Standard of Care Preemption in Aviation Litigation: Halting Steps to a Coherent Analysis

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STANDARD OF CARE PREEMPTION IN AVIATION LITIGATION: HALTING STEPS TO A COHERENT ANALYSIS

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TABLE OF CONTENTS

I. INTRODUCTION .................................. 328
II. KEY PRINCIPLES OF FEDERAL PREEMPTION... 329
   A. TYPES OF FEDERAL PREEMPTION ................. 330
   B. A PRESUMPTION AGAINST PREEMPTION .......... 333
   C. FEDERAL PREEMPTION OF STATE LAW STANDARDS
      OF CARE ........................................ 337
   D. FEDERAL PREEMPTION AS A BASIS FOR REMOVAL
      JURISDICTION .......................................... 341
      1. The Complete Preemption Doctrine ........ 343
      2. Grable Preemption .............................. 344
      3. Complete Preemption Applied: In re Air Crash
         at Lexington, Kentucky, August 27, 2007 .. 345
         Southwest Airlines ............................ 347
III. JUDICIAL CONSTRUCTION OF PREEMPTION
     PROVISIONS ........................................ 350
   A. FREIGHTLINER CORP. v. MYRICK ................ 351
   B. GEIER v. AMERICAN HONDA MOTOR CO. .......... 353
   C. WILLIAMSON v. MAZDA MOTOR CORP. OF
      AMERICA .......................................... 358
IV. FEDERAL AVIATION LEGISLATION ............... 361

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I. INTRODUCTION

OVER THE LAST thirty years, but especially during the past decade, federal courts have wrestled with the issue of preemption in aviation litigation. Not surprisingly, the courts have come to differing results. Some held that there is no federal preemption at all; others delivered forceful opinions holding that, given the breadth and detail of federal aviation regulation, federal law preempts state law standards of care completely. Still other courts searched for a middle ground—applying federal preemption principles sparingly under narrowly defined facts. The result of these decisions, particularly those rendered by the federal courts of appeals, is a potential circuit-split that may prompt the Supreme Court's first reconsideration of federal preemption in the context of aviation safety litigation in more than thirty-five years. Until then, however, practitioners must be well-apprised of recent developments—and possible emerging trends—concerning standard of care preemption. We hope this article will aid in that effort.
The article is organized in four parts. Part I introduces key principles of federal preemption law recognized by the courts, including a taxonomy of the different types of preemption. In Part II, we discuss three Supreme Court decisions that, while not aviation cases, explain the interplay between the various types of preemption and how that interplay can govern the outcome of individual preemption cases. This discussion also provides context for our analysis in Part IV of three recent airline cases. In Part III, we review relevant federal aviation legislation, principally the Federal Aviation Act of 1958, the Airline Deregulation Act of 1978, and the General Aviation Revitalization Act of 1994. Finally, in Section IV, we address three recent appellate decisions dealing with federal preemption principles applied in air safety litigation.

II. KEY PRINCIPLES OF FEDERAL PREEMPTION

The Supremacy Clause of the Constitution says that federal law “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” This clause delegates to Congress the power to enact federal statutes that preempt state law. Because Congress has the constitutionally mandated power to preempt state law, the central question for courts in deciding preemption issues is primarily one of congressional intent. Such intent may be found in a

1 An earlier version of this article was presented on March 31, 2011, at the Forty-Fifth Annual SMU Air Law Symposium. The authors wish to thank Mr. Charles A. Tarpley and the Air Law Symposium Board of Editors for inviting us to submit our work and participate in the Symposium. We also wish to thank Christina Arnone, an associate at Stinson Morrison Hecker, and Frank Tankard, a student at the University of Missouri, Kansas City School of Law, for their valuable research and editorial assistance.

2 U.S. Const. art. VI. “The phrase ‘any [state law] to the Contrary notwithstanding’ is a non obstante provision.” Pliva, Inc. v. Mensing, 131 S.Ct. 2567, 2579 (2011). “Eighteenth-century legislatures used non obstante provisions to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field.” Id.; see also Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 234, 252–53 (2000) (describing discussion of the Supremacy Clause in state ratification debates as concerning whether federal law could repeal state law or vice versa).

3 Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 509 (1989) (“Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent.”).

statute's express language or through its structure and purpose. Because federal law is supreme, any state law—including common law as applied by the states—which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted.

A. TYPES OF FEDERAL PREEMPTION

The taxonomy of federal preemption law is imprecise and can be confusing. Before discussing specific cases, therefore, we will first outline the various types of preemption recognized by the courts, explain briefly how each type is applied, and, in Part II infra, discuss three important Supreme Court decisions in which the Court interpreted how the various types of preemption interact.

The Supreme Court has identified two general types of federal preemption—express and implied. Express preemption is as it sounds: state laws are preempted because Congress has expressly said they are preempted, usually by including a preemption clause or other similar provision within the enacted law. Implied preemption, on the other hand, is found (usually, but not always, in the absence of an express preemption clause) where Congress impliedly preempts state law by the breadth or

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5 Id. at 486 (citations omitted).
6 Riegel v. Medtronic, Inc., 552 U.S. 312, 324-25 (2008) ("[W]hile the common-law remedy is limited to damages, a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy. In the present case, there is nothing to contradict this normal meaning. To the contrary, in the context of [the Medical Device Act of 1976] excluding common-law duties from the scope of pre-emption would make little sense." (internal quotations omitted)).
7 Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (noting that the Court's "primary function is to determine whether, under the circumstances of [a] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); see also Gibbons v. Ogden, 22 U.S. 1, 211 (1824) (finding that state laws which "interfere with, or are contrary to the laws of Congress," are invalid).
8 See, e.g., Elassaad v. Independence Air, Inc., 613 F.3d 119, 126 (3d Cir. 2010) ("Courts have recognized three species of preemption: express preemption, conflict preemption, and field preemption."). For a fuller discussion of the Elassaad case, see infra Section V.A.
9 See Altria Group, Inc. v. Good, 555 U.S. 70, 76-77 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).
thoroughness with which its federal enactment has occupied a particular area of law.\textsuperscript{11}

Implied preemption may be organized into two sub-types: implied field preemption and implied conflict preemption.\textsuperscript{12} Implied field preemption is found where "state law . . . regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."\textsuperscript{13} Such intent may be discerned in one of two ways. First, it "may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"\textsuperscript{14} Second, it may also be found "where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"\textsuperscript{15}

The other sub-type of implied preemption—implied conflict preemption—may also be organized into two varieties. The first is found where a private party's efforts to comply with competing federal and state law or regulation is physically impossible.\textsuperscript{16} Impossibility conflict has been a frequent issue in drug labeling litigation, for example.\textsuperscript{17} The other variety of implied conflict

\textsuperscript{11} Id.
\textsuperscript{12} Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict pre-emption . . . .").
\textsuperscript{14} Id. (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
\textsuperscript{15} Id. (alteration in original) (quoting Rice, 331 U.S. at 230). We discuss yet another type of implied field preemption—"complete preemption"—in a somewhat different context later in the paper. See infra Part II.D.1.
\textsuperscript{16} Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.'" (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963))).
\textsuperscript{17} See generally Pliva, Inc. v. Mensing, 131 S.Ct. 2567, 2578 (2011) (holding that "it was impossible for the [m]anufacturers to comply with both their state-law duty to change the label and their federal law duty to keep the label the same"); Wyeth v. Levine, 555 U.S. 555, 129 S.Ct. 1187, 1196 (2009) ("The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label."). Such a conflict does not require preemption, however, so long as compliance with federal and state law "is theoretically possible." Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290–91 (1987) (citation omitted). Moreover, the "hypothetical" possibility of a conflict "is insufficient to warrant[] pre-emption." Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); see also English, 496 U.S. at 90 ("The 'teaching of this Court's decisions . . . en-
preemption is found where state law is an obstacle to compliance with what Congress intended to be in the enacted federal law. This aspect of implied conflict preemption is unique because there is no direct conflict with any federal law precisely on point—for example, either the preemption provision or a primary regulatory provision. One commentator suggested that obstacle conflict preemption is simply a midpoint between direct conflict preemption and field preemption.

Justice O'Connor, writing for the plurality in *Gade v. National Solid Wastes Management Ass'n*, summed up this taxonomy as follows:

Pre-emption may be either expressed or implied, and “is compelled whether Congress' [s] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.” Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the
accomplishment and execution of the full purposes and objectives of Congress.”

Becoming familiar with the various types of federal preemption is not a purely academic exercise. Recent Supreme Court and federal appellate court decisions have focused much attention on the interplay between the types of federal preemption. More specifically, the decisions examined how courts should decide whether federal law preempts state law when more than one type of preemption is in play. Without some familiarity with preemption terminology, much of the case law (and much of what follows here) may be unclear.

B. A Presumption Against Preemption

In addition to the Tenth Amendment’s reserving to the states all powers not delegated to the federal government, respect for the states as “independent sovereigns in our federal system” has led the Supreme Court to “presume that Congress does not cavalierly pre-empt state-law causes of action.” Because federal preemption nullifies the application of conflicting state law and because such nullification runs counter to the Framers’ conception of the dual sovereignty of federalism, the Supreme Court established a presumption that law traditionally left to the states is not to be preempted. Under our federalist system, “the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” To the extent the Supremacy Clause gives the federal government “a decided advantage in [a] delicate bal-

23 U.S. CONST. amend. X (“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.”).
25 See id. As the Framers observed, “the compound republic of America” provides “a double security ... to the rights of the people” because “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each sub-divided among distinct and separate departments.” THE FEDERALIST NO. 51, at 266 (James Madison) (Max Beloff ed., 1987).
26 Tafflin v. Levitt, 493 U.S. 455, 458 (1990). Furthermore, “under this system of dual sovereignty, [the Supreme Court] has consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” Id.
ance" between federal and state sovereigns, courts have created a presumption to keep that balance in equipoise.

In all pre-emption cases, and particularly in those in which Congress has "legislated... in a field which the States have traditionally occupied," [courts] "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."28

The Supreme Court cautioned that "despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."29

In what is perhaps a gross understatement, the Court noted in Malone v. White Motor Corp. that "[o]ften Congress does not clearly state in its legislation whether it intends to pre-empt state laws."30 Courts have held, therefore, that when a preemption clause may be given more than one plausible interpretation, a court will ordinarily "accept the reading that disfavors pre-emption."31 Federal courts should be hesitant—indeed, even "reluctant"—to find preemption absent a clear directive from

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27 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system." Id.

28 Medtronic, Inc., 518 U.S. at 485 (alteration in original) (citations omitted).

29 N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) (holding a New York statute requiring hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan does not "relate to" employee benefit plans within the meaning of ERISA's pre-emption provision, and accordingly is not preempted).


[I]n such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.

Id.

31 Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("Even if Dow had offered us a plausible alternative reading of [the preemption provision of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq.]—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption.").
Congress. As Justice White wrote for the majority in CSX Transportation, Inc. v. Easterwood, “[i]n the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”

The presumption against preemption does not apply, however, in areas of the law the states have not traditionally occupied. While a dominant federal interest in a field supports asserting federal preemption, “the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption.” According to the Supreme Court, “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’” Thus, a proponent of federal preemption must either demonstrate a clear and manifest purpose of Congress to supersede state control or convince the court that the state has not traditionally occupied the field at issue.

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33 Id. (holding that under the Federal Railway Safety Act federal regulations adopted by the Secretary of Transportation preempted respondent’s negligence action).
34 See, e.g., Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347–48 (2001) (holding that “[p]olicing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied,’” and that patients’ “state-law fraud-on-the-FDA claims . . . [were] therefore impliedly pre-empted by [the Food, Drug, and Cosmetic Act (FDCA), as amended by the Medical Device Amendments (MDA)].” Adopting this rationale, the Court of Appeals for the Tenth Circuit has recently held that the field of aviation safety is not a field the states have traditionally occupied, thereby extirpating the presumption against preemption. See US Airways, Inc. v. O’Donnell, 627 F.3d 1318, 1325 (10th Cir. 2010).
37 In his dissent in Geier v. American Honda Motor Co., Justice Stevens wrote that the presumption’s “requirement that Congress speak clearly” when preempting state law allows “the structural safeguards inherent in the normal operation of the legislative process [to] operate to defend state interests from undue infringement.” Geier v. Am. Honda Motor Co., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting); see also Notes, New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions, 120 Harv. L. Rev. 1604, 1608 (2007) (finding that by refusing to guess at Congress’s intent and thus “requiring Congress to speak clearly when preemption is

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The presumption is not without its critics. Justice Scalia has been harshly critical, calling the presumption "an extraordinary and unprecedented principle of federal statutory construction." His objections, stated most succinctly in his dissent in *Cipollone v. Liggett Group, Inc.*, are two-fold. First, as an adherent to strict statutory construction, Justice Scalia finds objectionable that, despite the opportunity to do so in earlier cases, the Court has never recognized or applied the presumption until Justice Stevens wrote for the majority in *Cipollone*. Justice Scalia pointed to an opinion rendered just weeks before *Cipollone* was handed down:

Less than a month ago, in *Morales v. Trans World Airlines, Inc.*, we held that the Airline Deregulation Act's provision preempting state laws "relating to [airline] rates, routes, or services" was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any "plain-statement" rule, or rule of narrow construction, but applied the usual "assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." . . . We said not a word about a "presumption against . . . pre-emption" that was to be applied to construction of the text.

Second, as a matter of simple logic, Justice Scalia found it odd that the Court would require a narrow reading of the express preemption provisions of a congressional enactment, but at the same time be willing to find in other circumstances that state laws are preempted in the absence of any express statement by Congress to that effect, e.g., implied preemption. He describes what he views as a double-standard in this way:

In light of our willingness to find pre-emption in the absence of *any* explicit statement of pre-emptive intent, the notion that such explicit statements, where they exist, are subject to a "plain-statement" rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement,"
2011] STANDARD OF CARE PREEMPTION 337

and “narrow construction” designed variously to ensure that, absent unambiguous evidence of Congress’s intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. But none of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by sheer implication, with no express statement of intent at all. That is the novel regime the Court constructs today.43

We leave it to the reader to judge whether Justice Scalia has the better of this argument. In either event, practitioners should remain aware that, based on the majority opinion in Cipollone, courts are likely to apply a presumption against finding express preemption under any of the relevant federal aviation statutes.

C. FEDERAL PREEMPTION OF STATE LAW STANDARDS OF CARE

Courts have considered, and categorically rejected, the notion that federal aviation statutes preempt state-law-based remedies for persons injured or killed in aviation accidents.44 At most, the scope of preemption has been limited to the standard of care applied to negligence, strict liability, and other tort-based claims. However pervasive FAA regulations may be, they have not been recognized to bar state-law tort remedies otherwise available to persons injured in an airplane accident.45

43 Id. (citations omitted).
44 See, e.g., Elassaad v. Independence Air, Inc., 613 F.3d 119, 125 (3d Cir. 2010) (“We did not conclude in Abdullah that the passengers’ common law negligence claims themselves were preempted; instead, we determined only that the standard of care used in adjudicating those claims was preempted. Local law still governed the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.”).
45 Bennett v. Sw. Airlines, Co., 484 F.3d 907, 912 (7th Cir. 2007); see also Abdullah v. Am. Airlines, 181 F.3d 363, 376 (3d. Cir. 1999) (“[W]e cannot infer from Congress’s intent to federally preempt the standards of care [in aviation accident litigation], that Congress also intended to bar state and territorial tort remedies.”). Bennett has proved persuasive with a number of courts, both in and outside of the Seventh Circuit. See, e.g., O’Brien v. Cessna Aircraft Co., No. 8:09 CV 40, 2010 WL 4721189, at * 15 (D. Neb. July 21, 2010) (granting a motion to remand because the Federal Aviation Act does not preempt the state standard of care; Cessna failed to establish a colorable federal defense to support federal officer removal jurisdiction); Gonzales v. Ever-Ready Oil Co., 636 F. Supp. 2d 1187, 1195 (D.N.M. 2008) (“Congress did not create a federal cause of action to enforce the federal regulations regarding service of alcoholic beverages by airlines, which 'strongly indicat[es] that Congress did not intend to create a substantial federal question over cases implicating the FAA and FARs.'”); O.S. ex rel.
Because the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federally regulate aviation safety, we find that any state or territorial standards of care relating to aviation safety are federally preempted. . . .

It follows from the evident intent of Congress that there be federal supervision of air safety and from the decisions in which courts have found federal preemption of discrete, safety-related matters, that federal law preempts the general field of aviation safety. . . .

Thus, in determining the standards of care in an aviation negligence action, a court must refer not only to specific regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless. . . .

We conclude, therefore, that because of the need for one, consistent means of regulating aviation safety, the standard applied in determining if there has been careless or reckless operation of an aircraft should be federal . . . {

A number of courts, however, have continued to use the state law standard of care, along with state remedies. They concluded that the standards of care related to aviation safety by implication must not be preempted because expressio unius est exclusio alterius. 47 “Another rationale for finding that federal law does not preempt state and territorial safety standards rests upon the observation that Congress directed the Administrator to prescribe ‘minimum standards’ to promote safety.”48 “Because the federal standards are ‘minimum,’ some courts have determined

Sakar v. Hageland Aviation Servs., 609 F. Supp. 2d 889, 891–92 (D. Alaska 2008) (holding Federal Aviation Act does not contain an implied private right of action, and following the Supreme Court’s holding in Beneficial, the FAA does not require removal of all aviation safety claims).

