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When Federal Standards Crash and Burn: The Need to Distinguish Aviation Product Liability Claims from In-Air Operations Cases

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**WHEN FEDERAL STANDARDS CRASH AND BURN:
THE NEED TO DISTINGUISH AVIATION PRODUCT
LIABILITY CLAIMS FROM IN-AIR OPERATIONS CASES**

OLIVIA CAHILL*

ABSTRACT

If you are injured in an aviation disaster or lose a loved one in a plane crash, may you seek recovery under state law? Do federal regulations provide adequate opportunities to compensate aviation crash victims? These are questions few people think to ask themselves. A more common query is what entity regulates the more than 16 million flights that occur yearly in the U.S., and how do you know whether the aircraft you fly on are safe?

The tragic Boeing 737 MAX crashes initiated a federal oversight investigation into the Federal Aviation Administration (FAA). Industry whistleblowers revealed severe lapses in the FAA's aircraft certification regime and a culture that promoted unsafe practices in aircraft design and manufacturing. Despite crucial reforms, the ability of uniform federal standards to protect aviation consumers is under fire.

In a majority of U.S. jurisdictions, the Federal Aviation Act and associated federal regulations preempt all state law claims in aviation safety cases. The effect of this approach—few plaintiffs recover in aviation product liability suits, and the families of aviation crash victims go uncompensated. However, in *Sikkelee v. Precision Airmotive Corp.*, the Third Circuit offered a new approach that advocates for field preemption for in-air operations claims but allows recovery under state law for aviation product liability cases. This approach adequately compensates aviation crash

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victims without undermining the FAA's extensive and effective in-air regulatory scheme.

This Comment addresses recent reforms to the FAA's aircraft certification program and the ongoing circuit split regarding federal preemption of aviation safety claims. Further, this Comment seeks to analyze the fundamental differences between in-air operations regulations and rules governing aircraft design and manufacture to explain why different treatment of these claims is warranted. Ultimately, this Comment advocates for the *Sikkelee* methodology to provide ample opportunity for plaintiff recovery without unnecessarily undermining FAA regulatory authority.

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I. INTRODUCTION

IN 1958, CONGRESS PASSED the Federal Aviation Act (FAAct) “to consolidate aviation regulatory authority in a single federal entity.”¹ Prior to the passage of the FAAct and its creation of the Federal Aviation Administration (FAA), more than fifty federal agencies oversaw a piecemeal regulatory system.² However, for the last sixty years, the FAA has promulgated Federal Aviation Regulations, found in Title 14 of the Code of Federal Regulations, to address all aspects of aviation safety procedures, guidelines, and rules.³

The question of “whether the Federal Aviation Regulations (FARs) preempt the entire field of aviation safety,” specifically aviation product liability claims, continues to go unresolved.⁴ The circuit split regarding this issue has only deepened in recent years.⁵ The majority view is that federal regulation occupies the entire field of aviation safety to the exclusion of state law.⁶ The main argument for this approach: the need for one uniform national system of aviation safety regulation.⁷

Specifically, experts argue that the “interstate nature of aviation” requires the industry to conform with an exclusively federal regime.⁸ Scholars assert that the FAA has already met the needs of this “uniquely federal industry” by creating a “comprehensive system that encompasses the entire aviation realm,” including everything “from the development, use, and maintenance of aviation products, to the persons in aviation operations.”⁹ Thus, for many, FAA regulations simply “cannot coexist with supplementation by or variation among local safety standards.”¹⁰ According

¹ *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 684 (3d Cir. 2016) (citing Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (1958)).

² *See* *Sikkelee*, 822 F.3d at 684.

³ *See generally* 14 C.F.R. §§1-1399 (2022).

⁴ Christine Shang, *Recent Developments in Aviation Law*, 87 J. AIR L. & COM. 231, 244 (2022).

⁵ *See* James Dick & Graham Keithley, *Recent Federal Preemption Developments in the Aviation Industry*, 30 AIR & SPACE LAW. 4 (2017); *Sikkelee*, 822 F.3d at 684-708.

⁶ *See* *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-95 (6th Cir. 2005); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325-26 (10th Cir. 2010); *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210 (2d Cir. 2011); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019).

⁷ *See* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973).

⁸ Lauren L. Haertlein & Justin T. Barkowski, *Applying a Federal Standard of Care in Aviation Product Liability Actions*, 82 J. AIR L. & COM. 743, 756 (2017).

⁹ *Id.* at 746, 756-57.

¹⁰ *Id.* at 757.

to the Second Circuit, Congress passed the FAA Act to centralize in a single authority “the power to frame rules for the safe and efficient use of the nation’s airspace.”¹¹ However, the recent 2020 legislative overhaul of the FAA’s aircraft certification process has called into question the ability of federal aviation standards, specifically standards regarding aircraft certification, to protect aviation consumers.¹²

In the last two decades, the FAA has increasingly allowed manufacturers to designate airworthiness (with arguably limited FAA oversight) through the Organization Delegation Authority (ODA) program.¹³ This program was widely accepted until the tragic Boeing 737 MAX crashes of 2018 and 2019.¹⁴ The crashes spurred a Senate investigation that “called into question U.S. aviation safety oversight” and brought to light the dire need for reforms to the ODA program and the FAA aircraft certification scheme at large.¹⁵ As a result, Congress passed the 2020 Aircraft Certification, Safety, and Accountability Act (ACSAA), described as a “historic and comprehensive” legislative reform to increase certification oversight.¹⁶

Although reforms have been promulgated, the apparent need for such drastic legislative overhaul demonstrates that national aircraft certification standards frequently fall short in protecting aviation consumers. Further, since the passage of the ACSAA, the FAA has failed to effectuate many of the law’s crucial reforms.¹⁷ The apparent inadequacy of a uniform federal aircraft certification system and the FAA’s inability to implement critical reform cast a new light on the ongoing circuit split regarding the preemption of aviation safety and aviation products liability claims.

¹¹ *Tweed*, 930 F.3d at 74 (quoting *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224–25 (2d Cir. 2008)).

¹² See MARIA CANTWELL, U.S. SENATE COMM. ON COM., SCI., & TRANSP., AVIATION SAFETY WHISTLEBLOWER REPORT 3–4 (2021); Press Release, U.S. Senate Comm. on Com., Sci., & Transp., Comprehensive Aircraft Certification Reform Legislation Advances to President’s Desk (Dec. 22, 2020), <https://www.commerce.senate.gov/2020/12/comprehensive-aircraft-certification-reform-legislation-reform-legislation-advances-to-president-s-desk> [<https://perma.cc/9B34-GNSQ>].

¹³ CANTWELL, *supra* note 12, at 6.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 3–6.

¹⁶ U.S. S. Comm. on Com. Sci., & Transp., *supra* note 12; see Aircraft Certification Reform and Accountability Act, H.R. 8408, 116th Cong. § 2 (2020) <https://www.commerce.senate.gov/2020/12/comprehensive-aircraft-certification-reform-legislation-advances-to-president-s-desk> [<https://perma.cc/89HR-QQ5G>].

¹⁷ See CANTWELL, *supra* note 12, at 7; see also *Implementation of Aviation Safety Reform: Hearing on H.R. 8408 Before S. Comm. on Com., Sci., & Transp.*, 117th Congress (2021).

In order to adequately protect the rights of aviation crash victims, courts should adopt the Third Circuit's approach in *Sikkelee v. Precision Airmotive Corp.*, which found that the FAA Act does not preempt aviation product liability claims.¹⁸ The *Sikkelee* methodology, which focuses on whether there is pervasive enough federal regulation addressing the particular aviation safety issue, encourages the highest standard of care in aircraft design and manufacture without undermining FAA authority.¹⁹ *Sikkelee* makes a critical distinction between aviation product liability claims and in-air operations claims that should govern future cases.²⁰ Thus, while uniform federal standards should be upheld for in-air operations cases, plaintiffs should be allowed to recover under state law for aviation product liability claims, given the demonstrated inadequacy of federal aircraft certification standards.²¹

To further address these issues, Part II of this Comment will discuss the Senate's FAA oversight investigation and the 2020 Aircraft Certification Reform and Accountability Act. Next, Part III will address the ongoing circuit split regarding federal preemption of aviation safety and aviation product liability claims. Part III will also detail the *Sikkelee* methodology, specifically the fundamental distinction between in-air operations and aviation product liability regulations. Finally, Part IV will further clarify the distinction between in-air operations and aviation product liability cases and argue that such distinction should guide future courts, allowing plaintiffs to recover under state law for design and manufacturing defect claims without undermining the FAA's extensive and effective in-air regulatory scheme.

II. 2020 LEGISLATIVE REFORMS

A. AIRCRAFT CERTIFICATION & THE ODA PROGRAM

Understanding the reforms promulgated by the 2020 Aircraft Certification, Safety, and Accountability Act requires a brief overview of the aircraft certification process and the FAA's Organization Delegation Authority (ODA) Program. Bringing a new aircraft into service requires three certifications: type certification, production certification, and airworthiness certification.²²

¹⁸ See 822 F.3d 680, 708–709 (3d Cir. 2016).

¹⁹ See *id.* at 694–95.

²⁰ See *id.* at 694.

²¹ See *Id.* at 694–96.

²² BART ELLAS, CONG. RSCH. SERV., R46904, LEGISLATIVE REFORMS TO COMMERCIAL AIRCRAFT CERTIFICATION 1–2 (2021).

First, “[t]ype certification is the approval of the [new] design of the aircraft and all component parts.”²³ Officials perform tests and review data to affirm the design’s compliance with regulatory requirements.²⁴

Next, the aircraft or component manufacturer must receive a production certification before building the new aircraft.²⁵ Production certification requires a review of manufacturing facilities and processes to assess whether the facility is capable of safely constructing the type design.²⁶ The final step before operation of the aircraft is an airworthiness certification.²⁷ “Unlike type certification and production certification, a separate airworthiness certification is required” for every individual aircraft before use.²⁸ This process includes extensive “examinations, inspections, and tests to determine that the aircraft conforms to . . . [applicable safety standards].”²⁹

The FAA’s Aircraft Certification Service (AIR) runs this multi-step certification process.³⁰ AIR oversees roughly 1,600 manufacturers.³¹ As of February 12, 2023, fourteen of these manufacturers may issue type certifications (TC) for their own products, and nineteen may issue production certifications (PC) on their own behalf under the ODA program.³² In 2005, the FAA established the ODA program which, pursuant to 49 U.S.C. § 44702(d), allows the FAA to delegate an entity the authority to engage in a range of activities on behalf of the FAA, including issuing certifications for their own products.³³ In other words, with arguably limited

²³ *Certification*, FED. AVIATION ADMIN., https://www.faa.gov/uas/advanced_operations/certification [<https://perma.cc/KD2F-PMZZ>] (last updated July, 20, 2022).

