

No. 20-2951

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRENDA JONES AS ADMINISTRATRIX C.T.A. OF THE
ESTATE OF JOHN DAVID HORTMAN ET AL.,

Plaintiffs-Appellants,

v.

GOODRICH CORPORATION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut (D.C. No. 3:12-cv-1297(JBA))
District Judge: Warren W. Eginton

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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December 22, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae hereby provides the following disclosure statement:

The American Association for Justice (“AAJ”) is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns ten percent or more of this entity’s stock.

Respectfully submitted this 22nd day of December, 2020.

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.¹ AAJ is concerned that the decision by the district court in this case, if affirmed, will grant unprecedented immunity to manufacturers of aircraft and aircraft components. That lack of accountability for unreasonably dangerous aircraft will deny compensation to aircraft accident victims and will undermine an important incentive for manufacturers to exercise due care in aircraft design and improve flawed designs for the safety of all who fly.

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission of this brief.

SUMMARY OF ARGUMENT

The fundamental error in the ruling below is that the district court mistakenly concluded that the Federal Aviation Act (the Act) and Federal aviation regulations impliedly preempt all state law product liability design defect claims. If this Court affirms, the tort law standards available to people who sustain injuries or lose loved ones caused by aviation product design defects would be entirely eliminated. The district court decision, if allowed to stand, would allow aircraft and aviation part manufacturers to immunize themselves from liability simply because the Federal Aviation Administration (FAA) “certified” the aircraft or aviation part as having met the FAA’s minimum design requirements. Numerous commercial aviation disasters involving FAA certified aircraft, including two recent crashes involving the fully certified Boeing 737 MAX aircraft, demonstrate that FAA certification of an aircraft or component part does not make an aircraft safe. (These aviation disasters are discussed in detail in Section IV of this brief.) To ensure that the safest possible design of aircraft, the courts should allow State product liability design standards to work in tandem with the federal requirements.

Amicus and the plaintiff are well aware of decisions in this Circuit that have addressed implied field preemption in different aviation contexts involving airport runway operations, onboard airline services, and environmental regulations

effecting airport operations. But none of them were design defect product liability cases that require their own preemption analysis.

In *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019), for example, environmental conditions that arguably interfered with aircraft take-off and departure airspace were at issue. This Court said that Congress intended the FAA “to occupy the entire field of aviation safety.” *Tweed*, 930 F.3d at 75. The district court in this case extrapolated that language—written to resolve the preemption issue before this *Tweed* Court—to resolve an entirely different implied preemption issue. An appellate court’s expression of a broad and general legal conclusion always has a fact-related context that restrain its automatic application to other issues. Here, the breadth of the declaration of implied preemption of the entire field of aviation safety goes too far and its application to product liability design cases has no support in the Federal Aviation Act.

The Third Circuit confronted this same scenario in *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016). There, the Third Circuit held that satisfying the federal minimum requirements for FAA certification of an aircraft or component part does not preempt product liability claims asserting violations of State standards of care. To reach that conclusion, the Third Circuit had to refine and retreat from its prior ruling in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), where it held that Congress intended that the FAA under the Act occupy

the entire field of aviation safety and, therefore, the Act preempted all state law negligent claims concerning the flight crew's operation of an aircraft.

This Court should join the Third Circuit in holding that its prior field preemption decisions concerning airport and airline operations do not apply to product liability claims asserting a defective and dangerous design of an aircraft or component part. Such a holding by this Court would be consistent with recent United States Supreme Court expressions that principles of judicial restraint and federalism mandate the strongest presumption against implied field preemption and that the courts should avoid engaging in a free-wheeling inquiry into an unexpressed Congressional intent to preempt. Rather, the Congressional intent inquiry should be limited to the language of the statute itself.

ARGUMENT

I. THIS COURT'S PRIOR HOLDING THAT CONGRESS INTENDED "TO OCCUPY THE ENTIRE FIELD OF AVIATION SAFETY" DOES NOT AND SHOULD NOT APPLY TO PRODUCTS LIABILITY CLAIMS.