46 Abdullah, 181 F.3d at 371–72.


48 Abdullah, 181 F.3d at 373; see also 49 U.S.C. § 44701(a)(5) (“[t]he Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing . . . (5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.”).
that a common law duty of safety may be owed beyond the FAA regulations.\textsuperscript{49}

The § 91.13(a) prohibition of "careless or reckless" operation of an aircraft occupies the apparent void beyond the specified "minimum" standards. Therefore, because the Administrator has provided both general and specific standards, there is no need to look to state or territorial law to provide standards beyond those established by the Administrator.

. . . .

The FAA's saving clause provides: "A remedy under this part is in addition to any other remedies provided by law." The insurance clause requires that airlines maintain liability insurance "for bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft." These two sections have been interpreted to mean that state safety standards are not preempted because Congress provided for compensation of injured persons.

These two sections do demonstrate that Congress intended to allow for compensation of persons who were injured in aviation mishaps. As we point out in our answer to the second part of the certified question, however, we do not find that state and territorial law remedies are preempted, only the standards of care for the safe operation of aircraft.

. . . .

Clearly, Congress did not intend to prohibit state damage remedies by this language. Moreover, the insurance clause requires airlines to maintain liability insurance "for bodily injury to, or death of, an individual . . . resulting from the operation or maintenance of the aircraft." Congress could not have intended to abolish a damage remedy for injury or death if it required airlines to maintain insurance coverage to recompense injured persons.\textsuperscript{50}

In \textit{Silkwood v. Kerr-McGee Corp.}, the Court continued:

No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be

\textsuperscript{49} Abdulllah, 181 F.3d at 373–74.

\textsuperscript{50} Id. at 374–75 (citations omitted).
threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

We do not suggest that there could never be an instance in which the federal law would preempt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. We perceive no such conflict or frustration in the circumstances of this case.51

The conduct that the jury’s punitive damages award sought to regulate was the day-to-day safety procedures of nuclear licensees. There was no factual finding as to how the contamination of Karen Silkwood occurred; the trial judge expressly refused to give an instruction on intentional infliction, and the jury rejected Kerr-McGee’s suggestion that Silkwood intentionally contaminated herself. It is abundantly clear, therefore, that the punitive damages award in this case deters a nuclear facility from operating in the same manner as Kerr-McGee. Authority for a State to do so, however, is precisely what the Court held to be preempted in *Pacific Gas*.52

Punitive damages, in contrast, are calculated to compel adherence to a particular standard of safety—and it need not be a federal standard. In setting the punitive damages award in this case, the court instructed the jury to consider “the financial worth of the defendant” and award an “amount of exemplary damages . . . consistent with the general purpose of such an award in deterring the defendant, and others like it, from committing similar acts in the future.” The punitive damages award therefore enables a State to enforce a standard that is more exacting than the federal standard.53

“The punitive damage award upheld by the Court had both the purpose and the intended effect of punishing and deterring the type of conduct that caused radiation injuries.”54

52 Id. at 261 (citations omitted) (Blackmun, J., dissenting).
53 Id. at 264–65.
D. Federal Preemption as a Basis for Removal Jurisdiction

The Judiciary Act of 1875, which codified Article III, Section 2 of the Constitution, gave federal courts general jurisdiction over all cases "arising under" federal law. The current version of the Act, 28 U.S.C. § 1331, provides original federal jurisdiction only when the claim for relief depends on federal law "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." This limitation is better known as the "well-pleaded complaint" rule. Under the rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Courts may look only to the complaint, and not to any possible or anticipated defenses, to determine if the case arises under federal law. A defendant's answer or other responsive pleading which raises a federal question is usually not enough to confer "arising under" federal jurisdiction.

The well-pleaded complaint rule, however, does not answer the underlying question of whether the complaint states a federal claim. The rule says only where the federal issue must appear—in the complaint, and not in the answer—for the claims to give rise to federal jurisdiction. To determine what must be pled to raise a federal question is a distinct issue. Although
there is no "single, precise definition" of federal question jurisdiction, the "vast majority" of cases that come within a federal court's jurisdiction are those in which federal law creates the claim. Additionally, a case may arise under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." The courts, however, have applied this latter rule cautiously to ensure that only those cases involving a substantial "controversy respecting the validity, construction, or effect" of federal law receive federal question jurisdiction.

Claims filed in state court may be removed if they could have been filed originally in federal court. To determine this, the court must "examin[e] the complaint as it existed at the time of removal." When the determination is made, "[a]s a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." "Because they implicate federalism concerns, removal statutes are to be narrowly construed' with all doubts resolved against federal jurisdiction. "Any doubt regarding jurisdic-

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62 Franchise Tax Bd., 463 U.S. at 8–9. Although there is no precise definition of what combination of facts and claims constitutes "arising under," Justice Holmes's statement that "'[a] suit arises under the law that creates the cause of action'" is perhaps as precise as we may hope to achieve. Id. at 9.

63 Id. at 9.

64 Gully v. First Nat'l Bank, 299 U.S. 109, 114 (1936) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." (quoting Shulthis v. McDougal, 225 U.S. 561, 569 (1912))).

65 28 U.S.C. § 1441(a) (2006) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").


67 Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003) (holding that "an action filed in state court to recover damages from a national bank for allegedly charging excessive interest in violation of both 'the common law usury doctrine' and an Alabama usury statute may be removed to a federal court because it actually arises under federal law").

68 In re Air Crash at Lexington, Ky., Aug. 27, 2006, 486 F. Supp. 2d 640, 644 (E.D. Ky. 2007) (alteration in original) (quoting Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 757 (6th Cir. 2000)); see also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) ("The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be
tion should be resolved in favor of the states, and the burden of establishing federal jurisdiction falls on the party seeking removal." And, because a defendant may remove a case only if the plaintiff's claims could have been brought in federal court in the first place, whether a case is removable must be decided, as discussed above, using the well-pledged complaint rule.

1. The Complete Preemption Doctrine

There are two narrow exceptions to the well-pledged complaint rule, one discussed in this part and the other discussed in Part II.D.2. The first exception, known as the "complete preemption doctrine," arises when federal law completely preempts the plaintiff's state law claims. "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pledged complaint rule.'" "Once an area of state law has been completely pre-empted, any claim purportedly based on that... law is considered... a federal claim, and therefore arises under federal law." Complete preemption recognizes that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character."
Very few statutes meet this standard. Section 301 of the Labor Management Relations Act, 1947 (LMRA),\textsuperscript{76} section 502(A) of the Employee Retirement Income Security Act of 1974 (ERISA),\textsuperscript{77} and section 30 of the National Bank Act\textsuperscript{78} are the only three preemption provisions that have been interpreted to pre-empt completely efforts to assert in state court claims arising from them.\textsuperscript{79} Courts are reticent to find complete preemption because doing so essentially nullifies the well-pleaded complaint rule.\textsuperscript{80} Rather than looking only to the complaint for federal issues, in complete preemption cases the court must also look to the answering party's anticipated defenses to see whether the claims arise under federal law.\textsuperscript{81}

2. Grable Preemption

The second exception to the well-pleaded complaint rule is found where a state law claim raises a substantial question of federal law.\textsuperscript{82} This is often called "Grable preemption," named for the Supreme Court's decision in \textit{Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing}. In \textit{Grable}, the IRS seized part of Grable's land to secure payment of back taxes.\textsuperscript{83} Although the agency gave Grable notice of its intent to sell the property, Grable did not request a hearing in response to the notice, so the IRS sold the land and applied the proceeds to what it said Grable owed.\textsuperscript{84} Grable did not try to redeem the property within the statutory 180 days after the sale.\textsuperscript{85} Not until years later did Grable finally object, filing a state law quiet-title action and contending that he was still the owner of the property because the IRS's notice did not comply with a federal stat-

\textsuperscript{79} Roddy v. Grand Trunk W. R.R. Inc., 395 F.3d 318, 323 (6th Cir. 2005). In addition, "the Price-Anderson Act contains an unusual pre-emption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003) (citation omitted).
\textsuperscript{80} Roddy, 395 F.3d at 323.
\textsuperscript{81} See id. at 323–24.
\textsuperscript{82} See generally Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 508 (2005).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 310–11.
\textsuperscript{85} Id. at 310.
Thus, the only contested issue in his case was one of federal law—whether the notice was sufficient.87 “[T]he main effect of [this] if Grable should prevail would be to require the federal government to reimburse the parcel’s buyer, disgorging money that had been credited as taxes.”88

The Supreme Court reasoned that Grable’s claim arose under federal law because, apart from the form of the cause of action—a quiet title action—the claim was based only on federal law.89 Whether Grable had been given legal notice was, obviously, essential to his claim.90 In fact, how the federal notice statute should have been applied was the only legal or factual issue contested.91 Moreover, the outcome of that issue had the potential to have an impact on the federal government in the form of reduced tax revenues.92 “The Government thus had a direct interest in the availability of a federal forum to vindicate its own administrative action, and [foreclosure sale] buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters.”93 Finally, because quiet title actions in which a federal tax issue arises are relatively rare, exercising federal jurisdiction over such cases would have “only a microscopic effect” on the division of labor between federal and state courts.94 Under these limited circumstances—a federal agency’s performing duties under federal law affecting federal tax revenues—the Court concluded that removal to a federal forum had been appropriate.95

Both of these exceptions have been asserted in aviation safety litigation but with limited success, as the following discussion will show.


The federal district court for the Eastern District of Kentucky considered and rejected applying complete preemption in In re

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86 Id. at 311.
87 Id. at 315.
88 Bennett v. Sw. Airlines Co., 484 F.3d 907, 910 (7th Cir. 2007).
89 Grable, 545 U.S. at 314–15.
90 Id. at 315.
91 Id.
92 See id.
93 Id.
94 Id.
95 See id. at 311–12.
Air Crash at Lexington, Kentucky, August 27, 2006. These consolidated cases were brought by the families and representatives of the passengers who died in the Comair 5191 accident in August 2006 in Lexington, Kentucky. The plaintiffs filed their cases against various Comair corporate entities (collectively Comair) in Kentucky state court. Comair removed the cases to federal court, asserting that the plaintiffs’ claims for damages arose under federal law, specifically the Federal Aviation Act of 1958 and the Airline Deregulation Act of 1978.

Plaintiffs moved to remand the cases to state court, and the federal court granted the motion. The court found that “the critical issue before it was whether there was original federal question jurisdiction to support the removal . . . from state court.” If Comair failed to prove that federal question jurisdiction existed on the face of plaintiffs’ well-pleaded complaint, then the cases would be remanded to state court to decide all issues, including the standard of care applicable to plaintiffs’ tort-based claims.

Comair argued that the FAA completely preempts the field of aviation safety, and therefore any claims implicating or “arising under” the Act would create federal jurisdiction. Comair’s framing the argument in this way—and perhaps arguing more than it ought—allowed the court to reject the argument by applying the narrow concept of “complete preemption.”

The court was careful to point out, however, that it is not enough to find that a federal law preempts state law and from

\[97\] Id. at 642.
\[98\] Id.
\[99\] Id. In its answer, Comair asserted, “The Plaintiff’s action is one in which this Court has original jurisdiction under [28 U.S.C. §§ 1331, 1337] and one which can be removed to this Court by Comair pursuant to [28 U.S.C. § 1441], in that the Plaintiff’s right to institute a claim for monetary damages arises under federal law which, pursuant to the Federal Aviation Act of 1958, . . . P[ub.] L. 85-726, 72 Stat. 731, formerly codified as 49 U.S.C. § 1301 et seq., now recodified and incorporated into 49 U.S.C. § 40101, et seq., and the regulations promulgated thereunder, implicitly preempts state law standards governing aviation safety, flight operations, takeoff procedures, and flight crew procedures, which Plaintiff alleges Comair to have violated.” Id. at 642–43.
\[100\] Id. at 642.
\[101\] Id. at 647.
\[102\] Id.
\[103\] Id. at 643–44.
\[104\] See id. at 648.
that to infer the preemption to be "complete," thus making the case removable. Rather, the court acknowledged, "it is only when the federal statutory language demonstrates that Congress has manifested a clear intent that claims not only be preempted under the federal law, but also that they be removable, that they are deemed to be completely preempted." 

"In other words, the complete preemption doctrine is not simply one of preemption of the law, it is a sort of 'super' preemption which preempts not only state law, but also creates federal removal jurisdiction-to use the jargon of the day, it is 'preemption on steroids.'" But the court also noted a need for caution: "Complete pre-emption represents a substantial departure from the firmly established well-pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect." With this in mind, the court examined the text and legislative history of the FAA and ADA and found "no evidence that Congress intended the federal courts to have exclusive subject matter jurisdiction over the preemption defenses to state law claims against air carriers." Accordingly, Comair's defenses would not support removal jurisdiction.


_Bennett v. Southwest Airlines_ arose in December 2005, when a Southwest Boeing 737-700 landed long and downwind on Runway 31C during a snowstorm at Chicago's Midway Airport. These circumstances, together with the crew's delay in deploying thrust reversers during rollout, caused the airplane to over-run the runway and careen through a barrier and fence. Before coming to rest, the plane collided with a car, killing one

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105 Id. at 649 (discussing Palkow v. CSX Transp., Inc., 431 F.3d 543, 552-53 (6th Cir. 2006) ("'Erisa pre-emption, without more, does not convert a state claim into an action arising under federal law.'").
106 Id. (quoting _Palkow_, 431 F.3d at 552-53 (citation omitted)) (internal quotation marks omitted).
107 _Palkow_, 431 F.3d at 553.
109 Id. (quoting Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1253 (6th Cir. 1996)).
110 Id. at 653-54.
111 Bennett v. Sw. Airlines Co., 484 F.3d 907, 908 (7th Cir. 2007).
112 Id.
of the occupants, and injuring twelve others on the ground.\textsuperscript{113} No one onboard the plane was hurt.\textsuperscript{114}

The family of Mariko Bennett filed suit in Illinois state court, alleging that the negligence of Southwest, Boeing, and the City of Chicago (which owns and operates Midway) caused the accident.\textsuperscript{115} The defendants removed the case to federal court on the theory that plaintiffs' claims arose under federal law.\textsuperscript{116} The district court denied plaintiffs' motion to remand, then certified its decision for interlocutory appeal, which the Seventh Circuit accepted.\textsuperscript{117} The appeals court framed the issue this way: "We must decide whether plaintiffs' claims arise under federal law because federal aviation standards play a major role in a claim that Southwest (as operator of the flight), Boeing (as manufacturer of the airframe), or Chicago (as operator of the airport) acted negligently."\textsuperscript{118}

On appeal, the defendants argued that under \textit{Grable}, claims nominally based on state law may, under certain circumstances, "arise under" federal law.\textsuperscript{119} From this premise, they argued further that \textit{Grable} permitted removing the case under 28 U.S.C. § 1441(a), because the complaint "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."\textsuperscript{120} The defendants maintained that the \textit{Grable} rule "is satisfied for aviation accidents because of the dominant role that federal law plays in air transport."\textsuperscript{121}

\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} See id.
\textsuperscript{116} Id.; see 28 U.S.C. §§ 1331, 1441(a) (2006).
\textsuperscript{117} Bennett, 484 F.3d at 908; see 28 U.S.C. § 1292(b) (2006).
\textsuperscript{118} Bennett, 484 F.3d at at 908.
\textsuperscript{119} See id. at 909.
\textsuperscript{120} Bennett, 484 F.3d at 909.
\textsuperscript{121} Id.
The Seventh Circuit rejected each of these arguments and remanded the case to state court. To begin with, the court noted that the parties agreed Illinois tort law was the source of plaintiffs' claims for relief. Adopting Justice Holmes's logic that "[a] suit arises under the law that creates the cause of action," the court reasoned that if Illinois law was the basis for the claims, Illinois law must also "create[] the cause of action." Completing its three-part syllogism, the court concluded that if the source of plaintiffs' claims was Illinois law, and the claims were therefore created by Illinois law, then the claims also arose under Illinois law, not federal law. The court was quick to reject defendants' suggestion that applying a federal standard of care to otherwise state law based claims would alter this result, noting "[t]hat [because] some standards of care used in tort litigation come from federal law does not make the tort claim one 'arising under' federal law."