²⁴ ELIAS, *supra* note 22, at 1.

²⁵ *Id.* at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ ELIAS, *supra* note 22, at 1.

³⁰ *Id.* at 4.

³¹ *Id.* at 5.

³² FED. AVIATION ADMIN., FAA ODA DIRECTORY, https://www.faa.gov/other_visit/aviation_industry/designees_delegations/find_designees/oda_directory [<https://perma.cc/MA7H-JV4H>]; *see also Types of Organizational Designation Authorizations*, FED. AVIATION ADMIN., https://www.faa.gov/other_visit/aviation_industry/designees_delegations/delegated_organizations/types [<https://perma.cc/UQ88-6D2X>].

³³ *Delegated Organizations*, FED. AVIATION ADMIN., https://www.faa.gov/other_visit/aviation_industry/designees_delegations/delegated_organizations [<https://perma.cc/KM9A-N258>] (last updated Nov. 15, 2022); 49 U.S.C. § 44702(d); *see* JEFFERY B. GUZZETTI, OFF. OF INSPECTOR GENERAL, U.S. DEP’T TRANSP., AV-2011-136, AUDIT REPORT: FAA NEEDS TO STRENGTHEN ITS RISK ASSESSMENT AND OVERSIGHT APPROACH FOR

FAA oversight, ODA holders are authorized to act with the full authority of the FAA for functions that typically require extensive FAA involvement.³⁴ Notably, Boeing has been, and continues to remain, an aircraft manufacturer with delegated type, production, and airworthiness certification authority through the ODA program.³⁵

In the last two decades, the “FAA’s oversight of the certification process has eroded under the ODA program.”³⁶ As the ODA program has grown in dominance, the FAA “has embraced a ‘systems oversight’ approach instead of directly supervising the engineering work of individual designees.”³⁷ Through increased delegation, the FAA has worked to make efficiency one of its highest priorities.³⁸

B. SENATE INVESTIGATION & 2020 COMMITTEE REPORT

In March 2017, Boeing celebrated the FAA’s certification of its 737 MAX aircraft.³⁹ However, less than two years later, on October 28, 2018, disaster struck when a Lion Air 737 MAX aircraft plunged into the sea thirteen minutes after take-off.⁴⁰ The crash killed all 189 passengers on board.⁴¹ Less than five months later, on March 10, 2019, an Ethiopian Airlines 737 MAX crashed, leaving 157 dead.⁴² Just weeks after the fatal crashes, the U.S. Senate Committee on Commerce, Science, & Transportation (“the Committee”) received reports from multiple whistleblowers “regarding the aircraft safety and certification environment at the FAA and within the industry.”⁴³ These whistleblowers, including frontline FAA officials and industry engineers, revealed serious concerns that if true, threatened the flying public’s safety.⁴⁴ As a

ORGANIZATION DESIGNATION AUTHORIZATION AND RISK-BASED RESOURCE TARGETING PROGRAMS 2 (2011).

³⁴ See GUZZETTI, *supra* note 33.

³⁵ ELIAS, *supra* note 22, at 5; *see also* FAA ODA DIRECTORY, *supra* note 32.

³⁶ CANTWELL, *supra* note 12, at 6.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Eric M. Johnson, *TIMELINE-Boeing’s 737 MAX Crisis*, REUTERS (Nov. 18, 2020, 7:21 AM), <https://www.reuters.com/article/boeing-737max-timeline/timeline-boeings-737-max-crisis-idUSL1N2I417A> [<https://perma.cc/LG5Y-HEMV>].

⁴⁰ CANTWELL, *supra* note 12.

⁴¹ *Id.*

⁴² Johnson, *supra* note 39.

⁴³ CANTWELL, *supra* note 12; STAFF OF S. COMM. ON COM., SCI., & TRANSP., 116TH CONG., COMM. INVESTIGATION REP.: AVIATION SAFETY OVERSIGHT 2 (2020).

⁴⁴ *See* CANTWELL, *supra* note 12, at 3-4; STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43.

result, Senate Committee Chairman Roger Wicker immediately directed his staff to initiate an “oversight investigation.”⁴⁵

Despite initial focus on Boeing, “the scope and breadth of the investigation quickly expanded beyond the first allegations inspired by the 737 MAX tragedies.”⁴⁶ Informed by disclosures from over 50 whistleblowers and over 15,000 pages of relevant documents, the investigation revealed extensive problems in oversight and certification throughout the entirety of the FAA’s certification scheme.⁴⁷ In December 2020, Chairman Wicker officially released the Committee’s Aviation Safety Oversight Report, detailing the “significant . . . lapses in aviation safety oversight and failed leadership in the FAA.”⁴⁸ Among the Senate Committee’s most significant findings include:

- FAA continues to retaliate against whistleblowers instead of welcoming their disclosures in the interest of safety.
-
- During Boeing 737 MAX recertification testing, a Boeing employee inappropriately influenced FAA human factor simulator testing of pilot reaction times involving a Maneuvering Characteristics Augmentation System (MCAS) failure.
-
- The FAA repeatedly permitted Southwest Airlines to continue operating dozens of aircrafts in an unknown airworthiness condition for several years. These flights put millions of passengers at potential risk.
- Southwest Airlines successfully exerts improper influence on the FAA to gain favourable treatment related to regulatory compliance and voluntary reporting programs.
- FAA appears to select managers in the Southwest Airlines Certificate Management Office (CMO) who lack reasonable experience and do not provide effective regulatory compliance or enforcement . . .

⁴⁵ STAFF OF S. COMM. ON COMMERCE, SCIENCE, AND TRANSP., *supra* note 43.

⁴⁶ *Id.*

⁴⁷ See Press Release, U.S. Senate Comm. on Com., Sci., & Transp., Wicker Releases Committee’s FAA Investigation Report (Dec. 18, 2020) [<https://perma.cc/3QNJ-K385>]; STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43.

⁴⁸ Wicker Releases Committee’s FAA Investigation Report, *supra* note 47; Colin Dwyer, *Senate Report Faults FAA and Boeing for Failures in Review of 737 Max*, NPR (Dec. 19, 2020, 1:00 PM), <https://www.npr.org/2020/12/19/948332838/senate-report-faults-faa-and-boeing-for-failures-in-review-of-737-max> [<https://perma.cc/EL9H-686E>].

- FAA managers undermine Aviation Safety Inspectors and in some cases retaliate against them for conducting diligent oversight and making protected safety disclosures.⁴⁹

The findings regarding Boeing and Southwest Airlines are particularly illustrative of the FAA's extensive organization-wide oversight problems.⁵⁰ Over the course of the Senate investigation, "Committee staff [had] received disclosures from multiple whistleblowers alleging coziness between the FAA and Boeing."⁵¹ Such coziness played a significant role in the "lack of diligent oversight by the FAA in general, specifically in the certification of the 737 MAX."⁵² Importantly, "whistleblowers alleged Boeing intentionally misled FAA certification efforts [of the 737 MAX] and downplayed the significance of MCAS."⁵³ The MCAS, Boeing's Maneuvering Characteristics Augmentation System, is an aircraft flight control system software that was ultimately blamed for forcing the 737 MAX aircraft into nosedives that caused the 2018 and 2019 crashes.⁵⁴ Boeing Chief Technical Pilot Mark Forkner "intentionally misled the FAA to expedite 737 MAX certification to the benefit of Boeing."⁵⁵

With respect to Southwest Airlines, the FAA allowed Southwest to operate "dozens of aircrafts in an unknown airworthiness condition" for years, putting millions of passengers at risk.⁵⁶ From 2013 to 2017, Southwest acquired eighty-eight airplanes previously operated by over ten different foreign carriers.⁵⁷ Southwest used its Delegated Airworthiness Representative (DAR) contractors to conduct the required review of the maintenance records for these aircrafts.⁵⁸ Upon review, Southwest, using its DAR authority granted by the FAA, issued all eighty-eight aircrafts airworthiness certificates and implemented them into service.⁵⁹ When an FAA Safety Inspector discovered that 360 major repairs on the aircrafts were missing from Southwest's review, the FAA permitted

⁴⁹ STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43, at 2, 11–13.

⁵⁰ *See id.* at 38–47, 87–90.

⁵¹ *Id.* at 39.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Dwyer, *supra* note 48.

⁵⁵ STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43, at 39.

⁵⁶ *Id.* at 2.

⁵⁷ *Fact Sheet: Southwest Airlines Skyline Aircraft Concerns*, U.S. S. COMM. ON COM., SCI., & TRANSP. (Nov. 11, 2019), <https://www.commerce.senate.gov/2019/11/fact-sheet-southwest-airlines-skyline-aircraft-concerns> [<https://perma.cc/NY5Y-HPYV>]; STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43, at 87.

⁵⁸ STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43, at 87.

⁵⁹ *Id.*

Southwest to continue using these aircrafts in commercial service while they assessed repairs over a two year period.⁶⁰

Further, whistleblowers alleged that the Southwest contractors' initial review of the maintenance records was "alarmingly insufficient."⁶¹ Shockingly, whistleblowers "claim one contractor did not even translate . . . foreign-language documents," transferred over from the original foreign carriers, "to effectively evaluate what repairs and maintenance" the planes had undergone.⁶²

C. 2021 WHISTLEBLOWER REPORT

In December 2021, Commerce Committee Chair Maria Cantwell released the Committee's Aviation Safety Whistleblower Report.⁶³ Although this report was not released to the public until after the promulgation of legislative reforms, its findings help illuminate the systematic FAA regulatory failures.⁶⁴ The allegations include:

- FAA's certification process, including the ODA program, "suffers from undue pressure on line engineers and production staff."⁶⁵ Specifically, engineers working for airlines and manufacturers tasked with preparing aircraft to pass FAA certification tests were required to simultaneously conduct such conformity tests on behalf of the FAA.⁶⁶ Staff and engineers were also subject to increased time constraints, which produced significant quality issues.⁶⁷
- During the certification of the 737 MAX, Boeing line engineers with special technical expertise who raised safety concerns were ignored and side-lined.⁶⁸
- The FAA office in Seattle overseeing the Boeing Organization Designation Authorization (ODA) was critically understaffed.⁶⁹
- Due to regulatory gaps, "FAA certification processes do not require compliance with the latest airworthiness standards."⁷⁰

⁶⁰ U.S. S. COMM. ON COM., SCI., & TRANSP., *supra* note 57.