There is no basis for the district court's ruling that Congress intended to occupy the entire field of aviation safety concerning the design and manufacture of aircraft and aviation component parts. The district court relied upon this Court's prior statement that Congress intended "to occupy the entire field of aviation safety" and applied it to the products liability claims at issue. But the Second Circuit decisions relied upon by the district court involved state and local restrictions on the

movement of aircraft—an area that demands uniformity across state borders—or claims that are expressly preempted under the Airline Deregulation Act (ADA). *See Tweed*, 930 F.3d at 74 (Connecticut law prohibiting the length of an airport runway preempted because it interfered with the uniform interstate movement of aircraft required by the Act); *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2d Cir. 2011) (environmental state laws not preempted because they did not concern air safety and did not, therefore, interfere with federal law); *Fawemimo v. American Airlines, Inc.*, 751 Fed. App’x. 16 (2d Cir. 2018) (claim of a passenger against American Airlines for injuries caused when she hit her head on a television monitor above her seat was preempted by the express preemption clause in the ADA since it related to airline services and by conflict preemption). None of the decisions the district court relied upon considered the implied preemption of products liability claims against manufacturers of aircraft and aviation components alleging a defective design.

The Third Circuit has addressed the very scenario confronted by the district court in this case; that is, a sweeping pronouncement by the court of appeals that Congress intended to occupy the entire field of aviation safety and the question of applying that rule to products liability claims. In *Abdullah v. American Airlines*, 181 F.3d 363 (3d Cir. 1999), the Third Circuit considered whether state negligence standards alleged in claims against an airline for failing to detect, avoid, and warn

of turbulence were preempted. Although the claims in *Abdullah* related solely to the operations of an aircraft during flight, the Third Circuit broadly held that, under the Act, Congress intended to exclusively regulate “the general field of aviation safety.” 181 F.3d at 371. Therefore, “any state or territorial standards of care relating to aviation safety are federally preempted.” *Id.*

Subsequent district court decisions within the Third Circuit grappled with whether the *Abdullah* holding extended to products liability claims. In *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431 (M.D. Penn. 2016), the district court concluded that the Third Circuit’s sweeping pronouncement in *Abdullah* that any state standard of care was impliedly preempted by the Act extended to state products liability claims. *Id.* at 448-50. The plaintiff appealed, arguing that *Abdullah*’s broad preemption language should be limited to claims asserting negligence in the operation of an aircraft—the only claims before the *Abdullah* court.

The Third Circuit reversed, finding that products liability claims were outside the preempted field. In *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), the court retreated from its all-encompassing preemption statement in *Abdullah*:

In light of principles of federalism and the presumption against preemption, Congress must express its clear and manifest intent to preempt an entire field of state law. Here, none of the relevant statutes or regulations signals such an intent. To the contrary, the Federal Aviation Act, the General Aviation Revitalization Act of 1994, and the regulations promulgated by the Federal Aviation Administration reflect

that Congress did not intend to preempt aircraft products liability claims in a categorical way. ... **Today, we clarify the scope of *Abdullah* and hold that neither the Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims.**

Id. at 683 (emphasis added).

Sikkelee focused on two points. First, for claims relating to in-flight operations, the federal aviation regulations provide a clear federal standard of care that mirrors the common law negligence standard. The Third Circuit stated that in its *Abdullah* decision, “we paid special heed to 14 C.F.R. § 91.13(a), which proscribes ‘operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another,’ and observed that it provided a catch-all standard of care.” *Id.* at 689. Because the regulatory scheme provided a workable federal standard of care that mirrored the common law negligence standard, resort to the latter was unnecessary.

No such workable “catch-all” standard exists concerning design defects in aircraft and aviation components. In fact, it is impossible to glean any clear standard of care from FAA design requirements. As explained by the *Sikkelee* court:

[T]he manufacturing and design regulations ... 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. [T]he fact that the regulations are framed in terms of standards to acquire FAA approvals and certificates—and not as standards governing manufacture generally—supports the notions that the acquisition of a type certificate is merely a baseline requirement. ...

Id. at 694.

In other words, because the federal minimum design requirements cannot provide a workable federal standard of care, those requirements do not impliedly preempt established State standards. *Id.* at 695.