Second, the court noted that history and precedent also weighed against removal because "[f]or decades aviation suits have been litigated in state court when the parties were not of diverse citizenship." The court specifically rejected the defendants' argument that Grable supported removal jurisdiction, finding that the circumstances in Grable were "'poles apart'" from those arising from the Midway accident. Southwest, Boeing, and City argued that "all suits about commercial air travel belong in federal court because the national government is the principal source of rules about safe air transportation, and uniform application of these norms is desirable." The court concluded, however, that they could not plausibly suggest "that

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122 Id. at 912.
123 Id. at 908.
124 Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action.").
125 See Bennett, 484 F.3d at 908–09, 912 (citing Am. Well Works Co., 241 U.S. at 260).
126 Id. at 912.
127 Id.
128 Id. at 909.
129 Id. at 910 (citation omitted).
130 Id. at 909.
resolution of [the] suit revolves around any particular disputed issue of federal law."\textsuperscript{131}

To demonstrate this, the court outlined the "fact-bound question[s]" the trial court would have to address to decide whether any of the defendants were negligent: the length of the active runway, its condition because of the snowstorm, the approach routing of the flight to avoid conflicting traffic at O'Hare, and the inability of the city to acquire land around Midway to lengthen the airport's runways.\textsuperscript{132} The court concluded that "[t]he particulars of Flight 1248's landing may never recur; a search for a 'uniform federal rule,'" which defendants had said compelled federal jurisdiction, "would be a hunt for a will-o'-the-wisp."\textsuperscript{133} On this basis, the court ordered that the case be remanded to state court.\textsuperscript{134}

III. JUDICIAL CONSTRUCTION OF PREEMPTION PROVISIONS

Before further addressing how the principles discussed in Part I come into play in aviation safety litigation, we must first address three Supreme Court preemption decisions stemming from truck and auto safety litigation, which—along with pharmaceuticals—have been at the forefront of recent products liability preemption cases before the Supreme Court.\textsuperscript{135} These cases are important because they clarify important issues about how express and implied preemption interact and how the preemption provisions commonly found in federal laws may affect the way courts analyze their preemptive effect.

The first case, \textit{Freightliner Corp. v. Myrick}, held that courts may analyze a federal statute or regulation on implied preemption grounds even though Congress included an express preemption provision.\textsuperscript{136} The second, \textit{Geier v. American Honda Motor Co.}, held that a saving clause in a federal statute should not prevent courts from considering implied preemption principles in evaluating the impact of federal auto safety standards.\textsuperscript{137} Although

\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 912.
\textsuperscript{134} Id.
\textsuperscript{135} For additional reading on the current state of federal preemption of state law standards of care, see MARC S. MOLLER, PREEMPTION (2010) (unpublished) (on file with the authors).
the facts of the third case, *Williamson v. Mazda Motor Corp. of America, Inc.*, were very similar to *Geier*, they yielded a completely different outcome on the preemption issue.138 Although decided outside the context of aviation litigation, these cases are nonetheless at the center of recent aviation preemption cases, including the three cases we discuss in Part IV. We hope that an overview of *Freightliner*, *Geier*, and *Williamson* here will serve as a useful preface to the later discussion.

A. *Freightliner Corp. v. Myrick*

*Freightliner Corp. v. Myrick* arose from two separate accidents in Georgia involving 18-wheel tractor-trailers.139 The plaintiffs sued the truck manufacturers in state court under state tort law, alleging the trucks were negligently designed because they were not equipped with antilock brakes.140 The manufacturers removed the cases to federal court based on diversity of citizenship.141 They then moved for summary judgment, arguing plaintiffs' claims were preempted by the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act).142 The district court held that the Safety Act preempted Myrick's negligent design claims and granted summary judgment to Freightliner.143

On appeal, the two cases were consolidated then reversed by the Eleventh Circuit,144 which held that "the state-law tort claims were not expressly pre-empted," the court rejected the manufacturers' contention that the claims were preempted because of a conflict between state law and the federal regulations under the Safety Act.145 The Supreme Court granted certiorari and affirmed the Court of Appeals.146

At the Supreme Court, the plaintiffs (there respondents) argued that the Court need not address implied conflict preemp-

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139 *Freightliner*, 514 U.S. at 282.
140 Id. at 283.
141 Id.
144 Id. (citing Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994)).
145 Id.
146 Id.
tion at all.\textsuperscript{147} Relying on \textit{Cipollone},\textsuperscript{148} they argued that “implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute.”\textsuperscript{149} suggesting what the Court called “a variant of the familiar principle of \textit{expressio unius est exclusio alterius}.”\textsuperscript{150} The Court rejected this argument, explaining that \textit{Cipollone} had not created “a categorical rule precluding the coexistence of express and implied pre-emption.”\textsuperscript{151}

“In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ‘reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions’ of the legislation.”\textsuperscript{152}

Justice Thomas, writing for the Court in \textit{Freightliner}, cautioned that \textit{Cipollone} does not say that the presence of an express pre-emption provision necessarily precludes conducting an implied preemption analysis.\textsuperscript{153}

The fact that an express definition of the pre-emptive reach of a statute “implies”-\textit{i.e.}, supports a reasonable inference-that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption. . . . At best, \textit{Cipollone} supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.\textsuperscript{154}

Finally, Justice Thomas, perhaps foreshadowing the Court’s next major preemption case in the products liability area, declined to address plaintiffs’ argument that the Safety Act’s saving clause\textsuperscript{155} precluded the manufacturers from using the federal

\textsuperscript{147} See id. at 287.
\textsuperscript{148} \textit{Cipollone} v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) (“Such reasoning is a variant of the familiar principle of \textit{expressio unius est exclusio alterius}: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.”).
\textsuperscript{149} \textit{Freightliner}, 514 U.S. at 287.
\textsuperscript{150} Id. at 288 (quoting \textit{Cipollone}, 505 U.S. at 517).
\textsuperscript{151} Id.
\textsuperscript{152} Id. (quoting \textit{Cipollone}, 505 U.S. at 517).
\textsuperscript{153} Id. at 288–89.
\textsuperscript{154} Id.
\textsuperscript{155} The Safety Act’s saving clause provided that “[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any
safety standard to immunize themselves from state common-law liability. Instead, that specific question was addressed five years later in Geier.


Alexis Geier was badly injured when she drove her Honda Accord into a tree. The car was equipped with manual shoulder and lap belts, both of which she had buckled. She and her parents sued Honda under District of Columbia tort law, "claiming, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag." The district court dismissed the suit on preemption grounds, holding that the Safety Act, and more particularly, the Federal Motor Vehicle Safety Standard (FMVSS) promulgated by the Department of Transportation under the

156 See also Altria Grp., Inc. v. Good, 555 U.S. 70, 75 (2008) ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress'[s] displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law."); Some courts have read Geier narrowly, holding that it only applies in conflict preemption cases, and thus leaves open whether a saving clause forecloses implied field preemption analysis. See, e.g., Hart v. Boeing Co., No. 09-cv-00397, 2009 WL 4250122, at *3 (D. Colo. Nov. 23, 2009) ("Given that Geier clearly confined its analysis for conflict preemption, I cannot say that this vague dicta is sufficient to overcome the precedent of Cleveland."); Sheesley v. Cessna Aircraft Co., No. Civ. 02-4185-KES, 2006 WL 1084103, at *21 (D.S.D. Apr. 20, 2006) (noting that Geier involved conflict preemption, not field preemption, but that Geier states Congress' adoption of a saving clause does not limit application of ordinary implied preemption principles); Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006) (holding that Geier limited the standard from Cipollone that implied preemption is not generally applicable to statutes that contain express preemption clauses and does not apply to cases where implied conflict preemption exists, although it still applies to the implied field preemption analysis). But see Choate v. Champion Home Builders Co., 222 F.3d 788, 794 (10th Cir. 2000) ("The presence of a saving clause such as the one in the Manufactured Housing Act also does not, by itself, foreclose an implied preemption analysis."). The Choate decision is especially relevant to the Tenth Circuit's later holding in US Airways, Inc. v. O'Donnell. US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010); see also infra Section IV.C.
Safety Act, gave car manufacturers a choice of whether to install airbags. The district court found that Ms. Geier's lawsuit, "because it sought to establish a different safety standard—i.e., an airbag requirement—was expressly pre-empted."

The Court of Appeals for the District of Columbia agreed with the lower court's conclusion, but found Ms. Geier's claim pre-empted for different reasons. Rather than hold that the Safety Act expressly pre-empted her claim, the court of appeals reasoned that Ms. Geier's state law tort claims "posed an obstacle to the accomplishment of [the] FMVSS['s] . . . objectives." For that reason, the court concluded that her state law claims conflicted with the FMVSS and therefore were impliedly pre-empted. Despite its differing reasons for finding preemption, the court of appeals nevertheless affirmed the district court's dismissal.

The Supreme Court also affirmed the dismissal. After surveying state and federal appellate decisions in "no airbag" cases and finding a consensus that such claims were pre-empted—either under the Safety Act's express preemption provision or by implied conflict preemption—the Court concluded that Ms. Geier's claims conflicted with the objectives of the FMVSS and were therefore pre-empted by the Safety Act. The Court said it reached its decision by answering "three subsidiary questions." "First, [did] the [Safety] Act's express pre-emption provision pre-empt this lawsuit?" The Court held that it did

161 Id.
162 Id.
163 Id.
164 Id. at 866.
165 Id.
166 Id. The court's decision suggests two ancillary points: first, each type of federal preemption, however it may be described, has the same preemptive effect as the others; and second, any one type is sufficient to preempt a state-law claim.
167 Id.
168 Id. The court found that all of the courts of appeal that had considered the question had found preemption. Id. One decision relied on the Safety Act's express preemption provision. See, e.g., Harris v. Ford Motor Co., 110 F.3d 1410, 1413–15 (9th Cir. 1997). Others found preemption under ordinary preemption principles, i.e., conflicts with the objectives of the FMVSS, and thus with the Safety Act itself. See, e.g., Montag v. Honda Motor Co., 75 F.3d 1414, 1417 (10th Cir. 1996); Pokorny v. Ford Motor Co., 902 F.2d 1116, 1121–25 (3d Cir. 1990); Taylor v. Gen. Motors Corp., 875 F.2d 816, 825–27 (11th Cir. 1989); Wood v. Gen. Motors Corp., 865 F.2d 395, 412–14 (1st Cir. 1988).
169 Geier, 529 U.S. at 867.
170 Id.
not. Second, did ordinary preemption principles apply, even though the Safety Act has an express preemption provision? The Court held that they did. Finally, the Court asked whether Ms. Geier’s lawsuit actually conflicted with the FMVSS and thus the Safety Act itself. The Court held that it did.

The first of these three questions is most relevant here. Honda argued that “safety standard,” as used in the Safety Act’s express preemption provision, was similar to the word “requirements” used in the preemption clause of the Medical Device Amendments of 1976 (MDA). The Supreme Court had considered the MDA preemption clause in Medtronic, Inc. v. Lohr and found that it preempted state law tort claims. Honda reasoned that, because the Court found the MDA clause preempted state-law claims, and because the Safety Act’s “safety standard” was synonymous with the MDA’s “requirement,” the Court should find the Safety Act likewise to preempt state law tort claims. The Geiers, on the other hand, argued that the Safety Act refers to “pre-empting a state-law safety standard, not a ‘requirement,’ and that a tort action does not involve a safety standard.”

Writing for the majority, Justice Breyer declined to resolve this issue. Rather than parse the (perhaps illusory) distinctions between “standard” and “requirement,” he opted to rely on the Safety Act’s saving clause to support the Court’s conclusion that Ms. Geier’s claims were not expressly preempted.

Justice Breyer wrote,

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171 Id.
172 Id.
173 Id. This had been answered affirmatively in Freightliner. See discussion supra Part II.C. and text accompanying notes 139-157.
174 Geier, 529 U.S. at 867.
175 Id.
176 Id.
177 Id.

"[N]o State . . . may establish . . . with respect to a device . . . any [state] requirement . . . which is different from, or in addition to, any [federal] requirement . . . .” Id. (emphasis added).
179 Geier, 529 U.S. at 867.
180 Id.
181 Id. at 867-68.
We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the [Safety] Act contains another provision, which resolves the disagreement. That provision, a "saving" clause, says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." "The saving clause assumes that there are some significant number of common-law liability cases to save."\(^\text{182}\)

In other words, had Congress not included a saving clause in the Safety Act, then a broad reading of the express preemption provision would make sense—there would be nothing in the statute to suggest that Congress intended to "save" state law actions from preemption.\(^\text{183}\) But, because Congress included a saving clause, the Court found it reasonable to infer that Congress also anticipated that at least some cases based on state law would be "saved."\(^\text{184}\) Had it intended otherwise—that is, had it intended to preempt all state law cases by enacting the Safety Act—it would have had no reason to include a saving clause. The preemption clause itself would have been sufficient to preempt all such cases without exception. Although Justice Breyer's opinion does not say so explicitly, any differing conclusion would make the saving clause superfluous, violating the rule that courts should, if possible, interpret statutes to give effect to every word and clause.\(^\text{185}\)

Having decided "that the saving clause at least removes tort actions from the scope of the express pre-emption clause," the Court then asked, "Does it do more?"\(^\text{186}\) "[D]oes [the saving clause] foreclose or limit the operation of ordinary pre-emption principles"—that is, implied preemption?\(^\text{187}\) Although *Freightliner* held that an express preemption provision did not foreclose implied conflict preemption analysis, it did not address whether the saving clause in the Safety Act prevents a manufacturer from using a federal standard to avoid state common law liability.\(^\text{188}\)

\(^{182}\) *Id.*

\(^{183}\) *Id.* at 868.

\(^{184}\) *Id.*

\(^{185}\) Moskal v. United States, 498 U.S. 103, 109–10 (1990) (holding defendant's construction of criminal statute "violates the established principle that a court should 'give effect, if possible, to every clause and word of a statute.'" (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955))).

\(^{186}\) Geier, 529 U.S. at 869.

\(^{187}\) *Id.*

\(^{188}\) *Id.* ("declining to address whether the saving clause prevents a manufacturer from 'us[ing] a federal safety standard to immunize itself from state com-
To fill that narrow gap in the Court’s preemption decisions, the Court took up the issue and concluded “that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.”

The Court based its conclusion on three closely related points. First, the Court noted that “[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations.” Just as the saving clause should not be read to be ineffectual and save no state law cases, neither should it be read to save all such cases and thus nullify whatever preemptive effect the federal statute or regulation might have. 

Relying on the Restatement (Third) of Torts to distinguish between the two types of defenses, the Court said the language of the saving clause “sound[s] as if [it] simply bar[s] a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law.” The saving clause was not intended to “save” all state law tort claims, only those that were not otherwise expressly or impliedly preempted.

Second, consistent with its repeated refusal to read saving clauses broadly, the Court found that “the saving clause foresees—it does not foreclose—the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.”

Finally, and perhaps anticipating Justice Stevens’ dissent, Justice Breyer noted that the presence of a preemption provision, a saving clause, or both, does not create a “special burden” on the party advocating preemption “beyond that [which is] inherent in ordinary pre-emption principles.” Read together, a pre-emption provision and a saving clause in the same statute “re-
fect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles." Thus, simply because a body of law contains express preemption language as to some areas does not necessarily foreclose the possibility that Congress intended to preempt impliedly other areas of the law.

To summarize, *Freightliner* holds that the presence of an express preemption provision in a statute or regulation does not foreclose the possibility that the statute or regulation may also impliedly preempt a state law claim, either because the federal law occupies the field or because the state law claim conflicts with the federal law. *Geier*, on the other hand, holds that the presence of a saving clause does not allow for an expansive reading of the law's express preemption provision, but also does not foreclose the possibility that state law claims are nonetheless impliedly preempted.

C. **Williamson v. Mazda Motor Corp. of America**

On February 23, 2011, the Supreme Court issued its opinion in *Williamson v. Mazda Motor Corp. of America, Inc.* Although *Williamson* does not mark a major shift in the Supreme Court's preemption analysis, the case is noteworthy because, based on facts very similar to those discussed above in *Geier*, the Court came to precisely the opposite conclusion on the issue of federal preemption. This immediately puts in issue, of course, how the facts in Williamson were different enough to yield a different outcome.

