

No. 18-1140

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, DECEASED,

Respondent.

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

**AMICUS CURIAE BRIEF OF
EXPERIMENTAL AIRCRAFT ASSOCIATION,
INC. IN SUPPORT OF PETITIONER
AVCO CORPORATION**

MICHAEL RESIS

Counsel of Record

ALAN L. FARKAS

SMITHAMUNDSEN LLC

150 North Michigan Avenue, Suite 3300

Chicago, Illinois 60601

(312) 894-3200

mresis@salawus.com

Counsel for Amicus Curiae

288090



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF INTEREST OF <i>AMICUS</i> <i>CURIAE</i>	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
REVIEW OF THE DIVIDED THIRD CIRCUIT COURT OF APPEALS OPINION IS WARRANTED BECAUSE THE FEDERAL AVIATION ACT AND FAA REGULATIONS PREEMPT STATE- LAW DESIGN-DEFECT CLAIMS.....	5
A. The Third Circuit’s Divided Opinion Misapplied This Court’s Case Law Recognizing That State Law Is Impliedly Preempted By Federal Law When It Is Impossible To Comply With Both State and Federal Requirements	5
B. The Federal Aviation Act and FAA Regulations Field-Preempt State-Law Defect-Design Claims.....	14

Table of Contents

	<i>Page</i>
C. This Appeal Presents an Exceptionally Important Question of Law Warranting Review	17
CONCLUSION	18

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Federal Cases	
<i>Abdullah v. American Airlines, Inc.</i> , 181 F.3d 363 (3d Cir. 1999)	16
<i>Cipollone v. Liggett Group Inc.</i> , 505 U.S. 504 (1992).....	15
<i>City of Burbank v. Lockheed Air Terminal Inc.</i> , 411 U.S. 624 (1973)	15
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S. 363 (2000).....	11
<i>Freightliner Corp. v. Myrick</i> , 514 U.S. 280 (1995)	15
<i>Gade v. Nat’l Solid Wastes Management Ass’n</i> , 505 U.S. 88 (1992).....	11
<i>Int’l Paper Co. v. Ouelette</i> , 479 U.S. 481 (1987).....	11
<i>Kurns v. Railroad Friction Products Corp.</i> , 565 U.S. 625 (2012).....	15
<i>Montalvo v. Spirit Airlines</i> , 508 F.3d 464 (9th Cir. 2007)	16

Cited Authorities

	<i>Page</i>
<i>Mutual Pharmaceutical Co., Inc. v. Bartlett</i> , 570 U.S. 472 (2013)	5, 10, 11
<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011)	5, 10, 11, 13
<i>Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983)	15
<i>Ray v. Atlantic Richfield Co.</i> , 435 U.S. 151 (1978)	15, 16
<i>Sikkelee v. AVCO Corp.</i> , 268 F. Supp. 3d 660 (M.D. Pa. 2017)	10
<i>Sikkelee v. Precision Airmotive Corp.</i> , 822 F.3d 680 (3d Cir. 2016)	14
<i>Sikkelee v. Precision Airmotive Corp.</i> , 907 F.3d 701 (3d Cir. 2018)	6, 9, 10, 11
<i>US Airways, Inc. v. O'Donnell</i> , 627 F.3d 1318 (10th Cir. 2010)	16
<i>United States v. Locke</i> , 529 U.S. 89 (2000)	12, 15, 17
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009)	6, 10, 18

Cited Authorities

Page

Federal Statutes

49 U.S.C. § 4012(c)16

49 U.S.C. § 4470114

Pub. L. No. 85-726, 72 Stat. 731 (1958)..... *passim*

Federal Regulations

14 C.F.R. § 21.319.....6

14 C.F.R. § 237, 9

14 C.F.R. § 39.37

14 C.F.R. § 39.57

Other Sources

“Aircraft Certification Service,” retrieved
from http://www.faa.gov/about/office_organizational_structure/headquarters_offices/avs/offices/air/, (last accessed March 20, 2019)7