Second, the Third Circuit looked to what Congress did not say. The court reasoned that:

[I]f Congress had wanted to change the preemptive effect of the type certification process, it would have done so—or at least given some indication of that intention. It did not. The Federal Aviation Act itself therefore does not signal an intent to preempt state law products liability claims.

Id. at 693.

Here, the district court mistakenly felt bound to automatically apply to products liability claims the *Goodspeed* holding that Congress impliedly occupied the entire field of aviation safety. The Third Circuit's response to fundamentally the same situation in *Sikkelee* was to clarify that the scope of the preempted field announced in *Abdullah* was limited to claims concerning aircraft operations and did not extend to products liability claims. This Court should similarly limit the scope of its holdings in *Goodspeed*, *Tweed*, and *Fawemimo* to the specific claims in those cases to the exclusion of products liability claims.²

² On remand, the district court in *Sikkelee* ruled that the plaintiff's product liability claims were conflict-preempted. The district court reasoned that because the defendant's FAA-approved type certificate precluded it from unilaterally changing

As held in *Sikkelee*, 822 F.3d at 696-99, congressional amendments of the Act further support a finding that Congress did not intend to preempt products liability actions against manufacturers. In 1994, Congress enacted the General Aviation Revitalization Act (GARA), which contains an eighteen-year statute of repose precluding product liability actions against manufacturers of aircraft carrying fewer than twenty people and not engaged in passenger carrying operations at the time of the accident. 49 U.S.C. § 40101, note § 2(a)(1).

The fact that Congress needed to expressly bar product liability claims in a limited manner establishes that, prior to GARA, Congress never intended to preempt *any* product liability claims, but rather concluded that such claims and the standards underlying those claims constitutionally coexisted with the FAA’s regulatory authority. *Sikkelee*, 822 F.3d at 696 (“By barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted. Indeed, GARA’s eighteen-year statute of repose would be superfluous if all aviation products liability claims are preempted from day

its design, it could not simultaneously comply with federal and state law, where state law would require it to adopt a different design. *Sikkelee v. AVCO Corp.*, 268 F. Supp. 3d 660, 696 (M.D. Penn. 2017). The Third Circuit reversed, holding that because “Lycoming could have—indeed it had—adjusted its design,” it was not impossible for it to comply with federal requirements and State common law standards. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 713-14 (3d Cir. 2018). The Supreme Court denied Lycoming’s petition for certiorari. *AVCO Corp. v. Sikkelee*, 140 S. Ct. 860 (2020).

one”); *see also Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (“[W]e are hardly free to extend [the preemptive effect of] a federal statute to a sphere Congress was well aware of but chose to leave alone”); *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014) (“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them”); *Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (Congress’s decision to enact a preemption clause limited only to medical devices, “coupled with its certain awareness of the prevalence of state tort litigation [relating to prescription drugs], is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness”); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253-54 (1984) (an amendment to the Atomic Energy Act (AEA) requiring nuclear plants to waive certain common law defenses in the event of a “extraordinary nuclear occurrence” confirmed that Congress intended to otherwise preserve state tort standards and causes of action).³

³ In 1978, Congress passed the Airline Deregulation Act, which included an express preemption clause that precludes states from adopting standards relating to “a rate, route or service” of an air carrier. 49 U.S.C. § 41713(b). The inclusion of the limited express preemption clause further demonstrates that Congress did not understand that the Act already preempted state laws relating to aviation.

II. EXCLUDING PRODUCTS LIABILITY CLAIMS FROM THE PREEMPTIVE FIELD IS CONSISTENT WITH THE SUPREME COURT’S RESTRICTIVE APPROACH TO THE DOCTRINE OF IMPLIED FIELD PREEMPTION.

