No. 18-1140

In the Supreme Court of the United States

AVCO CORPORATION, PETITIONER

v.

JILL SIKKELEE, RESPONDENT

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The United States' brief confirms the need for this Court's review. The United States does not dispute the exceptional importance of, and enormous federal interest in, the question this petition presents. To the contrary, the United States confirms "the importance of a uniform, federal system governing the development of aviation." U.S. Br. 14. Absent consistent federal standards, manufacturers will be unable to ensure safety in a national system or justify capital investment in new technology to improve safety. The decisions below thus represent a clear and present risk to the safety of the flying public.

The United States also agrees with petitioner that the Third Circuit's decisions are rife with serious, consequential errors. The government agrees that the Third Circuit's badly flawed decisions improperly permit lay juries applying state law to override the FAA's safety determinations for the design of aircraft engines. And the government laments that the Third Circuit's decisions undermine the uniformity of the comprehensive regulatory scheme Congress sought to achieve under the Federal Aviation Act. Absent this Court's intervention, manufacturers will be subject to a patchwork of regulation under the laws of all fifty States, a "problem [that] is particularly acute for aircraft." U.S. Br. 16. The consequences for petitioner and the aviation industry as a whole—described in vivid detail by petitioner's diverse array of amici—are substantial. If allowed to stand, the decisions below will seriously disrupt the economic stability of aviation manufacturers across the country. The United States echoes many of the same warnings in its brief.

Nor does the United States argue that this case is a poor vehicle to decide this exceptionally important question. To the contrary, it reiterates the key facts that make this case a good vehicle, including the absence of any factual dispute regarding the contents of the FAA-approved type design. U.S. Br. 8. Nonetheless, the United States urges the Court to *delay* review. But the reasons it throws up in support of its wait-and-see approach—some of which span only a single sentence—do not justify delay.

The United States insists that no square circuit conflict exists. U.S. Br. 20. That ignores the diametrically opposite approaches the courts of appeals have adopted when defining the scope of the field preempted by the Act, including with respect to aircraft design. The United

States also fails to appreciate that the opinion below contradicts this Court's conflict-preemption precedents. Both conflicts warrant the Court's immediate review.

The United States also suggests that this Court should defer review until after trial. But the key evidence relevant to petitioner's preemption defense—the FAA's approval of the carburetor design at issue—is undisputed. Waiting until after a trial will only subject petitioner to the needless and burdensome expense of litigating claims that the United States agrees are preempted.

Finally, the United States invokes the recent tragedies involving the Boeing 737 MAX aircraft as a reason for postponing review. But the hypothetical possibility of regulatory change in their wake does not justify delay. The question presented is indisputably important, and no obstacles prevent this Court from considering it. The Court should not stand idly by as a lower court twice misapplies binding preemption precedent, disregards the views of the FAA, and undermines the safety of aviation travel in this country by permitting lay juries to impose their own design standards on manufacturers. The petition should be granted.

A. The Exceptional Importance of the Question Presented Demands Review in This Case

1. The United States reiterates its longstanding view that maintaining federal preeminence in the field of aviation regulation is an issue of "paramount federal concern." U.S. Br. at 1-2, *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir. 1993). The United States also agrees with petitioner that the Third Circuit has badly erred—twice—in deciding this critical federal issue.

The United States agrees that aviation safety is a "field reserved for federal regulation." U.S. Br. 16. As

the United States explains, it would be intolerable if "Pennsylvania might prescribe aircraft-engine design standards 'of one sort, Oregon another, California another, and so on.'" U.S. Br. 16 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 166 n.15 (1978)). Yet that is precisely the sort of chaos that the Third Circuit's decisions would unleash absent this Court's review.

The United States also confirms that the Third Circuit erroneously held that state-law standards of care are not preempted. "Enforcement of state-law aircraft-design standards," the United States explains, "would frustrate Congress's intention to establish uniform federal aircraft design standards." U.S. Br. 17. It is thus common ground between the United States and petitioner that allowing state-law design-defect claims to proceed against manufacturers, as the Third Circuit's decisions would do, profoundly undermines the FAA's comprehensive regulatory scheme.

Nor does the United States dispute amici's warnings of devastating consequences were the decisions below to stand. Seven briefs from representatives of every facet of the aviation industry attest to the myriad harms that will follow from letting lay juries considering state-law design-defect liability supplant the FAA's expert oversight. As amici explain, suits like respondent's will "undermine the industry's ability to achieve its unmatched record of safety under the uniform regulatory framework," AIA Br. 15; will "promote an unworkable system that will prove highly detrimental to national and international uniformity in aircraft design," Airbus Br. 13; and could even "make flying *less* safe." Garmin Br. 19; *see also* EAA Br. 17-18; GAMA Br. 16-19. The United States expresses many of the same concerns, emphasizing that manufac-

turers like petitioner should focus on complying with *federal* safety requirements rather than "diverting time and resources to accommodate a patchwork of additional design requirements" imposed on an ad hoc, trial-by-trial basis. U.S Br. 16.

