No. 16-323

IN THE

Supreme Court of the United States

AVCO CORPORATION,

Petitioner

v.

JILL SIKKELEE,

Respondent

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, NY 10538
(914) 834-3322
mskaufman@atlanticlegal.org

Of Counsel:

MARTIN J. NEWHOUSE
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

Counsel for Amici Curiae

October 2016

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

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that it is a 26 U.S.C. § 501 © (3) nonprofit, nonpartisan, public interest law firm incorporated as a Pennsylvania not for profit corporation. It has no shareholders, subsidiaries or parent corporation. It does not issue stock or other securities.

The New England Legal Foundation is a 26 U.S.C. § 501 © (3) nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF does not issue stock or any other form of securities and does not have any publicly owned parent, subsidiary, or affiliated companies. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the federal, state and local regulation and have decades of experience with attempting to reconcile sometimes inconsistent legislation or regulations promulgated by levels of government. The Foundation regularly appears as *amicus curiae* in this Court and inferior federal and state courts in cases involving issues of

---

[1] Pursuant to Rule 37.2(a), *amici* have given notice of intent to file this brief to all parties more than 10 days before this brief was filed. All parties have consented to the filing of this brief and the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or entity made a monetary contribution to fund the preparation or submission of this brief.

economic and regulatory significance to the business community.

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

This case is of interest to *amici* because of the importance to the business community of balanced and uniform regulations that provide clear standards and responsibilities. *Amici* are concerned that inconsistent or contradictory state standards of care, exposing the aviation industry to multiple and sometimes inconsistent standards, would be counterproductive and can have a deleterious impact on the ability of this vitally important sector to function rationally, efficiently, and in the best interest of the public, especially when a comprehensive scheme of federal aviation safety regulations already exists. Federal

preemption of state law with regard to aviation safety serves the public interest by maintaining a clear and rational regulatory regime for the aviation industry.

SUMMARY OF ARGUMENT

Review is warranted because there is a split among circuits on whether the Federal Aviation Act and implementing regulations preempt state law standards of care with regard to aircraft product liability claims.

Review is also warranted because the decision below in *Sikkelee v. Precision Airmotive Corp. et al.*, No. 14-4193, 2016 U.S. App. LEXIS 7015 (3d Cir. Apr. 19, 2016) (hereafter "*Sikkelee*, No. 14-4193") is incorrect. It ignores this Court's teaching that Congress intended to regulate aviation safety pervasively. Permitting application of disparate state standards in a case such as this would be inimical to that clear Congressional purpose.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The Third Circuit's holding that the Act does not preempt the entire field of aviation safety deepens an existing circuit conflict. The Second and Tenth Circuits have held that the Act preempts state regulation in the entire field of

aviation safety[2] while the Ninth and Eleventh Circuits have held to the contrary. The Court should grant review to resolve this conflict and provide definitive guidance concerning the preemptive scope of the Act.

A. Circuits Holding the Act Preempts State Law

In *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2011), the Second Circuit held that the Act preempts the entire field of aviation safety, in a case involving a dispute over the application of state environmental laws to the removal of trees adjacent to an airport. *Id.* at 208-209. In considering whether the state laws were preempted, the Second Circuit noted its statement in *Air Transport Ass'n of America, Inc.* v. *Cuomo*, 520 F.3d 218, 225 (2008) (per curiam) that "Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field." *Id.* at 210). The court adopted its dicta in *Air Transport Ass'n* as the holding in *Goodspeed Airport*, that the Act preempts the entire field. *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

---

[2] As did the Third Circuit itself in *Abdullah*. The First and Fifth Circuits have implicitly so found.

that do not refer to aviation or airports," did not implicate the preempted field. *Id.* at 210-211.