The holding in *Sikkelee* comports with the United States Supreme Court’s application of the strong presumption against field preemption of State laws in general and common law tort standards in particular. *Wyeth*, 555 U.S. at 565 (“in all preemption cases, and particularly in those in which Congress has ‘legislated ... in a field in which the States have traditionally occupied,’ we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Recent Supreme Court decisions have strengthened the presumption against implied field preemption. The Supreme Court has cautioned against a free-wheeling judicial inquiry into unexpressed congressional intent that the Justices view as both a form of judicial legislation and an unwarranted intrusion into the sovereignty of the States. As stated in *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020), “[t]here is no federal preemption in vacuo,’ without a constitutional text, federal statute, or treaty made under the authority of the United States.” (emphasis added) (quoting *Puerto Rico Dep’t of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 503 (1988)). The Court reemphasized that “*all preemption arguments, must be grounded ‘in the text*

and structure of the statute at issue.’’ Garcia, 140 S. Ct. at 804 (emphasis added) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

In *Chamber of Com. v. Whiting*, 563 U.S. 582 (2011), the Supreme Court found that delving into the unexpressed intent of Congress raises serious separation of powers issues in the form of an unwarranted intrusion into Congress’s prerogative to decide the preemptive effect of its laws:

Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law.

Id. at 607.

In *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), the Court considered whether the Atomic Energy Act (AEA) preempted a Virginia law that prohibited the mining of uranium on private land in that state. In the plurality lead opinion authored by Justice Gorsuch and joined by Justices Thomas and Kavanaugh, the Court signaled that implied field preemption does not give a court unbridled license to probe into the unexpressed intent of Congress:

Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to “a constitutional text or a federal statute” that does the displacing or conflicts with state law. ... The preemption of state laws represents “a serious intrusion into state sovereignty.” ... It would also represent a significant judicial intrusion into Congress’s authority to delimit the preemptive effect of its laws.

Id. at 1901-05 (internal citations omitted).

The sentiments in *Warren* were cited by the majority in *Garcia*, 140 S. Ct. at 801, signaling that the majority of Justices favor a text-based approach to implied field preemption over a judicial search for legislative intent that Congress could have, but failed to clearly express in the statutory text.

Warren explained the speculative nature of a judicial inquiry into congressional intent beyond the text of a statute:

Hefty inferences may be required ... when trying to estimate whether Congress would have wanted to prohibit States from pursuing regulations that may happen to touch, in various degrees and different ways, on unenacted federal purposes and objectives. ... [W]e may only wind up displacing perfectly legitimate state laws on the strength of “purposes” that only we can see, that may seem perfectly logical to us, but that lack the democratic provenance the Constitution demands before a federal law may be declared supreme. ... The only thing a court can be sure of is what can be found in the law itself.

139 S. Ct. at 1908 (internal citations omitted).⁴

Simply put, the Court in *Warren* stated that “as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn’t write.” *Id.* at 1900. Congress did not include an express

⁴ In a concurring opinion, Justice Ginsburg—joined by Justices Sotomayor and Kagan—likewise rejected preemption based primarily on the text of the statute itself. *Id.* at 1912 (the AEA does not address uranium mining on private lands. “Every indication, then, is that Congress left private conventional mining unregulated. And if Congress did not provide for regulation of private conventional mining, it is hard to see how or why state law on the subject would be preempted, whatever the reason for the law’s enactment”).

preemption clause in the Act. Instead, Congress included a savings clause stating that the legislation’s provisions are “in *addition to* any other remedies provided by law,” such as a common-law negligence claim for injured plaintiffs. 49 U.S.C. § 40120(c) (emphasis added). See *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 390 (2015) (implied field preemption is particularly unwarranted when the State law at issue, like products liability law, is not directed at a particular industry or actor; but rather, applies equally across all industries). One district court has observed that “complete preemption is such an extraordinary statutory event that the Supreme Court has found only three statutes that reflect Congress’ intent to completely preempt a field: Section 301 of the Labor Management Relations Act, Section 502(a) of the Employment Retirement Income Security Act, and Sections 85 and 86 the National Bank Act.” *Veneruso v. Mount Vernon Neighborhood Health Ctr.*, 933 F. Supp. 2d 613, 621 (S.D.N.Y. 2013), *aff’d*, 586 F. App’x. 604 (2d Cir. 2014).

III. THIS COURT SHOULD PERMIT FEDERAL REGULATIONS AND COMMON LAW PRODUCTS LIABILITY STANDARDS TO WORK IN TANDEM TO IMPROVE AVIATION SAFETY.

The Supreme Court has repeatedly noted that Congress has often decided “to stand by both”—state tort litigation and federal regulation—“and to tolerate whatever tension there [is] between them.” *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)). Instead,

“negligence liability could just as easily complement” federal safety regulations. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993).

