

No. 18-1140

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IN THE  
**Supreme Court of the United States**

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AVCO CORPORATION,

*Petitioner,*

v.

JILL SIKKELEE,

*Respondent.*

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

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**BRIEF OF THE PRODUCT LIABILITY  
ADVISORY COUNCIL, INC. AND NATIONAL  
ASSOCIATION OF MANUFACTURERS AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## IDENTITY AND INTEREST OF AMICI

*Amicus Curiae* Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association whose corporate members represent a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC’s perspective derives from the experiences of a corporate membership that spans a diverse range of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of manufacturers seeking to improve the application and development of the law as it affects product liability. PLAC’s complete membership list is available at <https://plac.com/PLAC/AboutPLACAmicus>.<sup>1</sup>

*Amicus Curiae* the National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part and no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.



Manufacturing employs more than twelve million men and women, contributes \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Aviation has become an instrumental and efficient method for the transportation of people and goods throughout this country and beyond. No state should dictate the design of every aircraft that flies over its territory; the Federal Government has sole responsibility for that task. *Amici* and the public share a vital interest in fostering consistent safety standards for aviation, in accordance with the Federal Government's comprehensive regulation of design and performance of this critical mode of transportation.

*Amici's* members include not only manufacturers of aircraft and related products, but also consumers of America's air transportation. We support the public interest in sustaining and improving a vibrant, efficient, safe, and reliable transportation system that benefits us all. Consequently, *Amici* are concerned about actions that result in unpredictable regulation by each state, county, city, or jury. Our members, as well as the public, benefit from the safety, predictability and reliability of the unified system of regulation that Congress has created for aviation.

*Amici* also share a strong interest in federal preemption. Corporate members of our organizations design, manufacture, or distribute products regulated by a variety of federal agencies. Many must also confront laws in some states that are inconsistent with federal law. No one benefits from uncertainty about which legal requirements apply. If allowed to stand, the Third Circuit's decision on conflict preemption could result in years of legal uncertainty, not only in aviation, but in manufacturing a wide range of other products. AVCO Corporation's petition for certiorari in this case should be granted so that the Federal Aviation Act, like other preemptive federal statutes and comprehensive regulations, such as the Federal Food, Drug, and Cosmetic Act, will be interpreted and applied in a consistent and coherent manner.

### **SUMMARY OF ARGUMENT**

Because federal law requires prior approval by the Federal Aviation Administration of any aircraft or aircraft component design, a state law that requires a change in design conflicts with federal law and is preempted because simultaneous compliance with state and federal law is impossible. If allowed to stand, the Third Circuit's misinterpretation of conflict preemption will have ominous consequences for manufacturers far beyond the aviation community.

Moreover, the Federal Government has assumed responsibility for safety regulation of aviation almost as long as airplanes have flown. Its pervasive and

unified system of regulation encompasses the design, manufacture, alteration, maintenance, and operation of aircraft and preempts the field of aircraft safety standards.

The Third Circuit’s misguided decisions are on issues of great importance to manufacturers. Its rejection of conflict preemption, *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018) (“*Sikkelee II*”), flatly contradicts this Court’s recent and definitive holdings on impossibility conflicts. In so doing, the decision threatens to undo this Court’s clear criteria articulated in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) (“*Mensing*”), and *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472 (2013) (“*Bartlett*”), thereby threatening a broad range of Congress’s important policy choices—including, but also beyond, aviation.

In addition, the Third Circuit’s earlier rejection of field preemption, *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) (“*Sikkelee I*”), demonstrated an erroneous application of established law and misinterpreted historical facts surrounding the Federal Government’s pervasive and long-standing regulation of aviation safety.

## ARGUMENT

### I. SIMULTANEOUS COMPLIANCE WITH STATE AND FEDERAL LAW IS IMPOSSIBLE, AND THE FEDERAL AVIATION ACT AND SAFETY REGULATIONS PREEMPT STATE LAW.