The facts of the case are simple. In 2002, the Williamson family, while traveling in their Mazda minivan, was involved in a head-on collision. Their daughter, Thahn, who was sitting in the rear aisle seat wearing a lap belt, was killed. The Willianms' two other children, who were wearing lap-and-shoulder belts, survived the collision. The Willianms sued Mazda in California state court, claiming that Mazda should have installed a shoulder belt for the rear aisle seat in which Thahn had been

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196 Id. at 870–71.
198 *Geier*, 529 U.S. at 868.
200 See id. at 1137–40.
201 Id. at 1134.
202 Id.
203 Id.
seated and that the company’s failure to do so created a defect that caused her death.\textsuperscript{204}

The trial court dismissed the case on the pleadings, and the California Court of Appeals affirmed, holding that applying a shoulder-and-lap-belt-only requirement would deprive minivan manufacturers of the choice—allowed by the then-current version of Federal Motor Vehicle Safety Standard 208—between installing lap belts only or shoulder-and-lap belt combinations for the rear aisle seat.\textsuperscript{205} The court of appeals concluded that the federal regulation preempted the state tort suit.\textsuperscript{206}

The U.S. Supreme Court granted certiorari “in light of the fact that several courts have interpreted \textit{Geier} as indicating that FMVSS 208 pre-empts state tort suits claiming that manufacturers should have installed lap-and-shoulder belts, not lap belts, on rear inner seats.”\textsuperscript{207} Writing for a 7-1 majority, Justice Breyer\textsuperscript{208} noted at the outset of the majority opinion the close similarities between \textit{Williamson} and \textit{Geier}.\textsuperscript{209}

We turn now to the present case. Like the regulation in \textit{Geier}, the regulation here leaves the manufacturer with a choice. And, like the tort suit in \textit{Geier}, the tort suit here would restrict that choice. But unlike \textit{Geier}, we do not believe here that choice is a significant regulatory objective.\textsuperscript{210}

Notwithstanding the ultimate outcome of the Court’s decision on preemption, \textit{Williamson} confirms the soundness of \textit{Geier}’s three-part preemption analysis. Applying that analysis to slightly different facts, however, led to the opposite result.\textsuperscript{211} As it did in \textit{Geier}, the Court asked first whether the National Traffic and Motor Vehicle Safety Act’s (NTMVSA) express preemption clause preempted the Williamsons’ claim.\textsuperscript{212} The Court found that it did not.\textsuperscript{213} Second, the Court asked whether ordinary tort principles apply even though the NTMVSA contains an express pre-

\begin{itemize}
  \item \textsuperscript{204} Id.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id. at 1135 (citations omitted).
  \item \textsuperscript{208} Id. at 1133. Justice Kagan took no part in the consideration or decision of the case. Id. Justice Breyer also wrote for the 5-4 majority in \textit{Geier}. Geier v. Am. Honda Motor Co., 529 U.S. 861, 863 (2000).
  \item \textsuperscript{209} Williamson, 131 S. Ct. at 1135.
  \item \textsuperscript{210} Id. at 1137.
  \item \textsuperscript{211} Id.
  \item \textsuperscript{212} Id. at 1135–36 (citing \textit{Geier}, 529 U.S. at 867–69).
  \item \textsuperscript{213} Id. at 1136.
\end{itemize}
emptions.\textsuperscript{214} The Court found that they do apply.\textsuperscript{215} Finally, the Court asked whether the Williamsons' state tort action actually conflicted with the FMVSS and Safety Act itself.\textsuperscript{216} Unlike in Geier, the Court found that it did not.\textsuperscript{217}

The Court reasoned that, unlike the choice between airbags and seatbelts in Geier, "providing manufacturers with [a] seatbelt choice [between lap belts and shoulder-lap belts] is not a significant objective of the federal regulation."\textsuperscript{218} Thus, California tort law did not impede the federal law's objective.\textsuperscript{219} In reaching this conclusion, the Court reviewed the FMVSS's regulatory history, the Department of Transportation's reasoning for allowing manufacturers a choice between lap belts and shoulder-and-lap belt combinations, and the Solicitor General's amicus brief on the issue.\textsuperscript{220} Although the history of the regulation was similar to what the Court considered in Geier,\textsuperscript{221} the Court found that the agency's objectives behind the newer version of the regulation differed.\textsuperscript{222} In Geier, the Court found that the underlying policy objective of allowing car-makers to offer a variety of passive restraints was to encourage consumers to become familiar with and use them.\textsuperscript{223} In Williamson, on the other hand, the Court found that the agency's regulation did not require lap-and-shoulder belts in certain rear seat configurations mainly because of the perceived added costs to manufacturers, among other factors.\textsuperscript{224} That objective—making passive restraints more economical—was not sufficient to show that the DOT intended to bar states from imposing more stringent standards through common law tort actions.\textsuperscript{225} And, unlike in Geier, the Solicitor General's office had submitted a brief saying that the applicable regulation did not preempt the Williamson family's claims.\textsuperscript{226}

Williamson likely will not have a significant impact on federal preemption in aviation litigation, at least in the near-term. The
case appears to be confined to passive-restraint defect cases against auto manufacturers. Geier remains good law. Williamson does suggest, however, that the Court may be increasingly willing—as Justice Thomas pointed out in his dissenting opinion—to wade "into a sea of agency musings and Government litigating positions and fish[ ] for what the agency may have been thinking 20 years ago when it drafted the relevant provision." If Justice Thomas is correct, then practitioners increasingly may have to look past statutory language (the supposed lodestar of Congress's intent), and instead parse finer and finer traces of administrative policy objectives to make their case for or against federal preemption. This, in turn, will lead to less certainty, more risk, and an added burden on already-burdened litigants for whom the choice between state or federal law is an important one.

IV. FEDERAL AVIATION LEGISLATION

Not long after Congress passed and President Eisenhower signed the Federal Aviation Act of 1958 (FAA or Act), the Court of Appeals for the Second Circuit said the Act "was passed by Congress for the purpose of centralizing in a single authority — indeed, in one administrator — the power to frame rules for the safe and efficient use of the nation's airspace." By enacting the FAA, "Congress's consolidation of control of aviation in one agency indicated its intent to federally preempt aviation safety." Later decisions by U.S. courts of appeals said, however, that the Supreme Court's conclusion about the FAA does not mean aviation-related negligence claims are themselves preempted; rather, only the standard of care applied in deciding

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227 Id. at 1142 (Thomas, J., dissenting).
229 Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960).
those claims is preempted.\textsuperscript{251} Other courts of appeals have
discounted (or ignored) this distinction and have held that the
FAA does not preempt either the standard of care or aviation-
related negligence claims as a whole.\textsuperscript{252} To add to this uncer-
tainty, other courts have applied federal preemption to claims
arising under the Airline Deregulation Act of 1978 (ADA) and
the Air Carrier Access Act (ACAA), also with differing and some-
times contradictory results.\textsuperscript{253}

Given the differing interpretations of federal legislation and
their interplay with state law claims, a review of the applicable
federal legislation is warranted.

A. THE FEDERAL AVIATION ACT OF 1958 AND ITS PRECURSORS

Not long after Clyde Cessna, Walter Beech, and other pio-
ners of civil aviation started building airplanes, the federal gov-
ernment began to impose regulatory control over interstate air
transportation and commerce.\textsuperscript{254} As Justice Jackson noted
somewhat later, “Federal control is intensive and exclusive.
Planes do not wander about in the sky like vagrant clouds. They
move only by federal permission, subject to federal inspection,
in the hands of federally certified personnel and under an intri-
cate system of federal commands.”\textsuperscript{255}

Federal regulation of aviation began in 1926 with the Air
Commerce Act (1926 Act),\textsuperscript{256} which empowered the Secretary of
Commerce to regulate the “full particulars of the design [of air-
craft] and of the calculations upon which the design is based
and the materials and methods used in the construction.”\textsuperscript{257}
The 1926 Act left regulation of intrastate flying to the states, but
Congress urged them to adopt “uniform laws and regulations

\textsuperscript{252} Id. at 26–27.
\textsuperscript{253} Eric E. Murphy, Comment, Federal Preemption of State Law Relating to an Air Carrier’s Services, 7 U. Chi. L. Rev. 1197, 1197–99 (2004).
\textsuperscript{254} The relatively short period between the advent of commercially viable air-
plane manufacturing and the imposition of federal regulation on air commerce
suggests that the states may have had little, if any, opportunity to enact a compet-
ing set of air safety laws and regulations. See Tim Brody, The American Aviation
\textsuperscript{255} Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J.,
concurring).
\textsuperscript{256} Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926)
(amended 1938).
\textsuperscript{257} Id. § 15.
corresponding with the provisions of [the 1926 Act] and the rules and regulations that will be promulgated under it.”

Prompted by Congress’s urging, virtually all the states passed legislation adopting the federal standards, including the Uniform State Air Licensing Act (USALA). The USALA was based on the common sense notion that “[i]nasmuch as there can be but one standard of airworthiness, only a limited range of piloting ability, and no variation in rules, it would seem obvious that State laws dealing with regulation should provide requirements identical with those of the Federal law.”

From the outset, conformity with federal standards has been the universal principle in civil aviation law. When the federal government did not police intrastate flight, the states voluntarily ceded any police power in this area to the federal government. Federal regulations became more pervasive with the Civil Aeronautics Act of 1938, and culminated in the FAA. A Senate report accompanying the FAA recognized the federal government’s exclusive role in regulating interstate air travel, saying “the Federal Government bears virtually complete responsibility for the promotion and supervision of [the aviation] industry.”

A key objective in enacting the FAA was to promote airline safety by establishing comprehensive and uniform federal regulation. Congress enacted the FAA “for the purpose of centralizing in a single authority – [the Federal Aviation Administration, then called the Federal Aviation Agency] – the power to frame rules for the safe and efficient use of the nation’s airspace.” “The [FAA] requires a delicate balance be-

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239 Uniform Air Licensing Act (1930).
242 Fed. Aviation Act of 1958 (FAA), Pub. L. No. 85-726, 72 Stat. 731 (1958). The acronym “FAA” is typically associated with the Federal Aviation Administration. For the sake of clarity here, however, we will use “FAA” or “Act” as shorthand for the Federal Aviation Act of 1958, and use “Agency” or the full name “Federal Aviation Administration” or its predecessor, the “Federal Aviation Agency,” when referring to the administrative body.
244 Federal Aviation Act of 1958 §§ 102-03.
245 Air Line Pilots Ass’n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960); see also French v. Pan Am Express, Inc., 869 F.2d 1, 5 (1st Cir. 1989) (citation omitted) (“[E]stablishment of a single uniform system of regulation in the area of air safety was one of the primary object[ives] . . . of the Act.”); In re Mex. City Air-
tween safety and efficiency, and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the [FAA] are to be fulfilled."246

To further Congress’s objective of uniform regulation, the Act required the newly organized Federal Aviation Agency to prescribe “[s]uch reasonable rules and regulations . . . as the Administrator may find necessary to provide adequately for . . . safety in air commerce.”247 The Agency, renamed the Federal Aviation Administration when it became part of the Department of Transportation in 1967,248 has complied with this directive by issuing pervasive regulations addressing airline safety, covering operations both in the air and on the ground.249

The text and legislative history of the Act establish Congress’s intent to regulate aviation safety comprehensively. It granted the Agency broad authority to ensure aircraft safety,250 and more specifically directs the Agency to prescribe “minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft.”251

In sum, the federal government has sole responsibility for promulgating rules about aircraft safety.252 Consistent with that responsibility, the Agency has enacted a comprehensive set of aviation regulations, found in Title 14 of the Code of Federal Regulations, governing nearly all aspects of aircraft safety—from crash of Oct. 31, 1979, 708 F.2d 400, 406 (9th Cir. 1983) (finding it “beyond dispute that the [FAA] was enacted . . . to promote safety in aviation”); cf. Dilley v. Nat’l Transp. Safety Bd., 49 F.3d 667, 668 (10th Cir. 1995) (“The Federal Aviation Act clearly grants broad disciplinary power to the agency” including suspending a pilot’s certificate.).

246 City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973) (citations omitted); see also id. at 644 (Rehnquist, J., dissenting) (“The paramount substantive concerns of Congress [in enacting the FAA] were to regulate federally all aspects of air safety.”).


airplane design, manufacture, and certification,\textsuperscript{253} to pilot training and qualifications,\textsuperscript{254} to the complex set of regulations on how scheduled airlines must operate.\textsuperscript{255}

**B. THE AIRLINE DEREGULATION ACT OF 1978**

The ADA\textsuperscript{256} signaled a starting point on many issues, including deregulation of routes and fares.\textsuperscript{257} Unlike the FAA, the ADA includes an express preemption clause, which provides “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”\textsuperscript{258} Congress included that provision in the ADA “[t]o ensure that the States would not undo federal deregulation with regulation of their own.”\textsuperscript{259} Congress did not want the states to fill a regulatory vacuum by enacting conflicting regulations, potentially reducing air carrier competitiveness and increasing air fares to the public.

The express preemption clause, applicable to “price, route or service,” has been characterized as a “careful and balanced application of the statutory standard of preemption.”\textsuperscript{260} While we will concede that the clause may be careful and balanced, it is not free of ambiguity. What constitutes a “price” or a “route” seems relatively straightforward; however, “service” is another matter entirely.\textsuperscript{261} Courts have struggled with what Congress in-

\textsuperscript{253} See 14 C.F.R. pt. 25 (2010).
\textsuperscript{254} See id. at pt. 61.
\textsuperscript{255} See id. at pt. 121.
\textsuperscript{261} Daniel H. Rosenthal, Legal Turbulence: The Court’s Misconstrual of the Airline Deregulation Act’s Preemption Clause and the Effect on Passengers’ Rights, 51 DUKE L.J. 1857, 1870 (2002) (arguing that “[i]n the Deregulation Act, Congress neither defined ‘services’ nor specified the type of state action preempted by the clause. Consequently, the courts have had to interpret what Congress meant, but they
tended to include within the term "service," especially when engaging in preemption analysis.\textsuperscript{262}

Because the ADA's express preemption clause relates only to the price, route, or service of an "air carrier," many argue that it is not relevant to product liability and negligence claims, at least those involving general aviation.\textsuperscript{263} Opponents of standard of care preemption argue that Congress's inclusion of an express preemption clause in the ADA signals that it did not intend to preempt state law with the FAA, also pointing to the FAA's saving clause.\textsuperscript{264} But as seen in Part I.C., supra, the Supreme Court has held that an express preemption provision does not foreclose the possibility of implied preemption, nor does a saving clause foreclose state law claims being impliedly preempted.\textsuperscript{265}

C. THE GENERAL AVIATION REVITALIZATION ACT OF 1994

The General Aviation Revitalization Act of 1994 (GARA) generally bars lawsuits against general aviation aircraft manufacturers if eighteen or more years have elapsed between the manufacture and sale of the aircraft and an accident involving the aircraft causing death or injury to persons or property.\textsuperscript{266} GARA expressly preempts state law where state law would otherwise allow such a suit after the eighteen-year statute of repose has run.\textsuperscript{267} GARA's preemptive effect has generally been limited to this narrow circumstance, in conformity with its express language and legislative history. GARA also created a "rolling statute of repose"\textsuperscript{268} applicable to replacement parts, including "any new component, system, subassembly, or other part . . . of the

\textsuperscript{262} Rosenthal, supra note 261, at 1871.


\textsuperscript{264} Id.

\textsuperscript{265} See discussion supra Part II.C.


\textsuperscript{267} "A statute of limitation is a bar on suits filed more than a specified period of time—usually 2 years or 3 years—after an injury occurs or is discovered. A statute of repose, in contrast, is a bar on suits brought more than a specified period after the date of manufacture." H.R. Rep. No. 103-525, pt. 2, at 4 (1994), reprinted in 1994 U.S.C.C.A.N. 1644.

\textsuperscript{268} Id. at 6.
aircraft," which resets each time a new part is installed, but only with respect to that part.269 GARA is limited to smaller aircraft, defining “general aviation aircraft” as any FAA-certified aircraft with a seating capacity of fewer than twenty passengers and that was not “engaged in scheduled passenger-carrying operations” at the time of the accident.270

GARA carves out four exceptions to the statute of repose.271 The most important is the first, which applies when a manufacturer either “knowingly misrepresented to . . . or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or [component part] that is causally related to the harm which the claimant allegedly suffered.”272 The other three exceptions apply when a person injured or killed in an accident “is a passenger for purposes of receiving treatment for a medical or other emergency,”273 or “was not aboard the aircraft at the time of the accident,”274 or when the suit is “brought under a written warranty enforceable under law but for [GARA].”275 GARA “supersedes any State law” to the extent that state law would otherwise allow a claim to be brought after the eighteen-year statute of repose has elapsed.276

1. Purpose and Intended Scope of GARA

Congress passed GARA to address what the House Report deemed a “‘perceived’ liability crisis in the general aviation industry,”277 and to spur economic growth in that business.278 Industry leaders testified before Congress describing the sharp decline in industry sales,279 much of which they attributed to large increases in liability insurance premiums brought about by long-tail claimants suing for alleged manufacturing defects in

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270 Id. § 2(c).
271 Id. § (2)(b).
272 Id. § (2)(b)(1).
273 Id. § (2)(b)(2).
274 Id. § (2)(b)(3).
275 Id. § (2)(b)(4).
276 Id. § (2)(d).
278 H.R. REP. No. 103-525, pt. 1, at 3.
decades-old airplanes. The House Report found that although U.S. sales of general aviation aircraft declined from 17,000 units in 1979 to just 954 in 1993, the industry's product liability costs increased over the same time from $24 million to more than $200 million annually. The House Report noted that GARA's statute of repose was intended as "a narrow and considered response" to the liability crisis, and that it was deliberately crafted to be limited in scope, unlike previous proposals that sought to "revise substantially a number of substantive and procedural matters relating to State tort law." The report reasoned:

Given the conjunction of all these exceptional considerations, the Committee was willing to take the unusual step to preempting State law in this one extremely limited instance. The legislation attempts to strike a fair balance by providing some certainty to manufacturers, which will spur the development of new jobs, while preserving victims' right to bring suit for compensation in certain particularly compelling circumstances. In essence, the bill acknowledges that, for those general aviation aircraft and component parts in service beyond the statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself.

The House Report provides that where a state statute of repose is shorter than eighteen years, affording manufacturers greater protection from long-tail claims, GARA preemption does not apply.

2. Judicial Interpretation of GARA

GARA's limited preemptive reach has proven relatively straightforward and uncontroversial. Courts followed the lead of the legislative history and confined GARA preemption to those instances in which a conflicting state statute of repose is longer than the eighteen years prescribed in GARA.

