No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Aviation Act preempts state-law design-defect claims.

CORPORATE DISCLOSURE STATEMENT

Petitioner Avco Corporation is wholly owned by Textron Inc. Textron Inc. has no parent corporation. T. Rowe Price Associates, Inc., a mutual-fund company, is the registered owner of 10% or more of Textron's stock. T. Rowe Price Associates, Inc., is a subsidiary of T. Rowe Price Group, Inc., a publicly held company.

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Avco Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals regarding conflict preemption (App., *infra*, 1a-44a) is reported at 907 F.3d 701. The memorandum opinion of the district court granting petitioner's motion for summary judgment (App., *infra*, 47a-154a) is reported at 268 F. Supp. 3d 660.

The earlier opinion of the court of appeals regarding field preemption (App., *infra*, 163a-216a) is reported at

822 F.3d 680. An earlier memorandum opinion of the district court granting petitioner's motion for summary judgment in relevant part (App., *infra*, 219a-274a) is reported at 45 F. Supp. 3d 431. An earlier memorandum opinion and order of the district court granting petitioner's and other defendants' motion for judgment on the pleadings (App., *infra*, 275a-296a) is reported at 731 F. Supp. 2d 429.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2018. A petition for rehearing was denied on December 11, 2018 (App., *infra*, 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]

Relevant provisions of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, are reproduced in the appendix to this petition (App., *infra*, 297a-306a).

STATEMENT

This case presents a question of "paramount federal concern": whether the Federal Aviation Act preempts state-law design-defect claims. U.S. Br. at 1, *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), cert. denied, 510 U.S. 908 (1993). Aviation is a uniquely national mode of transportation that transcends state boundaries. For nearly a century, Congress has taken the

view that the laws and regulations governing aviation safety must be "uniform" across the United States. See, *e.g.*, S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925). To achieve that end, Congress created the Federal Aviation Administration and authorized the FAA to regulate every aspect of aviation, including aircraft design. Once the FAA approves the design of an aircraft or a component, a manufacturer cannot depart from that design without the FAA's permission.

In 1969, petitioner manufactured an aircraft engine pursuant to an FAA-approved design that included a carburetor. More than three decades later, an unaffiliated party installed a replacement carburetor on the engine manufactured by petitioner. The replacement carburetor had previously been overhauled by another unaffiliated party using aftermarket replacement parts with that party's own FAA-approved design. Under federal law, it was impossible for petitioner and the entity that designed and manufactured the replacement carburetor parts to deviate from the FAA-approved designs without the FAA's permission. Nonetheless, in the decisions under review, the Third Circuit held that a jury may hold petitioner liable under state tort law for alleged defects in the FAA-approved designs of the carburetor and its aftermarket replacement parts.

In so holding, the Third Circuit disregarded the preemption framework set out by this Court in *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 623-624 (2011). Although the Third Circuit acknowledged that petitioner could not unilaterally have implemented the design change respondent sought, it nonetheless held—over a dissent from Judge Roth—that the impossibility strand of conflict preemption was unavailable. That decision capped a years-long effort to undermine established preemption principles. In an earlier opinion, the Third Circuit had

held that respondent could base her design-defect claims against petitioner on state-law standards of care. In dismissing the availability of field preemption, the Third Circuit rejected the views of the FAA, set forth in an amicus brief, on the preemptive scope of the Federal Aviation Act.

As a result of the Third Circuit's hostility to preemption, aviation manufacturers will be subjected to a patchwork of regulation under the laws of all fifty States, eliminating the uniformity Congress sought to achieve when it consolidated authority over aircraft design in the FAA. The Third Circuit's opinions effectively unwind the comprehensive regulatory scheme that Congress created to ensure aviation safety. And both inside and outside the context of aviation, the Third Circuit's approach threatens to deprive regulated entities of the impossibility-preemption defense. This case is an optimal vehicle in which to consider whether the Federal Aviation Act preempts state-law design-defect claims. The petition for a writ of certiorari should therefore be granted.

A. Background

1. The aviation industry is "unique among transportation industries in its relation to the Federal Government." S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). The federal government has regulated aviation safety since 1926, when Congress enacted the Air Commerce Act. See Pub. L. No. 69-254, 44 Stat. 568. That act directed the Secretary of Commerce to create an aircraft registration scheme, and it authorized the Secretary to demand "full particulars of the design [of aircraft] and of the calculations upon which the design is based and of the materials and methods used in the construction." *Id.* § 3(b), (f), 44 Stat. 569, 570.

Because of then-prevailing views about the scope of Congress's power under the Commerce Clause, Congress required registration only for aircraft engaged in interstate or foreign air commerce. See Air Commerce Act § 11(a)(2), 44 Stat. 574; S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925). At the same time, however, Congress recognized the need for uniform national standards governing aircraft design, and it encouraged States to adopt "uniform laws and regulations corresponding with the provisions of [the act] and the rules and regulations that will be promulgated under it." S. Rep. No. 2, *supra*, at 8.

2. As civil aviation grew over the following decades, authority over air safety became broadly diffused. At one point, there were 75 different interagency groups working on aviation planning and policy. See S. Rep. No. 1811, *supra*, at 6, 9-10. Congress responded by enacting the Federal Aviation Act of 1958 (Act). See Pub. L. No. 85-726, 72 Stat. 731. Congress recognized that, because the aviation industry's "operations are conducted almost wholly within the Federal jurisdiction[] and are subject to little or no regulation by States or local authorities," "the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest." S. Rep. No. 1811, *supra*, at 5. In the Act, Congress created the Federal Aviation Agency, now known as the Federal Aviation Administration, and consolidated in that agency "full responsibility" for "the promulgation and enforcement of safety regulations." H.R. Rep. No. 2360, 85th Cong., 2d Sess. 1 (1958).

