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,

Respondent.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The government confirms that "the petition for a writ of certiorari should be denied." U.S. Br. 1. As the government points out, there is no circuit split. *Id*. at 20. The government also believes that the Third Circuit's opinion "preserve[s] the legal principle that has paramount importance to the [Federal Aviation Administration (FAA)]," *i.e.*, that conflict preemption is available in appropriate cases. *Id*. at 20-21. It recognizes that the regulatory regime governing aircraft design is not clearly analogous to the regime for the labeling of generic drugs, and argues that the issue should percolate in the lower courts. *Id*. at 21-22. And it notes that the relevant regulations may change in response to the Boeing 737 MAX crashes. *Id*. at 22-23. These considerations, combined with the arguments in the brief in opposition, make the case against certiorari overwhelming.

This supplemental brief will do three things. First, it will explain why the Third Circuit correctly found that respondent's claim was not preempted. Second, it will reinforce the government's point about the value of further percolation. Finally, it will briefly note additional arguments against certiorari that the government did not address, but remain important.

I. The Third Circuit Correctly Rejected Petitioner's Preemption Arguments.

The Third Circuit correctly found against preemption. The court held that if petitioner had shown that the FAA would have prevented petitioner from changing its design, petitioner would have a conflict preemption defense. Petitioner's defense failed because it could not make the required showing.

The government acknowledges that this rule "preserve[s] the legal principle that has paramount importance to the FAA," *i.e.*, that the FAA has final say over aviation safety. U.S. Br. 20. But it nevertheless argues that the court of appeals should have gone further by holding that there can be no liability for design features that were approved by the FAA, outside a handful of examples involving fraud on the FAA, or similar. *Id.* at 14, 17. That position has serious flaws.

First, the premise of the government's argument is that if the FAA deems a design safe, courts should treat that determination as conclusive. That premise is both logically and empirically dubious. It is illogical because when a design flaw actually causes a fatal air crash, there is no conceivable reason that a court should ignore reality and deem the design safe.

The government's premise is empirically flawed because it is indisputable that the FAA mistakenly approves unsafe designs. This case is but one illustration. Here, the evidence shows that a flaw in the approved engine design caused the carburetor to come apart mid-flight, resulting in a fatal crash. This case is hardly alone. An investigative report revealed that "[n]early 45,000 people have been killed over the past five decades in private planes and helicopters," including "repeated instances in which crashes, deaths and injuries were caused by defective parts and dangerous designs, casting doubt on the government's official rulings." Thomas Frank, *Safety Last: Lies and Coverups Mask Roots of Small-Plane Carnage*, USA Today (June 17, 2014), https://www.usatoday.com/story/news/nation/2014/06/12/lies-coverups-mask-roots-small-aircraft-carnage-unfit-for-flight-part-1/10405323/.

Indeed, poor certification decisions have led to numerous high-profile air crashes. In the 1990s, multiple planes crashed because the FAA had certified them as safe for flying into ice despite data showing otherwise. *See* Matthew L. Wald, *Review of Deadly Plane Crash Faults F.A.A. on Rules for De-Icing*, N.Y. Times (Aug. 28, 1998), https://www.nytimes.com/1998/08/28/us/review-of-deadly-plane-crash-faults-faa-on-rules-for-de-icing.html. The FAA also approved the design of the Boeing 737, which infamously crashed multiple times when its rudder reversed due to a design flaw. *See* Nat'l Transp. Safety Bd. (NTSB), News Release: NTSB Concludes Longest Investigation in History; Finds Rudder Reversal Was Likely Cause of USAIR Flight 427, a Boeing 737, Near Pittsburgh in 1994 (Mar. 24, 1999), https://www.ntsb.gov/news/press-releases/Pages/NTSB_Concludes_Longest_Investigation_in_History;_Finds_Rudder_Reversal_was_Likely_Cause_of_USAIR_Flight_427_A_Boeing_737_N.aspx. And more recently, the FAA approved a design for the Boeing 737 MAX that included the Maneuvering Characteristics Augmentation System (MCAS), which caused two commercial flights to crash, killing 346 people. As in the icing cases, the FAA allowed the plane to continue flying even after the first crash, and even after its own internal analyses predicted that 15 more fatal crashes would occur during the lifetime of the aircraft. *See* David Koenig, *FAA Analysis Predicted Many More Max Crashes Without a Fix*, AP News (Dec. 11, 2019), https://apnews.com/3dee52fbe1bbeb9d684b6de5e66ec82f. In response to congressional scrutiny about these lapses, the FAA Administrator acknowledged that the agency had made mistakes. *See* C-SPAN, Boeing 737 MAX Aircraft Safety (Dec. 11, 2019), https://www.c-span.org/video/?467035-1/faa-administrator-stephen-

