

No. 16-323

IN THE
Supreme Court of the United States

AVCO CORPORATION,
Petitioner,

v.

JILL SIKKELEE, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF DAVID SIKKELEE,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Aviation Act requires courts adjudicating state-law products liability claims alleging defects in the design of general aviation aircraft components to apply federal standards of care instead of state-law standards of care.

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BRIEF IN OPPOSITION

Petitioner AVCO Corporation, through its Lycoming Engines Division (Lycoming) designed an engine (the O-320) for use in “general aviation” aircraft—*i.e.*, small aircraft, like the Cessna 172 series. According to Lycoming’s design, which only Lycoming could alter, many variants of that engine must utilize a model MA-4SPA carburetor. Lycoming’s design also requires that the screws holding the two main parts of the MA-4SPA carburetor together be secured using lock tab washers. For decades, however, Lycoming has known that this screw attachment system loosens due to engine vibration when used in O-320 engines installed on Cessna 172 series aircraft, and that this loosening can cause the engine to lose power. In 2005, respondent Jill Sikkelee’s husband David died from injuries he sustained in a fiery plane crash caused by that design defect. Sikkelee sued Lycoming and other responsible defendants.

Both before and after the enactment of the Federal Aviation Act, courts have adjudicated such claims under state products liability law. The district court here bucked that consensus, misreading the Third Circuit’s decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), to mean that federal standards of care preempt state ones for general aviation design defect claims. The resulting lawsuit was an awkward hybrid: state law provided all of the elements of the cause of action except the standard of care, which the district court unsuccessfully attempted to distill from the federal aviation regulations.

Then, in a truly unprecedented decision, the district court held that because Lycoming had obtained a “type certificate” from the Federal Aviation Administration (FAA)—*i.e.*, a pre-production design approval—for the O-320 engine’s design, its compliance with federal standards must be conclusively presumed, effectively absolving Lycoming of liability for defects in its design.

In an interlocutory appeal, the Third Circuit reversed the district court, restoring the status quo that had existed for decades. The court held that state-law standards of care apply to the claims in this case, thus “declin[ing] 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.” Pet. App. 54a. It also separately rejected Lycoming’s type certification defense, holding that type certification is not conclusive evidence of compliance, but instead may be relevant under conflict preemption principles depending on the facts of a given case.

Lycoming’s petition seeking this Court’s review of that interlocutory decision should be denied.

STATEMENT OF THE CASE

I. The Product Defect That Killed David Sikkelee.

This case arises from the failure of Lycoming's O-320-D2C¹ engine's carburetor attachment system installed in a single-engine Cessna 172 series airplane.

1. Broadly speaking, a carburetor combines air with fuel in a ratio that facilitates combustion in an engine. The MA-4SPA carburetor, which is the required carburetor for the Lycoming O-320-D2C engine, has two main parts: a bowl, which contains fuel, and a throttle body, which is a valve that regulates the amount of air that flows into the carburetor.

If the seal between those two parts becomes loose, then an incorrect mixture of fuel and air will flow to the engine cylinders. This causes a reduction or complete loss of engine power because the

¹ O-320 describes the engine generally (an engine with cylinders in an opposing configuration, with a displacement of 320 cubic inches). Lycoming's type certificate for the O-320 includes approximately 60 variants of the O-320 engine; the O-320-D2C is one of those variants. *See* Type Certificate Data Sheet No. E-274, at 2, *available at* <http://tinyurl.com/prckhr9>. Two of the variants on the type certificate (B2D, and D1D) do not use the same carburetor as the others. *Id.* Lycoming also has multiple variants of the IO-320, which is very similar to the O-320 except that it uses fuel injection instead of carburetion. *See* Type Certificate Data Sheet No. 1E12, *available at* <http://tinyurl.com/nwcdmpa>.

improper mix does not combust with the requisite force.

To maintain the seal, the MA-4SPA carburetor has four screws attaching the throttle body to the bowl. But merely using screws is insufficient because engine vibration can cause those screws to loosen, and the seal to break. The throttle body-to-bowl screws must therefore be secured in place.

For a time, the throttle body-to-bowl screws in MA-4SPA carburetors were secured using safety wire. When using safety wire, a small hole is drilled sideways through the head of each of the four body-to-bowl screws. A metal wire is then threaded through the holes in one pair of screws, and twisted to maintain tension so that neither screw head can turn. The same is done for the other pair of screws. Safety wire is a highly effective method for securing screws in place.

In 1965, Lycoming changed the design of MA-4SPA carburetors used in its O-320 engines by replacing the safety wire with lock tab washers. *See Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479, 484 (M.D. Pa. 2012). These washers sit just under the screw, and have tabs on them that bend upward. In theory, these tabs are intended to hold the screw heads in place and prevent them from turning. In practice, however, lock tab washers do not prevent the throttle body-to-bowl screws from loosening—especially in engines like Lycoming’s O-320 that vibrate significantly—because the lock tabs simply cannot hold on to the screw heads in high vibration environments. *See id.*; *see also* Dkt. #234-6, at 16 (expert affidavit explaining that “[t]he lock tab washers designed to maintain the throttle body to

float bowl screw torque are defective, do not function properly and allow the screws to loosen during operation”).²

2. Because it holds the type certificate for the O-320 engine, Lycoming alone has the power to change the design of that engine’s fuel system. A type certificate is a prerequisite to mass producing a design, and is granted based on the FAA’s initial determination that the design complies with all applicable federal statutes and regulations, according to the manufacturer’s representations. 49 U.S.C. § 44704(a)(1). As this Court has explained, the system places the duty to comply with the minimum federal standards upon the manufacturers, not the FAA. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816 (1984).