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281 Id. at 1–2.
283 Id.
284 Id. at 7.
Although a complete survey of GARA preemption issues is beyond the scope of this article, the three cases that follow give a general sense of the preemption issues that arise under the statute. The first case, *Wright v. Bond-Air, Ltd.*, is an early case in which the court emphasized the legislative history of GARA, as subsequent cases have likewise done, in concluding that the preemptive reach of the Act is narrow and carefully defined.\(^{286}\) The second, *Buroughs v. Precision Airmotive Corp.*, serves as an example of a court finding that GARA preempted state law, and arguably interpreting GARA as having a preemptive reach somewhat beyond the court’s interpretation in *Wright*.\(^{287}\) The third case, *Lucia v. Teledyne Continental Motors*, is included here for its analysis of what GARA may have added to the argument that the Federal Aviation Act does not completely preempt related state law.\(^{288}\)


*Wright v. Bond-Air, Ltd.* arose from a 1995 crash of a 1967 model Cessna twin engine airplane, in which the pilot was killed.\(^{289}\) The administrator of the pilot’s estate filed a lawsuit in Michigan state court against Cessna and two other defendants based on state law claims of wrongful death and product liability.\(^{290}\) The defendants removed to federal court and the plaintiff moved to remand.\(^{291}\)

The defendants did not argue that GARA completely preempted the plaintiff’s state law claims; instead, they contended that whether the complaint met GARA’s “knowing misrepresentation exception” was a substantial federal question conferring “arising under” federal jurisdiction.\(^{292}\) The court granted the plaintiff’s motion to remand, holding that GARA does not create a federal cause of action and that the issue of whether the plaintiff met the knowing misrepresentation exception did not amount to a substantial federal question.\(^{293}\) Although the court was not squarely presented with the issue of whether and when

\(^{286}\) *Wright*, 930 F. Supp. at 305.

\(^{287}\) *Buroughs*, 93 Cal. Rptr. 2d 124 (Ct. App. 2000).

\(^{288}\) See generally *Lucia*, 173 F. Supp. at 1253.

\(^{289}\) *Wright*, 930 F. Supp. at 301.

\(^{290}\) Id.

\(^{291}\) Id. at 301–02.

\(^{292}\) Id. at 302–03, 305.

\(^{293}\) Id. at 305.
GARA preempts state law, the court addressed preemption nonetheless in emphasizing GARA's limited scope:

GARA is a statute of repose and merely serves a gatekeeping function for Plaintiff's [state-law] cause of action. There is nothing in GARA's legislative history to support an argument that Congress intended GARA to create a body of federal common law. Nor does the Act preempt a state's substantive law regarding negligence or breach of warranty claims. Rather, GARA is narrowly drafted to preempt only [state-law] statutes of limitation or repose that would permit lawsuits beyond GARA's 18 year limitation period in circumstances where its exceptions do not apply.294

The court relied on House Report No. 103-525, part II in support of its conclusion that Congress intended GARA to preempt only state statutes of repose or limitation of fewer than eighteen years.295 The court acknowledged that GARA can amount to "'a formidable first hurdle' to a plaintiff bringing a product liability lawsuit against a general aviation aircraft manufacturer" but noted that the hurdle may be overcome where the knowing misrepresentation exception applies.296 Thus, although the court based its holding on both the lack of a federally created cause of action under GARA and the lack of a substantial federal question in the case, the court made clear that, had the defendants argued for preemption, they would not have prevailed because of the "knowing misrepresentation exception."297

b. Burroughs v. Precision Airmotive Corp.

In Burroughs v. Precision Airmotive Corp., the preemption issue was whether the plaintiffs could circumvent GARA's statute of repose under California successor liability law.298 The case arose after a 1995 crash of an airplane that seriously injured both the pilot and his passenger.299 The crash was allegedly caused by a defective carburetor manufactured and sold in 1968.300 The claimants sued the plane's owner, mechanic, engine manufac-

294 Id.
295 Id. at 303.
296 Id. at 305 (quoting Rickert v. Mitsubishi Heavy Indus., Ltd., 929 F. Supp. 380, 383 (D. Wyo. 1996)).
297 See id.
299 Id. at 127.
300 Id.
turer, airplane manufacturer, and the successor to the airplane manufacturer (Precision) under theories of negligence, strict liability, and breach of warranty. The plaintiffs settled with the owner and mechanic. The trial court granted summary judgment in favor of the three remaining defendants, holding that GARA’s statute of repose barred the claims. The plaintiffs appealed the court’s summary judgment ruling.

Some context may be helpful. The plaintiffs argued that because Precision, as a successor company, did not manufacture the carburetor, it was not a “manufacturer” under GARA and was therefore not entitled to the protection of the eighteen-year statute of repose. The court acknowledged that “[t]he term ‘manufacturer’ is nowhere defined in GARA, and GARA does not specifically include successor manufacturers within the protection of the statute.” After noting that the purpose of GARA was to revitalize the general aviation industry—to which Precision belonged—by protecting aircraft manufacturers against long-tail claims, the appellate court held the statute applies to successor manufacturers. Otherwise, the court reasoned, “[t]he central objective of GARA would be materially undermined.”

The plaintiffs conceded in their appeal that GARA immunizes successors from claims after the statute of repose has run but only “to the extent [the successor] has assumed such liability from the manufacturer.” The plaintiffs argued that under California state law, a successor assumes its predecessor’s liability for torts “only in limited circumstances, which do not apply here.” Because the successor did not assume liability from the manufacturer under California law, GARA did not apply. The court rejected this, reasoning:

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301 Id. at 129.
302 Id. at n.1.
303 Id.
304 Id. at 130.
305 Id. at 130.
306 Id.
307 Id.
308 Id.
309 Id.
310 Id.
311 See id. (The court did not discuss what theories would entitle the plaintiffs to relief if California successor liability law were to apply to prevent Precision from assuming tort liability from its predecessor.).
Because of the preemptive reach of GARA . . . California law relating to successor liability does not govern if it would allow a claim otherwise barred by GARA. In other words, GARA cannot be interpreted by reference to state law. Rather the question is whether Precision assumed the obligations and duties of the manufacturer, as well as liability for a breach of those duties, under the relevant federal law.312

The court’s interpretation of GARA’s “preemptive reach” is not entirely clear, however.313 Its broad statement that “GARA cannot be interpreted by reference to state law” could be interpreted as opening the door to a potential expansion of GARA preemption.314 Yet, it is not clear that the court intended this result, as the opinion failed to address the necessary implications; for example, the opinion is silent on whether GARA may be “interpreted by reference to state law” where state law would afford manufacturers stronger protection from long-tail claims than federal law.315 Perhaps the sweeping language of Burroughs can be attributed to imprecise writing that should not be construed beyond the court’s holding—that California successor liability law is preempted if it would “allow a claim otherwise barred by GARA.”316 This creates no obvious conflict with other courts’ narrow interpretation of GARA preemption.317 On the other hand, perhaps the court intended for its language to be read literally, interpreting GARA to mean that only federal successor liability law applies with reference to it, thus arguably expanding the preemptive reach of GARA, at least in that limited context.318

c.  Lucia v. Teledyne Continental Motors

In Lucia v. Teledyne Continental Motors, the court examined the relationship between GARA section 2(d) and the FAA, particularly its “saving clause,”319 to determine whether the FAA com-

312 Id. at 132-33 (internal citation omitted) (The court rejected the plaintiffs’ argument without reaching the issue of whether California successor liability law conflicts with GARA.).
315 See id. at 132.
314 See id.
316 See id.
317 See id.
318 See id. at 132-33.
pletely preempts state law in the field of aviation safety.\textsuperscript{320} Although the facts of the case did not implicate GARA—the dispute involved recently manufactured engine crankshafts and no accident—the court found that GARA "is relevant here for purposes of preemption to address the statute's effect on state law."\textsuperscript{321} Citing GARA's legislative history, the court recognized a twofold purpose: (1) "to provide the opportunity to restart large scale production of light piston general aviation aircraft in order to create jobs and exports"\textsuperscript{322} and (2) to "avoid[ ] fundamental reform of the tort system."\textsuperscript{323}

Reading GARA in conjunction with the FAA rather than in the isolated context of long-tail claims, the court concluded that GARA "affirmatively preserves a role for state law, which continues to govern the adjudication of aviation products liability cases involving claims for defective design or manufacture."\textsuperscript{324} Underlying this conclusion, the court adopted language from an article favoring the view that the FAA does not completely preempt related state tort law:

Congress gave the various courts a definitive expression of federal legislative intent. It did so by failing to address federal preemption of state tort actions for aircraft accidents and by specifically preserving any and all state law not superseded. GARA § 2(d), in company with preservation of the 49 U.S.C. § 40120(c) general "savings clause," may thus be read as clarifying the scope and strengthening the role of state tort law applicability to aviation products liability actions.\textsuperscript{325}

The court thus used GARA to support its conclusion that the FAA does not "completely preempt state law in the field of aviation hardware safety."\textsuperscript{326}

\textsuperscript{321} Id. at 1269.
\textsuperscript{322} Id.
\textsuperscript{323} Id.
\textsuperscript{324} Id. at 1270.
\textsuperscript{326} Id. at 1270.
IV. RECENT AVIATION SAFETY CASES

Standard of care preemption has been at the center of aviation law in recent years.\textsuperscript{327} Three relatively recent cases illustrate several of the key, unresolved issues involved in the courts' analyses. Each of these cases involves claims against airlines,

\textsuperscript{327} Although far from exhaustive, the following are examples of federal courts that have tackled the issue of federal preemption in aviation litigation. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973) (holding, 5-4, that a city ordinance prohibiting aircraft from taking off during certain night hours was invalid because Congress had indicated its intent to preempt state control over aircraft noise); Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206, 210 (2d Cir. 2011) (joining other circuits in concluding "that Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field," and holding that the plaintiff's claims relating to land use permit requirements were outside the field of preempted law); Montalvo v. Spirit Airlines, 508 F.3d 464, 475-76 (9th Cir. 2007) (holding that federal law preempted state-law duties to warn about risks associated with flying and deep vein thrombosis but remanding to determine a factual issue rather than deciding whether claims relating to airline seat configuration were preempted by the ADA in view of its economic impact); Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 797 (6th Cir. 2005) (holding that federal law preempted a state-law failure to warn claim arising from a helicopter crash); Witty v. Delta Air Lines, Inc., 366 F.3d 380, 386 (5th Cir. 2004) (holding that a passenger's claims against an airline for inadequate leg room and a lack of warnings relating to deep vein thrombosis, a blood clot condition he allegedly contracted on a flight, were preempted by federal law); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 376 (3d Cir. 1999) (providing an in-depth analysis of aviation preemption and holding that state law regarding the standard of care for plaintiffs' negligence claims was preempted); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 195 (3d Cir. 1998) (holding that a defamation claim that a travel agency brought against an airline was not preempted by federal law); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1444 (10th Cir. 1993) (holding that the plaintiffs' design-defect claims were not preempted by the FAA because of the presence of a saving clause and an express preemption clause that does not mention airline safety), abrogated by Geier v. Am. Honda Motor Co., 529 U.S. 861, 868 (2000) (holding that the presence of a saving clause does not allow for a broad reading of the FAA's express preemption provision but also does not foreclose the possibility that state-law claims are nonetheless impliedly preempted); French v. Pam Am Express, Inc., 869 F.2d 1, 7 (1st Cir. 1989) (holding that a state law requiring drug testing for pilots of interstate airline carriers was preempted); Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 438-39 (M.D. Pa. 2010) (holding that state-law standards of care regarding claims arising from an airline accident were preempted by federal law); Landis v. US Airways, Inc., No. 07-1216, 2008 WL 728369, at *4 (W.D. Pa. Mar. 28, 2008) (holding that standards of care imposed by state common law are preempted by the FAA); Deahl v. Air Wis. Airlines Corp., No. 03-C-5150, 2003 WL 22843073, at *4 (S.D. Ill., Nov. 26, 2003) (adopting the reasoning of Abdullah in holding that "state standards of care are preempted but state remedies are not"); Curtin v. Port Auth. of N.Y., 183 F. Supp. 2d 664, 671 (S.D.N.Y. 2002) (holding that state-law standards of care are preempted by federal law regarding emergency evacuations from an airplane).
leaving plausible questions about whether they are precedent in general aviation cases. Those questions are beyond the scope of this paper and will be left unanswered here.

Three circuits in particular recently wrestled with standard of care preemption in aviation litigation; two circuits narrowed earlier implied preemption rulings, while the third moved in the other direction. Is this a circuit split worthy of the Supreme Court’s consideration or merely different outcomes based on different facts? Do these cases suggest a trend in preemption law and, if so, a trend in which direction? Rather than try to definitively answer these questions here, we instead offer an analysis of the cases that we hope will identify issues for lawyers and judges to consider. Part IV will discuss each circuit in turn, first reviewing the law as it previously existed and then discussing recent developments.

A. THIRD CIRCUIT: ABDULLAH TO ELLASSAAD

Perhaps the most prominent—or at least most often cited—aviation preemption case is Abdullah v. American Airlines, Inc. Khaled Abdullah, along with several other individuals, sued American Airlines for injuries sustained while aboard Flight 1473 traveling from New York to San Juan, Puerto Rico. Although the first officer noticed a developing weather system along the flight’s anticipated course, turned on the passenger fasten seatbelt lights, and notified the flight attendants, none of the passengers were ever warned about the possibility of turbulence. A short time later, the flight encountered extreme turbulence, and Mr. Abdullah and several other passengers were injured.
The plaintiffs filed suit against American Airlines contending that the pilot, first officer, and flight attendants had not taken appropriate evasive maneuvers to avoid the convective weather, failed to warn passengers about the possibility of turbulence, and that because of these failures the plaintiffs were injured. At trial, the district court applied territorial common law to determine the applicable standard of care for plaintiffs' negligence claims; the jury found the airline liable and awarded plaintiffs more than two million dollars. American filed post-trial motions asserting that because federal law preempted territorial common law, the district court had set forth an improper basis for standard of care. On appeal, the Court of Appeals for the Third Circuit reversed and remanded, finding that the FAA preempted the standard of care. The district court agreed, stating that "the FAA impliedly preempts state and territorial regulation of aviation safety and standards of care." Because it previously utilized the improper standard of care, the district court ordered a new trial and the plaintiffs filed an interlocutory appeal.

The court in Abdullah provided an in-depth analysis of the FAA and the history surrounding its enactment, citing reports and testimony from both the United States Senate and House of Representatives. The court concluded that Congress intends for the Federal Aviation Administration to "exercise sole discretion in regulating air safety." "To effectuate this broad authority to regulate air safety, the Administrator of the [Aviation Administration] has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules."

Having determined that state and territorial standards of care were impliedly preempted, the court in Abdullah reasoned that the appropriate federal standard of care was found in 14 C.F.R. § 91.13(a), which relates to operation of an aircraft. Applying

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335 Id.
336 Id. at 365–66.
337 Id. at 366.
338 Id. at 376.
339 Id. at 366.
340 Id.
341 Id. at 368–69.
342 Id. at 369.
343 Id. (multiple footnotes omitted).
344 Id. at 371.
this section, the appropriate standard was avoiding "careless or reckless" operation.\textsuperscript{345}

Thus, in determining the standards of care in an aviation negligence action, a court must refer not only to specific regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless.\textsuperscript{346}

The court recognized that other courts of appeals had relied on an express preemption clause in the ADA as evidence of Congress's intent not to preempt federal standards of care under the FAA.\textsuperscript{347} The Third Circuit, however, disagreed with the other circuits' rationale.\textsuperscript{348} Instead, it held that "Congress, in enacting the FAA and relevant regulations, intended generally to preempt state and territorial regulation of aviation safety. Nevertheless, we find that plaintiffs may recover damages under state and territorial remedial schemes."\textsuperscript{349}

\textbf{B. \textit{Elassaad v. Independence Air, Inc.}}

In \textit{Elassaad v. Independence Air, Inc.}, the Third Circuit appears to have pulled back from its decision in \textit{Abdullah}.\textsuperscript{350} Although the court reaffirmed its earlier ruling that the FAA preempts the standard of care in state law negligence claims, it distinguished \textit{Abdullah} because Mr. Elassaad was not hurt while the airliner was being operated for purposes of air navigation.\textsuperscript{351} Thus, \textit{Elassaad} avoided a wholesale endorsement of standard of care preemption and limited its application to in-flight safety only.\textsuperscript{352} A detailed analysis is needed to understand how the court of appeals reached this decision.

Joseph Elassaad's right leg was amputated in 1978; he uses crutches to walk.\textsuperscript{353} In February 2004, Mr. Elassaad was a passenger on a Delta flight from Boston to Philadelphia operated by
Independence Air. After boarding the airplane (a Fairchild Dornier 328), Mr. Ellassaad tried to stow his crutches but found that the overhead bins were not long enough to accommodate them. The only flight attendant onboard helped Mr. Ellassaad store his crutches with the checked luggage.

