

No. 18-1140

In the Supreme Court of the United States

AVCO CORP., PETITIONER,

v.

JILL SIKKELEE.

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

**BRIEF OF *AMICUS CURIAE*
AIRBUS AMERICAS, INC.
IN SUPPORT OF PETITIONER**

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RULE 29.6 STATEMENT

Airbus Americas, Inc. is a subsidiary of Airbus SE. It has no other parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*¹

Airbus Americas, Inc. is the North American subsidiary of Airbus SE (“Airbus”), a European multinational aerospace corporation that is one of the largest aircraft manufacturers in the world. In 2018, Airbus delivered more than 800 commercial aircraft. Its products are used by millions of travelers. Airbus’s new aircraft sold for commercial use are primarily manufactured and assembled in the European Union. Airbus’s aircraft are certified as airworthy under the standards of both the Federal Aviation Administration (FAA) and the European Aviation Safety Agency (EASA). Airbus works extensively with both agencies to achieve type certification and to address issues that arise in the current fleet, especially issues that could affect airworthiness.

Uniform airworthiness standards are essential to Airbus’s ability to design and manufacture aircraft for operation across the globe. By opening the door to state regulation of aircraft design, the opinions below not only contravene longstanding federal regulation and policy, but also conflict with the international arrangements that promote worldwide uniformity in aircraft design. This Court’s review is necessary

¹ No counsel for a party authored this brief in whole or in part. Allianz Global Corporate & Specialty SE (“Allianz”), which is *amicus curiae*’s insurer, funded the preparation and submission of this brief. Apart from Allianz, no one other than *amicus curiae*, its members, or *amicus curiae*’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs in this case, and copies of the letters of consent are on file with the Clerk’s Office. Counsel of record for the parties received timely notice of *amicus curiae*’s intention to file this brief.

to safeguard the stable and efficient operation of the international aviation industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

Modern aviation is inherently transnational. As the only rapid, worldwide transportation network, aviation is essential for international travel. Every year, more than a billion passengers, including 52% of international tourists, travel internationally by air. *See Aviation Benefits Beyond Borders*, Air Transport Action Group 4 (Apr. 2014), <https://bit.ly/2ETxxVO>.

The commercial aircraft that ferry tens of thousands of passengers around the globe every day are themselves a product of—and depend heavily on—international cooperation. Before any aircraft may be operated anywhere in the world, it must, among other things, be accompanied by a type certificate—which approves the aircraft’s design as safe and air-worthy—that is recognized by local authorities.

To facilitate this certification process, national governments have entered into a complex web of treaties and agreements that are designed to promote uniformity and standardization in the area of aircraft design, and to permit—where appropriate—the reciprocal recognition of other countries’ regulatory approvals of aircraft design. Naturally, the concept of global uniformity in aircraft design standards also presumes consistency at the national level.

The United States’ practice in the area of aviation regulation has long been designed to promote these international principles. On the domestic front, the FAA has exercised virtually exclusive regulatory authority over the industry. And the federal

government has entered into a multitude of international agreements with its regulatory counterparts in other countries to promote aviation safety worldwide. In this area where uniformity is paramount, there is no place for state regulation—by juries, judges, or state regulators.

The Third Circuit's opinions in this case conflict with these longstanding federal and international policies. By permitting state common law suits to proceed against aircraft manufacturers even after the FAA has approved the design at issue, the Third Circuit sanctions the creation of fifty new sets of standards for aircraft design, directly undermining the goals of uniformity. This result not only intrudes on the FAA's authority; it also places the United States in violation of its international commitments to grant reciprocal recognition of other national authorities' certifications and approvals in the area of aviation safety.

What is more, the opinions below contemplate that these additional standards may be formulated by juries that lack any expertise in aerospace engineering. This notion is highly counterintuitive and an anomaly in international practice. This Court should grant review to preserve the integrity of the national and international systems for the regulation of aircraft design.

ARGUMENT

I. UNIFORM STANDARDS FOR AIRCRAFT DESIGN ARE ESSENTIAL TO INTERNATIONAL AVIATION SAFETY

The smooth, safe, and efficient functioning of the international aviation industry demands cross-

border cooperation and coordination. As one commentator has put it, “[c]ivil aviation could not have evolved without [worldwide] uniformity in regulations, standards and procedures in relation of air navigation.” Michael Milde, *Enforcement of Aviation Safety Standards: Problems of Safety Oversight*, 45 *German J. Air & Space L.* 3, 4 (1996).

A. National governments have long recognized the critical importance of international cooperation in the aviation industry.