“Airworthiness Directives Manual”
(FAA-IR-M-8040.1C) (May 17, 2010).....8

Cited Authorities

	<i>Page</i>
“Guide for Obtaining a Supplemental Type Certificate,” FAA Advisory Circular No. 21-40A, September 27, 2007, retrieved from http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/1baee87ba684597d862573690056b687/\$FILE/AC%2021-40A.pdf , (last accessed April 15, 2019).....	9
“New Certification Rule for Small Airplanes Becomes Effective,” retrieved from http://www.faa.gov/news/updates/?newsId=88746 , (last accessed March 20, 2019)	9
“Supplemental Type Certificates,” retrieved from http://www.faa.gov/aircraft/air_cert/design_approvals/stc/ , (last accessed March 21, 2019) ...	8, 9
“Type Certification,” Order 8110.4C, retrieved from http://www.faa.gov/documentLibrary/media/Order/FAA_Order_8110_4C_Chg_6.pdf , (last accessed March 21, 2019)	12
FAA Advisory Circular (Nov. 17, 2011) (AC No: 23.1309-1E, 11(b), Application of § 23.1309(a)(4), as adopted by Amendment 23-49)	12
FAA Advisory Circular (Nov. 17, 2011) (AC No: 23.1309-1E, 12(d))	12
FAA Advisory Circular (Dec. 9, 2010) (AC No 33.91-1 (6)(b))......	13

**STATEMENT OF INTEREST
OF AMICUS CURIAE.¹**

Experimental Aircraft Association, Inc. (EAA) is a non-profit 501(c)(3) community of passionate aviation enthusiasts that promotes and supports recreational flying. EAA's mission is to grow participation in aviation by promoting the spirit of aviation. EAA has 220,000 members including 75,000 pilots, 7,500 student pilots, and 15,000 aircraft mechanics. EAA's members are spread across all 50 states (and 125 countries).

EAA is headquartered in Oshkosh, Wisconsin, where it hosts an annual gathering known as "AirVenture," or, alternatively, "Oshkosh." Through AirVenture, EAA promotes aircraft ownership, safety and maintenance. 115 manufacturers, 220 part suppliers, and 35 maintenance, repair and overhaul facilities display their offerings to 600,000 visitors over the course of one week each summer. EAA works closely with Federal elected officials and the Federal Aviation Administration (FAA) on legal and regulatory reforms to increase safety while mitigating the costs of owning and renting aircraft, including efforts to streamline regulations that stymie innovation.

EAA encourages participation in aviation through programs that attract new pilots (the EAA Young Eagles Program provided 170,000 introductory flights in the

1. All parties consent to the filing of this *amicus curiae* brief and notice of intent to file was provided more than 10 days prior to filing. This *amicus* brief was not authored by counsel for a party in whole or in part and was not funded by a party or a party's counsel in whole or in part. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

past 3 years), educational forums (including 50 webinars and 1,500 live forums annually), workshops on aircraft building and maintenance, and a variety of opportunities to engage in recreational flying. EAA works on legal and regulatory reforms that increase safety while making flying more accessible, including the application of contemporary medical standards to pilot assessments and the development of new classes of pilots' licenses.

EAA gives voice to the recreational aviation community and provides a perspective that may assist the Court in determining whether the FAA or a state-law jury has the final say on the safety of aircraft design standards under the Federal Aviation Act (Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. §§ 40101–49105)) and the FAA's comprehensive regulatory scheme. EAA supports the petition for a *writ of certiorari* filed by AVCO Corporation to review the judgment of the Third Circuit. Indeed, recognition of FAA's preemptive authority over aircraft design standards is paramount to the safety of air transportation and the health of civil aviation.

EAA respectfully submits that, as Congress intended, the FAA's deliberative, expert, scientific approval process is best equipped to determine appropriate initial aircraft design standards and when design modifications and new parts should be approved. Our uniquely national civil aviation industry relies on uniform and exclusively national standards to avoid a hodgepodge of conflicting state-law standards established on an ad-hoc basis by tribunals that lack the experience, resources, or broad perspective employed by the FAA. Should the decision below stand, maintenance, repair and overhaul facilities, and individual mechanics will face unprecedented

uncertainty and confusion over the standards to which they must conform when repairing or replacing FAA-approved component parts for aircraft that typically operate in multiple jurisdictions. The EAA members who own, maintain or rent aircraft will also face increased uncertainty and second-guessing of the airworthiness of their aircraft despite compliance with FAA-approved design standards. Naturally, this will have a disastrous impact on participation in aviation at a time when our nation and EAA are combatting a critical shortage of aircraft mechanics and pilots. The ramifications of the Third Circuit's divided opinion and judgment, if not reversed, will have dramatic, long lasting impacts throughout the aviation industry and the individuals and businesses that depend on our industry.