a. The Act directs the FAA to "promote safe flight of civil aircraft in air commerce" by comprehensively regulating the aviation industry. 49 U.S.C. 44701(a). Among other things, the Act specifically directs the FAA to issue "minimum standards required in the interest of safety * * * for the design, material, construction, quality of

work, and performance of aircraft, aircraft engines, and propellers." *Ibid.*

Under that statutory directive, the FAA has issued a comprehensive set of design regulations, known as airworthiness standards, applicable to aircraft and engines. See *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805, 814 (1984); 14 C.F.R. pts. 23, 25, 27, 29, 31, 33, 35. As to engines, a subset of those regulations, Part 33 of Title 14 of the Code of Federal Regulations, prescribes airworthiness standards for certain types of aircraft engines, including "general design and construction requirements." 14 C.F.R. 33.11. The regulations cover every aspect of an engine's design, from ignition and lubrication systems to fuel and induction systems. See 14 C.F.R. 33.11-33.39.

b. The Act creates a multi-step certification process through which the FAA enforces its airworthiness standards. At the first step, type certification, the FAA ascertains that the engine "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards" that Congress directed the FAA to prescribe. 49 U.S.C. 44704(a)(1). An application for a type certificate consists of detailed drawings and specifications (known as the "type design"), as well as test reports, analyses, and other data to show that the engine satisfies the FAA's airworthiness standards. See 14 C.F.R. 21.21, 21.31.

Type certification "can be intensive and painstaking." App., *infra*, 167a. "[F]or example, a commercial aircraft manufacturer seeking a new type certificate for a widebody aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests." *Ibid.* (citing *Varig Airlines*, 467 U.S. at 805 n.7).

At the second step of the certification process, production certification, the FAA must satisfy itself that the manufacturer has "a quality system that ensures that each product and article conforms to its approved design and is in a condition for safe operation." 14 C.F.R. 21.137; see 49 U.S.C. 44704(c).

At the final step, airworthiness certification, the FAA determines whether a particular aircraft is fit to enter service. See 49 U.S.C. 44704(d). An airworthiness certificate signifies that the aircraft as a whole "conforms to its type certificate and, after inspection, is in condition for safe operation." 49 U.S.C. 44704(d)(1). It is unlawful to operate an aircraft without such a certificate. See 49 U.S.C. 44711(a)(1).

c. As the FAA explained in an amicus brief it submitted to the court of appeals, "a manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate." 14-4193 FAA C.A. Br. 10-11. After issuance of the type certificate, the manufacturer may propose changes to a type-certificated design. 14 C.F.R. 21.93. As the court of appeals recognized, however, the manufacturer must obtain the appropriate regulatory approval in order to make such changes. See App., *infra*, 16a, 167a, 204a-205a; FAA C.A. Br. 4-5, 15.

There are two types of changes to a type-certificated design, both of which require prior FAA approval. A minor change is one that has "no appreciable effect" on any "characteristics affecting the airworthiness of the product"; a major change is any other change. 14 C.F.R. 21.93(a). A major change requires an application to the FAA for an amended or supplemental type certificate. See FAA C.A. Br. 4 (citing 49 U.S.C. 44704(b)); 14 C.F.R. 21.113. A minor change is similarly subject to advance FAA approval. See App., *infra*, 167a, 205a; FAA

C.A. Br. 5. To implement a minor change, a type-certificate holder must use a "method acceptable to the FAA." 14 C.F.R. 21.95.

d. The FAA also pervasively regulates aftermarket manufacturers that produce and sell replacement parts for type-certificated products. As a general matter, a manufacturer seeking to produce a replacement part for installation on a type-certificated product must obtain a Parts Manufacturer Approval (PMA). See 14 C.F.R. 21.303(a) (2004). There are several ways to do so. First, a PMA applicant may prove that the design of its part is identical to a design that has previously been approved in a type certificate. See 14 C.F.R. 21.303(a)(4). Second, the applicant may show that it obtained approval to use the design under a licensing agreement. See *ibid.* Third, an applicant may demonstrate, through tests and computations, that the design of its part meets applicable airworthiness requirements. See *ibid.*

B. Facts And Procedural History

1. Petitioner designs and manufactures engines for general-aviation aircraft. In 1966, the FAA issued petitioner a type certificate for an engine with model number O-320-D2C (the "O-320 engine"). The FAA-approved design included a carburetor—a component that controls the mixture of air and fuel supplied to the engine. The specified carburetor was manufactured by an unaffiliated entity, Marvel-Schebler, with model number MA-4SPA (the "MA-4 carburetor"). That carburetor consists of two halves: a bottom half, known as the float bowl, and a top half, known as the throttle body. Those halves are joined by four bolts with hexagonal heads and four washers with locking tabs. App., *infra*, 89a.

Petitioner manufactured an O-320 engine equipped with an MA-4 carburetor in 1969. It shipped the engine

to Beagle Aircraft, a British airplane manufacturer. Petitioner had no further contact with the engine or the carburetor. The engine sat in storage for nearly 30 years; in 1998, the engine was installed on a Cessna 172N aircraft, together with a different MA-4 carburetor than the unit that was shipped along with the engine in 1969. App., *infra*, 7a.

In 2004, a party unaffiliated with petitioner installed a third MA-4 carburetor (the "replacement carburetor") on the O-320 engine. Before installation, another unaffiliated party, Kelly Aerospace, had overhauled the replacement carburetor using hex bolts and lock-tab washers it manufactured under PMAs issued by the FAA. Kelly did not have a license agreement with petitioner or with Marvel-Schebler (or its successors). Instead, Kelly obtained PMAs allowing it independently to design and manufacture carburetor replacement parts by independently demonstrating similarity (but not identicality) with the original Marvel-Schebler design. App., *infra*, 94a-95a.