Type certificates are issued for entire aircraft, for aircraft engines, and for propellers. *See* 49 U.S.C. § 44704(a)(1); 14 C.F.R. § 21.11(a). Type certificate holders like Lycoming are responsible for ensuring that all sub-components, including carburetors, installed on their certificated designs are safe and compliant. *See* 14 C.F.R. §§ 21.20, 21.23(b). Type certificate holders also have a duty to monitor the continued airworthiness of their certificated products. *Id.* §§ 21.3, 21.50.

To obtain a type certificate, a manufacturer must submit an application to the FAA for approval. The application includes all design specifications and

² “Dkt.” refers to the district court’s electronic docket.

testing data needed to show compliance with the applicable regulations. *Id.* §§ 21.15, 21.20. Because of resource constraints and a lack of agency expertise, however, the FAA’s evaluative function is largely delegated to the applicants themselves. Thus, the applicants perform essentially all of the necessary testing and analysis through “designees,” who are employees of the manufacturer that act as surrogates for the FAA. *See* 14 C.F.R. Part 183; *see also* FAA, Type Certification, Order 8110.4C, at 52 (2007), *available at* <http://tinyurl.com/qc8tsfb>. Indeed, a 2004 report by the Government Accountability Office (GAO) stated that designees perform “more than 90 percent of [the FAA’s] certification activities.” GAO, *Aviation Safety: FAA Needs to Strengthen the Management of its Designee Programs*, GAO-05-40, at 3 (2004). Thus, in an ordinary case, the FAA does not independently test designs to verify the data submitted by the manufacturers, but instead essentially takes the manufacturers at their word that their designs are compliant.

As the number and the complexity of type certificate applications increased over time, the degree of delegation from the FAA to the manufacturers has likewise increased. Consequently, as this Court has recognized, “in most cases the FAA staff performs only a cursory review of the substance of th[e] overwhelming volume of documents submitted for approval.” *Varig Airlines*, 467 U.S. at 818 n.14 (quotation marks omitted). The GAO has therefore concluded that the FAA’s approach is “too ad hoc and unmeasured to ensure a minimum effective level of involvement” in the certification process. GAO, *Aircraft Certification: New FAA*

Approach Needed to Meet Challenges of Advanced Technologies, GAO/RCED-93-155, at 5 (1993). Although the agency recently has taken steps to enhance the certification process, there is no evidence that it has any capacity to second-guess a manufacturer's assertions of compliance—especially when it comes to relatively minor components of the design. Unsurprisingly, latent defects frequently make their way into certificated products.³

A single type certificate may include multiple variants of a design. For example, the type certificate for Lycoming's O-320 engine includes more than sixty variants. See Type Certificate Data Sheet No. E-274, at 3, available at <http://tinyurl.com/prckhr9>. The approval of variants to a design is often perfunctory. The variant at issue in this case, the O-320-D2C, took only 18 days to certify. *Id.*

Major changes to a certificated design may require a manufacturer to amend the type certificate—but manufacturers can make some changes on their own. See FAA, Designated Engineering Representative (DER) Handbook, Order 8110.37E, at 12, 24 (2011), available at <http://tinyurl.com/zp8pq3z>. Indeed, that is how

³ Lycoming provides a nice example when it argues that the certification process for the Boeing 787 Dreamliner was exhaustive. Pet. 6. That, of course, is the same plane that caught fire more than once due to fuel leaks and battery problems. Importantly, the certification process for large commercial aircraft is far more involved than the process for small general aviation aircraft and components—so if Boeing's jumbo jets can have latent defects that survive certification, then Lycoming's engines surely can too.

Lycoming changed its carburetor design to use lock tab washers in lieu of safety wire. Instead of applying for a new, amended, or supplemental type certificate, Lycoming issued what is known as an Engineering Change Order, *i.e.*, an internal design change authorizing the use of lock tab washers, approved by Lycoming's own Designated Engineering Representative. *See* Dkt. #233 (filed under seal).

3. Lycoming has known the dangers of using lock tab washers since at least 1971, when the FAA sent it a letter enclosing numerous field reports of throttle body-to-bowl screws with lock tab washers coming loose on O-320 series engines installed in Cessna 172 series aircraft. Dkt. #234, at ¶ 24; Dkt. #317 (filed under seal). After receiving another letter from the FAA in 1972 (Dkt. #234-8) disclosing even more defect reports, Lycoming responded in 1973 by issuing a “service bulletin” instructing mechanics to check and tighten the throttle body-to-bowl screws. Dkt. #234-10. For a variety of reasons—principally because the problem was with the design itself, and not how the engine was maintained—that fix was ineffective, which Lycoming knew. In fact, evidence showed that compliance with Lycoming's service bulletin would compromise the integrity of the lock washers. Dkt. #234, at ¶¶ 32-35. The problem persisted for decades, but Lycoming took no further action to fix it, and did not change the design to again incorporate safety wire or other feasible alternatives—even after it was approached by Precision Airmotive, one of its former codefendants, who urged Lycoming, as the type certificate holder, to fix the ongoing problem many months before the crash that gave rise to this litigation. Dkt. #234-14.

