No. 14-4193

In the

United States Court Of Appeals

For The Third Circuit

JILL SIKKELEE, Individually and as Personal Representative of the Estate of David Sikkelee, deceased,

Plaintiff-Appellant,

v.

PRECISION AIRMOTIVE CORPORATION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 08-cv-00358-JL

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent plaintiffs in personal injury and products liability actions, as well as plaintiffs in civil rights, employment rights, and consumer rights actions.[1]

AAJ is concerned that this Court's precedent regarding the scope of preemption under the Federal Aviation Act has been misapplied in this case and in others to effectively bestow immunity on manufacturers and suppliers of unreasonably dangerous aircraft and aircraft components. Immunity with respect to conduct unrelated to aircraft operation was not intended by Congress or, AAJ believes, by this Court. Unwarranted preemption of state aviation products liability not only deprives wrongfully injured victims of fair compensation, but removes an incentive for safety that protects all Americans who travel.

SUMMARY OF ARGUMENT

1. This Court in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), broadly declared that it found implied federal preemption of the entire field of aviation safety under the Federal Aviation Act. However, this Court made clear

[1] No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

that its holding was based on federal preemption of the field of safe aircraft *operations*, and its reasoning did not extend to the safe design of manufacture of aircraft and aircraft components occurring long before an aircraft is placed into operation.

Nevertheless, there is confusion concerning the scope of field preemption found by this Court under the FAA. Two district court judges in this case have expressed divergent views on whether *Abdullah* compels preemption of plaintiff's state law products liability claim.

2. Even if this Court's precedent is amenable to a construction that includes state products liability law within the preempted field, such a construction does not comport with the principles of federal preemption established by the Supreme Court of the United States.

The Supreme Court has emphasized that due regard for the states' role in our system of federalism demands that courts not find preemption of state law unless Congress has clearly and manifestly intended such preemption, particularly in areas traditionally governed by state law and where implied preemption would effectively deprive injured persons legal redress altogether.

3. The plain text of the Federal Aviation Act does not reveal a clear and manifest intent on the part of Congress to preempt state products liability law. The FAA directs the agency to promote safety by establishing "minimum standards"

regarding design and manufacture of aircraft and aircraft components. Moreover, the FAA contains a savings clause that expressly preserves state law "remedies." The Supreme Court has held that such remedies include state law products liability causes of action.

In addition, Congress in 1994 enacted the General Aviation Revitalization Act, which provides that state products liability claims against the makers of certain aircraft must be brought within 18 years of the injury-producing event. Congress clearly intended that other aviation products liability action continue to be governed by state law.

4. Finally, this Court should make clear that the preemptive field described in *Abdullah* does not extend to products liability to avoid attributing to Congress an authority over state law that it does not constitutionally possess. As applied to products liability, *Abdullah* would allow a plaintiff to maintain an action under state law, but would require the court to rewrite the substantive portion of state law defining the standard or care in violation of the Tenth Amendment.

ARGUMENT

I. THIS COURT'S PRECEDENT DOES NOT REQUIRE PREEMPTION OF PENNSYLVANIA'S PRODUCTS LIABILITY STANDARDS OF CARE.

A. This Court's Decision in *Abdullah* Found Preemption of the Field of Aircraft Safety Regarding Aircraft Operations That Are Pervasively Regulated by Federal Law.

Plaintiff in this case has alleged that Lycoming is liable for defects in the carburetor and fuel delivery system installed in the Cessna 172N decedent was piloting at the time of his death as well as manuals related to those components. AAJ wholly supports Plaintiff's argument that violation of federal regulation supports Plaintiff's cause of action. However, AAJ respectfully urges this Court to revisit its decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), and its application to preemption of state standards of care in product liability cases.

Abdullah was not a product liability case. Plaintiffs there were passengers on an American Airlines flight from New York to Puerto Rico who had sustained injuries when the aircraft encountered severe turbulence. They alleged that the pilots were negligent in failing to alter the flight route to avoid the turbulence and that the flight crew had failed to warn passengers of the danger. This Court broadly declared that it found "implied federal preemption of the entire field of aviation safety" by the Federal Aviation Act. *Id*. at 365. However, the Court made clear that its precise holding and the basis for reversing a jury verdict for plaintiffs in that case was that

the FAA preempts the field of state law regarding "standards of care for the safe *operation* of aircraft." *Id*. at 375 (emphasis added).