From the very outset, as the potential of air travel as a global transportation network became apparent, national governments recognized the need for international cooperation to ensure aviation safety and to promote the continued development of the industry. Thus, in 1944, 52 States signed the Chicago Convention on International Civil Aviation, setting forth principles “in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.” Convention on International Civil Aviation pmbl., Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (hereinafter “Chicago Convention”). The United States signed the treaty on December 7, 1944, and the Senate gave its advice and consent to the treaty’s ratification on July 25, 1946. 61 Stat. 1180.

The Contracting States understood that uniformity was key to achieving international aviation safety, and therefore undertook “to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization ... in all matters in which such uniformity will facili-

tate and improve air navigation.” *Id.* art. 37. The Convention therefore created the International Civil Aviation Organization (ICAO), an agency of the United Nations whose purpose is to “develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.” *Id.* arts. 43–44. To that end, the ICAO is charged with adopting international standards and recommended practices, including with respect to the airworthiness of aircraft. *Id.* art. 37. A Contracting State that finds it “impracticable” to achieve full compliance with international standards must notify the ICAO of any differences between its own practice and the international standard. *Id.* art. 38.

To be sure, the project of global uniformity in airworthiness standards has proven difficult to achieve in practice. “The uniformity of the regulations, standards and procedures for [worldwide] application requires harmonization of the potentially conflicting interests of [191] member States at different levels of technical and economic development, each of whom may have different national priorities.” Milde, *supra*, at 7. While the ICAO has issued recommendations as to minimum international standards for aircraft design, *see* Annex 8 to the Convention on International Civil Aviation, ICAO (Apr. 2005), <https://bit.ly/2UGlkQq>, national authorities remain responsible for implementing and enforcing their own airworthiness regulations. Due in large part to disparities in the technological and economic capabilities of different countries, “ICAO moves ahead like a fast locomotive, happy with its speed but without noticing that many wagons of the train may

have become unhitched and stay behind.” Milde, *supra*, at 7–8.

In the absence of true worldwide uniformity—i.e., airworthiness standards applicable and enforced across the globe—individual countries have come to rely on bilateral and other multilateral agreements to reconcile different national airworthiness standards and to minimize the need for aircraft manufacturers to seek redundant type certifications in multiple countries. Such agreements reflect national governments’ continued recognition of the need for harmonization and uniformity in the area of aircraft safety.

B. The U.S. Government works closely with other countries’ regulatory authorities to ensure aircraft safety.

In the United States, airworthiness standards are set forth in regulations promulgated by the FAA, long considered the gold standard for aviation safety. But various bilateral agreements provide for FAA recognition of type certificates and other approvals granted by other national and supranational aviation authorities. For example, under a bilateral agreement between the United States and the European Union, the United States accepts certifications by EASA “as if they were made in accordance with its own applicable laws, regulations, and requirements.” Technical Implementation Procedures for Airworthiness and Environmental Certification Between the FAA of the United States of America and the EASA of the European Union § 1.3.1 (last amended April 2, 2019), <https://bit.ly/2V42Vwf> (“FAA-EASA Technical Implementation Procedures”); Agreement between the United States and the European Community on

Cooperation in the Regulation of Civil Aviation Safety art. 4, E.U.-U.S., June 30, 2008, T.I.A.S. 11-501 (“E.U.-U.S. Cooperation Agreement”). Conversely, EASA also recognizes FAA certifications as though they were issued in accordance with EU regulations and standards. FAA-EASA Technical Implementation Procedures, *supra*, § 1.3.1; E.U.-U.S. Cooperation Agreement, *supra*, art. 4. The FAA’s recognition of EASA certifications is based on the FAA’s determination that EASA’s regulatory system is at least as rigorous as its own, producing equivalent results and guaranteeing aircraft design safety. See FAA-EASA Technical Implementation Procedures, *supra*, § 1.3.1.

The United States has similarly broad reciprocity arrangements with several other countries, including Canada, Australia, and Israel.² The United States

² Agreement on the Promotion of Aviation Safety between the Government of the United States of America and the Government of Australia, Aus.-U.S., June 21, 2005, T.I.A.S. 06-1128; Implementation Procedures for Airworthiness under the Agreement on the Promotion of Aviation Safety between the Government of Australia and the Government of the United States of America § 1.2 (revised May 7, 2010), <https://bit.ly/2vc1lcX>; Agreement Between the Government of the United States of America and the Government of Canada for Promotion of Aviation Safety, Can.-U.S., June 12, 2000, T.I.A.S. 13118; Implementation Procedures for Airworthiness under the Agreement between the Government of the United States of America and the Government of Canada for Promotion of Aviation Safety § 1.3.1 (revised Nov. 10, 2016), <https://bit.ly/2UqNQk0>; Agreement Between the Government of the United States of America and the Government of Israel for Promotion of Aviation Safety art. 1, Isr.-U.S., Dec. 19, 2000, <https://bit.ly/2PnrOxO>; Implementation Procedures under the Agreement between the Government of the United States of America and the Government of Israel for Promotion of Avia-

also has entered into bilateral agreements with certain other countries that define FAA procedures for issuing type certificates for aeronautical products previously certified in the other country. *E.g.*, Agreement for the Promotion of Aviation Safety, S. Kor.-U.S., Feb. 19, 2008, T.I.A.S. 08-219.