⁶¹ *Id.*

⁶² *Id.*

⁶³ CANTWELL, *supra* note 12.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.*

⁶⁸ CANTWELL, *supra* note 12.

⁶⁹ *Id.*

⁷⁰ *Id.* at 6.

- The FAA’s once strong oversight of the certification process has “eroded” through increased delegation under the ODA program.⁷¹

D. AIRCRAFT CERTIFICATION, SAFETY, AND ACCOUNTABILITY ACT

As a result of the Senate Committee investigation and bombshell revelations, Congress passed the “historic and comprehensive” Aircraft Certification, Safety, and Accountability Act (ACSAA).⁷² This revolutionary bipartisan legislation dramatically “reform[ed] and strengthen[ed] the . . . [FAA’s] aircraft certification process,” taking unprecedented steps to prevent the use of substandard aircraft in service.⁷³ Enacted into law on December 27, 2020, the legislation “made clear that a course correction in safety oversight was required” to adequately protect the flying public.⁷⁴ The stated purpose of the ACSAA is to:

[I]mprove aviation safety by reforming the Federal Aviation Administration (FAA) aircraft certification process; ensure that the FAA and aircraft manufacturers develop and maintain robust safety cultures; establish enhanced safety requirements related to the design of new aircrafts, engines, propellers, and appliances, as well as enhanced requirements for the FAA’s process[es] for certifying new designs as safe.⁷⁵

The ACSAA mandates that:

- FAA institute extensive changes to the ODA program and oversight of that program;
- [A]ircraft manufacturers implement FAA-approved safety management systems (SMSs) that establish formal organization-wide procedures, practices, and policies to manage safety-related risks;
- FAA review and update requirements and guidance addressing flight deck human factors and the design of aircraft-pilot interfaces; and
- FAA and manufacturers work with international partners to address pilot training standards in the context of aircraft certification and assess operational impacts of new automation technologies.⁷⁶

⁷¹ *Id.*

⁷² U.S. S. Comm. on Com., Sci., & Transp., *supra* note 12; see Aircraft Certification Reform and Accountability Act, Pub. L. No. 116-260, 134 Stat. 2309 (2020) (Division V).

⁷³ U.S. S. Comm. on Com., Sci., & Transp., *supra* note 12.

⁷⁴ CANTWELL, *supra* note 12.

⁷⁵ Aircraft Certification Reform and Accountability Act, H.R. 8408, 116th Cong. (2020).

⁷⁶ ELIAS, *supra* note 22.

In addition, the ACSAA institutes reforms that encourage independent review by ODA unit members and reverses the FAA's policy preference for efficiency over careful holistic review.⁷⁷ Specifically, the ACSAA prohibits "interfere[nce] with the duties of ODA unit members, including exerting undue pressure on unit members or assigning them work not related to certification duties."⁷⁸ Further, the ACSAA repealed important tenants of the FAA Authorization Act of 2018 "that had directed the FAA to streamline aircraft certification processes and reduce delays, in part by fully utilizing its delegation and designation authorities."⁷⁹

E. ACSAA IMPLEMENTATION CONCERNS

While the landmark ACSAA reforms are undoubtedly a major step toward preventing future tragedies by increasing oversight of aircraft certification, the need for such extensive legislative overhaul calls into question the federal government's ability to adequately protect aviation consumers. Further, since the ACSAA's enactment, the Senate has determined that the FAA has failed to effectuate crucial reforms promulgated by the law and has missed statutorily required deadlines for implementation.⁸⁰ This determination was the result of a November 2021 Commerce Committee hearing called to evaluate the FAA's implementation of the ACSAA.⁸¹

Specifically, Chair Maria Cantwell identified at the hearing that the FAA was not prepared on January 1, 2022, to "restore direct supervision and control over . . . delegated authority" because the necessary review processes had not begun in a timely manner.⁸² For example, as of the hearing, the FAA had failed to complete an Independent Expert Panel, statutorily prescribed to determine whether the FAA should formally limit or pull Boeing's ODA authority.⁸³ The ACSAA mandated the panel be convened within

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ CANTWELL, *supra* note 12, at 7; *Implementation of Aviation Safety Reform: Hearing Before S. Comm. on Com., Sci., & Transp.*, 117th Congress (2021) [hereinafter *Hearing on the Implementation of Aviation Safety Reform*] (statement of Sen. Maria Cantwell, Chair, S. Comm. On Com., Sci., & Transp.).

⁸¹ See CANTWELL, *supra* note 12, at 7; *Hearing on the Implementation of Aviation Safety Reform*, *supra* note 80.

⁸² *Hearing on the Implementation of Aviation Safety Reform*, *supra* note 80.

⁸³ See *id.*

30 days of the law's enactment.⁸⁴ Chair Cantwell, addressing FAA representatives, reiterated that the FAA had failed to review critical information to determine whether additional oversight over manufacturers is needed and questioned the FAA's ability to potentially bring the law's true goals to fruition.⁸⁵

Cantwell's Aviation Safety Whistleblower Report, released after the hearing, reiterates these concerns.⁸⁶ The report urges that the FAA "must take immediate action to implement outstanding items under the [ACSAA]" and included a comprehensive list of recommendations to bring reforms to fruition.⁸⁷ For example, according to the report, "a workforce review to determine gaps in staffing levels" was mandated by section 104 of the ACSAA.⁸⁸ However, the FAA missed the September 22, 2021, deadline.⁸⁹

The mere need for a major legislative overhaul of aircraft certification regulations is arguably enough in and of itself to spark concerns about the federal government's ability to maintain aviation standards. The FAA's inability, or potential unwillingness, to implement the crucial reforms only compounds these fears. The ACSAA is beneficial to aviation consumers and the industry at large. However, the need for its enactment and its questionable implementation raises larger concerns about the FAA's aircraft certification scheme and the utility of national standards for aviation safety.

III. THE CIRCUIT SPLIT

The demonstrated inadequacies of uniform federal standards for aircraft certification casts a new light on the ongoing circuit split regarding preemption of aviation safety and aviation product liability claims. The still unresolved question is whether federal standards of care are meant to exclusively govern aviation safety and aviation product liability claims or whether plaintiffs can recover on the basis of state law.⁹⁰ The majority view is that federal standards occupy the entire realm of aviation safety, preempting

⁸⁴ Aircraft Certification Reform and Accountability Act, Pub. L. No. 116-260, § 103(a)(1), 134 Stat. 2309, 2311 (2020).

⁸⁵ *Hearing on the Implementation of Aviation Safety Reform*, *supra* note 80.

⁸⁶ CANTWELL, *supra* note 12, at 7.

⁸⁷ *Id.*

⁸⁸ *Id.* at 8.

⁸⁹ *Id.*

⁹⁰ See *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367–68 (3d Cir. 1999); *Shang*, *supra* note 4, at 244.

any state regulation.⁹¹ Thus, most circuit courts advocate for field preemption, which occurs when Congress so “thoroughly occupies” a certain “legislative field” that all state regulation in the area is precluded.⁹² Conflict preemption, by contrast, arises when compliance with both the federal and state law at issue is impossible.⁹³

Proponents of field preemption argue that one uniform federal system of regulation is necessary given the “interstate nature of aviation” and its status as a “uniquely federal industry.”⁹⁴ Experts argue that in order to “achieve Congress’ safety goals,” FAA regulations cannot withstand “supplementation by or variation among local safety standards.”⁹⁵ According to some scholars:

Without uniform, exclusive federal control, manufacturers could be subject to varying design directives in different states. If a manufacturer does not modify a design in accordance with a state product liability decision, the manufacturer risks further liability in that state. And because manufacturers have little to no control over where their products go after they are sold, manufacturers are potentially exposed to liability in all U.S. jurisdictions, which could mean fifty different design standards.⁹⁶

However, Part II of this Comment clearly outlines the apparent issues regarding federal aircraft certification regulation. If the FAA aircraft certification program required such extensive overhaul, and mandated reforms are not implemented properly, how can we trust that federal standards of care adequately protect aviation consumers? With U.S. airline carriers servicing hundreds of millions of passengers annually, the stakes could not be higher.⁹⁷

⁹¹ See *Abdullah*, 181 F.3d at 367; *Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784, 794–95 (6th Cir. 2005); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1325–26 (10th Cir. 2010); *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2d Cir. 2011); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019).

⁹² *Abdullah*, 181 F.3d at 367.

⁹³ Edward Boula, *Taking Flight or Landing: Implied Field Preemption Under the Federal Aviation Act of 1958* and *Wyeth v. Levine*, 24 DCBA BRIEF 34, 36 (2012).

⁹⁴ Haertlein & Barkowski, *supra* note 8 at 756–57; see *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638–39 (1973).

⁹⁵ Haertlein & Barkowski, *supra* note 8, at 757.