Lycoming's failure to act is important because as the holder of the type certificate, Lycoming is the only company that has the power to change the design of the O-320 engine. Thus, every Lycoming O-320-D2C engine was manufactured using a carburetor with lock tab washers. And every component manufacturer and maintenance facility must follow Lycoming's instructions precisely.

4. In 2005, David Sikkelee rented a single-engine Cessna 172 series airplane, which had in it a Lycoming O-320-D2C engine and its MA-4SPA carburetion system, assembled and overhauled according to Lycoming's instructions. Investigation and expert analysis revealed that loose throttle body-to-bowl screws caused a loss of engine power shortly after takeoff, leading to a lethal crash. David died from the injuries and burns he sustained, leaving behind his widow, Jill, and five children. A passenger on the plane was seriously injured.

II. The District Court Litigation.

After the plane crash that killed her husband, Jill Sikkelee filed suit against Lycoming and other defendants, alleging claims under state law, in the U.S. District Court for the Middle District of Pennsylvania. Pet. App. 114a.

Lycoming moved to dismiss, arguing that the Federal Aviation Act preempted state law in this area, requiring dismissal of Sikkelee's claims. Although the district court acknowledged the "wisdom of the various decisions in other Circuits that have failed to find preemption in circumstances similar to the case at bar," it concluded that the Third Circuit's decision in *Abdullah v. American*

Airlines, Inc., 181 F.3d 363 (3d Cir. 1999), compelled a contrary result. Pet. App. 132a. *Abdullah* had held, in a case involving injuries sustained by passengers due to turbulence aboard a commercial flight, that federal aviation regulations provide the applicable standard of care for negligence claims arising out of the operation of an aircraft—but that state-law remedies remain available for violation of those federal regulations. 181 F.3d at 365. Along the way, the Third Circuit stated that the “entire field of aviation safety” was preempted. *Id.* at 375. Reading this language to encompass general aviation aircraft design, the district court held that federal law supplies the standard of care for Sikkelee’s claims, dismissed Sikkelee’s claims, and granted her leave to amend to assert claims under federal standards of care. Pet. App. 133a-34a.

Sikkelee promptly filed a new complaint alleging violations of federal regulations. Among other regulations, she alleged a violation of 14 C.F.R. § 33.35(a),⁴ which provides that “[t]he fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.” She also alleged a violation of 14 C.F.R. § 21.3, which provides that “[t]he holder of a type certificate . . . must report any failure, malfunction, or defect in any product or article manufactured by it” that could

⁴ Formally CAR § 13.110(a).

cause an “engine failure” or other enumerated problems such as flammable fluid leakage.

The case proceeded to discovery and summary judgment motions, during which some defendants settled and some claims were dismissed. The district court denied Lycoming’s motions for summary judgment with respect to Sikkelee’s design defect products liability claims as well as her claim that Lycoming had concealed this defect from the FAA. The court found “abundant evidence” showing that “the defective throttle body to bowl assembly . . . was the cause of the accident,” and that “alternative designs were feasible and completed but, ultimately, rejected by Lycoming in favor of the defective body to bowl assembly herein at issue.” *Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479, 490-91 (M.D. Pa. 2012).

Lycoming unsuccessfully sought an interlocutory appeal, after which the case was reassigned to a new district judge. Lycoming twice moved for reconsideration of the prior summary judgment denial, and was again denied. *See Sikkelee v. Precision Airmotive Corp.*, No. 4:07-CV-00886, 2013 WL 3456953, at *1 (M.D. Pa. July 9, 2013) (noting that Lycoming’s latest motion “test[ed] the limits of this Court’s Local Rule” permitting motions for reconsideration and “arguably overstepp[ed] the bounds of tactfulness”); *Sikkelee v. Precision Airmotive Corp.*, No. 4:07-CV-00886, 2013 WL 2393005, at *11 (M.D. Pa. June 3, 2013).

On the eve of trial, the newly assigned district judge encountered difficulty crafting jury instructions around the federal regulations, and expressed skepticism that the federal regulations establish

standards of care at all. The court invited Lycoming to file a renewed motion for summary judgment suggesting that Sikkelee's claims must fail because Lycoming had obtained a type certificate for O-320 series engines, thus conclusively establishing its compliance with the applicable federal regulations.

Lycoming filed the motion, and the district court granted it in part, concluding that any claims alleging violations of regulations that were part of the type certification process were preempted because the issuance of the certificate established Lycoming's compliance with those regulations. Pet. App. 96a-97a. That holding effectively granted Lycoming immunity for any claim alleging a defect in its design. The court denied summary judgment with respect to Sikkelee's claim that Lycoming had concealed defects in its design from the FAA in violation of 14 C.F.R. § 21.3. Pet. App. 108a-09a, 113a.

One key to the district court's analysis was its refusal to revisit the prior district judge's determination that under *Abdullah*, federal standards of care govern Sikkelee's claims. The court acknowledged that the contrary arguments were "compelling," *Id.* 82a, including because the federal regulations leave "gaps in the regulatory scheme governing makers of aircraft engines and components" that "give one pause before concluding that the case at bar is within the field of preemption identified in *Abdullah*," *id.* 90a. Nevertheless, the court deferred to the prior order holding that "*Abdullah* applies." *Id.* 83a. The court concluded by expressing substantial doubt about its decision:

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.