In 2005, respondent's husband was piloting the aircraft in which Kelly's replacement carburetor was installed when the aircraft crashed shortly after takeoff. Respondent's husband died from injuries sustained in the crash. App., *infra*, 96a.

2. a. In 2007, respondent filed suit in the United States District Court for the Middle District of Pennsylvania against numerous defendants, including petitioner; Marvel-Schebler's alleged successors; and Kelly. Respondent alleged that the Cessna 172N "lost power as a result of an engine fuel delivery system malfunction/defect," which "caus[ed] the aircraft and its pilot to lose control and crash." D. Ct. Dkt. 1, at 13. Respondent asserted various state-law claims, including claims for negligence and strict liability. See *id.* at 78-87.

In 2010, the district court granted judgment on the pleadings in part. App., *infra*, 275a-296a. As is relevant here, relying on *Abdullah* v. *American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), the court held that respondent's claims, which sought to impose state-law standards of care on the manufacture and design of aircraft engines, were subject to field preemption. App., *infra*, 281a-295a. *Abdullah* involved a common-law tort claim alleging that an airline had negligently failed to avoid turbulence and to provide adequate warnings of the turbulence. See 181 F.3d at 365. Reviewing the history and structure of the Federal Aviation Act, the Third Circuit explained that "Congress intended the [FAA] to exercise sole discretion in regulating air safety." *Id.* at 369. Accordingly, the court held that "federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." *Id.* at 367.

b. After the district court granted judgment on the pleadings, respondent filed an amended complaint asserting state-law design-defect and failure-to-warn claims based on alleged violations of FAA regulations. D. Ct. Dkt. 205. Respondent's specific theory of liability in the amended complaint was that the attachment system connecting the two halves of the carburetor—including the hex bolts and lock-tab washers—was defective. See *id.* at 26, 41-42. As the case progressed, the other defendants either were dismissed from the case or settled.

Petitioner then moved for summary judgment on the grounds, first, that its engine was not in a defective condition at the time of sale in 1969, and second, that it had not manufactured or sold the allegedly defective replacement carburetor. The district court granted summary judgment in part and denied it in part. 876 F. Supp. 2d 479 (M.D. Pa. 2012). Although the court acknowledged that

there was no evidence that the engine was defective when it left petitioner's control in 1969, it nevertheless concluded that petitioner could qualify as a "*de facto* manufacturer" of the replacement carburetor because "it was [petitioner's] design directive which caused the allegedly defective carburetor to be produced and placed in the engine." D. Ct. Dkt. 299, at 17, 19.

c. The case was later reassigned to a different judge. As trial approached, the judge expressed concern about respondent's articulation of the applicable federal standards of care and invited further summary-judgment briefing. Petitioner again moved for summary judgment, arguing, as relevant here, that the FAA's issuance of a type certificate for the O-320 engine precluded respondent's claims based on violations of FAA regulations.

The district court granted petitioner's motion in relevant part. App., *infra*, 219a-274a. The court held that, to the extent respondent was pursuing claims that petitioner had violated airworthiness standards applicable to aircraft engines, those standards "establish[] a requirement that applicants must satisfy in order to obtain a type certificate, and it is the [FAA] alone [that] decides whether a certificate should be issued." *Id.* at 258a (emphasis omitted).

3. Respondent appealed, contending that, despite its earlier decision in *Abdullah*, the court of appeals should hold that the Federal Aviation Act preempts the application of state-law standards of care only in the field of aircraft operation and not in the field of aircraft design. See Resp. C.A. Br. 51-57.

The court of appeals invited the FAA to file an amicus brief expressing its view on the scope of field preemption under the Act. In that brief, the FAA reaffirmed its longstanding position that the Act "preempts the field of aviation safety with respect to substantive standards of

safety," including aircraft design. FAA C.A. Br. 2. According to the FAA, "[t]he structure of the Federal Aviation Act confirms the federal government's occupation of the field of substantive safety standards by establishing an all-encompassing federal regulatory framework and directing the Secretary to issue regulations setting safety standards for every facet of air safety and aircraft design." *Id.* at 7. As a result, the FAA observed, "the federal government's presence in the field of aircraft safety is pervasive." *Ibid.* The FAA concluded that "[t]he field preempted by the Federal Aviation Act thus extends broadly to all aspects of aviation safety and includes product liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care." *Ibid.*

The court of appeals rejected the FAA's position, vacated the district court's grant of summary judgment, and remanded for further proceedings. App., *infra*, 163a-216a. Purporting to "clarify the scope of *Abdullah*," the court held that the Federal Aviation Act does not preempt the entire field of aviation safety but instead preempts only the limited field of "in-air operations." *Id.* at 164a, 176a. Because aircraft design falls outside the preempted field, according to the court, "aircraft products liability cases * * * may proceed using a state standard of care." *Id.* at 164a.

According to the court of appeals, Congress had not expressed a clear and manifest intent to preempt product-liability claims in the aviation context. App., *infra*, 177a-184a. In so concluding, the court of appeals primarily relied on two features of the Act. First, it noted that the Act "says only that the FAA may establish 'minimum standards' for aviation safety." *Id.* at 182a (quoting 49 U.S.C. 44701). That language, the court reasoned, was "insufficient on its own to support a finding of clear and manifest

congressional intent of preemption." *Ibid.* Second, the court highlighted the Act's savings clause, which preserves "other remedies provided by law." *Ibid.* (quoting 49 U.S.C. 40120(c)). The court suggested that the existence of the savings clause "belie[d]" an argument that the Act preempted state-law standards of care. *Id.* at 183a.

Picking up on a suggestion in the FAA's brief, the court of appeals noted the possibility that some state-law tort suits would still be preempted "as a result of a conflict between state law and a given type certificate." App., *infra*, 202a. The court left that issue for the district court on remand. *Ibid.*

4. Petitioner petitioned for a writ of certiorari. With only seven Justices participating, this Court denied review. 137 S. Ct. 495 (2016).