The Tenth Circuit, in *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (2010), held that the Act occupies the entire field of aviation safety, overruling its own prior holding in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (1993)[3]. *US Airways*, involved a state's enforcement of its state liquor law against an airline because a passenger who became intoxicated on a flight later caused a car accident. The airline argued 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 *US Airways*, the Tenth Circuit held that the Act preempts the entire field of aviation safety. See 627 F.3d at 1326-1327. The court explained that

---

[3] In its *Cleveland* decision 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). After Cleveland was decided, 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 in *Geier* the Court had "rejected [the] reasoning" underlying its earlier *Cleveland* decision, and it thus considered the preemptive scope of the Act with no deference to *Cleveland*. See 627 F.3d at 1326.

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,'" *id.* (quoting 49 U.S.C. 44701(a)), and its legislative history, which emphasized the need to have "one agency of government, and one agency alone, be responsible for issuing safety regulations," *id.* (quoting H.R. Rep. No. 2360, 85th Cong., 2d Sess. 22 (1958)). The Tenth Circuit cited *Abdullah*. See 627 F.3d at 1327.

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. *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 that, "[p]ursuant to its congressional charge to regulate air safety, the [FAA] has issued a broad array of safety-related regulations," including air-

worthiness 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, Fourth, and Seventh Circuits, have not specifically ruled on product liability preemption. However, these courts have concluded that some preemption exists in the field of aviation safety. In *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989) (in a case involving a pilot's claim that his employer could not test him for drug use because of a state law banning such testing), the First Circuit upheld the employer's preemption argument, finding that "Congress intended to occupy the field of pilot regulation related to air safety"). In *Smith v. Comair*, 134 F.3d 254, 256-59 (4th Cir. 1998) the court held that claims based on an air carrier's boarding procedures were preempted by federal law. In *Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir. 2007) the court found that some standards of care in state law aviation negligence claims are also found in federal regulations.

B. Circuits Holding the Act Does Not Preempt State Law

Of the circuits that have decided cases involving preemption in the aviation product liability context, only the Ninth and Eleventh Circuits had

directly found that FAA regulations do not preempt the field.

The Eleventh Circuit expressly rejected the preemption of state-law standards of care in a case in which plaintiff pilot alleged that the defective design of a helicopter seat aggravated injuries he sustained in a crash. *Public Health Trust of Dade County v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). The Eleventh Circuit held that the Act does not preempt design-defect claims, *id.* at 295, and rejected defendant's argument that the Act preempted the state-law claims, because product liability claims fall outside the scope of the Airline Deregulation Act's express preemption clause, such claims are not preempted under federal law.[4]

The Ninth Circuit, in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (2009), held that the Act does not preempt state-law standards of care with respect to the design-defect claim relating to the airplane's stairs. *Id.* at 812. In *Martin*, a pregnant woman slipped

---

[4] See 49 U.S.C. § 41713. The Eleventh Circuit's opinion is based largely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), where the Supreme Court held that, in the face of an express preemption clause, there can be no implied preemption. See 49 U.S.C. § 41713(b), formerly 49 U.S.C. § 1305(a) ("ADA") (preempting state laws "relating to rates, routes, or services" of an air carrier). However, *Geier*, *supra*, this Court clarified that *Cipollone* does not establish an iron-clad rule against finding implied preemption under a statute containing an express preemption clause.

and fell down the stairs while exiting the airplane, causing injury to her and the fetus. The manufacturer relied on an earlier Ninth Circuit decision, *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (2007), that had held that the "entire field of aviation safety" is preempted. *Id.* at 809. In *Martin* the Ninth Circuit held 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.

Arguably, the Ninth Circuit has left the door open to finding preemption through the use of the "pervasive regulations" standard. See *Martin,* 555 F.3d at 811; *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007); see also *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013). If an area is "pervasively" regulated, FAA regulations preempt the state law claim. 709 F.3d at 1004-06 (if a claim is preempted, the second step is to determine whether there are any applicable state standards of care that are also preempted). The Ninth Circuit has stated this standard should not be read expansively to conclude "that the [Act] preempts all state law personal injury claims." *Martin*, 555 F.3d at 810.

