with public interest.” Report of the Federal Aviation Commission, S. Doc. No. 74-15, at 211 (1935) (emphases added). There is thus no reason to think that Congress intended the phrase “minimum standards” to permit States to impose *higher* standards—and good reason to think otherwise.

The court of appeals also placed substantial weight on the Act’s savings clause, which provides that “[a] remedy under this part is in addition to any other remedies provided by law.” 49 U.S.C. 40120(c). The court of appeals construed that provision to save not just state-law remedies, but also state-law standards of care. See App., *infra*, 20a-21a. In so doing, however, the court of appeals disregarded this Court’s guidance that courts should “decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” *Locke*, 529 U.S. at 106-107. Given Congress’s evident recognition that air travel demands uniform, federal standards, the Act’s savings clause cannot reasonably be read to permit States to impose their own standards in common-law tort actions. Instead, as the Seventh Circuit has explained, “[s]tatutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules.” *Bieneman*

v. *City of Chicago*, 864 F.2d 463, 471 (1988); see FAA C.A. Br. 9-10 (adopting the foregoing interpretation of the Act's savings clause).

What is more, nothing in the savings clause (or any other provision of the Act) supplies any support for the court of appeals' arbitrary distinction between "in-air operations" and other aspects of aviation safety that affect the operation of an aircraft in flight, such as aircraft design. Notably, Congress used the same "minimum standards" language in directing the FAA to regulate a variety of aspects of aviation safety, including aircraft design. See, e.g., 49 U.S.C. 44701(a)(1), (5). And "in-air operations" are not carved out of the savings clause. The court of appeals provided no reason why Congress would have intended to preempt the application of state standards of care in the field of "in-air operations," but not in the rest of the field of aircraft safety.

b. The court of appeals paid lip service to the notion that "agencies are well equipped to understand the technical and complex nature of the subject matter over which they regulate and thus have a 'unique understanding of the statutes they administer,'" but it dismissed the FAA's understanding of the complex scheme it regulates as unpersuasive. App., *infra*, 23a (quoting *Wyeth v. Levine*, 555 U.S. 555, 576-577 (2009)). In substituting its own understanding of the Act and its implementing regulations for the FAA's, the court of appeals made several glaring errors.

To begin with, the court of appeals asserted that the FAA's airworthiness standards "do not purport to govern the manufacture and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA." App., *infra*, 24a. That assertion is demonstrably false. The Act provides that the FAA

“shall” issue “minimum standards required in the interest of safety * * * for the *design*, material, *construction*, quality of work, and performance of aircraft, aircraft engines, and propellers.” 49 U.S.C. 44701(a)(1) (emphases added). Implementing that directive in the specific context presented here, the FAA has issued regulations that “prescrib[e] the general *design and construction requirements* for reciprocating and turbine aircraft engines.” 14 C.F.R. 33.11 (emphasis added). The fact that manufacturers must demonstrate compliance with the FAA’s airworthiness standards for aircraft engines in order to obtain approval to manufacture them hardly transforms those standards into mere procedural requirements.

The court of appeals also characterized the FAA’s airworthiness standards (which span hundreds and hundreds of pages in the Code of Federal Regulations) as insufficiently “comprehensive.” App., *infra*, 25a (citation omitted). It is not entirely clear what the court of appeals meant by that statement: in the same breath, it criticized the standards as both overly general and overly “technical.” *Id.* at 25a-26a. In any event, the court of appeals’ statement is flatly inconsistent with this Court’s own statement that “the FAA has promulgated a comprehensive set of regulations delineating the minimum safety standards with which the designers and manufacturers of aircraft must comply before marketing their products.” *Varig Airlines*, 467 U.S. at 805.

Finally on this score, the court of appeals observed that the FAA’s airworthiness standards do not contain a catch-all standard of care “sound[ing] in common law tort.” App., *infra*, 26a (citing 14 C.F.R. 91.13(a)). But that observation turns the concept of field preemption on its head: when Congress evinces an intent to occupy a field,

the mere fact federal law does not provide the same remedy as state law does not negate the existence of preemption. See, *e.g.*, *Kurns*, 132 S. Ct. at 1270.

c. Contrary to the court of appeals' assertion, see App., *infra*, 28a-33a, Congress's enactment of the General Aviation Revitalization Act of 1994 says nothing about whether Congress intended to occupy the field of aircraft safety standards in 1958. Of course, as a general matter, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Hagen v. Utah*, 510 U.S. 399, 420 (1994) (citation omitted). More specifically, the question of which standards of care govern claims that an aircraft or engine was defectively designed is entirely distinct from the repose period applicable to those claims. A holding that the Act preempts state-law standards of care thus does not render GARA "superfluous," as the court of appeals stated. App., *infra*, 29a.

In short, there is no valid basis for the court of appeals' holding that the Act does not preempt the entire field of aviation safety. Permitting design-defect claims to proceed using state-law standards of care threatens to expose aircraft manufacturers to a patchwork of potentially conflicting standards every time their planes cross state lines far overhead. That is the very opposite of the "uniform and exclusive" scheme envisioned by Congress. *City of Burbank*, 411 U.S. at 639. This Court should grant review and reverse the court of appeals' deeply flawed holding.

C. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review

1. The question whether the Federal Aviation Act preempts the entire field of aviation safety is a self-evidently important one. This Court has routinely granted review in cases presenting the question whether federal

law preempts States from regulating the design of vehicles engaged in interstate commerce. See, e.g., *Kurns*, 132 S. Ct. at 1267-1268 (holding that the Locomotive Inspection Act preempts the field of locomotive equipment design); *Locke*, 529 U.S. at 111 (holding that Title II of the Ports and Waterways Safety Act preempts the field of tanker design and construction). If anything, this case presents an even more compelling case for certiorari than previous cases in the area. As discussed above, the aviation industry is “unique among transportation industries in its relation to the Federal Government.” S. Rep. No. 1811, *supra*, at 5. Not only is civil aviation inherently federal in nature, but the federal government’s supervision of the civil aviation industry exceeds that of virtually any other industry. See H.R. Rep. No. 525, *supra*, pt. 2, at 6.

2. The court of appeals’ decision implicates the critical federal interest in ensuring aviation safety. Congress entrusted safety regulation to the FAA for a reason. Aircraft design is incredibly technical and involves delicate tradeoffs between a variety of considerations. See, e.g., Geoffrey M. Hand, Comment, *Should Juries Decide Aircraft Design?* *Cleveland v. Piper Aircraft Corp. and Federal Preemption of State Tort Law*, 29 U.S.F. L. Rev. 741, 785-786 (1995). When it enacted the Act, Congress recognized that “laymen” are not qualified to make decisions about those tradeoffs. See S. Rep. No. 1811, *supra*, at 10. It therefore assigned the authority to make such decisions to the “experts” at the FAA. See *id.* at 11.

As the federal government has explained, aviation “cannot remain safe and continue to grow if every plane that rises into the airways is subjected to a multitude of different—and potentially conflicting—state standards of care.” U.S. Br. at 1-2, *Cleveland*, *supra*. State regulation of aircraft design—whether through positive regulation by 50 state legislatures or aviation agencies or through

tort verdicts by lay juries—thus threatens to undermine aviation safety. In entrusting decisions about aircraft design to the FAA, Congress intended for the FAA’s regulation to be “uniform and exclusive.” *City of Burbank*, 411 U.S. at 639. The court of appeals’ decision flouts that congressional determination.

3. In preemption cases, this Court often calls for the views of the Solicitor General before deciding whether to grant certiorari. In petitioner’s view, it is unnecessary, and would merely introduce delay, for this Court to do so here; the government’s views—which have been consistent across numerous administrations—are already known and were rejected by the court of appeals. In addition, the government has already made clear that it believes that the question presented in this case is one of “paramount federal concern.” U.S. Br. at 1, *Cleveland*, *supra*.

Of course, in the event the Court has any doubt about granting certiorari, it would certainly be appropriate to call for the Solicitor General’s views. But in light of the clear circuit conflict on the scope of field preemption under the Act and the extraordinary importance of the issue, the better course would be for the Court to grant certiorari outright so that it can expeditiously address, and resolve, the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 14-4193

JILL SIKKELEE, Individually and as Personal Representative of the Estate of David Sikkelee, deceased,
Appellant

v.

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; KELLY AEROSPACE POWER SYSTEMS, INC., Individually and as Joint Venturer and Successor-In-Interest a/k/a ElectroSystems, Inc. a/k/a Confuel Inc.; ELECTROSYSTEMS, INC., Individually and as Joint Venturer and as Successor-In-Interest a/k/a Consolidated Fuel Systems, Inc. a/k/a Confuel, Inc.; CONSOLIDATED FUEL SYSTEMS, INC., a/k/a Confuel, Inc.

Filed: April 19, 2016

(1a)

Before: CHAGARES, KRAUSE, and VAN ANTWERPEN, Circuit Judges.

OPINION

KRAUSE, Circuit Judge.

This case presents the question whether *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), in which we held that federal law preempts the field of aviation safety, extends to state law products liability claims. We hold it does not. In light of principles of federalism and the presumption against preemption, Congress must express its clear and manifest intent to preempt an entire field of state law. Here, none of the relevant statutes or regulations signals such an intent. To the contrary, the Federal Aviation Act, the General Aviation Revitalization Act of 1994, and the regulations promulgated by the Federal Aviation Administration reflect that Congress did not intend to preempt aircraft products liability claims in a categorical way. The District Court faithfully sought to apply our precedent, and while it concluded that state products liability claims are preempted by *Abdullah*, it also recognized the question was sufficiently unclear and important to certify its order for interlocutory review. Today, we clarify the scope of *Abdullah* and hold that neither the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims. Rather, subject to traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate, aircraft products liability cases like Appellant's may proceed using a state standard of care. For these reasons, we will reverse the District Court's entry of summary judgment in favor of Appellees and remand for further proceedings.

I. Background

A. Overview of Federal Aviation Regulation

Almost immediately after the airplane became a viable means of transportation, it became clear that certain aspects of aviation, such as air traffic control, required uniform federal oversight. *See* Air Commerce Act of 1926, ch. 344, 44 Stat. 568. Congress soon thereafter expanded federal control over aviation by enacting the Civil Aeronautics Act of 1938, which created the Civil Aeronautics Authority (“CAA”) to oversee the regulatory aspects of aviation safety and to prescribe “minimum standards governing the design . . . of aircraft, aircraft engines, and propellers as may be required in the interest of safety.” Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 1007. The 1938 Act also authorized the CAA to issue so-called “type certificates,” “production certificate[s],” and “airworthiness certificate[s]” if an airplane or airplane part complied with the relevant safety regulations. *Id.* at 1007, 1009-10.

As the scope of federal involvement in regulating aviation expanded, so too did the number of governmental bodies regulating aviation, and by the 1950s, there had, at one point, been seventy-five different interagency groups with some responsibility in the field. S. Rep. No. 85-1811, at 6 (1958). To resolve this problem, Congress enacted the 1958 Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731, to consolidate regulatory authority in a single entity: the Federal Aviation Administration (“FAA”). The Federal Aviation Act adopted verbatim from the Civil Aeronautics Act the statutory framework for the promulgation of minimum standards for design safety and the process

for the issuance of certificates that indicated compliance with those regulations.¹

Pursuant to the statutory framework established in the Civil Aeronautics Act and adopted by the Federal Aviation Act, aircraft engine manufacturers must obtain from the FAA (1) a *type certificate*, which certifies that a new design for an aircraft or aircraft part performs properly and meets the safety standards defined in the aviation regulations, 49 U.S.C. § 44704(a); 14 C.F.R. § 21.31; and (2) a *production certificate*, which certifies that a duplicate part produced for a particular plane will conform to the design in the type certificate, 49 U.S.C. § 44704(c); 14 C.F.R. § 21.137. Before a new aircraft may legally fly, it must also receive (3) an *airworthiness certificate*, which certifies that the plane and its component parts conform to its type certificate and are in condition for safe operation. 49 U.S.C. §§ 44704(d), 44711(a)(1).

The FAA issues a type certificate when it has determined that a product “is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under [49 U.S.C. §] 44701(a).” 49 U.S.C. § 44704(a)(1); *see also* 14 C.F.R. § 21.21. A type certificate includes the type design, which

¹ The only difference between these portions of the two Acts is that the Federal Aviation Act replaced the word “Authority”—referring to the Civil Aviation Authority created by the 1938 Act—with “Administrator,” which refers to the appointed head of the Authority’s successor organization, the Federal Aviation Administration. *See also* H.R. Rep. 85-2360, at 16 (1958) (reflecting that, except for certain enumerated changes, “TITLE VI. SAFETY REGULATION OF CIVIL AERONAUTICS [of the Federal Aviation Act] . . . is a reenactment of existing law without substantial change”).

outlines the detailed specifications, dimensions, and materials used for a given product; the product's operating limitations; a "certificate data sheet," which denotes the conditions and limitations necessary to meet airworthiness requirements; and any other conditions or limitations prescribed under FAA regulations. *See* 14 C.F.R. §§ 21.31, 21.41; FAA, Order 8110.4C, change 5, Type Certification, ch. 3-3(a) (2011). This certification process can be intensive and painstaking; for example, a commercial aircraft manufacturer seeking a new type certificate for a wide-body aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 n.7 (1984). A type certificate remains in effect "until surrendered, suspended, revoked, or a termination date is otherwise established by the FAA." 14 C.F.R. § 21.51. A manufacturer may make both "major" and "minor" changes to a type certificated design, 14 C.F.R. § 21.93, but must obtain the appropriate regulatory approval to do so, which for "major changes" requires the issuance of an amended or supplemental type certificate by the FAA, *see* 49 U.S.C. § 44704(b); 14 C.F.R. § 21.97; FAA Order 8110.4C, change 1, Type Certification, ch. 4-1(a), 4-2 (2011), and for "minor changes" requires the manufacturer to comply with a pertinent "method acceptable to the FAA," 14 C.F.R. § 21.95.

B. Factual History

This case involves alleged manufacturing and design defects in a Textron Lycoming O-320-D2C engine ("the engine") manufactured in 1969 and installed "factory new" on a Cessna 172N aircraft ("the aircraft") in 1998.

Lycoming holds both a type certificate and production certificate for the engine. The engine in the aircraft was overhauled in 2004 and installed with a MA-4SPA carburetor in accordance with Lycoming's type-certificated design.

David Sikkelee was piloting the aircraft when it crashed shortly after taking off from Transylvania County Airport in Brevard, North Carolina in July 2005. Sikkelee was killed as a result of serious injuries and burns he suffered in the crash. His wife, Jill Sikkelee, the Plaintiff-Appellant in this case, alleges that the aircraft lost power and crashed as a result of a malfunction or defect in the engine's carburetor. Specifically, she contends that, "due to the faulty design of the lock tab washers as well as gasket set," vibrations from the engine loosened screws holding the carburetor's throttle body to its float bowl. J.A. 643. When properly functioning, a carburetor regulates the mixture of fuel and air that enters the engine's cylinders. According to Sikkelee, however, the manner by which the throttle body was attached to the float bowl in the Textron Lycoming O-320-D2C engine allowed raw fuel to leak out of the carburetor into the engine and thereby caused the aircraft to crash.

C. Procedural History

Sikkelee initially filed a wrongful death and survival action in the Middle District of Pennsylvania in 2007 against seventeen defendants, asserting state law claims of strict liability, breach of warranty, negligence, misrepresentation, and concert of action. In 2010, the District Court granted defendants' motion for judgment on the pleadings, holding that Sikkelee's state law claims, which were premised on state law standards of care, fell within

the preempted “field of air safety” described in *Abdullah. Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 435 (M.D. Pa. 2014) (quoting *Abdullah*, 181 F.3d at 367). Sikkelee subsequently filed an amended complaint, continuing to assert state law claims, but this time incorporating federal standards of care by alleging violations of numerous FAA regulations.² Following certain settlements and motion practice, Sikkelee narrowed her claims against Lycoming to defective design (under theories of both negligence and strict liability) and failure to warn.³

As the trial date approached, the District Court expressed concern that Sikkelee’s proposed jury instructions using federal standards of care were “all but completely unable to assist the Court in . . . formulating an intelligible statement of applicable law.” *Sikkelee*, 45 F. Supp. 3d at 437 (internal quotation marks omitted) (recounting its position on this point as first expressed in its Memorandum of November 20, 2013). On the one hand, the District Court asserted that, under *Abdullah*, it was

² As summarized by the District Court, Sikkelee specifically alleged that Lycoming had violated, at least, the following regulations: Civil Air Regulations (CARs) §§ 13.100, 13.101, 13.104, 13.110 (1964); 14 C.F.R. §§ 21.2, 21.3, 21.14, 21.21, 21.303, 33.4, 33.15, 33.19, 33.35, 145.221(a) (2004). As described by the District Court, CARs were precursors to modern day Federal Aviation Regulations codified in Title 14 of the Code of Federal Regulations. *Sikkelee*, 45 F. Supp. 3d at 440 n.9 (citing a description of the history of aviation regulations found in 2 Kreindler, *Aviation Accident Law* § 9.01(1)-(2) (Matthew Bender)).

³ The case then took a detour to this Court to determine whether the Second or Third Restatement of Torts applied to products liability cases. In denying the petition for interlocutory appeal, we clearly indicated that the Third Restatement applied. *Sikkelee v. Precision Airmotive Corp.*, No. 12-8081, 2012 WL 5077571 (3d Cir. Oct. 17, 2012). At that point, the case was reassigned from Judge John E. Jones III to Judge Matthew W. Brann.

bound to apply some federal standard of care and that compliance with the applicable design and construction regulations was the only identifiable, let alone articulable, federal standard. On the other hand, because it determined that the “FAA regulations relating to the design and manufacture of airplanes and airplane component parts were never intended to create federal standards of care,” *id.* at 437 n. 4 (quoting *Pease v. Lycoming Engines*, No. 4:10-cv-00843, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011) (Conner, J.)) (internal quotation marks omitted), the District Court found it to be “arduous and impractical” to fashion the regulations themselves into such standards, *id.* (quoting *Pease*, 2011 WL 6339833, at *23) (internal quotation marks omitted). Faced with this conundrum, the District Court ordered Sikkelee to submit additional briefing on the question of the appropriate standard of care and, after review of that briefing, invited Lycoming to file a motion for summary judgment. *Id.* at 438.

In its ruling on that motion, the District Court concluded that the federal standard of care was established in the type certificate itself. Reasoning that the FAA issues a type certificate based on its determination that the manufacturer has complied with the pertinent regulations, the District Court held that the FAA’s issuance of a type certificate for the Textron Lycoming O-320-D2C engine meant that the federal standard of care had been satisfied as a matter of law. *Id.* at 451-43, 456. The District Court therefore granted Lycoming’s summary judgment motion, in part, on that basis. *Id.* at 456. The District Court denied summary judgment, however, on Sikkelee’s failure to warn claims, which were premised on Lycoming’s alleged violation of 14 C.F.R. § 21.3 for failure to “report any failure, malfunction, or defect in any product,

part, process, or article” that Lycoming manufactured.⁴ *Id.* at 459-60 (quoting 14 C.F.R. § 21.3(a) (2004)).

Recognizing that its grant of partial summary judgment raised novel and complex questions concerning the reach of *Abdullah* and the scope of preemption in the airlines industry, the District Court certified the order for immediate appeal, and we granted interlocutory review.

II. Jurisdiction and Standard of Review

The District Court had diversity jurisdiction under 28 U.S.C. § 1332(a), and we have jurisdiction under 28 U.S.C. § 1292(b) to review the order certified by the District Court for interlocutory appeal. We review the District Court’s order granting summary judgment de novo. *Azur v. Chase Bank, USA, Nat’l Ass’n*, 601 F.3d 212, 216 (3d Cir. 2010). We also review questions of preemption de novo. *Farina v. Nokia Inc.*, 625 F.3d 97, 115 n.20 (3d Cir. 2010).

III. Discussion

The doctrine of preemption is a necessary but precarious component of our system of federalism under which the states and the federal government possess concurrent sovereignty, subject to the limitation that federal law is

⁴ Upon receiving a report that a product has malfunctioned or contains a defect, the FAA may issue a legally enforceable airworthiness directive that specifies “inspections you must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition.” 14 C.F.R. § 39.11; *see also* 14 C.F.R. §§ 39.3, 39.5. Any further operation of an aircraft in contravention of an airworthiness directive is a violation of federal law. 14 C.F.R. §§ 39.7, 39.9.

“the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Consistent with this principle, Congress has the power to enact legislation that preempts state law. *See Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012). At the same time, with due respect to our constitutional scheme built upon a “compound republic,” with power allocated between “two distinct governments,” *The Federalist* No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), there is a strong presumption against preemption in areas of the law that States have traditionally occupied, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Bruesewitz v. Wyeth, Inc.*, 561 F.3d 233, 240 (3d Cir. 2009) (explaining that, “[w]hen faced with two equally plausible readings of statutory text, [courts] have a duty to accept the reading that disfavors preemption” (internal quotation marks omitted)). For that reason, all preemption cases “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic*, 518 U.S. at 485) (internal quotation marks omitted). Congressional intent is the “ultimate touchstone” of a preemption analysis. *Id.* Thus, when confronted with the question of whether state claims are preempted, as we are here, we look to the language, structure, and purpose of the relevant statutory and regulatory scheme to develop a “reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic*, 518 U.S. at 486; *see also Bruesewitz*, 561 F.3d at 243-44 (recognizing that

divining congressional intent regarding preemption requires considering a law’s “structure and purpose,” underlying “object and policy,” and, where relevant, legislative history (internal quotation marks omitted)).

Congress may exert its supremacy by expressly preempting state law, but it may also do so implicitly, which we have recognized in limited circumstances in the doctrine of “field” preemption. *See Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). For that doctrine to apply, “we must find that federal law leaves no room for state regulation and that Congress had a clear and manifest intent to supersede state law” in that field. *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010) (quoting *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009)) (alteration and internal quotation marks omitted). Where Congress expresses an intent to occupy an entire field, States are foreclosed from adopting any regulation in that area, regardless of whether that action is consistent with federal standards. *Oneok*, 135 S. Ct. at 1595.

In addition to field preemption, federal law may supersede state law through conflict preemption. This occurs when a state law conflicts with federal law such that compliance with both state and federal regulations is impossible, *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), or when a challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law,” *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011) (internal quotation marks omitted).

In this case, we are asked to analyze the extent to which federal aviation law preempts state tort law, specifically, products liability claims for defective design. We do not write on a blank slate, but rather, against the backdrop of our decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

A. Abdullah

In *Abdullah*, we considered the preemptive effect of federal in-flight seatbelt regulations on state law negligence claims for a flight crew's failure to warn passengers that their flight would encounter severe turbulence. *Id.* at 365. One of the plane's crew members had illuminated the fasten seatbelt sign in accordance with the federal regulations, but none of the crew had given the passengers an additional verbal warning of expected turbulence. *Id.* at 365, 371 & n.11. When the turbulence hit, the plaintiffs suffered serious injuries. *Id.* at 365. After the jury found American Airlines liable and awarded the plaintiffs damages, the district court ordered a new trial, holding that the Federal Aviation Act preempted the territorial standards for aviation safety, and thus, that the jury should not have been instructed on a territorial standard of care. *Id.* at 365-66. We affirmed, explaining that the Federal Aviation Act and federal regulations "establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions." *Id.* at 365. Although we held that federal law preempts state law standards of care in the field of air safety, we also held that it preserves state law remedies. *Id.* at 364. As such, within the field of air safety, *Abdullah* instructs that plaintiffs may bring state law causes of action that incorporate federal standards of care. *Id.* at 365.

Our analysis in reaching this conclusion focused on the text and legislative history of the Federal Aviation Act, which was adopted primarily to promote safety in aviation and gave the FAA broad authority to issue safety regulations. *Id.* at 368-69. We observed that the FAA, in exercising this authority, “has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Id.* at 369 (footnotes omitted). We then reviewed several cases from the Supreme Court and our sister Circuits that had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); pilot regulation, *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989); and control of flights through navigable airspace, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75, 84 (2d Cir.1977). *Abdullah*, 181 F.3d at 369-71. We paid special heed to 14 C.F.R. § 91.13(a), which proscribes “operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another,” and observed that it provided a catch-all standard of care. *Id.* at 371.⁵ Thus, we concluded that state law standards of care within the “field of aviation safety” were preempted, and we instructed that “a court must refer . . . to the overall concept that aircraft may not be operated in a careless or reckless manner” in addition to any specific regulations that may be applicable. *Id.*

⁵ The full text of this regulation reads: “Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.” 14 C.F.R. § 91.13(a).

