No. 18-1140

In the Supreme Court of the United States

AVCO CORPORATION, PETITIONER

v.

JILL SIKKELEE

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

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute the exceptional importance of the simple question the petition presents: whether the Federal Aviation Act preempts state-law design-defect claims. If allowed to stand, the Third Circuit's opinions will eviscerate the comprehensive and exclusive regulatory scheme that Congress established in the Federal Aviation Act. For that reason, as respondent recognizes, a "divers[e]" group of amici have filed briefs supporting the petition. See Br. in Opp. 17.

As the FAA warned in an earlier amicus brief in this case, permitting States to impose their own standards of care governing aircraft design would threaten the safety of air travel, not promote it. Yet that is precisely what the

Third Circuit did, expressly rejecting the FAA's long-standing view that "[t]he field preempted by the Federal Aviation Act * * * extends broadly to all aspects of aviation safety." 14-4193 FAA C.A. Br. 7. The Third Circuit also mangled this Court's framework for preemption, resulting in an opinion that is flatly inconsistent with *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604 (2011).

Perhaps realizing that the Third Circuit is traveling in the wrong direction on preemption issues, respondent does little to defend that court's reasoning. She instead throws up a host of purported vehicle issues in an effort to avoid the Court's review. Her vehicle arguments uniformly lack merit. This case presents the Court with an ideal opportunity to resolve a question that has enormous consequences for the safety of air travelers in this country.

The Court should therefore grant the petition for a writ of certiorari. In the alternative, in light of the undisputed federal interest and the previous participation of the FAA in this case, it would be appropriate for the Court to call for the views of the Solicitor General.

A. The Court Of Appeals' Decision Conflicts With This Court's Decisions Concerning Impossibility Preemption

Respondent contends (Br. in Opp. 20-29) that "the decision below is correct on its own terms." That contention is mistaken.

1. Most fundamentally, respondent incorrectly asserts that the test of *Wyeth* v. *Levine*, 555 U.S. 555 (2009), governs here. See Br. in Opp. 22-25. Aviation manufacturers are unlike brand-name drug manufacturers in the only way that matters for impossibility-preemption purposes: they lack the ability unilaterally to implement changes to their designs. See *PLIVA*, 564 U.S. at 624.

And while respondent more generally resists the application of this Court's preemption cases insofar as they arose in the context of FDA rather than FAA approval, see Br. in Opp. 21, the safety of air travel, even more than drug manufacturing, demands national uniformity. See p. 5, *infra*.

In an attempt to avoid the application of *PLIVA*, respondent argues that the parties agree that the design change she is seeking is "minor," and that the change thus could be implemented without "any prior FAA input whatsoever." Br. in Opp. 3, 25-26, 30.[1] But whether respondent's proposed design change (from lock-tab washers to safety wire) would be "major" or "minor" is irrelevant. All of the panel members concluded that FAA preapproval was required for all changes to a type-certificated design, whether major or minor. See Pet. App. 17a (majority); *id.* at 39a (Roth, J., dissenting). That conclusion was correct: while the FAA and an applicant establish acceptable approval procedures on a case-specific basis, see 14 C.F.R. 21.95, minor changes remain "subject to approval by the FAA." FAA C.A. Br. 5. And here, FAA preapproval would additionally have been required for

[1] In fact, "[petitioner's] precise position at oral argument was that, while [petitioner] viewed the proposed change as having no impact on airworthiness and thus as minor, [respondent's] theory of tort liability inherently required the conclusion that the change was major." Pet. App. 39a (Roth J., dissenting). In other words, respondent cannot have it both ways: if respondent is correct that her proposed design change is "minor" and thus has "no appreciable effect" on the airworthiness of the engine, 14 C.F.R. 21.93(a), she cannot possibly have a viable design-defect claim.

Kelly, the aftermarket manufacturer that made the component parts of the at-issue carburetor, to manufacture safety wire.[2]

Respondent thus cannot disguise the true (and disturbing) import of the Third Circuit's impossibility-preemption analysis: the Third Circuit extended *Wyeth*'s test into a regulatory context in which, *by the court's own admission*, unilateral changes are not permitted. See Pet. App. 17a. That egregious error alone warrants this Court's review.