Indeed, the entire tenor of Judge Roth's opinion leaves no doubt that this Court's decision was premised entirely upon the Federal government's exclusive and historic control over the movement of aircraft across State borders unencumbered by a patchwork of local aircraft flight and operation rules. *See, e.g.*, *id.* at 368 (The purpose of the Federal Aviation Act "is to create and enforce one unified system of flight rules."); *id*. at 369 ("Congress clearly intended to preempt the States from regulating aircraft inflight."); *id*. at 370 (The principal purpose of the FAA "is to create one unified system of flight rules and . . . to promulgate rules for the safe and efficient use of the country's airspace."); *id*. at 370 n. 10 (quoting Justice Jackson's concurrence in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) ("The moment a[n aircraft] taxis onto a runway it is caught up in an elaborate and detailed system of controls. . . . Its privileges, rights and protections, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.")); *id*. at 375 ("[W]e do not find that state or territorial law remedies are preempted, only the standards of care for the safe *operation* of aircraft.") (emphasis added, internal quotes and citations omitted).

The Court made clear, based on its reading of the FAA's legislative history that the scope of the preempted field encompassed only those "operations [that] are

conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States." *Id*. at 368 (quoting S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958)).

Moreover, in *Abdullah* the FAA had issued "both general and specific standards" prohibiting "careless or reckless" operation of an aircraft so there was "no need to look to state or territorial law to provide standards beyond those established by the Administrator." *Id*. at 374. The Court viewed the field preempted by the FAA to be limited to the in-the-air operations of the aircraft governed by the standard set out in 14 C.F.R. § 91.13(a), which governs "Careless or Reckless Operation" of an aircraft. 181 F.3d at 371.

The fair reading of this Court's opinion in *Abdullah* is that the standards of care preempted by the FAA are those relating to aircraft operations and do not include state products liability standards, which focus on a defendant's design and manufacturing conduct long prior to putting the aircraft into operation. Indeed, this Court had itself repeatedly applied those state standards in diversity cases against aircraft manufacturers. *See, e.g., J. Meade Williamson & F.D.I.B., Inc. v. Piper Aircraft Corp.*, 968 F.2d 380, 384-385 (3d Cir. 1992); *Paoletto v. Beech Aircraft Corp*., 464 F.2d 976, 980-981 (3d Cir. 1972); *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 606 (3d Cir. 1958).

As this Court subsequently indicated, "there is no indication that either Congress or the FAA intended that federal law would impose a legal duty in an area that is neither specifically regulated by federal law nor clearly governed by a general federal standard of care." *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 131 (3d Cir. 2010). In that case, the Court concluded that the FAA and its safety regulations "do not preempt state law standards of care in this negligence action" regarding assistance provided to disembarking passengers. This Court explained:

> Our discussion of the regulatory framework giving rise to preemption in Abdullah focused exclusively on safety while a plane is in the air, flying between its origin and destination. Our use of the term "aviation safety" in *Abdullah* to describe the field preempted by federal law was thus limited to in-air safety.

Id. at 127.

AAJ asks this Court to similarly clarify that the scope of field preemption under *Abdullah* does not extend to the products liability standard of care, which is even farther removed from flight operations than disembarkation procedures, where there is no conflict with specific federal standards for manufacturers.

B. District Courts in this Case and in Others Have Misconstrued the Scope of Field Preemption under *Abdullah*.

AAJ submits that there has been confusion and possible misconstruction of this Court's language on this score. District Judge John E. Jones III, at an earlier stage of this case, stated that *Elassaad* not only "reaffirmed that *Abdullah's* primary

holding was that federal law preempted the entire field of aviation safety," but also "strongly, and perhaps explicitly, suggest[ed] that the manufacture of aircraft parts is . . . contained in this field and, thus, subject solely to federal standards of care." *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 437-38 (M.D. Pa. 2010) (internal quotation omitted).

In contrast, District Judge Matthew W. Brann, who was subsequently assigned to this case, noted that in *Lewis v. Lycoming*, 957 F.Supp.2d 552, 558 (E.D. Pa. 2013), "Judge Harvey Bartle III has reasoned that the pronouncements of the Third Circuit that Judge Jones viewed as "controlling" in *Sikkelee I*, [731 F. Supp. 2d at 438], were actually 'dicta.'" *Sikkelee v. Precision Airmotive Corp.*, No. 4:07-CV-00886, 2014 WL 4447018, at *11 (M.D. Pa. Sept. 10, 2014). Judge Brann stated that Judge Bartle would apply state products liability standards to defendants like Lycoming, "a view this Court also finds compelling." *Id*.