Id. 112a. The court certified its order for interlocutory appeal, and the Third Circuit granted Sikkelee’s petition to appeal. The trial on Sikkelee’s remaining claim (for a violation of 14 C.F.R. § 21.3) was and remains stayed.

III. The Interlocutory Appeal.

On appeal, Sikkelee argued first that whether the standard of care comes from state law or from federal regulations, type certification does not insulate Lycoming from liability for general aviation design defect claims. She argued in the alternative that *Abdullah* preemption does not apply to general aviation design defect claims. Lycoming took the opposite positions, and also raised a new defense under state law—but it conceded that whatever the outcome of the appeal, Sikkelee’s claim for concealment of design defects (which was not at issue in the appeal, and therefore is not at issue in the petition) would proceed to trial.

After argument, the FAA filed a brief at the court's invitation. The FAA argued in favor of field preemption, but rejected Lycoming's contention that the issuance of a type certificate conclusively establishes compliance with federal standards. Instead, the FAA argued that courts should assess the importance of a type certificate by applying ordinary conflict preemption principles—a theory that had not been advanced by any of the parties, or even by the government itself in any prior case.

In a unanimous decision, the Third Circuit reversed the decision to grant summary judgment to Lycoming. It concluded first that the preempted field of aviation safety does not include general aviation design defect claims. The district court had reached a contrary conclusion by over-reading *Abdullah*—which was distinguishable because it involved entirely distinct regulations and statutory requirements that were more sweeping and more detailed than the federal regulations relating to general aviation designs. *See* Pet. App. 14a-15a (describing limitations of *Abdullah*'s holding).

The court of appeals' reasoning was detailed and thorough. It canvassed the entire history of civil aviation, noting that “aviation torts have been consistently governed by state law.” *Id.* 16a. The court of appeals observed that “there was little question when the Civil Aeronautics Act was adopted in 1938 that common law standards governed tort claims arising from plane crashes,” and that when Congress in 1958 enacted the Federal Aviation Act, it did not move to preempt such suits, but instead included a “savings clause” that preserves state-law remedies. *Id.* 20a-21a. Similarly, when Congress

commanded the FAA to establish “minimum standards” for aircraft designs and created the modern type certification regime, it never stated—or even suggested—that those increased regulatory requirements were intended to displace state law. *See id.* at 21a-22a. The Third Circuit further reasoned that the federal aviation regulations governing the design of general aviation aircraft and their engines do not establish a federal standard of care that would preempt state standards. *Id.* 23a-27a. Like the district court, the Third Circuit found it challenging to distill a standard of care from the regulations at all.

The Third Circuit also found support in the text and legislative history of the General Aviation Revitalization Act of 1994 (GARA), Pub L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 note), an amendment to the Federal Aviation Act. GARA created a limited statute of repose that, with certain exceptions and tolling provisions, bars suit against an aircraft manufacturer for injuries arising from a general aviation accident that occurs more than 18 years after the aircraft was delivered or a new part installed. The Third Circuit reasoned that “[b]y barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted.” Pet. App. 29a. Any other reading would render GARA “superfluous.” *Id.*

GARA’s legislative history also “states explicitly what is implied by the statutory text: Aviation products liability claims are governed by state law.” *Id.* 31a. Indeed, Congress stated that “in cases where the [GARA] statute of repose has not expired, State

law will continue to govern fully, unfettered by Federal interference.” H.R. Rep. No. 103-525, pt. 2, at 7 (1994).

The Third Circuit then surveyed this Court’s preemption cases, as well as the decisions of other circuits, and concluded “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.” Pet. App. 34a.

Separately, the court rejected Lycoming’s contention that “the issuance of a type certificate must both establish and satisfy” the federal standard of care. *Id.* 27a. The court was concerned that if it adopted Lycoming’s “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.” *Id.* The court found it improbable that Congress would have silently stripped the victims of such accidents of any judicial recourse. *Id.* 28a. Instead, it held that “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.” *Id.* 41a. Consequently, when a type certificate requires a manufacturer to create a product in a certain way—and the manufacturer has no power to alter the design—it may be impossible for the manufacturer to comply with a conflicting state-law duty, and the state law may be preempted. *See id.* at 43a-44a. Because the issue had only been raised in post-

argument supplemental briefing, the Third Circuit did not “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.” *Id.* 41a. Instead, it left those issues for the district court to consider on remand. *Id.*

The court of appeals summarized its analysis:

[N]o federal appellate court has held an aviation products liability claim to be subject to a federal standard of care or otherwise field preempted, and [Lycoming] ha[s] 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.

Id. 50a. It concluded:

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.

Id. 54a. Finally, the Third Circuit declined to reach Lycoming’s state-law arguments, directing Lycoming

to address them to the district court (to the extent they have been preserved). *See id.* 54a n.24.

After the Third Circuit denied rehearing, Lycoming filed its petition in this Court.

REASONS TO DENY THE WRIT

Certiorari should be denied because there is no circuit split, the decision below is correct, and this case is a poor vehicle to address questions of field preemption generally.