2. Perhaps recognizing the lack of support for her argument that FAA preapproval is not required, respondent focuses at length on the possibility that the FAA might eventually have approved the proposed design change. See Br. in Opp. 21, 24-25. But to defeat preemption, it is not sufficient that petitioner had the "unilateral ability * * * to *apply* [to FAA] to make [design] changes," *id.* at 24 (emphasis added); this Court rejected that very argument in *PLIVA*. See 564 U.S. at 619-620. As Judge Roth explained in her dissenting opinion below, preemption instead turns on whether the manufacturer can "*independently*" accomplish under federal law what state law requires. Pet. App. 42a (emphasis added); see *PLIVA*, 564 U.S. at 620.

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[2] In support of her contention that manufacturers can unilaterally implement minor changes, respondent cites a 2007 FAA order. See Br. in Opp. 4. But that order merely reaffirms that the FAA and the applicant work together to determine an acceptable method for approving minor changes and the supporting data. See Federal Aviation Administration Order 8110.4C, at 87 (2007). Respondent's only other authority (Br. in Opp. 4-5) is a 2013 report drafted by the Reorganization Aviation Rulemaking Committee—a body the FAA has tasked merely with providing "advice and recommendations" concerning aviation-related issues. Federal Aviation Administration, *Advisory and Rulemaking Committees* <tinyurl.com/faa2013>.

3. In the alternative to arguing that FAA preapproval is not required, respondent seeks more generally to minimize the FAA's role in the change-approval process. See Br. in Opp. 24-25. Respondent goes so far as to suggest that the aviation industry is subject to less rigorous oversight than the pharmaceutical industry. See *ibid.* But the House Report accompanying the General Aviation Revitalization Act of 1994 (GARA) recognized that the general aviation industry's "'cradle to grave' Federal regulatory oversight" is one of its "distinguishing characteristics." H.R. Rep. No. 525, 103d Cong., 2d Sess., pt. 2, at 5 (1994). It further observed that "[t]he result of this extensive Federal involvement is an industry whose products are regulated to a degree *not comparable to any other*." *Id.* at 6 (emphasis added). And in this very case, the FAA has explained the central role it plays in approving both initial designs and subsequent design changes. See FAA C.A. Br. 4-5.

Indeed, as respondent acknowledges (Br. in Opp. 7-8), the FAA has exercised that oversight with regard to the very design feature at issue here—the use of lock-tab washers in the carburetor attachment mechanism. When the FAA issued the type certificate for the engine at issue in 1966, it had already considered the safety of the attachment mechanism, issuing a directive with respect to other Marvel-Schebler MA-model carburetors specifying that lock-tab washers "may be substituted for screws and safety wire * * * without adversely affecting safety." 30 Fed. Reg. 8034 (1965). When the FAA issued the type certificate, it accordingly *required* the use of a Marvel-Schebler carburetor with lock-tab washers. See C.A. App. 969. And decades later, the FAA issued a PMA approving Kelly's lock-tab washers; there is no evidence that it issued a similar PMA for safety wire. See Pet. 9. The fact

that Kelly (or petitioner) would need to obtain FAA approval before using safety wire resolves the impossibility-preemption inquiry here.

4. Respondent additionally contends (Br. in Opp. 1, 14) that a contrary holding on impossibility preemption would disrupt a century of settled law. But she cites only three district-court decisions—all of which focus primarily on field preemption—to support that contention. See *id.* at 14. Of those decisions, two pre-date *PLIVA*, and one involved a manufacturer that did not even advance an impossibility-preemption defense. See *Monroe* v. *Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 836 (E.D. Tex. 2006). It is therefore hard to credit respondent's assertion that "everybody * * * understood that tort claims against aviation manufacturers were not preempted." Br. in Opp. 14. To the contrary, it is the Third Circuit's approach that threatens to unleash chaos, as planes move from one regulatory regime to another at several hundred miles per hour.