Above all, EAA favors safe and reliable aircraft design and modification standards as Congress intended, through the assurances provided by the FAA's rigorous multi-step certification process, not piecemeal by state-law courts. Based on the perspective and experience of its many members, and to avoid upsetting the carefully balanced interests recognized by the FAA's regulatory scheme, EAA respectfully submits that the Federal Aviation Act and FAA regulations necessarily preempt state-law design defect claims.

SUMMARY OF ARGUMENT

Under this Court's recent case law, design-defect claims are conflict-preempted when federal law makes it physically impossible for a private party to unilaterally modify a product design to meet a state-tort law duty without prior regulatory agency approval. In this case,

both the majority opinion and the dissent recognized that FAA approval was necessary prior to the implementation of any change in design to the aircraft engine. Nevertheless, the Third Circuit, over a dissent, held that the design-defect claim was not preempted without clear evidence that the FAA would have rejected the proposed design change. Rather than promote safety, the result will lead only to confusion and a catch-22 over the safety standards that govern aircraft design. If the engine manufacturer and other aircraft entities in the downstream distribution chain immediately adopt an alternative design to meet their state law obligation, they will find themselves in violation of federal law; conversely, if they rely on the FAA-approved design until the FAA approves the proposed change, they will have violated their state-tort law duties. Based on this Court's settled precedent, the design-defect claim was conflict-preempted when it was physically impossible for the engine to be modified without prior FAA approval to comply with both federal and state law. Moreover, the possibility of tort liability against regulated aviation manufacturers, envisioned in the Federal Aviation Act, does not require that juries be granted the authority to mandate design changes under penalty of tort liability.

Conflict-preemption aside, the Federal Aviation Act and FAA regulations field-preempt all aspects of air safety, including design-defect claims. Since the FAA regulations are so pervasive, and the federal interest so dominant, this leads to the reasonable inference that Congress has left no room for different state standards governing the design and safety of aircraft engine parts. The usual assumption against federal preemption does not apply in areas such as aviation which has a long history of significant federal dominance.

Finally, review is warranted because the scope of federal preemption is a question of exceptional public importance that only this Court can answer. If the decision below is permitted to stand, the standards governing every detail of aircraft design will no longer be uniform or exclusively national in enforcement.

ARGUMENT

REVIEW OF THE DIVIDED THIRD CIRCUIT COURT OF APPEALS OPINION IS WARRANTED BECAUSE THE FEDERAL AVIATION ACT AND FAA REGULATIONS PREEMPT STATE-LAW DESIGN-DEFECT CLAIMS

A. The Third Circuit's Divided Opinion Misapplied This Court's Case Law Recognizing That State Law Is Impliedly Preempted By Federal Law When It Is Impossible To Comply With Both State and Federal Requirements

The issue in this case turns on a straightforward application of this Court's recent federal preemption law.

Under the case law, the issue is whether a type certificate holder could *independently*—that is, unilaterally, without prior FAA approval—accomplish under federal law what state law purportedly required of it—modification of the design of the carburetor's fastening mechanism as set forth in the FAA issued type certificate. *See, e.g., Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 487 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620 (2011). If the answer to the question is no, as EAA submits is the only correct answer under the

comprehensive FAA regulatory regime, then the inquiry ends—as that answer suffices to demonstrate a conflict between the type certificate holder’s federal and state obligations, making it physically impossible to comply with both.