The flight was uneventful. After the plane landed, the flight attendant asked Mr. Ellassaad to remain seated while the other passengers deplaned. He complied with the request, and when the flight attendant returned his crutches, he “used them to approach the aircraft door.” The air stairs “had a railing on the left side, but not on the right.” As Mr. Ellassaad tried to get down the stairs on his crutches, “he lost his balance and fell off the right side of the staircase, striking his shoulder on the pavement” and sustaining personal injuries for which surgery was required.

Mr. Ellassaad sued Independence Air and Delta in Pennsylvania state court, claiming the airlines were negligent under Pennsylvania law because they (1) were “operating an [airplane] made defective by” the faulty design of its passenger stairs and hand rail; (2) “fail[ed] to inspect and [properly] maintain the” passenger stairs and hand rail; and (3) “fail[ed] to offer and [provide] ... assistance to [him] as he” left the airplane. Independence Air removed the case to federal court based on diversity jurisdiction. Mr. Ellassaad voluntarily dismissed his claims against Delta after Independence admitted it was responsible for all aspects of the flight.

Independence Air then moved for partial summary judgment on Mr. Ellassaad’s first claim, arguing that under the Third Circuit’s decision in *Abdullah*, the FAA impliedly preempted the claims for negligent operation and inspection of the air-
plane.\textsuperscript{367} In his response, Mr. Elassaad conceded that the court was obliged to follow Abdullah and that, because the FAA had issued regulations governing integral stair systems,\textsuperscript{368} his claims based on the alleged defect in the stairs and hand rail were impliedly preempted.\textsuperscript{369} With the product defect based claims dismissed, Mr. Elassaad’s only remaining claim was that Independence Air had been negligent in failing to assist him in disembarking from the airplane, including failing to “mak[e] available all appropriate safety measures and devices.”\textsuperscript{370}

With Mr. Elassaad’s claims narrowed in this way, Independence Air moved for summary judgment a second time, arguing that the ACAA\textsuperscript{371} and regulations implementing it\textsuperscript{372} preempted state-law standards on how air carriers are to provide service to disabled passengers.\textsuperscript{373} Although the ACAA requires carriers to provide assistance when requested to do so by a disabled passenger,\textsuperscript{374} Mr. Elassaad conceded that the airline was not required to offer him assistance and that because of his natural tendency toward self-reliance, he purposely did not ask for assistance.\textsuperscript{375}

Mr. Elassaad responded to the airline’s summary judgment motion with four arguments: (1) “the ACAA and its [accompanying] regulations were intended only to prevent discrimination against disabled passengers, not to establish [safe-operating] standards;” (2) notwithstanding the ACAA, “air carriers could be [found] liable for failing to . . . offer assistance to disabled passengers, . . . if that failure compromised passenger safety;” (3) absent FAA regulations defining what assistance carriers must offer deplaning passengers, “state negligence law governs [the] carrier’s duty of care,” and the airline’s failure “to offer him [help amounted to] negligence under Pennsylvania common law;” and (4) the standard of care in 14 C.F.R. § 91.13, “which

\begin{footnotes}
\textsuperscript{367} Elassaad, 613 F.3d at 123.
\textsuperscript{368} See 14 C.F.R. § 25.783(i) (2004).
\textsuperscript{369} With Mr. Elassaad’s claims narrowed in this way, Independence Air moved for summary judgment a second time, arguing that the ACAA and regulations implementing it preempted state-law standards on how air carriers are to provide service to disabled passengers. Although the ACAA requires carriers to provide assistance when requested to do so by a disabled passenger, Mr. Elassaad conceded that the airline was not required to offer him assistance and that because of his natural tendency toward self-reliance, he purposely did not ask for assistance. Mr. Elassaad responded to the airline’s summary judgment motion with four arguments: (1) “the ACAA and its [accompanying] regulations were intended only to prevent discrimination against disabled passengers, not to establish [safe-operating] standards;” (2) notwithstanding the ACAA, “air carriers could be [found] liable for failing to . . . offer assistance to disabled passengers, . . . if that failure compromised passenger safety;” (3) absent FAA regulations defining what assistance carriers must offer deplaning passengers, “state negligence law governs [the] carrier’s duty of care,” and the airline’s failure “to offer him [help amounted to] negligence under Pennsylvania common law;” and (4) the standard of care in 14 C.F.R. § 91.13, “which
\end{footnotes}
prohibits carriers from operating an aircraft in a 'careless or reckless manner,' imposed a duty of care on [the airline] to offer him deplaning assistance.\textsuperscript{376}

The district court rejected each of these arguments, holding that under \textit{Abdullah} "federal law [established] the standard of care for [Mr.] Elassaad's negligence" claims.\textsuperscript{377} The court "adopted [the airline's] view" that "the applicable standard of care" was "found in the ACAA regulations."\textsuperscript{378} Based on these findings, the court concluded that the ACAA "impose[d] no affirmative duty to offer assistance to a disabled . . . passenger,"\textsuperscript{379} and even if 14 C.F.R. § 91.13\textsuperscript{380} were applied in this context, Mr. "Elassaad had failed to 'point[ ] to caselaw or expert testimony to establish that the [airline's failure] to offer assistance to [Elassaad] constituted careless or reckless conduct.'"\textsuperscript{381} The court granted the airline's summary judgment motion, and Mr. Elassaad appealed.\textsuperscript{382}

The court of appeals reversed the district court, finding that \textit{Abdullah} did not control the pending facts and that neither the FAA nor the ACAA preempted the standard of care applicable to the airline's conduct.\textsuperscript{383} The court's decision rest on four conclusions, the most important of which is the court's limitation of \textit{Abdullah}.

First, the court reaffirmed its earlier decision in \textit{Abdullah} that the FAA preempts only the standard of care, not the remaining elements of a state law negligence claim.\textsuperscript{384} Second, the court

\textsuperscript{376} Id.
\textsuperscript{377} Id. at 123--24.
\textsuperscript{378} Id. at 124.
\textsuperscript{379} Id.
\textsuperscript{380} 14 C.F.R. § 91.13 (2009) provides:
(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. (b) Aircraft operations other than for the purpose of air navigation. No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.
\textsuperscript{381} \textit{Elassaad}, 613 F.3d at 124.
\textsuperscript{382} Id.
\textsuperscript{383} Id.
\textsuperscript{384} Id. at 125.
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.\(^8\)

Although the passenger’s injury in *Abdullah* occurred in flight, the court of appeals nonetheless held broadly that “[t]he applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless.”\(^3\)

In *Elassaad*, the court backed away from this broad assertion.\(^3\) “[O]ur analysis of field preemption in *Abdullah*—specifically, the ‘field’ of ‘aviation safety’—was in the context of in-flight safety. This is clear from a careful reading of our decision.”\(^3\) Thus, despite *Abdullah*’s holding that there was implied preemption “of the entire field of aviation safety as a result of the Aviation Act and its implementing regulations,”\(^3\) the *Elassaad* court was convinced it had to start its preemption analysis from a clean slate.

Having determined that *Abdullah* applied to in-flight activities only, *Elassaad* held that *Abdullah* was not controlling and that claims surrounding deplaning presented questions of first impression.\(^3\) Thus, the court took up the task of determining whether the FAA, the ACA, and any accompanying regulations preempted the state standard of care, thus giving rise to the court’s third basis for its decision.\(^3\)

The court agreed that field preemption was the only viable argument concerning the FAA and its implementing regulations.\(^3\) Reviewing the legislative history and text of the FAA,

\(^{385}\) *Id.* at 126–27.

\(^{386}\) *Id.* at 127.


\(^{388}\) *See Elassaad*, 613 F.3d at 125–26.

\(^{389}\) *Id.* at 126 (referencing its analysis in *Abdullah* of “pilot certification, pilot pre-flight duties, pilot flight responsibilities, ... flight rules, ... airspace management, flight operations, and aviation noise”).

\(^{390}\) *Id.* (quoting *Abdullah*, 181 F.3d at 365).

\(^{391}\) *Id.* at 124, 127.

\(^{392}\) *Id.* at 127.

\(^{393}\) *Id.* at 127–28.
the court was satisfied that "[n]othing in the statute pertains to safety during disembarkation; rather, the statute’s safety provisions appear to be principally concerned with safety in connection with operations associated with flight."\textsuperscript{394} Given that Mr. Elassaad’s accident occurred while the airplane was parked at the gate, in-flight safety provisions that preempted the standard of care in \textit{Abdullah} were not applicable.\textsuperscript{395} Other broad standards for general safe operation of an aircraft were similarly inapplicable.\textsuperscript{396}

Specifically, the court noted that two regulations, 14 C.F.R. § 91.13(a) and (b), implemented pursuant to the FAA, provided “general description[s] of the standard” of care “for the safe operation of [an] aircraft.”\textsuperscript{397} The first, § 91.13(a), applies to operations “for the purpose of air navigation.”\textsuperscript{398} The court looked to the plain meaning of “operate” and “air navigation” to decide whether those terms showed Congress’s intent to occupy the field.\textsuperscript{399} The court was not convinced; “air navigation,” although not defined, reasonably applied only to operations in flight or to tasks related to flight.\textsuperscript{400} “[W]e conclude that a flight crew’s oversight of the disembarkation of passengers—after a plane has finished taxiing to the gate, and its crew has opened the aircraft’s door and lowered its stairs—does not constitute ‘operations for the purpose of air navigation.’”\textsuperscript{401}

The court’s discussion of § 91.13(b), dealing with operations “other than for the purpose of air navigation,” should be considered dicta because both Mr. Elassaad and Independence Air conceded that it was not applicable.\textsuperscript{402} Thus, because the court deemed \textit{Abdullah} only applicable to in-flight incidents, and because the FAA and its accompanying regulations did not touch on plane disembarkation, the court held that “the Aviation Act

\textsuperscript{394} Id. at 128.
\textsuperscript{395} Id. at 128–30.
\textsuperscript{396} Id. at 129.
\textsuperscript{397} Id. (internal citation omitted).
\textsuperscript{398} Id. (internal citation omitted).
\textsuperscript{399} Id. at 129–30.
\textsuperscript{400} Id. (looking to other definitions, such as “air navigation” and “air navigation facility,” 49 U.S.C. § 40102(a)(4), (33), as support for its position).
\textsuperscript{401} Id. at 130 (footnote omitted).
\textsuperscript{402} Id. (The court stated that “[t]here [was] no evidence that, by watching Ellassaad exit the plane, the flight crew was engaging in any acts that ‘impart[ed] some physical movement to the aircraft, or involve[d] the manipulation of the controls of the aircraft[,]’” as the court felt necessary for § 91.13(b) to preempt a state standard of care.).
and its safety regulations do not preempt [state law] standards of care in this negligence action.\(^{403}\)

The fourth and final basis for the court's decision was that Elassaad's negligence claim was not preempted by the ACAA under either field or conflict preemption theories.\(^{404}\) The ACAA was designed only to proscribe airline discrimination based on disabilities.\(^{405}\) Regarding field preemption, the court was not convinced that it was Congress's intent to preempt a state regulation that governed interactions between a disabled passenger and the air carrier.\(^{406}\) "At most, the ACAA might preempt state nondiscrimination laws as they apply to discrimination by air carriers against disabled passengers."\(^{407}\)

In addition to rejecting Independence's proposition that the field of air carrier interaction with disabled passengers was preempted by the ACAA, the court also found no conflict preemption.\(^{408}\) Independence argued the ACAA's purpose was to "protect the dignity of disabled passengers,"\(^{409}\) relying on several federal regulations that (1) stipulate an air carrier should not offer guidance unless it is apparent the passenger needs help; (2) prohibit an air carrier from insisting that a passenger accept assistance; and (3) require an air carrier to provide assistance, upon request, when "enplaning and deplaning."\(^{410}\) The court rejected Independence's arguments, holding that any state-law requirements could "easily coexist with the ACAA's mandate that Independence not discriminate against [Elassaad]."\(^{411}\)

So, what is the practitioner to conclude? The Third Circuit's limiting interpretation of Abdullah signals its unease with its earlier broad reading of implied preemption of state law standards of care.\(^{412}\) But in doing so, the court in Elassaad likely created more ambiguity.

\(^{403}\) Id. at 131.

\(^{404}\) Id.

\(^{405}\) Id.

\(^{406}\) Id.

\(^{407}\) Id. at 132 (internal citation omitted).

\(^{408}\) Id. at 132-33.

\(^{409}\) Id. at 133 (internal quotation and citation omitted).

\(^{410}\) Id. (citing Nondiscrimination on the Basis of Disability in Air Travel, 70 Fed. Reg. 41,482, 41,504 (July 19, 2005); 14 C.F.R. § 382.7(a)(2) (2004); 14 C.F.R. § 382.39(a) (2004)).

\(^{411}\) Id.

\(^{412}\) For an additional foray into Abdullah and Elassaad, see Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429 (M.D. Pa. 2010). On the heels of the Third Circuit's decision in Elassaad, the United States District Court for the Middle Dis-
For instance, the court of appeals held that plane disembarkation is not aircraft operation. But, the court did not provide where “aircraft operation” for preemption analysis purposes begins and ends. Clearly, the court recognized it left more questions unanswered than answered. “We do not reach the issue of whether other activities that occur while a plane is on the ground, such as taxiing or the process of opening an aircraft’s doors, would constitute ‘operations’ such that they would be subject to federal preemption.” The court did not consider whether baggage handlers were unloading luggage from the airplane. Had a refueling truck started to refuel? Was the caterer loading ice, snacks, and beverages? And what if the plane had just arrived from taxiing and was in the process of connecting to the skywalk? Would these activities have been enough to fall within the category of “operations”? There are no clear answers to these questions in *Elassaad*.

The district of Pennsylvania in *Sikkelee* was presented with the issue of federal general aviation preemption. The defendants argued that the FAA, and other applicable aviation standards and legislation, preempt the entire field of aviation safety. *Id.* at 432. The plaintiff in *Sikkelee*, in turn, argued that its claims were not preempted, asserting that *Abdullah* was limited to commercial operations, that *Abdullah* was flawed because it failed to consider GARA, and finally that *Abdullah* was no longer good law in light of *Wyeth v. Levine*. *Id.* at 432–33. The district court in *Sikkelee* was torn between the arguments, but felt compelled to follow *Abdullah* and *Elassaad* and apply federal preemption in the general aviation context. *Id.* at 438–39. The court noted the difficult nature of its decision, writing:

> Candidly, we note that the decision that follows has not been easy to reach. Both parties advance compelling arguments in support of or in opposition to the Motion, and each interpretation finds support in this clearly underdeveloped body of law. Like the learned counsel for the parties, the Court has conducted exhaustive research and has considered all apparent interpretations and conclusions. We thus detail the controlling and instructive law that has formed our conclusion below.

> There is certainly not an absence of authority that agrees with Plaintiff’s proffered interpretation of the law. Indeed, we find the logic therein alluring, and perceive the wisdom of the various decisions in other Circuits that have failed to find preemption in circumstances similar to the case at bar. Nonetheless, no matter how compelling their reasoning, those authorities are not controlling for our purposes as we must follow the state of the law as articulated by the Third Circuit. The legal principle of *stare decisis* commands no less.

*Sikkelee*, 731 F. Supp. 2d at 433.

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413 See supra text accompanying note 400.
414 See *Elassaad*, 613 F.3d at 129–31.
415 *Id.* at 130 n.14.
C. Ninth Circuit: Montalvo to Martin

In Martin ex rel. Heckman v. Midwest Express Holdings, Inc., the Ninth Circuit has also narrowed its view of standard of care pre-emption. Before discussing Martin, however, it may be helpful to understand the Ninth Circuit’s earlier aviation preemption cases.

Montalvo v. Spirit Airlines involved fourteen consolidated cases originally filed in California state court where passengers sued airlines for causing them to suffer deep vein thrombosis in flight. The passengers claimed that the airlines failed to warn them of the danger of deep vein thrombosis and provided seating arrangements that were unsafe. Deep vein thrombosis “is a medical condition that occurs when a blood clot forms in a deep vein”—most commonly in an individual’s leg. A clot can dislodge and travel through the individual’s pulmonary system, often reaching either the brain or lungs. Deep vein thrombosis is a dangerous condition; indeed, several of the plaintiffs in Montalvo died as a result of it.

The airlines removed the suits to federal court, where they were consolidated and then transferred to the Northern District of California. The airlines sought, and the district court granted, summary judgment on the defective seat design claim. The airlines also sought dismissal of the consolidated suit, arguing that the ADA expressly preempted the separate unsafe seating configuration claim and that the FAA impliedly preempted plaintiffs’ failure to warn claims. The district court agreed; plaintiffs appealed the failure to warn claim and the unsafe seat configuration claim.