#### A. State and Federal Law Are in Conflict.

Plaintiff alleges here that Pennsylvania law required the Lycoming Engines Division of AVCO to modify the FAA-approved design of the carburetor attached to its engine to use safety wire to secure the bolts that attach the float bowl and throttle body. *Sikkelee II*, 907 F.3d at 710. As the Third Circuit acknowledged, the Federal Aviation Regulations prohibited the engine manufacturer from independently changing the design of the carburetor without prior FAA approval.

It is impossible for a manufacturer to comply both with state law and the Federal Aviation Act. The history of federal aviation regulation demonstrates why federal regulation preempts state law under principles of field preemption as well as conflict preemption. The Third Circuit blithely concluded that “State-law claims, such as Sikkelee’s, supplement the federal scheme and further its central purpose: safe aircrafts.” *Sikkelee II*, 907 F.3d at 714-715. Locally-imposed aviation safety standards, however well-intentioned, are incompatible with, and undermine the FAA’s mission of establishing unified regulation to enhance air safety.

Juries look at a single accident in hindsight, years after the event. They need not balance the safety benefits of a proposed change in design (such as using safety wire on a carburetor) with the existing design, except insofar as it would have affected the single accident. By contrast, the FAA can look at the overall safety history of the aircraft as well as its components. It has access to safety data, product experience, and unbiased expertise, which enable it to weigh all the criteria relating to safety and make a logical decision that is far more likely to improve overall safety than a decision based on the evidence in one lawsuit.

**B. The Third Circuit's Treatment of Conflict Preemption by Reason of Impossibility is Contrary to this Court's Recent Decisions.**

The Third Circuit's rejection of impossibility preemption is puzzling. The panel in *Sikkelee II* simply bypassed the definitive holding of this Court's two recent decisions on this form of preemption, *Mensing* (2011) and *Bartlett* (2013). Both of these decisions clarified—and should have resolved—the issue in the present case.

In *Mensing*, plaintiffs alleged that a generic drug carried inadequate warnings. 564 U.S. at 610. As here, the duties imposed by state product liability principles were immediate and “required the Manufacturers to use a different, stronger label than the label they actually used.” *Id.* at 617. Federal law, however, “prevented the Manufacturers from independently changing their generic drugs’ safety labels,” without first “ask[ing] for FDA assistance in

convincing the brand-name manufacturer to adopt a stronger label,” *id.*, because federal law required that branded and generic drug labeling be “the same” at all times.<sup>2</sup>

This conflict made it impossible for the defendant manufacturers in *Mensing* to comply simultaneously with both federal and state law, requiring preemption of state law. “The question for ‘impossibility’ is whether the private party could independently do under federal law what state law requires of it.” *Id.* at 620. In *Mensing* the FDA had to approve and coordinate label changes to ensure that branded and generic labeling remained at all times verbatim, as the statute required. *Mensing* thus recognized the preemptive significance of mandatory intervention by a federal agency. “[W]hen a party cannot satisfy its state duties without the Federal Government’s special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.” *Id.* at 623-24. Where “state law imposed a duty on the Manufacturers to take a certain action, and federal law barred them from taking that action . . . [state-law] tort claims are pre-empted.” *Id.* at 624.

In *Bartlett*, another product liability matter involving a generic drug, the Court reiterated and

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<sup>2</sup> *Id.* at 613 (“A manufacturer seeking generic drug approval, on the other hand, is responsible for ensuring that its warning label is the same as the brand name’s.”) (citing 21 U.S.C. §§355(j)(2)(A)(v); 355(j)(4)(G); 21 C.F.R. §§314.94(a)(8), 314.127(a)(7)).

reinforced its preemptive holding in *Mensing*. To circumvent *Mensing*, the plaintiff alleged a “design defect” claim. *Id.* at 479. However, the independence principle recognized in *Mensing* also applied to design-related claims because, as with warnings, federal statute requires that generic and branded drug designs be the “same.” *Id.* at 477. Any changes to drug design require prior FDA approval. After approval, “the manufacturer is prohibited from making any major changes to the ‘qualitative or quantitative formulation of the drug product, including active ingredients, or in the specifications provided in the approved application.’” *Id.* (quoting 21 C.F.R. §314.70(b)(2)(i)). Thus, under federal law, “redesign was not possible” because the statute “requires a generic drug to have the same active ingredients, route of administration, dosage form, strength, and labeling as the brand-name drug on which it is based.” *Id.* at 483-84 (citation omitted).