The majority opinion of the Third Circuit correctly determined that under the applicable FAA regulations, prior FAA approval was necessary for any major design changes to aircraft components covered by an FAA issued type certificate. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 711 (3d Cir. 2018). The majority of the panel further noted that minor design changes could be “approved using a method acceptable to the FAA.” *Id.* at 711-12 (citing 14 C.F.R. § 21.319). Ultimately, the majority did not decide whether the design change at issue was major or minor. However, the majority concluded that the type certificate holder could not show that it was impossible to comply simultaneously with federal mandates and state-law tort duties. *Id.* at 712. While the majority observed that “the Federal Aviation Act and FAA regulations require FAA approval of a type certificate and changes to it” (*id.* at 713), the majority also found that the certificate holder was not “stuck with the design initially adopted and approved” and noted that the holder had “made numerous changes to the type certificate” which the FAA had approved in short order. *Id.* Thus, according to the majority, based on the FAA regulations for the approval of changes to type certificates, the type certificate holder could not show that it was physically impossible to comply with a state-mandated change in design without providing clear evidence that the FAA would have rejected the change. *Id.* at 714 (citing *Wyeth v. Levine*, 555 U.S. 555, 571 (2009)).

The FAA regularly encourages and adopts revisions to aircraft design standards. Avenues for design changes include Airworthiness Directives (“ADs”), Supplemental Type Certificates (“STCs”), amendments to Airworthiness Standards developed by FAA Directorates and implemented via rulemaking subject to the Administrative Procedures Act, and, most recently, comprehensive revisions to 14 C.F.R part 23 (14 C.F.R. § 23 *et al.*, “Airworthiness Standards: Normal Category Airplanes”). However, this all takes place through a carefully managed process, and no changes are permitted without FAA approval.

Further, in contrast with the relatively narrow range of partisan experts utilized by the courts, the FAA office responsible for overseeing certification and design changes, the Aircraft Certification Service (“AIR”), utilizes “more than 1300 engineers, scientists, inspectors, test pilots and other experts responsible for oversight of design, production, airworthiness certification, continued airworthiness certification, and continued airworthiness programs for all U.S. civil aviation products and foreign products.” (“Aircraft Certification Service,” retrieved from http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/air/, last accessed March 20, 2019). “AIR collaborates with the International Civil Aviation Organization (ICAO) and other Civil Aviation Authorities (CAA) to maintain and further the safety of the international air transportation system.” *Id.*

FAA ADs are issued pursuant to 14 C.F.R § 39.5 to correct an unsafe condition in a product. 14 CFR § 39.5. ADs are legally enforceable rules that apply to aircraft, aircraft engines, propellers, and appliances. 14 CFR § 39.3.

FAA personnel are guided by an extensive and detailed FAA publication, the “Airworthiness Directives Manual” (FAA-IR-M-8040.1C) (May 17, 2010), which provides specific guidance of considerations to be evaluated, including mandates of the Administrative Procedures Act (public review, comment and promulgation of the AD), FAA regulations, and Department of Transportation Rulemaking Policies and Procedures. *Id.* The manual details when an AD should be issued, including issuance of emergency ADs as necessary to maintain aviation safety. *Id.* Throughout over 70 pages of guidance, the manual assists FAA personnel in carrying out the FAA’s Congressional mandate to preserve aviation safety. *Id.* Once again, this careful, deliberative process would be entirely undermined if state court juries are empowered to dictate when modifications should or should not be implemented.

STC(s) provide another method to achieve approved revisions to aircraft designs. The FAA grants an STC when an applicant, other than the original manufacturer, receives approval to modify an aeronautical product from its original design. (“Supplemental Type Certificates,” retrieved from http://www.faa.gov/aircraft/air_cert/design_approvals/stc/, last accessed March 21, 2019). These modifications are often more efficient than the original product, offer added safety characteristics, and may even provide an economical alternative that provides aircraft operators with the safety and advantages of equipment that they would not have been able to otherwise afford. *Id.* By way of example, EAA’s STC program has granted owners the ability to install modern instrumentation and autopilot equipment on older aircraft with minimal cost or difficulty through close coordination with FAA

technicians. Again, these advances become available for installation only after the strict FAA standards are met and demonstrated through rigorous testing. *Id. See also*, “Guide for Obtaining a Supplemental Type Certificate,” FAA Advisory Circular No. 21-40A, September 27, 2007, retrieved from [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/1baee87ba684597d862573690056b687/\\$FILE/AC%2021-40A.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/1baee87ba684597d862573690056b687/$FILE/AC%2021-40A.pdf), last accessed April 15, 2019.