dickson-testifies-boeing-737-max-safety (video of hearing before the House Transportation and Infrastructure Committee, statement at 2:26:30). The government's brief, however, makes no attempt to reconcile its assertion that the FAA's safety judgments are sacrosanct with the reality that FAA-approved designs have proven catastrophically unsafe.

The government's argument also ignores the extraordinary degree of delegation to manufacturers during the certification process. Manufacturer employees perform "more than 90 percent of FAA's certification activities." Gov't Accountability Office (GAO), GAO-05-40, *Aviation Safety: FAA Needs to Strengthen the Management of Its Designee Programs* 12 (2004). Accordingly, manufacturers have tremendous control over the certification of their own designs—and they are often tempted to cut corners. That was a key factor leading to the 737 MAX crashes, but the problem goes back decades. In 1984, this Court recognized that manufacturers do most of the certification work, and the FAA merely performs a "spot check" of that work. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 817 (1984). In 1993, the GAO concluded that the FAA "has not ensured that its staff are effectively involved in the certification process," and has "increasingly delegated duties to manufacturers without defining such a role." GAO, GAO/RCED-93-155, *Aircraft Certification: New FAA Approach Needed to Meet Challenges of Advanced Technology* 3 (1993). Citing internal reviews, the GAO found that the FAA's approach was "too ad hoc and unmeasured to ensure a minimum effective level of involvement" in the certification process. *Id.* at 5. In 2004, the GAO reaffirmed that the FAA's "inconsistent

monitoring of its designee programs and oversight of its designees are key weaknesses of the programs." GAO-05-40, *supra*, at 3. In 2010, it noted that the process had long produced inconsistent results—as reported by studies over a fourteen-year period. *See* GAO, GAO-11-14, *Aviation Safety: Certification and Approval Processes Are Generally Viewed as Working Well, but Better Evaluative Information Needed to Improve Efficiency* 11 (2010).

This degree of delegation weighs against preemption for two reasons. First, when FAA employees do not personally approve a design feature, it makes no sense to treat the resulting design approvals as a federal judgment about safety.[1] More pointedly, it is difficult to imagine that Congress intended for an industry to effectively control the certification process of its designs, and then use the resulting certifications as shields against liability when flaws in those designs kill Americans. Second, if a manufacturer's designees can change its designs without consulting an FAA employee (which they often can), then the manufacturer effectively has the unilateral power to change its designs under federal law—a fact that independently defeats conflict preemption under any standard. The government does not account for delegation in its brief except to acknowledge that it occurs. U.S. Br. 6.

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[1] This argument undercuts the government's contention that the particular design feature in this case received FAA approval. As the brief in opposition points out, this design feature was never "expressly approved" by the FAA—which is the standard the FAA itself previously argued was necessary to trigger preemption. *See* BIO 26.

The government's argument also cannot be squared with Congress's intent. For decades, Congress has known that aircraft sometimes crash due to design defects. But there is no evidence anywhere that Congress intended for type certification to preclude manufacturer liability for those defects. The type certification provision itself only instructs the FAA to establish "minimum standards"—not ceilings on safety. *See* 49 U.S.C. § 44704(a)(1). And no other provision of the Federal Aviation Act even suggests that design defect claims should all be preempted.