Importantly for our purposes, although we stated in broad terms that the Federal Aviation Act preempted the “field of aviation safety,” *id.*, the regulations and decisions we discussed in *Abdullah* all related to in-air operations, *see* 14 C.F.R. § 1.1 (“Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose . . . of air navigation including the piloting of aircraft. . . .”), and the catch-all standard of care that we held a court “must refer to” applied only to operating, not designing or manufacturing, an aircraft. *See* 14 C.F.R. §§ 1.1, 91.13.

We confirmed the limits of our holding in *Abdullah* a decade later in *Elassaad*, 613 F.3d at 121, where we clarified that a flight crew’s oversight of the disembarkation of passengers after an airplane came to a complete stop at its destination was not within the preempted field of aviation safety. By drawing a line between what happens during flight and what happens upon disembarking, we made clear that the field of aviation safety described in *Abdullah* was limited to in-air operations. *Id.* at 127-31 (“[T]he [Federal Aviation Act’s] safety provisions appear to be principally concerned with safety in connection with *operations* associated with flight.” (emphasis added)). *Abdullah* thus does not govern products liability claims like those at issue here.⁶ Indeed, as discussed further below, products liability claims are not subject to the same catch-all standard of care that motivated our field preemption decision in *Abdullah*; the design regulations governing

⁶ Appellees point to our passing reference in *Elassaad* that the certification and airworthiness requirements for aircraft parts concern aspects of air safety. 613 F.3d at 128. The certification process, however, had no relevance to the pertinent issues in *Elassaad*, so this statement constituted dicta. *See In re Nat’l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 583-84 n.18 (3d Cir. 2014).

the issuance of type certificates are not as comprehensive as the regulations governing pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules discussed there; and our post-*Abdullah* case law cautions us against interpreting the scope of the preempted field too broadly. *See Ellassaad*, 613 F.3d at 131.

This conclusion is consistent with other courts that have interpreted *Abdullah*. For example, the Ninth Circuit, which had previously adopted *Abdullah*'s conclusion that the Federal Aviation Act preempts state law standards of care in the field of aviation safety, has held that products liability does *not* fall within that preempted field. *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809-11 (9th Cir. 2009) (Kozinski, J.). Even the district courts that believed *Abdullah* compelled them to extend the preempted field to products liability claims, including the District Court in this case, have noted that such a holding was at odds with the federal regulatory scheme governing aviation design and manufacturing. *See Sikkelee*, 45 F. Supp. 3d at 460 (“Yet having endeavored to reconcile *Abdullah* with the federal regulatory scheme that governs aviation design and manufacturing, this Court—either by way of its own error or that of the precedents it has followed—has reached holdings that it imagines have little to do with Congressional intent.”); *see also Pease*, 2011 WL 6339833, at *22-23 (stating that *Abdullah*'s reasoning is overbroad).

Having concluded that *Abdullah* does not control here, we must now determine whether Congress intended the Federal Aviation Act to preempt products liability claims.

B. Whether the Presumption Against Preemption Applies

Typically, our preemption analysis begins with the presumption that Congress does not preempt areas of law traditionally occupied by the states unless that is its clear and manifest intent. *Wyeth*, 555 U.S. at 565. In this case, Appellees argue that the presumption against preemption should not apply in the aviation context given the history of federal involvement in the field. That argument turns, however, on a selective view of history.

In general, products liability claims are exemplars of traditional state law causes of action. *See Medtronic*, 518 U.S. at 491. Indeed, state law governed the earliest products liability claims in this country. *See, e.g., Curtain v. Somerset*, 21 A. 244, 244-45 (Pa. 1891) (applying Pennsylvania law); *Thomas v. Winchester*, 6 N.Y. 397, 407-11 (N.Y. 1852) (applying New York law); *see also* Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 Colum. L. Rev. 699, 732-44 (1936) (discussing distinctions between the early products liability law of the various States).

More specifically, even aviation torts have been consistently governed by state law. In *The Crawford Bros. No. 2*, 215 F. 269 (W.D. Wash. 1914), which appears to be the earliest tort case involving an aircraft, the court considered the effect of the “legal code of the air” that had been proposed by the International Juridic Committee on Aviation on a salvage claim related to an airplane crash in Puget Sound. *Id.* at 269-70. The court posited that, if the code had become law, “it would be important to consider its provisions in determining what was reasonable and

proper in a cause involving air craft in a common-law action,” much like with rules governing water craft. *Id.* at 270. The court ultimately dismissed the suit for lack of jurisdiction, as neither the proposed legal code of the air nor maritime law provided for jurisdiction, and instructed that such questions “must be relegated to the common-law courts.” *Id.* at 271. The decision in *Crawford Bros.* thus recognized that, absent specific legislation, the common law governed aviation tort claims.

Years later, after Congress passed the 1926 Air Commerce Act but before the current type certification regime was imposed, Judge Buffington authored what appears to be this Court’s first decision involving an aviation-related tort claim, *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710 (3d Cir.), *cert. denied*, 290 U.S. 696 (1933). There, a widow brought suit against the Curtiss-Wright Flying Service, an early airline, after her husband was killed in a plane crash as a result of negligent operation. *Id.* at 711. We analyzed the claims under common law negligence standards, *see id.* at 712, as no specific legislation or regulation governed those claims. Of course, because that decision preceded *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), our analysis turned on federal, rather than state, common law, but the distinction is not important for our purposes here. Rather, our decision reflects that despite the emergence of federal statutes governing aviation, the common law continued to apply to aviation torts.

Since then, in the absence of applicable statutory or regulatory provisions, we have consistently applied state law to tort claims arising from airplane crashes. Only a month before the Federal Aviation Act was enacted, we were faced with a case involving three claims of defective design against an aircraft manufacturer after its plane

broke apart in midair. *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 603-04 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958). In concluding that the aircraft manufacturer did not negligently design the plane, we did not exclusively rely on the Civil Aeronautics Board's certification of the relevant design, but rather methodically considered each design defect claim under a common law negligence standard, using the type certificate as but a part of that overall analysis. *Id.* at 605-07; *see also Nw. Airlines v. Glenn L. Martin Co.*, 224 F.2d 120, 124 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956) (confirming the district court's decision to leave the question of a manufacturer's negligent design to the jury for determination of whether the pertinent state standard of ordinary care was met).

We have done the same in the years since the Federal Aviation Act replaced the Civil Aeronautics Act, *see, e.g., Paoletto v. Beech Aircraft Corp.*, 464 F.2d 976, 978-82 (3d Cir. 1972) (applying a state standard of care to claims for strict liability, negligence, and breach of warranty arising from an airplane crash caused by the collapse of the plane's right wing); *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236-37 (3d Cir. 1964) (rejecting defendant's argument that approval by the Civil Aeronautics Administration of an airplane's propeller system was conclusive of compliance with the standard of care), as have other Courts of Appeals, *see, e.g., Martin*, 555 F.3d at 808; *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908 (7th Cir. 2007); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 426 (5th Cir. 2001); *In re Air Crash Disaster*, 86 F.3d 498, 522-23 (6th Cir. 1996); *Pub. Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 293-95 (11th Cir.1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1441-47 (10th Cir. 1993); *In re N-500L Cases*, 691 F.2d 15, 27-28 (1st Cir. 1982); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411

F.2d 451, 452-53 (2d Cir. 1969); *Banko v. Cont'l Motors Corp.*, 373 F.2d 314, 315-16 (4th Cir. 1966).

Consistent with the uniform treatment of aviation products liability cases as state law torts, we expressly held in *Elassaad* that the presumption against preemption applies in the aviation context.⁷ See 613 F.3d at 127 (“When considering preemption of an area of traditional state regulation, we begin our analysis by applying a presumption against preemption. . . . [I]t is appropriate to use a restrained approach in recognizing the preemption of common law torts in the field of aviation.” (quoting *Holk*, 575 F.3d at 334) (internal quotation marks omitted)); *Abdullah*, 181 F.3d at 366 (“[We] have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law.”). Appellees’ attempts to set the presumption aside are therefore unavailing.

With this presumption in mind, we must determine whether Congress expressed its clear and manifest intent to preempt aviation products liability claims. We do so by reviewing the text and structure of the Federal Aviation Act, and, to the extent necessary and relevant to this statute, examining subsequent congressional action that sheds light on its intent. See *Medtronic*, 518 U.S. at 485-86. We also consider relevant regulations that have been issued pursuant to the valid exercise of the FAA’s dele-

⁷ The Tenth Circuit rejected the application of the presumption against preemption in the air operations context on the ground that “the field of aviation safety has long been dominated by federal interests.” See *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1325 (10th Cir. 2010) (internal quotation marks omitted). For the reasons discussed above, we respectfully disagree.

gated authority, which can have the same preemptive effect as federal statutes. *See Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008).

C. Indicia of Congressional Intent

1. The Federal Aviation Act

As we have explained, although the federal government has overseen certain aspects of aviation, such as air traffic control and pilot certification, since the early days of flight, *see* Air Commerce Act of 1926, ch. 344, 44 Stat. 568, there was little question when the Civil Aeronautics Act was adopted in 1938 that common law standards governed tort claims arising from plane crashes, *see, e.g., Curtiss-Wright Flying Serv.*, 66 F.2d at 711-13 (applying the common law standard for negligence). It is therefore significant that the Federal Aviation Act, which succeeded the Civil Aeronautics Act and remains the foundation of federal aviation law today, contains no express preemption provision. In fact, it says only that the FAA may establish “minimum standards” for aviation safety, 49 U.S.C. § 44701—statutory language the Supreme Court has held in other contexts to be insufficient on its own to support a finding of clear and manifest congressional intent of preemption, *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145 (1963); *see also Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 n.19 (1978); *Abdullah*, 181 F.3d at 373-74; *Cleveland*, 985 F.2d at 1445.

Further, the Federal Aviation Act contains a “savings clause,” which provides that “[a] remedy under this part

is *in addition* to any other remedies provided by law.”⁸ 49 U.S.C. § 40120(c) (emphasis added). The Supreme Court observed that this statutory scheme permits states to retain their traditional regulatory power over aspects of aviation. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (noting that the Federal Aviation Act’s savings clause permitted the States to regulate intrastate airfares and enforce their own laws against deceptive trade practices prior to the 1978 enactment of the Airline Deregulation Act, which *did* expressly preempt state laws relating to the rates, routes, or services of an air carrier). While the inclusion of the savings clause “is not inconsistent” with a requirement that courts apply federal standards of care when adjudicating state law claims, *Abdullah*, 181 F.3d at 374-75, it belies Appellees’ argument that Congress demonstrated a clear and manifest intent to preempt state law products liability claims altogether.

Whereas Appellees must show a clear and manifest congressional intent to overcome the presumption against preemption, they instead have mustered scant evidence and, at best, have demonstrated ambiguity. For example, they discuss § 601 of the Federal Aviation Act, which empowers the FAA to promulgate regulations “to promote safety of flight of civil aircraft in air commerce by prescribing . . . minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety.” Federal Aviation Act of 1958, Pub. L. No. 85-726, § 601(a)(1), 72 Stat. 731, 775. Yet,

⁸ There is no question that state law provides remedies for products liability claims. *See, e.g., Tinch v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

that provision, along with § 603, which provides the statutory framework for the issuance of type certificates, was adopted verbatim from the 1938 Civil Aeronautics Act, *id.* § 603; *see* H.R. Rep. No. 85-2360, at 16 (1958), which clearly did not preempt state law products liability claims, *see supra*, Part III.B. Neither the Federal Aviation Act nor subsequent amendments substantially changed this statutory framework. *See* Revision of Title 49, United States Code Annotated, “Transportation,” Pub. L. No. 103-272, 108 Stat. 745 (1994); *see also* H.R. Rep. No. 103-180, at 343-44 (1993) (discussing changes to the statutory provisions governing the issuance of type certificates as words “added for clarity” and “omitted as surplus”).

Appellees thus present no evidence from the Federal Aviation Act’s text or extensive legislative history that plausibly suggests Congress intended these same provisions to have a different meaning in the 1958 Act than they had in the 1938 Act. Simply put, if Congress had wanted to change the preemptive effect of the type certification process, it would have done so—or at least given some indication of that intention. It did not. The Federal Aviation Act itself therefore does not signal an intent to preempt state law products liability claims.

2. Federal Aviation Regulations

The federal aviation design regulations are likewise devoid of evidence of congressional intent to preempt state law products liability claims. The FAA, in the letter brief it submitted as *amicus curiae* in this case, takes the position that the Act and these regulations so pervasively occupy the field of design safety that, consistent with *Abdullah*, they require state tort suits that survive a conflict preemption analysis to proceed under “federal standards

of care found in the Federal Aviation Act and its implementing regulations.” Letter Br. of Amicus Curiae Fed. Aviation Admin. 11 (“FAA Ltr. Br.”).⁹

We do not defer to an agency’s view that its regulations preempt state law, but we do recognize that agencies are well equipped to understand the technical and complex nature of the subject matter over which they regulate and thus have a “unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Wyeth*, 555 U.S. at 576-77 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted); see also *Farina*, 625 F.3d at 126. We therefore consider the FAA’s “explanation of state law’s impact on the federal scheme” governing aircraft design and manufacture, but “[t]he weight we accord [its] explanation . . . depends on its thoroughness, consistency, and persuasiveness.” *Wyeth*, 555 U.S. at 577 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Farina*, 625 F.3d at 126-27 & n.27. Specifically, its views as presented in an amicus brief are “‘entitled to respect’ only to the extent [they] ha[ve] the ‘power to persuade.’” See *Gonzales v. Oregon*, 546 U.S.

⁹ At our request, the FAA submitted a letter brief specifically to address the scope of field preemption, the existence and source of any federal standard of care for design defect claims, and the role of the type certificate in determining whether the relevant standard of care had been met. For the reasons set forth below, we are not persuaded by the FAA’s position on field preemption and the applicable standard of care. However, we do find persuasive its views on the relevance of the type certification process to a conflict preemption analysis. See *infra* Part III.D.2.

243, 255-56 (2006) (quoting *Skidmore*, 323 U.S. at 140); see also *Farina*, 625 F.3d at 126-27.

Here, three fundamental differences between the regulations at issue in *Abdullah* and those concerning aircraft design, along with the agency's inability to specifically identify or articulate the proposed federal standard of care, lead us to disagree with this aspect of the FAA's submission. First, the regulations governing in-flight operations on their face "prescribe[] rules governing the operation of aircraft . . . within the United States." 14 C.F.R. § 91.1(a); see also 14 C.F.R. § 121.1(e) (prescribing rules governing "[e]ach person who is on board an aircraft being operated under this part"). In contrast, the manufacturing and design regulations prescribe "[p]rocedural requirements for issuing and changing—(i) Design approvals; (ii) Production approvals; (iii) Airworthiness certificates; and (iv) Airworthiness approvals" and "[r]ules governing applicants for, and holders of" such approvals and certificates. 14 C.F.R. § 21.1(a). That is, these regulations do not purport to govern the manufacture and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA, see generally 14 C.F.R. § 21, and in the context of those procedures, to "prescribe[] airworthiness standards for the issue of type certificates," 14 C.F.R. § 33.1(a) (aircraft engines) (emphasis added); see also 14 C.F.R. §§ 23.1(a), 25.1(a), 27.1(a), 29.1(a), 31.1(a), 35.1(a). Of course, the issuance of a type certificate is a threshold requirement for the lawful manufacture and production of component parts and, at least to that extent, arguably reflects nationwide standards for the manufacture and design of such parts. But the fact that the regulations are framed in

terms of standards to acquire FAA approvals and certificates—and not as standards governing manufacture generally—supports the notions that the acquisition of a type certificate is merely a baseline requirement and that, in the manufacturing context, the statutory language indicating that these are “minimum standards,” 49 U.S.C. § 44701, means what it says.

Second, the standards that must be met for the issuance of type certificates cannot be said to provide the type of “comprehensive system of rules and regulations” we determined existed in *Abdullah* to promote in-flight safety “by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Abdullah*, 181 F.3d at 369 (footnotes omitted). Rather, many are in the nature of discrete, technical specifications that range from simply requiring that a given component part work properly, *e.g.*, 14 C.F.R. § 33.71(a) (providing that a lubrication system “must function properly in the flight altitudes and atmospheric conditions in which an aircraft is expected to operate”), to prescribing particular specifications for certain aspects (and not even all aspects) of that component part, *e.g.*, 14 C.F.R. § 33.69 (providing that an electric engine ignition system “must have at least two igniters and two separate secondary electric circuits, except that only one igniter is required for fuel burning augmentation systems”). The regulation governing the fuel and induction system at issue in this case, for example, specifies that this part 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.” 14 C.F.R. § 33.35(a) (emphasis added). As the District Court observed, the highly technical and part-

specific nature of these regulations makes them exceedingly difficult to translate into a standard of care that could be applied to a tort claim.

Third, the regulations governing in-flight operations “suppl[y] a comprehensive standard of care,” *Abdullah*, 181 F.3d at 371, that could be used to evaluate conduct not specifically prescribed by the regulations, i.e., that a person must not “operate an aircraft in a careless or reckless manner so as to endanger the life or property of another,” 14 C.F.R. § 91.13(a). We recognized in *Abdullah* that § 91.13(a) sounds in common law tort, making it appropriate and practical to incorporate as a federal standard of care in state law claims concerning in-flight operations and rendering existing state law standards of care duplicative (if not conflicting with them outright). *Abdullah*, 181 F.3d at 371, 374. Neither the FAA nor Appellees have pointed us to any analogous provision for aircraft manufacture and design, nor have we identified one.¹⁰

We therefore agree with the District Court that neither the Federal Aviation Act nor the associated FAA regulations “were [ever] intended to create federal standards of care” for manufacturing and design defect claims.

¹⁰ Although Appellees suggest 49 U.S.C. § 44701(a)(5) and CAR §§ 13.100-101, 13.104 (1964) as candidates for an equivalent to § 91.13(a), neither states a workable standard of care. The first simply describes what types of regulations the FAA is authorized to promulgate by directing the agency to prescribe “regulations and minimum standards for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security.” 49 U.S.C. § 44701(a)(5). The second establishes “standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.” CAR § 13.0 (1964). Neither provision purports to, nor could, practically function as a general standard of care for products liability claims.

Sikkelee, 45 F. Supp. 3d at 437 n.4 (internal quotation marks omitted) (describing the District Court’s reasoning in its earlier memorandum responding to proposed jury instructions and citing *Pease*, 2011 WL 6339833, at *22-23). However, the District Court proceeded from that accurate premise to a faulty conclusion (the one urged by Appellees), i.e., that because there is no federal standard of care for these claims in the statute or regulations, the issuance of a type certificate must both establish and satisfy that standard. Not so. In light of the presumption against preemption, absent clear evidence that Congress intended the mere issuance of a type certificate to foreclose all design defect claims, state tort suits using state standards of care may proceed subject only to traditional conflict preemption principles.

Besides preserving principles of federalism, this conclusion avoids interpreting the Federal Aviation Act in a way that would have “the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation.” *Medtronic*, 518 U.S. at 487. Conversely, were we to adopt Appellees’ position, we would be holding, in effect, that the mere issuance of a type certificate exempts designers and manufacturers of defective airplanes from the bulk of liability for both individual and large-scale air catastrophes. While Appellees answer that “failure to report defects” claims could still proceed under state law, as the District Court permitted here, even Appellees acknowledge that, at best, only some “percentage

of claims that are theoretically available would be left under [their] interpretation. . . .” Oral Arg. at 35:01, 42:54 (argued June 24, 2015).¹¹

In short, like the manufacturer in *Medtronic*, Appellees would have us adopt the position that “because there is no explicit private cause of action against manufacturers contained in the [Act], and no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective [aircraft parts].” *Medtronic*, 518 U.S. at 487. Like the Supreme Court in *Medtronic*, however, we find it “to say the least, ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.’” *Id.* (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

These observations lead us to conclude that the Federal Aviation Act and its implementing regulations do not indicate a clear and manifest congressional intent to preempt state law products liability claims; Congress has not created a federal standard of care for persons injured by defective airplanes; and the type certification process cannot as a categorical matter displace the need for compliance in this context with state standards of care.

3. GARA

Our conclusion is solidified by the General Aviation Revitalization Act of 1994 (“GARA”), Pub L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 note). In that

¹¹ An audio recording of the oral argument is available online, at <http://www2.ca3.uscourts.gov/oralargument/audio/14-4193JillSilleev.PrecisionAirmotiveCorp.mp3>.

statute, Congress created a statute of repose that, with certain exceptions, bars suit against an aircraft manufacturer arising from a general aviation accident brought more than eighteen years after the aircraft was delivered or a new part was installed.¹² 49 U.S.C. § 40101 note § 3(3). GARA was adopted to limit the “long tail of liability” imposed on manufacturers of general aviation aircraft. *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 951 (9th Cir. 2008) (quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001)).

By barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted. Indeed, GARA’s eighteen-year statute of repose would be superfluous if all aviation products liability claims are preempted from day one. Because we must “interpret a statute so as to ‘give effect to every word of a statute wherever possible,’” *Shalom Pentecostal Church v. Acting Sec’y U.S. Dept of Homeland Sec.*, 783 F.3d 156, 165 (3d Cir. 2015) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)), GARA reinforces what is now apparent: Federal law does not preempt state design defect claims. Rather, Congress left state law remedies in place when it enacted GARA in 1994, just as it did when it enacted the Civil Aeronautics Act in 1938 and the Federal Aviation Act in 1958.

Appellees argue that GARA would not be entirely superfluous because general aviation manufacturers would “remain subject to state tort remedies for actual violations

¹² “General aviation aircraft” is defined in GARA as any aircraft with a maximum seating capacity of fewer than 20 passengers that was not engaged in scheduled passenger-carrying operations at the time of the accident. 49 U.S.C. § 40101 note § 2(c). In other words, general aviation is distinct from larger-scale commercial aviation.

of federal aviation safety standards,” Appellee’s Br. 51, such as the failure to disclose defects discovered after a type certificate has been issued or the failure to comply with an airworthiness directive, Oral Arg. at 35:20, 37:00. Those kinds of claims, however, are already expressly exempted in § 2(b)(1) from GARA’s statute of repose.¹³ In sum, if GARA and its § 2(b)(1) carveout are to serve their stated purpose, the state law claims to which GARA’s statute of repose applies must not be preempted.

Our interpretation of the Federal Aviation Act is only bolstered by GARA’s legislative history. We are mindful, of course, that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic

¹³ In full, this exception provides that GARA’s statute of repose does not apply

if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered.

49 U.S.C. § 40101 note § 2(b)(1). This provision would exempt from the statute of repose claims that are based on a manufacturer’s misrepresentations and omissions with regard to a type certificate or the continuing airworthiness of a plane or its component part, such as a manufacturer’s failure to comply with a type certificate or failure to report required information to the FAA.

material,” as legislative history can be “murky, ambiguous, and contradictory.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Here, however, the legislative history is none of those things. GARA’s legislative history states explicitly what is implied by the statutory text: Aviation products liability claims are governed by state law. *See* H.R. Rep. No. 103-525, pt. 2, at 3-7 (1994). The House Report begins by stating that “[t]he liability of general aviation aircraft manufacturers is governed by tort law” that “is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.” *Id.* at 3-4. In enacting GARA, Congress “voted to permit, in this exceptional instance, a very limited Federal preemption of State law,” that is, only where GARA’s statute of repose has run are state law claims preempted. *Id.* at 4-7. “[I]n cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.”¹⁴ *Id.* at 7.

¹⁴ Appellant notes that, as indicated in the House Report accompanying GARA, prior legislative efforts to explicitly federalize aviation tort law failed to get off the ground. H.R. Rep. No. 103-525, pt. 2, at 6 & n. 11 (referencing failed bill H.R. 5362, 102d Cong. (1992)); *see* Appellant’s Br. 9. For example, H.R. 5362 would have explicitly preempted state tort claims against aircraft manufacturers arising out of general aviation accidents, put in place substantive legal rules for such actions (e.g., applying principles of comparative responsibility in such cases), and imbued federal courts with original, concurrent jurisdiction to adjudicate such claims. Although Appellant seems to be suggesting that such proposed bills reflect Congress’s belief at the time that the field of aviation products liability was not preempted—and, thus, remains so today absent legislation to the contrary—we take no confidence in the reading of tea leaves left behind by failed legislative efforts. For, while on rare occasion the Supreme Court has described legislative inaction as “instructive” but “not conclusive,” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (internal quotation marks omitted), it far more often, and with good reason, has

Appellees attempt to discount GARA’s significance, arguing that the views of Congress in 1994 “form a hazardous basis for inferring the intent” of the 1958 Congress that enacted the Federal Aviation Act. Appellee’s Br. 41 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). It is true that “the weight given subsequent legislation and whether it constitutes a clarification or a repeal is a context- and fact-dependent inquiry,” *Bd. of Trs. of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*, 802 F.3d 534, 546 (3d Cir. 2015), but there are circumstances where its consideration is appropriate. Indeed, the Supreme Court relied on precisely this type of analysis in determining congressional intent in the preemption context in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). There, the Court considered the question of whether state law actions for punitive damages were subject to field preemption under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284. *Silkwood*, 464 U.S. at 241. The Atomic Energy Act itself was silent on the preemption of state tort claims, but, when it was subsequently amended by the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), the accompanying Joint Committee Report reflected an assumption that state law would apply in the absence of subsequent legislative action. *Id.* at 251-54. The Supreme Court found this legislative history to be persuasive in concluding that Congress did not intend to foreclose state remedies for those injured by nuclear accidents by way of field preemption. *Id.* at 256.

emphasized its “reluctan[ce] to draw inferences from Congress’[s] failure to act,” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000) (declining to “rely on Congress’[s] failure to act”).