Recently, with EAA’s urging and support, the FAA implemented new streamlined rules to govern the airworthiness certification standards for small general aviation aircraft. 14 C.F.R § 23; (“New Certification Rule for Small Airplanes Becomes Effective,” retrieved from <http://www.faa.gov/news/updates/?newsId=88746>, last accessed March 20, 2019). The newly published standards were developed in response to Congressional mandates to facilitate safety advancements for these types of aircraft. “The new Part 23 also promotes regulatory harmonization among the FAA’s foreign partners, including the European Aviation Safety Agency, Transport Canada Civil Aviation, and Brazil’s National Civil Aviation Authority. Harmonization may help minimize certification costs for airplane and engine manufacturers...who want to certify their products for the global market.” *Id.* No doubt, the Congressional goals advanced by this Part 23 rewrite would be thwarted by exposing manufacturers to differing and inconsistent state aircraft design standards.

As noted by both the majority (907 F.3d at 711-12) and the dissent below (*id.* at 722, 724), under the FAA regulatory scheme, a type certificate holder cannot implement even a minor design change without FAA

approval. Regardless of whether the type design change is major or minor, or whether the type certificate is amended or supplemented, as both the majority and the dissent recognized, some form of FAA approval is necessary prior to the implementation of every design modification to the engine. *Id.* Here, as in every case, asking whether the FAA would have likely approved the alternative design is not the same as saying that the manufacturer could *independently* implement the alternative design on its own initiative without obtaining FAA approval. The FAA's comprehensive regulatory scheme, which leaves no discretion to a private party to implement design modifications unilaterally, makes this case more clearly analogous to *Bartlett* and *PLIVA* than to *Wyeth*.

Contrary to the majority opinion's pronouncement (913 F.3d at 715), the result reached by the majority will not promote air safety, but lead only to confusion and uncertainty over the standards governing the safety of aircraft parts and put regulated private parties in a catch-22. Had the manufacturer adopted an alternative engine design immediately, without FAA approval to meet a state-tort law duty, it would have violated federal law.² Maintenance, repair and overhaul facilities, and individual airplane mechanics using the alternatively designed engine, would find themselves in violation of federal law, and would be vulnerable to state tort liability by adhering to the FAA-approved engine design. Moreover, once FAA-approved standards are forced to yield to state tort law,

2. As set forth in the district court opinion, the proposed design changes included using a fuel injection system in lieu of the carburetor, safety lock wire and different gasket material. *Sikkelee v. AVCO Corp.*, 268 F. Supp.3d 660, 697 (M.D. Pa. 2017).

then mechanics and repair facilities become vulnerable to conflicting and changing standards among the various (and often unpredictable) states where the subject aircraft may operate. In any event, it would have been physically impossible to repair an engine so that it would comply with both federal and state law, let alone multiple states' laws.

The Third Circuit believed otherwise because other changes had been made to the approved engine design over time. 907 F.3d at 713. That misses the point of the comprehensive FAA regulatory regime. Those changes were made only with prior FAA approval. The issue under this Court's conflict-preemption law is not whether a manufacturer can change the agency-approved product, but whether it may do so of its own volition without agency approval. When prior agency approval is required without exception, as is true of the subject engine design under the applicable FAA regulations, *Bartlett* and *PLIVA* instruct that the state-law design-defect claim is conflict-preempted.

Although federal and state standards may share the same goal of aircraft safety, the common end alone does not obviate the conflict in the different means chosen under federal and state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (observing that "a common end hardly neutralizes conflicting means") (citing *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992) ("[I]t is not enough to say that the ultimate goal of both federal and state law' is the same") (quoting *Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987))).