⁹⁶ *Id.*

⁹⁷ *Full-Year 2021 and December 2021 U.S. Airline Traffic Data*, BUREAU OF TRANSP. STAT., U.S. DEP’T OF TRANSP., (Mar. 10, 2022) <https://www.bts.gov/newsroom/full-year-2021-and-december-2021-us-airline-traffic-data#:~:text=U.S.%20airlines%20carried%20674%20million,2019's%20927%20million%20> (“U.S. airlines carried

Given that “the Supreme Court has never addressed negligence or product liability in the context of aviation law,” lower courts lack guidance over such claims.⁹⁸ However, the origins of the majority view can be traced to the Supreme Court’s 1973 opinion in *City of Burbank v. Lockheed Air Terminal*, which provided field preemption analysis in an aviation statutory context.⁹⁹ In *City of Burbank*, a local ordinance prohibited aircraft take-off between 11 p.m. and 7 a.m. to reduce unwanted noise.¹⁰⁰ The Court found that the Federal Aviation Act provides a “scheme of federal regulation [for] aircraft noise” of such a “pervasive nature” to conclude the local ordinance was preempted by federal law.¹⁰¹ Circuit courts often cite *City of Burbank*’s proposition that the Federal Aviation Act “requires a uniform and exclusive system of federal regulation if the congressional objectives underlying [it] are to be fulfilled.”¹⁰²

A. CIRCUIT COURT PRECEDENT

In order to understand why the Third Circuit’s approach in *Sikkelee v. Precision Airmotive Corp.* should be adopted—to adequately protect aviation crash victims and aviation consumers at large—it is important to examine the complexities of the ongoing circuit split.

1. *Second Circuit Precedent*

The Second Circuit is arguably the strongest proponent of field preemption for aviation claims.¹⁰³ The two preeminent Second Circuit cases, *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n* and *Tweed-New Haven Airport Auth. v. Tong*, assert that federal regulation governs aviation safety to the total exclusion of state law.¹⁰⁴

674 million passengers (not seasonally adjusted) in 2021, 82.5% more than in 2020 (369 million, unadjusted). U.S. airline passenger enplanements in 2021 remained 27.3% below pre-pandemic 2019’s 927 million.” [<https://perma.cc/AS9D-ACTW>].

⁹⁸ Boula, *supra* note 93, at 36.

⁹⁹ See Boula, *supra* note 93, at 36; *City of Burbank*, 411 U.S. at 625–40.

¹⁰⁰ 411 U.S. at 625–26.

¹⁰¹ *Id.* at 633.

¹⁰² *Id.* at 639. See, e.g., *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 699 (3d Cir. 2016) (However, the court held that the state laws at issue did not fall within the pre-empted air safety field.).

¹⁰³ See *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2d Cir. 2011); *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73–74 (2d Cir. 2019).

¹⁰⁴ See *Goodspeed*, 634 F.3d at 210; *Tweed*, 930 F.3d at 74.

Goodspeed, decided in 2011, involved a privately owned and operated airport that sought a declaratory judgment against the town's wetlands commission to establish its right to cut trees on airport property without a permit.¹⁰⁵ According to the airport, the trees fell within the definition of "obstructions to air navigation" under the relevant FAA Regulations, "and the otherwise applicable state and local statutory and regulatory framework establishing the [wetland commission's] permit process [was] preempted."¹⁰⁶

The Second Circuit made it clear at the outset that it would "join [its] sister circuits" who have determined "Congress intended to occupy the field of aviation safety."¹⁰⁷ The Second Circuit found such "clear congressional intent to occupy the entire field" based on two considerations.¹⁰⁸ First, the court relied on the language in 49 U.S.C. § 40103(a)(1), which asserts that the U.S. government "has exclusive sovereignty of airspace of the United States."¹⁰⁹ Further, the court reiterated the pervasiveness of the "statutory and regulatory scheme initiated by the [Federal] Aviation Act."¹¹⁰ The Second Circuit next evaluated "at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted."¹¹¹ The Second Circuit does not waiver in its determination that federal regulations occupy the entire field of aviation safety; this analysis merely determines whether the state law enters the realm of regulations Congress sought to preempt.

According to the *Goodspeed* court, the regulations at issue did not "enter the scope of the preempted field in either their purpose or their effect."¹¹² The environmental laws "[did] not refer to aviation or airports," and the private airport at issue was not licensed by the FAA.¹¹³ Importantly, the local statutes did not prohibit tree removal, but merely required a permit to do so.¹¹⁴ Consequently, the environmental regulations did not prohibit the removal of obstructions under the Aviation Act.¹¹⁵ While the

¹⁰⁵ 634 F.3d at 207–08.

¹⁰⁶ *Id.* at 209.

¹⁰⁷ *Id.* at 210.

¹⁰⁸ *Id.* (quoting *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 681 F. Supp. 2d 182, 201 (D. Conn. 2010)).

¹⁰⁹ *Id.* (quoting 49 U.S.C. § 40103(a)(1)).

¹¹⁰ *Id.*

¹¹¹ 634 F.3d at 211 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Goodspeed court found that there was no preemption in the particular instance at hand, the case as a whole stands for the Second Circuit’s strong assertion that federal regulations occupy the entire field of aviation safety.¹¹⁶

In 2019, the Second Circuit reiterated its position from *Goodspeed* in *Tweed*.¹¹⁷ In *Tweed*, a commercial airport, as required by the FAA, prepared a master plan for upgrading its facilities, which included a runway extension.¹¹⁸ Both the FAA and Connecticut approved the plan, but the state later passed the Runway Statute, mandating the runway remain at its current length.¹¹⁹ In determining that the federal law preempted the statute, the Second Circuit first asserted that the Federal Aviation Act was “passed by Congress for the purpose of centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation’s airspace.”¹²⁰

The court then “straightforwardly conclude[d] that the Runway Statute f[ell] well within the scope of the FAA’s preemption because of its direct impact on air safety.”¹²¹ Due to the statute, weight penalties were imposed for aircrafts operating out of the airport, and commercial airlines were prohibited from flying planes at full passenger capacity.¹²² In the court’s view, such a “localized, state-created limitation is incompatible with the FAA’s objective” of providing a uniform system of aviation safety regulation.¹²³

2. *Sixth, Ninth, and Tenth Circuit Precedent*

The aforementioned “sister courts” that have concluded that Congress intended to occupy the entire field of aviation safety to the exclusion of state law are the Sixth, Ninth, and Tenth Circuits.¹²⁴ The three preeminent cases from each of these circuits,

¹¹⁶ *Id.* at 208, 211.

¹¹⁷ *See Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019).

¹¹⁸ *Id.* at 69.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 74 (quoting *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224–25 (2d Cir. 2008)).

¹²¹ *Id.*

¹²² *Id.* at 69, 74.

¹²³ *Id.* (citing *Air Transp. Ass’n*, 520 F.3d at 224).

¹²⁴ *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2d Cir. 2011); *see Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784, 794–95 (6th Cir. 2005); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1325–26 (10th Cir. 2010).

respectively, set out the argument for field preemption in aviation safety and some aviation products liability suits.¹²⁵

In *Greene v. B.F. Goodrich Avionics*, the Sixth Circuit addressed a product liability claim brought by the wife of a pilot killed in a helicopter crash.¹²⁶ The wife alleged that the manufacturer had “defectively designed . . . the vertical gyroscope portion of the helicopter’s navigation system” and “was negligent in failing to warn of its defective product.”¹²⁷ Integral to the failure to warn claim was that the manufacturer “had no central database structure . . . to track malfunctions, to register employee concerns of gyro system weaknesses, or to communicate horizontally between [the manufacturing headquarters, quality assurance, and repair facilities].”¹²⁸ Notably, the wife “did not allege any violations of federal law;” indeed, “the district court found it significant that [FAA] guidelines do not propose or mandate a database like [the wife] suggested [the manufacturer] should maintain.”¹²⁹

In refusing to accept state law aviation standards of care as a potential basis for recovery, the Sixth Circuit relied on two main considerations.¹³⁰ First, the court reiterated the pervasiveness of other circuits in recognizing that “federal law [exclusively] establishes standards of care in aviation safety.”¹³¹ Further, the court felt that legislative history of the Federal Aviation Act sufficiently demonstrated Congress’s intent to occupy the field, as such history noted that “[i]t is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.”¹³²

In *Montalvo v. Spirit Airlines*, the Ninth Circuit similarly held that the Federal Aviation Act preempted a failure to warn claim.¹³³ The *Montalvo* plaintiffs alleged that they developed deep vein thrombosis (DVT) while in flight, claiming that the airline

¹²⁵ See *Greene*, 409 F.3d at 794–95; *Montalvo*, 508 F.3d at 468; *O’Donnell*, 627 F.3d at 1325–26.

¹²⁶ See 409 F.3d at 786–88.

¹²⁷ *Id.* at 786.

¹²⁸ *Id.* at 794.

¹²⁹ *Id.*

¹³⁰ *Id.* at 794–95.

¹³¹ *Id.* at 795 (citing *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3rd Cir. 1999)).

¹³² 409 F.3d at 794.

¹³³ See 508 F.3d 464, 468–76 (9th Cir. 2007).

“failed to warn about the risk of developing DVT” and failed to inform passengers about in-flight mitigation tactics.¹³⁴

For the Ninth Circuit, federal air safety regulations “read in conjunction with the FAA[ct] itself, sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety.”¹³⁵ The court relied on the breadth of federal aviation regulation topics, citing that they “cover, *inter alia*, airworthiness standards, crew certification and medical standards, and aircraft operating requirements.”¹³⁶ Importantly, the court noted that federal regulations “include a general federal standard of care for aircraft operators, requiring that ‘no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.’”¹³⁷ The court then discussed the numerous federal regulations regarding passenger warnings, including the illumination of “no smoking” signs, the use of “fasten seat belt” warnings, and the oral briefings by flight attendants to alert passengers of aircraft safety features.¹³⁸ For the court, the “comprehensiveness of these regulations” demonstrated federal authority “to regulate aviation safety to the exclusion of states.”¹³⁹

In the eyes of the court, “[i]f the FAA did not impliedly preempt state requirements for passenger warnings, each state would be free to require any announcement it wished on all planes arriving in, or departing from, its soil.”¹⁴⁰ The court reasoned that “Congress could not reasonably have intended an airline on a Providence-to-Baltimore-to-Miami run to be subject to certain requirements in . . . Maryland, but not in Rhode Island or Florida.”¹⁴¹ Given that “there is no federal requirement that airlines warn passengers about the risk of developing DVT,” the plaintiffs’ claim “fail[ed] as a matter of law.”¹⁴²

Finally, in *U.S. Airways v. O’Donnell*, the Tenth Circuit held that federal law preempted New Mexico’s regulatory scheme for alcoholic beverage service.¹⁴³ The New Mexico Liquor Control Act

¹³⁴ *Id.* at 469.

¹³⁵ *Id.* at 471.