Silkwood provides an instructive example. There, the jury awarded compensatory and punitive damages against the owner of a nuclear power plant for plutonium contamination sustained by a plant worker. The case was submitted to the jury under State common law negligence and strict liability standards. *Silkwood*, 464 U.S. at 244. Finding that such claims were not preempted by the AEA, the Court held that:

No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages *based on the state law of negligence or strict liability* is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to *state standards*, but that regulatory consequence was something that Congress was quite willing to accept.

Id. at 256 (emphasis added).

Courts have long harmonized state law-based product liability lawsuits with federal regulatory standards where the federal requirements serve as “the *floor* of safe conduct” and not “a *ceiling* on the ability of states to protect their citizens.” *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984) (emphasis original); *see also Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981).

This is sound policy. Federal regulators are not infallible; there is a substantial “laundry list of defective products that also met federal standards yet are known to kill people.” Jeff Wigington, *The Best-Selling Defect in America*, 39 *Trial* 62, 64 (July 2003). As Justice Stevens once wryly noted, “the *Titanic* complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 903 n.19 (2000) (Stevens, J., dissenting) (internal quotation marks and citation omitted). As the Supreme Court has pointed out, tort litigation shines a spotlight on dangers that regulators overlooked or undervalued, prompting the federal agency to revise its regulations “in light of the new information that has been brought to its attention through common law suits.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451 (2005).

Moreover, the recent experience associated with the certification of the Boeing 737 Max and the tragic crash of two 737 Max aircraft underscores the need for State products liability claims to add a critical level of protection for the flying public.

The Boeing B737 MAX was certified under the FAA’s Organization Designation Authorization (ODA) program, which provides manufacturers authority

over FAA delegated certification functions.⁵ Boeing itself conducted most of the compliance actions that resulted in the certification. Despite its FAA certification, the B737 MAX contained a deadly defect that would soon cause two aviation disasters and kill 346 people.

On October 29, 2018, Lion Air Flight JT610, a B737 MAX crashed shortly after takeoff from Jakarta, Indonesia, taking 189 lives. The investigation quickly identified that the airplane's Maneuvering Characteristics Augmentation System (MCAS) contributed to the crash.⁶

Boeing's design for the B737 MAX included adding new fuel-efficient engines to the existing B737NG airframe. The size and placement of the new engines caused the airplane to have the undesirable tendency to pitch up under certain flight conditions. Boeing developed MCAS, a flight control law programed in the airplane's flight control computers, to mitigate this pitch-up problem by automatically trimming the airplane's nose down when the airplane's angle of attack pitched too high upward. Boeing chose to have MCAS accept data from only one of the airplane's two angle of attack sensors and to not check the accuracy of that data

⁵ See 49 U.S.C. § 44702(d) (permitting the FAA Administrator to delegate the examination, testing and inspection).

⁶ See Komite Nasional Keselamatan Transportasi Republic of Indonesia Preliminary Aircraft Accident Report, KNKT.18.10.35.04, PT. Lion Mentari Airlines, Boeing 737-8 (MAX); PK-LQP, Tanjung Karawang, West Java, Republic of Indonesia (Oct. 29, 2018), available at http://reports.aviation-safety.net/2018/20181029-0_B38M_PK-LQP_PRELIMINARY.pdf.

against the data supplied by the airplane's second angle of attack sensor. This design feature made MCAS vulnerable to a single point failure because erroneous data from a single sensor could trigger MCAS to repeatedly dive the airplane. On flight JT610, the airplane's left angle of attack sensor transmitted an erroneously high angle of attack and this caused the airplane's MCAS to repeatedly dive the airplane even as its pilots were fighting to bring the nose of the airplane back up and to regain control.⁷

Boeing never described MCAS in the airplane's flight manuals or in the training materials it supplied to its customer airlines, prompting the FAA, on November 7, 2018, to issue an Emergency Airworthiness Directive to flight crews. The FAA then conducted an analysis, called a Transport Aircraft Risk Assessment Methodology (TARAM), which predicted that more B737 MAX crashes would occur if the airplane's design was not changed.⁸ Boeing, however, failed to provide a fix for the MCAS in time to prevent a second crash.