As in Pennsylvania, relevant state law in *Bartlett* “impose[d] design-defect liability only where the design of the product created a defective condition unreasonably dangerous to the user.” 570 U.S. at 482 (quoting *Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178, 1181 (N.H. 2001))<sup>3</sup> To avoid an “unreasonably dangerous” product “would require redesigning the [product]: A

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<sup>3</sup> Cf. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 380 (Pa. 2014) (“[T]he critical inquiry in affixing liability is whether a product is ‘defective’; in the context of a strict liability claim, whether a product is defective depends upon whether that product is ‘unreasonably dangerous.’” In Pennsylvania, “the notion of ‘defective condition unreasonably dangerous’ is the normative principle of the strict liability cause of action.” *Id.* at 400.

[product’s] usefulness and its risk of danger are both direct results of its . . . design.” *Id.* at 483. In *Mensing*, impossibility preemption therefore precluded any “design defect” claim based on “redesigning” the product. *Id.*<sup>4</sup> “When federal law forbids an action that state law requires, the state law is without effect.” *Id.* at 486 (citation and quotation marks omitted).

Like the defendants in *Mensing* and *Bartlett*, petitioner here could not unilaterally change the design of its product because FAA regulations precluded it from unilaterally changing its design. So, the answer in the present case should have been simple: It was impossible to comply with both state and federal law because, indisputably, the petitioner, as in *Mensing/Bartlett*, could not alter the type design of the engine without prior FAA review and approval. Yet the Third Circuit panel was “not persuaded” [by] *PLIVA* and *Bartlett*. *Sikkelee II*, 907 F.3d at 713. Purporting to rely on *Wyeth v. Levine*, 555 U.S. 555 (2009), *Sikkelee II* sought to distinguish this Court’s more recent decisions on the ground that agency preapproval—although undisputedly

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<sup>4</sup> A second prong of *Bartlett* similarly held that a “stop selling” claim, imposing liability for not removing a federally-approved product from the market altogether, was also preempted. *Id.* at 488-89. *Amici* do not understand plaintiffs here to be arguing that the defendant should have stopped selling their product. Indeed, Lycoming did not manufacture or install the carburetor on the aircraft at the time of the accident. *Sikkelee v. AVCO Corp.*, 268 F.Supp.3d 660, 663 (M.D. Pa. 2017).



required<sup>5</sup>—was, relatively speaking, easy. *See* 907 F.3d at 713 (defendant “has made numerous changes to the type certificate . . ., which the FAA approved in short order”).

That is not the test for impossibility. *Sikkelee II* perversely penalizes regulated entities when they have previously obtained agency approval to make other design changes. A regulated manufacturer is entitled to preemption both when its submissions for agency pre-approval obviously comply with relevant administrative requirements, and when those filings draw intense agency scrutiny. Nor does it matter that “[t]here is no evidence in the record showing that the FAA would not have approved a change.” *Sikkelee II*, 907 F.3d at 714. To the contrary, “[t]he question for ‘impossibility’ is whether the private party *could independently do* under federal law what state law requires of it.” *Mensing*, 564 U.S. at 620 (emphasis added). Here, the Third Circuit found that the petitioner could not act independently. *Sikkelee II* thus misapplied this Court’s impossibility preemption precedent in the first appellate decision fully considering that precedent in the context of the Federal Aviation Act.

Judge Roth’s dissent in *Sikkelee II* got it right. It pointed out that preemption “is readily apparent when we consider the question of impossibility in the precise language provided by the Supreme Court: Could Lycoming independently do under federal law

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<sup>5</sup> The panel conceded that “the Federal Aviation Act and FAA regulations require FAA approval of a type certificate and changes to it.” *Sikkelee II*, 907 F.3d at 713.

what state law required of it, *i.e.*, alter the design of the carburetor's fastening mechanism from lock-tab washers to safety wire? Under the applicable FAA regulations, the answer to that fundamental question is clearly no, regardless of whether such a change would have been minor or major." *Id.* 907 F.3d at 723.