These agreements (and numerous others) are the result of considerable deliberation at the federal level, with input from multiple U.S. agencies that have an interest in international aviation. *See Generic Steps for Obtaining a Bilateral Aviation Safety Agreement-Implementation Procedure for Airworthiness*, Federal Aviation Agency, <https://bit.ly/2KDsKzn>. Permission for the State Department to pursue a bilateral aviation safety agreement is contingent not only on an interagency determination that an agreement would accord with U.S. foreign policy, but also on a thorough technical assessment by the FAA “establish[ing] confidence in a country’s technical competence and regulatory capability for performing airworthiness certification functions.” *Id.* at 1–2. Detailed international negotiations ensure that the certification and validation procedures under any bilateral aviation safety agreement are satisfactory to both parties. *Id.* at 3–4.

The FAA’s rigorous and comprehensive standards—and its close cooperation with its international counterparts to ensure that products manufactured abroad also meet its safety standards—have made

air travel the safest mode of transportation in human history.³

II. STATE LAW DESIGN-DEFECT CLAIMS AGAINST AIRCRAFT MANUFACTURERS UNDERMINE INTERNATIONAL COOPERATION IN AVIATION SAFETY

Permitting a jury to hold aircraft manufacturers liable for alleged design defects—when those designs have already received FAA approval—is antithetical to the uniformity on which the international aviation system depends. The opinions below open the door to the creation of fifty new sets of state-law standards for aircraft design. Particularly when these new standards may be elaborated in an unpredictable and piecemeal fashion by lay juries that lack any knowledge or expertise in aerospace engineering, this development is fundamentally incompatible with the goal of achieving worldwide uniformity in aircraft design.

A. State regulation disrupts the national uniformity that international cooperation requires.

1. The existence of the international agreements described above buttresses Congress’s recognition that “the Federal Government bears virtually complete responsibility for the promotion and supervi-

³ There were 160 airplane accidents worldwide in 2018, 13 of which involved a total of 534 fatalities. *To70’s Civil Aviation Safety Review 2018*, to70 (Jan. 1, 2019), <https://to70.com/to70s-civil-aviation-safety-review-2018/>. For comparison, roughly 1.8 million people perish in road accidents every year. *Global Status Report on Road Safety 2018*, World Health Org., <https://bit.ly/2IymlTh>.

sion of [the aviation] industry in the public interest.” S. Rep. No. 1811, at 5 (1958). Indeed, the Senate’s advice and consent to the ratification of the Chicago Convention—which, as discussed, enshrines the overarching principles of international standardization of airworthiness standards—“indicate[s] that Congress will have demanded national uniformity” in this sphere. *United States v. Locke*, 529 U.S. 89, 103 (2000).

This Court has previously highlighted the need for national uniformity in design standards relating to transportation in order to achieve international standardization. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court stated, the “decided congressional preference for arriving at international standards for building tank vessels” showed that “the Nation was to speak with one voice with respect to tanker-design standards.” *Id.* at 166. So too here: international uniformity in aircraft design necessarily demands uniformity on the domestic plane.

2. The decision below opens the door to the creation of fifty additional sets of aircraft design standards in the United States. That is because if common-law standards apply, then states may engage in direct regulation of aircraft safety and aircraft design. As this Court has acknowledged, “[g]eneral tort duties of care, unlike fire codes or restrictions on trade practices, ‘directly regulate’ [a] device itself, including its design.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328–29 (2008); *id.* at 332 (Stevens, J., concurring in part and in the judgment). In other words, there is no distinction between product liability actions and direct state regulation for purposes of preemption. The Third Circuit’s opinions thus invite indi-

vidual states to take an increasingly active role in the regulation of aircraft design.

This state of affairs runs contrary to longstanding federal regulation and policy. It is highly unlikely that the Congress that enacted the Federal Aviation Act in 1958 contemplated any state regulation, in any form, in the area of aviation safety. Direct state regulation of this field did not exist at that time, and it was not until the mid-1970s that courts began to impose state tort liability on theories of defective design. *See, e.g.,* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479, 484 (1990).

The notion that individual U.S. states may impose their own regulations on aircraft design and certification would be equally surprising to aviation authorities and aircraft manufacturers outside the United States, which have long understood that the FAA is the exclusive regulator in the area of aircraft design in the United States. State regulation of aircraft design will inevitably result in a proliferation of disparate standards across the United States—a result that is inconsistent with the United States’ international obligation “to collaborate in securing the highest practicable degree of uniformity” in airworthiness regulations. Chicago Convention, *supra*, art. 37.