5. On remand, petitioner again moved for summary judgment, arguing that respondent's claims failed as a matter of Pennsylvania law and in any event were subject to conflict preemption.

In an exhaustive, 115-page opinion, the district court granted summary judgment to petitioner. App., *infra*, 45a-154a. As to Pennsylvania law, the court concluded that petitioner was entitled to summary judgment because respondent could not state a valid claim under state product-liability law: the engine was concededly not defective when it left petitioner's hands, petitioner did not manufacture or sell the allegedly defective replacement carburetor, and petitioner could not have foreseen the substantial modifications the engine and carburetor would ultimately undergo. *Id.* at 138a-153a.

Of particular relevance here, the district court also concluded that petitioner was entitled to summary judgment because federal law preempted respondent's claims; specifically, on the ground that it was impossible for petitioner to comply with its alleged state-law obligations

without obtaining FAA approval. App., *infra*, 108a-137a. Surveying this Court's conflict-preemption jurisprudence, the district court explained that the dispositive inquiry for impossibility preemption is whether a private party may independently accomplish under federal law what state law requires. *Id.* at 103a-109a. Respondent's argument, the court observed, was that Pennsylvania law required petitioner to alter the design of the carburetor attached to its O-320 engine. *Id.* at 111a-112a. The court concluded that federal law preempted respondent's claims because, absent FAA approval, petitioner could not have altered the design in its type certificate—much less ensured that Kelly, an independent party, would have followed suit. *Id.* at 108a-137a.

6. A divided court of appeals reversed and remanded. App., *infra*, 1a-44a. While the panel agreed that disputed issues of material fact precluded summary judgment as a matter of Pennsylvania law, *id.* at 25a-26a, 29a, the panel disagreed on whether respondent's claims were preempted, *id.* at 11a-24a, 28a-44a.

a. At the outset, the panel majority acknowledged that FAA regulations prevented petitioner from implementing respondent's proposed design change without FAA preapproval. App., *infra*, 20a. In the majority's view, however, that was insufficient to establish impossibility preemption. *Ibid.* Relying on *Wyeth* v. *Levine*, 555 U.S. 555 (2009), the majority instead held that, for impossibility preemption, petitioner was required to present clear evidence that the FAA *would have denied* the proposed design change. App., *infra*, 21a.

The majority reasoned that "[t]he principles of *Wyeth* apply here" simply because petitioner had the ability to *request* and obtain FAA approval for design changes and had successfully done so in the past. App., *infra*, 21a. The

majority contrasted petitioner with the generic drug manufacturers in *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604 (2011), and *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472 (2013), which it viewed as lacking *any* ability to alter their FDA-approved warning labels. App., *infra*, 20a. Applying the *Wyeth* test, the majority concluded that the FAA would likely have permitted the change to the attachment system if petitioner had proposed it. *Id.* at 22a-23a.

Judge Roth dissented. App., *infra*, 28a-44a. Judge Roth faulted the majority for misconstruing this Court's "cohesive" framework for impossibility preemption. *Id.* at 29a. According to Judge Roth, the dispositive question is not "whether a manufacturer may ever alter its product under the applicable federal regulatory scheme," but is instead "whether a manufacturer may do so without *prior* agency approval." *Id.* at 34a (emphasis added). In her view, respondent's claims were preempted because FAA regulations prohibited petitioner from implementing respondent's proposed design change without FAA preapproval. *Id.* at 35a-44a.

Judge Roth rejected the majority's distinction between petitioner and the generic drug manufacturers in *PLIVA* and *Bartlett*. App., *infra*, 29a-34a. She explained that, contrary to the majority's assertion, the generic drug manufacturers were not incapable of altering their warning labels; rather, they could not do so without FDA's permission and assistance. *Id.* at 31a. Because "some form of FAA approval would have been required before [petitioner] could have implemented the design change proposed by [respondent]," "the answer to the fundamental question of impossibility preemption—could [petitioner] independently do under federal law what state law allegedly required of it—is clearly no." *Id.* at 43a.

7. The court of appeals subsequently denied petitioner's petition for panel rehearing. App., *infra*, 46a.

REASONS FOR GRANTING THE PETITION

In the opinions under review, the Third Circuit flouted this Court's precedent, dismissed out of hand the FAA's expert views, and undermined Congress's intent to create uniform safety standards to govern aviation—the most quintessentially national of industries. The regulatory scheme created by Congress vests exclusive decision-making regarding the standards for aircraft design in the FAA. As the Third Circuit recognized, manufacturers such as petitioner cannot comply with a state-law duty to implement a new design without the FAA's advance approval. With regard to impossibility preemption, therefore, this case is indistinguishable from *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604 (2011). The Third Circuit effectively, and impermissibly, rewrote the reasoning of that case to avoid applying it here.

In its earlier opinion, the Third Circuit held that the Federal Aviation Act does not preempt the entire field of aviation safety, rejecting the argument that federal standards of care should govern state tort claims. As a result, juries can impose a patchwork of state-law standards of care on federally regulated aircraft manufacturers. Together, the Third Circuit's opinions betray a now-familiar hostility to federal preemption and threaten serious disruption to the federal government's exclusive regulation of aircraft design. This case is the ideal vehicle in which to decide the important question whether the Federal Aviation Act preempts state-law design-defect claims. The petition for a writ of certiorari should therefore be granted.

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

A manufacturer cannot be liable under state tort law if it could not *independently* have complied with the alleged standard of care—*i.e.*, without the government's assistance. As Judge Roth explained in her dissent, the majority below completely mangled the impossibility-preemption framework established by this Court. The court of appeals' conceptually flawed approach demands the Court's review.