⁷ See Komite Nasional Keselamatan Transportasi Republic of Indonesia Final Aircraft Accident Report, KNKT.19.05.10.04, PT. Batik Air Indonesia, Airbus A320; PK-LZJ, Sultan Hasanuddin International Airport, Republic of Indonesia (May 25, 2019), *available at* http://knkt.dephub.go.id/knkt/ntsc_home/ntsc.htm.

⁸ See The House Committee on Transportation & Infrastructure, The Boeing 737 MAX Aircraft: Costs, Consequences, and Lessons from its Design, Development, and Certification – Preliminary Investigative Finding, at 11 (Mar. 2020), *available at* http://transportation.house.gov/imo/media/doc/TI_Preliminary_Investigative_Findings_Boeing_737_MAX_March_2020.pdf.

On March 10, 2019, Ethiopian Airlines Flight 302, a B737 MAX, crashed shortly after takeoff killing 157 people. MCAS was quickly implicated in the disaster. On March 13, 2019, the FAA issued an emergency order prohibiting the operation of the B737 MAX in the United States.⁹ That grounding order stayed in effect until November 18, 2020.¹⁰

The B737 MAX disasters demonstrate that aircraft certification by the FAA does not mean that an aircraft is safe or free from defects. Aircraft certification is mostly conducted by the manufacturers themselves and merely signifies compliance with the minimum requirements set forth in certification plans and federal regulations.

Congress enacted the Act to improve aviation safety. In short, a safe airplane will meet the minimum certification requirements, but the converse is not necessarily true. The B737 MAX was a fully certified airplane that was also clearly unsafe. Closing the courtroom doors to the victims of the defective B737 MAX airplanes would not improve aviation safety. The same is true in *Jones*—granting summary judgment based on implied federal preemption not only denies the plaintiffs’

⁹ See FAA, Emergency Order of Prohibition (Mar. 13, 2019), https://www.faa.gov/news/updates/media/Emergency_Order.pdf.

¹⁰ See FAA, Rescission of Emergency Order of Prohibition (Nov. 18, 2020), https://www.faa.gov/foia/electronic_reading_room/boeing_reading_room/media/737_MAX_Rescission_of_Grounding_Order.pdf.

remedies, it also effectively reduced the products liability standards to the federal minimum certification requirements.

The lower court's decision removes an important safeguard in the Act's efforts to improve aviation safety, denies injured plaintiffs a remedy for losses caused by a design defect, and intrudes upon a state's sovereign right to provide its citizens with compensation. It is not at all surprising that in the nearly six decades since Congress passed the Act, the overwhelming majority of cases have held that aviation products liability claims are not impliedly preempted under the doctrine of field preemption.

IV. DESIGN DEFECT CASES PLAY A CRITICAL ROLE IN IMPROVING AVIATION SAFETY AND REDRESSING INJURIES.

Major aviation product liability claims prosecuted under state law demonstrate the critical role litigation has played in revealing dangerous conditions in aircraft, resulting in major safety improvements and awarding fair compensation to aviation disaster victims and their families. None of these cases would have survived motion practice if the district court's field preemption decision had been the applicable law.

A. The Boeing 737 Rudder Defects

Product liability lawsuits arising out of a series of commercial aircraft disasters in the 1990s revealed dangerous defects in a critical component of the Boeing 737 aircraft, leading to design improvements that eliminated the defect.

1. *USAir Flight 427*

On September 8, 1994, USAir Flight 427 crashed on approach to Pittsburgh International Airport, killing all 132 passengers and crew on board. As Flight 427 came in for landing, the airplane suddenly banked and rolled to the left, entered an uncontrolled descent, and crashed. Though the airplane's design had been FAA certificated, the NTSB determined that the plane's rudder "most likely deflected in a direction opposite to that commanded by the pilots as a result of a jam of the main rudder power control unit[.]" NTSB, Aircraft Accident Report – Uncontrolled Descent and Collision with Terrain – USAir Flight 427, 295 (Mar. 24, 1999), available at <https://www.nts.gov/investigations/AccidentReports/Reports/AAR9901.pdf> [hereinafter "USAir 427 Report"].