The FAA is charged with balancing an array of interests that are far broader than the elements used to weigh tort liability. For example, the standards for type

certification include considerations of whether a feature ensures no failure, has redundancy and “annunciation,” is reliably independent of its redundancy and properly indicates its current status of functionality to the pilot (FAA Advisory Circular (Nov. 17, 2011) (AC No: 23.1309-1E, 11(b), Application of § 23.1309(a)(4), as adopted by Amendment 23-49, at 18); how a feature addresses or interacts with external environmental conditions such as atmospheric turbulence, lightning, and precipitation (*id.* 12(d), at 19); the environmental effect within the airplane, such as vibration and acceleration loads, variations in fluid pressure and electrical power, and fluid or vapor contamination due to either the normal environment or accidental leaks or spillage and handling by personnel (*id.*); and the FAA must consider environmental and noise impacts (“Type Certification,” Order 8110.4C, retrieved from http://www.faa.gov/documentLibrary/media/Order/FAA_Order_8110_4C_Chg_6.pdf, last accessed March 21, 2019). Of course, these concerns do not appear in Pennsylvania jury instructions and the FAA’s determination of the essential factors to be considered when certifying aircraft parts would be entirely undermined by requiring the aviation industry to adopt designs that ignore these factors (and a laundry list of others).

As this Court has recognized, the appropriate inquiry remains whether the purposes and objectives of the federal scheme, including the intent to establish a workable, uniform system, is consistent with state regulation. *United States v. Locke*, 529 U.S. 89, 115 (2000). When it comes to the design of aircraft and air safety, different standards would thwart the national objective of uniformity. Federal regulation is based on an intensive, painstaking multi-step

FAA approval process that is lacking at the state level. When, as here, unilateral compliance with both is not simultaneously possible, state regulation must yield to the supremacy of federal regulation of the approved design.

If permitted to stand, the result reached by the majority will not complement the federal regulatory scheme, but actually conflict with and subvert it. The public, as well as EAA members, should be able to rely on the type-certification process for aircraft parts and design changes with the confidence that they have been approved after analysis of vast amounts of technical data, drawings and other details about the component and testing to exacting specifications by experts under FAA auspices. Rather than expose the manufacturer and all other aviation entities in the distribution chain downstream to a patchwork of state-law tort liability, as the Third Circuit has done here, it should be left to Congress and the FAA to make changes to the law and the regulations governing the approval process for aircraft design modifications as deemed necessary, following appropriate consideration. *See PLIVA*, 564 U.S. at 626.

Finally, EAA and its members have a direct stake in receiving assurance that all parts and components on the aircraft have been thoroughly tested across the conditions that may be encountered in flight, and that certainty is not provided by our judicial system. By way of example, engine certification requires testing in low temperatures, with contaminated fluids, under vibration, in simulated crash scenarios, sand and dust, icing, fungus, altitude variations, water infiltration, and fire conditions FAA Advisory Circular (Dec. 9, 2010) (AC No 33.91-1 (6) (b), at 2). EAA members should not have to wonder which considerations were satisfied in the airplane they have

entrusted with their lives; they should have the confidence that comes only from the uniform, comprehensive, expert and preemptive design certification process established by Congress.

B. The Federal Aviation Act and FAA Regulations Field-Preempt State-Law Defect-Design Claims

In its earlier opinion, the Third Circuit held that the Federal Aviation Act and FAA regulations did not field-preempt state-law defect-design claims. *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 693-96 (3d Cir. 2016).

Wholly apart from conflict-preemption, this Court should grant *certiorari* and hold that the scheme of federal regulation of air safety is so pervasive and the federal interest so dominant as to field-preempt all aspects of aviation safety, including state-law defect-design claims. The fact that the Federal Aviation Act directs the Administrator of the FAA to promote the safety and the development of air travel by fixing “minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers” (49 U.S.C. § 44701), in conjunction with the FAA’s all-encompassing scheme of regulation governing flight performance, structural characteristics, design and construction, leads to the reasonable inference that Congress left no room for different and various state standards governing aircraft design.

Field preemption may be found when the scope of a federal statutory and regulatory scheme impliedly shows

that Congress intended that federal law occupy a field exclusively. *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 630-31 (2012) (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). Field preemption results when a “scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room...to supplement it,” because then “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983); see also *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 516 (1992). Any assumption of non-preemption does not apply when a state regulates in an area with a history of significant federal presence. *Locke*, 529 U.S. at 108 (making the observation in the context of national and international maritime commerce). Field-preemption extends to damages suits involving state common-law duties and standards of care. *Kurns*, 565 U.S. at 637-38.