1. The doctrine of preemption arises from the supremacy of federal law. U.S. Const. Art. VI. Congress may exert its supremacy either expressly, see, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), or impliedly under the doctrines of field and conflict preemption, see, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Field preemption occurs when Congress has indicated "an intent to occupy a given field to the exclusion of state law." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). Conflict preemption exists when compliance with both federal and state law is impossible, *PLIVA*, 564 U.S. at 617, or when a challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law, *Crosby*, 530 U.S. at 373.

This Court recently delineated the contours of the impossibility strand of conflict preemption in a trilogy of cases. Those cases establish the principle that federal law preempts state tort claims when a party cannot independently act under federal law in the manner that state law requires.

In *Wyeth* v. *Levine*, 555 U.S. 555 (2009), a plaintiff who was injured after using a brand-name drug claimed that the manufacturer's label failed to warn adequately of the

drug's risks. See *id.* at 558. In response, the manufacturer argued that federal drug regulations made it "impossible for it to comply with the state-law duty to modify [the drug's] labeling without violating federal law." *Id.* at 563.

This Court rejected the manufacturer's preemption defense. The Court recognized that manufacturers generally require FDA's permission to change a drug label. See *Wyeth*, 555 U.S. at 568. But the Court identified an exception to that principle under an FDA regulation that permits a manufacturer to make changes to its label *before* receiving the agency's approval. See *id.* at 568, 571. Because the manufacturer in *Wyeth* could have used the FDA regulation unilaterally to add the warning required by state law, the Court determined that it was not impossible for the manufacturer to comply with both federal and state law, absent "clear evidence" that FDA would have rejected the change after the fact. *Id.* at 571.

Two years later, in *PLIVA, supra*, this Court reached the opposite result. There, the plaintiffs claimed that state law required generic drug manufacturers to use a different label. The manufacturers again argued that it was impossible to comply with both federal labeling requirements and the state-law warning requirement. See 564 U.S. at 610.

This time, the Court agreed with the manufacturers. See 564 U.S. at 618. The Court determined that the relevant FDA regulation did not permit generic drug manufacturers unilaterally to alter their labels in the same manner as brand-name manufacturers. See *id.* at 614-615. Although the generic manufacturers could *request* that FDA allow them to strengthen their labels, see *id.* at 616-617, the Court held that the mere *possibility* of action by the government could not eliminate the conflict between federal and state law. See *id.* at 620. Were such

"conjectures" sufficient to prevent a conflict, the Court reasoned, conflict preemption would be "meaningless." *Id.* at 621. Instead, this Court held that "impossibility" was determined by what "the private party could independently do" without "the Federal Government's special permission and assistance." *Id.* at 620, 623-624.

This Court reaffirmed and expanded upon *PLIVA* in *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 475, 486 (2013). In that case, the plaintiff brought a design-defect claim that would have required the generic drug manufacturer to change the drug's design or labeling. See 570 U.S. at 482-484. The lower court had concluded that the manufacturer had failed to demonstrate impossibility because it could "simply have pulled [the drug] from the market." *Id.* at 475. This Court rejected that reasoning; it noted that, if simply abstaining from an activity governed by conflicting federal and state laws were enough to prevent impossibility preemption, such preemption would be "meaningless." See *id.* at 488 (citation omitted).

2. It should have been straightforward to apply those precedents here: the Federal Aviation Act preempts respondent's claims because petitioner could not have altered the design of the carburetor attached to the O-320 engine without FAA preapproval.

Respondent alleges that an FAA-approved design feature of the replacement carburetor caused the aircraft to crash: she challenges the mechanism by which the two halves of the carburetor were connected. See App., *infra*, 8a. Because petitioner could not have implemented respondent's proposed design change without federal approval (much less ensured that Kelly adopted any such change, which likewise requires FAA approval), respondent's claims are preempted.

As both the majority and the dissenting judge below recognized, FAA regulations prohibited petitioner from

unilaterally altering the design of the Marvel-Schebler carburetor attached to the O-320 engine. See App., *infra*, 19a-20a, 36a-40a. FAA approval is required for both major and minor changes to a type design; the only difference is the process an applicant must follow in order to secure such approval.* Preemption is required here because petitioner could not have changed the design of the carburetor attached to the O-320 engine without "the Federal Government's special permission and assistance." *PLIVA*, 564 U.S. at 620, 623-624.

3. In this case, the Third Circuit effectively discarded this Court's impossibility-preemption framework. Rejecting the reasoning of *PLIVA* and *Bartlett*, the court improperly imported *Wyeth*'s "clear evidence" test into a regulatory regime that, as in *PLIVA* and *Bartlett*, requires *advance* approval by the FAA to make design changes. It goes without saying that courts of appeals are not free to ignore the rationale of this Court's decisions. Yet that is exactly what happened in the proceedings below.

This Court's holding in *PLIVA* could not be clearer: the "question for 'impossibility'" is "whether the private party could *independently* do under federal law what state law requires of it." 564 U.S. at 620 (emphasis added). When, as in *PLIVA*, the manufacturer cannot satisfy state

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* The process to implement major design changes requires the submission of substantiating and descriptive data, as well as evidence that the change complies with applicable regulatory requirements. See 14 C.F.R. 21.97(a), 21.115; FAA C.A. Br. 4, 15. Minor changes are likewise approved under a "method acceptable to the FAA," although the certificate holder may submit substantiating or descriptive data later. 14 C.F.R. 21.95. The FAA has explained that minor changes are "subject to approval by the FAA," FAA C.A. Br. 5; the FAA and the applicant establish acceptable approval procedures on a case-specific basis.

law without first obtaining approval from the federal government, federal law preempts state law. See *id.* at 623-624. By contrast, when a manufacturer can implement the proposed change unilaterally before obtaining an agency's approval, as in *Wyeth*, federal law does not preempt state law (unless the manufacturer presents clear evidence that the agency would have rejected the change). See *id.* at 624. Notably, the court of appeals acknowledged that the FAA does not have an "[FDA]-type process that allows the certificate holder to make a change *before* obtaining approval." App., *infra*, 21a (emphasis added). As Judge Roth noted in dissent, that should have been the end of the inquiry. *Id.* at 41a.