Despite the FAA's certification of the rudder design, evidence of defects in the 737 rudder control system proved so strong that every Flight 427 family's claim was settled prior to trial. See Torsten Ove, *Trial Opens in '94 Crash of US Airways Flight 427*, Pittsburgh Post-Gazette (June 4, 2002), <http://old.post-gazette.com/nation/20020604crashnation1p1.asp>.

2. *United Airlines Flight 585*

Several years prior to the USAir Flight 427 disaster, United Airlines Flight 585, another Boeing 737 with a rudder control system containing the same power

control unit, experienced a rudder malfunction while approaching Colorado Springs Municipal Airport. *See* NTSB, Aircraft Accident Report – Uncontrolled Descent and Collision with Terrain – United Airlines Flight 585, 1-4 (2001), *available at* <https://www.nts.gov/investigations/AccidentReports/Reports/AAR0101.pdf>. As happened later with Flight 427, the pilots could not regain control of the aircraft and the airplane crashed at over 200 mph. *Id.*

3. *Eastwind Airlines Flight 517*

Problems with the Boeing 737 rudder control system persisted. On June 9, 1996, five years after the Flight 585 crash and two years after the Flight 427 crash—but before Boeing had resolved the lawsuits arising out of either case—a near-fatal crash occurred following another Boeing 737 rudder malfunction. During a landing at Richmond International Airport, the pilots of Eastwind Airlines Flight 517 overcame two reverse rudder events—the exact malfunctions that killed the passengers and crew of Flight 427 and Flight 585—and landed the aircraft safely. *See* USAir 427 Report at 51-54, 263-71, 293-94; *see also* NTSB, Aviation Incident Final Report – Incident Number DCA96IA061, Richmond, VA (2007). Yet, the FAA did not change its regulatory requirements concerning the clearly defective rudder control system until after a third fatal crash, and after the investigations prompted by the lawsuits initiated by the victims’ family members.

4. *Silk Air Flight 185*

An additional fatal accident involving the 737 rudder occurred when Silk Air Flight 185 crashed in 1997. After reaching cruising altitude, the aircraft suddenly plummeted to earth at such an extreme speed that it broke up before hitting the ground. *See* NTSB, Aircraft Accident Report – SilkAir Flight MI 185, 1-2 (2000), available at <https://app.nts.gov/pdfgenerator/ReportGeneratorFile.aspx?EventID=20001208X05950&AKey=1&RType=Final&IType=IA>.

The Indonesian National Transportation Safety Committee that investigated the crash was unable to identify the cause, while the NTSB postulated that a pilot must have intentionally crashed the airplane. *See id.* at 46-47 and Appendix N. Only after the families of the crash victims retained counsel to investigate the crash was the cause of the crash traced back to the defective rudder design.

After trial, the jury found the manufacturer liable for the crash. *See* \$43.6 Million Awarded in Silk Air Crash Cases, 22 No. 13 Andrews Aviation Litig. Rep. 2 (Aug. 17, 2004).

5. *Federal Agency Investigations and the Identification of Design Flaws in the 737 Rudder System*

After reviewing the service history for the 737 aircraft, the NTSB discovered seventy-one reported yaw/roll events involving the aircraft's rudder system. *See* USAir 427 Report at 151. In 1999, the NTSB issued an urgent recommendation to the FAA that the 737's rudder system be redesigned and upgraded. *See id.* at 296.

The NTSB chastised the FAA for approving the designs in the first place and recommended that the FAA's certification processes be significantly overhauled, providing another reminder that FAA certification does not ensure a safe aircraft. *See id.* at 296-97. But it took the FAA another three years to act on that criticism. In 2002 the FAA finally mandated that a new rudder system with multiple power control units be installed in every Boeing 737 aircraft by 2008—nearly two decades after the NTSB identified the aircraft's rudder control system as the probable cause of a fatal commercial aviation disaster. *See* FAA, Airworthiness Directive 2002-20-07R1 (Nov. 6, 2002), *available at* <https://ad.easa.europa.eu/ad/US-2002-20-07R1>; *see also* FAA, Lessons Learned – USAir 737 in Pennsylvania – Airworthiness Directives (ADs) Issued, *available at* http://lessonslearned.faa.gov/ll_main.cfm?TabID=3&LLID=1&LLTypeID=11.