¹³⁶ *Id.* at 472.

¹³⁷ *Id.* (quoting 14 C.F.R. § 91.13(a) (2003)).

¹³⁸ *Id.* at 472–73 (quoting 14 C.F.R. §§ 25.791(d) (“no smoking” placards), 121.317(d) (“fasten seat belt” sign), 121.327(a)(3) (oral briefings for passenger safety)).

¹³⁹ 508 F.3d at 473.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (quoting *French v. Pan Am Express Inc.*, 869 F.2d 1, 6 (1st Cir. 1989)).

¹⁴² *Id.* at 73–74.

¹⁴³ *See* 627 F.3d 1318, 1321–29 (10th Cir. 2010).

(NMLCA) regulates the sale and service of alcohol in the state and requires airlines serving alcohol to secure a public service license.¹⁴⁴ When a passenger on a U.S. Airways flight into New Mexico killed six people in an alcohol-related accident after deplaning, New Mexico denied U.S. Airways a license to serve alcohol in the state.¹⁴⁵

In enjoining New Mexico's enforcement, the Tenth Circuit reasoned that the FAA had already recognized the safety considerations for alcoholic beverages on planes and had promulgated 14 C.F.R. § 121.575, a specific federal legislative scheme to address such concerns.¹⁴⁶ The court reasoned that “[b]y requiring airlines to comply with NMLCA, New Mexico [sought] to impose additional training requirements on flight attendants.”¹⁴⁷ However, the court found that “federal law [already] extensively regulates flight attendant and crew member training programs and certification requirements” with regard to beverage service, citing several specific federal regulations.¹⁴⁸

A. THE THIRD CIRCUIT'S EVOLUTION AND THE SIKKELEE METHODOLOGY

Ironically, the Third Circuit used to follow the methodology of the above-mentioned courts.¹⁴⁹ *Greene*, *Montalvo*, and *O'Donnell* all mention *Abdullah v. Am. Airlines, Inc.*, a preeminent Third Circuit case on the subject.¹⁵⁰ As discussed below, the Third Circuit eventually narrowed *Abdullah's* broad holding in *Sikkelee v. Precision Airmotive Corp.*, adopting a distinct new methodology.¹⁵¹

In *Abdullah*, the Third Circuit “considered the preemptive effect of federal in-flight seatbelt regulations on state law negligence claims for a flight crew’s failure to warn passengers that their flight would encounter severe turbulence.”¹⁵² While the pilot illuminated the seatbelt sign in accordance with federal regulations, the

¹⁴⁴ *Id.* at 1321–22.

¹⁴⁵ *Id.* at 1322–23.

¹⁴⁶ *Id.* at 1325 (citing 14 C.F.R. § 121.575).

¹⁴⁷ *Id.* at 1328.

¹⁴⁸ *Id.* at 1328–29.

¹⁴⁹ *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 370–371 (3rd Cir. 1999).

¹⁵⁰ *See Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784, 794–95 (6th Cir. 2005); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1327 (10th Cir. 2010).

¹⁵¹ *See* 822 F.3d 680, 688–690 (3d Cir. 2016).

¹⁵² *Id.* at 688 (citing *Abdullah*, 181 F.3d at 365).

crew did not alert passengers of the upcoming turbulence.¹⁵³ At trial, injured passengers won a large judgment against American Airlines using “territorial common law to establish the standards of care” for pilots and flight attendants.¹⁵⁴

On appeal, the Third Circuit held that federal law preempted the state law standard of care.¹⁵⁵ The court reasoned that the FAA “has implemented a comprehensive system of rules and regulations” to promote in-flight safety “by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.”¹⁵⁶ These federal regulations, in the eyes of the court, “establish complete and thorough safety standards for . . . air transportation . . . that are not subject to supplementation by . . . other jurisdictions.”¹⁵⁷ In justifying its decision, the *Abdullah* court relied on a string of cases that found federal preemption in “discrete, safety-related matters, such as airspace management, flight operations, and aviation noise.”¹⁵⁸ For example, the court relied on *City of Burbank*, which addressed aircraft noise and *French v. Pan Am Express Inc.*, which involved pilot regulation.¹⁵⁹ The court also relied on *British Airways Bd. v. Port Authority of New York*, which addressed the FAA’s exclusive “control of flights through navigable airspace.”¹⁶⁰

The *Abdullah* holding was also based on the general federal standard of care for pilots and crew operating an aircraft found in 14 C.F.R. § 91.13(a), which provides that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”¹⁶¹ Thus, in determining whether there is a breach of the standard of care in an aviation negligence action, *Abdullah* requires courts to examine the applicable specific federal standard, such as the requirement to turn on the seatbelt sign in the event of turbulence, and this overarching general federal standard of care.¹⁶²

¹⁵³ *Abdullah*, 181 F.3d at 365.

¹⁵⁴ *Id.* at 366.

¹⁵⁵ *Id.* at 372.

¹⁵⁶ *Id.* at 369.

¹⁵⁷ *Id.* at 365.

¹⁵⁸ *Id.* at 371.

¹⁵⁹ *Abdullah*, 181 F.3d at 369–71 (citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *French v. Pan Am Express Inc.*, 869 F.2d 1, 6–7 (1st Cir. 1989)).

¹⁶⁰ *Id.* at 370 (quoting 558 F.2d 75, 84 (2d Cir. 1997)).

¹⁶¹ *Id.* at 371.

¹⁶² *See id.* at 371–72.

1. *Sikkelee: A New Age of Analysis*

Seventeen years later, in *Sikkelee*, the Third Circuit narrowed *Abdullah's* broad holding, finding a crucial distinction between in-air operations claims, at issue in *Abdullah*, and aircraft manufacture and design claims, at issue in *Sikkelee*.¹⁶³ This critical distinction should govern the approach of all future cases, given the demonstrated inadequacies of federal aircraft certification standards. In other words, while uniform federal standards should be upheld in in-air operations cases, plaintiffs should be allowed to recover on the basis of state law for aviation product design and manufacture claims.

In *Sikkelee*, the Third Circuit analyzed the extent to which federal aviation law preempts state product liability claims against the backdrop of *Abdullah*.¹⁶⁴ The *Sikkelee* court ultimately found that “[t]he field of aviation safety . . . identified as preempted in *Abdullah* does not include product manufacture and design” claims.¹⁶⁵ For the *Sikkelee* court, “the Federal Aviation Act and its implementing regulations do not indicate a clear and manifest congressional intent to preempt state law products liability claims” because “Congress has not created a federal standard of care for persons injured by defective airplanes” and, categorically, “the type certification process cannot . . . displace the need for compliance in this context with state standards of care.”¹⁶⁶

The *Sikkelee* case involved manufacturing and design defects in the engine of a Cessna 172N aircraft: “David Sikkelee was piloting the aircraft when it crashed shortly after takeoff.”¹⁶⁷ Sikkelee later died from severe injuries and burns he suffered as a result of the crash.¹⁶⁸ Sikkelee’s wife asserted state law defective design and failure to warn claims, contending that the design of the engine “allowed raw fuel to leak out of the carburetor into the engine,” causing the crash.¹⁶⁹ The lower court granted the defendants’ motion for judgment on the pleadings, holding that Sikkelee’s claims, “premised on state law standards of care, fell within the preempted ‘field of air safety’ described in *Abdullah*.”¹⁷⁰

¹⁶³ See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 688–90 (3d Cir. 2016).

¹⁶⁴ *Id.* at 684–89.

¹⁶⁵ *Id.* at 709.

¹⁶⁶ *Id.* at 696.

¹⁶⁷ *Id.* at 685.

¹⁶⁸ *Id.*

¹⁶⁹ *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 685–86.

¹⁷⁰ *Id.* (quoting *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999)) (citing *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 435 (M.D. Pa. 2014)).

The *Sikkelee* court narrowed *Abdullah's* broad holding, finding that federal preemption only applies to in-air operations claims, not aviation product liability suits.¹⁷¹ The Third Circuit asserted: “[A]lthough we stated in broad terms that the Federal Aviation Act preempted the ‘field of aviation safety,’ . . . the regulations and decisions we discussed in *Abdullah* all related to in-air operations.”¹⁷² All of the cases relied on in *Abdullah* “found federal preemption with regard to discrete matters of in-flight operations,” not aviation product liability claims.¹⁷³ The *Sikkelee* court cited *Abdullah's* use of *City of Burbank* (aircraft noise), *French* (pilot regulation), and *British Airways Bd.* (control of flights through airspace).¹⁷⁴ Further, the Third Circuit reasoned that the federal “catch-all standard of care” relied on in *Abdullah* “applied only to operating, not designing or manufacturing, an aircraft.”¹⁷⁵ 14 C.F.R. § 91.13(a) prohibits “operat[ing] an aircraft in a careless or reckless manner,” and the *Sikkelee* court carefully noted that, per 14 C.F.R. § 1.1, “[o]perate with respect to aircraft, means use, cause to use or authorize to use [an] aircraft, for the purpose . . . of air navigation including the piloting of aircraft.”¹⁷⁶

As noted in *Sikkelee*, the roots of this crucial distinction between in-air operations cases and product liability claims began in *Elassaad v. Indep. Air, Inc.*, a case that clarified *Abdullah's* limits.¹⁷⁷ In *Elassaad*, the Third Circuit “clarified that a flight crew’s oversight of the disembarkation of passengers after an airplane came to a complete stop at its destination was not within the preempted field of aviation safety.”¹⁷⁸ According to the *Sikkelee* court, “[b]y drawing a line between what happens upon disembarking, we made clear that the field of aviation safety described in *Abdullah* was limited to in-air operations.”¹⁷⁹ As explained in *Sikkelee*, the *Elassaad* court reiterated that the Federal Aviation Act’s “safety provisions . . . [are] principally concerned with safety in connection with operations associated with flight.”¹⁸⁰

¹⁷¹ *See id.* at 688–90.

¹⁷² *Id.* at 689 (quoting *Abdullah*, 181 F.3d at 371).

¹⁷³ *Id.* at 688–89.

¹⁷⁴ *Id.* (first citing *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); then citing *French v. Pan Am Express Inc.*, 869 F.2d 1, 6–7 (1st Cir. 1989); and then citing *British Airways Bd. v. Port Auth., of N.Y.*, F.2d 75, 84 (2d Cir. 1997)).