I. There Is No Circuit Split Over The Question Actually Presented By This Case.

The Third Circuit expressly “decline[d Lycoming’s] invitation to create a circuit split” by finding field preemption of general aviation design defect claims. Pet. App. 54a. Instead, it followed the lead of every other circuit by holding that the minimum standards embodied in the federal design regulations do not preempt state standards of care.

Lycoming attempts to manufacture a split by phrasing the question presented at a high level of abstraction, asking whether “the Federal Aviation Act preempts the application of state-law standards of care in the entire field of aviation safety.” Pet. i.

To the extent that courts disagree in the abstract about the scope of aviation field preemption, this case does not implicate that disagreement because the courts of appeals uniformly agree that whatever the scope of the preempted field, it does not reach general aviation design defect cases. *See* Pet. App. 6a (involving defective carburetor design); *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d

806, 812 (9th Cir. 2009) (finding against preemption in case involving the defective design of aircraft stairs); *Pub. Health Trust of Dade Cty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-95 (11th Cir. 1993) (finding no preemption in case involving the defective design of a helicopter seat); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir. 1993) (finding no preemption in case involving defective cockpit design).

The cases Lycoming cites on the other side of its alleged split involve entirely different facts. See *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210-11 (2d Cir. 2011) (accepting that the Federal Aviation Act preempts in-air safety, but finding against preemption in a case involving state environmental laws governing tree removal near an airport, and never discussing aviation design); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1327-28 (10th Cir. 2010) (finding preemption of state positive regulations regarding alcohol service in a case involving injuries sustained due to alcoholic beverage service aboard commercial aircraft); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 285-86 (5th Cir. 2004) (involving injuries sustained from deep vein thrombosis aboard a commercial flight); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 364-65 (3d Cir. 1999) (involving injuries sustained due to turbulence aboard a commercial flight); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989) (involving drug testing of commercial pilot).

The distinction between general aviation design defect claims and other aviation claims holds across circuits and within circuits, belying the notion that

circuits take radically different approaches to aviation field preemption. For example, the Third and Tenth Circuits both found field preemption for claims relating to the operation of aircraft, but not for general aviation design defect claims. Thus, there is no reason to worry that the Third Circuit abandoned the concept of aviation preemption generally by deciding against preemption in this case.

Moreover, there are principled grounds for the distinction. *See* Part II, *infra*. Thus, there is no cause for concern that the decision below will undermine uniformity in aviation regulation. On the contrary, as the court of appeals explained, its holding “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 defects.” Pet. App. 51a-52a.

II. The Third Circuit Correctly Refused To Find That The Federal Aviation Act Preempts State Standards Of Care For General Aviation Products Liability Claims.

Certiorari also should be denied because the Third Circuit correctly determined that aviation torts—and especially products liability claims—have historically been governed by state law, and that Congress has never clearly indicated any intention to preempt that body of law.

1. “Preemption analysis starts with the assumption that the historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress.” *Riegel v.*

Medtronic, Inc., 552 U.S. 312, 334 (2008) (quotation marks omitted). “Given the traditional primacy of state regulation of matters of health and safety, courts assume that state and local regulation related to [those] matters . . . can normally coexist with federal regulations.” *Id.* (quotation marks and citation omitted); see also *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (“Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action . . . unless Congress has made such an intention ‘clear and manifest.’”). As the Third Circuit explained, both aviation torts and products liability claims have long been governed by state law, and so the ordinary presumption against preemption applies here.

Lycoming disputes that the presumption applies, citing the general federal interest in aviation. But the Federal Aviation Act itself—*i.e.*, the source of all of Lycoming’s evidence—includes a savings clause to preserve state remedies. See 49 U.S.C. § 40120(c).

The cases Lycoming cites also do not speak to products liability claims, and they do not speak to general aviation—which refers only to civil aviation that is not conducted by commercial carriers. The vast majority of general aviation flights involve very small aircraft, often taking off and landing at the same airfield or one nearby. Aside from a handful of private jets, general aviation aircraft rarely cross international borders. And they are regulated substantially less than commercial aircraft and flights.

Lycoming never acknowledges that general aviation products liability has, for decades, been governed by state law, including state standards of care. That long history—which Congress knows about—makes a presumption against preemption appropriate.

This Court’s recent cases, which have “frequently rejected field pre-emption in the absence of statutory language expressly requiring it,” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas J., dissenting), further establish that field preemption of state tort standards faces a high bar. For example, in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), this Court refused to find preemption of state antitrust laws as they related to natural gas sales. The Court found against preemption, in substantial part, because the state laws in question were not targeted at the same objectives as federal law. *Id.* at 1600-01. So too here: state tort law exists principally to ensure that the victims of accidents receive fair compensation—a goal that federal aviation law does not attempt to fulfill. Moreover, like the antitrust laws at issue in *Oneok*, products liability laws “are not aimed at [general aviation manufacturers] in particular, but rather all businesses in the marketplace,” a fact that “supports a finding of no pre-emption here.” *Id.* at 1601.⁵

⁵ In *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), Justice Kagan’s concurring opinion explained that under “modern preemption law,” a mere grant of comprehensive regulatory authority is insufficient “to oust all of state law from a field.” *Id.* at 1270 (Kagan, J., concurring). Although the Court

2. Lycoming cannot carry its heavy burden to overcome the presumption against field preemption. Start with a relatively simple proposition: there is no evidence anywhere that Congress intended to deny the victims of plane crashes their day in court, or to insulate manufacturers who cause such crashes from civil liability. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (“It is, to say the least, ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.’”) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); cf. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 237 (1995) (Stevens, J., concurring) (“Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation . . .”). At the same time, Congress did not provide a federal cause of action for air crash victims or any other mechanism for recovery under federal law. There is no general aviation federal products liability law. Instead, Congress included in the Federal Aviation Act a savings clause that preserves existing remedies. The natural inference is that Congress expected such claims to be litigated under state law.