The Third Circuit rewrote *PLIVA* in order to circumvent it. According to the panel majority, what distinguished the generic manufacturer in *PLIVA* from the brand-name manufacturer in *Wyeth* was the generic manufacturer's inability to effect *any* change to its label. App., *infra*, 20a. But that is simply incorrect. In *PLIVA*, this Court assumed that generic drug manufacturers could have proposed, and in fact were *required* to propose, stronger labels when necessary. See 564 U.S. at 616-617; App., *infra*, 31a (Roth, J., dissenting). If FDA agreed, the Court observed, it would have worked with the brand-name and generic manufacturers to create a new label. See 564 U.S. at 616. The Court's decision in *PLIVA* was driven by the fact that generic manufacturers could not change their labels without FDA's preapproval.

The court of appeals' flawed reasoning led it to extend *Wyeth*'s "clear evidence" test into a regulatory context in which unilateral changes are not permitted. The court required petitioner to come forward with "clear evidence that the [FAA] would not have approved a change." App., *infra*, 21a (quoting *Wyeth*, 555 U.S. at 571). But as Judge

Roth correctly observed, this Court expressly contemplated that very rule in *PLIVA*. *Id.* at 42a. There, the plaintiffs argued that, "when a private party's ability to comply with state law depends on approval and assistance from the FDA, proving pre-emption requires that party to demonstrate that the FDA would not have allowed compliance with state law." 564 U.S. at 620. This Court rejected that rule. See *ibid.* Yet the Third Circuit resurrected it in the opinion below.

The Third Circuit's rule is not only inconsistent with this Court's impossibility-preemption jurisprudence; it makes no sense. *Wyeth*'s "clear evidence" test was designed to accommodate manufacturers with the freedom to implement design changes, subject to potential after-the-fact rescission by the agency. In such circumstances, the only way to ensure that it is "impossible" for a manufacturer to comply with both state and federal law is to limit preemption to those situations in which an agency is likely to invoke its revocation powers. By contrast, when a manufacturer *lacks* the ability unilaterally to implement a design change, there is no justification for limiting the preemption defense to those instances in which an agency is likely to deny the request.

Finally, contrary to the court of appeals' assertion, state-law claims such as respondent's do not "complement" or "supplement" the federal scheme. App., *infra*, 23a. They undermine it. That is true even though the Act and state standards share the ultimate goal of aircraft safety. A shared regulatory goal does not eliminate the conflict between federal and state law, as "a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379. The FAA prioritizes safety by requiring manufacturers to obtain permission from the experts of the FAA before modifying an FAA-approved design. See 14 C.F.R.

21.93(a), 21.97. Where, as here, state law requires an immediate design modification, federal and state law can and do conflict.

The Third Circuit's cramped view of impossibility preemption is inconsistent with this Court's decisions. The Court should grant review and correct the Third Circuit's profoundly flawed approach.

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

Even if the doctrine of impossibility preemption does not foreclose respondent's claims altogether, those claims should be governed by federal standards of care because federal law occupies the entire field of aviation safety. The court of appeals' earlier opinion, limiting the scope of field preemption under the Federal Aviation Act, impermissibly subjects aviation manufacturers to myriad, conflicting state laws.

1. a. By its very nature, air travel transcends state boundaries. Even before the enactment of the Federal Aviation Act, this Court recognized the special character of air travel and the resulting need for uniform national regulation. As Justice Jackson eloquently explained, "[a]ir as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water," and "[l]ocal exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (concurring opinion). "A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948).

Congress, too, has long recognized that aviation demands federal regulation. In light of the national (and, indeed, international) nature of air travel, Congress expressed the view in enacting the Federal Aviation Act that the aviation industry is "unique among transportation industries in its relation to the Federal Government," in that "[its] operations are conducted almost wholly within the Federal jurisdiction." S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958).

b. Under the doctrine of field preemption, federal law preempts state law if Congress "indicate[s] an intent to occupy a given field to the exclusion of state law." *Schneidewind*, 485 U.S. at 299-300. Congress's preemptive intent "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States [or] where the federal interest in the field is sufficiently dominant." *Id.* at 300. And because "state regulation can be * * * effectively exerted through an award of damages," it is well established that federal law may preempt "state common-law duties and standards of care." *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012) (alteration in original) (internal quotation marks and citation omitted).

In the Federal Aviation Act, Congress pervasively regulated the entire field of aviation safety, necessarily precluding supplementation by state-law standards of care. Congress directed the FAA to regulate every significant aspect of aviation safety, including aircraft design, pilot qualifications, and in-air operations. See Act §§ 601(a), 602, 604, 72 Stat. 775-778. Of particular relevance here, Congress directed the FAA to promulgate aircraft design and construction standards "required in the interest of safety," 49 U.S.C. 44701(a)(1), and created a comprehensive certification regime to enforce those standards, see 49 U.S.C. 44704.

There can be no doubt that Congress intended to create a "uniform and exclusive system of federal regulation" for aviation safety, including aircraft design. *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973). Embracing the Eisenhower Administration's recommendation that "one agency of government, and one agency alone, be responsible for issuing safety regulations," H.R. Rep. No. 2360, *supra*, at 22, Congress gave the FAA "full responsibility and authority for * * * the promulgation and enforcement of safety regulations." S. Rep. No. 1811, *supra*, at 1. In consolidating authority in the FAA, moreover, Congress specifically recognized the "indivisible" nature of aviation safety regulation. See *id.* at 11.

The Act thus created a "cradle to grave" system of regulatory oversight that has produced "an industry whose products are regulated to a degree not comparable to any other." H.R. Rep. No. 525, 103d Cong., 2d Sess., pt. 2, at 5-6 (1994). Even the heavily regulated pharmaceutical industry is "not subject to anywhere near the degree of Federal supervision over the lifespan of the product." *Id.* at 6 n.10.