More recently, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Supreme Court held that disparate impact claims were cognizable under the 1968 Fair Housing Act (“FHA”), relying in part on the “crucial[ly] importan[t]” fact that Congress had adopted amendments to the Act in 1988 that assumed the existence of such claims. *Id.* at 2519-20. Because the amendments would make sense only if disparate impact liability existed under the FHA, the Court reasoned that the most logical conclusion was that Congress presupposed the existence of disparate impact claims under the FHA as it had been enacted in 1968. *Id.* at 2520-21.

Consistent with the Supreme Court’s approach and our recent guidance in *Board of Trustees of IBT Local 863 Pension Fund*, we may pay heed to the significance of subsequent legislation when it is apparent from the facts and context that it bears directly on Congress’s own understanding and intent. Here, the Federal Aviation Act itself neither states nor implies an intent to preempt state law products liability claims, and GARA confirms that Congress understood and intended that Act to preserve such claims. Thus, despite Appellees’ exhortations, we cannot infer a clear and manifest congressional purpose to preempt these claims where the indicia of congressional intent, including in this case the assumptions underlying subsequent legislation, point overwhelmingly the other way.

D. Relevant Preemption Precedent

We turn next to Appellees’ contention that the Supreme Court’s preemption jurisprudence compels us to find that federal law occupies the entire field of aircraft

design and manufacture and that the issuance of a type certificate conclusively demonstrates compliance with the corresponding federal standard of care. Appellees argue that: (1) the Court has accorded broad field preemption to analogous statutory regimes governing oil tankers and locomotives; (2) the Court has given broad preemptive effect to analogous premarket approval processes in the medical device context; and (3) other Courts of Appeals have recognized preemption of the field of aviation safety. For its part, the FAA argues that the mere issuance of a type certificate does not preempt all design defect claims concerning the certificated part but that specifications expressly embodied in a type certificate may, in a given case, preempt such claims under traditional conflict preemption principles. We address Appellees' arguments below and conclude that the case law of the Supreme Court and our sister Circuits supports the application of traditional conflict preemption principles but not preemption of the entire field of aviation design and manufacture.

1. Field Preemption in Analogous Statutory Regimes

Although they acknowledge that the Supreme Court has not addressed whether the Federal Aviation Act preempts the field of aviation design and manufacture, Appellees argue on the basis of other Supreme Court precedent that we should affirm the reasoning of the District Court. First, Appellees point to the Supreme Court's observation in *City of Burbank*, 411 U.S. at 639, that the Federal Aviation Act "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled" as evidence that the Supreme Court has concluded the FAA occupies the entire field of aviation safety. That begs the question,

however, of the scope of the field in question. In *City of Burbank*, the Court held only that Congress had preempted the field of aircraft noise regulation. *Id.* at 633, 638-40. Even in interpreting the express preemption clause of the Airline Deregulation Act,¹⁵ the Court has taken a cautious approach, holding that plaintiffs' claims under state consumer protection statutes are preempted but that related state law claims for breach of contract are not. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223, 227-33 (1995); *Morales*, 504 U.S. at 391. The Supreme Court also has observed in dicta that state tort law "plainly appl[ies]" to aviation tort cases and that Congress would need to enact legislation "[i]f federal uniformity is the desired goal with respect to claims arising from aviation accidents." *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). The Court's few pronouncements in the area of aviation preemption, in other words, offer little support for the broad field preemption Appellees seek.

Appellees next compare aircraft to oil tankers and locomotives, urging that the broad scope of field preemption recognized by the Supreme Court in those industries should extend as well to aircraft design defect claims. As Appellees point out, the Supreme Court has found field preemption of oil tanker design, operation, and seaworthiness under Title II of the Ports and Waterways Safety Act and concluded state regulations that impose additional crew training requirements and mandate standard safety

¹⁵ The Airline Deregulation Act, Pub. L. No. 95-504, § 105(a)(1), 92 Stat. 1705, 1708 (1978), expressly preempted state law claims "relating to rates, routes, or services of any air carrier." In light of non-substantive amendments by Congress, today's iteration of the express preemption clause precludes state law claims "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1).

features on certain boats fall within this preempted field. *United States v. Locke*, 529 U.S. 89, 109-14 (2000); *Ray*, 435 U.S. at 158-68. Appellees also refer to decisions that have found field preemption of design defect claims in the railroad context, see *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1267-68 (2012); *Del. & Hudson Ry. Co. v. Knoedler Mfrs., Inc.*, 781 F.3d 656, 661-62 (3d Cir. 2015).

We do not find either of these analogies apt. As to tankers, the Supreme Court subsequently distinguished *Ray* and *Locke* on the grounds that both cases invalidated state regulations that created positive obligations, and neither of those cases “purported to pre-empt possible common law claims,” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002), such as the aviation tort claims at issue here. As to locomotives, the Supreme Court and our own Court were bound to find such design defect claims preempted by the Supreme Court’s ninety-year-old precedent in *Napier v. Atlantic Coast Line Railway Co.*, 272 U.S. 605 (1926), which held that the Locomotive Inspection Act preempts “the field of regulating locomotive equipment used on a highway of interstate commerce,” including “the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.” *Id.* at 607, 611.

Far more apropos in the transportation industry is the Supreme Court’s conflict preemption approach in the context of automobiles and boats, for just as the Federal Aviation Act directs the FAA to “prescrib[e] minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers,” 49 U.S.C. § 44701(a)(1), the National Traffic and Motor Safety Act of 1966 (“NTMSA”) empowers the National

Highway Traffic Safety Administration to “prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment,” 49 U.S.C. § 30101(1), and the Federal Boat Safety Act of 1971 (“FBSA”) authorizes the Secretary of Transportation to issue regulations “establishing minimum safety standards for recreational vessels and associated equipment,” 46 U.S.C. § 4302(a)(1).¹⁶ Moreover, like the Federal Aviation Act, the NTMSA and FBSA both contain savings clauses. 49 U.S.C. § 30103(e); 46 U.S.C. § 4311(g).

In assessing implied preemption under these statutory schemes, the Supreme Court has found that the statutory language and applicable regulations support not field preemption, but rather a traditional conflict preemption analysis. In the automobile context, for example, the Court held that a federal regulation governing air bag usage implicated a significant federal regulatory objective—maintaining manufacturer choice—and therefore preempted a state law tort claim, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), while another regulation governing seatbelt usage did not reflect a similarly significant federal objective and thus did not preempt state law claims, *Williamson*, 562 U.S. at 336.

¹⁶ Appellees argue that the Federal Aviation Act’s mandate that the FAA Administrator establish “minimum” standards in both Section 604 (pertaining to operations) and Section 601(a) (pertaining to aircraft design and manufacture) justifies the extension of *Abdullah* field preemption to both areas. Appellees’ Br. 34 (citing §§ 101(3), (10), (21); 601(a)(1)-(5)). In *Abdullah*, however, we observed that the reference to “minimum standards” did not *preclude* a finding of field preemption; we did not hold that it required or even supported it. See *Abdullah*, 181 F.3d at 373-74.

Similarly, in *Sprietsma*, the Court held that the Federal Boat Safety Act did not preempt the field of “state common law relating to boat manufacture,” but nonetheless applied a conflict preemption analysis to determine whether petitioner’s tort law claims were preempted by the Federal Boat Safety Act (“FBSA”) or the Coast Guard’s decision not to promulgate a regulation requiring propeller guards on motorboats. 537 U.S. at 60-70. The Court held that the Coast Guard’s decision not to regulate did not preclude “a tort verdict premised on a jury’s finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent’s particular type of motor” because the Coast Guard’s decision “does not convey an ‘authoritative’ message of a federal policy against propeller guards.” *Id.* at 67.¹⁷

In sum, the Supreme Court’s preemption cases in the transportation context support that aircraft design and

¹⁷ We recognize that, unlike the Federal Aviation Act, the NTMSA and the FBSA also contain express preemption clauses. 49 U.S.C. § 30103(b)(1); 46 U.S.C. § 4306. Despite these clauses, however, the Supreme Court still conducted a conflict preemption analysis in *Geier* and *Sprietsma* rather than a field preemption analysis because it determined that, while an express preemption clause may indicate some congressional desire to “subject the industry to a single, uniform set of federal safety standards,” the presence of a savings clause simultaneously “reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries . . . enforce[] safety standards [and] . . . provid[e] necessary compensation to victims.” *Geier*, 529 U.S. at 867-71; *see also Sprietsma*, 537 U.S. at 62-65. Because the Court has been willing to apply conflict rather than field preemption even in situations where an *express* preemption clause is at play, conflict preemption appears especially apt in a case like this one where there is no such clause to counsel in favor of field preemption.

manufacture claims are not field preempted, but remain subject to principles of conflict preemption.

2. Type Certification As Support for Field Preemption

Appellees also assert that because type certificates represent the FAA’s determination that a design meets federal safety standards, allowing juries to impose tort liability notwithstanding the presence of a type certificate would infringe upon the field of aviation safety as defined in *Abdullah* and would fatally undermine uniformity in the federal regulatory regime. Appellees’ Br. 44-45 (quoting *City of Burbank*, 411 U.S. at 639). In support of this argument, Appellees rely on *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), in which state tort claims were deemed preempted by an express preemption clause where the plaintiff challenged the safety of a medical device that had received preapproval from the Food and Drug Administration. *Id.* at 330. Although there is no express preemption clause here, Appellees posit that the FAA’s type certification process should be accorded a similar field preemptive effect.

The FAA, on the other hand, argues that type certification is relevant only to an analysis under “ordinary conflict preemption principles.”¹⁸ FAA Ltr. Br. 2. Thus, according to the FAA, “[i]t is . . . only where compliance with both the type certificate and the claims made in the state tort suit ‘is a physical impossibility[.]’; or where the claim

¹⁸ Even with regard to those claims not preempted by conflict preemption, the FAA contends that a federal standard of care should apply. FAA Ltr. Br. 11. For the reasons set forth above, we have rejected that contention. *See supra* Part III.C.2.

‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ that the type certificate will serve to preempt a state tort suit.” *Id.* at 10 (first quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43; then quoting *Geier*, 529 U.S. at 873). This, the FAA contends, strikes the right balance in the interests of federalism because:

to the extent that a plaintiff challenges an aspect of an aircraft’s design that was expressly approved by the FAA as shown on the type certificate, accompanying operating limitations, underlying type certificate data sheet, or other form of FAA approval incorporated by reference into those materials, a plaintiff’s state tort suit arguing for an alternative design would be preempted under conflict preemption principles . . . because a manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate.

Id. at 10-11. On the other hand, “to the extent that the FAA has not made an affirmative determination with respect to the challenged design aspect, and the agency has left that design aspect to the manufacturer’s discretion, the claim would not be preempted.” *Id.* at 11.¹⁹

¹⁹ A type certificate thus would not create such a conflict in the FAA’s view where unilateral changes are permissible without preapproval or where an allegation of negligence arises after the issuance of a type certificate, such as claims related to a manufacturer’s maintenance of an aircraft, issuance of service bulletins to correct an issue that has come to the manufacturer’s attention, or failure to conform its manufacturing process to the specifications in the type certificate. *See* FAA Ltr. Br. 10-11, 12-13 n. 2.

We have no need here to demarcate the boundaries of those tort suits that will be preempted as a result of a conflict between state law and a given type certificate, nor which FAA documents incorporated by reference in a type certificate might give rise to such a conflict. While the parties responded to the FAA's submission by arguing for the first time in supplemental submissions whether the alleged design defect at issue in this case is a design aspect that was expressly incorporated into the type certificate for the Textron Lycoming O-320-D2C engine and what significance that might have for conflict preemption, we will leave those issues for the District Court to consider on remand. *See, e.g., Miller v. Mitchell*, 598 F.3d 139, 148 (3d Cir. 2010) (remanding consideration of an issue discussed in supplemental briefing on appeal but not addressed by the district court in the first instance). For today, we hold only that, consistent with the FAA's view, type certification does not itself establish or satisfy the relevant standard of care for tort actions, nor does it evince congressional intent to preempt the field of products liability; rather, because the type certification process results in the FAA's preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict preemption principles. *See Wyeth*, 555 U.S. at 576-77 (according "some weight" to an agency's "unique understanding" of "state law's impact on [a] federal scheme" insofar as its views are "thorough[], consisten[t], and persuasive[]"); *accord Farina*, 625 F.3d at 126-27.

Indeed, when confronting an analogous preapproval scheme for pharmaceutical labeling, the Supreme Court has held that, where manufacturers are unable to simul-

taneously comply with both federal and state requirements, state law design defect claims are conflict preempted, not field preempted. *See Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013); *PLIVA*, 131 S. Ct. at 2577. Before a new drug may legally be distributed in the United States, both its contents and its labeling must be preapproved by the FDA. 21 U.S.C. §§ 355(a), (b)(1)(F). In a series of recent preemption cases, the Court has distinguished between brand-name drugs and their generic equivalents, determining that at least some state law tort claims may be brought against brand-name drug companies because such companies have the ability to make some *unilateral* changes to their labels without additional regulatory preapproval, *Wyeth*, 555 U.S. at 572-73, 581, but such claims against generic drug manufacturers cannot survive a conflict preemption analysis because the generic manufacturers are bound by federal law to directly mimic their brand-name counterparts, *Bartlett*, 133 S. Ct. at 2473, 2480; *PLIVA*, 131 S. Ct. at 2577-81.²⁰ Ultimately,

²⁰ In the case of a new brand-name drug, FDA approval can be secured only by submitting a new drug application (“NDA”), which must include full reports of clinical investigations, 21 U.S.C. § 355(b)(1)(A), relevant nonclinical studies, 21 C.F.R. § 314.50(d)(2), “any other data or information relevant to an evaluation of the safety and effectiveness of the drug product obtained or otherwise received by the applicant from any source,” 21 C.F.R. § 314.50(d)(5)(iv), and “the labeling proposed to be used for such drug,” 21 U.S.C. § 355(b)(1)(F). The FDA approves an NDA only if it determines that the drug in question is safe for use under its proposed labeling and the drug’s probable therapeutic benefits outweigh its risk of harm. 21 U.S.C. § 355(d); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 140. In contrast, a manufacturer of generic drugs can piggyback off of a previously-approved brand-name drug, but is required by federal law to match the preapproved brand-name analogue’s labeling and composition *exactly*. 21 U.S.C. § 355(j)(2)(A).

where a party cannot “independently do under federal law what state law requires of it,” the state law is conflict preempted. *PLIVA*, 131 S. Ct. at 2579.

The same considerations apply to the case before us. The FAA’s preapproval process for specifications embodied or incorporated into a type certificate, which precludes a manufacturer from making at least “major changes”²¹ to a design aspect without further preapproval, means a manufacturer may well find it impossible to simultaneously comply with both a type certificate’s specifications

²¹ As previously described, a company may not manufacture, much less produce, an aircraft part until its proposed design, to the extent described in its application, has been approved by the FAA in a type certificate. *See supra*, Part I.A. Once approved, there are two basic mechanisms by which a change can be made, depending whether the change is a “major change” or “minor change.” *See* 14 C.F.R. § 21.93. For “major changes,” a manufacturer cannot alter its design without obtaining preapproval and an amended type certificate from the FAA. *See* 49 U.S.C. § 44704(b); 14 C.F.R. § 21.97. Even where a manufacturer identifies and reports a defect, it may not unilaterally make a major change to its preapproved design; instead, the FAA must either preapprove such a change or issue an airworthiness directive that provides legally enforceable instructions to make the product safe. *See supra*, Part I.A. “Minor changes,” on the other hand, “may be approved under a method acceptable to the FAA before submitting to the FAA any substantiating or descriptive data.” 14 C.F.R. § 21.95. Importantly, “[t]he FAA permits a wide latitude in the approval process for minor changes to type design,” FAA, Order 8110.4C, change 5, Type Certification, ch. 4-1 (2011), allowing, for example, for manufacturers holding a certain, separately-applied-for authorization from the FAA (a so-called “technical standard order authorization”) to “make minor design changes . . . without further approval by the FAA,” 14 C.F.R. § 21.619(a). Under the regulations, then, it appears that “major changes” to the design aspects expressly set forth in or incorporated into a type certificate require preapproval, whereas “minor changes,” depending on the “method acceptable to the FAA,” 14 C.F.R. § 21.95, may not.

and a separate—and perhaps more stringent—state tort duty. Thus, there may be cases where a manufacturer’s compliance with both the type certificate and a state law standard of care “is a physical impossibility,” *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43, or would pose an obstacle to Congress’s purposes and objectives. In such cases, the state law claim would be conflict preempted. For, even if an alternative design aspect would improve safety, the mere “possibility” that the FAA would approve a hypothetical application for an alteration does not make it possible to comply with both federal and state requirements: As the Supreme Court observed in *PLIVA*, if that were enough, conflict preemption would be “all but meaningless.” 131 S. Ct. at 2579.

As for Appellees’ reliance on *Riegel*, we agree that the FAA’s type certification process resembles the “rigorous” preapproval process for certain medical devices under the Federal Food, Drug, and Cosmetic Act (FDCA), Pub. L. No. 75-717, 52 Stat. 1040 (1939) (amended 1976). *Riegel*, 552 U.S. at 317 (quoting *Lohr*, 518 U.S. at 477). Not unlike type certification, this approval process involves copious submissions and exhaustive review, and the FDA grants approval only if a device is deemed both safe and effective. *Id.* at 317-19. In addition, just as aircraft manufacturers may not make major changes to or deviate from their type certificates without the FAA’s sign-off, certain medical device manufacturers may not deviate from a federally sanctioned design without first obtaining supplemental approval from the FDA. *See* 21 U.S.C. § 360e(d)(6)(A)(i); *Riegel*, 552 U.S. at 319. However, unlike the Federal Aviation Act, the statute governing medical devices includes an express preemption clause that forbids states from imposing “requirements”

that are “different from, or in addition to” federal requirements placed on medical devices. 21 U.S.C. § 360k(a)(1); *Riegel*, 552 U.S. at 316. Because the Supreme Court’s preemption analysis in *Riegel* hinged on its interpretation of this express preemption clause, the case provides no support for the general proposition that states may not regulate devices governed by a federal statutory scheme.

Moreover, in an important respect, *Riegel* cuts against a finding of field preemption in this case, particularly when read in conjunction with the Court’s prior medical device decision in *Lohr*. Together these cases reflect a narrow, rather than sweeping, approach to analyzing the preemptive contours of a federal premarket approval scheme. In *Lohr*, finding that the “overarching concern” of the federal statutory and regulatory scheme was ensuring “that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest,” the Court preserved state common law requirements “equal to, or substantially identical to, requirements imposed under federal law.” 518 U.S. at 497, 500-01 (internal quotation marks omitted). Subsequently, in *Riegel*, although the Court held that state design defect claims were preempted where they imposed additional safety requirements on medical device manufacturers in violation of the express preemption clause, the Court left *Lohr* intact and took care to note that state duties that “‘parallel,’ rather than add to, federal requirements” are not preempted by the statute. 552 U.S. at 330. Here, confronted with a similarly exhaustive preapproval process governing aircraft manufacture and design and no express preemption clause, we see no justification for going further than the Supreme Court elected to go in *Riegel* or *Lohr* by deeming categorically preempted even those

state requirements that may be consistent with the federal regulatory scheme as embodied in the FAA's type certificates. We thus read *Riegel* not to bestow field preemptive effect on type certificates, but rather to counsel in favor of narrowly construing the effect of federal regulations on state law—much like the conflict preemption analysis undertaken in *Bartlett* and *PLIVA*.

3. Aviation Preemption Precedent in the Courts of Appeals

With a dearth of support for the proposition that the field of aircraft design and manufacture is preempted, Appellees attempt to muster support from select language in the opinions of other Courts of Appeals. Their efforts are unavailing.

Appellees observe that various Courts of Appeals have described the entire field of aviation safety as preempted, but, on inspection, even those courts have carefully circumscribed the scope of those rulings. The Second, Ninth, and Tenth Circuits all assess the scope of the field of aviation safety by examining the pervasiveness of the regulations in a particular area rather than simply determining whether the area implicated by the lawsuit concerns an aspect of air safety. *See Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013) (inquiring as to “whether the particular area of aviation commerce and safety implicated by the lawsuit is governed by pervasive federal regulations” (quoting *Martin*, 555 F.3d at 811) (alteration and internal quotation marks omitted)); *Goodspeed Airport L.L.C. v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210-11 (2d Cir. 2011) (“[C]oncluding that Congress intended to occupy

the field of air safety does not end our task. . . . [T]he inquiry is twofold; we must determine not only Congressional intent to preempt, but also the scope of that preemption. “The key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted[.]” (second alteration in original) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 107 (1992)); *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1329 (10th Cir. 2010) (“Based on the pervasive federal regulations concerning flight attendant and crew member training and the aviation safety concerns involved when regulating an airline’s alcoholic beverage service, we conclude that NMLCA’s application to an airline implicates the field of airline safety that Congress intended federal law to regulate exclusively.”).²²

²² Thus, although described as field preemption, these two-part tests define the relevant “field” so narrowly as to result in an analysis that resembles conventional conflict preemption. See *Williamson*, 562 U.S. at 330 (asking “whether, in fact, the state tort action conflicts with the federal regulation” (citation and internal quotation marks omitted)). Indeed, in *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 (1992) (plurality opinion), on which the Second Circuit relied in *Goodspeed* to articulate its test, the Supreme Court rested its plurality opinion on conflict preemption rather than field preemption. See *Goodspeed*, 634 F.3d at 209 n. 4, 210-11 (recognizing that the categories of preemption “are not rigidly distinct,” but that, while field preemption may be considered a “subset of conflict preemption,” courts often recognize field preemption and conflict preemption as separate doctrinal categories (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990))).

Notably, several district courts have also rejected field preemption in the aviation context and thereafter considered whether conflict preemption applies. See, e.g., *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103, at *23 (D.S.D. 2006); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 836 (E.D. Tex.

In any event, to date, the Courts of Appeals have held that aviation products liability claims are not preempted, although they have taken a variety of different approaches to reach that result. *See Martin*, 555 F.3d at 812; *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788-89, 794-95 (6th Cir. 2005); *Pub. Health Trust*, 992 F.2d at 294-95; *Cleveland*, 985 F.2d at 1442-47. The Ninth Circuit has held that the entire field of aviation safety is preempted, *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468-69 (9th Cir. 2007), but that products liability claims are not within that preempted field, drawing a line between areas of law where the FAA *has* issued “pervasive regulations”—such as passenger warnings, *id.* (concluding that state law negligence claims for failure to warn passengers of medical risks accompanying long flights are preempted), and pilot qualifications, *Ventress v. Japan Airlines*, 747 F.3d 716, 721-23 (9th Cir.), *cert. denied*, 135 S. Ct. 164 (2014) (holding state law claims implicating pilot qualifications and medical standards fall within the preempted field of aviation safety because “unlike aircraft stairs, [they] are pervasively regulated”)—and other areas where the FAA has not—such as products liability claims for allegedly defective airstairs, *Martin*, 555 F.3d at 808-11.