This Court should grant review to ensure that its recent holdings in *Mensing* and *Bartlett*, which finally brought clarity to a complex subject, and which impact a wide variety of *amici*'s members, and not undone.

**II. AVIATION SAFETY REGULATION HAS Pervasively BEEN THE PROVINCE OF FEDERAL LAW AND SUBJECT TO LITTLE OR NO REGULATION BY STATE OR LOCAL AUTHORITIES.**

**A. The Third Circuit Erroneously Rejected Field Preemption.**

Even in the absence of an express preemption clause, a court should infer that Congress intended to occupy the field "where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.'" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Based upon this principle, the Third Circuit in *Abdullah*

*v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999), recognized “implied federal preemption of the entire field of aviation safety.” However, the Third Circuit reversed course in *Sikkelee*, holding that preemption in aviation was limited to “in-air” activities and “was at odds with the federal regulatory scheme governing aviation design and manufacturing.” *Sikkelee I*, 822 F.3d at 689-690, quoting from *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp.3d 431, at 460 (M.D. Pa. 2014). The history of aviation regulation, as set forth below, provides no basis for such a distinction.

**B. Transportation is at the Core of Federal Preemption.**

Conflicts over regulation of transportation have long been at the core of federal field preemption. The Constitution’s Framers recognized the dominant federal interest in regulating interstate commerce. Article I Section 8 of the Constitution delegates to Congress the power “[t]o regulate Commerce ... among the several States....” Alexander Hamilton discussed a major shortcoming of the absence of such a power in the Articles of Confederation, fearing that the nation would be undermined by “interfering and unneighborly regulations of some States” if “a national control” did not restrain them. The *Federalist* No. 22, p. 135 (A. Hamilton) (Heritage Press 1945). He cited the problems of the German empire, in which “the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless” because of the “multiplicity of duties” the various princes and states exacted upon merchandise.

Thus, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court rebuffed New York's attempt to reestablish the unilateral burdens on interstate transportation. Chief Justice Marshall's opinion declared that the commerce power was "plenary" (22 U.S. at 197); it was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 22 U.S. at 196. The Court declared that the power over commerce "is vested in Congress as absolutely as it would be in a single government." 22 U.S., at 220-221. The Court has since upheld preemption to restrain local regulation of many modes of transportation, historically via field preemption. See, e.g. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 165-167 (1978) (ship design standards); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (trucking); *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625 (2012) (railroads); and *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973) (aviation).

As explained below, the Federal Government has always assumed the responsibility for regulation of aviation, including regulation of design, manufacturing, alteration, and airworthiness, for nearly a century. In 1926, when Congress first decided to regulate aviation, it relied upon this Court's precedents precluding states from stepping in. The Court had recently held that one state could not require trains to have a platform in the rear despite the Interstate Commerce Commission allowing a caboose without a platform. See *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566 (1919); see

also *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

In the present era, the Court has held that the Federal Government's "evident congressional intention to establish a uniform federal regime controlling the design of oil tankers" under the Tank Vessel Act preempted the state of Washington from attempting to impose standards of its own. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 166 (1978).

To allow state-by-state regulation of aircraft design would be at least as disruptive as states' attempts to regulate equipment on trains or ships. If each state could regulate the design of aircraft, one can only imagine the disruption, delay, and added danger to require an airplane to land and replace equipment in the airplane in accordance each state's demands.<sup>6</sup> The Court long ago recognized the "weighty considerations why the controlling law should be uniform, and not change at every state line." *New York Cent. Ry. Co. v. Winfield*, 244 U.S. 147 (1917). State law intervention is preempted even if it purports to "help" achieve the Federal Government's objectives. As Justice Holmes wrote, "When Congress has taken the particular subject-matter in hand, . . . a state law is not to be declared a help because it attempts to go farther than Congress has

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<sup>6</sup> Such an extreme hypothetical may seem implausible, but our history (and Britain's) includes the railroads' "gage wars," when railroad companies used different gages of track, and some communities fought to preserve a unique gage, for their own economic advantage. See Sarah H. Gordon, *PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829-1929*, 114-115, 151 (1996).

seen fit to go.” *Charleston & W.C. Ry. Co. v. Varnville Furniture Co*, 237 U.S. 597, 604 (1915).