Although they reach the same conclusion – that the Act does not preempt the entire field of

aviation safety – the Third, Ninth, and Eleventh Circuits have evaluated the Act's preemptive scope using different criteria. In *Sikkelee*, the Third Circuit took the narrowest, most literal view of what is meant by "in-air operations," leading it to ignore the realities of aircraft operations and safety in order to justify its departure from its earlier decision in *Abdullah*.

II. THE DECISION BELOW IS INCORRECT.

The Third Circuit's decision in *Sikkelee v. Precision Airmotive Corp. et al.*, No. 14-4193, 2016 U.S. App. LEXIS 7015 (3d Cir. Apr. 19, 2016) was substantively incorrect. The court of appeals erred in holding that the Act does not preempt the application of state-law standards of care in the entire field of aviation safety. The court's distinction between "in-air operations" and other aspects of aviation safety is arbitrary, has no basis in reality, and has no basis in the Act and the applicable FAA regulations.

Preemption may be found if the scope of the statute indicates that Congress intended federal law to occupy the legislative field ("field preemption"), or if there is an actual conflict between state and federal law ("conflict preemption"). *Altria Group v. Good*, 555 U.S. 70, 76-77; *Freightliner Corp. v. Myrick,* 514 U. S. 280, 287 (1995); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984); *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977). Field preemption arises when

Congress occupies an entire field of a substantive area of law, thus precluding any type of state interference in that field. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300 (1988) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)); *Abdullah*, 181 F.3d at 367. States are precluded from regulating conduct in a field that Congress has determined must be regulated by it exclusively, and intent to preclude can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230 (1947); *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).[5]

This appeal involves field preemption, which occurs when Congress has indicated "an intent to occupy a given field to the exclusion of state law." *Schneidewind*, 485 U.S. at 300. Such an intent "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States [or] where the federal interest in the field is sufficiently dominant." *Id*. "The 'purpose of Congress is the ultimate touchstone of pre-emption analysis.'" *Riegel v. Medtronic*, 552 U.S. 312, 334

---

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

(2008), quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U. S. 96, 103 (1963)). Congress may indicate pre-emptive intent through a statute's express language or through the statute's structure and purpose. See *Jones v. Rath Packing Co.*, 430 U. S. at 525 (1977).[6]

State standards for aircraft design and manufacture are preempted because the Act creates a comprehensive scheme governing aviation safety and leaves no room for supplementation by state-law standards of care. Permitting states to impose their own standards of care governing aircraft design, as the Third Circuit did here, would give rise to the very lack of uniformity that the Act was intended to prevent and threatens to undermine aviation safety. The Court should grant review to rectify this dangerous error.

The purpose of passing the Act was to create a system of unified rules to "promote safety and efficiency." *City of Burbank v. Lockheed*, 411 U.S. 624 (1973) and the Act "requires a uniform and

---

[6] Conflict preemption, occurs when there is an irreconcilable conflict between federal and state standards or when the imposition of a state standard would frustrate the objectives of the federal law. *Silkwood,* 464 U.S. 238, 256; *Abdullah*, 181 F.3d at 366. The *Sikkelee* court did not rule on conflict preemption, remanding that issue to the trial court.

exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled." *Id*. at 639.

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

Exclusive federal control is also required to comply with the numerous international treaties with respect to aviation to which the United States is a party.[7] The United States' obligation to

---

[7] The Act authorizes the FAA to accept foreign airworthiness certifications if the certifying nation is "in compliance with its obligations under international law for the safety oversight of civil aviation." 49 U.S.C. § 44701(e)(1), (3). The Convention on International Civil Aviation specifies conditions under which the aircraft of one

(continued...)

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

Congress recognized the uniquely national nature of aviation because "the federal government bears *virtually complete responsibility* for the promotion and supervision of this industry in the public interest." S. Rep. No. 85-1811, at 5 (1958) (emphasis added) and also recognized the "indivisible" nature of aviation safety regulation, and it centralized authority in the FAA to issue national, uniform regulations. H. R. Rep. No. 85-2360, at 1-2, 7, 22, 27 (1958); S. Rep. No. 85-1811, at 1.