The regulatory scheme established by the Federal Aviation Act is at least as pervasive as others that this Court has held to preempt an entire field of vehicle design. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court held that the Ports and Waterways Safety Act, which directed the Coast Guard to establish "minimum standards of design, construction, alteration, repair, maintenance, and operation" of oil tankers and to enforce those standards through mandatory inspections, indicated Congress's intent to create "uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." *Id.* at 161, 163 (citation omitted); see

United States v. *Locke*, 529 U.S. 89, 111 (2000). And in *Kurns*, *supra*, the Court held that the Locomotive Inspection Act preempted a plaintiff's design-defect and failure-to-warn claims related to locomotive design. See 565 U.S. at 633-637.

c. Notably, this Court has already recognized the pervasive nature of federal regulation under the Act. In *City of Burbank*, *supra*, the Court considered whether the Act, as amended by the Noise Control Act of 1972, occupied the field of aviation noise regulation. The Court held that it did. See 411 U.S. at 633. The Court observed that "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground." *Id.* at 638-639 (citation omitted). The Court concluded that "[t]he interdependence of these factors requires a *uniform and exclusive system of federal regulation* if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *Id.* at 639 (emphasis added). That rationale applies with full force here.

Decisions from the courts of appeals similarly acknowledge the broad preemptive scope of federal regulation in the aviation industry, and the Third Circuit's opinion cannot be reconciled with those decisions. In *US Airways, Inc.* v. *O'Donnell*, 627 F.3d 1318 (2010), the Tenth Circuit held that the Act occupied the entire field of aviation safety, overruling its earlier holding that aviation design-defect claims are not preempted. *US Airways* concerned New Mexico's attempt to enforce its state liquor-control law against an airline when a passenger who became intoxicated on a flight later caused a car accident. The airline argued that the Act "occup[ied] the field of aviation safety to the exclusion of state regulation" and thus preempted the New Mexico law. *Id.* at 1321.

The Tenth Circuit agreed with the airline. As a preliminary matter, the court explained that the presumption against preemption did not apply because "the field of aviation safety has long been dominated by federal interests." 627 F.3d at 1325 (internal quotation marks omitted). On the merits of the preemption question, the court observed that the Act "was enacted to create a 'uniform and exclusive system of federal regulation' in the field of air safety." *Id.* at 1326 (quoting *City of Burbank*, 411 U.S. at 639). In holding that the Act preempts the entire field of aviation safety, the Tenth Circuit relied on the Act's text and history, *ibid.*, and approvingly cited the Third Circuit's earlier decision in *Abdullah*, which had also so held. See *id.* at 1327.

The Second Circuit reached the same conclusion in *Goodspeed Airport LLC* v. *East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2011). That case involved a dispute over the application of state environmental laws to the removal of trees next to an airport. See *id.* at 208-209. In considering whether the state laws were preempted, the Second Circuit remarked that it had previously stated in dicta that "Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field." *Id.* at 210 (citing *Air Transport Ass'n of America, Inc.* v. *Cuomo*, 520 F.3d 218, 225 (2008) (per curiam)). The court adopted its previous dicta as the holding of the case, expressly joining the Tenth Circuit (and then the Third Circuit) in holding that the Act preempts the entire field. See *id.* at 210 & n.5 (citing, *inter alia*, *US Airways*, 627 F.3d at 1326, and *Abdullah*, 181 F.3d at 367-368). The court ultimately determined that the state laws at issue, which were "environmental laws that do not refer to aviation or airports," did not implicate the preempted field. *Id.* at 210-211.

2. In its earlier opinion in this case, the Third Circuit erred by holding that the Act does not preempt the entire field of aviation safety.

a. As an initial matter, the Third Circuit erred by applying the presumption against preemption, in conflict with the Tenth Circuit's approach in *US Airways*, *supra*. The presumption is not triggered when "the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108. As in *Locke*, Congress has regulated aircraft design since the beginning of the civil aviation industry. See pp. 4-8, *supra*. And when Congress enacted the Act in 1958, it specifically recognized that the aviation industry's "operations * * * are subject to little or no regulation by States or local authorities." S. Rep. No. 1811, *supra*, at 5. There is a long history of federal presence—and indeed dominance—in the regulation of aviation safety.

Regardless whether the presumption against preemption applies, moreover, none of the statutory provisions cited by the Third Circuit undermines the conclusion that Congress intended for the FAA to exercise exclusive authority to prescribe standards for aircraft design. The court highlighted the fact that Congress directed the FAA to promulgate "minimum standards." App., *infra*, 182a (quoting 49 U.S.C. 44701). In *Ray*, however, this Court rejected the proposition that Congress's use of the phrase "minimum standards" necessarily indicated an intent to recognize "state authority to impose higher standards." 435 U.S. at 168 n.19. Instead, where "it is sufficiently clear that Congress directed the promulgation of standards on the national level, as well as national enforcement," field preemption is appropriate even though the standards are "minimum standards." *Ibid.* Here, as in the statute at issue in *Ray*, Congress instructed a federal agency to promulgate and enforce national standards.

b. The Third Circuit also placed substantial weight on the Act's savings clause, which provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. 40120(c). The Third Circuit construed that provision to save not just state-law remedies (*i.e.*, tort claims), but also state-law standards of care. App., *infra*, 182a-183a.

In so doing, however, the Third Circuit disregarded this Court's guidance that courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106-107. Given Congress's evident recognition that air travel demands uniform, federal standards, the Act's savings clause cannot reasonably be read to permit States to impose their own standards in state-law tort actions. Instead, as the Seventh Circuit has explained, "[s]tatutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules." *Bieneman* v. *City of Chicago*, 864 F.2d 463, 471 (1988), cert. denied, 490 U.S. 1080 (1989); see FAA C.A. Br. 9-10 (adopting the foregoing interpretation of the Act's savings clause).