**III. THE FEDERAL AVIATION ACT PREEMPTS THE FIELD OF AVIATION SAFETY STANDARDS BECAUSE HISTORY DEMONSTRATES LONG-STANDING AND PERVASIVE FEDERAL REGULATION OF AVIATION.**

The Federal Government’s central role in aviation regulation began nearly a century ago. Petition, p. 4. Aviation was still novel, but Congress recognized the need for uniform laws and regulations. *Id.*, p. 5. The Federal Government’s 1926 regulations established airworthiness and safety standards that controlled every aspect of the design of aircraft, parts approved for installation, and alterations. *Id.*, pp. 6-8.

By the time Charles Lindbergh flew the Spirit of St. Louis across the Atlantic to Paris in 1927, the Federal Government had already undertaken comprehensive regulation. The scope of such federal regulation was unprecedented. This regulatory system evolved, first, in 1926 to regulate all interstate aviation; next, in 1938 to extend regulation to all aviation that might affect interstate aviation (which includes all domestic aviation) as well as the design of aircraft and their components. A preeminent expert in international aviation law wrote, “Aviation is probably the most extensively and strictly regulated human activity. The technical and operational complexity and the concern for safety and security in the operation of aircraft are

reflected in detailed legal regulation that is enforced by national and international mechanisms.”<sup>7</sup>

### A. The Air Commerce Act of 1926.

The Air Commerce Act of 1926, Act of May 20, 1926, ch 344, 44 Stat. 568 (“1926 Act”) was regarded as the “first comprehensive federal code for the regulation of air navigation” and covered examination and licensing of pilots and mechanics, registering and licensing of airplanes, issuance of airworthiness certificates for airplanes, inspection of aircraft, air traffic rules, and rating of airports.<sup>8</sup> The 1926 Act gave the United States “complete and exclusive national sovereignty in the air space’ over this country.” *United States v. Causby*, 328 U.S. 256, 260 (1946). See also, 72 Stat. 798, 49 U.S.C. §1508 (1970). Courts interpreted the 1926 Act as requiring uniformity of regulation to the extent that intrastate travel would interfere with the flow of interstate commerce and, to that extent, as disallowing conflicting state rules.<sup>9</sup>

Section 3 of the 1926 Act directed the Secretary of Commerce to promulgate regulations, *inter alia*, to

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<sup>7</sup> 44 Stat. 568 (1926); Michael Milde, INTERNATIONAL AIR AND ICAO (2d ed. 2012) p. xii (“Milde”).

<sup>8</sup> Eugene A. Weibel, *Problems of Federalism in the Air Age-Part I*, 24 J. Air L. & Comm. 127, 140 (1957) (“Weibel”).

<sup>9</sup> *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F.2d 761, 763 (N.D. Ohio 1929); *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 940 (N.D. Ohio 1930), *modified*, 55 F.2d 201 (6th Cir. 1932), cited in Geoffrey M. Hand, *Should Juries Decide Aircraft Design? Cleveland v. Piper Aircraft Corp. and Federal Preemption of State Tort Law*, 29 U.S.F. L. Rev. 741, 749 (1995).

“[p]rovide for the rating of aircraft of the United States as to their airworthiness,” and review the “full particulars of the design and of the calculations upon which the design is based and of the materials and methods used in the construction.” 44 Stat. at 569-570. The first airworthiness regulations, enacted within a year of the passage of the 1926 Act, established standards for the critical aircraft systems.<sup>10</sup> The 1926 Act and regulations improved aviation safety.<sup>11</sup> The regulations were incrementally amended, then recodified in 1937 and renamed the Civil Air Regulations. *Ballard* at 1240.