The first issue on appeal was whether the FAA, subsequent amendments, and applicable federal regulations preempted state law duties to warn about the risks associated with flying and deep vein thrombosis. The second issue was whether claims

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416 See Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806, 811 (9th Cir. 2009).
417 Montalvo v. Spirit Airlines, 508 F.3d 464, 467-68 (9th Cir. 2007).
418 Id. at 469.
419 Id.
420 Id.
421 Id.
422 Id.
423 Id.
424 Id.
425 Id. at 470.
426 Id. at 468.
relating to airline seat configuration were preempted by the ADA in view of its economic impact. 427 The district court determined that preemption existed as to the first issue. 428 On appeal, the Ninth Circuit affirmed the finding that the FAA impliedly preempted the failure to warn claim, but it reversed and remanded the issue of ADA preemption on seat configuration, noting that this was a closer question. 429

In affirming the district court’s finding that the FAA impliedly preempts the entire field of aviation safety, the Ninth Circuit expressly adopted the rationale in Abdullah, stating, “We adopt the Third Circuit’s broad, historical approach to hold that federal law generally establishes the applicable standards of care in the field of aviation safety.” 430 Specifically, Montalvo determined that Congress intended to occupy the field of aviation safety as evidenced by the FAA’s purpose, language, and history surrounding its enactment, as well as accompanying federal regulations. 431 It was clear to the Montalvo court that Congress had impliedly preempted state law regulations of passenger warnings; had it not, each state would be able to enact differing standards, potentially exposing the airlines to fifty different potential standards of care. 432

The seat configuration issue, however, was not as clear cut. 433 The plaintiffs claimed that the current seat configuration caused blood clots; the only remedy, argued the airlines, was to reduce the number of seats (increasing legroom), which would in turn raise individual ticket prices. 434 Such a requirement, according to the court, would be a “forbidden indirect regulation of the aviation industry under the ADA.” 435 Because the Ninth Circuit had previously narrowly construed the ADA’s express preemption provision, the court in Montalvo was unable to determine whether the seating configuration issue presented a “significant

427 Id. The district court granted the defendants’ motion for summary judgment pertaining to seat design; the plaintiffs did not appeal this issue. Id. at 469–70.
428 Id. at 468.
429 Id.
430 Id.
431 Id. at 471–72.
432 Id. at 473.
433 Id. at 475 (“Without more factual development, we cannot determine whether the preemptive reach . . . extends as far as the seating configuration issue presented in this case.”).
434 Id. at 474.
435 Id.
effect" on pricing. Thus, the court in Montalvo felt compelled to reverse and remand for further fact determination.

Although the Ninth Circuit adopted Abdullah’s broad interpretation of standard of care preemption in aviation litigation, it would soon have the opportunity to narrow its reach in Martin.

D. Martin ex rel. Heckman v. Midwest Express Holdings, Inc.

In 2002, Carrie Heckman, accompanied by her infant son Malcolm, flew on Skyway Airlines (a wholly-owned subsidiary of Midwest Airlines) from Milwaukee to the Twin Cities. While deplaning from the Fairchild Dornier 328 (the same type of plane as in Elassaad), Ms. Heckman, who had Malcolm in her arms, fell from the single-handrail airstair. She and Malcolm struck the concrete ramp and were injured. Ms. Heckman was also twenty-two weeks pregnant with her daughter Lola. About four weeks later, Lola was born prematurely and suffered disabilities attributable to her mother’s fall.

On behalf of her children and herself, Ms. Heckman sued Midwest Express for negligence and Fairchild Dornier for strict product liability. She claimed the airline was negligent because it had failed to assist her as she and her son deplaned and that the manufacturer was liable because the airstair design was defective. After protracted procedural litigation, Midwest Ex-

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436 Id. at 475.
437 Id. The court also noted that the Fifth Circuit in Witty v. Delta Air Lines, Inc. had recently been presented with a similar factual scenario. Witty v. Delta Air Lines, Inc., 366 F.3d 380, 383 (5th Cir. 2004). There, plaintiffs acknowledged that seat reconfiguration would ultimately result in increased airfare. Id. Thus, the court in Witty dismissed the plaintiffs’ claim as preempted under the ADA. Id.

438 See Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806, 808 (9th Cir. 2009).
439 Brief of Appellants at 14, Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806 (9th Cir. 2009) (No. 07-55063).
440 Id.
441 Id. at 15.
442 Id. at 14.
443 Id. at 15.
444 Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806, 808 (9th Cir. 2009); Brief of Appellants, supra note 439, at 12.
press agreed to pay Ms. Heckman $8 million in settlement and then sought to recover that sum in an indemnity action against Fairchild Dornier based on the alleged design defect.\footnote{Martin, 555 F.3d at 808.}

Fairchild Dornier resisted these claims and moved for summary judgment, arguing that (1) “federal law preempt[ed] [Midwest Express’s] [state law] claims because” federal legislation preempts “the entire field of aviation safety” and (2) an express warranty disclaimer contained in the sales contract for the airplane barred Midwest Express from recovering settlement costs from Fairchild Dornier.\footnote{Order Granting Summary Judgment, supra note 445.} The district court granted Fairchild Dornier’s motion on the latter basis, finding the warranty disclaimer absolved the manufacturer from any liability to the airline.\footnote{Id. at 3 (The facts surrounding the warranty provision and the district court’s rationale for granting summary judgment based on it are not relevant here. Thus, we have focused on only the district court’s discussion of federal preemption.).}

The district court rejected Fairchild Dornier’s preemption argument, however, holding that Congress had not intended the FAA to preempt the entire field of aviation safety.\footnote{Id. at 3, 7. To the extent the court’s preemption analysis was not necessary to its decision to grant Fairchild Dornier’s motion for summary judgment, it is arguably dicta.} To support its holding, the court relied on three federal statutes. First, it found the FAA’s saving clause was evidence that Congress did not intend to preempt the entire field of aviation safety.\footnote{Id. at 7–8.} Second, that Congress, by enacting the eighteen-year statute of repose in GARA,\footnote{General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 (2006)). In GARA, Congress established an eighteen-year statute of repose for civil actions against manufacturers of general aviation aircraft and component parts. Id. §§ 2(a)(1), 3(3). For further reading on this topic, please see infra text accompanying note 452 and GARA articles cited there.} must have intended only to protect airplane manufacturers from old liability claims, further suggesting that Congress did not mean to preempt all—and particularly newer—aviation-related, state law tort claims.\footnote{Order Granting Summary Judgment, supra note 445, at 8 (citing Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 832 (E.D. Tex. 2006)). The House Judiciary Committee noted, “[GARA] attempts to strike a fair balance by providing some certainty to manufacturers, which will spur the development of new jobs, while preserving victims’ right to bring suit for compensation in certain particularly compelling circumstances.” H.R. Rep. No. 103-525, pt. 2, at 5 (1994),
district court considered whether an airline’s providing its passengers with a means of egress from an airplane amounted to “services” under the ADA and found that it did not.\textsuperscript{453} Noting that the Ninth Circuit construed “service” narrowly and limited the word to the context of airline economic performance, the district court decided that an ordinary personal injury lawsuit was not a “service” such that federal law preempted Midwest Express’s claim.\textsuperscript{454}

Rounding out its preemption analysis, the district court found that federal regulations did not preempt state laws applicable to an airstair design.\textsuperscript{455} Although Fairchild Dornier claimed several regulations preempted airstair design, the district court thought only two regulations gave rise to colorable arguments.\textsuperscript{456} Fairchild Dornier’s best argument concerned 14


\textsuperscript{454} Order Granting Summary Judgment, supra note 445, at 10. Congress used the word “service” in the phrase “rates, routes, or service” in the ADA’s preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. . . . [A]llowing smoking on Northwest’s trans-Pacific flights does not constitute a “service.” An airline’s decision to permit (or not to permit) smoking on a flight is not a decision dealing with “the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided.”

\textsuperscript{455} Order Granting Summary Judgment, supra note 445, at 10.

\textsuperscript{456} Id.
C.F.R. § 25.810, which covers escape routes from planes and mandates that airstair designs must not impede emergency passenger egress.\textsuperscript{457} Also pertaining to emergency egress and stair designs is 14 C.F.R. § 23.783.\textsuperscript{458} Although these regulations concerned integrated stair designs, the district court reasoned that this case was "concerned not with emergency egress, but rather with safety standards regarding the placement of handrails on airstairs provided for non-emergency ingress and egress. The federal regulation does not address this topic, and the airline has not presented any explanation as to why it has any application in this case."\textsuperscript{459}

Finally, the district court discredited Fairchild Dornier’s reliance on In re Deep Vein Thrombosis Litigation,\textsuperscript{460} noting that it dealt with the highly regulated area of plane seat design, not airstair design, and thus was of no help to the manufacturer.\textsuperscript{461} For this reason, and those previously discussed, the district court denied Fairchild Dornier’s motion for summary judgment on the basis of federal preemption.\textsuperscript{462} The district court, however, granted Fairchild Dornier’s motion for summary judgment on the basis that it had properly disclaimed liability in the sales agreement.\textsuperscript{463}

Very little mention of this issue made its way into Chief Judge Alex Kozinski’s appellate opinion, however.\textsuperscript{464} Instead, the court released a one-paragraph “accompanying memorandum”\textsuperscript{465} in which it held that the limitations language in the sales agreement did not bar Midwest Express from seeking indemnification from Fairchild Dornier.\textsuperscript{466} Although procedur-
ally the court of appeals reversed the district court’s dismissal of the complaint, its opinion effectively agreed with the district court’s ultimate determination that federal preemption did not bar Midwest Express’s claim against Fairchild Dornier.\textsuperscript{467}

Such a procedural move is interesting: why devote a one-paragraph “accompanying memorandum” to the issue that ultimately justified reversal of the district court’s decision,\textsuperscript{468} yet issue a multiple-page order agreeing that there was no federal preemption, something the district court had already dismissed?\textsuperscript{469} The answer is likely that the court in \textit{Martin} wished to back away from its recent holding in \textit{Montalvo v. Spirit Airlines}, which had expressly adopted \textit{Abdullah},\textsuperscript{470} something the district court in \textit{Martin} resisted.\textsuperscript{471}

Prior to the district court’s granting of Fairchild Dornier’s motion for summary judgment and the court of appeals’ determination on the issue of federal preemption, the Ninth Circuit issued an opinion on federal preemption in \textit{Montalvo}.\textsuperscript{472} On appeal, Fairchild Dornier argued that \textit{Montalvo} reached a different conclusion than that of the district court in \textit{Martin}, necessitating reversal on the issue of federal preemption on the basis that the FAA preempted Martin’s personal injury claim and, it asserted, Midwest Express’s indemnity claim.\textsuperscript{473} And although the court in \textit{Martin} ultimately decided that Congress had not preempted the specific issue in \textit{Martin}, the three-judge panel disagreed in the interpretation of \textit{Montalvo}.\textsuperscript{474}

press’ right to recover consequential damages also does not bar the claim, as the clause does not specifically foreclose indemnity. For reasons set forth in the accompanying opinion, Midwest Express’ claim is not federally preempted.

\textit{Martin}, 2009 WL 306216, at *1. Thus, the court in \textit{Martin} reversed the district court’s order dismissing Midwest Express’s complaint. \textit{Id.}

\textsuperscript{467} See \textit{Martin}, 555 F.3d at 812.
\textsuperscript{468} See \textit{Martin}, 2009 WL 306216, at *1.
\textsuperscript{469} See \textit{Martin}, 555 F.3d at 806.
\textsuperscript{470} See \textit{Montalvo v. Spirit Airlines}, 508 F.3d 464, 468 (9th Cir. 2007).
\textsuperscript{471} Order Granting Summary Judgment, \textit{supra} note 445, at 9 n.4.
\textsuperscript{472} \textit{Montalvo}, 508 F.3d at 468.
\textsuperscript{473} Answering Brief of Appellees at 13–14, Midwest Express Holdings, Inc. v. Braun, 555 F.3d 806 (9th Cir. 2009) (No. 07-55063).
\textsuperscript{474} \textit{Martin}, 555 F.3d at 812 (Bea, J., concurring) (“I agree the district court’s order dismissing the complaint should be reversed, but to another result. This is because I read \textit{Montalvo v. Spirit Airlines}, 508 F.3d 464 (9th Cir. 2007), quite differently than does the majority.”).
Central to the majority's decision in Martin was its reading of Montalvo.475 Chief Judge Kozinski and Judge Huff476 interpreted Montalvo differently than Judge Bea.477 The manufacturer urged the court to read Montalvo broadly, arguing that "the FAA preempts all personal injury claims by airline passengers, except claims based on violations of specific federal regulations."478 The majority thought otherwise, stating that Montalvo "cuts against the manufacturer's argument for broad FAA preemption."479 Montalvo, the majority reasoned, "rested heavily" on the extensive federal regulations surrounding passenger warnings pertaining to seatbelts.480 The majority thought the manufacturer's argument was negated by Montalvo's treatment of the seating configuration issue in which the plaintiffs never alleged violation of federal regulations and in which the court in Montalvo did not "consider [FAA] preemption at all."481 Instead, as the majority pointed out, Montalvo considered seat configuration under the ADA's express preemption clause.482 If the Ninth Circuit thought the FAA preempted all personal injury claims, the majority reasoned, why even consider the ADA at all?483

The majority's reasoning in Martin springs from Montalvo's different treatment of the seating configuration and failure to warn claims. If Montalvo had held that the FAA preempts all state law personal injury claims, it would have been unnecessary to reverse the district court's dismissal of the seating configuration claim and remand for further consideration of ADA preemption.484

As such, the majority interpreted Montalvo to:

neither preclude[ ] all claims except those based on violations of specific federal regulations, nor require[ ] federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, it means that when the agency is-

475 See id. at 809-11.
476 United States District Judge for the Southern District of California, sitting by designation.
477 Compare Martin, 555 F.3d at 809-11 (majority opinion), with id. at 812-16 (Bea, J., concurring).
478 Id. at 810 (majority opinion).
479 Id. at 809.
480 Id. at 809–10.
481 Id. at 810.
482 Id.
483 Id.
484 Id. (emphasis in original).
sues “pervasive regulations” in an area, like passenger warnings, the FAA preempts all [state-law] claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.485

Stepping back from Montalvo, the majority in Martin adopted a fact-intensive determination of whether preemption exists.486 Absent pervasive regulations or other compelling indicia of preemption, various state standards of care control.487 Thus, preemption may exist (and, it follows, a federal standard of care applies) in some types of personal injury claims while other personal injury claims can still be governed by state law.488 In essence, there is no wholesale preemption of state law standards of care for personal injury claims as Montalvo might suggest.489

Having lost its Montalvo arguments, Fairchild-Dornier made a last-ditch argument that the federal certification process preempts product defect claims.490 Although various federal regulations might influence airplane component design, such as airstairs, the court was not convinced of any indication of intent “to pervasively regulate every aspect of plane design.”491 Indeed, the majority closed its opinion stating:

Airstairs are not pervasively regulated; the only regulation on airstairs is that they can’t be designed in a way that might block the emergency exits. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers’ weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It’s hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted [state-law] claims that the stairs are defective.492

485 Id. at 811 (The majority in Martin noted that this viewpoint had been adopted by other circuits.).
486 See id.
487 See id.
488 See id.
489 See id.
490 Id. at 811–12 (“To certify a plane design, the manufacturer must show that it meets the agency’s regulations, and ‘that no feature or characteristic makes it unsafe.’”) (quoting 14 C.F.R. § 21.21(b)(2) (2009)).
492 Id. (internal citations omitted).
Thus, the court in Martin determined there was no federal preemption in this instance, essentially concurring in the result of the district court’s decision.\(^{493}\)

1. Minority Concurring Opinion

Judge Bea concurred that the district court order should be reversed but interpreted Montalvo “quite differently” than the majority.\(^{494}\) Pointing out that in Montalvo claims were brought both for negligent design and negligent configuration of the plane’s seats, Judge Bea distinguished the majority’s interpretation on the basis that the Montalvo plaintiffs never appealed dismissal of their negligent seat-design claim.\(^{495}\)

"[T]he lesson of Montalvo is that the plaintiffs thought so little of the idea that federal law did not preempt state theories of negligent design liability that they chose to let dead dogs lie by not even attempting to resuscitate that claim by appeal. But note, there was no more “pervasive” federal regulation of seat design than there is of stairway bannister design."\(^{496}\)

Moreover, Judge Bea felt that the court’s language in Montalvo expressly adopted the Third Circuit’s approach in Abdullah.\(^{497}\) “Montalvo still provides the framework by which we analyze preemption of state tort law actions against airlines, and I think the solution to this case lies in Montalvo’s plain text: “[w]e adopt the Third Circuit’s broad, historical approach [in Abdullah v. American Airlines, Inc.]”\(^{498}\) However, the issues in Abdullah were pervasively regulated while the issue before the court in Martin did not fall under specific regulation.\(^{499}\) Thus, the true question before the court, Judge Bea felt, “[was] whether the Abdullah rule [as adopted by Montalvo], which establishes federal preemption of state standards of care in state law personal injury actions against airlines, applies to negligent design actions in which the FAA has not promulgated relevant regulations describing the particular obligations of the airline.”\(^{500}\) Contrary to the majority’s interpretation, Judge Bea interpreted Montalvo’s adoption of Abdullah to allow expert

\(^{493}\) See id.

\(^{494}\) Id. at 812–13 (Bea, J., concurring).

\(^{495}\) Id.

\(^{496}\) Id. at 811.


\(^{498}\) Martin, 555 F.3d at 813 (Bea, J., concurring).