Similarly, District Judge Christopher Conner has held that the scope of field preemption under *Abdullah* includes products liability action. *Pease v. Lycoming Engines*, No. 4:10-CV-00843, 2011 WL 6339833, at *23 (M.D. Pa. Dec. 19, 2011). Judge Conner added, however, that the *Abdullah* opinion did not consider, because *Abdullah* was not a products liability case, that "regulations relating to the design and manufacture of airplanes and airplane component parts were never intended to create federal standards of care." *Id*. at *22. Moreover, formulating a federal

standard to apply in a products liability action "will be arduous and impractical" because applicable "FAA regulations are acutely technical and often incurably vague." *Id*. at *23. Judge Conner concluded that "*Abdullah* fails in its application to aviation products liability cases," *id*. at *22, and pointedly suggested, "*Stare decisis* is not a straitjacket that prohibits the Third Circuit from correcting manifest errors or unforeseen circumstances. *Id*.[2]

The interpretation of this Court's precedent regarding preemption under the FAA as applied to the products liability claim in this case is plainly in need of clarification. AAJ urges this Court to make clear that the scope of field preemption under *Abdullah* does not extend to non-operations conduct by manufacturers and other products liability defendants.

II. ENLARGEMENT OF *ABDULLAH* FIELD PREEMPTION TO ENCOMPASS STATE LAW PRODUCTS LIABILITY ACTIONS IS INCONSISTENT WITH THE STRONG PRESUMPTION AGAINST PREEMPTION.

Even if field preemption under *Abdullah* can be construed as encompassing aviation products liability actions, as several district courts have held, attributing such broad preemption to the FAA is not consistent with principles of federal

[2] The uncertainty among district courts in this Circuit is also highlighted by the decisions in *Landis v. US Airways, Inc.*, No. 07-1216, 2008 WL 728369 (W.D. Pa. Mar. 18, 2008), and *Duvall v. Avco Corp.*, No. 4:cv-05-1786, 2006 WL 1410794 (M.D. Pa. May 19, 2006), holding products liability claims against Boeing preempted under *Abdullah.*

preemption, particularly in view of the preemption decisions by the Supreme Court of the United States in the years following the *Abdullah* decision.

The Federal Aviation Act originally enacted by Congress in 1958, Pub. L. No. 85-726, 72 Stat. 731, codified as amended at 49 U.S.C. §§ 40101-49105 ("FAA"), contained no express preemption of state regulation of air transportation. In 1978, Congress enacted the Airline Deregulation Act (ADA), Pub. L. 95-504, 92 Stat. 1705, which amended the FAA and largely deregulated domestic air transport. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), Congress included a preemption clause which reads in relevant part: "[N]o State . . . shall enact or enforce any law, rule, regulation, [or] standard . . . relating to rates, routes, or services of any air carrier." 49 U.S.C. § 41713(b)(1) (1978).

By its plain terms, that express preemption clause does not affect product liability claims against a manufacturer. *See Public Health Trust of Dade Cnty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006). Indeed, the limited coverage of this clause establishes both that Congress did not intend to occupy the field of air safety and that Congress intended to leave products liability standards of care in the hands of the states. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (a

limited express pre-emption clause is evidence that Congress did not intend to completely pre-empt the field).

Although this Court in *Abdullah* found that "to regulate air safety, the Administrator of the FAA has implemented a comprehensive system of rules and regulations," 181 F.3d at 369, the FAA generally does not promulgate specific design or performance standards that might be in conflict with a state standard for unreasonably dangerous products. As one district court has explained,

> The certification process provides the FAA with a mechanism to ensure that aircraft are in compliance with the safety and design standards set out in other regulations. The regulations that do control the design and safety of an aircraft are broad and provide a non-exhaustive list of minimum requirements leaving discretion to the manufacturer."

Monroe, 417 F. Supp. 2d at 833. *See also Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1446 (10th Cir. 1993) *cert. denied*, 510 U.S. 908 (1993) ("FAA certification is, by its very nature, a minimum check on safety.").