Moreover, nothing in the savings clause (or any other provision of the Act) supports the Third Circuit's arbitrary distinction between "in-air operations" and other aspects of aviation safety that *affect* the operation of an aircraft in flight, such as aircraft design. The court of appeals provided no reason that Congress would have intended to preempt the application of state standards of care only in the field of "in-air operations," but not in the rest of the field of aircraft safety.

c. The Third Circuit offered no valid justification for its rejection of the views expressed by the FAA.

The Third Circuit asserted that the FAA's airworthiness standards "do not purport to govern the manufacture

and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA." App., *infra*, 186a. That is simply wrong. The Act provides that the FAA "shall" issue "minimum standards required in the interest of safety * * * for the *design*, material, *construction*, quality of work, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. 44701(a)(1) (emphases added). Implementing that directive in the specific context presented here, the FAA has issued regulations that "prescribe[] the general *design and construction requirements* for reciprocating and turbine aircraft engines." 14 C.F.R. 33.11 (emphasis added). The fact that engine manufacturers must demonstrate compliance with the FAA's airworthiness standards to obtain manufacturing approval hardly transforms those substantive standards into mere procedural requirements.

The Third Circuit also dismissed the FAA's airworthiness standards (which span hundreds of pages in the Code of Federal Regulations) as insufficiently "comprehensive." App., *infra*, 187a (citation omitted). That assertion is flatly inconsistent with this Court's own statement that "the FAA has promulgated a *comprehensive* set of regulations delineating the minimum safety standards with which the designers and manufacturers of aircraft must comply before marketing their products." *Varig Airlines*, 467 U.S. at 805 (emphasis added).

Finally on this score, the Third Circuit observed that the FAA's airworthiness standards do not contain a catch-all standard of care "sound[ing] in common law tort." App., *infra*, 188a (citing 14 C.F.R. 91.13(a)). When Congress evinces an intent to occupy a field, however, the mere fact that federal law does not provide the same remedy as state law does not defeat preemption. See, *e.g.*,

Kurns, 565 U.S. at 637. The Third Circuit's rationales for rejecting the FAA's views were unconvincing, and this Court should grant review to consider the availability of field as well as conflict preemption.

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

1. The question whether the Federal Aviation Act preempts state-law design-defect claims is a self-evidently important one. This Court has routinely granted review in cases presenting the question whether federal law preempts States from regulating the design of vehicles engaged in interstate commerce. See, *e.g.*, *Kurns*, 565 U.S. at 633-637 (holding that the Locomotive Inspection Act preempts the field of locomotive equipment design); *Locke*, 529 U.S. at 111 (holding that Title II of the Ports and Waterways Safety Act preempts the field of tanker design and construction). This case presents an even more compelling case for certiorari. As discussed above, the aviation industry is "unique among transportation industries in its relation to the Federal Government." S. Rep. No. 1811, *supra*, at 5. Not only is civil aviation a uniquely national mode of transportation, but the federal government's supervision of civil aviation exceeds that of virtually any other industry. See H.R. Rep. No. 525, *supra*, pt. 2, at 6.

For that reason, it is unsurprising that the FAA itself has recognized that the question presented is of "paramount federal concern." U.S. Br. at 1-2, *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir. 1993). According to the FAA, aviation "cannot remain safe and continue to grow if every plane that rises into the airways is subjected to a multitude of different—and potentially conflicting—state standards of care." *Id.* at 1-2.

Congress entrusted safety regulation to the FAA—and the FAA requires that it preapprove design changes—for a reason. Aircraft design is incredibly technical and involves delicate tradeoffs between a variety of considerations. See, *e.g.*, Geoffrey M. Hand, Comment, *Should Juries Decide Aircraft Design?* Cleveland v. Piper Aircraft Corp. *and Federal Preemption of State Tort Law*, 29 U.S.F. L. Rev. 741, 785-786 (1995). When it enacted the Act, Congress recognized that "laymen" are not qualified to make decisions about those tradeoffs. See S. Rep. No. 1811, *supra*, at 10. It therefore assigned the authority to make such decisions to the "experts" at the FAA. See *id.* at 11. State regulation of aircraft design—whether through positive regulation by 50 state legislatures or administrative agencies or through tort verdicts by lay juries—divests the FAA of its exclusive authority to make these decisions. Permitting juries to impose a duty to make immediate design changes, without FAA input or approval, undermines rather than promotes aviation safety.

2. If allowed to stand, moreover, the Third Circuit's approach to impossibility preemption will resonate far beyond the aviation industry. The court's reasoning would extend *Wyeth*'s "clear evidence" test to any industry in which a regulated entity *might* be able to take certain action after obtaining an agency's advance permission. As this Court has recognized, such "conjectures" are insufficient to defeat preemption. See *PLIVA*, 564 U.S. at 621. Absent further review by this Court, the Third Circuit's approach will invite speculation about what agencies would or would not have done across a number of industries.

3. This case is an ideal vehicle to address the question presented. Whether the Act preempts state-law design-defect claims is a pure question of law, and resolution of

that question is case-dispositive. The question was pressed and passed upon at length by both the district court and the court of appeals in four exhaustive opinions (and one dissent). And the FAA has already expressed its views regarding the scope of preemption in this uniquely federal industry.

* * * * *

Not for the first time, the Third Circuit has betrayed its hostility toward federal preemption. The patchwork regulatory framework that results from the Third Circuit's opinions in this case is the very opposite of the "uniform and exclusive" scheme envisioned by Congress. *City of Burbank*, 411 U.S. at 639. This Court should grant review, correct the Third Circuit's profoundly misguided approach to field and conflict preemption, and reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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