6. *The Impact of Jones on the Boeing 737-300 Rudder Control System Cases*

Had the district court's decision been governing law at the time that the families sued the aircraft and rudder system manufacturers, the result would have been dismissal of the Boeing 737-300 defective rudder control cases and the denial of remedies to the victims' families.

B. Inadequate Fire Prevention Components and Suppression.

On September 2, 1998, Swissair Flight 111, a McDonnell Douglas MD-11 operating between New York and Geneva, crashed after an uncontrollable in-flight

fire broke out. The fire started in the ceiling of the aircraft where McDonnell Douglas had installed both highly flammable metallized polyethylene terephthalate (MPET) insulation blankets and polyimide electrical wiring. Canadian Transportation Safety Board, *Accident Report, No. A98H0003*, § 134 (2003), available at <http://bit.ly/2hUsKtA> [hereinafter “Swiss 111 Report”]. The pilots were not able to cut off electrical power because of the airplane’s systems design. Swiss 111 Report, at 227. The aircraft also lacked fire detection and suppression devices where the fire started and spread. *Id.* at 213-14. Despite these dangerous conditions, the incident aircraft was FAA certificated.

The Swiss Air 111 tragedy shows that FAA certification does not mean that an airplane is free from design defects. The flammable MPET insulation blankets that fueled the on-board fire passed all FAA requirements, which the FAA subsequently changed because the crash demonstrated that the fire testing requirements were inadequate. *See* FAA, Lessons Learned – Swissair MD-11 at Peggy’s Cove, Nova Scotia – Airworthiness Directives (ADs) Issued, available at <http://bit.ly/2jq7s7h>.

Boeing ultimately settled “all outstanding lawsuits brought by the estates of the Flight 111 victims.” *In re Air Crash Near Peggy’s Cove, Nova Scotia on Sept. 2, 1998*, No. MDL No. 1269, 99-5998, 2004 WL 2486263, at *2 (E.D. Pa. Nov. 2, 2004). Today, under the district court’s decision, summary judgment would have

been entered based on an “implied field preemption” defense.

C. Boeing 747 Center Fuel Tank Design.

On July 17, 1996, approximately twelve minutes after departing New York’s JFK Airport, TWA 800 exploded and crashed into the Atlantic Ocean, resulting in the deaths of 230 people. NTSB, Aircraft Accident Report – In-Flight Breakup Over the Atlantic Ocean – Trans World Airlines Flight 800, AAR-00/03, xvi (Aug. 23, 2000), *available at* <https://www.nts.gov/investigations/AccidentReports/Reports./AAR0003.pdf>. The NTSB determined that the aircraft’s fuel tank design permitted heat generated by the air conditioning units to vaporize fuel in the tank, thus forming an explosive mixture. *Id.* This critical flaw in the FAA certificated airplane positioned the center wing fuel tank immediately above the plane’s air conditioning packs. *Id.* at 308. All it took was one spark to ignite the explosive fuel/vapor mixture and cause the explosion that blew out the bottom of the aircraft and severed the entire front section of the plane. *Id.* at 308.

The families of the 225 victims sued TWA and Boeing, alleging defects in the aircraft design. The NTSB found that a contributing cause of the crash was the FAA certification of the aircraft’s defective design. *Id.* at 1. The FAA specifically accepted the design that permitted the potential for an explosive fuel/air mixture to form in the center fuel tank. *Id.* at 218, 295, 298. The NTSB found that the FAA’s certification process for the accident aircraft was insufficient because “a fuel tank

design and certification philosophy that relies solely on the elimination of all ignition sources, while accepting the existence of fuel tank flammability, is fundamentally flawed.” *Id.* at 307. Under the district court’s implied field preemption summary judgment decision, the TWA 800 litigation would have been dismissed on summary judgment and the families of the disaster’s victims would have been denied all legal remedies.

CONCLUSION

For the foregoing reasons, amicus curiae the American Association for Justice respectfully urges this Court to reverse the decision by the district court.

Respectfully submitted,

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Date: December 22, 2020

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Second Circuit and remain a member in good standing of the Bar of this Court.

Date: December 22, 2020

/s/ Jeffrey R. White
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,246 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: December 22, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2020, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

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