Rather than rely on conflict preemption, as this Court has stated, "in *Abdullah*, we found that there was implied field preemption 'of the entire field of aviation safety' as a result of the Aviation Act and its implementing regulations." *Elassaad*, 613 F.3d at 126 (quoting *Abdullah*, 181 F.3d at 365).

Courts may find implied field preemption only where "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that

Congress left no room for the States to supplement it.'" *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *English v. General Elect. Co.*, 496 U.S. 72, 79 (1990) (same).

Because such field preemption broadly displaces state law, even where consistent with federal regulation, "[c]ourts rarely find field preemption." *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 n.3 (3d Cir. 2008). This is particularly true where Congress has not included a provision expressly preempting a field of state law.

> The mere fact that Congress has identified a field as one requiring national legislation does not constitute occupation of the field. Nor does the promulgation of extensive, even "comprehensive," regulations necessarily displace state law. Even where Congress has precluded state regulation in a particular field, the Court has held that state tort suits are not necessarily barred.

Philip H. Corby & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Advoc. 435, 446-47 (1992) (internal citations omitted).

Additionally, a general concern for uniformity of standards across State lines "does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective . . . of promoting . . . safety." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002).

AAJ also suggests that the much-feared patchwork or "crazy-quilt" of fifty inconsistent state standards for defective products is vastly overstated. Although there is variation among the states with respect to defenses or damages, there is general agreement on the common-law standard of care. *See*, *e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 887 (1998) (The "overwhelming majority" of courts apply the same "risk-utility approach in determining design defects.").

The Supreme Court's most recent pronouncements reflect a strong reluctance to impinge upon areas in which states have traditionally played an important role. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court emphasized that any decision to preempt state law,

> [M]ust be guided by two cornerstones of our pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field 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.

Id. at 565 (emphasis added, ellipses in original, internal quotations and citations omitted).

Importantly, the Court explained that this strong presumption against preemption is not diminished in areas where the federal government has historically

regulated, because the presumption is grounded in "respect for the States as independent sovereigns in our federal system" *Id*. at 565 n.3 (internal citations omitted).

AAJ submits, the strong presumption against preemption is all the stronger where preemption, as a practical matter, would leave those whom the federal legislation sought to protect without any legal recourse for injury. The right to a legal remedy for wrongful injury is a fundamental right of American citizens. As Chief Justice John Marshall declared:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Indeed, it is the "the duty of every state to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). More recently, the Court recognized that "a separate and distinct right to seek judicial relief for some wrong" is a fundamental right grounded in multiple provisions of the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12 (2002).

Given these fundamental precepts, the Supreme Court has declined to infer that Congress intended, without a word of explanation or qualification, to effectively deprive injured persons of their day in court to seek legal redress. This is particularly

true with respect to state law products liability suits. As Justice Stevens wrote for the Court,

> The long history of tort litigation against manufacturers . . . adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.

Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005).

Additionally, the fact that Congress has occupied the field with respect to state statutes and safety regulations does not itself suggest congressional intent to deprive injured persons of their legal recourse for compensation. For example, the Supreme Court held in *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983), that the federal government has occupied the field of safety regulation of nuclear power plants to the exclusion of state regulation. Nevertheless, the following year the Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258. The Court found it especially difficult to find implied preemption under such circumstances:

> This silence [of Congress] takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove

> all means of judicial recourse for those injured by illegal conduct.

464 U.S at 251. Justice Blackmun, dissenting, was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims . . . is strong evidence that Congress intended the matter to be left to the States." *Id*. at 264 n.7.

More recently, in *Wyeth*, the fact that Congress did not provide a federal cause of action for consumers harmed by unsafe drugs, "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." 555 U.S. at 575 (emphasis added). *See also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("The long history of tort litigation against manufacturers . . . adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

The strong presumption against implied field preemption argues against any expansion of the field preemption under *Abdullah* to encompass products liability actions. In a similar circumstance, the Supreme Court concluded:

> [The Federal Boat Safety Act] might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a "clear and manifest" intent to go even further

> and implicitly pre-empt all state common law relating to boat manufacture.

Sprietsma v. Mercury Marine, 537 U.S. 51, 69 (2002) (internal citations omitted). AAJ submits that the structure and framework of the FAA similarly do not reflect a clear and manifest intent on the part of Congress to preempt state aviation products liability actions.