Given Congress’s desire to preserve state causes of action, it would be unusual for Congress to have preempted the standards of care in those actions.

found preemption in that case, it did so on the basis of 85-year-old precedent compelling that conclusion. There is no comparable precedent for aviation claims—and this Court should not create it now.

And again, there is no evidence that Congress wished to do so. The closest Lycoming can come is to cite sweeping statements from distinguishable cases stressing the generally strong federal interest in aviation. But it cannot cite anything specific to general aviation aircraft designs.

In fact, the most specific evidence—which is directly on point—cuts strongly the other way. In 1994, Congress enacted GARA as a response to complaints from general aviation manufacturers who had long been subject to state tort liability for defective planes and parts. The manufacturers worried that liability for old designs would prevent them from making a profit. Various legislative proposals had been considered and rejected—including some that would have replaced state causes of action with a federal products liability tort and federal standards of care. Instead of those comprehensive proposals, Congress in GARA enacted “a narrow and considered response to the ‘perceived’ liability crisis in the general aviation industry,” which was “limited to creating a statute of repose.” H.R. Rep. No. 103-525, pt. 2, at 6 (1994).

GARA’s legislative history is telling. The House Report explains that “[t]he liability of general aviation aircraft manufacturers is governed by tort law . . . While the specific contours have ebbed and flowed, the public’s right to sue for damages is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.” *Id.* at 3-4. Respect for federalism and common law tradition had caused Congress “to tread very carefully when considering proposals . . . that would preempt State liability law.” *Id.* at 4. Thus, whereas

prior legislative efforts had sought “to revise substantially a number of substantive and procedural matters relating to State tort law,” GARA “is limited to creating a statute of repose.” *Id.* at 6. After considering the costs of tort liability, as well as the substantial federal regulatory oversight of the industry, “the Committee voted to permit, in this exceptional instance, a very limited Federal preemption of State law.” *Id.* “In essence, the bill acknowledges that, for those general aviation aircraft and component parts in service beyond the statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself,” so that civil liability is unnecessary. *Id.* at 6. But Congress was explicit that “in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.” *Id.* at 7.

In enacting GARA, Congress “paid close attention to the distinguishing characteristics of the general aviation industry,” including the degree of “[f]ederal regulatory oversight” and the “rigid standards set by the Federal Aviation Administration” for the type certification process. *Id.* at 5. Indeed, it was “all these exceptional considerations” that made Congress “willing to take the unusual step to preempting State law in this one extremely limited instance,” striking “a fair balance by providing some certainty to manufacturers . . . while preserving victims’ right to bring suit for compensation.” *Id.* at 6. GARA thus accounts for all of the general points that Lycoming makes about the federal interest in aviation, including the rigors of

the type certification process—and proves that Congress deemed them insufficient to justify broad implied field preemption.

Lycoming says as little as possible about GARA, arguing that subsequent legislation does not always reveal the meaning of prior legislation, and also that its interpretation of the Federal Aviation Act would not render GARA entirely “superfluous” because some tort claims would remain available. *See* Pet. 29.

The first point is unpersuasive because this Court has often relied on subsequent legislative amendments to determine the meaning of statutes. *See, e.g., Tex. Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520-21 (2015) (deciding that the 1968 Federal Housing Act authorized disparate impact claims by citing the 1988 amendments to the statute that presumed the availability of such claims); *Silkwood.*, 464 U.S. at 256 (citing legislative history of the amendments to the Atomic Energy Act to hold that the act did not preempt punitive damages claims). In this case, such reliance is particularly appropriate because the entire motivation for the law was to create preemption where previously there was none, and because GARA’s legislative history speaks directly to the scope of federal preemption under the Federal Aviation Act itself.

Lycoming’s second point is unpersuasive because in order to win the preemption debate we do not have to prove that Lycoming’s interpretation would render GARA “superfluous” or meaningless in every case. Even if Lycoming’s interpretation would preserve some tort claims, the key point about GARA is that its existence and history are fundamentally

irreconcilable with Lycoming's interpretation of the Federal Aviation Act because general aviation manufacturers' liability for product defects cannot be a field that Congress occupied "to the exclusion of state law," Pet. 21, and also be "governed by tort law . . . unfettered by Federal interference," H.R. Rep. No. 103-525, pt. 2, at 3, 7.

3. Although GARA is the most compelling evidence available, it is by no means the only evidence refuting Lycoming's preemption argument. The Third Circuit aptly catalogued the textual and historical arguments against preemption, and there is no need to retread that ground here.