### **B. The Civil Aeronautics Act of 1938.**

By the mid-1930s, safety lapses led to well-publicized accidents, culminating in a Congressman’s death in a 1935 crash. *Id.*, at 1240-1241. The result was enactment of the Civil Aeronautics Act of 1938, 52 Stat. 973 (“1938 Act”). It was generally agreed that federal regulation should extend to the utmost limits of the Constitution; “that it should cover both commercial and private flying; and that it should include both economic and safety regulation.” *Id.* at 1252. The 1938 Act also empowered the Civil Aeronautics Authority to oversee all aspects of air commerce, including “any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.” (emphasis added).

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<sup>10</sup> William P. MacCracken, Jr., *Air Regulations*, 131 *Annals Am. Acad. Pol. & Soc. Sci.* at 118-119 (1927).

<sup>11</sup> Frederick A. Ballard, *Federal Regulation of Aviation*, 60 *Harvard L. Rev.* 1235, 1240 (1947) (“Ballard”).



This broader definition of “air commerce” embraced “all areas in which this fast-moving activity could operate.” *Weibel*, 24 J. Air L. & Comm. at 142. The 1938 Act thereby subsumed whatever powers the states might have had to regulate intrastate aviation. The keystone of the 1938 Act was, “Full control over the production and use of aircraft from drawing board and flight performance to overhaul and obsolescence, the margin of reserves from aircraft parts to flight fuel minima, the maximum pilot hours, minimum safe altitudes of flight, and air traffic rules. . . .”*Id.* This broad language empowered the Federal Government to regulate safety issues arising from *intrastate* air activities as well as interstate operations.<sup>12</sup> Contemporary commentators immediately recognized that the 1938 Act left no room for state regulation of aviation safety.<sup>13</sup> The Act “so practically covers the field that there is very little left for the states to do in aviation except, perhaps, establish and maintain airports, and cooperate with the Federal Government.”<sup>14</sup> The “chief function” of the Act was “the control of safety,” including “[f]ull control over the production and use of aircraft from drawing board and flight performance to overhaul

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<sup>12</sup> See e.g. *Rosenhan v. United States*, 131 F.2d 932, 935 (10th Cir. 1942); accord, *United States v. Drumm*, 55 F. Supp. 151 (D. Nev. 1944).

<sup>13</sup> See, e.g., Willebrandt, 11 J. Air L & Comm. at 204-205; Charles S. Rhyne, *Federal, State and Local Jurisdiction over Civil Aviation*, 11 Law & Contemp. Probs. 459, 464 (1946); Ballard, 60 Harvard L. Rev. at 1278; *Weibel*, 24 J. Air L.& Comm. at 142.

<sup>14</sup> Willebrandt, at 205.

and obsolescence.”<sup>15</sup> The Federal Government had already occupied the field of regulating air safety long before the Federal Aviation Act of 1958.

**C. ICAO and The Federal Aviation Act of 1958.**

In 1944, the Federal Government led the effort to extend its aviation safety rules internationally and thereby unify aviation law worldwide with the formation of the International Civil Aviation Organization (“ICAO”).<sup>16</sup> While not directly addressing the specific regulations at issue here, this country’s leadership in establishing international norms for aviation standards through ICAO confirms the fact that federal regulation was intended to be the uniform source of regulation of aviation safety standards and that they should not vary from state to state.

The Third Circuit trivialized the preemptive effect of the Federal Aviation Act of 1958, stating that the applicable statutory provision governing product design was simply “adopted verbatim from the 1938 Civil Aeronautics Act . . . which clearly did not preempt state law products liability claims.” *Sikkelee I*, 822 F.3d at 693. Virtually none of the cases it cited addressed preemption. But the 1958 Act’s continuation and improvement of long-standing

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<sup>15</sup> Weibel, at 142.