III. CONGRESS DID NOT INTEND TO PREEMPT STATE PRODUCTS LIABILITY STANDARDS OF CARE FOR AIRCRAFT AND EQUIPMENT.

The other "cornerstone" of federal preemption analysis is that "the purpose of Congress is the ultimate touchstone." *Wyeth*, 555 U.S. at 565. The most direct indicator of congressional intent – the statutory text – precludes any finding that Congress intended to impose federal standards as the exclusive standard of care or intended to preempt aviation products liability actions under state law.

A. Congress Directed the FAA to Prescribe *Minimum* Standards for Safe Design and Manufacture of Aircraft and Components.

As the *Abdullah* court explained, its preemption determination proceeded from Chapter 447 of the Federal Aviation Act itself, in which Congress gave broad authority to the Administrator of the Federal Aviation Administration with respect to air safety and "directed the Administrator to carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 181 F.3d at 369 (quoting 49 U.S.C. § 44701(c)).

With particular respect to the manufacture of aircraft and aircraft components, that provision of the statute directs the Administrator to

> [P]romote safe flight of civil aircraft in air commerce by prescribing--
>
> (1) *minimum standards* required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers.

49 U.S.C. § 44701(a) (emphasis added).

A "minimum safety standard," the Supreme Court has observed, creates "only a floor," leaving "adequate room for state tort law to operate." *Geier v. American Honda Motor Co*., 529 U.S. 861, 868 (2000). As the Court has instructed, where "[b]y its very terms, in fact, the statute purports only to establish minimum standards" such "language cannot be said, without more, to reveal a design that federal . . . orders should displace all state regulations." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 147-48 (1963).

As the Tenth Circuit observed, the FAA "by its very words . . . leaves in place remedies [that existed] at common law or by statute" *Cleveland* 985 F.2d at 1442-43. It follows that Congress "intended to allow state common law to stand side by side with the system of federal regulations it has developed." *Id.* at 1444. *See also United States v. Varig Airlines*, 467 U.S. 797, 805 (1984) ("FAA has promulgated a comprehensive set of regulations delineating the minimum safety standards with

which the designers and manufacturers of aircraft must comply"). *See also In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 75 (2d Cir. 1980) ("[T]hese regulations do outline minimum standards of safety").

On that basis, the weight of reasoned authority holds that aircraft manufacturers are not "insulated from liability for a defectively designed product by their compliance with certain minimum standards." *Holliday v. Bell Helicopters Textron, Inc*., 747 F. Supp. 1396, 1401 (D. Hawaii 1990). *See also Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 633 (N.D. Tex. 2011) ("After careful consideration of the Third Circuit's reasoned opinion in *Abdullah*, . . . this Court cannot conclude that the Plaintiff's [common law products liability] claims are preempted."); *Ballenger v. Sikorsky Aircraft Corp.*, No. 2:09cv72-MHT, 2011 WL 5245209, *2 (M.D. Ala. Nov. 3, 2011); *Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185, 2006 WL 1084103, at *22 (D.S.D. Apr. 20, 2006).

B. Congress Enacted a Savings Clause that Expressly Preserves State Law Causes of Action, Including State Aviation Products Liability.

As enacted in 1958, the FAA provided: "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. App. § 1506. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). The plain reading of this statutory language is that Congress did not intend to so occupy the

field as to permit no state law causes of action. Congress amended the FAA in 1978 by enacting the Airline Deregulation Act, but, as the district court correctly noted in this case, the savings clause "remained intact." *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d at 434.

To remove any doubt on this point, Congress in the ADA again enacted the express savings clause in slightly altered form: "A remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). As the FAA does not create a federal cause of action for personal injury suits, *see Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir. 2007), this clause can only contemplate tort suits brought under state law. Significantly, the Supreme Court has equated "remedies" in express preemption or savings clauses with common law causes of action, including standards of care. *See Medtronic v. Lohr*, 518 U.S. 470, 487 (1996). The savings clause thus preserves both the plaintiff's products liability cause of action and the standard of care applied there.

Where a statute both prescribes "minimum" standards and contains an express savings clause, as does the FAA, the savings clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by federal regulation intended to provide a floor." *Geier*, 529 U.S. at 870. As the Supreme Court explained, the presence of a savings clause "assumes that there are some significant number of common-law liability cases to save" and "reflects a

congressional determination that occasional non-uniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." *Id*. at 868 & 871.