On the contrary, Congress declined to create a federal cause of action for such cases, and instead enacted a "saving clause" that preserves state remedies—indicating that Congress is relying on state tort law to provide compensation to accident victims. 49 U.S.C. § 40120(c); *Wyeth v. Levine*, 555 U.S. 555, 574 (2009) (relying on the lack of a "federal remedy," coupled with Congress's refusal to expressly preempt state tort claims, as evidence that federal regulation and state tort law should coexist); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (holding that Congress's silence about state tort remedies, coupled with its "failure to provide any federal remedy," was strong evidence that state tort remedies were available).

Indeed, while enacting the General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat. 1552, *reprinted in* 49 U.S.C. § 40101 note, Congress observed that "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." H.R. Rep. No. 103-525, pt. 2, at 4 (1994). Congress resolved to "tread very carefully when considering proposals . . . that would preempt State

liability law." *Ibid*. Indeed, Congress decided not to "revise substantially a number of substantive and procedural matters relating to State tort law, as earlier [failed] legislative efforts would have done." *Id*. at 6. Instead, it enacted narrow legislation, "limited to creating a statute of repose" of 18 years. *Ibid*. Even that narrow change was controversial: Congress only made it after considering "the distinguishing characteristics of the general aviation industry," including the fact that "aircraft must meet rigid standards set by the Federal Aviation Administration," and then are subject to "'cradle to grave' Federal regulatory oversight." *Id*. at 5. These "exceptional considerations" led Congress "to take the unusual step to preempting State law in this one extremely limited instance." *Id*. at 6. Congress was emphatic, however, 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. That is a ringing endorsement of state tort claims—and an explicit recognition that federal aviation regulations do not displace them.

Recent hearings confirm that Congress would not be comfortable regarding the FAA's safety determinations as conclusive. Legislators evaluating the agency's performance after the 737 MAX crashes commented that the "FAA rolled the dice on the safety of the traveling public,"[2] and opined that "the trust Congress gave FAA with delegation authority has been broken."[3]

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[2] Boeing 737 MAX Aircraft Safety, *supra*, at 05:35 (Rep. DeFazio).

[3] *Id*. at 3:14:00 (Rep. Payne).

In light of the foregoing, the government's statement that "Congress would not have anticipated that an aircraft design that has been certified by the FAA as safe under the controlling federal standards would nevertheless be deemed unsafe by the law of a particular State," is not credible. U.S. Br. 16. There is no evidence that any Congress ever held such a rosy view of the FAA's ability to ensure safety, or harbored such hostility toward state tort law. On the contrary, it seems that Congress understood that state tort suits are a critical means to compensate accident victims, and they also uncover unknown hazards and provide incentives to manufacturers to disclose and address safety risks promptly. *See Wyeth*, 555 U.S. at 579.

In an attempt to reconcile its position with congressional intent, the government argues that its rule permits some product liability cases based on violations of federal duties. *See* U.S. Br. 17. At a high level, this argument misses the point. The saving clause preserves state law remedies *without qualification*—and Congress's other actions indicate its intent to preserve state tort claims, unfettered by federal interference, with the exception of stale claims. Thus, even if the government's position does not render the saving clause a complete nullity, it conflicts with Congress's clearly expressed intent by precluding a critically important category of claims.

On a more granular level, the examples of potential claims the government offers are not compelling. It does not cite a case advancing the theories it endorses, so we have no idea how many of them would be feasible to plead or prove, or would provide adequate compensation to accident victims. For some of the theories, it is not clear how the government's position on

preemption would affect them. For example, the government argues that a plaintiff could bring a claim that a product was not manufactured in conformity with its type certificate. But it is unclear why, under the government's preemption theory, a manufacturer could not assert that the airworthiness certificate on that product preempted the claim. These novel and uncertain examples thus do not prove that the government's argument is consistent with congressional intent, but they do illustrate why more percolation would be valuable. *See* Part II, *infra*.