The Tenth and Eleventh Circuits, in addressing products liability claims, have held that not only are those claims governed by state law, but also that the entire field of aviation safety is not preempted. *See Pub. Health Trust*, 992 F.2d at 295; *Cleveland*, 985 F.2d at 1447. While

2006); *Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396, 1400 (D. Haw. 1990).

the basis for their broader holdings is now in doubt,²³ both of those Circuits still hold that aviation products liability claims are governed by state law. The Sixth Circuit’s approach is most difficult to decipher: In a single opinion, it relied on *Abdullah* for the proposition that “federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation” yet also applied Kentucky tort law to a design defect products liability claim involving a navigational instrument. *Greene*, 409 F.3d at 788-89, 794-95. The most logical reading of *Greene* is that it holds products liability claims not to be preempted, as any other interpretation would render futile its extensive analysis of the design defect claim

²³ The Tenth and Eleventh Circuits both relied in part on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the canon of *expressio unius est exclusio alterius* to conclude that because products liability claims were outside the scope of the ADA’s express preemption clause, they were not preempted. Although this employment of *expressio unius* has been called into question by more recent Supreme Court authority, see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872-73 (2000), courts in the Eleventh Circuit continue to apply *Public Health’s* broad holding, see *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253-55 (11th Cir. 2003); *Psalmund v. Delta Air Lines, Inc.*, No. 1:13-cv-2327, 2014 WL 1232149, at *3 (N.D. Ga. Mar. 25, 2014); *North v. Precision Airmotive Corp.*, No. 6:08-cv-2020, 2011 WL 679932, at *4-5 (M.D. Fla. Feb. 16, 2011). The fate of *Cleveland* is less certain. In *O’Donnell*, the Tenth Circuit reversed course and held that the field of aviation safety is preempted. *O’Donnell*, 627 F.3d at 1322. Several district courts, including the District Court here, have stated without explanation that *Cleveland* has been abrogated by *O’Donnell*. See, e.g., *Sikkelee*, 45 F. Supp. 3d at 448 n.16. While *O’Donnell* narrowed *Cleveland’s* holding, it did not purport to overturn *Cleveland’s* application to products liability claims, but rather concluded that it “does not dictate the outcome in this case.” 627 F.3d at 1326. Thus, *Cleveland’s* holding that products liability claims are not preempted still appears to be the law of the Tenth Circuit.

under state law. *See Martin*, 555 F.3d at 811; *McWilliams v. S.E., Inc.*, 581 F. Supp. 2d 885, 888-92 (N.D. Ohio 2008).

Even those Courts of Appeals that have not directly addressed the issue have adopted approaches to aviation preemption that suggest they would reach a similar result. The Seventh Circuit has clearly indicated its understanding that state law applies to aviation products liability claims. *See Bennett*, 484 F.3d at 908-09 (“Defendants’ early theory that federal law occupies the field of aviation safety and thus ‘completely preempts’ all state law has been abandoned. . . . Illinois tort law supplies the claim for relief. On that much all parties agree. For decades aviation suits have been litigated in state court when the parties were not of diverse citizenship.”). And the Fifth Circuit has found field preemption only of the narrower field of passenger safety warnings, *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004), and otherwise has applied state law to aviation products liability claims, *e.g.*, *McLennan*, 245 F.3d at 425-26.

In sum, no federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or otherwise field preempted, and Appellees have been unable to identify a single decision from any court, other than the District Court here, that has held the mere issuance of a type certificate conclusively establishes a defendant’s compliance with the relevant standard of care.

E. The Parties’ Policy Arguments

In addition to their legal arguments, the parties present various policy arguments in support of their respective positions. While we are not unsympathetic to those arguments, they carry no sway in face of clear evidence of congressional intent and the guidance we draw from the

Supreme Court's preemption jurisprudence. Nonetheless, for the sake of completeness, we address those arguments briefly here.

First, in support of field preemption and a federal standard of care, Appellees and their amici warn that allowing state tort law to govern design defect claims will open up aviation manufacturers to tremendous potential liability and the unpredictability of non-uniform standards applied by juries throughout the states. *See, e.g.*, Br. of Amicus Curiae Gen. Aviation Mfrs. Ass'n 18-24. Even if we accepted the premise that members of the aviation manufacturing industry would suffer more harm from exposure to tort liability than any other manufacturer that sells its products in all fifty states, this policy argument could not lead us to find field preemption without the requisite congressional intent. And as even the FAA acknowledges, "[a]lthough allowing a defendant to be held liable for a design defect in an engine that has received a type certificate from the FAA is in some tension with Congress's interest in national uniformity in safety standards with oversight by a single federal agency, Congress struck a balance between protecting these interests in uniformity and permitting States to compensate accident victims." FAA Ltr. Br. 12.

Nor are we moved by Appellees' predictions of the dire consequences to aircraft and component manufacturers of permitting products liability claims to proceed under state tort law, for our holding does not effect a sea change. On the contrary, it simply maintains the status quo that has existed since the inception of the aviation industry, preserving state tort remedies for people injured or killed in plane crashes caused by manufacturing and design de-

fects. That status quo leaves intact the traditional deterrence mechanism of a state standard of care, with attendant remedies for its breach. Thus, while perhaps contrary to certain policies identified by Appellees and their amici, our holding furthers an overriding public policy and one we conclude is consistent with the Federal Aviation Act, FAA regulations, GARA, and decisions of the Supreme Court and our sister Circuits: promoting aviation safety. *See* 49 U.S.C. §§ 40101(a)(1)-(3), 44701(a).

On the other side of this debate, in arguing that type certificates should have no significance for conflict preemption, much less field preemption, Appellant contends that FAA preapproval of particular specifications provides no assurance of safety because the FAA delegates ninety percent of its certification activities to private individuals and organizations, known as designees, which can include the manufacturers themselves. U.S. Gov't Accountability Office, GAO-05-40, *Aviation Safety: FAA Needs to Strengthen the Management of Its Designee Programs* 3 (2004); *see also Junhong v. Boeing Co.*, 792 F.3d 805, 808 (7th Cir. 2015) (“Instead of sending a cadre of inspectors to check whether every aircraft design meets every particular of every federal rule and policy, the FAA allows [manufacturers] to do some of the checking [themselves].”). We too have recognized that designees receive inconsistent monitoring and oversight from the FAA, and many have some association with the applicant, so that in essence “[s]ome manufacturers are able to grant themselves a type certificate.” *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 166 (3d Cir. 2006); *see also Varig Airlines*, 467 U.S. at 818 n.14 (expressing concern that the staff of the FAA “performs only a cursory review of the substance of the overwhelming volume of documents submitted for its approval” (alteration, internal

quotation marks, and citation omitted)). Even the FAA acknowledges that, “[i]n light of its limited resources,” the agency designates outside organizations to perform some of the FAA’s work in preparing a type certificate. FAA Ltr. Br. 14. From these alleged “flaws” in the review process, Appellant argues that the agency preapproval of specifications in the type certificate amounts to an unreliable self-policing regime that should play no role in even conflict preemption.

This very same argument, however, was raised in *Bartlett* and failed to carry the day. While the dissenters decried that granting “manufacturers of products that require preapproval . . . *de facto* immunity from design-defect liability” would force the public “to rely exclusively on imperfect federal agencies with limited resources,” *Bartlett*, 133 S. Ct. at 2495 (Sotomayor, J., dissenting), the majority held that because generic drug manufacturers are required to directly mirror the preapproved labels of their brand-name counterparts and are thus “prohibited from making any unilateral changes” to their labels, state law design defect claims were foreclosed by “a straightforward application of pre-emption law,” *id.* at 2471, 2480. Although the resource limitations and extent of outsourcing of parts of the review process highlight the need for the FAA’s vigilant oversight, the FAA still makes the ultimate decision to approve the particular design specifications sought in a type certificate. 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21. Thus, the reasoning of the *Bartlett* majority, 133 S. Ct. at 2473, 2480, and the consideration we must give to the FAA’s views under separation of powers principles, *see Wyeth*, 555 U.S. at 576-77, lead us to conclude that the FAA’s preapproval process for aircraft component part designs must be accorded due weight under a conflict preemption analysis.

In sum, the parties' policy arguments notwithstanding, the case law of the Supreme Court and our sister Circuits confirm our conclusion: We are dealing with an area at the heart of state police powers, and we have no indication of congressional intent to preempt the entire field of aviation design and manufacture. We therefore decline the invitation to create a circuit split and to broaden the scope of *Abdullah's* field preemption to design defects when the statute, the regulations, and relevant precedent militate against it.

IV. Conclusion

We conclude that the District Court erred in granting summary judgment on Sikkelee's design defect claims on the basis of field preemption. The field of aviation safety we identified as preempted in *Abdullah* does not include product manufacture and design, which continues to be governed by state tort law, subject to traditional conflict preemption principles. Accordingly, we will vacate and remand for further proceedings consistent with this opinion.²⁴

²⁴ Appellees should address to the District Court in the first instance their argument that Sikkelee's claims fail as a matter of Pennsylvania law. Given the basis for its judgment, the District Court had no need to reach that question and it is not fairly encompassed within the order certified for this interlocutory appeal. *See Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000) (declining to consider on interlocutory appeal issues unaddressed by the district court below).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4193

JILL SIKKELEE, Individually and as Personal Representative of the Estate of David Sikkelee, deceased,
Appellant

v.

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 as Joint Venturer and Successor-In-Interest; KELLY AEROSPACE POWER SYSTEMS, INC., Individually and as Joint Venturer and Successor-In-Interest a/k/a Electrosystems, Inc. a/k/a Confuel Inc.; ELECTROSYSTEMS, INC., Individually and as Joint Venturer and as Successor-In-Interest a/k/a Consolidated Fuel Systems, Inc. a/k/a Confuel, Inc.; CONSOLIDATED FUEL SYSTEMS, INC., a/k/a Confuel, Inc.

Filed: June 7, 2016

SUR PETITION FOR REHEARING

BEFORE: McKEE, *Chief Judge*, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and VAN ANTWERPEN,¹ *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

¹ Judge Van Antwerpen's vote is limited to panel rehearing only.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 4:07-cv-00886

JILL SIKKELEE, Individually and as Personal Representative of the Estate of David Sikkelee, deceased,
Plaintiff

v.

PRECISION AIRMOTIVE CORPORATION, PRECISION AIRMOTIVE LLC, PRECISION AEROSPACE CORPORATION, PRECISION AEROSPACE SERVICES LLC, PRECISION AVIATION PRODUCTS CORPORATION, PRECISION PRODUCTS LLC, ZENITH FUEL SYSTEMS LLC, BURNS INTERNATIONAL SERVICES CORPORATION, FORMER FUEL SYSTEMS, INC., MARK IV INDUSTRIES, INC., TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, TEXTRON INC., AVCO CORPORATION, KELLY AEROSPACE, INC., KELLY AEROSPACE POWER SYSTEMS, INC., ELECTROSYSTEMS, INC., CONSOLIDATED FUEL SYSTEMS, INC., Defendants.

Filed: September 10, 2014

MEMORANDUM

BRANN, District Judge.

For the following reasons, the motion for summary judgment of AVCO Corporation, on behalf of its Lycoming Engines Division (hereinafter, “Lycoming”), is granted in part and denied in part.

I. Background

Before turning to Lycoming’s pending motion for summary judgment, the Court should review the relatively long history of this products liability case. Commenced in May 2007 by way of a 103-page Complaint, the case was originally assigned to the Honorable John E. Jones III, and was reassigned to the undersigned almost six years later on January 17, 2013.

Plaintiff is Jill Sikkelee (hereinafter, “Sikkelee”), individually and as personal representative of the estate of David Sikkelee (hereinafter, “David”); David was Jill’s husband when he died piloting an airplane in 2005. Sikkelee’s Complaint asserts that David’s “aircraft lost power as a result of an engine fuel delivery system [*i.e.*, carburetor] malfunction/defect [that, in turn, caused] the aircraft and its pilot [*i.e.*, David] to lose control and crash” shortly after takeoff from Transylvania County Airport in Brevard, North Carolina. (Complaint, May 16, 2007, ECF No. 1 ¶ 11). The Complaint asserts claims against seventeen defendants associated with the alleged “malfunction/defect” that supposedly caused David’s crash and death. Sikkelee predicated her claims on state law theories of strict liability, breach of warranty, negligence, misrepresentation, and concert of action.

Sikkelee's claims against five defendants were dismissed by stipulation on Dec. 22, 2008 (ECF No. 102); two more defendants were dismissed by stipulation on April 14, 2010 (ECF No. 140); and settlement with four more defendants was approved on July 13, 2010. (ECF No. 146).

On August 13, 2010, more than three years after the Complaint was filed, Judge Jones dismissed Sikkelee's claims against the remaining defendants. A decade before, in *Abdullah v. Am. Airlines*, 181 F.3d 363 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit 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," though "traditional state and territorial law remedies continue to exist for violation of those [federal] standards."¹ *Id.* at 367, 375. Ten years later, Judge Jones concluded that *Abdullah* compelled dismissal of Sikkelee's Complaint: "[B]ased upon the state of the controlling law, this action is indeed controlled by *Abdullah*." *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 438-39 (M.D. Pa. 2010) (hereinafter, "*Sikkelee I*"). Therefore, continued Judge Jones, "any claims that Plaintiff asserts under a state-law standard of care"—*i.e.*, all of Sikkelee's claims in the Complaint—"must necessarily be dismissed." *Sikkelee I*, 731 F. Supp. 2d at 438-439.

¹ Which is to say, the Circuit Court "did not conclude in *Abdullah* that the [plaintiffs's] common law negligence claims themselves were preempted; instead, [the Circuit Court] determined only that the standard of care used in adjudicating those claims was preempted. Local law still governed the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies." *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 125 (3d Cir. 2010).

Although she had opposed the extension of *Abdullah* to her claims partly on the ground that “there is no specific federal regulation pertaining to the actual design, construction, inspecting, and testing [of the] carburetor/engine fuel system at issue [in this case . . . , *i.e.*,] [t]here is a gap, unlike the facts in *Abdullah* ” (Pl. Br., May 6, 2009, ECF No. 117 at 20), Judge Jones nevertheless granted Sikkelee “leave to amend the Complaint and assert claims under federal standards of care.” *Sikkelee I*, 731 F. Supp. 2d at 439. On August 31, 2010, Sikkelee filed a 155-page Amended Complaint. (ECF No. 160).

As the case neared its fourth anniversary, Judge Jones granted Lycoming’s motion to dismiss Sikkelee’s claims for breach of warranty, misrepresentation, and concert of action. 2011 WL 1344635, at *4 (M.D. Pa. Apr. 8, 2011). Sikkelee followed with a Second Amended Complaint (137 pages, for those keeping track) on April 18, 2011 (ECF No. 205), and by the time Judge Jones decided on March 13, 2012, that “Pennsylvania law will apply to the liability issues remaining in th[is] case,”² the termination of additional parties left Lycoming as the only defendant in the case. (ECF No. 288 at 1-2).

Just past the wooden anniversary, with the matter pared down to Sikkelee’s claims asserting Lycoming’s negligence and strict liability, Judge Jones decided two Lycoming motions for summary judgment on July 3, 2012

² Given Judge Jones’s previous determination that *Abdullah* applies and that, accordingly, federal law supplies the standard of care in this case, Pennsylvania law is preempted insofar as it imposes a standard of care on Lycoming.

n an opinion reported at 876 F. Supp. 2d 479 (2012) (hereinafter, “*Sikkelee II*”). Upon consideration of the parties’s briefs, which “focus[ed] primarily on the issue of whether or not Lycoming is a manufacturer” subject to potential liability under Pennsylvania products liability law, Judge Jones denied Lycoming’s motions in part, holding that “genuine issues of material fact remain with regard to whether Lycoming is a manufacture [*sic*] relative to the defective carburetor and overhaul of the engine in 2004, whether a defect existed, and whether said defect proximately caused the Plaintiff’s injuries.” *Sikkelee II*, 876 F. Supp. 2d at 493, 495. He also, however, “grant[ed] summary judgment to the limited extent that Plaintiff’s claims may be construed to allege a defect in the engine in 1969,” reasoning that “Plaintiff has offered no evidence . . . demonstrating that the engine was defective when it left the Lycoming’s Williamsport manufacturing plant in 1969 or that a defect existing at that time caused the 2005 aircraft accident.” *Id.* at 486. Judge Jones ordered that “[t]he case shall proceed on the negligence and strict liability design defect theories asserted by the Plaintiff as they relate to the 2004 engine overhaul.” *Id.* at 495.

On July 26, 2012, at Lycoming’s urging, Judge Jones amended the Order that accompanied *Sikkelee II* to include a statement under 28 U.S.C. § 1292(b) encouraging the Third Circuit to hear an interlocutory appeal on the issue of “whether the Pennsylvania Supreme Court would adopt the RESTATEMENT (THIRD) OF TORTS or continue in its application of the RESTATEMENT (SECOND) OF TORTS.” (ECF No. 306). Judge Jones had predicted in *Sikkelee II* that the Pennsylvania Supreme Court would be guided by the Restatement (Second) of Torts, and denied Lycoming’s motions for summary judg-

ment based on his application of the Restatement (Second). Deeming the Restatement (Second) versus Restatement (Third) issue “a controlling question of law” (ECF No. 306), Judge Jones suspended briefing on Lycoming’s then-pending motion for reconsideration in order to give the parties the benefit of the Third Circuit’s expected disposition of Lycoming’s interlocutory appeal (July 26, 2012, ECF No. 307).

On September 14, 2012, a panel of the Third Circuit denied Lycoming’s Petition for Permission to Appeal Judge Jones’s July 3, 2012 Order. 2012 WL 4953074 (3d Cir. Sept. 14, 2012). Lycoming petitioned for rehearing *en banc* and panel rehearing. The Third Circuit likewise rejected these petitions on October 17, 2012, but its Order decidedly instructed that “federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to sections 1 and 2 of the *Restatement (Third) of Torts*.” 2012 WL 5077571 (3d Cir. Oct. 17, 2012) (emphasis added). The same day, Judge Jones denied as moot Lycoming’s pending motion for reconsideration of *Sikkelee II* and provided that “[t]he parties MAY, at their election, file new motions for reconsideration, guided by the Circuit’s direction that the RESTATEMENT (THIRD) is applicable to this action.” (ECF No. 324). On October 31, 2012, Lycoming filed a motion for reconsideration of *Sikkelee II* to the extent it denied Lycoming’s motion for summary judgment. (ECF No. 332). That motion for reconsideration was pending at the time this case was reassigned to the undersigned in January 2013.

On June 3, 2013, applying against Lycoming the demanding standard that confronts a motion for reconsideration,³ this Court held that neither an intervening change in law nor supposed clear error warranted reversal of *Sikkelee II*, 2013 WL 2393005 (M.D. Pa. June 3, 2013), a determination the Court reinforced and elaborated upon in an Order dated July 9, 2013, 2013 WL 3456953 (M.D. Pa. July 9, 2013), at oral argument on November 13, 2013 (Tr., Nov. 25, 2013, ECF No. 459 at 199-204), and in a Memorandum dated November 20, 2013 (ECF No. 456 at 4 n.2). Trial was then scheduled for December 2, 2013.

Some months before trial, however, it became clear that Sikkelee had hurdled the fence of the Restatement (Third) only to be confronted by the menacing hound that is *Abdullah* lurking on the other side. On October 24, 2013, Sikkelee proposed jury instructions incorporating some eighteen federal regulations and pronouncements of the Federal Aviation Administration (hereinafter, the “FAA”) and Civil Aeronautics Board, the FAA’s predecessor. (ECF No. 409-7). The Court reviewed the proposed charge with a raised eyebrow, puzzled by Sikkelee’s derivation of a standard of care from certain regulations,

³ See page *2 of the Court’s Memorandum:

The Court may amend its prior ruling “if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Howard Hess Dental Lab. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 251 (3d Cir. 2010) (quoting *Max’s Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

and unable to grasp the causal relevance of the alleged breach of others.

At a November 13, 2013 hearing, the Court expressed doubt concerning the validity of Sikkelee’s proposed instructions and heard her counsel’s attempts to justify them. By way of a November 20, 2013 Memorandum, the Court—after explaining the difficulty that courts have had fashioning jury instructions consistent with *Abdullah* generally⁴—recounted the hearing as follows:

[P]laintiff’s counsel was all but completely unable to assist the Court in, to use Chief Judge Conner’s phrase, “formulating an intelligible statement of applicable law.” The Court’s confidence in the capacity of plaintiff’s proposed instructions to guide the Court steadily diminished throughout the argument, and was lost completely when plaintiff’s counsel made the incredible suggestion that the Court could fulfill its duty to instruct the jury by delivering Pennsylvania pattern instructions on

⁴ At pages 2-3, the Court wrote,

As Chief Judge Conner has explained, “FAA regulations relating to the design and manufacture of airplanes and airplane component parts were never intended to create federal standards of care.” [*Pease v. Lycoming Engines*, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011)]. This makes construing the regulations as standards of care, which *Abdullah* requires, “arduous and impractical.” *Pease*, 2011 WL 6339833, at *23. Chief Judge Conner found under similar circumstances that “[t]he court’s obligation to instruct the jury with these obscure regulations will be severely challenged, and there is no jurisprudential guidance to assist the court in formulating an intelligible statement of applicable law.” *Id.*

negligence. *See Abdullah*, 181 F.3d at 376 (remanding case to district court to “evaluate whether the evidence on standards of care and the instructions given to the jury conformed to the federal aviation safety standards as we have described them”).

(ECF No. 456 at 5-6).

With trial approaching, the Court found itself “without sufficient guidance from either precedent or the parties as to the law that will govern not only the jury’s deliberations, but also the Court’s rulings on the relevance of evidence, motions pursuant to Fed. R. Civ. P. 50, and other questions.” (*Id.* at 6). The Court postponed trial to March 10, 2014 and ordered Sikkelee to submit a brief showing why the regulations she cited constitute the standard of care applicable to Lycoming; Lycoming was given the opportunity to respond. (Nov. 20, 2013, ECF No. 457).

Upon review of the parties’s papers, the Court determined that the issues raised would profit from examination in the posture of summary judgment. Not incidentally, an order resolving a motion for summary judgment would, in the Court’s view, be conducive of interlocutory consideration by the Third Circuit under 28 U.S.C. § 1292(b), consideration which this Court resolved to encourage in light of the vexation these issues have caused this Court and others. *Compare Lewis v. Lycoming*, 957 F. Supp. 2d 552 (E.D. Pa. 2013), *with Pease v. Lycoming Engines*, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011).⁵ On February 10, 2014, the Court ordered summary

⁵ The Third Circuit has permitted appeals of analogous issues in the past. *See In re TMI*, 67 F.3d 1103, 1106 (3d Cir. 1995) (certified

judgment briefing limited to Lycoming's contention that, in view of the parties's evidence, no reasonable jury could conclude that Lycoming's allegedly tortious conduct breached a federal standard of care and caused David's crash thereby. Trial was postponed. (ECF No. 478). In accordance with the Court's Order, Lycoming moved for summary judgment on March 19, 2014. (ECF No. 482).

II. Summary Judgment Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" where it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" where "the evidence is such that a reasonable jury," giving credence to the evidence favoring the nonmovant and making all reasonable inferences in the nonmovant's favor, "could return a verdict for the nonmoving party." *Id.*

For movants and nonmovants alike, the assertion "that a fact cannot be or is genuinely disputed must" be supported by "citing to particular parts of materials in the record," or by "showing that the materials cited [by an adverse party] do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . .

question involving whether specified federal regulations constituted standard of care in case involving claims arising from the Three Mile Island nuclear meltdown).

consider the fact undisputed for purposes of the motion.” Fed. R. Civ. P. 56(e)(2).

Thus, where the moving party’s motion is properly supported and his evidence, if not controverted, would entitle him to judgment as a matter of law, the nonmoving party, to avoid summary judgment in his opponent’s favor, must answer by setting forth “genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 250. In the face of the moving party’s evidence, the nonmoving party’s mere allegations, general denials or vague statements will not create a genuine factual dispute. *See Bixler v. Cent. Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1302 (3d Cir. 1993). Only citation to specific facts is sufficient. *Anderson*, 477 U.S. at 250.

Where the nonmoving party has had adequate time for discovery and will bear the burden of proof at trial, “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial,” and summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

III. Facts⁶

Sikkelee claims that Lycoming is liable for alleged defects in the “engine, . . . carburetor, . . . [and] fuel delivery

⁶ Where the parties’s accounts differ, the Court views the facts and draws reasonable inferences therefrom in Sikkelee’s favor. *See Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013) (facts and reasonable inferences drawn therefrom must be favorable to party opposing motion for summary judgment).

system” (as well as various “manuals and instructions” related to these components) installed in the aircraft (a Cessna 172N) that David was piloting when he crashed fatally in 2005 (hereinafter, the “accident aircraft”). (2d Am. Compl., Apr. 18, 2011, ECF No. 205 ¶¶ 141, 144, 162). The nature of Lycoming’s association with the components at issue is important to the Court’s analysis and will be set forth in some detail.

In 1969, Lycoming manufactured the engine—a model O-320-D2C bearing the serial number L-6590-39A (hereinafter, the “subject engine”)—that was installed in the accident aircraft at the time of David’s crash. (Def. Facts, Mar. 19, 2014, ECF No. 483 ¶¶ 6, 8 (hereinafter, “Def. Facts I”). Most of the subject engine’s 35-plus years were spent in storage: Lycoming shipped the engine to Beagle Aircraft, Inc., in September of 1969, and it was not until 1998 that the engine was installed “factory new” on the accident aircraft. (Def. Facts I ¶ 7; Pl. Facts, Apr. 28, 2014, ECF No. 488 ¶ 7 (hereinafter “Pl. Facts”).