C. Enactment of GARA Demonstrates That Congress Did Not Intend the FAA to Preempt State Products Liability Claims.

Congress again amended the Federal Aviation Act in 1994 by enacting the General Aviation Revitalization Act, Pub. L. No. 103-298, 108 Stat. 1552 (1994) ("GARA"). GARA contains a statute of repose affecting some product liability actions against manufacturers of small aircraft not engaged in passenger carrying operations at the time of the accident. As to this type of aircraft and operation, "no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component . . . if the accident occurred" more than 18 years after first delivery of the aircraft. 49 U.S.C. § 40101, Note § 2(a)(1) (1994). *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001).

This language plainly demonstrates that Congress never intended to impliedly preempt state law products liability claims under the Federal Aviation Act. If Congress had so intended, the enactment of GARA's limited preemption of a narrow category of State claims would have been superfluous. Rather, the statute's plain text establishes that Congress intended that only the narrow category of products liability

claims identified in GARA be preempted and that all other claims and the standards underlying those claims coexist with the FAA's regulatory authority. *See Sheesley*, 2006 WL 1084103, *22 (enactment of GARA to preempt State tort law in a narrow set of circumstances would have been unnecessary if Congress had already preempted all State tort actions affecting aviation safety when it enacted the FAA).

The House Report accompanying GARA confirms this conclusion:

> The liability of general aviation aircraft manufacturers is governed by tort law. As part of our civil justice system, tort law has evolved over the centuries to reflect societal values and needs. . . . While the specific contours have ebbed and flowed, the public's right to sue for damages is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.
>
> It has also been noted that attempts to preempt State tort law can create procedural and jurisdictional confusion. . . .
>
> For all the foregoing reasons Congress has chosen to tread very carefully when considering proposals such as S. 1458 [GARA] that would preempt State liability law. . . .
>
> Based on the hearing record, the Committee voted to permit, in this exceptional instance, a very limited Federal preemption of State law. . . . And in cases where the statute of repose has not expired, State law will *continue to govern fully, unfettered by Federal interference.*

H.R. Rep. No. 103-525(II), at 6-7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1644, 1647-48 (emphasis added).

GARA, in short, is an explicit Congressional recognition of the continued role of state law products liability standards in ensuring aircraft safety and providing

victim compensation. As the Supreme Court has observed, when Congress narrowly limits a statute's preemptive reach to allow products liability actions for injured persons, it preserves an "additional, and important, layer of . . . protection that complements [federal] regulation." *Wyeth*, 555 U.S. at 579. *See Lucia v. Teledyne Continental Motors*, 173 F. Supp. 2d 1253, 1268-1269 (S.D. Ala. 2001) (GARA must be read as "clarifying the scope and strengthening the role of state tort law applicability to aviation products liability actions"); *Monroe*, 417 F. Supp. 2d at 830 ("GARA's statute of repose implies Congress's recognition of the continuing viability of state law tort claims against aircraft manufacturers.").

The Ninth Circuit in *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009), revisiting its holding in *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), emphasized that its prior opinion had held that the FAA preempts field in only those areas that are "pervasively" regulated by the federal government. The court reversed the dismissal on preemption grounds of a products liability claim by a passenger who fell from an aircraft stair. Chief Judge Kozinski wrote for the Court that in "areas without pervasive regulations" including the design and manufacture of aircraft and components, "the state standard of care remains applicable." *Id*. at 808-12.

AAJ urges this Court to clarify the limits of its holding in *Abdullah* in similar fashion.

IV. THIS COURT SHOULD CONSTRUE ABDULLAH NARROWLY TO AVOID UNDERMINING STATE SOVEREIGN AUTHORITY IN VIOLATION OF THE TENTH AMENDMENT.

This Court should clarify its *Abdullah* holding to avoid an extension of field preemption to products liability based on an authority to declare Pennsylvania law that Congress and the Federal Aviation Administration do not possess and the Constitution does not permit.

This Court in *Abdullah* took a unique approach to reconciling state negligence law and conflicting federal regulation: The Court did not hold that plaintiff's state law cause of action was directly preempted in favor of federal law. Rather, the Court purported to preserve state tort "remedies," while rewriting the state law of products liability to substitute a federal standard for the state law standard of care with regard to aircraft. Thus, this Court stated, although FAA regulations preempt state aviation safety standards, "state and territorial damage remedies still exist for violation of" those federal standards. 181 F.3d at 365. *See also id.* at 372 ("even with federal preemption of standards of care, state tort remedies are preserved"); *id*. at 375 ("[W]e do not find that state or territorial law remedies are preempted, only the standards of care for the safe operation of aircraft.").