Numerous provisions of the Act confirm that Congress intended the FAA's regulation of aviation safety to be complete. Section 601 requires the FAA to regulate what occurs during flight, see,

---

[7](...continued)
signatory nation can enter the airspace of another. See Convention on International Civil Aviation, art. 33, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. The International Civil Aviation Organization lists over 50 multilateral conventions and protocols applicable to civil aviation; the United States is a signatory to the vast majority. See International Civil Aviation Organization, Multilateral Air Law Treaties available at http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (last visited Oct. 10, 2016).

e.g., Act § 601(a)(4)-(5); and what occurs on the ground, e.g., qualification of pilots, *id*. § 602; air navigation facilities, *id*.§ 606; flight schools, *id*. § 607. Of special note, the very first category of aviation safety regulation under the purview of the FAA is aircraft design, manufacture, inspection, and maintenance, *id*. § 601(a)(1)-(3).

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

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. . . ." 49 U.S.C. 44701(a)(1) (emphases added). The FAA has issued implementing regulations that "prescrib[e] the general *design and construction requirements* for reciprocating and turbine aircraft engines." 14 C.F.R. 33.11 (emphasis added). FAA's regulations regarding the design, manufacture and maintenance of the aircraft components at issue in this case are detailed, thorough, and pervasive.

The Third Circuit severely limiting the scope of *Abdullah*.[8] The panel concluded that Congress did not express a clear and manifest intent "to preempt aircraft products liability claims in a categorical way." *Sikkelee*, No. 14-4193 at *2. Thus, "neither the [Act] nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims." *Id*. at *2-*3. Rather, the court held that state law applied to product claims, subject to "traditional principles of conflict preemption" to resolve any conflicts between the pertinent type certificate specifications and state law standards of care. *Id*. at *3. Central to the panel's reasoning was its distinction between claims based on "in-air"

---

[8] In *Abdullah*, the Third Circuit addressed the allegation that, although the airline followed federal in-flight seatbelt regulations, it failed to adequately warn passengers of the need to fasten seatbelts in the face of impending turbulence. *Abdullah* held that federal aviation regulations occupied the field of "air safety" and thus preempted any state-created duties of care because the FAA, through the broad authority granted to it by the Act, "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," and these regulations must remain uniform. *Abdullah*, 181 F.3d at 369 (footnotes omitted). The *Abdullah* court found that federal preemption in the field of air safety was supported by decisions by this Court and other circuits, that "had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise…pilot regulation … and control of flights through navigable airspace." See *Sikkelee*, No. 14-4193 at *16-*17.

operations and those based on design defects, stating that preemption does not extend to product liability claims.

The *Sikkelee* court's narrow reading of *Abdullah* is mistaken. The *Sikkelee* court noted that, although *Abdullah* described the preempted field as "air safety," it really included only "in-air operations." *Sikkelee*, No. 14-4193 at *17. The panel stated that *Abdullah* discussed a catch-all standard of care in FAA regulations for in-air operations (a category not applicable to design and manufacturing), and that *Abdullah* relied on regulations and other opinions relating only to in-air operations. The court also noted that, in its view, the Third Circuit limited *Abdullah* in *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 121 (3d Cir. 2010), where the court declined to apply *Abdullah* to the disembarkation of passengers after an airplane came to a complete stop at its destination; this, the *Sikkelee* panel said made it clear that the field of aviation safety described in *Abdullah* was limited to in-air operations. *Sikkelee*, No. 14-4193, *18 (citing *Elassaad*, 613 F.3d at 127-31). It contended that the holding of *Abdullah* does not apply to the design or manufacture of aircraft or aircraft components, and cites *Elassaad* in support. To the contrary, *Elassaad* recognized that the design and manufacture of aircraft are part of the preempted field when it specifically included the regulations in 14 C.F.R. part 23 (prescribing safety standards for aircraft with 19 or fewer seats, which includes the airplane which