When the subject engine left Lycoming’s control in 1969, it shipped with a carburetor⁷—setting 10-3678-32, serial number A-25-15850 (hereinafter, the “original carburetor”)—but the carburetor installed in the subject engine when the accident aircraft crashed in 2005 was not the original carburetor. (Def. Facts I ¶¶ 7, 9, 11; Pl. Facts ¶ 9). When the engine came out of storage in 1998, an overhauled Marvel-Schebler/Precision Airmotive Corp. (hereinafter, “Precision”) model MA-4SPA carburetor bearing serial number CK 6 11739 was installed in accordance

⁷ A “carburetor” is defined at Merriam-Webster.com as “the part of an engine in which gasoline is mixed with air so it will burn and provide the engine with power.”

with the O-320-D2C's type-certificated design (more on FAA "type certification" shortly), which calls for installation of the MA-4SPA. (Pl. Ex., ECF No. 234-1; Pl. Ex., ECF No. 234-6 at 8).

Then, just under a year before David's accident, Kelly Aerospace, Inc. (hereinafter, "Kelly"), an FAA certified repair station, overhauled another MA-4SPA carburetor—this one bearing serial number CK 6 10964 and originally manufactured by Precision in 1978 (hereinafter, the "replacement carburetor")—and installed it on the subject engine, again in accordance with Lycoming's type-certificated design. (Pl. Facts ¶ 10; Pl. Ex., ECF No. 234-6 at 8; Pl. Ex., ECF No. 54 ¶ 101; Pl. Ex., ECF No. 207 ¶ 22). In performing the overhaul, Kelly was required to "use the methods, techniques and practices prescribed in [Lycoming's] maintenance manual or Instructions for Continued Airworthiness," 14 C.F.R. § 43.13(a) (2004), and did so (Pl. Ex., ECF No. 234-6 at 9-10). As part of the overhaul, Kelly removed parts from the replacement carburetor and replaced them with parts⁸ that Kelly had manufactured under its FAA-issued Parts Manufacturer Approval (hereinafter, "PMA") (more on PMA shortly). (Def. Facts I ¶ 10). The Kelly-overhauled replacement carburetor was powering the subject engine when David was piloting the accident aircraft in 2005.

Those are the basics. To better understand Lycoming's association with—and duties with regard to—

⁸ These parts include the "pump plunger assembly," the "valve and seat assembly," the "single piece venturi," the "throttle shaft," and the "carburetor float," the last of which was actually manufactured by a vendor to Kelly. (Def. Facts I ¶¶ 12-13).

the allegedly defective components, however, it is necessary to specify where Lycoming is situated in the context of the Civil Air Regulations (hereinafter, the “CARs”) and the Federal Aviation Regulations (hereinafter, the “FARs”). General background for the CARs and the FARs is provided in the margin.⁹

⁹ The Kreindler Treatise provides a helpful guide through the statutory and regulatory evolution generally relevant to the case at bar:

As early as 1938, . . . Congress . . . enacted the Civil Aeronautics Act of 1938 (CAA), the predecessor to the Federal Aviation Act.

Originally, under the CAA, the Civil Aeronautics Board (CAB), an agency within the Department of Commerce, was the agency responsible for the regulatory aspects of aviation safety, including promulgating safety rules [and] inspecting and certifying aircraft,

In 1958, the Federal Aviation Act (the Act) was passed and continues to be the basic law of the land concerning aviation. With the enactment of the Federal Aviation Act of 1958, the regulatory functions of the CAB were transferred to a newly created Federal Aviation Agency. Subsequently, Congress enacted the Department of Transportation Act of 1966, which transferred the duties of the Federal Aviation Agency, in their entirety, to the newly created Department of Transportation (DOT) and its Secretary of Transportation. The Department of Transportation Act did not change the substance of the Federal Administration Act, but rather only reorganized the administrative hierarchy.

The Federal Aviation Agency, renamed as the Federal Aviation Administration (FAA), remains as an agency within the DOT and acts for the Secretary of Transportation in the safety rule-making, air-traffic controlling, and certification processes. The CAB was stripped of its safety and investigatory functions

. . . .

The Federal Aviation Regulations (FARs) are promulgated pursuant to the Federal Aviation Act and have the full force and effect of law. The FARs are a voluminous body of ever-changing

IV. Regulatory Structure

Lycoming is the holder of a “type certificate” for the Lycoming O-320-D2C model engine. (Def. Facts I ¶ 2). To obtain this status, which it did in 1966, Lycoming demonstrated the O-320-D2C’s compliance with certain “airworthiness” standards, *see* CAR § 13.10 (1964),¹⁰ and type certification denotes that, in the view of the Federal Aviation Administrator (the head of the FAA, hereinafter, the “Administrator”), the engine “is of proper design, material specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations” prescribed by the FAA. 49 U.S.C. § 1423(a) (1964). The MA-4SPA carburetor, which is actually manufactured by Precision (or, in the past, Precision’s

rules and regulations governing the qualifications, certification, and operation of aircraft, pilots, instructors, air carriers, and air traffic controllers. . . . In large part, they constitute a broad recodification of the former Civil Air Regulations, which were originally issued by the Secretary of Commerce, then by the Civil Aeronautics Board (CAB), then by the Federal Aviation Agency, and finally by the Federal Aviation Administration (FAA). They are codified in Title 14 of the Code of Federal Regulations.

2 Kreindler, *Aviation Accident Law* § 9.01(1)-(2) (Matthew Bender).

¹⁰ When discussing type certification of the O-320-D2C, the Court refers to the CARs and relevant provisions of the Federal Aviation Act as they stood in 1964 because, in the Court’s understanding, the 1964 regulations and statute governed Lycoming’s 1966 application for type certification. Otherwise, the Court refers to the FARs and Federal Aviation Act as they stood in 2004, doing so on the understanding that the 2004 regulations and statute governed at the time of David’s accident.

predecessors), is a component of the O-320-D2C's type-certificated design.¹¹ (Pl. Ex., ECF No. 234-9).

By virtue of its status as a type certificate holder, Lycoming has the privilege of “obtain[ing] a production certificate” for the O-320-D2C. 14 C.F.R. § 21.45 (2004). A production certificate holder is permitted to produce duplicates of the certificated product, 49 U.S.C. § 44704(c) (2004), and Lycoming obtained such a certificate (although when it did so is not clear from the record) for the O-320-D2C (Pl. Ex., ECF No. 234-5 at 12) by demonstrating that it maintains a quality control system adequate to ensure that “each [O-320-D2C produced] will meet the design provisions of the [O-320-D2C] type certificate,” 14 C.F.R. § 21.139 (2004), and that it has developed “procedures necessary to ensure that each article produced conforms to the type design and is in a condition for safe operation,” 14 C.F.R. § 21.143(a) (2004). The FARs take account of the fact that a type certificated product (*e.g.*, an engine) is often an assemblage of smaller components (*e.g.*, a carburetor) purchased from outside suppliers (*e.g.*, Precision), making clear that a production certificate holder must establish procedures for ensuring the quality and conformity of all components integrated in the certificated product. 14 C.F.R. § 21.143(a)(2) (2004). Once a production certificate is obtained, the holder is responsible for maintaining its quality control system and for “[d]etermin[ing] that each part and each completed product . . . submitted for airworthiness certification or approval conforms to the approved design and is in a condition for safe

¹¹ Since at least the 1970s, it appears, Lycoming has licensed its design of the MA-4SPA to Precision or Precision's predecessors in interest. (Pl. Opp'n Br., Apr. 28, 2014, ECF No. 487 at 12; Pl. Ex., ECF No. 152-4 at 9; Pl. Ex., ECF No. 234-13).

operation.” 14 C.F.R. § 21.165 (2004). The subject engine is one of many O-320-D2Cs produced under Lycoming’s production certificate.

Like all machines, aircraft engines must be maintained to ensure proper functioning, and the FAA would prefer that you not rely on your handy uncle to do the job. Accordingly, only persons designated qualified by the FARs are permitted to “maintain, rebuild, alter, or perform preventative maintenance on an . . . aircraft engine,” a designation which includes agents of “[t]he holder of a repair station certificate.” 14 C.F.R. § 43.3(a) & (e) (2004). Kelly held such a certificate when it overhauled the replacement carburetor. Under federal regulations, type certificate holders are required to “prepare and make available an approved manual containing instructions for the installation, operation, servicing, maintenance, repair, and overhaul of the engine,” CAR § 13.21 (1964), and as noted above, Kelly was required to follow Lycoming-prepared manuals and instructions in performing the overhaul. 14 C.F.R. § 43.13(a) (2004).

Finally, sometimes parts of aircraft engines should be replaced to ensure proper functioning. Rather than give the holder of a production certificate or his supplier a monopoly on replacements, however, the FARs permit others to “produce a modification or replacement part for sale for installation on a type certificated product . . . pursuant to a Parts Manufacturer Approval issued” by the Administrator. 14 C.F.R. § 21.303(a) (2004). An applicant obtains a PMA once the “Administrator finds, upon examination of the design and after completing all tests and inspections, that the design meets the airworthiness requirements of the Federal Aviation Regulations applicable to the product on which the part is to be installed”—

unless “the design of the part is identical to the design of the part that is covered under a type certificate,” in which case no such showing is necessary—and the applicant “submits a statement certifying that he has established” a system for “ensur[ing] that each completed part conforms to its design data and is safe for installation on applicable type certificated products.” 14 C.F.R. § 21.303(d) & (g) (2004). Once a manufacturer has obtained a PMA, he is responsible for “determin[ing] that each completed part conforms to the design data and is safe for installation on type certificated products.” 14 C.F.R. § 21.303(k) (2004). A number of the parts that Kelly installed on the replacement carburetor were manufactured under a “Parts Manufacturer Approval.” (Pl. Facts ¶ 10).

In sum, the regulatory framework attempts to ensure—by way of issuing various certificates/authorizations and imposing responsibilities on their holders—that the design of an aircraft engine is safe (type certification), that duplicate engines manufactured for the public conform to the approved design (production certification), that engine maintenance and repairs are performed in accordance with manuals and instructions prepared by the manufacturer, 14 C.F.R. § 43.13 (2004), and that any replacement parts for the engine are either identical to the original parts described in the type certificate or otherwise airworthy (PMA). But in recognition of the fact that the Administrator’s authorization of an engine’s design and manufacture is an imperfect predictor of the engine’s future performance in the field, holders of type certificates and PMAs are required to “report any failure, malfunction, or defect in any product, part, process, or article” that they have manufactured when they determine that the item “has resulted in any of [various] occurrences,” including “engine failure.” 14 C.F.R. § 21.3(a)

(2004). If the item left the holder's quality control system, the holder must report any defect "that it determines could result in any of [various] occurrences," again including "engine failure." 14 C.F.R. § 21.3(b) (2004). Such reports are "made to the Aircraft Certification Office in the region in which the person required to make the report is located." 14 C.F.R. § 21.3(e) (2004).

When the Administrator determines that an "unsafe condition exists" in an engine and that the "condition is likely to exist or develop in other [engines] of the same type design" and, further, that "design changes are necessary to correct the unsafe condition," the type certificate holder must change the design and, upon the Administrator's approval of the design, "make available the descriptive data covering the changes to all operators of [engines] previously certificated under the type certificate." 14 C.F.R. §§ 21.99 & 39.5 (2004). Absent an unsafe condition, if the Administrator or the type certificate holder finds "through service experience that changes in type design will contribute to the safety of the [engine], the holder of the type certificate may submit appropriate design changes for approval." 14 C.F.R. § 21.99(b) (2004). Upon approval, "the manufacturer shall make information on the design changes available to all operators of the same type of product." *Id.*

Sikkelee asserts that David's crash was caused by Lycoming's violation of various federal regulations that govern type certification and breaches of the duties of type certificate and production certificate holders. In particular, Sikkelee argues that Lycoming's design of the O-320-D2C engine (and its MA-4SPA carburetor) violated a number of design-related requirements that an engine must satisfy for type certification and that Lycoming

failed to provide an adequate instruction manual (CARs §§ 13.21, 13.100(a), 13.101, 13.104 & 13.110(a) (1964)); that Lycoming breached the duty of a production certificate holder to ensure that “each part and each completed product . . . submitted for . . . approval [by the certificate holder] conforms to the approved design and is in a condition for safe operation” (14 C.F.R. § 21.165 (2004)); and that Lycoming breached the duty of a type certificate holder to report engine defects to the Administrator and to suggest design changes in order to make the O-320-D2C safer (14 C.F.R. §§ 21.3 & 21.99 (2004)).

V. Discussion

Lycoming calls for summary judgment in its favor on various grounds: (1) Sikkelee fails to set forth federal regulations establishing a standard of care applicable to Lycoming’s allegedly tortious conduct; (2) assuming *arguendo* that the regulations cited by Sikkelee establish an applicable standard of care, Sikkelee adduces no evidence from which a reasonable jury could infer that Lycoming violated the regulations; and (3) assuming *arguendo* that Lycoming violated regulations that establish an applicable standard of care, Sikkelee proffers no evidence from which a reasonable jury could infer that the violation caused David’s crash. (Def. Supp. Br., Mar. 19, 2014, ECF No. 484 at 8 (hereinafter, “Def. Supp. Br.”)). In particular, Lycoming argues that (4) FAA type certification of the O-320-D2C (including its carburetor, the MA-4SPA) “conclusively establishes” that the engine met any design-related standard of care established by federal regulations. (Def. Supp. Br. at 9).

Sikkelee retorts with her own battery of arguments: (1) Judge Jones “held that [Sikkelee] presented genuine

issues of material fact as to whether Lycoming breached federal standards of care,” and the law of the case doctrine dictates that the Court should adhere to this ruling (Pl. Opp’n Br., Apr. 28, 2014, ECF No. 487 at 6, 8, 48 (hereinafter, “Pl. Opp’n Br.”)); (2) Lycoming has previously admitted that certain federal regulations apply in this litigation (Pl. Opp’n Br. at 7); and (3) by their terms, various federal regulations govern Lycoming’s allegedly tortious conduct, namely 14 C.F.R. §§ 21.3, 21.99 & 21.165 (2004), and CAR §§ 13.21, 13.100, 13.101, 13.104 & 13.110 (1964). Sikkelee also argues that (4) Judge Jones’s determination that federal law preempts the field of aviation safety and supplies the standard of care for this case dictates *per force* that federal regulations reach Lycoming’s allegedly tortious conduct because “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s] aircraft engine design.” (Pl. Opp’n Br. at 43). Further, (5) Sikkelee extrapolates from the “premise” of *Abdullah* that, where no specific federal regulation governs Lycoming’s conduct, the Court must recognize a federally supplied “overall concept” of appropriate behavior requiring reasonably careful conduct from aircraft designers, and corresponding liability for carelessness or recklessness that causes injury. (*Id.* at 45-46). Finally, (6) Sikkelee argues that the FAA’s issuance of a type certificate for the O-320-D2C does not preclude a jury from finding that Lycoming’s design fell short of the standards set by federal regulation.

As a mode of proceeding, the Court will first address briefly Sikkelee’s arguments (1) and (2), holding that neither the law of the case doctrine nor the doctrine of judicial estoppel defeat Lycoming’s motion for summary

judgment. The Court will then skip to Sikkelee's arguments (4)-(6), rejecting each and explaining why Lycoming is therefore entitled to summary judgment in relation to Sikkelee's claims alleging violations of design-related regulations. After granting Lycoming summary judgment in relation to two additional regulatory bases for Sikkelee's claims, the Court will then discuss briefly the single basis on which Sikkelee may proceed to trial.

(a) The "law of the case" doctrine should not bar the Court from considering Lycoming's Motion for Summary Judgment.

Denying (in part) Lycoming's previous motion for summary judgment, Judge Jones held that Sikkelee "has created a genuine issue of material fact for the jury with respect to whether Lycoming breached the applicable federal standards of care by negligently designing a defective product that proximately caused" David's crash. *Sikkelee II*, 876 F. Supp. 2d at 495. Based on this ruling, Sikkelee now asserts that "[t]he law of the case mandates that material questions of fact abound as to Lycoming's breach of the cited federal regulations." (Pl. Opp'n Br. at 8).

The Court disagrees. Courts tend not to revisit issues already decided, a tendency named the "law of the case" doctrine. *See Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997). The doctrine "does not limit the power of trial judges to reconsider their prior decisions," but the Third Circuit "has identified two prudential considerations that limit a court's authority to do so. First, the court must explain on the record the reasoning behind its decision to reconsider the prior ruling. Second, the court must take

appropriate steps so that the parties are not prejudiced by reliance on the prior ruling.” *Id.*

The law of the case doctrine should not bar the Court from considering Lycoming’s pending Motion for Summary Judgment. For one thing, the law of the case doctrine does not apply to Judge Jones’s denial of Lycoming’s previous summary judgment motion:

A denial of a motion for summary judgment cannot determine the law of a case because it is an interlocutory order subject to reconsideration at any time before final judgment in the case. It does not conclusively resolve any legal issue or find any fact . . . and has no claim- or issue-preclusive effect. Therefore, the law of the case doctrine does not apply to a denial of a summary judgment motion.

11 *Moore’s Federal Practice*, § 56.121(1)(c) (Matthew Bender 3d ed.).

Moreover, assuming *arguendo* that the doctrine does apply, there is good reason to reconsider Judge Jones’s holding. As Judge Jones noted at the time of his decision in 2012, “the parties’ briefs focus primarily on the issue of whether or not Lycoming is a manufacturer” for purposes of Pennsylvania law, not on the issue of whether Lycoming breached federal standards, and Judge Jones reached his holding on the latter issue “after briefly engag[ing] in a largely independent analysis.” *Sikkelee II*, 876 F. Supp. 2d at 493-94. This is not the foundation upon which highly reliable holdings are built. In addition, Sikkelee has presented no evidence showing prejudice to her resulting from reliance on Judge Jones’s prior ruling and

the Court perceives none. Thus, “prudential considerations” do not counsel against reconsideration of Judge Jones’s holding.

(b) Lycoming’s previous statements should not bar it from asserting that it is not liable for violating various CARs and FARs.

Without using the phrase (or citing any relevant caselaw), Sikkelee opposes Lycoming’s summary judgment motion on the ground that the doctrine of judicial estoppel applies. Because “Lycoming . . . [previously] admitted in this case that federal regulations apply” (Pl. Opp’n Br. at 7), Lycoming should now be barred from asserting that it cannot be found liable under various FARs and CARs, Sikkelee argues.

The Court disagrees. “Under the doctrine of judicial estoppel, a court can defend the integrity of the judicial process by barring a party from taking contradictory positions during the course of litigation.” *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 261 (3d Cir. 2009). “Though there is no rigid test for judicial estoppel, three factors inform a federal court’s decision whether to apply it: there must be (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) a showing that estoppel addresses the harm and no lesser sanction [is] sufficient.” *Id.* at 262 (internal quotation marks and alterations omitted).

Either ignoring or not recognizing the existence of these factors, Sikkelee does not argue all of them, focusing all but exclusively on the first. But her argument fails even here. Most of the statements Sikkelee attributes to Lycoming were actually mouthed by other defendants (since dismissed from this case) in support of a motion

joined by Lycoming. (*See* Pl. Opp'n Br. at 28-29). But by joining other defendants in the motion (*see* Def. Supp. Br., Apr. 6, 2009, ECF No. 111 at 2), Lycoming did not adopt the statements made in the other parties's briefs—indeed it could not. *See* L.R. 7.8(a) (“No brief may incorporate by reference all or any portion of any other brief”). Thus, the statements that Sikkelee pulls from other parties's briefs are not Lycoming's admissions. Moreover, the statements that Sikkelee attributes to Lycoming are not irreconcilably inconsistent with Lycoming's current position that it is not liable for violating various FARs and CARs. For these reasons, judicial estoppel doctrine should not bar Lycoming from summary judgment.

(c) Federal preemption of the field of aviation safety does not necessarily imply that there must be a regulation “at hand” for Lycoming to have violated, and neither principles of field preemption nor *Abdullah* require this Court to fill in the gaps of the FARs and CARs with an “overall concept” of due care for engine designers; accordingly, Sikkelee's arguments (4) and (5) are rejected.

Although she does not stress the point at this stage of the game, it is worth remembering that Sikkelee's original position in this litigation—a position she no doubt maintains today—was that *Abdullah* does not control design defect claims against aircraft engine manufacturers. Judge Jones conceded that he perceived the “wisdom” of this position—as does this Court¹²—but thought his hands

¹² *See also Pease v. Lycoming Engines*, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (“The undersigned concludes that *Abdullah* fails in its application to aviation products liability

were tied by “the state of the law as articulated by the Third Circuit,” and held that federal law must supply the standard of care in this case because state standards are preempted. *Sikkelee I*, 731 F. Supp. 2d at 438. Since Judge Jones’s decision was issued in 2010, Judge Harvey Bartle III has reasoned that the pronouncements of the Third Circuit that Judge Jones viewed as “controlling” in *Sikkelee I*, *id.*, were actually “dicta, not the holding of *Abdullah*,” *Lewis v. Lycoming*, 957 F. Supp. 2d 552, 558 (E.D. Pa. 2013), a view this Court also finds compelling.¹³

Nevertheless, the Court will not revisit Judge Jones’s determination to apply *Abdullah*, a determination reached after a careful effort to be faithful to the Third Circuit’s precedents in this jumbled area of the law.¹⁴ (*Cf.* section V.(a) *supra* (deciding to revisit issue previously addressed by Judge Jones where briefs submitted to Judge Jones at that time focused primarily on a different

cases, and for the following reasons, it would be far more facile to employ the applicable state standards of care in aviation products liability cases.”).

¹³ Judge Bartle would subject defendants like Lycoming to the standards of “state products liability, negligence, or breach of warranty law.” *Id.* at 599.

¹⁴ Examining the relevant precedents, Judge Jones noted that the Third Circuit in *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3d Cir. 2010), “reaffirmed that ‘*Abdullah*’s primary holding was that federal law preempted the entire field of aviation safety,” and “strongly, and perhaps explicitly, suggest[ed] that the manufacture of aircraft parts is . . . contained in this field and, thus, subject solely to federal standards of care.” *Sikkelee I*, 731 F. Supp. 2d at 437-38 (quoting *Elassaad*, 613 F.3d at 126). *See also Pease v. Lycoming Engines*, 2011 WL 6339833, at *21-*22 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (collecting evidence for the proposition that “the Third Circuit’s definition of ‘air safety’ litigation encapsulates aviation product liability cases”).

issue and Judge Jones reached his holding based on largely independent analysis)). Therefore, *Abdullah* applies.

Her prime position defeated, Sikkelee now offers second-best arguments purporting to show that the impact of *Abdullah* on her claims is limited. In particular, she argues that if her claim is subject to field preemption, then there must be a federal regulation “at hand” for Lycoming to have violated because “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s] aircraft engine design.” (Pl. Opp’n Br. at 43). Relatedly, Sikkelee argues that *Abdullah* implies the general principle that aircraft engine designers should not act carelessly or recklessly, even where no specific federal regulation governs their conduct, and that if the Court finds that “no general or specific regulation” reaches Lycoming’s allegedly tortious conduct, then “Lycoming is not immune . . . [-] there would simply be no preemption.” (*Id.* at 46).

The Court rejects both arguments. First, *Abdullah* does not compel the conclusion that the CARs and FARs imply a general standard of care for aircraft engine designers. At issue in *Abdullah* was plaintiffs’s suit for damages sustained while passengers on the severely turbulent American Airlines Flight 1473. 181 F.3d at 365. The plaintiffs brought suit “against defendant American Airlines, Inc., alleging negligence on the part of the pilot and flight crew in failing to take reasonable precautions to avoid the turbulent conditions known to them and in failing to give warnings reasonably calculated to permit plaintiffs to take steps to protect themselves.” *Id.* Judge Roth held that the plaintiffs could recover only if the conduct of the

airline's personnel fell below federal aviation safety standards.

In reaching this conclusion, Judge Roth analyzed the 1958 Federal Aviation Act (hereinafter, the "Aviation Act") and federal regulations concerning aviation and "[found] implied federal preemption of the entire field of aviation safety." 181 F.3d at 365. "[T]he [Aviation Act] and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation and . . . these standards are not subject to supplementation by, or variation among, jurisdictions." *Id.* "[F]ederal law establishes the applicable standards of care in the field of air safety." *Id.* at 367.

Examining federal law in order to identify the relevant standard of care, Judge Roth held that, in addition to any specific applicable regulations, "there is an overarching general standard of care under the [Aviation Act] and its regulations[,] . . . [arising] in particular from 14 C.F.R. § 91.13(a)." *Abdullah*, 181 F.3d at 365. Section 91.13(a) of the FARs provides with respect to "aircraft operations for the purpose of air navigation" that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13(a) (2004). Judge Roth instructed that § 91.13(a) should form an aspect of the standard of care applicable to the *aircraft operations* at issue in *Abdullah* on remand. *Abdullah*, 181 F.3d at 365.