<sup>16</sup> 61 Stat. 1180 (1944); see also, Milde, *supra*, which discusses the significance of the Convention on International Civil Aviation in Chicago.

federal regulations<sup>17</sup> demonstrates that “the federal interest has been manifest,” is now “well established,” and there has been a “history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 99, 108 (2000).

The Federal Aviation Act of 1958 (the “Act”) and regulations adopted to implement the Act, retained and further expanded federal regulatory control over aircraft design at a critical time when aviation technology was rapidly changing. The Act furthered the objective of a unified aviation system by combining tasks previously split among numerous agencies into one.

The calamity that most directly prompted the Federal Aviation Act of 1958 was a mid-air collision between two airliners over the Grand Canyon on June 30, 1956, that killed all 128 passengers. It was then the worst aviation disaster in history. And it was readily avoidable. Both aircraft had departed the same airport within a few minutes of each other, with the slower plane in the lead. Tragically, the trailing plane caught up, despite both aircraft known to be at the same altitude and on the same course. Due to the lack of a uniform system of air traffic control, no traffic advisories were given to either aircraft.<sup>18</sup> The disaster graphically illustrated the need for complete and uniform overhaul of the nation’s air traffic control system, but it also

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<sup>17</sup> Compare CAR Parts 04-18 with 14 C.F.R. Parts 21-43. CARs are available at <https://dotlibrary.specialcollection.net>.

<sup>18</sup> See David Geto, *AVIATION DISASTERS: THE WORLD’S MAJOR AIRLINER CRASHES SINCE 1950*, 22-24 (2d ed. 1996).

highlighted other shortcomings in the post-1938-Act regime that were already under investigation by Congress and the President.

Nor was this disaster an isolated event. Preceding the Grand Canyon disaster, there had been *65 other* midair collisions in the United States between 1950 and 1955.<sup>19</sup> Although the accident led to a proposal for a new Federal Aviation Agency, the legislation bogged down for two years until still more mid-air collisions between military jets and commercial aircraft in California, Nevada, and Maryland in 1958 triggered emergency hearings in Congress and adoption of the Act. U.S. Senate, 85<sup>th</sup> Congress 2d Session, Report No. 1811, July 9 (legislative day July 7, 1958), pp. 7-8 (“Senate Report 1811”).<sup>20</sup>

Technological and economic developments, as well as the mid-air crashes, highlighted the need to overhaul the law. The most important feature of the 1958 Act was to ensure that safety regulation of aviation would be indivisible by consolidating regulatory power in a single federal entity, the Federal Aviation Agency and modern-day FAA.

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<sup>19</sup> Theresa L. Kraus, *THE FEDERAL AVIATION ADMINISTRATION: A HISTORICAL PERSPECTIVE*, 1903-2008, 7 (2008).

<sup>20</sup> See also, John Nance, *BLIND TRUST*, 99-103 (1986). Senate Report 1811 can be found at [https://1.next.westlaw.com/Link/Document/Blob/I388941606a2f11de8625010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=e1a40209-c11f-4037-bba8-660b20ec8483&contextData=\(sc.Search\)](https://1.next.westlaw.com/Link/Document/Blob/I388941606a2f11de8625010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=e1a40209-c11f-4037-bba8-660b20ec8483&contextData=(sc.Search)).

**D. Congress Created a Unified Federal System of Air Safety Standards.**

Aviation had advanced rapidly prior to 1958. In recommending adoption of the Federal Aviation Act, the Senate Committee on Interstate and Foreign Commerce reported these statistics: In barely twenty years, aircraft registration figures had more than tripled, from 29,000 to 90,000. Senate Report 1811. p. 4. Takeoffs and landings had ballooned from five million to 65 million per year, and scheduled carriers, whose planes represented only two percent of all operating aircraft, were flying over 32 billion passenger miles per year, an increase of 450 percent since the close of World War II. *Id.* Private aircraft were being added at a rate of 500 per month. *Id.* Airlines had replaced the railroads as the principal means of long-haul passenger transportation. *Id.*