David Sikkelee was flying) within the preempted field. 613 F.3d at 128, n.9.[9] The Third Circuit's reading of *Abdullah*, and its extremely narrow concept of the preempted field of "air safety," leads to the anomalous conclusion that regulations governing in-flight food or beverage service are more pertinent to flight safety than regulations prescribing standards for aircraft design, construction and maintenance because design, construction and maintenance do not occur, literally, while the airplane is "in flight." The Third Circuit in *Elassaad* noted that "regulations detail[ing] certification and 'airworthiness' requirements for aircraft parts" – the category of regulations at issue here – were among the "regulations . . . concern[ing] aspects of safety that are associated with flight" and thus within the preempted field. *Elassaad*, 613 F.3d at 128.

As far as we can tell, no other federal court has limited the preemptive power of the Act and the FAA regulations to "in-air" operations.

The *Sikkelee* court seems to have been greatly influenced by its reluctance to "interpret[] the Federal Aviation Act in a way that would," in its

---

[9] See *Abdullah*, 181 F.3d 363 at 367 "[W]e hold that federal law establishes the applicable standards of care in the field of air safety, *generally*, *thus preempting the entire field* from state and territorial regulation." (emphasis added, citations omitted) and *Elassaad*, 613 F. 3d at 125 ("We held that there was 'implied preemption of the *entire field of aviation safety* . . . .'")(citation omitted, emphasis added) and 613 F.3d at 126.

view, grant immunity from design defect liability in aviation. *Sikkelee*, No. 14-4193 at *35. The court stated it would be a "perverse" result if issuance of a type certificate would wholly exempt manufacturers and designers from what it termed "the bulk of liability for both individual and large-scale air catastrophes." *Id.* (internal quotation marks and citations omitted). But this concern implicates the whole category of field preemption, not only for air safety, but for any product. It simply ignores Congress' underlying purpose of insuring uniformity in what is undeniably quintessentially interstate (and international) commerce.

The *Sikkelee* decision is also anomalous because the court sought the FAA's guidance, then largely disregarded it. The court asked the FAA to file a brief addressing "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 has been met." *Sikkelee*, at n. 9. The FAA, responding to the court's request, stated quite directly, "[t]he field preempted by the Federal Aviation Act [] extends broadly to all aspects of aviation safety and includes products liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care." See FAA Letter to Marcia M. Waldron, Clerk of Court for the United States Court of Appeals for the Third Circuit, at *7 , (Sept. 21, 2015). The FAA explained: "The Act requires the

Department of Transportation, through the FAA Administrator, to impose uniform national standards for every facet of aviation safety, including the design of aircraft and aircraft parts," FAA Letter brief at *2. "[U]niform national standards for every facet of aviation safety" impliedly preempt any state-created standard of care in the field of aircraft design and manufacturing. The *Sikkelee* court dismissed these unequivocal statements by the FAA, saying that it recognized the while FAA is "well equipped to understand the technical and complex nature of the subject matter over which they regulate," the FAA's arguments were entitled to respect only to the extent [they] ha[ve] the power to persuade. *Sikkelee*, No. 14-4193 at *29-*30. We submit that the Third Circuit's concept of "deference" is at odds with this Court's standard. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)*, *Auer v. Robbins*, 519 U. S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945).

The Third Circuit's decision was mistaken on the merits of an important question that affects air safety and interstate and international commerce and must be rectified.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW.

The question whether the Federal Aviation Act preempts the entire field of aviation safety is indisputably important. State regulation of aircraft

design, manufacturing or maintenance, which the Third Circuit now invites, whether through regulation by 50 states or through tort litigation would encourage forum shopping and frequent litigation, and would frustrate the very uniformity of standards that ensures aviation safety.

The circuit split on that question is fully developed and ripe for resolution by this Court. The split is unlikely to resolve itself and this Court should intervene now to resolve it.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

Martin S. Kaufman
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org

Of Counsel:
Martin J. Newhouse
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

October 2016