In a related vein, respondent contends (Br. in Opp. 26-27) that Congress signaled its intent not to preempt product-liability claims when it enacted GARA, which established a period of repose for civil claims against manufacturers arising from general-aviation accidents. But Congress's decision to enact a nationwide statute of repose in 1994 does not inform the views of the Congress that established exclusive and comprehensive FAA oversight of aircraft design in 1958. See *United States* v. *Price*, 361 U.S. 304, 313 (1960). Nor does GARA, which predated *PLIVA*, say anything about which types of state-law product-liability claims conflict with federal law. And respondent's hyperbolic assertion that petitioner's position would render GARA a nullity by "foreclos[ing] manufacturer liability in each and every plane crash case we have seen"

(Br. in Opp. 1, 28), is flatly incorrect: petitioner's arguments permit manufacturing-defect claims, and potentially certain other claims, to proceed. As the FAA has explained in this case, GARA "has a quite limited effect" and "does not conflict with the [proper] understanding of preemption under the Federal Aviation Act." FAA C.A. Br. 13.

5. Finally with regard to impossibility preemption, respondent maintains that state and federal law cannot conflict in the aviation context because both regimes prioritize safety. See Br. in Opp. 16. But as petitioner's amici have explained, ensuring the safety of the flying public requires a comprehensive assessment of competing considerations. See, *e.g.*, Airbus Br. 14-15. For example, a jury might believe in the context of a specific case that requiring aircraft manufacturers to include an additional warning light is reasonable. See *id.* at 14. But the jury would have no conception of the potential harm caused by pilots receiving multiple nuisance warnings. See *id.* at 14-15.

The FAA alone possesses the necessary expertise and perspective to evaluate the costs and benefits of particular design choices. That expertise cannot be set aside merely because state law shares the general goal of safety. Were it otherwise, juries across the country could (and surely would) impose requirements that conflict with the FAA's considered judgment.

B. The Court Of Appeals Further Erred By Holding That The Federal Aviation Act Does Not Preempt The Entire Field Of Aviation Safety

Respondent makes no serious effort to defend the Third Circuit's holding limiting field preemption under the Federal Aviation Act to standards of care regarding "in-air operations."

1. Nothing in the Act or its history supports the Third Circuit's novel "in-air operations" distinction. Rather

than attempting to defend that distinction directly, respondent seeks to minimize the importance of the issue by claiming that petitioner has failed to identify the federal standards of care that would apply to respondent's claims. See Br. in Opp. 32-34. That argument rests on the assumption that, as the Third Circuit concluded in its earlier decision in *Abdullah* v. *American Airlines, Inc.*, 181 F.3d 363 (1999), parallel state-law causes of action enforcing federal standards of care would remain available even if the relevant field were preempted. Even assuming that is true, however, the onus falls on *respondent*, not petitioner, to identify the federal standards of care that she seeks to enforce. And which federal standard (if any) governs; how it applies; and what effect it will have on the outcome of this case are logically subsequent questions that would arise only after the Third Circuit's holding regarding the applicability of *state-law* standards of care is reversed.

2. Respondent further suggests that this Court effectively decided that the field-preemption issue did not warrant review when, with only seven Justices participating, it denied petitioner's earlier petition for a writ of certiorari. See Br. in Opp. 31. But respondent elides the fact that she argued for denial of the earlier petition in part because of the case's interlocutory posture. Given her position, respondent cannot colorably attach significance to the Court's disposition of the earlier petition.

3. Finally on this point, the Third Circuit's position on field preemption conflicts with the FAA's own, decades-long views on the issue. See Pet. 31-33. Respondent cannot wish away the FAA's views simply by ignoring them.

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

Respondent offers a host of additional reasons why the Court should deny review. All of those reasons lack merit.

1. Respondent first contends (Br. in Opp. 14-15, 31-32) that further review is premature because no square circuit conflict exists.