One point, however, bears special emphasis. In this litigation, Lycoming argues on the one hand for field preemption while on the other hand denying that federal law imposes any standard of care relevant to the defects at issue in this case. Those premises negate each other: regulations cannot be so pervasive that they preempt all of state law, but so porous that they have nothing to say about the design of an aircraft engine's fuel system. The district court recognized that this tension militated strongly against field preemption—but found itself unable to depart from the prior district judge's field preemption decision. The Third Circuit was not so bound, and it was therefore free to correctly hold that the regulations at issue do not displace state standards of care.

Even as it seeks reversal of that decision, Lycoming never explains how federal standards of care ought to work. For instance, Lycoming never describes what a plaintiff injured by a defective carburetor or other general aviation engine fuel

system must prove in order to recover under a supposed federal standard of care. Nor does Lycoming explain how a federal standard governing carburetors would differ from a state-law standard. Indeed, throughout this entire litigation, Lycoming has never even attempted to do so. Consequently, it is difficult to understand how field preemption might work in practice. The lower courts correctly recognized that these difficulties suggest that Congress did not intend to preempt the standards of care that state courts have successfully been applying for decades.

4. The best thing Lycoming's argument has going for it is that the FAA agreed in its post-argument letter brief to the Third Circuit that federal standards of care should govern a manufacturer's liability for aviation design defects. As this Court has explained, however, it does not "defer[] to an agency's *conclusion* that state law is pre-empted." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Instead, it considers the agency's "explanation of how state law affects the regulatory scheme." *Id.* Under that standard, this Court has not hesitated to reject the executive branch's arguments in favor of preemption. *See, e.g., id.* at 576; *Oneok*, 135 S. Ct. at 1599 (rejecting United States' position that state laws fell within preempted field).

In this case, the FAA was invited to state its views, but on the question of field preemption it did not add anything to Lycoming's presentation, and the Third Circuit found the FAA's position unpersuasive for the same reasons. *See* FAA Letter Br. 6-9 (Sept. 21, 2015). Specifically, the FAA offered no explanation for how state law would affect the

regulatory scheme; it merely stated that it had “carefully considered the question of the preemptive scope of the statute and federal regulations.” *Id.* at 9. Moreover, no court has ever agreed with the FAA’s position in this case: the Third Circuit rejected it below, and the Tenth Circuit rejected it twenty-three years ago in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444-46 (10th Cir. 1993).⁶ Notably, general aviation has only become more safe since then.⁷

⁶ The FAA’s position is also at least arguably inconsistent with the position the United States took in *Varig Airlines*. There, various plaintiffs attempted to sue the United States for negligently certifying defective aircraft designs. One of the plaintiffs argued that the FAA was responsible because it had “preempt(ed) the field’ of airline safety.” U.S. Reply Br. n.8, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). The government responded that this contention “utterly ignores the continuing duty of manufacturers and operators to inspect their aircraft for compliance with all safety requirements,” *id.*, indicating that the federal regulatory scheme is not so pervasive that it limits manufacturer liability.

⁷ It is also important that the FAA’s position has never been that manufacturers like Lycoming can evade liability for defective designs. Instead, the FAA consistently has argued that when manufacturers violate federal regulations, they can and should be held accountable in state tort cases. *See, e.g.*, FAA Letter Br. 9-10; U.S. Br. at *29, *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993) (“An injured party would thus retain, as the act’s savings clause requires, the full panoply of compensatory remedies for a manufacturer’s violation of an applicable standard of design safety.”). The FAA also rejected Lycoming’s argument that type certification “is dispositive of the question whether the manufacturer complied with federal standards.” FAA Letter Br. 10.

5. Lycoming’s amici fare no better on the merits. Indeed, all of the amicus briefs exhibit the same three critical defects.

First, it is as if the amicus briefs were drafted in an alternate universe in which GARA was never enacted. Only AOPA’s brief mentions GARA at all—and then only once, on the last page of the argument (page 20), to suggest that “GARA is a statute of repose and does not address the standard of care in aviation products liability actions.” But of course GARA does not address the standard of care: the entire point of the statute was to take a narrow approach to preemption by leaving preexisting state-law standards of care intact. *See, e.g.*, General Aviation Revitalization Act of 1993: Hearing on H.R. 3087 Before the Subcomm. on Economic and Commercial Law of the H. Comm. on the Judiciary, 103rd Cong., at 26 (1994) (Statement of Rep. Hansen) (“The bill does not create a federal standard of liability”); H.R. Rep. No. 103-525, pt. 1, at 1-2 (1994) (“In the 100th and 101st Congresses . . . the Committee reported general aviation product liability bills establishing uniform standards on a number of issues, including . . . standards of liability [N]o action was taken by the Committee on the Judiciary In the 103rd Congress, the legislation has been limited to one issue, a statute of repose.”).

The most charitable interpretation of the amici’s silence regarding GARA is that they believe that the only statute in which Congress spoke directly to the scope of federal preemption for general aviation products liability claims is irrelevant to the scope of field preemption in this general aviation products liability case. But if that premise is wrong—and it is

certainly wrong—then the amici’s submissions lack merit.

Second, none of the amicus briefs acknowledge that the Third Circuit’s rule has in fact been the rule governing general aviation cases for as long as general aviation has existed. Thus, while Lycoming’s amici fret that the Third Circuit’s decision will disrupt the orderly regulation of civil aviation, they express no qualms about the status quo—indeed, GAMA notes (at 16-17) that general aviation accidents have been declining, and describes U.S. aviation as “the safest and best in the world.” Aside from naked speculation, the amici cannot and do not provide any explanation for how regulation will be impaired going forward.