¹⁷⁵ *Id.* at 689 (citing 14 C.F.R. §§ 1.1, 91.13(a)).

¹⁷⁶ *Id.* (quoting 14 C.F.R. §§ 1.1, 91.13(a)) (emphasis added).

¹⁷⁷ *See id.*; 613 F.3d 119, 121 (3d Cir. 2010).

¹⁷⁸ *Sikkelee*, 822 F.3d at 689; *see Elassaad*, 613 F.3d at 121.

¹⁷⁹ *Sikkelee*, 822 F.3d at 689 (citing *Elassaad*, 613 F.3d at 127–131).

¹⁸⁰ *Elassaad*, 613 F.3d at 128 (emphasis added).

2. *Fundamental Differences: In-Air Operations and Product Liability Regulations*

After concluding that *Abdullah* was not controlling, the *Sikkelee* court turned to “whether Congress intended the Federal Aviation Act to preempt products liability claims.”¹⁸¹ The answer to this question forms the discrete *Sikkelee* methodology, which, by focusing on the pervasiveness of the regulations at issue, outlines the critical distinction between in-air operations cases and aviation product liability claims.¹⁸² The *Sikkelee* court ultimately found “three fundamental differences” between the in-air operation regulations in *Abdullah* and aircraft design regulations that explained why “neither the Federal Aviation Act nor the associated FAA regulations ‘were [ever] intended to create federal standards of care’ for manufacturing and design defects claims.”¹⁸³

The first critical distinction is that while the federal regulations governing in-flight operations “prescribe” distinct substantive rules to address aircraft operation, manufacturing and design regulations only outline “procedural requirements.”¹⁸⁴ Federal in-flight operations regulations delineate the exact conduct and actions of pilots, crew members, and all standards involved in aircraft management.¹⁸⁵ By contrast, federal manufacturing and design regulations merely provide procedural mechanisms for “issuing and changing—(i) [aircraft] [d]esign approvals; (ii) [p]roduction approvals; (iii) [a]irworthiness certificates; and (iv) [a]irworthiness approvals.”¹⁸⁶ Importantly, “these regulations do not purport to govern the manufacture and design of aircraft per se or establish a general standard of care.”¹⁸⁷ Rather, they merely establish the mechanisms “to obtain approvals and certificates from the FAA” and, “in the context of those procedures, . . . ‘prescribe[] airworthiness standards for the issu[ance] of type certificates.’”¹⁸⁸

The Third Circuit conceded that the issuance of a type certificate as a threshold requirement would, to some extent, reflect “nationwide standards for the manufacture and design of such

¹⁸¹ *Sikkelee*, 822 F.3d at 690.

¹⁸² *See id.* at 694–96.

¹⁸³ *Id.* at 694–95 (quoting *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 437 n. 4 (M.D. Pa. 2014)).

¹⁸⁴ *Id.* at 694 (quoting 14 C.F.R. §§ 91.1(a), 21.1(a)).

¹⁸⁵ *Id.* (citing 14 C.F.R. §§ 91.1(a), 121.1(e)).

¹⁸⁶ *Sikkelee*, 822 F.3d at 694 (quoting 14 C.F.R. § 21.1(a)).

¹⁸⁷ *Id.* (citing 14 C.F.R. § 21).

¹⁸⁸ *Id.* (alteration in original).

parts.”¹⁸⁹ However, “the 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 [notion] that the acquisition of a type certificate is merely a baseline requirement.”¹⁹⁰ Thus, “in the [design and] manufacturing context, the statutory language indicating that these are ‘minimum standards,’ . . . means what it says.”¹⁹¹

The second fundamental difference is the lack of regulations for the issuance of type certificates that can be translated into a standard of care in product liability claims.¹⁹² The standards required to receive a type certificate do not provide the same type of “comprehensive system of rules and regulations” that the Third Circuit “determined existed in *Abdullah* to promote in-flight safety ‘by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.’”¹⁹³ Unlike in-flight regulations, certification requirements are “discrete, technical specifications.”¹⁹⁴ Such specifications may just “simply requir[e] that a given component part work properly, *e.g.*, 14 C.F.R. § 33.71(a) (providing that a lubrication system ‘must function properly in the flight altitudes and atmospheric conditions in which an aircraft is expected to operate’).”¹⁹⁵

The regulation governing the defective part at issue in *Sikkelee* demonstrates the technical yet vague nature of these standards.¹⁹⁶ The regulations required that the engine “be designed and constructed to supply *an appropriate mixture* of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.”¹⁹⁷ Ultimately, according to the Third Circuit, “the highly technical and part-specific nature of these regulations makes them exceedingly difficult to translate into a standard of care that can be applied to a tort claim.”¹⁹⁸

Finally, unlike manufacture and design regulations, in-flight operations are subject to the federal catch-all standard of care that can be “used to evaluate conduct not specifically prescribed

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citing 49.U.S.C. § 44701).

¹⁹² *Sikkelee*, 822 F.3d at 694–95.

¹⁹³ *Id.* at 695 (quoting *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369 (3rd Cir. 1999)).

¹⁹⁴ *Id.* at 694–95.

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 695 (citing 14 C.F.R. § 33.35(a)).

¹⁹⁷ *Id.* (quoting 14 C.F.R. § 33.35(a)) (alteration in original).

¹⁹⁸ *Sikkelee*, 822 F.3d at 695.

by the regulations.”¹⁹⁹ 14 C.F.R. § 91.13(a)’s standard prohibiting the operation of an aircraft “in a careless or reckless manner” is “sound[ed] in common tort law, making it appropriate and practical to incorporate as a federal standard of care in state law claims concerning in-flight operations.”²⁰⁰ The *Sikkelee* court reasoned that such a comprehensive standard for in-air claims “render[s] existing state law standards of care duplicative (if not conflicting with them outright).”²⁰¹ By contrast, there is no analogous provision for aircraft design, manufacture, and certification claims.²⁰²

For the *Sikkelee* court these three fundamental differences between in-air operations and aviation product liability regulations make it clear that Congress did not ever intend the Federal Aviation Act or associated FAA regulations “to create federal standards of care’ for manufacturing and design defects claims.”²⁰³ The District Court wrongly assumed “that because there is no federal standard of care for these claims[,] . . . the issuance of a type certificate must both establish and satisfy that standard.”²⁰⁴ According to the *Sikkelee* court, even though “Congress has not created a federal standard of care for persons injured by defective airplanes,” the “type certification process cannot as a categorical matter displace the need for compliance in this context with state standards of care.”²⁰⁵ Thus, the Federal Aviation Act does not preempt state law product liability claims.²⁰⁶

IV. THE NEED TO DISTINGUISH BETWEEN IN-AIR OPERATIONS CASES AND AVIATION DESIGN AND MANUFACTURING CLAIMS

A. SIKKELEE’S IMPORTANCE TODAY

The Supreme Court denied a petition for certiorari review of *Sikkelee*, leaving open the question of whether federal regulations preempt state law claims in the aviation safety realm.²⁰⁷ As the Circuit split persists, *Sikkelee*’s methodology should govern

¹⁹⁹ *Id.* (citing 14 C.F.R. § 91.13(a)).

²⁰⁰ *Id.* (quoting 14 C.F.R. § 91.13(a)) (citing *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 371, 374 (3rd Cir. 1999)).

²⁰¹ *Id.* (citing *Abdullah*, 181 F.3d at 371, 374).

²⁰² *See id.*

²⁰³ *Id.* (citation omitted).

²⁰⁴ *Sikkelee*, 822 F.3d at 695.

²⁰⁵ *Id.* at 696.

²⁰⁶ *See id.*

²⁰⁷ *See AVCO Corp. v. Sikkelee*, 822 F.3d 680 (3d Cir. 2016), *cert. denied*, 580 U.S. 1014 (2016).

future cases, given the demonstrated inadequacies of federal aircraft certification regulations in today's climate. While uniform federal standards should be upheld for in-air operations cases, plaintiffs should be allowed to recover under state law for aviation product liability claims. This approach will serve to adequately protect and compensate aviation disaster victims, without undermining the FAA's extensive in-air regulatory scheme.

In justifying the holding, the *Sikkelee* court argued that its methodology “avoids interpreting the Federal Aviation Act in a way that would have ‘the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation.’”²⁰⁸ The *Sikkelee* court has thus, in essence, foreshadowed the conclusion of this Comment. Congress recognized, as evident by the passage of the Aircraft Certification, Safety, and Accountability Act, that aircraft certification desperately needed stricter regulation.²⁰⁹ Three hundred forty-six people died in the Boeing 737 MAX crashes, and the Senate determined that flaws in the FAA's aircraft certification process put millions more consumers at risk.²¹⁰ As understood by the *Sikkelee* court, when an area is in such desperate need of reform, and existing federal regulations provide no framework that can be translated into a tort law standard, victims must be able to recover on the basis of state law.²¹¹

Congress has clearly failed to promulgate an articulable federal standard of care for individuals injured by defective aircrafts.²¹² In response, many argue that the issuance of a type certification itself should serve as an adequate standard to evaluate aviation product liability claims. However, as discussed by the *Sikkelee* court, FAA approval via the type certification process “provides no assurance of safety because the FAA delegates ninety percent of its certification activities to private individuals and organizations.”²¹³ Recognizing the appellant's policy argument, *Sikkelee* identified the most pervasive and dangerous issue outlined by the Senate's 2020 Aviation Oversight Report: dramatically increased delegation and corruption under the FAA's Organization Delegation

²⁰⁸ *Sikkelee*, 822 F.3d at 695 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996)).

²⁰⁹ See generally Pub. L. No. 116-260, 134 Stat. 2309 (2020) (Division V).

²¹⁰ Johnson, *supra* note 39; STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43.

²¹¹ See *Sikkelee*, 822 F.3d at 694–96.

²¹² See *id.* at 696.

²¹³ *Id.* at 708.