With respect to conflict preemption, respondent's contention misses the point: the Third Circuit's decision conflicts with this Court's decisions, and the resulting conflict warrants the Court's review. See S. Ct. R. 10(c). In the context of preemption, this Court has routinely granted review to correct decisions by even a single wayward court of appeals because of the "importance of the * * * issue." *Wyeth*, 555 U.S. at 563; see *Merck Sharp & Dohme Corp.* v. *Albrecht*, No. 17-290, slip op. 9 (May 20, 2019) (reversing a preemption decision of the Third Circuit despite the absence of a circuit conflict on the specific question presented). As the diversity and sheer number of petitioner's amici attest, the question presented here is exceptionally important not just to the entire aviation industry and the flying public, but to other industries as well. See, *e.g.*, DRI Br. 2-3, 19.

With respect to field preemption, respondent contends that the cases cited by petitioner did not involve exactly the same facts and are thus irrelevant. See Br. in Opp. 32. The salient question, however, is whether "it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013). There can be no doubt that both the Second and Tenth Circuits would have reached the opposite result to the Third Circuit on these facts: both courts have held

that the Act preempts state-law standards of care in the *entire field* of aviation safety. See *Goodspeed Airport LLC* v. *East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206, 210 & n.5 (2d Cir. 2011); *US Airways, Inc.* v. *O'Donnell*, 627 F.3d 1318, 1326-1327 (10th Cir. 2010).

2. There is no merit, either, to any of respondent's purported vehicle defects.

a. Respondent suggests (Br. in Opp. 18-19) that the importance of the question presented has been diminished by the (decade-long) existence of the Organization Designation Authorization (ODA) program. But petitioner did not use that program to certify the engine design at issue. For this case—and the countless others involving designs approved outside the program—the ODA program is thus irrelevant.

In any event, the ODA program does not eliminate the requirement of FAA approval. As with FAA's parallel Designated Engineering Representative program, ODA designees act as "surrogates of the FAA" who are "guided by the same requirements, instructions, and procedures as FAA employees." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807 (1984). Designees "are legally distinct from and act independent of the organizations that employ them." 70 Fed. Reg. 59,933 (2005). And, even under the ODA program, only the FAA can approve original and amended type designs. See Federal Aviation Administration, *Types of Organizational Designation Authorizations* <tinyurl.com/oda2019>.

b. Respondent further contends (Br. in Opp. 29-30) that she has other state-law failure-to-warn claims that would be unaffected by the resolution of this case. But respondent did not advance any such claim in her opening brief below; her sole failure-to-warn claim was a claim that

petitioner had failed to warn the FAA. See Resp. C.A. Br. 53-54. The Third Circuit appropriately affirmed the dismissal of that claim, see Pet. App. 27a-28a, and no other failure-to-warn claim remains in the case.

c. Contrary to respondent's claim (Br. in Opp. 31), the factual record before the Court is not "underdeveloped." The additional factual development that respondent claims is necessary, see *id.* at 17-18, is in reality information about the FAA's own practices. To the extent such information would be helpful to the Court in reaching a decision on the merits, the government can provide it as amicus curiae if certiorari is granted.

d. Finally, respondent complains (Br. in Opp. 30) that the facts here are "idiosyncratic." To be sure, the theory of liability advanced by respondent and her counsel—that petitioner should be held responsible for the alleged failure of an aftermarket part designed and manufactured by a third party that petitioner did not control—is unprecedented. And the Third Circuit's decision to permit that expansive theory of tort liability is equally unprecedented. If anything, however, that is all the more reason to grant review.

Respondent does not genuinely believe that the facts are an obstacle to further review, because she recognizes that the question presented arises in a variety of contexts and complains that petitioner is pressing an "extremely broad" rule. Br. in Opp. 31. In fact, the question presented is simple, straightforward, and purely legal. It implicates the strong federal interest in having uniform rules to ensure the safety of air travel. And this case, which comes back to the Court on a complete summary-judgment record and now offers the full range of possible dispositions on field and conflict preemption, is optimally situated for the Court's review.

* * * * *

The Court should grant the petition for a writ of certiorari. In the alternative, in light of the substantial federal interest, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted.

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