This Court has recognized field preemption under the Federal Aviation Act (*City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-39 (1973) (preempting in conjunction with Noise Control Act state and local control over aircraft noise at airports) and under other federal statutes (*Kurns*, 565 U.S. at 630-31) (Locomotive Inspection Act field-preempted failure-to-warn and defect-design claims relating to asbestos brake pads and engine valves containing asbestos used in locomotives); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163-68 (1978) (Ports and Waterways Safety Act created uniform and national standards that field-preempted different or more stringent state pilotage requirement, limitation on oil tanker size, and tanker design and construction rules)).

In recognition of the pervasive federal scheme and dominant federal interest, courts of appeals have recognized field-preemption under the Federal Aviation Act and FAA regulations. *See, e.g., US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326-27 (10th Cir. 2010) (state regulation of alcoholic beverage service on flights field-preempted); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (any state-imposed duty to warn airline passengers about risks of deep vein thrombosis field-preempted); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 371-74 (3d Cir. 1999) (entire field of aviation safety field-preempted).

As this Court recognized in *Ray*, the reference to “minimum standards” set forth in the Federal Aviation Act is not a “litmus test” and does not necessarily mean that Congress invited state authority to impose more stringent standards. 435 U.S. at 168 n.19. On the contrary, field-preemption was found in *Ray* where it was clear that Congress intended the promulgation of uniform standards and enforcement on the national level. *Id.* And while Congress took care in the Federal Aviation Act to include a savings clause providing that “[a] remedy under this part is in addition to any other remedies provided by law” (49 U.S.C. § 4012(c)), the quoted language has been interpreted to mean simply that a state-law tort action is to proceed based on violation of the standards set forth in the federal statute and corresponding FAA regulations. *Abdullah*, 181 F.3d at 475-76. As this suit was not and could not be predicated on any such violation of federal law, this Court should hold that the design-defect claim was field-preempted by the Federal Aviation Act and the corresponding FAA regulations.

C. This Appeal Presents an Exceptionally Important Question of Law Warranting Review

Finally, this appeal presents an exceptionally important question of law on the extent of federal preemption of state-law under the Federal Aviation Act and FAA regulations.

Aircraft design has a long history of significant federal presence going back to the infancy of aviation. It is no exaggeration to say that aviation and aircraft design have been dominated by federal interests. This Court has been mindful that in areas dominated by a federal presence, such as national and international maritime commerce, state regulation can upset the careful regulatory scheme established by federal law. *Locke*, 529 U.S. at 106. Aviation, no less than maritime commerce, requires national uniformity in aircraft design.

EAA and its members will be profoundly impacted by this decision. They have benefitted from a safe, uniform, expert, and comprehensive approach to aircraft certification. EAA hopes this largely successful approach to certification will be maintained. The problems associated with delegating certification to juries who will evaluate safety under the lens of tort liability rather than maintaining the uniform Federal scheme envisioned by Congress are not theoretical to EAA and its members; they have grave concerns for the consequences they will suffer if the unbiased experts at the FAA no longer have the final say on aircraft product design.

If allowed to stand, the opinion and judgment of the Third Circuit will upset the careful balance of interests

established by the FAA regulatory regime. The standards governing every detail of aircraft design will no longer be uniform or exclusively national in enforcement. If that were not enough, the Third Circuit's extension of the "clear evidence" test of *Wyeth* will be applied beyond aviation to other heavily federal-regulated industries. The question that only this Court can answer is of exceptional public importance across all such regulated industries where federal law imposes uniform standards and requires advance agency approval for any product design modification.

CONCLUSION

For all of the foregoing reasons, the *amicus curiae*, Experimental Aircraft Association, Inc., asks that the Court grant *certiorari* and upon review, that it reverse the judgment of the United States Court of Appeals for the Third Circuit upon finding that the state-law defect-design claims are federally preempted.

Respectfully submitted,

MICHAEL RESIS

Counsel of Record

ALAN L. FARKAS

SMITHAMUNDSEN LLC

150 North Michigan Avenue, Suite 3300

Chicago, Illinois 60601

(312) 894-3200

mresis@salawus.com

Counsel for Amicus Curiae