Authority (ODA) Program.²¹⁴ Part II of this Comment fully details the disastrous oversight failures inherent in the FAA's ODA program, the most obvious being the certification of the Boeing 737 MAX under such delegation.²¹⁵

As the FAA has continued to delegate its certification authority away, making efficiency a number one priority, the granting of an FAA type certification means less and less in terms of the safety of aircraft design and manufacture.²¹⁶ Even worse, crucial reforms to this program have yet to be implemented.²¹⁷ Thus, not only do type certification standards provide technical and vague qualifications that do not translate into tort law standards of care, but it can be argued, "the type certificat[ion] [process] [itself] amounts to an unreliable self-policing regime."²¹⁸ Given the questionable reliability of a type certification and its inability to serve as a recovery standard, the families of victims killed in aviation disasters caused by design or manufacturing defects must be given the opportunity to recover under state law.²¹⁹

As discussed, opponents argue that "allowing state tort law to govern design defect claims will open up aviation manufacturers to tremendous potential liability and the unpredictability of non-uniform standards."²²⁰ It is undeniable that holding a defendant liable for a design or manufacturing defect in an aircraft that has received an FAA type, product, or airworthiness certification "is in some tension with Congress's interest in national uniformity in safety standards with oversight by a single federal agency."²²¹ This result is unavoidable. However, it can be argued that in not promulgating a federal standard of care for aviation product liability claims, "Congress struck a balance between protecting these interests in uniformity and permitting States to compensate accident victims."²²² Another argument may provide less deference to Congress on this point. Congress has failed to take into account the need to compensate aviation disaster victims. Thus, no federal standard of care exists to provide recovery for the deceased's loved ones. Further, Congress has allowed a regulatory scheme

²¹⁴ See *id.*; STAFF OF S. COMM. ON COM., SCI., & TRANSP., *supra* note 43, at 2, 11–13.

²¹⁵ See CANTWELL, *supra* note 12, at 6.

²¹⁶ *Id.*

²¹⁷ See *Hearing on the Implementation of Aviation Safety Reform*, *supra* note 80.

²¹⁸ See Sikkelee, 822 F.3d at 708.

²¹⁹ *Id.* at 707.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

where type certifications cannot guarantee safety. As a result of these deficiencies, there is no other option than to allow recovery under state law.

B. THE UTILITY OF UNIFORM REGULATIONS FOR IN-AIR OPERATIONS

What about the FAA's extensive in-air operations regulatory scheme?²²³ As laid out by the *Sikkelee* methodology, in-air operations regulations do not suffer from the same fatal issues as regulations governing aviation product liability claims.²²⁴ Rules governing in-flight operations provide substantive, rather than procedural, rules to govern all aspects of crew conduct and aircraft management.²²⁵ Further, where specific regulations fall short in offering a standard of care, the federal catch-all standard, sounded in tort law, can step in to provide recovery.²²⁶ As a result, field preemption should apply to these cases, as state supplementation is not necessary to provide relief.

The genius of the *Sikkelee* methodology is that its approach will not undermine the FAA's extensive and effective in-air regulatory scheme. Aircraft certification is undoubtedly an area where FAA regulations have fallen short in protecting aviation consumers.²²⁷ However, this is not to say that FAA regulations in other areas are not extremely successful and well-crafted. As recognized by the *Sikkelee* court, in-air operations standards constitute a "comprehensive system of rules and regulations" that "promote in-flight safety 'by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.'"²²⁸ Although *Sikkelee* advocates against uniform national standards for product liability claims, the methodology understands that there is no need to discard uniform federal standards when they properly protect aviation consumers.²²⁹

A review of above-discussed case law helps explain why national standards should be upheld for in-flight operations cases. *Abdullah*,

²²³ See, e.g., 14 C.F.R. §§ 91.13(a) (prohibits operation of aircraft "in a careless or reckless manner"), 121.575, 1.1 (general definitions), 91.1(a) (general operations), 121.1(e) (air carriers), 121.317(b), (d) ("Fasten Seat Belt While Seated" sign), 25.791(d) ("No Smoking" sign).

²²⁴ See 822 F.3d at 694–95.

²²⁵ See *id.* at 694.

²²⁶ See *id.* at 695–696 (citing 14 C.F.R. § 91.13(a)).

²²⁷ See CANTWELL, *supra* note 12.

²²⁸ 822 F.3d at 694 (quoting *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369 (3d Cir. 1999)).

²²⁹ See *id.* at 694–96.

of course, serves as the prime example of an in-air operations case.²³⁰ In *Abdullah*, the federal regulations regarding pilot and crew duties were comprehensive enough to provide a standard of care.²³¹ The plaintiffs could then use this federal standard of care to recover a state law damages remedy.²³² In other words, although it was improper to allow “territorial common law to establish the standards of care,” a finding of preemption did not prohibit the possibility of recovery.²³³ According to the *Abdullah* court, “[e]ven though we have found federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violations of those standards.”²³⁴ In the eyes of the court, the language of the Federal Aviation Act made it “evident” that “Congress found state damage remedies to be compatible with federal aviation standards.”²³⁵ Therefore, insurance proceeds were available as a remedy to plaintiffs when a federal standard had been violated.²³⁶

Ultimately, the *Abdullah* court was correct in highlighting that “there is nothing inherently inconsistent in the proposition that even if the federal government has entirely occupied the field of regulating an activity a state may simultaneously grant damages for violation of such regulations.”²³⁷ For in-air operations cases, the extensive federal regulations can serve as a standard of care that ultimately promotes a state law damages remedy.²³⁸

Examinations of *Montalvo* and *O'Donnell* provide another perspective on this point.²³⁹ Both *Montalvo* and *O'Donnell* serve as examples of in-air operations cases.²⁴⁰ In *Montalvo*, the court reiterated the breadth of federal regulations regarding required passenger warnings and the general federal standard of care.²⁴¹ While the plaintiffs ultimately were not able to recover on their claim for failure to warn of developing DVT, *Montalvo* demonstrates *Sikkelee's*

²³⁰ See *Abdullah*, 181 F.3d at 367–68.

²³¹ See *id.* at 369, 371.

²³² See *id.* at 376.

²³³ See *id.* at 364–65.

²³⁴ *Id.* at 375.

²³⁵ *Id.*

²³⁶ See *id.* at 376.

²³⁷ *Id.* (quoting *Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630, 634–35 (Cal. 1984)).

²³⁸ See *id.*

²³⁹ See *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468–71 (9th Cir. 2007); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1321–29 (10th Cir. 2010).

²⁴⁰ See 508 F.3d at 468–73; 627 F.3d at 1321–29.

²⁴¹ See 508 F.3d at 472–73 (citing 14 C.F.R. § 91.13(a)).

key points regarding in-flight regulations.²⁴² Federal in-flight regulations, unlike aviation design and manufacture guidelines, provide rules that can be easily translated into tort law standards of care.²⁴³ For instance, had the airline violated 14 C.F.R. § 121.317(b) and not illuminated the “Fasten Seat Belt” sign during turbulence, for instance, the plaintiffs could have easily achieved recovery.²⁴⁴

It is undoubtedly unfortunate that the plaintiffs in this case could not recover for the development of DVT in-flight.²⁴⁵ In a perfect world, plaintiff recovery in aviation safety cases would be enhanced in every sense. However, the buck must stop somewhere. The *Sikkelee* methodology is so useful because it strikes a balance between adequately protecting and compensating aviation disaster victims without undermining the FAA’s extensive in-air regulatory scheme.²⁴⁶ The FAA has promulgated profuse regulations that promote recovery for plaintiffs in in-air operations cases.²⁴⁷ Such a regime should be respected. Although plaintiffs will not always be able to recover when field preemption is applied to in-air operations claims, it would not be feasible to disregard preemption in all aviation cases. The *Sikkelee* view is already the minority perspective, and as stated, strikes the proper balance between uniformity and recovery.²⁴⁸

Lastly, *O’Donnell* demonstrates that in many cases, state regulations in the in-air operations realm can be duplicative and unnecessary for plaintiff recovery.²⁴⁹ *O’Donnell* made clear that, when it came to safety concerns regarding in-flight alcoholic beverage service, the federal government had promulgated extensive regulations pursuant to 14 C.F.R. § 121.575.²⁵⁰ State regulators wanted to impose crew certification and training requirements, but the FAA had already fully addressed such needs.²⁵¹ Had a plaintiff been injured due to crew member non-compliance with such FAA regulations, an opportunity to recover under federal law would have certainly been available. Thus, state regulation for this safety

²⁴² See *id.* at 468–76.

²⁴³ See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 694–96 (3d Cir. 2016).

²⁴⁴ See *id.*; 14 C.F.R. § 121.317(b).

²⁴⁵ See *Montalvo*, 508 F.3d at 468–76.

²⁴⁶ See *Sikkelee*, 822 F.3d at 694–96.

²⁴⁷ See, e.g., 14 C.F.R. §§ 91.13(a) (prohibits operation of aircraft “in a careless or reckless manner”), 121.575, 1.1 (general definitions), 91.1(a) (general operations), 121.1(e) (air carriers), 121.317(b), (d) (“Fasten Seat Belt While Seated” sign), 25.791(d) (“No Smoking” sign).

²⁴⁸ See *Sikkelee*, 822 F.3d at 696.

²⁴⁹ See *U.S. Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1321–29 (10th Cir. 2010).

²⁵⁰ *Id.* at 1325 (citing 14 C.F.R. § 121.575).

²⁵¹ *Id.* at 1328–29.

issue would have been extraneous.²⁵² Ultimately, *Sikkelee* was justified in understanding the utility of uniform national standards for in-air operations cases.²⁵³

C. PROMOTING RECOVERY IN AVIATION PRODUCT LIABILITY SUITS

Finally, a review of above-mentioned cases and an analysis of more recent case law demonstrates why federal preemption should not apply to aviation product liability claims.