In addition to the rapid increase of the sheer volume of flights, the speed and technological complexity of advanced aircraft increased, too. These advances occurred in both military and civilian aviation. The Senate Committee report noted that the military's "well-recognized reliance on jet-propelled military airpower" had transformed aviation into "the most dynamic of American industries." *Id.* p. 5. The advent of commercial jet airliners was recognized as "imminent," and a "frontier . . . in as much need of law and order as ever." *Id.* The Committee considered aviation to be "unique" among transportation industries because "it is the only one whose operations are conducted wholly within the federal jurisdiction, and are subject to little or no regulation by States or local authorities." *Id.* Consequently, the report concluded, "the Federal

Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.” *Id.* The Federal Government’s pervasive control of aviation regulation was thus already recognized before the 1958 Act was enacted.

The Committee recognized the need to unify safety regulation. “In no area of its activities is the [Civil Aeronautics] Board more completely dependent upon its staff of experts than in the field of safety rulemaking.” *Id.* Because of “the belief that aviation safety is essentially indivisible,” all safety regulation was placed in the hands of a single agency, the new FAA. 72 Stat. at 775, 798, §§ 601, 1108. The Act empowered the FAA, and the FAA alone, to promulgate and enforce air safety regulations—a task that had previously divided among multiple agencies. 72 Stat. at 775, 798, §§ 601, 1108. These changes finally resulted in a system in which “*aviation safety is essentially indivisible.*” Senate Report 1811, at 11 (emphasis supplied); *see also* H.R. Rep. 85-2360, 1958 U.S.C.C.A.N. 3741, p. 7.

Thus, over the course of several decades, Congress ensured unified federal regulation of aviation safety, first by promulgating nation-wide comprehensive safety regulation in 1926, then in 1938 regulating intrastate as well as interstate aviation, in 1944 leading the effort to unify international standards via ICAO, and then consolidating all federal safety regulation in one agency in 1958. See *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969). The rationales for preemptive safety regulation echoed the same concerns that the Court recognized in holding that the Tank Vessel Act preempted the

state of Washington from attempting to impose standards for tankers. *Ray, supra*, 435 U.S. at 165-167.

This issue is critically important, not only to *amici*'s members, but also to the public. In the past century, the federal regulatory system has vastly improved the safety of air commerce, even as rapid changes in technology have made aviation more complex. Ensuring that safety regulation remains unified, as Congress intended, or Balkanized, makes a real difference in everyone's future safety.

Congress gave the FAA responsibility for setting the minimum safety standards for all aspects of aviation. 72 Stat. 775, § 601, 49 U.S.C. §1431 (1970). The interdependence of its responsibilities "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973). The Third Circuit rightly concluded in *Abdullah* that federal regulations preempt the field of aviation safety standards. It should not have retreated from that conclusion in *Sikkelee*.

#### IV. CONCLUSION

The long-standing and pervasive federal requirement of advance approval of every design, manufacturing process, aircraft component, and alteration, makes it impossible for a manufacturer to alter the design of an approved product legally without the FAA's prior approval. The Third Circuit's trivialization of this requirement, *see* 907 F.3d at 713, is not only inconsistent with *Mensing*

and *Bartlett*, but also risks causing wider chaos in other federally-regulated industries.

State-imposed aviation safety standards are inconsistent with federal law. Opponents of preemption may argue that state law that sets a *higher* safety standard than FAA regulations is acceptable because the FAA is duty-bound to improve aviation safety. But such an assertion overlooks the fact that Congress also gave the FAA and its predecessor federal agencies total control of aviation safety regulation. It did so because of the recognition that the safest system of regulation is a one that applies consistently, wherever the aircraft is designed, manufactured maintained, and flies. It is impossible to reconcile the powers of the FAA and ad hoc safety standards by the states.

Federal law preempts the field of aviation safety because Congress has long recognized that aviation safety standards cannot vary from state to state. Its actions since 1926 have broadened the scope of federal regulation, but the steps taken have been to unify the federal regulatory system, which is the only system of comprehensive aviation safety rules that we have.



*Amici* respectfully ask that the Court grant certiorari in the above-captioned case.

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APRIL 2019