The case at bar, however, is not an aircraft "operations" case. *See* 14 C.F.R. § 1.1 (2004) ("*Aircraft* means a device that is used or intended to be used for flight in the air." "*Operate*, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose . . . of

air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).”) (emphasis in original). No party argues that this is an “operations” case, and the Court sees no reasonable argument to be made, *see Ellassaad v. Independence Air, Inc.*, 613 F.3d 119, 129-30 (3d Cir. 2010) (analyzing application of § 91.13 at length); therefore, § 91.13(a) does not readily supply a general standard of care to fill gaps left by the relevant FARs and CARs. Accordingly, *Abdullah* does not compel the conclusion that aircraft designers are governed by a general standard of care.

That much is clear, but how the Court should adapt *Abdullah* to apply in the context of the case at bar is anything but. *See Pease v. Lycoming Engines*, 2011 WL 6339833, at *23 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (“[C]onstruing and applying FAA safety regulations as federal standards of care in [aircraft product liability cases] will be arduous and impractical”).¹⁵ A major source of the difficulty is that Judge Roth’s identification of § 91.13(a) (which bears a definite resemblance to a common law negligence standard) as an aspect of the standard of care applicable to the *aircraft operations* at issue in *Abdullah* seems to have provided critical support for her decision to find the field of aviation safety preempted.¹⁶ *Abdullah*, 181 F.3d at 365, 376. It is tempting, if for no reason

¹⁵ Deciding how federal regulations should translate into a standard of care has proven a bedeviling task in other contexts as well. *See, e.g., In re TMI*, 67 F.3d 1103, 1107 (3d Cir. 1995) (“Although it is clear that federal law governs the standard of care for tort claims arising from nuclear accidents, it is more difficult to discern the precise contours of that federal duty”).

¹⁶ The existence of a “general standard” backstopping the “specific standards” set forth in the relevant federal regulations seems to have

other than an appreciation of symmetry, to conclude that because Judge Roth found the field of aviation safety federally preempted at least partly because she derived a general standard of care from the federal regulations applicable in *Abdullah*, that placing the facts of this case within the preempted field (as Judge Jones did) implies the existence of a general standard of care.

been an important aspect of *Abdullah*. Faulting the trial judge for the “narrow nature of the federal standard” applied below, *Abdullah*, 181 F.3d at 365, Judge Roth reasoned that, “[i]n a case . . . where there is no specific provision or regulation governing air safety, § 91.13(a) provides a general description of the standard required for the safe operation of aircraft,” *id.* at 371:

Thus, in determining the standards of care in an aviation negligence action, a court must refer not only to specific regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless.

Id. And faulting the Tenth Circuit’s decision in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *abrogated by U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318 (10th Cir. 2010), for concluding that, because state common law duties do not conflict with duties imposed by the federal aviation safety regulations, federal law therefore does not preempt the common law, Judge Roth wrote that “there is no gap in the federal standards to fill with a state common law standard [because] [t]he § 91.13(a) prohibition of ‘careless or reckless’ operation of an aircraft occupies the apparent void.” *Abdullah*, 181 F.3d at 374. “[B]ecause the Administrator [of the FAA] has provided both general and specific standards, there is no need to look to state or territorial law to provide standards beyond those established by the Administrator.” *Id.*

The Court is faced with an uncomfortable choice: (1) read an “overall concept” of careful conduct into the federal regulations, dissociated from any anchor in the text, or (2) apply only the standards specifically enunciated in the relevant federal regulations, leaving gaps unfilled by any overall concept of care, thus taking a sledgehammer to one of the pillars (load-bearing or ornamental?) that underlaid Judge Roth’s finding of preemption in *Abdullah*.¹⁷

¹⁷ A third option that would normally be available—to fill the gaps with state common law not inconsistent with any specific federal regulation—is unavailable as a consequence of Judge Jones’s decision that this case is within the field of aviation safety governed by *Abdullah*: “If Congress has preempted a field—whether it be expressly or by implication—state laws attempting to regulate within that field will be invalidated no matter how well they comport with substantive federal policies.” *Abdullah*, 181 F.3d at 374 (internal quotation marks omitted). See also *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (“Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”).

A fourth option is Judge Bartle’s approach—to hold that aircraft design defect cases are not within the field governed by *Abdullah*—but Judge Jones’s previous ruling likewise precludes taking this option. See also *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009) (“[W]hen the agency issues ‘pervasive regulations’ in an area, like passenger warnings, the FAA preempts all state law claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.”).

There may be yet a fifth option, though it seems to have been eliminated by the Third Circuit’s decision in *In re TMI*, 67 F.3d 1103 (3d Cir. 1995), a case that set the groundwork for the Circuit Court’s approach in *Abdullah*, 181 F.3d at 367. Four years prior to the 1995 *TMI* decision, Judge Scirica concurred in an earlier Judge Mansmann opinion in the same case, 940 F.2d 832 (3d Cir. 1991), but doubted

Judge Mansmann's holding that, because the federal government occupied the field of nuclear safety, "plaintiffs' rights [in nuclear safety torts actions] will necessarily be determined, in part, by reference to federal law, namely the federal statutes and regulations governing the safety and operation of nuclear facilities." *TMI*, 940 F.2d at 860. Judge Scirica wrote,

[I]t is not clear to me that Congress has precluded state law tort suits predicated on standards of care that do not conform to federal regulation. As the majority notes, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed. 752 (1983), the Court held that the Atomic Energy Act pre-empts all state regulation of nuclear safety. But in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Court considered the holding of *Pacific Gas* in the context of private tort law. In *Silkwood*, the Court held that Congress did not intend to pre-empt punitive damages awards under state tort law. The Court relied on the legislative history of the Price-Anderson Act, which indicated that Congress intended to retain all state tort law remedies. The Court noted that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted," and that the defendant has the burden of demonstrating pre-emption. *Id.* at 255, 104 S.Ct. at 625. It also indicated that a state may impose strict liability for nuclear accidents. *Id.* at 254, 256, 104 S.Ct. at 625. See also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186, 108 S.Ct. 1704, 1712-13, 100 L.Ed. 2d 158 (1988) (Characterizing *Silkwood* as finding that "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted.").

If state tort law may hold a nuclear plant operator strictly liable, or establish some other standard of care that does not conform to federal regulation, the federal law quotient in public liability actions would be decreased. As noted in the majority opinion, notwithstanding *Silkwood*, at least two district courts have found that the Price-Anderson Act pre-empts state tort suits that do

Sikkelee would have the Court pick option (1), but the Court thinks option (2) is the better choice. By what principle could the Court choose option (1)? To do so would undermine an unambiguously crafted—and therefore, the Court presumes, deliberate—regulatory scheme. The relevant regulations prohibit careless or reckless *aircraft operation* generally. Makers of aircraft engines and components, in contrast, are subject only to specific regulations devised to ensure engine safety; Sikkelee points to no regulation imposing a generally applicable standard of care functioning as a catchall; once the engine or component-maker has complied with the specific regulations, he has met any standard of care the federal regulations can be said to constitute. Moreover, since this is an area in which this Court has no “authority to formulate federal common law . . . absent some congressional authorization to formulate substantive rules of decision,” *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), and “neither . . . *Abdullah*, nor any language in the FAA contemplates such [rules],” *Martin v. Midwest Express Airlines, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009) (“The [Aviation Act] itself makes no mention of federal courts developing a federal common law standard of care for airplane personal injury actions . . .”), the Court does

not adopt federal regulations as the standard of care. *See Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495 (N.D. Ill. 1991); *O’Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672 (C.D. Ill. 1990). In *Hennessy*, however, the court left open the issue of whether state law may impose strict liability for nuclear incidents.

Unlike the majority, I would not decide these issues here.

TMI, 940 F.2d at 870 (Scirica, J., concurring). Four years later, however, Judge Scirica held that Judge Mansmann’s ruling “controls, and federal law determines the standard of care and preempts state tort law” in the field of nuclear safety. *TMI*, 67 F.3d at 1107.

not view the creation of federal common law as an option. Ultimately, Sikkelee’s argument for a general standard of care represents a mere policy disagreement with the regulations as written, and for the Court to follow Sikkelee’s approach would be the functional equivalent of filling in the gaps left by the FARs and CARs with state common law, which is anathema to the very notion that the field is preempted. The Court will not travel this road.

Of course, option (2) is not without its drawbacks, which have been foreshadowed *supra*. Not recognizing a general prohibition on careless or reckless conduct leaves gaps in the regulatory scheme governing makers of aircraft engines and components. These gaps are problematic in the sense that they give one pause before concluding that the case at bar is within the field of preemption identified in *Abdullah*. See *Abdullah*, 181 F.3d at 367 (“[I]mplied federal preemption may be found where federal regulation of a field is pervasive . . . or where state regulation of the field would interfere with Congressional objectives.”) (internal citations omitted).

Gaps are, however, not terribly problematic once it has been determined—and it has been, by Judge Jones—that this case is within a preempted field, and this is so even if Sikkelee is left remediless because she cannot identify any relevant federal regulation that Lycoming has violated.

In other words, Sikkelee is incorrect when she suggests that “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s] aircraft engine design.” (Pl. Opp’n Br. at 43). So long as its intent is clearly expressed, Congress’s decision to leave an area *unregulated* by both the federal and

state governments preempts the field as effectively as its decision to have federal law regulate so comprehensively that state law supplementation is undesirable. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Moreover, where Congress determines that common law tort claims should play no role in a regulatory scheme, preemption may leave an injured person remediless. *See, e.g., Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012) (Locomotive Inspection Act preempted defective design/warning claims of railroad locomotive repairman exposed to asbestos, leaving repairman remediless).¹⁸ Stated conversely, the absence of federal regulation that reaches Lycoming’s allegedly tortious conduct does not necessarily imply that “there [is] simply . . . no preemption.”¹⁹

¹⁸ This result obtained even though relevant federal regulations did not address hazards arising from locomotive repair. Indeed, the agency to which Congress delegated regulatory authority had never regulated locomotive repair and disclaimed the power to do so. *Kurns*, 132 S. Ct. at 1274 (Sotomayor, J., concurring in part and dissenting in part). Despite the consequent regulatory gap, the Supreme Court’s field preemption holding “[left] petitioners without a remedy for what they allege was fatal exposure to asbestos in repair facilities.” *Id.* at 1275.

¹⁹ Of course, *Abdullah* held neither that Congress desired to leave the field of aviation safety unregulated, nor that Congress envisioned no regulatory role for state common law remedies to play. As the Third Circuit has clarified,

We did not conclude in *Abdullah* that the passengers’ common law negligence claims themselves were preempted; instead, we determined only that the standard of care used in adjudicating those claims was preempted. Local law still governed the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.

Thus, in accordance with Judge Jones determination that *Abdullah* controls and Sikkelee’s failure to provide persuasive reasons for undergirding the relevant specific federal regulations with a general standard of care, the Court will choose option (2) *supra*. The Court will measure Lycoming’s allegedly tortious conduct against the specific federal regulations that Sikkelee asserts are applicable; if there is no genuine issue as to whether Lycoming violated the specific regulations, then summary judgment in Lycoming’s favor is warranted.

(d) Type certification of the O-320-D2C entitles Lycoming to summary judgment on the design-related regulatory grounds asserted by Sikkelee.

Lycoming argues that type certification of the O-320-D2C renders a number of Sikkelee’s claims—namely those alleging failure to comply with regulations governing the design of aircraft engines—a dead letter:

The FAA alone establishes the regulations governing the design requirements for aircraft engines, and the FAA alone, through the type certification process, decides whether the standards of care it has created by those regulations have been met. . . . [T]he question of whether any standards in those regulations were met cannot exist separately from the issuance of the type certificate. Under field preemption, the standards can only be what

Elassaad, 613 F.3d at 125. The Court mentions the extreme case of Congress leaving an area totally unregulated simply to illustrate that, contrary to Sikkelee’s contention, the federal government’s pervasive regulation of the field of aviation safety does not imply that there must there be a federal regulation “at hand” for Lycoming to have violated.

the FAA defines them to be, and the FAA alone decides if they have been met.

(Def. Supp. Br. at 34).

Sikkelee disagrees, arguing that Lycoming's position is contrary to the United States Supreme Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and contrary to Chief Judge Conner's decision in *Pease*, 2011 WL 6339833, at *13-*14 (M.D. Pa. Dec. 19, 2011).

To evaluate the significance of the O-320-D2C's type certificate for Sikkelee's claims, the Court must examine the regulatory basis for Sikkelee's assertion that Lycoming breached "federal standards related to design and continued airworthiness." (Pl. Opp'n Br. at 30). Sikkelee cites to four regulations that she supposes comprise a federal standard of care for aircraft engine design: CAR § 13.100, CAR § 13.101, CAR § 13.104, and CAR § 13.110(a) (1964). Each of these provisions is taken from the CARs's Part 13, which says of the "[a]pplicability of this part" that it "establishes standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft." CAR § 13.0 (1964). Part 13 further provides that

[a]n engine shall be eligible for type certification under the provisions of this part if it complies with the airworthiness provisions hereinafter established or if the Administrator²⁰ finds that the provision or provisions not complied with are compensated for by factors which provide an equivalent

²⁰ Defined as the then-existing Administrator of Civil Aeronautics.

level of safety: *Provided*, That the Administrator finds no feature or characteristic of the engine which renders it unsafe for use on aircraft.

CAR § 13.10. At CAR § 13.13(a), it is further provided, in relevant part, that “[a]n applicant shall be issued a type certificate when he demonstrates the eligibility of the engine by complying with the requirements of this part.”

An applicant for type certification “demonstrates the eligibility” of his engine by “submit[ting] to the Administrator . . . descriptive data, test reports, and computations.” CAR § 13.14(a). The descriptive data is

known as the type design and shall consist of such drawings and specifications as are necessary to disclose the configuration of the engine and all the design features covered in the requirements of this part, such information on dimensions, materials, and processes as is necessary to define the structural strength of the engine, and such other data as are necessary to permit by comparison the determination of the airworthiness of subsequent engines of the same type.

CAR § 13.14(b).

Finally, under the heading of “[d]esign and [c]onstruction,” there are the provisions that Sikkelee asserts Lycoming violated. Part 13 provides that reciprocating engines (like the O-320-D2C) should, as a general matter, “not incorporate design features or details which experience has shown to be hazardous or unreliable.” CAR § 13.100(a). The sections that follow, CARS §§ 13.101-13.115 (hereinafter, along with CAR § 13.100(a), the “design and construction regulations”), set forth specific

standards for design devised by regulators to ensure safety when an engine is “installed, operated, . . . maintained in accordance with the instruction manual . . . and . . . fitted with an appropriate propeller.” CAR § 13.100(b). Sikkelee asserts that there is a genuine issue of material fact concerning whether Lycoming violated three of these:

CAR § 13.101—The suitability and durability of all materials used in the engine shall be established on a basis of experience or tests. All materials used in the engine shall conform to approved specifications which will insure their having the strength and other properties assumed in the design data.

CAR § 13.104—All parts of the engine shall be designed and constructed to minimize the development of an unsafe condition of the engine between overhaul periods.

CAR § 13.110(a)—The fuel system of the engine shall 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.

In tension with Sikkelee’s assertion that Lycoming has violated these provisions, the FAA’s issuance of a type certificate for the O-320-D2C in 1966 denotes the Administrator’s finding that the engine met all applicable requirements. *See* CAR § 13.13(a) (“An applicant shall be issued a type certificate when he demonstrates the eligibility of the engine by complying with the requirements of this part.”). Lycoming argues that the FAA’s determination is conclusive.

The Court holds that Lycoming is entitled to summary judgment on Sikkelee’s claims asserting violations of CAR §§ 13.100(a), 13.101, 13.104, and 13.110. As set forth *supra*, each of the cited regulations establishes a requirement that applicants must satisfy *in order to obtain a type certificate*, and it is the Administrator alone who decides whether a certificate should be issued. To hold as Sikkelee proposes, the Court would be required to take two questionable steps away from the apparent regulatory scheme. First, the design and construction regulations would have to be read as freestanding mandates possessing a meaning independent of that given them by the Administrator’s application, not as mere prerequisites for type certification, an interpretation without apparent basis in the regulation. *Cf. Martin*, 555 F.3d at 814 (Bea, J., concurring) (“[I]n the field of aircraft design regulation, the FAA directs only the conditions under which the government may grant an aircraft design a ‘certificate’ that permits production; the FAA does not prescribe general standards the manufacturer must follow to exercise reasonable care in designing a safe aircraft.”). Second, the Administrator would be dethroned as the arbiter of whether the requirements set forth in the design and construction regulations have been met. How else—after the Administrator’s decision to type certify the O-320-D2C in 1966—could the Court allow a jury to reconsider Lycoming’s compliance with the design and construction regulations? The Court concludes that the natural interpretation of the regulatory scheme commands that, under the circumstances, Sikkelee is precluded from proving

that Lycoming violated CAR §§ 13.100(a), 13.101, 13.104, and 13.110 as a matter of law.²¹

²¹ In *Pease*, Chief Judge Conner concluded that “[t]here is simply no textual support in either the *Abdullah* decision or the Aviation Act that Congress intended the FAA to act as the sole arbiter of whether manufacturers have complied with its own regulations.” This Court disagrees, at least with respect to the design and construction regulations.

The issue is complicated. In the Aviation Act, Congress gave the Administrator the “duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time . . . [s]uch minimum standards governing the design, materials, workmanship, construction, and performance of . . . aircraft engines . . . as may be required in the interest of safety.” 49 U.S.C. § 1421 (1964). Here, the language suggests that the minimum standards are to be prescribed by the Administrator, but that (at least theoretically) anyone might evaluate compliance with them. At 49 U.S.C. § 1423(a) (1964), however, the “Administrator is empowered to issue type certificates for . . . aircraft engines,” and it is commanded that “he shall issue a type certificate” once he finds—after “investigation[s],” “hearings,” and “tests” for his consideration—“that such . . . aircraft engine . . . is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator.” Congress’s creation of this apparatus suggests an intention to give the Administrator sole responsibility for not only prescribing minimum standards, but also for interpreting and applying them in the process of deciding whether an engine is sufficiently safe for the use of pilots and passengers.

As discussed *supra*, the regulations promulgated by the Administrator in accordance with Congress’s mandates show that he viewed “minimum standards governing design” merely as a framework for determining an applicant’s entitlement to a type certificate, *see* CAR § 13.0 (“This part establishes standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.”), and viewed himself as the arbiter of compliance with the standards. The Court should defer to the Administrator’s interpretation. *See Chevron, U.S.A., Inc. v. Natural Res.*

Varig Airlines is not to the contrary. Even Sikkelee does not argue that the holding of the case—*i.e.*, that tort claims against the FAA for alleged negligence in certifying aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act—controls here. Rather, Sikkelee posits that Chief Justice Burger’s description of the FAA’s role in type certification mandates that a jury should be permitted to revisit Lycoming’s compliance with the design and construction regulations. (*See* Pl. Opp’n Br. at 44).

In *Varig Airlines*, Chief Justice Burger explained that the FAA had “implement[ed] [a] ‘spot-check’ system of compliance review” for determining whether an applicant meets the type certification prerequisites:

The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a “spot check” of the manufacturer’s work.

Def. Council, 467 U.S. 837, 843-45 (1984). Moreover, as discussed *infra*, the design and construction regulations are sufficiently vague that, unless the Administrator is given sole responsibility for their interpretation and application, it is difficult to see how Congress’s intention that “the Administrator . . . exercise sole discretion in regulating air safety,” *Abdullah*, 181 F.3d at 369, can be accomplished.

467 U.S. at 816-17, 819. In Sikkelee’s view, the FAA’s approach to determining compliance with the design and construction regulations is too hands-off and would benefit from a jury’s assistance. Therefore, argues Sikkelee, a jury’s reconsideration of Lycoming’s compliance with the regulations must be permitted.

Sikkelee’s argument is lent some credence by Chief Judge Conner’s acceptance of its essentials in *Pease*, where the Chief Judge wrote that jury reconsideration of a manufacturer’s compliance with the design and construction regulations “pragmatically recognizes the limitations of FAA certification.” 2011 WL 6339833, at *14. “Moreover,” in the Chief Judge’s view,

there is a salutary effect of opening the courthouse door: “An inquiry . . . into whether the manufacturer in fact complied with the regulations . . . would assist the FAA in policing a manufacturer’s compliance rather than hampering the agency in this regard.” [*Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630, 636 (Cal. 1984)]. In the case *sub judice*, the [plaintiffs’s] products liability claims regarding the airworthiness of [an] engine serve the public interest of ensuring that [the defendant-manufacturer] complied with all applicable FAA regulations. The [plaintiffs’s] claims will not disrupt the “uniform system of regulation” desired by Congress because the FAA still has sole authority to promulgate regulations. *See Abdullah*, 181 F.3d at 368.

Pease, 2011 WL 6339833, at *14.

To this Court, the Chief Judge's reasoning is incomplete. A jury trial will have the "salutary effect" of "ensuring . . . compli[ance] with all applicable FAA regulations" only if one makes the assumption that a jury will interpret and apply the FAA regulations as would the Administrator himself. But there is no reason to think this assumption will hold in reality. The jury might also interpret and apply the regulations in a more demanding fashion than the Administrator, in which case a trial will have the *un-salutary* effect of invading the federally preempted field of aviation safety.

In this Court's view, that the jury's interpretation and application of the CARs will vary from the Administrator's is more than likely. As Chief Judge Conner himself wrote in *Pease*, "The applicable FAA regulations are acutely technical and often incurably vague." 2011 WL 6339833, at *23. Indeed, when the regulations provide that an "engine shall not incorporate design features or details which experience has shown to be hazardous or unreliable," CAR § 13.100(a), how much experience is contemplated? What are the relevant hazards? If the "suitability and durability of all materials used in the engine shall be established on the basis of experience or tests," CAR § 13.101, how much experience or testing is required? If "[a]ll parts of the engine shall be designed and constructed to minimize the development of an unsafe condition of the engine between overhaul periods," CAR § 13.104, how small should the probability of the development of an unsafe condition be? If the "fuel system of the engine shall 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," CAR § 13.110(a), does this contemplate a negligence or strict standard of liability or,

more likely, is it merely a way of expressing that the system should prove its fitness through the “[i]nspections and tests . . . found necessary by the Administrator,” CAR § 13.15? What should be made of CAR 13.10, which provides that, even if the engine does not satisfy the design and construction regulations, the engine may still be considered safe when the “provisions not complied with are compensated for by factors which provide an equivalent level of safety”?

Faced with these imponderables, the parties, the Court and the jury will likely resort to more familiar negligence standards, a problematic outcome in this federally preempted field. In this regard, Judge Scirica’s decision in *In re TMI* is instructive. 67 F.3d 1103 (3d Cir. 1995). In *TMI*, plaintiffs sought to recover in tort for injuries allegedly caused by the Three Mile Island nuclear meltdown. As in *Abdullah*, the Third Circuit held that, in light of federal preemption of the field of nuclear safety, “federal law determines the standard of care.” *Id.* at 1107. The Third Circuit then endeavored to “discern the precise contours of that federal duty” and rejected plaintiffs’s attempt to fashion a standard of care out of a regulation requiring applicants for “a permit to construct a nuclear power reactor[] [to] identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable.”²² *Id.* at 1107, 1109 (quoting 10 C.F.R.

²² The regulations defined “as low as reasonably achievable” to mean “as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety and other societal and socio-economic considerations, and in relation to the utilization of atomic energy in the public interest.” *TMI*, 67 F.3d at 1109 (quoting 10 C.F.R. § 50.34a(a)).

§ 50.34a(a)). Agreeing with the trial judge that the “as low as is reasonably achievable” requirement—deemed the “ALARA” standard—resulted “essentially, in a negligence standard,” Judge Scirica reasoned that “[a]dopting ALARA as part of the standard of care would put juries in charge of deciding the permissible levels of radiation exposure and, more generally, the adequacy of safety procedures at nuclear plants—issues that have explicitly been reserved to the federal government in general and the [Nuclear Regulatory Commission] specifically.” *TMI*, 67 F.3d at 1115. He continued,

Adoption of a standard as vague as ALARA would give no real guidance to operators and would allow juries to fix the standard case by case and plant by plant. An operator acting in the utmost good faith and diligence could still find itself liable for failing to meet such an elusive and undeterminable standard. Our holding protects the public and provides owners and operators of nuclear power plants with a definitive standard by which their conduct will be measured.

Id.

Jury interpretation and application of the design and construction standards in the case at bar will poke at the same hornets’s nest identified by Judge Scirica. No less than if jurors were permitted to subject manufacturers to state common law duties, jury interpretation and application of the design and construction regulations would put jurors in charge of deciding permissible safety levels and engine designs—issues left to the Administrator. Jurors would fix the standard case by case and engine by engine, resulting in an elusive and undeterminable standard, as

opposed to the “one, consistent means of regulating aviation safety” that Congress intended. *Abdullah*, 181 F.3d at 372.