Greene exemplifies precisely why the *Sikkelee* methodology encourages the highest standards of care in aviation safety.²⁵⁴ In *Greene*, the wife of the deceased pilot could not recover for her husband's death because federal standards did not contemplate the kind of central database that could have tracked malfunctions and prevented the crash.²⁵⁵ In rejecting the possibility of state law as a standard for recovery, the *Greene* court notably relied on *Abdullah*, failing to make *Sikkelee*'s critical distinction between in-air operations and products liability cases.²⁵⁶ In a dissent as to the failure to warn claim, one Sixth Circuit justice recognized this fact, arguing: "[t]o the extent that we choose to rely on *Abdullah* as persuasive authority, I believe the facts of the instant case are readily distinguishable."²⁵⁷

The dissenting justice put forth the *Sikkelee* methodology, writing:

Abdullah can only truly be relied on for the limited proposition that a State's standard of care for aviation personnel is preempted by the [Federal Aviation Act]. The situation before us is not like that in *Abdullah*, because in this case, there are no federal regulations which lay out the exact standard of care. Therefore, I would not expand the proposition in *Abdullah* to apply to commercial enterprises that manufacture aviation equipment I cannot assume that the [Federal Aviation Act] implicitly preempts any State or common law-imposed duties here. Admittedly, the FAA is involved in overseeing the quality control of certain aviation equipment; however, neither the appellant nor the majority have proffered any reason why a State's more stringent duty of care in the failure to warn context could not supplement rather than frustrate the [Federal Aviation Act].²⁵⁸

²⁵² *See id.* at 1329.

²⁵³ *See Sikkelee*, 822 F.3d at 694–96.

²⁵⁴ *See Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784, 786–88 (6th Cir. 2005).

²⁵⁵ *See id.* at 787, 794–95.

²⁵⁶ *See id.* at 794–95 (citing *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369, 371 (3d Cir. 1999)).

²⁵⁷ *Id.* at 798 (Cole, J., dissenting).

²⁵⁸ *Id.*

Eleven years in advance, this dissent foreshadowed *Sikkelee*'s precise reasoning.²⁵⁹ Had such an approach actually been adopted in *Greene*, the wife could have had an opportunity to recover for her husband's death.²⁶⁰ As argued above, what is the harm in considering a "more stringent duty of care" when "there are no federal regulations which lay out the exact standard of care?"²⁶¹ Further, when federal certification regulations have fallen short in protecting aviation consumers, the interest in uniformity is significantly diminished. Ultimately, rejecting preemption in this context will only serve to adequately compensate aviation crash victims and their families, who rightly deserve recovery.

A 2017 Washington Supreme Court case, *Estate of Becker v. Avco Corp.*, is one of the only cases to ever actually adopt *Sikkelee*'s reasoning.²⁶² The *Becker* case involved a single-propeller airplane crash that killed the pilot and two passengers.²⁶³ The component manufacturer allegedly created an unreasonably dangerous condition in the engine carburetor, which caused the aircraft to stall.²⁶⁴ Directly analogizing the case to *Sikkelee*, the court held that federal law does not preempt state law aviation product liability claims.²⁶⁵

The lower court found preemption given that federal regulations "pervasively regulated the area of the 'engine's fuel system,'" citing twelve federal guidelines that focused on engine "performance and safety standards."²⁶⁶ However, the *Becker* court explained that these federal rules "do not attempt to regulate aircraft manufacture or design in and of itself."²⁶⁷ Citing *Sikkelee*, the court reiterated that federal regulations in the manufacture context "were not designed to supplant state standards of care."²⁶⁸ Rather, federal regulations are merely "minimum standards" and "not a ceiling limiting state tort remedies."²⁶⁹

²⁵⁹ See *id.*; *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 694–96 (3d Cir. 2016).

²⁶⁰ See *Greene*, 409 F.3d at 797–98 (Cole, J., dissenting).

²⁶¹ *Id.* at 798.

²⁶² See 387 P.3d 1066, 1069–72 (Wash. 2017).

²⁶³ *Id.* at 1067.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1070.

²⁶⁶ *Id.* (quoting *Estate of Becker v. Avco Corp.*, 365 P.3d 1273, 1275 (Wash. Ct. App. 2015), *rev'd*, 387 P.3d 1066 (Wash. 2017)).

²⁶⁷ *Id.*

²⁶⁸ 387 P.3d 1066 at 1070 (Wash. 2017) (citing *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 695 (3d Cir. 2016)).

²⁶⁹ *Id.* (citing *Sikkelee*, 822 F.3d at 692–93).

The *Becker* court also distinguished the case from *Montalvo* (and other in-air operations cases), explaining that the component manufacturer “[did not] cite a comprehensive set of requirements akin to the list of warnings found in *Montalvo*.”²⁷⁰ Rather, the manufacturer could only “identif[y] a set of baseline requirements for certified manufacturers.”²⁷¹ Absent the *Sikkelee* methodology, the *Becker* plaintiffs would have gone uncompensated merely because federal aircraft design regulations are not conducive to victim recovery.²⁷² Broadly speaking, *Sikkelee* provides courts the tools to allow families to recoup for their loss under circumstances where preemption would normally thwart recovery efforts.²⁷³

The most recent case on the subject, *Jones v. Goodrich Corp.*, ultimately demonstrates why courts should pay attention to the nuances of the *Sikkelee* methodology.²⁷⁴ Further, the case’s pending appeal provides hope that, going forward, other courts will follow the Third Circuit’s lead.²⁷⁵

In *Jones*, the estates of two deceased U.S. Army pilots sought to hold a manufacturer liable for an alleged defect in a helicopter’s hydromechanical unit.²⁷⁶ In its analysis, the district court misapplied Second Circuit precedent, crafting a confusing opinion that fails to produce an articulable standard.²⁷⁷

In attempting to distinguish the case at hand from *Goodspeed* and *Tweed*, the plaintiffs argued that *Sikkelee*’s “line between regulations governing in-flight operations (preempted) and aircraft design (not preempted)” should govern.²⁷⁸ At first, the court dismissed the distinction, arguing that “the Second Circuit has not distinguished between” in-air operations cases and aircraft design claims.²⁷⁹ Accordingly, “[a]bsent such a distinction aircraft engine . . . design [fell] squarely within the ‘entire field of aviation safety.’”²⁸⁰ The court’s decision to ignore *Sikkelee*’s distinction

²⁷⁰ *Id.* at 1071 (citing *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 810 (9th Cir. 2009) (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007))).

²⁷¹ *Id.*

²⁷² *See generally id.* at 1069–72.

²⁷³ *See id.* at 267–72.

²⁷⁴ *See* 422 F. Supp. 3d 518, 519–26 (D. Conn. 2019), *appeal docketed*, No. 20-2591 (2d Cir. Sept. 2, 2020).

²⁷⁵ *See id.*

²⁷⁶ *Id.* at 519–20.

²⁷⁷ *See id.* at 524.

²⁷⁸ *Id.* at 523–534 (citing *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 694 (3d Cir. 2016)).

²⁷⁹ *Id.* at 524.

²⁸⁰ 422 F. Supp. 3d 518, 519–26 (D. Conn. 2019) (citation omitted).

is not surprising or particularly note-worthy, as other courts have agreed with this sentiment. However, the court then backtracked on its assertion, attempting to categorize this design defect claim as an in-air operations case.²⁸¹ The court wrote: “[T]he instant case involves design defect claims that allegedly caused the helicopter to crash, so the components at issue here are . . . related to in-air operations . . . which the Second Circuit found to be preempted.”²⁸² The *Jones* court may not have been convinced of the irrelevancy of the *Sikkelee* distinction and ultimately felt the need to justify its finding of preemption by recategorizing the case as an in-air operations claim.²⁸³ Alternatively, the court simply may not have fully understood the significance of the fundamental distinction.

Additionally, the *Jones* court concluded that federal law preempted the plaintiff’s design and manufacture claims because the engine at issue had received an FAA type certification.²⁸⁴ In the court’s view, the federal certification standards were robust enough to disallow any recovery under state law.²⁸⁵ The court did not discuss these standards but merely rattled off a long list of reports that the manufacturer had submitted to receive the FAA type certification.²⁸⁶ For example, the court described how the manufacturer turned in “engineering test reports, department reports, design specifications, . . . manuals, and engineering drawings, all of which proved to the FAA that the . . . engine met federal certification standards.”²⁸⁷ For the court, a type certificate meant that the engine was per se in compliance with all necessary standards, and, as a result, the plaintiffs were denied any recovery.²⁸⁸

In September 2020, the plaintiffs filed an appeal to the Second Circuit, and the action is ongoing.²⁸⁹ Given the misapplication of Second Circuit precedent and the murky standard that resulted from the case, there is hope that the Second Circuit will reverse the decision and adopt the *Sikkelee* methodology to compensate aviation disaster victims going forward. If the Sec-

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See id.*

²⁸⁴ *See id.* at 524–25.

²⁸⁵ *See id.* at 523–24.

²⁸⁶ 422 F. Supp. 3d 518, 523 (D. Conn. 2019).

²⁸⁷ *Id.*

²⁸⁸ *See id.* at 524.

²⁸⁹ *See Jones v. Goodrich Corp.*, 422 F. Supp. 3d 518, 519–28 (D. Conn. 2019), *appeal docketed*, No. 20-2591 (2d Cir. Sept. 2, 2020).

ond Circuit, one of the strongest proponents of field preemption, adopts *Sikkelee*, the door will open for the methodology to become the majority approach.

V. CONCLUSION

Recent revelations regarding FAA oversight failures have cast a new light on how we compensate aviation disaster victims. Although the *Aircraft Certification, Safety, and Accountability Act* promulgated historic reforms, such a drastic legislative overhaul calls into question the ability of national standards to protect aviation consumers.²⁹⁰ Further, many crucial reforms have yet to be implemented. When federal aircraft certification regulations have fallen short of protecting the flying public, the interest in uniformity is diminished.

Ultimately, the *Sikkelee* methodology strikes the proper balance between uniformity and victim compensation.²⁹¹ The FAA has promulgated an extensive and effective regime to govern in-air operations conduct. Where regulations work well in providing a standard for recovery, the FAA's dominance should be respected, and uniform federal standards should be upheld. However, in order to adequately compensate aviation crash victims and their families, plaintiffs must be able to recover under state law for aviation design and manufacture claims.

While the nuances of the distinction may be lost on many, *Sikkelee* should serve as a guide to future courts who address aviation safety claims. Sometime in the near future, the Supreme Court may elect to resolve this split. Until then, the *Sikkelee* methodology will provide more opportunities for recovery without undermining FAA authority.

²⁹⁰ See Aircraft Certification Reform and Accountability Act, Pub. L. No. 116-260, 134 Stat. 2309 (2020) (Division V).

²⁹¹ See *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 694–96 (3d Cir. 2016).