The intrusion of state regulation into the sphere of aviation safety—thus potentially imposing design requirements above and beyond what is necessary to obtain FAA approval—directly undermines the principles of reciprocity and mutual acceptance on which the United States’ bilateral aviation safety agree-

ments are based. For example, as mentioned above, under the U.S.-EU bilateral aviation safety agreement, the EU accepts the United States' aviation authorities' findings of compliance and approvals "as if they were made in accordance with its own applicable laws, regulations, and requirements." FAA-EASA Technical Implementation Procedures, *supra*, § 1.3.1. The United States has an international obligation to do the same with regard to certifications issued by EU aviation authorities—certifications that, like FAA type certificates, are rigorous and comprehensive, requiring compliance with thousands of detailed requirements.

Requiring aircraft manufacturers who have already received type certification from EASA to also comply with separate state-law standards for aircraft design amounts to a refusal by the United States to recognize EASA's regulatory approvals. It is of no relevance for purposes of the United States' international obligations that these extra-treaty requirements are imposed by state governments, rather than the United States itself. "The states are unknown to foreign nations ... Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity." *Gibbons v. Ogden*, 24 U.S. (9 Wheat.) 1, 228–29 (1824) (Johnson, J., concurring). See also Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 4, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N.

Doc. A/56/10, at 40 (2001) (“The conduct of any State organ shall be considered an act of that State under international law ... whatever its character as an organ of the central Government or a territorial unit of the State.”). In other words, permitting state governments to impose additional regulations on aircraft design effectively renders the United States’ international agreements a dead letter.

B. Placing aircraft design standards in the hands of lay juries is counterintuitive and contrary to international practice.

The opinions below promote an unworkable system that will prove highly detrimental to national and international uniformity in aircraft design. Aircraft manufacturers around the world must comply with FAA standards, whether through the procedures set forth in bilateral agreements or by seeking type certification directly. If the Third Circuit’s decisions stand, they must now also consider the unpredictable determinations of American juries that are ill-suited for the elaborate and highly technical task of evaluating the safety of aircraft design.

Permitting juries to second-guess the decisions of the FAA with regard to design standards places the United States wildly out of step with its counterparts. Civil jury trials are rare as a general matter outside the United States, even in other common-law legal systems. Valerie P. Hans, *Jury Systems Around the World*, 4 Ann. Rev. L. & Soc. Sci. 275, 282 (2008). The notion that a jury trial could be an appropriate way to resolve questions as technical and complex as the safety of an aircraft’s design is particularly counterintuitive.

And for good reason. Aircraft are extraordinarily intricate machines. An Airbus A350, for example, has millions of individual parts and complicated, integrated systems. These mechanisms are the subject of thousands of design standards promulgated by the FAA and its regulatory counterparts in other countries. The type-certification process is necessarily arduous and time-consuming for the manufacturer and the agency alike. A commercial aircraft manufacturer seeking type certification for a new wide-body 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.” Pet. App. 56a (citations omitted).

Questions of expertise aside, the context in which questions of aircraft design come before a jury makes tort litigation a poor substitute for the considered regulatory judgment of the FAA. Whereas the FAA conducts a comprehensive assessment of the aircraft and weighs the costs and benefits of particular design choices, a jury considers, in the context of a specific accident, whether a particular aircraft part was defectively designed. But “[a] jury ... sees only the cost of a more dangerous design, and is not concerned with its benefits; [those] who reaped those benefits are not represented in court.” *Riegel*, 552 U.S. at 325 (2008).

A jury presented with emotional evidence in the wake of an accident may believe that requiring aircraft manufacturers to include an additional warning light or incorporate a redundant system is reasonable. But a jury that reaches that conclusion may have no conception of the potential harm caused by

pilots receiving multiple nuisance warnings, or the structural changes that a redundant system might require. Moreover, there is a *post hoc* element to the work that juries perform that further undermines the carefully calibrated regulatory scheme that Congress created for aircraft design standards. While regulatory bodies such as the FAA set forward-looking standards, juries effectively impose new and different standards retroactively. Manufacturers thus may not know about a change in design standards until it is announced in the form of a jury verdict. Yet despite all these shortcomings in a jury's capacity to evaluate aircraft safety, the decision below vests individual lay juries with the power to override expert determinations by the FAA that a given design is safe and airworthy.

* * *

In all events, the Third Circuit's opinions stand to usher in a new era in which states—including even state legislatures—exercise significant oversight and regulatory authority in an area long understood to be reserved to the FAA. The instability and fragmentation that will result from this change in U.S. regulatory practice cannot be reconciled with the principles of uniformity and standardization that have animated national and international policy in the area of aircraft safety since the advent of international aviation.

CONCLUSION

The petition should be granted.

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April 22, 2019