Therefore, the Court cannot conclude that the supposed inadequacies²³ in the type certification process imply that the jury should be employed to “ensur[e] that Lycoming complied with all applicable FAA regulations.” *Pease*, 2011 WL 6339833, at *14. Rather than ensure such compliance, jury reconsideration of the design and construction requirements (in this case and others) promises to “disrupt the ‘uniform system of regulation’ desired by Congress” and achieved by putting responsibility for type certification with the Administrator. *Id.*

Accordingly, this Court holds that the Administrator’s issuance of a type certificate for the O-320-D2C is conclusive of the engine’s compliance with the design and construction regulations. Lycoming’s motion for summary judgment on Sikkelee’s claims predicated on the violation of these regulations should be granted.

²³ That it relies heavily on manufacturers is not an unambiguously flawed aspect of the type certification process. Granted, agents of the manufacturers are burdened by a conflict of interest that could make them prone to cut corners in the manufacturer’s favor. On the other hand, they likely “possess detailed knowledge of an aircraft[] [or engine’s] design based upon their day-to-day involvement in its development,” *Varig Airlines*, 467 U.S. at 807, knowledge that could make their work more accurate and efficient than that of FAA officials.

(e) Sikkelee’s claims may move forward on the theory that Lycoming violated its duty to report engine defects to the FAA.

The Court holds that Lycoming is entitled to summary judgment in relation to additional FARs,²⁴ primarily because these FARs are meant to ensure that products *conform* to a type design found safe by the Administrator.²⁵ Sikkelee does not claim or proffer evidence showing that the replacement carburetor did not conform to its type design (*see* Pl. Opp’n Br. at 30 (“There is no claim here of defective manufacture.”)); she claims, rather, that the replacement carburetor conformed to a defective type design. Fundamentally, Sikkelee’s claims and her evidence in support of them are mismatched with these regulations.

Sikkelee asserts that Lycoming, as holder of a production certificate for the O-320-D2C, violated its responsibility to “[d]etermine that each part and completed product . . . submitted for airworthiness certification or approval conforms to the approved design and is in a condition for safe operation.” (Pl. Opp’n Br. at 32 (citing 14 C.F.R. § 21.165(b) (2004))).

The Court disagrees. Sikkelee proffers no evidence showing that the allegedly defective replacement carburetor did not conform to its “approved design”; she states

²⁴ Sikkelee has asserted in previous filings that Lycoming violated additional FARs, but the Court assumes that, by not addressing these regulations in her brief, she has abandoned any claims based on them.

²⁵ Sikkelee’s briefs are as exacting as a shock and awe bombing campaign; as a result, the Court sometimes strains to understand how, in her view, a given regulation is relevant. The discussion *infra* represents the Court’s best effort to make sense of Sikkelee’s arguments.

the opposite multiple times. (Pl. Facts ¶¶ 10, 12, 13). She also does not proffer evidence showing that David’s crash was caused by Lycoming’s alleged failure to determine that the carburetor was in a “condition for safe operation.” For one thing, Lycoming’s § 21.165 duty applied (if at all) in 1978—*i.e.*, when the replacement carburetor was hot off the assembly line and initially submitted for airworthiness certification—not in 2004 when Kelly overhauled the replacement carburetor. Sikkelee directs the Court to no evidence showing that Lycoming breached its § 21.165 duty in 1978 or that such breach contributed to the 2005 accident. And there is another hurdle: assuming *arguendo* that Lycoming’s § 21.165 duties extended to Kelly’s submission of the replacement carburetor for airworthiness certification in 2004, Sikkelee directs the Court to no evidence showing that Kelly’s submission was not in a “condition for safe operation.”

According to the FAA, an “engine is in a condition for safe operation when the condition of the engine considering such factors such as wear, damage, and deterioration does not prevent the engine from demonstrating compliance with those requirements of [the airworthiness standards for type certificate issuance] that relate to the safe operation of the engine, and does not result in an unsafe condition to the aircraft.” (Pl. Opp’n Br. at 37 (citing FAA AC 33.4-1, *Instructions for Continued Airworthiness* (Aug. 27, 1999))). Sikkelee blames David’s crash on the O-320-D2C’s carburetor, specifically the MA-4SPA’s “throttle body to float bowl screws [coming] loose due to the faulty design of the lock tab washers as well as gasket

set.” (Pl. Facts ¶ 16).²⁶ But during its 2004 overhaul, Kelly installed “new throttle body to bowl screws and lock tab washers as an attachment system,” and the engine was adorned with an airworthiness approval tag. (Pl. Facts ¶¶ 12, 14).²⁷ Sikkelee proffers no evidence that “the condition of the engine considering factors such as wear, damage, and deterioration” was a factor in the crash; the “condition” of the engine allowed it to function with the same potential for failure as a new engine that conformed to Lycoming’s (allegedly defective) type design.²⁸ Since there is neither evidence showing that the replacement carburetor did not conform to the approved design, nor evidence showing that the replacement carburetor was not in a condition for safe operation, Lycoming is entitled to summary judgment to the extent Sikkelee’s claims are based on the violation of 14 C.F.R. § 21.165.

For much the same reason, Sikkelee fails in her assertion that Lycoming violated regulations requiring it to

²⁶ (*See also* Pl. Opp’n Br. at 15 (“Plaintiff’s expert found that loose throttle body to bowl screws caused a loss of engine power, which was a causal factor in the crash at issue.”)).

²⁷ (*See also* Pl. Facts ¶ 13) (“Lycoming instructed carburetor overhaulers to follow Precision’s manual, which Kelly did, requiring new throttle body to bowl screws and lock tab washers as an attachment system. This defective method of throttle body to bowl attachment for the O-320 series engines was part of the O-320 engine type design, and approved by Lycoming.”)

²⁸ Presumably, then, the subject engine was also no less likely than a new engine to “demonstrat[e] compliance with those requirements of [the airworthiness standards for type certificate issuance] that relate to the safe operation of the engine . . . [and to not] result in an unsafe condition to the aircraft.” To the extent the subject engine would not have demonstrated such compliance or did compromise safety, the design—not the “condition”—of the engine was the problem.

provide “Instructions for Continued Airworthiness.” (Pl. Opp’n Br. at 40-43). First, the relevant CAR—CAR § 13.21 (1964)—actually calls for the type certificate applicant to prepare “an approved manual containing instructions for the installation, operation, servicing, maintenance, repair, and overhaul of the engine”; the requirement of “Instructions for Continued Airworthiness” came later, as did most of the supposed “standards” to which Sikkelee cites. CAR § 13.21 does not supply a “standard.” In any case, the concept of “airworthiness” simply denotes that an engine “conforms to its type certificate” and “is in a condition for safe operation.” (Pl. Opp’n Br. at 36 (citing FAA AC 33.4-1, *Instructions for Continued Airworthiness* (Aug. 27, 1999))). As discussed *supra*, Sikkelee does not claim that the supposedly defective carburetor failed to conform to Lycoming’s type design, and the part of the carburetor that allegedly caused David’s crash was in a condition for safe operation as defined by the FAA.

Moreover, Sikkelee does not really allege or proffer evidence in support of the claim that Lycoming did not comply with the applicable regulations requiring Instructions for Continued Airworthiness. Her position, rather, is that “Lycoming was required to use reasonable care in the design of its continued airworthiness instructions” and failed to do so. (Pl. Opp’n Br. at 41). But there is nothing in the regulations themselves that imposes a reasonable care standard on Lycoming in this regard; Sikkelee has overlaid that common law standard on top of Lycoming’s duty to comply with the federal regulations. Contrary to Sikkelee’s view that “[t]his is a negligence case where Lycoming is held to the standard of reasonable care in complying with the minimum federal regulations” (Pl. Opp’n Br. at 27), it is the minimum regulations

themselves that constitute the standard of care. Accordingly, Lycoming is entitled to summary judgment to the extent Sikkelee's claims are based on a violation of CAR § 13.21.

That leaves Sikkelee's claims based on Lycoming's alleged violation of 14 C.F.R. §§ 21.3 and 21.99 (2004). With respect to § 21.99(b), which provides that "the holder of [a] type certificate [who] finds through service experience that changes in type design will contribute to the safety of the product . . . may submit appropriate design changes for approval [of the Administrator]," Lycoming should be granted summary judgment. Section 21.99(b) is permissive; it does not create a duty. Sikkelee's argument to the contrary—that "[i]t is for a jury to determine whether Lycoming should have issued a design change pursuant to § 21.99(b) [because] [t]his is a negligence case where Lycoming is held to the standard of reasonable care in complying with the minimum federal regulations" (Pl. Opp'n Br. at 27)—has already been rejected by this Court. It is the minimum regulations themselves that constitute the standard of care, and since § 21.99(b) does not impose a standard of care on Lycoming, it cannot serve as the basis for Sikkelee's claims.

So Sikkelee is left with 14 C.F.R. § 21.3, the regulation to which she devotes by far the most attention in her brief (Pl. Opp'n Br. at 8-26), and (relatedly) § 21.99(a). Under § 21.3(a), holders of type certificates are required to "report any failure, malfunction, or defect in any product, part, process, or article" that they manufactured, if the holder determines that the item "has resulted in any of [various] occurrences," including "engine failure." 14 C.F.R. § 21.3(a). If the item left the holder's quality control system, then under § 21.3(b) the holder must report

any defect “that it determines could result in any of [various] occurrences,” again including “engine failure.” Sikkelee proffers a variety of evidence tending to show that Lycoming knew of a defect in the O-320-D2C (namely the MA-4SPA carburetor), but hid the defect from the FAA, arguably preventing the Administrator from ordering “design changes . . . to correct the unsafe condition” under § 21.99(a). (Pl. Opp’n Br. at 15-27; Pl. Facts ¶¶ 16-34).

Lycoming raises four defenses: (1) § 21.3 “does not apply to Lycoming because [Lycoming] did not manufacture the [replacement] carburetor, and the carburetor did not pass through Lycoming’s quality control system; (2) “[n]o evidence exists that Lycoming ever determined that a failure, defect, or malfunction in the subject carburetor could or did result in any of the enumerated safety risks”; (3) Lycoming’s reporting obligation was lifted by the previous reports of others (citing 14 C.F.R. § 21.3(d) (reporting is not necessary when the type certificate holder “knows” that the failure, malfunction, or defect was already reported to the FAA by another person)); and (4) “[n]o evidence exists in this case that [a report from Lycoming to the FAA] would have caused the FAA to issue an Airworthiness Directive²⁹ or otherwise mandate a design change.” (Def. Supp. Br. at 24-27).

The Court rejects Lycoming’s first argument because it mischaracterizes Sikkelee’s theory of liability. In the

²⁹ Airworthiness Directives are issued by the FAA when the agency “finds that . . . [a]n unsafe condition exists in [a] product.” 14 C.F.R. § 39.5 (2004). The Directive “specif[ies] inspections you [*i.e.*, the operator of a given aviation product] must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition.” 14 C.F.R. § 39.11 (2004).

Court's understanding, Sikkelee posits that had Lycoming complied with its § 21.3 reporting responsibilities in relation to the O-320-D2C engines (incorporating MA-4SPA carburetors) that *were* manufactured by Lycoming or *did* go through its quality control system, then a type design change would have been mandated by the Administrator, which would have changed the design of even those carburetors that were not manufactured by Lycoming. Since the identity of the manufacturer of the replacement carburetor is irrelevant under Sikkelee's theory of liability, Lycoming's defense on the basis that it did not manufacture the carburetor fails.

The Court rejects Lycoming's second arguments because Sikkelee adduces enough evidence to create a genuine issue of material fact as to whether Lycoming determined that a defect in the MA-4SPA created safety risks. It is possible that Lycoming never made such a determination, in which case its reporting responsibility was never triggered. But viewing the facts in Sikkelee's favor, it is also possible that Lycoming made the determination, but hid the relevant information from the FAA.

The Court rejects Lycoming's third argument for similar reasons. Sikkelee has adduced enough evidence to allow the jury to compare the "failure, malfunction, or defect" reports of others to the reports that Lycoming allegedly should have made and decide whether Lycoming's reporting duty was rendered unnecessary under § 21.3(d).

Finally, Lycoming is correct that Sikkelee's claim based on § 21.3 is a difficult one because Sikkelee must prove not only that the allegedly defective replacement carburetor caused David's crash, but also that the FAA would have responded to Lycoming's § 21.3 reports—had

Lycoming not breached its duty to make them—by ordering changes to the carburetor’s design or otherwise taking action that would have prevented David’s accident. In other words, Sikkelee must prove that the carburetor’s defective design caused the crash *and* that the carburetor’s design was defective on the date of David’s accident because Lycoming failed to make § 21.3 reports to the FAA. Proving the second element requires establishing that the FAA would have responded meaningfully to the reports.

The circumstances are similar to those in *Stanton v. Astra Pharm. Prod., Inc.*, 718 F.2d 553 (3d Cir. 1983), which involved a claim against the manufacturer of an anesthetic for negligence that caused the plaintiff severe injury. The alleged negligence was the manufacturer’s failure to submit certain adverse-reaction reports to the Food and Drug Administration. On proving causation, Judge Becker wrote that the manufacturer’s negligence “in failing to file the reports is not in itself sufficient to sustain the finding that [the manufacturer] was liable. The negligence must also have been a proximate cause of the [plaintiff’s] injury.” *Stanton*, 718 F.2d at 565. The plaintiff relied on four experts “to establish causation by introducing evidence tending to show that the information withheld from the FDA was of great importance and that the agency could not properly perform its regulatory and supervisory roles without access to the unreported data, and that the FDA would have taken action had it been aware of [the anesthetic’s] propensity to cause adverse reactions despite low dosage.” *Id.* at 568. Calling the issue “an extremely close one,” Judge Becker held that the such evidence was sufficient to support the jury’s verdict in the plaintiff’s favor. *Id.* at 568-69.

In the case at bar, Sikkelee’s evidence is similar to that of the plaintiff in *Stanton*. For example, one of Sikkelee’s experts opines that, “As a former FAA certification engineer, this reportable failure, malfunction, or defect information associated with the Lycoming O-320 series engines and the Model MA-4SPA carburetor, is something that I would want to have and use to determine if an Airworthiness Directive should be issued to correct the unairworthy carburetor” (Pl. Ex., ECF No. 234-5 at 24). Since Sikkelee may be able to make a case for causation on par with the plaintiff in *Stanton*, summary judgment should be denied as to her claims based on Lycoming’s violation of 14 C.F.R. § 21.3.

VI. Conclusion

The watchword in *Abdullah* was Congressional intent. Yet having endeavored to reconcile *Abdullah* with the federal regulatory scheme that governs aviation design and manufacturing, this Court—either by way of its own error or that of the precedents it has followed—has reached holdings that it imagines have little to do with Congressional intent. Fortunately, whether this Court has been pushed to pier’s end by precedent or has stumbled to the edge itself, the Circuit Court has the authority to pull it back to safety. *See* 28 U.S.C. § 1291.

For the foregoing reasons, Lycoming’s motion for summary judgment is granted in part and denied in part.

BY THE COURT:

s/ Matthew W. Brann

Matthew W. Brann

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 07-cv-886

JILL SIKKELEE, Individually and as Personal Representative of the Estate of David Sikkelee, deceased,
Plaintiff,

v.

PRECISION AIRMOTIVE CORPORATION, *et al.*,
Defendants.

Filed: August 13, 2010

MEMORANDUM & ORDER

JONES, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

I. INTRODUCTION

Before the Court in this wrongful death/survival action is Defendants Precision Airmotive LLC, Precision Airmotive Corporation, Burns International Services

Corporation, Former Fuel Systems, Inc.,¹ and Mark IV Industries, Inc.’s² (“Carburetor Defendants”) Motion for judgment on the pleadings and dismissal of Plaintiff Jill Sikkelee’s (“Plaintiff”) Complaint. (Doc. 107). For the reasons articulated in this Memorandum, the Court will grant in part and deny in part the Motion and grant Plaintiff leave to amend the Complaint.

II. PROCEDURAL HISTORY

Plaintiff initiated this action on May 16, 2007 with the filing of a Complaint and asserted claims related to an aircraft accident that resulted in the death of her husband, David Sikkelee (“the decedent”). (Doc. 1). Individually and as personal representative of David Sikkelee’s estate, Plaintiff named as Defendants the Carburetor Defendants, AVCO Corporation and Textron, Inc. (collectively “Textron Defendants”), Kelly Aerospace, Inc., Kelly Aerospace Power Systems, Inc., and Consolidated Fuel Systems, Inc. (collectively, “Kelly Defendants”)^{3,4} In the 103-page Complaint, Plaintiff asserts five causes of action against the moving Carburetor Defendants—strict liability, negligence, breach of warranty, misrepresentation, and concert of action—related to the manufacture of a carburetor that Plaintiff alleges malfunctioned. On July

¹ Former Fuel Systems, Inc. was terminated as a Defendant on April 15, 2010.

² Mark IV Industries, Inc. was terminated as a Defendant on April 15, 2010.

³ The Kelly Defendants were terminated on July 13, 2010.

⁴ Plaintiff also named the following Defendants who have since been terminated from the action: Precision Aerospace Corporation, Precision Aerospace Services LLC, Precision Aviation Products Corporation, Precision Products LLC, and Zenith Fuel Systems LLC.

25, 2007, Carburetor Defendants answered Plaintiff's Complaint. On March 13, 2008, all Defendants jointly moved to transfer this case to the United States District Court for the Western District of North Carolina, and we denied that motion. (Doc. 85).

The Carburetor Defendants filed the instant Motion for Judgment on the Pleadings ("the Motion") (Doc. 107) and a brief in support thereof (Doc. 108) on March 17, 2009. Plaintiff filed her brief in opposition to the Motion on April 28, 2009. (Doc. 116). Carburetor Defendants responded on May 12, 2009. (Doc. 119). The Textron Defendants filed a brief in support of, and joining in, the Motion on April 6, 2009 (Doc. 111), to which Plaintiff responded on May 6, 2009 (Doc. 117).⁵ In May of 2009, the Court issued a stay of proceedings as to all parties involved because Defendant Mark IV Industries entered bankruptcy proceedings. (Doc. 121). Upon resolution of those proceedings, the stay was lifted and an amended scheduling order issued. (Doc. 125). Accordingly, this matter is ripe for disposition.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c) provides that "after the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."⁶ A "Rule 12(c) motion is little more than a relic of the common law and code era, and it only has utility when

⁵ The Kelly Defendants also joined the Motion; but, as they are no longer parties to the action, we will not consider their filings in support. (*See* Doc. 146 (approving partial settlement)).

⁶ Defendants already filed an answer and, at the time the motion was filed the trial date was in the distant future. Thus, Defendants properly raised the Motion under 12(c).

all the material allegations of fact are admitted in the pleadings and only questions of law remain. Granting a Rule 12(c) motion results in a determination on the merits at an early stage in the litigation, and thus this court requires the movant to clearly establish that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *Inst. for Sci. Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc.*, 931 F.2d 1002, 1005 (3d Cir. 1991) (citing *Jablonski*, 863 F.2d at 290-91, punctuation omitted). A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is subject to the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See *Turbe v. Gov’t of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991).

Thus, courts “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n. 7 (3d Cir. 2002)). In resolving a motion to dismiss under 12(c), a court generally should consider only the allegations in the complaint, as well as “documents that are attached to or submitted with the complaint, . . . and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.” *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A motion under Rule 12(b)(6) or 12(c) tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain

a short and plain statement of the claim showing that the pleader is entitled to relief, “in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint attacked by a motion to dismiss need not contain detailed factual allegations, it must contain “sufficient factual matter, accepted as true, to ‘state claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that “raise a right to relief above the speculative level. . . .” *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant’s liability is more than “a sheer possibility.” *Iqbal*, 129 S. Ct. at 1949. “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 557).

Under the two-pronged approach articulated in *Twombly* and later formalized in *Iqbal*, a district court must first identify all factual allegations that constitute nothing more than “legal conclusions” or “naked assertions.” *Twombly*, 550 U.S. at 555, 557. Such allegations are “not entitled to the assumption of truth” and must be disregarded for purposes of resolving a motion to dismiss. *Iqbal*, 129 S. Ct. at 1950. Next, the district court must identify “the ‘nub’ of the . . . complaint—the well-pleaded, nonconclusory factual allegation[s].” *Id.* Taking these allegations as true, the district judge must then determine whether the complaint states a plausible claim for relief. *See id.*

However, “a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits.” *Phillips*, 515 F.3d at 231 (citing *Twombly*, 127 S. Ct. at 1964-65, 1969 n.8). Rule 8 “does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.” *Id.* at 234.

IV. FACTUAL BACKGROUND

In accordance with the standard of review, we have derived the following background facts from the well-pleaded allegations of the Complaint, and construe them, and all reasonable inferences therefrom, in the light most favorable to Plaintiff as the non-moving party.

This action arises from an accident involving a 1976 Cessna aircraft, operated by the decedent David Sikkelee. On July 10, 2005, the decedent was piloting the subject aircraft when the aircraft lost power as a result of an engine fuel delivery system malfunction or defect shortly after takeoff. Because of the loss of power, the decedent lost control of the aircraft and crashed. The decedent died as a result of severe injuries and burns sustained from the accident.

The subject aircraft was overhauled in 2004 to restore it to a “factory new or as new condition with new or as new components.” At that time a carburetor was installed that was rebuilt or overhauled by the Kelly Defendants, who installed new or as new parts within said carburetor. The engine was tested and approved for a return to service. The Carburetor Defendants serviced, manufactured, or supplied the carburetor. The Textron Defendants were

the designer, manufacturer, seller, supplier, certifier, overhauler, repairer, maintainer, and product support servicer of the engine that was installed in the subject aircraft.

Plaintiff maintains that the Carburetor and Textron Defendants were aware of numerous problems and defects with the screws and locking mechanism that attaches the carburetor together. Plaintiff further maintains that these Defendants failed to meet industry standards by failing to warn of these problems or provide instructions to maintain their safety. Plaintiff advances that, beyond a mere failure to follow industry standard in that respect, Defendants further knowingly concealed such a defect. Plaintiff asserts myriad other allegations related to these Defendants' negligence. Thus, Plaintiff asserts the following claims against the Carburetor (Precision) Defendants and the Textron Defendants: Strict Liability (Counts I and IV); Breach of Warranties (Counts II and V); Negligence (Counts III and VI); Misrepresentation (Count X); and Concert of Action (Count XI).⁷ Plaintiff seeks compensatory and punitive damages under the applicable Survival Act and Wrongful Death statute.

V. DISCUSSION

A. Preemption

1. The Parties' Arguments

Defendants advance two central arguments to support their Motion for Judgment on the Pleadings. First and

⁷ Plaintiff also asserted the same or similar claims against the Kelly Defendants in Counts VII-IX and XII but, as previously mentioned, those Defendants are no longer a part of this action.

foremost, Defendants argue that Plaintiff's claims are preempted by federal law. Defendants maintain that because the Federal Aviation Act ("FAA") and other corresponding aviation-legislation create uniform and exclusive standards for the entire field of aviation safety and because federal regulation of aviation safety is pervasive, Congress intended to preempt the entire field. Defendants note that United States Court of Appeals for the Third Circuit found field-preemption in the entire field of aviation safety for those same reasons. *See Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999) (discussed *infra*). Thus, Defendants maintain that Plaintiff's claims must consequently allege violations of federal standards of care and, therefore, her claims that assert state-law standards of care must necessarily be dismissed.

Plaintiff responds to Defendants' preemption arguments by maintaining that the Third Circuit's mandate in *Abdullah* is inapplicable to the matter *sub judice*. In support, Plaintiff argues that *Abdullah* does not apply to this general aviation case because, unlike the commercial aviation case at bar in *Abdullah*, there are no federal regulations that apply to the specific carburetor in question. Further, and somewhat in the alternative, Plaintiff questions the holding in *Abdullah* because it did not consider the General Aviation Revitalization Amendment ("GARA") and was decided before the September 11th Victim Compensation Fund of 2001 Amendment to the FAA that expressly preserved state tort-law standards. Plaintiff also disputes the validity of *Abdullah* by arguing that its preemption conclusion was essentially overruled by the Supreme Court's preemption decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). Finally, because there is no Supreme Court case law interpreting the FAA and field-preemption of general aviation, and because courts in

other Circuits disagreed with the Third Circuit’s decision in general aviation cases, Plaintiff asserts that *Abdullah* is not controlling.

Candidly, we note that the decision that follows has not been easy to reach. Both parties advance compelling arguments in support of or in opposition to the Motion, and each interpretation finds support in this clearly underdeveloped body of law. Like the learned counsel for the parties, the Court has conducted exhaustive research and has considered all apparent interpretations and conclusions. We thus detail the controlling and instructive law that has formed our conclusion below.