Third, like the petition itself, none of the amicus briefs explain how a federal standard of care will work in *any* case—let alone what standard of care applies to Sikkelee’s claims in this case. More to the point, no amicus even suggests that a different standard of care would be outcome determinative in this case, because no amicus argues that the applicable standard of care permits Lycoming to design an engine fuel system that loosens mid-air, causing planes to crash. On the contrary, the majority of Lycoming’s amici agree with Sikkelee that manufacturers can and should be liable for defective designs.

III. This Interlocutory Appeal Is A Poor Vehicle To Decide The Question Presented.

This case is also a poor vehicle to decide the question presented for three reasons.

1. First, this case concerns only a discrete corner of aviation law that has its own unique statutory parameters, and therefore does not implicate broader questions about whether the “entire field” of aviation safety is preempted. For preemption purposes, general aviation is not the same as commercial aviation, tort claims are not the same as positive regulations, and products liability claims are not the same as torts governing in-air operations.

2. Second, the case is in an interlocutory posture, and this appeal cannot resolve the entire litigation. Regardless of the outcome, Sikkelee has a live claim that Lycoming violated 14 C.F.R. § 21.3 when it concealed the defects in its design from the FAA. Many of the facts that will be introduced in the trial on that claim overlap with the facts that would be introduced to support state-law design defect claims. For example, Sikkelee intends to prove that Lycoming’s design and service instructions were unsafe and that Lycoming failed to report that defect, which contributed to the cause of the crash that killed David Sikkelee. If she proves those facts, then that may inform how this Court considers the preemption questions. If she does not prove those facts, then the preemption question may become moot.

Lycoming also insisted in the court of appeals that it has viable defenses under state law. Of course, we disagree—but that is a matter for trial, and then perhaps appeal. If Lycoming prevails on state-law grounds, the preemption question will be moot.

3. Third, the question presented is not outcome determinative even with regard to the specific claims at issue in this appeal because the question relates

only to what standard of care applies—and not to whether Sikkelee has a claim *vel non*. Whether the standard is traditional state-law negligence and strict liability, or instead whether Lycoming violated federal regulations, summary judgment in Lycoming’s favor would be inappropriate because Sikkelee has produced ample evidence that Lycoming’s design is defective under any standard. That is why the district court denied summary judgment to Lycoming on Sikkelee’s claims based on federal standards of care, and then denied Lycoming’s multiple motions for reconsideration. *See Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479, 490-91 (M.D. Pa. 2012).

Indeed, it is not remotely clear why Lycoming cares about the question presented—at least in this case—because, as noted above, Lycoming has never explained how the allegedly applicable federal standard of care differs from the state standard. The standards may be the same. Or to the extent the standards differ, it is not remotely clear that the difference will matter in cases like this one because it is hard to imagine any standard of care that allows a manufacturer to design an engine fuel system that causes planes to crash.

In the lower courts, Lycoming’s field preemption argument was merely step one of a two-part gambit to avoid a trial. Lycoming argued first that federal law preempted state standards of care, and then argued that it prevailed as a matter of law because (1) there is no federal regulation on point, and therefore no applicable standard of care at all; and (2) the issuance of a type certificate conclusively

establishes Lycoming's compliance with federal standards.

The problem with argument (1) is that if there is no applicable standard of care, then it would be bizarre to find field preemption. *See supra* 27-28. If, as Lycoming has suggested, the regulatory regime has substantial gaps, then the logical inference is not that Congress intended for manufacturers to be free from liability for negligent conduct falling within those gaps; it is that Congress left those questions to state law.

The most obvious problem with argument (2) is that the Third Circuit unequivocally rejected it, and Lycoming's petition does not challenge that holding. The Third Circuit thus stated: "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 . . ." Pet. App. 41a. The court's holding rejecting Lycoming's "conclusive evidence" argument is clearly separate from its field preemption holding, and is not encompassed within the question presented. Nor would the question whether type certification constitutes conclusive evidence of compliance with federal standards be cert-worthy: there is no split over it because Lycoming was "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." *Id.* 50a.

Independent of the fact that it is not presented by the petition, Lycoming's type certification

argument is meritless because there is no indication anywhere that Congress intended to effectively immunize manufacturers from liability for certificated designs—especially in light of the many flaws and gaps in the type certification process itself. Indeed, Congress accounted for type certification in GARA itself—which both defines the term “general aviation aircraft” by reference to the type certification process, and discusses type certification in the legislative history. But Congress then determined that type certification does not justify any broader preemption than a limited statute of repose.⁸

In sum, it is difficult to understand how resolution of the question presented will impact the result—or even the conduct—of this litigation, let alone other cases. In the meantime, the Third Circuit’s decision merely restores the status quo that existed for many decades before the district court in this case departed from settled law. Victims of airplane crashes deserve to be compensated for product defects, as they have been since planes began to fly. To the extent Lycoming wishes to change that, it should direct its concerns to Congress.

⁸ This proposition has been roundly rejected. *See, e.g., Pease v. Lycoming Engines*, No. 4:10-CV-00843, 2011 WL 6339833, at *13 (M.D. Pa. Dec. 19, 2011) (collecting cases that “have specifically held that FAA certification does not foreclose design defect claims”).

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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