At the outset, AAJ notes that the Supreme Court has not made the distinction made by this Court in *Abdullah* between a products liability "remedy" and a products liability standard of care. Indeed, the Court has stated that a statute which "precluded

any 'remedy' under state law would have the identical result as a statute that "preclude[d] all common-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996). By the same token, preservation of state law remedies for harm due to defective products necessarily preserves the state law products liability cause of action, including the substantive standard of care.

Expansion of *Abdullah's* reasoning to state aviation products liability standards of care would yield an untenable result: A plaintiff could bring a products liability cause of action under Pennsylvania law, but the defendant would not be held to the duty developed by Pennsylvania courts. Instead, state courts and federal courts sitting in diversity would be required to apply a federal substantive standard of care. In place of the "unreasonably dangerous" standard as developed by state courts or state legislatures, the court would be obliged to instruct the jury to determine whether the defendant violated standards established by the Federal Aviation Administration in connection with its certification program. In short, Congress and the agency would be responsible for writing state law.

The Founders framed the Constitution to provide for a strong national government, but they did not demote the states to the status of mere subdepartments of the federal government which Congress might "commandeer" to serve policies set in Washington. *New York v. United States*, 505 U.S. 144, 161 (1992) (the federal government may not "commandeer the States by directly compelling them to enact

and enforce a federal regulatory program."); *Printz v. United States*, 521 U.S. 898, 925 (1997) (The "Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

To apply *Abdullah* to aviation product liability actions, however, would preserve the state "remedy" of a products liability lawsuit, but would require the court to rewrite the state substantive standard of care to substitute a federal standard formulated under the FAA. To declare substantive state law is beyond the constitutional authority of Congress. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X

Among the powers not surrendered to the national government but reserved to the States is "the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). For that reason,

> [T]he constitution . . . recognizes and preserves the autonomy and independence of the States . . . in their judicial departments. Supervision over . . . the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference . . ., except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.

Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938).

No delegated power authorizes Congress to prescribe the rule of decision in controversies governed by state law. Setting what has become the cornerstone of our federalism, Justice Brandeis declared:

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law *or a part of the law of torts*.

Id. at 78 (emphasis added). That power, Justice Brandeis added, is "reserved by the Constitution to the several States." *Id*. at 80. *Cf. Bernardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956) (under *Erie*, "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (suggesting that an attempt by Congress to establish "a general federal tort law" would founder on "constitutional shoals.").

Thus, although the "Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. at 166. The Court has explained,

> In *New York* and *Printz*, [*v. United States*, 521 U.S. 898 (1997)] we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.

Reno v. Condon, 528 U.S. 141, 149 (2000). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id*.

The protection of traditional areas of state law from federal intrusion "is not solely a matter of legislative grace," but of constitutional command. *United States v. Morrison*, 529 U.S. 598, 616 (2000). Indeed, the Ninth Circuit specifically rejected the argument, raised by the concurrence in that case, that *Abdullah* supports substituting a federal standard for state products liability standards of care, stating, "The FAA itself makes no mention of federal courts developing a federal common law standard of care for airplane personal injury actions, and '[t]here is no federal general common law."' *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009) (quoting *Erie*, 304 U.S. at 78.

In sum, the field preemption found by this Court under the FAA, which preserves state remedies but replaces the state standard of care with a federal standard cannot extend to aviation products liability actions because Congress does not have the constitutional authority to declare the state substantive law of products liability. Nor can it authorize the Federal Aviation Administration to do so. For that reason, in addition to considerations based on statutory interpretation and legislative history, this Court should clarify that its decision in *Abdullah* is limited to aircraft

operations that are pervasively regulated by the FAA and does not extend to products liability actions where state law provides the rule of decision.

CONCLUSION

For the foregoing reasons, Amicus AAJ urges this Court to reverse the judgment of the district court and in so doing, clarify the scope of implied field preemption under its precedents.

Date: January 14, 2015

Respectfully submitted,

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BAR MEMBERSHIP CERTIFICATE

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

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CERTIFICATES OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14- point type and contains 6,754 words (based on the Microsoft Word 2013 word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using Kapersky Endpoint Security. No computer virus was found.

Date: January 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2015, a true and correct copy of the foregoing was served via this Court's CM/ECF.

Date: January 14, 2015

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