2. Controlling Statutory and Case Law

The instant Motion implicates various legal issues we must resolve: the proper method to analyze whether a field is preempted where Congressional intent is unclear; the purpose and extent of federal regulation of the aviation industry; and the extent to which our analysis is controlled by *stare decisis*. As such, before commencing our analysis, we find it appropriate to review the various statutes and case-law, which date back over half of a century.

The Federal Aviation Act of 1958: In response to a “series of fatal air crashes between civil and military aircraft operating under separate flight rules,” *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999), Congress enacted the Federal Aviation Act of 1958 (“FAA”) “to establish a new Federal Agency with powers adequate to enable it to provide for the safety and efficient use of the navigable airspace by both civil and military operations.” H.R. Rep. No. 2360, 85th Cong., 2d Sess. Congress found that a “uniform and exclusive system of federal regulation” was necessary to achieve the air-safety objectives

of the FAA. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). Thus, “Congress intended to rest sole responsibility for supervising the aviation industry with the federal government.” *Abdullah*, 181 F.3d at 368. The FAA as originally enacted contained no clause preempting state regulation in the field of aviation, and contained the following savings clause that it still retains to this day: “Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 49 U.S.C. § 40120(c); 49 U.S.C. app. § 1506.

The Airline Deregulation Act of 1978: Twenty years later, Congress amended the FAA with the Airline Deregulation Act (“ADA”). In order to prevent states from frustrating the deregulation of the airline industry by extensively regulating on their own, the ADA prohibited the states from enacting “any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation.” 49 U.S.C. § 41713; 49 U.S.C.A § 1305(a)(1).⁸ Thus, unlike the FAA, the ADA expressly preempted state regulation, although only with respect to “rates, routes, or services” of an “air carrier.” The savings clause found in the FAA, however, remained intact.

The General Aviation Revitalization Act of 1994: Neither the FAA as originally enacted nor including the ADA amendment in 1994 specifically addressed products-liability actions. In response to declining sales of aircraft

⁸ This clause was revised in 1994 to read: “[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.” 49 U.S.C. § 41713(b)(1).

and increasing products-liability actions, the general aviation industry began pushing for tort reform. Subsequently, Congress passed the General Aviation Revitalization Act of 1994 (“GARA”). Ultimately, balancing the interests of the general-aviation industry and consumer-rights advocates resulted in the imposition of an eighteen (18) year statute of repose on civil actions for death, personal injury, or property damage relating to general-aviation aircraft and parts. 49 U.S.C. app. § 410101. GARA retained the FAA’s original savings clause and provided that “A remedy under this part is in addition to any other remedies provided by law”, 49 U.S.C. § 40120, and the legislative history reflects that “[i]n 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, 103d Cong., 2d Sess., pt. 2, at 6-7 (1994). Subsequent to the passage of GARA, some courts found that GARA’s legislative history demonstrated that Congress intended *not* to preempt the entire field of aviation safety, and some scholars observed that, until the commencement of the statute of repose, state products-liability standards control actions regarding the design or defects of general-aviation aircraft and component parts. *See, e.g.*, John D. McClune, *There is No Complete, Implied, or Field Federal Preemption of State Law Personal Injury/Wrongful Death Negligence or Product Liability Claims in General Aviation Cases*, 71 J. AIR L. & COM. 717 (Fall 2006) (“There is a clear distinction between enacting minimum federal regulations pertaining to general aviation aircraft and component design and manufacture and creating a body of federal common law foreclosing state rights.”); Timothy S. McAllister, *A “Tail” of Liability Reform: General Aviation Revitalization Act of 1994*, 23 TRANSP. L.J. 301 (1995).

Courts and commentators alike thus disagree with the implications of the enactment of GARA—even if Congress intended to preempt the entire aviation field with the FAA, it failed to expressly state that intention with the original passage of the FAA, nor did it do so twenty years later with the passage of the ADA, and it failed again to do so forty years later with the passage of GARA. As discussed below, some courts have held that Congress therefore did not intend to preempt the entire field of aviation, *see Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993)⁹, while others, including the Third Circuit, have held that the comprehensive and pervasive nature of federal regulation evinces Congressional intent to impliedly preempt the entire field of aviation. *See Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). This reference provides us with an appropriate segue to the material case law.

Abdullah v. American Airlines:¹⁰ Before the Third Circuit in *Abdullah v. American Airlines* (“*Abdullah*”) was an action for damages for injuries sustained during an American Airlines flight. The plaintiffs alleged that defendants were negligent in failing to take precautions to avoid severely turbulent conditions or to warn the passengers of those conditions. A jury found for plaintiffs and awarded more than two million dollars in damages. Facing post-trial motions, the District Court of the Virgin Is-

⁹ *Cleveland*, a products-liability action related to aircraft design, was decided a year before GARA was passed. The Tenth Circuit noted that “the plain language of the Federal Aviation Act suggests that Congress intended that the Act have no general preemptive effect.” *Id.* at 1442.

¹⁰ 181 F.3d 363 (3d Cir. 1999).

lands held that the FAA impliedly preempts state and territorial regulations, and thus plaintiffs should have recovered only for claims that asserted violations of federal standards. The District Court then certified to the Third Circuit the following question: Does federal law preempt the standards for air safety, but preserve State and Territorial damage remedies? The Third Circuit, based upon the following reasoning, answered each part of the certified question in the affirmative.

With respect to the first clause of the certified question, the Third Circuit found implied field-preemption of the “entire field” of aviation because the FAA and other regulations “establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions.” *Abdullah*, 181 F.3d at 367. In so holding, the Third Circuit noted that they chose to “depart from the precedent established by a number of cases which hold that federal law does not preempt any aspect of air safety.” *Id.* at 368 (citing *In re Air Crash Disaster at John F. Kennedy Int’l Airport*, 635 F.2d 67, 74-75 (2d Cir. 1980); *Trinidad v. American Airlines*, 932 F. Supp. 521 (S.D.N.Y. 1996); *In re Air Crash Disaster at Stapleton Int’l Airport*, 721 F. Supp. 1185, 1187 (D. Colo. 1988)). In support of this conclusion, the Court first ruled that, based upon the legislative history of the FAA, Congress intended to vest sole responsibility for aviation in the federal government.¹¹ The Court further advanced that “[t]o

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Congress found the creation of a single, uniform system of regulation vital to increasing air safety. [. . .] By enacting the FAA, Congress intended to rest sole responsibility for supervising the aviation industry with the federal government:

effectuate this broad authority to regulate air safety, the Administrator of the FAA has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Abdullah*, 181 F.3d at 369. Thus, the Court concluded that “[b]ecause the legislative history of the FAA and its judicial interpretation indicate that Congress’s intent was to federally regulate aviation safety . . . *any* state or territorial standards of care relating to aviation safety are federally preempted.” *Id.* at 371 (emphasis in original).

The Court recognized that “[d]espite the legislative history and interpreting authority which have informed our decision, many courts have held that the field of aviation safety is not federally preempted.” *Id.* at 372. The Court nonetheless detailed, at length, why the rationale used by those courts was unpersuasive. First, the Court highlighted that other courts have employed the maxim

“Aviation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.” S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). Similarly, the House Report accompanying the FAA indicates that one of the purposes of the Act is to give “the Administrator of the new Federal Aviation Agency . . . full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including the promulgation and enforcement of safety regulations.” H.R. Rep. No. 2360. . . . “It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.”

Abdullah, 181 F.3d at 368-69.

expressio unius est exclusio alterius, (to express one is to exclude the other), to conclude that, because the ADA only expressly mandates the preemption of “rates, routes, and services” and does not overtly preempt other state tort law claims such as personal injury, the latter claims were never intended to be preempted by federal law. The Court averred that this maxim “serves only as an aid in discovering the legislative intent when that is not otherwise manifest”, *id.* at 373 (quoting *United States v. Barnes*, 222 U.S. 513, 519 (1912)), and that Congress’s clear intent to preempt the entire field of aviation in the enactment of the FAA should not be skewed by the enactment of a separate statute (the ADA) twenty years later. *See id.* at 372-73. Further, the Court rejected other courts’ conclusion that, because Congress directs the Administrator to prescribe “minimum standards” to promote aviation safety, state and territorial common-law could require duties beyond FAA regulations as long as they do not conflict with the federal law. Instead, the Court offered that “in a federally preempted area, the question whether state or territorial law conflicts with federal law is a pointless inquiry.” *Id.* at 374. Moreover, the Court held that the FAA’s savings clause preserves only remedies—it does not preserve state standards or causes of action even when interpreted with the FAA’s insurance clause.¹² Finally, the Court disagreed with those courts that found that states may regulate aviation safety pursuant to their traditional police powers, asserting that states may only invoke those powers in fields that are not federally preempted.

¹² The insurance clause mandates that airlines have liability insurance “for bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft.” 49 U.S.C.A. § 41112(a).

Although the Court found that state and territorial standards of care in aviation safety are entirely preempted, the Court also found that the state and territorial remedies still exist for violations of federal standards. The Court affirmed that “it is evident in both the savings and the insurance clauses of the FAA that Congress found state damage remedies to be compatible with federal aviation safety standards”, *id.* at 375, even if state *standards* are not likewise compatible.

Duvall v. Avco Corporation.¹³ We were called upon to interpret and apply the essential holding of *Abdullah* in *Duvall v. Avco Corporation*, 05-cv-1786, an action that involved a fatal aircraft accident. The plaintiff asserted claims sounding in wrongful death, negligence, and products liability and alleged that the accident was caused by malfunctions of the aircraft’s engine and fuel servo. Upon the filing of a motion to dismiss or for a more definite statement, we were presented with nearly the same arguments regarding preemption of claims as we are today. We originally found that the holding of *Abdullah* applied only to the *operation* of an aircraft, but not the *manufacturing* of aircraft parts. *DuVall v. AVCO Corporation*, 2006 U.S. Dist. LEXIS 6093, *9 (M.D. Pa. January 30, 2006). However, upon consideration of the defendants’ motion for reconsideration, we were compelled to reluctantly agree with the defendants that we originally misconstrued the essential holding of *Abdullah*. 2006 U.S. Dist. LEXIS 31445 (M.D. Pa. May 19, 2006). In the May 19, 2006 Order, we noted that the Third Circuit did not limit its opinion in *Abdullah* to piloting or aircraft operation, and explicitly “rejected the approach adopted by other courts that found only certain aspects of aviation

¹³ 2006 U.S. Dist. LEXIS 31445 (M.D. Pa. May 19, 2006).

safety to be preempted. . . .” *Id.* at *8. Thus, we interpreted *Abdullah* as evidencing the Third Circuit’s intent, primarily through its precise language, to hold that the *entire* field of aviation is preempted: including its application to the manufacturing of aircraft parts. Our sister courts in this Circuit have also declared that the Third Circuit intended to hold that the entire field of aviation safety is preempted by federal law. *See, e.g. Landis v. U.S. Airways, Inc.*, 2008 U.S. Dist. LEXIS 21300, *12 (W.D. Pa. March 18, 2008).

Wyeth v. Levine:¹⁴ The United States Supreme Court recently addressed a preemption claim in the field of products liability in *Wyeth v. Levine* (“*Wyeth*”). In *Wyeth*, the Supreme Court granted certiorari on a decision of the Vermont Supreme Court to determine whether the Food and Drug Administration’s drug labeling judgments preempted state law products liability claims. The Vermont Supreme Court had affirmed a jury verdict that awarded damages to the plaintiff on her state law claims. In affirming the decision of the Vermont Supreme Court, the Supreme Court articulated the “two cornerstones” of preemption jurisprudence:

First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L.Ed. 2d 700 (1996). Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal

¹⁴ 129 S. Ct. 1887 (2009).

Act unless that was the clear and manifest purpose of Congress.’” *Lohr*, 518 U.S. at 485.

Id. at 1194-95 (other internal citations omitted). Thus, with those cornerstones in mind and because Congressional intent was not explicit, the Court reviewed the legislative history of the FDA and ultimately ruled that Congress never intended to preempt state-law claims with respect to drug labeling requirements¹⁵, and thus the plaintiff could properly assert products liability claims.

Elassaad v. Independence Air, Inc.¹⁶ The Third Circuit recently revisited their reasoning in *Abdullah* in *Elassaad v. Independence Air, Inc.* (“*Elassaad*”), and reaffirmed that “*Abdullah*’s primary holding was that federal law preempted the entire field of aviation safety.” 2010 U.S. App. LEXIS 13721 (3d Cir. 2010). The Court clarified, however, that their “use of the term ‘aviation safety’ in *Abdullah* to describe the field preempted by federal law was [] limited to in-air safety.” *Id.* at *18. Thus, as the plaintiff in *Elassaad* was asserting common-law negligence claims regarding an injury he sustained while

¹⁵ Specifically, the Court stated:

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA’s 70-year history. But, despite its 1976 enactment of an express pre-emption provision for medical devices, see § 521, 90 Stat. 574 (codified at 21 U.S.C. § 360k(a)), Congress has not enacted such a provision for drugs.

Id. at 1200.

¹⁶ 2010 U.S. App. LEXIS 13721 (3d Cir. 2010). The first opinion issued by the Third Circuit in this case on May 12, 2010 was vacated and amended by this opinion. See *Elassaad v. Independence Air, Inc.* 604 F.3d 804 (3d Cir. 2010).

disembarking an airplane, the plaintiff could avail himself of common-law standards of care because the issue did not implicate the preempted field of in-air safety. Notably for purposes of the action *sub judice*, when distinguishing in-air safety and safety measures when disembarking an aircraft, the Court detailed in great length the sort of measures that are encompassed within in-air safety and thus are preempted. For example, the Court noted that the FAA directs the Aviation Administration to issue regulations to reduce or eliminate the possibility or recurrence of aircraft accidents. Further, in highlighting that “most of the regulations adopted pursuant to the [FAA] concern aspects of safety that are associated with flight”, the Court propounded as an example that “the regulations detail certification and ‘airworthiness’ requirements for aircraft parts.” *Id.* at 22. Thus, although *Elassaad* slightly narrowed the broad definition of the “field of aviation” that could be interpreted from *Abdullah*, it strongly, and perhaps explicitly, suggests that the manufacture of aircraft parts is nonetheless contained in this field and, thus, subject solely to federal standards of care.

Notably, *Elassaad* was decided by the Third Circuit after the Supreme Court’s decision in *Wyeth*, which Plaintiff claims contradicts the Third Circuit’s field-preemption framework articulated in *Abdullah*. The Third Circuit declined to decide whether *Wyeth* has any effect on the holding in *Abdullah* because *Abdullah* did not apply to the facts of *Elassaad*.

3. Conclusion

There is certainly not an absence of authority that agrees with Plaintiff’s proffered interpretation of the

law.¹⁷ Indeed, we find the logic therein alluring, and perceive the wisdom of the various decisions in other Circuits that have failed to find preemption in circumstances similar to the case at bar. Nonetheless, no matter how compelling their reasoning, those authorities are not controlling for our purposes as we must follow the state of the law as articulated by the Third Circuit. The legal principle of *stare decisis* commands no less. Unlike *Elassaad*, which was distinguishable from *Abdullah* on the grounds that the case did not implicate “in-air” safety, we find that, based upon the state of the controlling law, this action is indeed controlled by *Abdullah*. We have previously extended *Abdullah*’s holding to general aviation cases, and there has been no change in the controlling law to preclude us from doing the same at this juncture. Further, although Plaintiff challenges the Third Circuit’s preemption analysis and argues that *Wyeth*’s preemption analysis supports no purpose of Congress to preempt, we find that the analysis of *Abdullah* is still applicable post-*Wyeth*. We

¹⁷ See, e.g. *Sheesley v. Cessna Aircraft Co.*, 2006 U.S. Dist. LEXIS 27133 (D.S.D. 2006); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824 (E.D. Tex. 2006); *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 160 (S.D.N.Y. 2000); *Skidmore v. Delta Air Lines, Inc.*, 2000 U.S. Dist. LEXIS 18587 (N.D. Tex. Dec. 15, 2000); see also John D. McClune, *Article: There is No Complete, Implied, or Field Federal Preemption of State Law Personal Injury/Wrongful Death Negligence or Product Liability Claims in General Aviation Cases*, 71 J. AIR L. & COM. 717, 730 (Fall, 2006) (“[. . .] *Abdullah* involved a commercial flight . . . even if correctly decided its reasoning does not apply to general aviation product liability, breach of warranty . . . cases. . . . *Abdullah* contradicts the FAA and its history [and] ignores GARA.”); AVIATION ACCIDENT LAW § 9.03 (2010) (“There are some indications that [*Abdullah*] will not withstand the test of time . . . Although one court in within the Third Circuit’s jurisdiction has followed it, the decision has been openly or implicitly criticized, or simply ignored, by other courts.”).

reach this conclusion because the Third Circuit applied in *Abdullah* the same process of analysis that was articulated in *Wyeth*. Thus, any claims that Plaintiff asserts under a state-law standard of care must necessarily be dismissed.

B. FAILURE TO STATE A CLAIM

Defendants argue that Plaintiff's remaining claims that do not rely on state standards contain only "cursory references to an alleged breach of an unidentified federal law". Defendants assert that Plaintiff fails to plead that she, or the decedent, were intended to be a third-party beneficiary for the sale of the carburetor, and also fails to identify any express warranty related to the carburetor. Thus, Defendants maintain that the Complaint fails to give Defendants adequate notice, and therefore should be dismissed for failure to state a claim upon which relief can be granted. Plaintiff counters that she has provided a "short and plain statement of the claim showing that the pleader is entitled to relief" sufficient to satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2). She further asserts that even if the Court finds that she has not satisfied the pleading requirements she should nonetheless be granted leave to file an amended complaint so that she can list violations of federal regulations by number. We agree, and thus find that the fairest course in this matter is to grant Plaintiff leave to amend the Complaint and assert claims under federal standards of care.

VI. CONCLUSION

Because of the reasons articulated in this memorandum, we ultimately grant Defendants' Motion vis-a-vis Plaintiff's claims that assert duties under state common-

law standards of care, and shall accordingly dismiss those claims. We will however grant Plaintiff leave to amend the Complaint against the remaining Defendants so that she may endeavor to properly assert her claims under appropriate federal standards.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendants' Motion for Judgment on the Pleadings (Doc. 107) is **GRANTED IN PART AND DENIED IN PART** to the following extent:
 - a. Plaintiff's claims that are based upon state-law standards of care are **DISMISSED**;
 - b. The Motion is denied in all other respects; and
2. Plaintiff **SHALL FILE** an Amended Complaint to properly assert her claims as detailed above within twenty (20) days of the date of this Order. Failure to do so shall result in dismissal of the action.

/s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX E

49 U.S.C. section 40120(c) provides:

(c) Additional remedies.—A remedy under this part is in addition to any other remedies provided by law.

* * * * *

49 U.S.C. section 44701 provides:

(a) Promoting safety.—The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for—

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers,

appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards.—The Administrator may prescribe minimum safety standards for—

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents.—The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.—When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral exchanges of safety oversight responsibilities.—

(1) **In general.**—Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) **Relinquishment and acceptance of responsibility.**—The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the func-

tions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions.—The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined.—In this subsection, the term “registered aircraft” means—

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f) Exemptions.—The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

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49 U.S.C. section 44704 provides:

(a) Type certificates.—

(1) Issuance, investigations, and tests.—The Administrator of the Federal Aviation Administration shall issue a type certificate for an aircraft, aircraft engine, or propeller, or for an appliance specified under paragraph (2)(A) of this subsection 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. On receiving an application for a type certificate, the Administrator shall investigate the application and may conduct a hearing. The Administrator shall make, or require the applicant to make, tests the Administrator considers necessary in the interest of safety.

(2) Specifications.—The Administrator may—

(A) specify in regulations those appliances that reasonably require a type certificate in the interest of safety;

(B) include in a type certificate terms required in the interest of safety; and

(C) record on the certificate a numerical specification of the essential factors related to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

(3) Special rules for new aircraft and appliances.—Except as provided in paragraph (4), if the holder of a type

certificate agrees to permit another person to use the certificate to manufacture a new aircraft, aircraft engine, propeller, or appliance, the holder shall provide the other person with written evidence, in a form acceptable to the Administrator, of that agreement. Such other person may manufacture a new aircraft, aircraft engine, propeller, or appliance based on a type certificate only if such other person is the holder of the type certificate or has permission from the holder.

(4) Limitation for aircraft manufactured before August 5, 2004.—Paragraph (3) shall not apply to a person who began the manufacture of an aircraft before August 5, 2004, and who demonstrates to the satisfaction of the Administrator that such manufacture began before August 5, 2004, if the name of the holder of the type certificate for the aircraft does not appear on the airworthiness certificate or identification plate of the aircraft. The holder of the type certificate for the aircraft shall not be responsible for the continued airworthiness of the aircraft. A person may invoke the exception provided by this paragraph with regard to the manufacture of only one aircraft.

(5) Release of data.—

(A) In general.—Notwithstanding any other provision of law, the Administrator may make available upon request, to a person seeking to maintain the airworthiness or develop product improvements of an aircraft, engine, propeller, or appliance, engineering data in the possession of the Administration relating to a type certificate or a supplemental type certificate for such aircraft, engine, propeller, or appliance, without the consent of the owner of record, if the Administrator determines that—

(i) the certificate containing the requested data has been inactive for 3 or more years, except that the Administrator may reduce this time if required to address an unsafe condition associated with the product;

(ii) after using due diligence, the Administrator is unable to find the owner of record, or the owner of record's heir, of the type certificate or supplemental type certificate; and

(iii) making such data available will enhance aviation safety.

(B) Engineering data defined.—In this section, the term “engineering data” as used with respect to an aircraft, engine, propeller, or appliance means type design drawing and specifications for the entire aircraft, engine, propeller, or appliance or change to the aircraft, engine, propeller, or appliance, including the original design data, and any associated supplier data for individual parts or components approved as part of the particular certificate for the aircraft, engine, propeller, or appliance.

(C) Requirement to maintain data.—The Administrator shall maintain engineering data in the possession of the Administration relating to a type certificate or a supplemental type certificate that has been inactive for 3 or more years.

(b) Supplemental type certificates.—

(1) Issuance.—The Administrator may issue a type certificate designated as a supplemental type certificate for a change to an aircraft, aircraft engine, propeller, or appliance.

(2) Contents.—A supplemental type certificate issued under paragraph (1) shall consist of the change to the aircraft, aircraft engine, propeller, or appliance with respect to the previously issued type certificate for the aircraft, aircraft engine, propeller, or appliance.

(3) Requirement.—If the holder of a supplemental type certificate agrees to permit another person to use the certificate to modify an aircraft, aircraft engine, propeller, or appliance, the holder shall provide the other person with written evidence, in a form acceptable to the Administrator, of that agreement. A person may change an aircraft, aircraft engine, propeller, or appliance based on a supplemental type certificate only if the person requesting the change is the holder of the supplemental type certificate or has permission from the holder to make the change.

(c) Production certificates.—The Administrator shall issue a production certificate authorizing the production of a duplicate of an aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued when the Administrator finds the duplicate will conform to the certificate. On receiving an application, the Administrator shall inspect, and may require testing of, a duplicate to ensure that it conforms to the requirements of the certificate. The Administrator may include in a production certificate terms required in the interest of safety.

(d) Airworthiness certificates.—(1) The registered owner of an aircraft may apply to the Administrator for an airworthiness certificate for the aircraft. The Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type

certificate and, after inspection, is in condition for safe operation. The Administrator shall register each airworthiness certificate and may include appropriate information in the certificate. The certificate number or other individual designation the Administrator requires shall be displayed on the aircraft. The Administrator may include in an airworthiness certificate terms required in the interest of safety.

(2) A person applying for the issuance or renewal of an airworthiness certificate for an aircraft for which ownership has not been recorded under section 44107 or 44110 of this title must submit with the application information related to the ownership of the aircraft the Administrator decides is necessary to identify each person having a property interest in the aircraft and the kind and extent of the interest.

(e) Design and production organization certificates.—

(1) **Issuance.**—Beginning January 1, 2013, the Administrator may issue a certificate to a design organization, production organization, or design and production organization to authorize the organization to certify compliance of aircraft, aircraft engines, propellers, and appliances with the requirements and minimum standards prescribed under section 44701(a). An organization holding a certificate issued under this subsection shall be known as a certified design and production organization (in this subsection referred to as a “CDPO”).

(2) **Applications.**—On receiving an application for a CDPO certificate, the Administrator shall examine and rate the organization submitting the application, in ac-

cordance with regulations to be prescribed by the Administrator, to determine whether the organization has adequate engineering, design, and production capabilities, standards, and safeguards to make certifications of compliance as described in paragraph (1).

(3) Issuance of certificates based on CDPO findings.—The Administrator may rely on certifications of compliance by a CDPO when making determinations under this section.

(4) Public safety.—The Administrator shall include in a CDPO certificate terms required in the interest of safety.

(5) No effect on power of revocation.—Nothing in this subsection affects the authority of the Secretary of Transportation to revoke a certificate.