These are the most significant flaws with the government's argument. But there are others. Briefly, the government relies on dated and distinguishable precedent such as *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), while ignoring the import of more recent and relevant product liability precedents like *Wyeth*, and precedents cautioning against finding field preemption "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).

Second, the government inflates the risk that different States will apply a "patchwork" of regulations to aircraft. U.S. Br. 16. We challenged petitioner to supply an example of two States adopting incompatible standards; petitioner never did. The government does not, either, and so its speculation that state tort standards will somehow complicate aviation regulation should be rejected. The reality is that every State basically applies the same standard—that aircraft designs should not cause aviation accidents—and that standard is also consistent with federal law.

Third, and relatedly, the government never fleshes out how federal standards of care differ from state ones. Assuming (as the evidence has shown) that the flawed design of petitioner's engine caused the crash in this case, the government does not explain how that design could possibly meet federal standards, nor how state standards impose a greater burden than federal ones by requiring a design that does not cause crashes.

Finally, state tort standards are not aimed at the same objectives as federal aviation regulations (*contra* U.S. Br. 20); state tort standards are general rules designed to ensure that accident victims are compensated—an objective that federal law does not attempt to address.

In sum, Congress did not contemplate federal preemption of state standards of care or state tort remedies—and the Third Circuit was correct to allow respondent's claim to go forward. Indeed, there is a strong argument that the degree of conflict preemption the Third Circuit permitted is too much. If certiorari is granted, respondent would argue for no implied preemption whatsoever. *See* BIO 26-28.

II. Further Percolation Is Desirable.

The government is correct that further percolation would be valuable. This Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam); *id*. at 1784 (Thomas, J., concurring) ("[F]urther percolation may assist our review of this issue of first impression"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995)

(Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

Petitioner's conflict preemption argument asserts a novel legal theory about the preemptive effect of complex regulations—an issue that warrants percolation. *See* BIO 16-20. The government agrees, arguing that "the FAA's regulation and certification of aircraft designs" is "different in some relevant respects" from drug labeling—which the lower courts treated as the closest analogue. U.S. Br. 21. The government thus concludes that further review in the lower courts "is warranted before this Court addresses the preemptive scope of this distinct regulatory regime." *Id*. at 22.[4]

The problems with and questions about the government's merits argument, highlighted above, further underscore the need for percolation. Lower courts should assess which precedents control and dig into congressional intent to determine the extent of federal preemption, if any, of state product liability claims.

Percolation is also desirable because, as the government recognizes, federal aviation oversight is in flux. Congress is holding hearings and considering legislation. The FAA is working to improve its practices.

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[4] We agree with the government that the state of the factual record makes this case a poor vehicle to consider conflict preemption. However, we will dispute on remand that petitioner can reopen the record. As the brief in opposition explained (at 11, 18, 26), petitioner forfeited its opportunity to introduce additional facts supporting preemption.

And manufacturers and public advocates are involved as well. It would make little sense for this Court to inject itself into that process now.

III. The Government Understates the Argument Against Certiorari.

Finally, the government's presentation of the case against certiorari is incomplete. The brief in opposition made three arguments that the government does not address, but still matter.

1. Preemption cannot resolve the entire case because it does not apply to respondent's failure-to-warn claims (which the government acknowledges would not be preempted). BIO 29-30.

2. The facts are idiosyncratic because of the role Kelly Aerospace played in supplying relevant parts. BIO 30.

3. The question presented is not important because the decisions below essentially maintain a status quo that has existed for decades. BIO 1, 15. Congress is always free to revisit the law. Its refusal to do so should be taken as acquiescence. There is no compelling reason for this Court to upend the status quo—and certainly no reason to do so now.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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