2. Despite invoking "the importance of a uniform, federal system governing the development of aviation," U.S. Br. 14; *see also id.* at 16, 17, the United States unconvincingly tries to minimize the implications of the decisions below. The United States suggests that the Third Circuit's opinions "appear to preserve the legal principle that has paramount importance to the FAA"—that "[a]ny mandatory directive from the FAA regarding aircraft design 'conflict preempt[s]' any tort claim (or other state law) that would attempt to impose a different design." U.S. Br. 20 (quoting Pet. App. 205a) (second alteration in original). But that argument focuses entirely on the Third Circuit's second, *conflict*-preemption decision. It overlooks the Third Circuit's earlier decision rejecting *field* preemption. On the subject of the preemption of state-law standards of care, the United States has already recognized that the question presented is of "paramount federal concern." U.S. Br. in *Cleveland*, *supra*, at 1-2. Nothing in the United States' brief undermines the clear federal interest in field preemption.

In any event, the United States misconstrues the Third Circuit's impossibility-preemption decision. The Third Circuit has squarely held—over the United States' vigorous objection—that state-law design-defect claims that "attempt to impose a different design" may proceed *even if* the FAA has approved the design feature at issue through the type certification process. *See* Pet. App. 20a-23a. Its decisions eviscerate the preemption defense in design-defect cases by permitting suits over the safety of

products the FAA has already certified as safe. And the Third Circuit did so on grounds that the United States itself acknowledges are wrong. *See* U.S. Br. 18-20.

The notion that the Third Circuit's decisions "appear" not to rule out preemption in all cases is cold comfort to companies like petitioner that have faithfully complied with the FAA's exhaustive regulatory process on the well-founded assumption that what the FAA says goes. The United States confirms that "a plaintiff should not be permitted to . . . ask a jury to rely on state law to override the FAA's judgments about what the applicable safety standard should be or whether a particular design met that standard." U.S. Br. 19. No legitimate reason exists to force the aviation industry to bear the burden of litigating claims that the United States agrees are preempted.

B. There Is No Valid Reason To Postpone Review

The United States identifies no factors specific to this case that make it a poor vehicle for resolution of this important question. Nonetheless, it half-heartedly offers three arguments in support of *postponing* review. *See* U.S. Br. 20-23. None justifies denying certiorari.

1. The United States first suggests that further review is premature because no square circuit conflict exists. *See* U.S. Br. 20.

With respect to conflict preemption, the United States ignores the very point it spent eight pages establishing: the Third Circuit's decisions conflict with this Court's precedents on an issue of real and immediate significance. That conflict warrants the Court's review. *See* S. Ct. R. 10(c). This Court repeatedly has agreed to review questions of federal preemption in cases involving the design of vehicles engaged in interstate commerce—notwithstanding the absence of a circuit conflict on the questions

presented. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012) (locomotives); *United States v. Locke*, 529 U.S. 89 (2000) (oil tankers); *Ray*, 435 U.S. 151 (same). Indeed, the United States previously has urged this Court to grant review where, as here, a lower court's decision "conflicts with a holding of this Court" in an area of "commerce critical to the Nation's economy." U.S. Pet. for Cert. 14, *United States v. Locke*, No. 98-1701, 1999 WL 33609307.

Even outside the transportation context, 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 v. Levine*, 555 U.S. 555, 563 (2009); *see also Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1676 (2019) (reversing a preemption decision of the Third Circuit despite the absence of a circuit conflict on the specific question presented). The preemption question presented here, affecting one of the Nation's largest and most highly regulated industries, is just as worthy of review as the questions in those previous cases.

Even were a circuit conflict required to justify review, there is one. The United States ignores the divergent conclusions of the courts of appeals concerning the scope of field preemption under the Federal Aviation Act. Consistent with the position advocated by the United States here, the Second and Tenth Circuits have expressly held that the Act preempts state regulation in the *entire field* of aviation safety. *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210 (2d Cir. 2011); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010).

The Second Circuit reaffirmed its broad position just a few months ago, after this Court called for the views of

the Solicitor General. *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019) ("[W]e have held that the FAAct impliedly preempts the entire 'field of air safety,'" and accordingly, state laws that "sufficiently interfere with federal regulation of air safety are . . . preempted" (second alteration in original)), *petition for cert. filed*, No. 19-735 (Dec. 6, 2019). And, in that decision, the Second Circuit cited a 2018 decision in which it applied its broad conception of field preemption to affirm dismissal of state-law claims challenging the design of airplane seats and monitors. *See Fawemimo v. Am. Airlines, Inc.*, 751 F. App'x 16, 19 (2d Cir. 2018) ("Because the complaint challenges the overall design of the monitors and seats, it depends on a common law rule for monitors and seats that would conflict with requirements established by the federal government. This result would be contrary to the FAA's goal of centralizing, in the federal government, the regulation of air safety."). The Second Circuit thus has reached the opposite result on similar facts, and there can be no doubt that the Tenth Circuit would as well.

2. The United States next contends that petitioner's conflict-preemption defense would be better suited for review "after additional development of the factual record." U.S. Br. 13. But no additional evidence at trial will affect petitioner's *field*-preemption defense—which the Third Circuit already has held is unavailable as a matter of law. Pet. App. 164a. Under the test proposed by the United States, moreover, federal law preempts respondent's design-defect claim on a theory of field preemption based on the current record. The United States agrees that where the FAA has determined that an engine design meets the applicable federal safety standard, design-defect claims proceeding under a state standard of care are preempted. U.S. Br. 14. And, as the United States acknowledges, it is

undisputed here that the FAA approved the very fastening mechanism that respondent challenges as part of the engine's type design. U.S. Br. 14. That is the critical fact for preemption purposes, and trial will not change it.

Nor is there reason to suspect that additional evidence relevant to *conflict* preemption could be developed at trial. Over the last decade of litigation, petitioner and respondent have compiled an extensive factual record, and petitioner introduced the material evidence from this record in two summary-judgment submissions. Given that the underlying events occurred over half a century ago, it is extremely unlikely that the passage of additional time will promote further factual development.

In any event, the additional factual development the government suggests is necessary, *see* U.S. Br. 21-22, is in reality information about the FAA's own practices and regulations, not historical facts in this case. To the extent such information would be helpful to the Court in reaching a decision on the merits, the FAA can provide it as amicus curiae if certiorari is granted.

Most importantly, denying review now would force petitioner and respondent to engage in an expensive and burdensome trial for no reason. Preemption is by its nature designed to be decided before a jury trial; indeed, this Court just held that preemption is a question of law for courts rather than a question of fact for juries. *See Merck*, 139 S. Ct. at 1679. This Court regularly grants certiorari in situations where the lower court denied a preemption motion before trial. *See, e.g.*, *Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 408 P.3d 515, 518 (Mont. 2017), *cert. granted*, 139 S. Ct. 2690 (2019) (granting review of denial of summary judgment on, *inter alia*, preemption grounds); *Merck*, 139 S. Ct. at 1679 (same); *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct.

1190, 1196-97 (2017) (same); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 383-84 (2015) (same). Here, too, forcing petitioner to go to trial applying state-law standards of care would undermine the very protections that Congress ordered.

Principles of judicial economy similarly counsel in favor of determining, at the outset, whether the impossibility test of *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), or the clear evidence test of *Wyeth v. Levine*, 555 U.S. 555 (2009), applies in this case. If petitioner's conflict-preemption defense should be evaluated using the test set forth in *PLIVA* rather than *Wyeth*, petitioner and respondent are best served by knowing that now. The alternative—litigating this case to judgment, only to learn post-judgment that the legal standard should have been different—risks significant delay and needless expense.

3. In a last-ditch effort to justify postponing review of a concededly important question, the United States vaguely alludes to the recent tragedies involving the Boeing 737 MAX aircraft. U.S. Br. 22-23. But the United States fails to articulate the relevance of those events to the straightforward legal question presented in this case, which involves a non-commercial, general aviation aircraft. The situation surrounding the 737 MAX aircraft raises a number of issues unrelated to the question presented. *See, e.g.*, First Am. Compl. ¶¶ 101(g), 109-119, *In re Ethiopian Airlines Flight ET 302 Crash*, 1:19-cv-02170 (N.D. Ill Apr. 16, 2019), ECF No. 14. The United States' position in its amicus brief leaves open the possibility of relief for the 737 MAX litigants on a number of grounds. *See* U.S. Br. 17. Petitioner and the rest of the general aviation industry need this Court's review now, and unrelated events provide no reason to delay review.

The mere possibility of a regulatory change, *see* U.S. Br. 22-23, is likewise insufficient to postpone review. Regulatory revisions will have no impact on the scope of field preemption under the Act itself. In any event, the United States has often advised this Court that pending legislation is not a reason to deny certiorari, and this same logic applies with equal force to potential regulatory changes. *See* U.S. Pet. Reply 8, *United States v. Eurodif S.A.*, No. 07-1059, 2008 WL 905193 ("The speculative possibility that Congress might ultimately enact" a pending bill "should not deter the Court from considering the important questions presented by this case"). In any case involving an administrative agency, some potential always exists that the agency may alter relevant regulations at some future date. If this Court were to deny review each time an agency sought "to assess possible [regulatory] modifications," U.S. Br. 23, it would rarely confront significant questions concerning the administrative state. And agencies could avoid review simply by professing an intention to "assess possible modifications" to an administrative regime.

* * * * *

The United States and the entire aviation industry have told this Court that the preemption issue presented by the petition is important, and that the Third Circuit seriously erred in answering it. There are no obstacles to this Court's review, and no legitimate reasons to delay review until after a trial. Congress did not want juries applying state law to become the final arbiters of design safety for this most federal of transportation industries. The Court should grant review to affirm that commonsense conclusion and restore federal supremacy in this critically important sector of the economy.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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