\(^{499}\) Id. at 814.

\(^{500}\) Id.
testimony to assist a fact finder in determining what the appropriate standard of care is when not expressly stated by federal regulation.\(^{501}\)

In sum, Judge Bea read *Montalvo* to require remand in *Martin* to the district court in order to determine the appropriate federal standard of care while retaining state standards for the remaining negligence elements, an approach consistent with *Abdullah*.\(^{502}\) Otherwise, according to Judge Bea:

Without federal preemption of the standard of care in personal injury tort actions, airlines and airplane manufacturers would be subject to the standard of care in whichever state their planes happen to be in (or over) when the injury occurs; the majority's rule essentially means airlines and airplane manufacturers must prepare for fifty kinds of liability. With federal preemption of the standard of care, both airlines and airplane manufacturers, on the one hand, and passengers, on the other, would have some manageable guidance regarding duties owed. Further, by allowing the states to determine the elements of breach, causation and, most importantly, damages, the *Abdullah* approach allows states to maintain individual policy priorities in line with Congress's intent to preserve [state-law] remedies.\(^{503}\)

*Martin* is unique in that the Ninth Circuit spent only one paragraph, in a separate memorandum opinion, reversing the district court's decision pertaining to contractual limitations of liability,\(^{504}\) yet dedicated multiple pages to interpreting the Ninth Circuit's prior federal aviation preemption decision in *Montalvo*, essentially concurring with the result reached by the district court.\(^{505}\) Clearly, the majority in *Martin* felt a need to back away from *Montalvo*'s wholesale endorsement of *Abdullah*'s finding of implied preemption of state law standards of care.\(^{506}\) Indeed, the majority distinguished *Montalvo* as only standing for standard of care preemption in instances of pervasive regulations or when other preemption doctrines are met, not the broad interpretation advocated by Fairchild Dornier.\(^{507}\)

\(^{501}\) Id. at 815.

\(^{502}\) Id. at 816.

\(^{503}\) Id. (multiple citations omitted).

\(^{504}\) See *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, No. 07-55063, 2009 WL 306216, at *1 (9th Cir. Feb. 9, 2009).

\(^{505}\) See *Martin*, 555 F.3d at 809–12.

\(^{506}\) See id. at 809.

\(^{507}\) See id. at 811.
But Martin cites Cleveland v. Piper Aircraft Corporation as a further example of the validity of such an interpretation.\textsuperscript{508} To the extent that Cleveland is no longer good law, as is discussed in Part IV.E., the majority’s conclusion in Martin may well be susceptible to challenge by proponents of a broad federal standard of care preemption.

E. Tenth Circuit: Cleveland to O’Donnell

Cleveland v. Piper Aircraft Corp.\textsuperscript{509} is often cited by counsel opposing the application of federal law to aviation claims. In 1983, Edward Cleveland was injured while attempting to takeoff from a New Mexico airstrip in a Piper Super Cub.\textsuperscript{510} The Super Cub was towing an unpowered glider that was to be filmed by Cleveland and a cinematographer for an advertisement.\textsuperscript{511} To facilitate the photography, Cleveland removed the pilot’s seat and installed a camera in its place.\textsuperscript{512} Cleveland then attempted to control the plane from the rear seat.\textsuperscript{513} The owner of the airport became concerned about the safety of Cleveland’s proposed operation and closed the runway, parking his van at one end to prevent takeoffs and landings.\textsuperscript{514} Undeterred, Cleveland attempted to takeoff while piloting the plane from the rear seat.\textsuperscript{515} Inevitably, Cleveland hit the parked van during takeoff, struck the mounted camera inside the plane, and suffered severe brain injuries.\textsuperscript{516} Cleveland’s wife brought suit on his behalf.\textsuperscript{517}

The jury found Piper liable for design defects in the airplane, but the judgment was reversed and remanded based on an error.

\textsuperscript{508} Id. at 811 ("This conclusion accords with the decisions of other circuits, refusing to find various defective product claims impliedly preempted by the FAA in the absence of relevant and pervasive regulations on the allegedly defective part.") (citing Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1445 (10th Cir. 1993), cert. denied, 510 U.S. 908 (1993), abrogated by Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000)).

\textsuperscript{509} Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989), reh’g denied, 898 F.2d 778 (10th Cir. 1990). See also discussion infra notes 579–81.

\textsuperscript{510} Cleveland, 985 F.2d at 1440.

\textsuperscript{511} Id. at 1441.

\textsuperscript{512} Id.

\textsuperscript{513} Id.

\textsuperscript{514} Id.

\textsuperscript{515} See id.

\textsuperscript{516} Id.

\textsuperscript{517} Id.
in the jury instructions. On remand, Piper sought leave to amend its answer to assert federal preemption (under the FAA) as an affirmative defense. Although the district court granted leave to amend, it later denied Piper's motion for summary judgment based on preemption. Piper then sought and was granted an interlocutory appeal to the Tenth Circuit.

The court of appeals concluded that the plaintiffs' design-defect claims were not preempted by the FAA for two key reasons. First was the presence of a saving clause in the FAA, which provides, "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The Cleveland panel reasoned that the saving clause, by stating Congress's intention not to limit remedies available to claimants, arguably limited the extent to which Congress had entered the field of aviation safety and "show[ed] that Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law." The court supported this conclusion by equating the word "remedies" with state law tort liability generally, reasoning that "[b]y its very words, the [FAA] leaves in place remedies then existing at common law or by statute." The court also noted that when Congress enacted the FAA in 1958, tort liability for product design defects was widely recognized in the states and had been extended specifically to airplane accident cases.

Second, the Cleveland court noted that the FAA "contains an express preemption provision that 'relates to rates, routes[,] or services of any carrier.'" The Act's express preemption clause provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law re-

518 See Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1546–51, 1556 (10th Cir. 1989), reh'g denied, 898 F.2d 778 (10th Cir. 1990).
519 See Cleveland, 985 F.2d at 1440–41 (10th Cir. 1993).
520 Id. at 1447.
521 See id. at 1440.
523 Cleveland, 985 F.2d at 1442 (citing In re Air Crash Disaster, 635 F.2d 67, 74–75 (2d Cir. 1980); In re Mexico City Aircrash, 708 F.2d 400, 407 (9th Cir. 1983) (dictum)).
524 Id. at 1442–43.
525 Id. at 1443.
526 Id. at 1443 n.11.
lated to a price, route, or service of an air carrier" but makes no similar provision for air safety. Viewing this as an apparent dichotomy within the provision, the court used the rule of statutory construction, *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of the other—to conclude that the express provision “excluded consideration of all forms of implied preemption.” Also relying on the Supreme Court’s decision in *Cipollone*, the *Cleveland* panel held that “implied preemption is generally inapplicable to a federal statute that contains an express preemption provision.”

Both of these conclusions had been challenged—and even subjected to criticism—before the Tenth Circuit issued its opinion in *US Airways, Inc. v. O’Donnell*. As we have discussed earlier, the Supreme Court had previously made clear, directly contradicting a substantial part of the *Cleveland* court’s reasoning, that “an express preemption provision [in a federal statute] does not, by itself, foreclose” finding that the statute also impliedly preempts the field and that a clause saving state civil remedies does not mean that state safety standards can be applied when Congress has evinced an intent to occupy the field. And with increasing scrutiny and disagreement by

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528 *Cleveland*, 985 F.2d at 1443.
529 *Id.* at 1443, 1447.
530 *Id.* at 1447 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (“[E]nteraction of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.”)); *See also supra* note 10 and text accompanying.
531 *See, e.g.*, *Curtin v. Port Auth. of N.Y.*, 183 F. Supp. 2d 664, 670 (S.D.N.Y. 2002) (noting that the Tenth Circuit’s logic in *Cleveland* had been undercut by recent Supreme Court decisions). The *Curtin* court was not persuaded by the Tenth Circuit’s reasoning and instead agreed with the First and Third Circuits’ decisions that the FAA implicitly preempted the field of air safety. “The comprehensive federal regulatory scheme covering emergency evacuation procedures, the manifest purpose of the FAA to ensure safety, and the legislative history [of the FAA and ADA] all favor finding that the standard of care is a matter of federal, not state, law.” *Id.* at 671.
532 *See supra* Part II.A–B.
534 *See United States v. Locke*, 529 U.S. 89, 105 (2000) (“The evident purpose of the saving clauses is to preserve state laws[,] which, rather than imposing substantive regulation of a vessel’s primary conduct, establish liability rules and financial requirements relating to oil spills.”).
other courts, the Tenth Circuit seemingly abrogated Cleveland’s rationale when it decided US Airways, Inc. v. O’Donnell.\footnote{US Airways, Inc. v. O’Donnell, 627 F.3d 1318 (10th Cir. 2010).}

1. US Airways, Inc. v. O’Donnell

In November 2006, Dana Papst flew from Phoenix to Albuquerque on US Airways.\footnote{Id. at 1322.} Mr. Papst reportedly “purchased and consumed alcoholic beverages during [the] flight.”\footnote{Id. Mr. Papst, a computer network administrator employed by the Santa Fe Opera, had attended a training session in Sacramento. Afterward, he took vacation time to travel to Reno. While Mr. Papst was returning from Reno to New Mexico on US Airways, flight attendants served him two miniature bottles of alcohol, even though he appeared already intoxicated to other passengers on board. Police reported that while driving to his home from the airport, Mr. Papst stopped at a convenience store and bought a six-pack of beer. Near an interstate exit, Mr. Papst apparently became disoriented and began traveling back toward Santa Fe on the wrong side of the interstate when the crash occurred. See Anne Constable, Opera, Papst Estate Settle with Family, SANTA FE NEW MEXICAN (Oct. 22, 2008), http://www.santafenewmexican.com/PrintStory/Opera—Papst-estate-settle-with-family.} About three hours after deplaning in Albuquerque, during his drive home from the airport, Mr. Papst caused an automobile accident in which he and five others were killed.\footnote{O’Donnell, 627 F.3d at 1322.} His blood-alcohol content at the time of the accident was approximately 0.329%.\footnote{Id.} The FAA investigated the accident but “declined to take any action against [US] Airways or its employees.”\footnote{Id. at 1322–23.}

Two months later, “[i]n January 2007, the Alcohol and Gaming Division (AGD) of the New Mexico Regulation and Licensing Department” cited US Airways for “serv[ing] alcohol to an intoxicated person, [specifically] Dana Papst.”\footnote{Id. at 1323.} “The AGD also served . . . a cease-and-desist order directing [the airline] to ‘refrain from selling, serving[,] and otherwise dispensing, storing[,] or possessing alcoholic beverages of any kind in the State of New Mexico’ without properly complying with the requirements of [the New Mexico Liquor Control Act] (NMLCA).”\footnote{Id. at 1323.}

In February 2007, [after] noting its belief that federal law preempted the application of the NMLCA to [its operations], [US] Airways applied for a public service license to serve alcoholic beverages to passengers on aircraft in New Mexico. In response to
the application, AGD issued [the airline] a ninety-day temporary license. However, in June 2007, [at the expiration of the ninety days], AGD declined to extend [the] temporary license explaining that [the airline’s] alcohol server training did not comply with NMLCA’s requirements.543

Ultimately, AGD “rejected [US] Airways’ application for a license in November 2007 citing as reasons” both the Papst accident “and another incident . . . involv[ing] a passenger who had been served alcoholic beverages on a [US] Airways flight and was [arrested for drunk driving about] an hour after he had de-planed at Albuquerque.”544

In response to the state’s actions, US Airways filed suit in federal court “seeking to enjoin New Mexico state officials [in the AGD and the New Mexico Regulation and Licensing Department] from enforcing laws that purport to govern [US] Airways’ alcoholic beverage service on flights departing from or arriving into New Mexico.”545 Asserting “both express and implied pre-emption in support of [the] injunction . . . [US] Airways argued that [enforcing the] NMLCA against an airline violated the Supremacy Clause . . . [because] the ADA expressly preempts state regulation of airline services, including” serving alcoholic beverages to airline passengers.546 “Alternatively, [US] Airways [argued] that federal law impliedly preempts [applying the] NMLCA to [an] airline[ ]” because doing so necessarily implicates “aviation safety, which federal law regulates to the exclusion of state regulation.”547 “[US] Airways [also] asserted that New Mexico’s regulatory efforts could not be otherwise authorized pursuant to the Twenty-first Amendment to the . . . Constitution.”548

“The parties filed cross-motions for summary judgment.”549 “The district court concluded that federal law neither expressly nor impliedly preempt[ed] New Mexico’s regulation of the alcoholic beverage service” provided by airlines.550 “[T]he district court narrowly construed the [ADA’s] explicit preemption pro-vision . . . , concluding that the provision’s reference to ‘service’

543 Id. (internal citations omitted).
544 Id.
545 Id. (internal quotations omitted).
546 Id.
547 Id.
548 Id.
549 Id.
550 Id. (internal quotations omitted).
did not include an airline’s alcoholic beverage service." \[551\] “The district court reasoned that [a] narrow” reading of “service” was necessary to avoid the ADA preemption provision’s violation of Section 2 of the Twenty-first Amendment. \[552\] “[T]he district court [also] addressed field preemption and concluded that federal law did not preempt the field of alcohol service on airlines,” reasoning that “Congress was addressing the need for exclusive and complete rules for the physical and mechanical operation of aircraft.” \[553\] “The district court . . . denied [US] Airways’ motion for summary judgment and granted New Mexico’s motion.” \[554\]

“On appeal, [US] Airways reassert[ed] its contention that federal law both expressly and impliedly preempt[ed] the NMLCA’s regulation of an airline’s alcoholic beverage service provided [aboard its own] aircraft.” \[555\] The airline also argued that New Mexico could not avoid preemption of the NMLCA by trying to rely on the Twenty-first Amendment. \[556\] US Airways’ opening brief to the Tenth Circuit argued that applying the NMLCA to its operations was both expressly and impliedly preempted. \[557\] The airline’s express preemption argument was made in four parts. \[558\] First, the plain language of the ADA bars state regulation “related to” any airline “service.” \[559\] US Airways argued that the phrase “related to” has always been interpreted by the Supreme Court to be exceptionally broad in the context of finding federal preemption. \[560\] The airline also

\[551\] Id.

\[552\] Id. Section 2 of the Twenty-first Amendment provides: “The transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.

\[553\] O’Donnell, 627 F.3d at 1323.

\[554\] Id. at 1324.

\[555\] Id.

\[556\] Id.


\[558\] See id. at 16–29.

\[559\] Id. at 17 (citing 49 U.S.C. § 41713(b)(1) (1997)).

\[560\] Id. (citing Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992) (“Since the relevant language of the ADA is identical [to the ‘related to’ provision of ERISA], we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline ‘rates, routes, or services’ are [preempted].”)).
argued that serving alcohol onboard its flights was a "service" within the definition of the statute.561

Second, the Supreme Court has interpreted the ADA preemption language broadly, calling it "conspicuous for its breadth." Elsewhere, the Court has provided examples of those circumstances in which the ADA preemption provision should be applied broadly:

(1) that "[s]tate enforcement actions having a connection with . . ." carrier "rates, routes, or services" are [preempted]; (2) that such [preemption] may occur even if a state law's effect on rates, routes or services "is only indirect"; (3) that, [with] respect to [preemption], it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation; and (4) that [preemption] occurs at least where state laws have a "significant impact" related to Congress's deregulatory and [preemption]-related objectives.568

Third, US Airways argued that the New Mexico district court's analysis was inconsistent with the Supreme Court's decision in Rowe v. New Hampshire Motor Transportation Ass'n.64 Fourth, for purely pragmatic reasons, Congress could not have intended to permit state regulation of airline services.565 Having to comply with the laws and regulations—on food labeling, warnings of risks of carcinogens, and liquor sales to name just three—of each of the states in which (and perhaps over which) they operate would impose complex and costly burdens on an already overburdened domestic air transportation system.566

Having heard US Airways's argument, the Tenth Circuit limited its analysis to US Airways' implied preemption argument, stating "[b]ecause we conclude that applying New Mexico's regulatory scheme to [US] Airways implicates the field of aviation safety that Congress intended federal law to regulate exclusively, we need not reach the question of express preemption." This limitation was, in turn, based on the court's finding that the

561 Id. at 17–18 (citing Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995) (en banc) ("Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.").
562 Id. at 18 (quoting Morales, 504 U.S. at 384).
563 Id. at 18–19 (quoting Rowe v. N.H. Motor Transp. Ass’n, 552 U.S. 364, 370–71 (2008) (internal citation omitted)).
564 Id. at 22–23 (citing Rowe, 552 U.S. at 370–71).
565 Id. at 26.
566 See id. at 26–29.
567 US Airways, Inc. v. O’Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010).
“field” in which the NMLCA’s regulation is applied is not just an airline’s alcoholic beverage service, as New Mexico contended, but rather the broader field of aviation safety.\footnote{Id. at 1325.}

The court supported its conclusion in two ways. First, it noted that the Federal Aviation Administration, pursuant to the FAA, recognized the safety implications of serving alcohol aboard airlines and promulgated regulations on how, to whom, and by whom alcohol may be served.\footnote{Id.; see 14 C.F.R. § 121.575 (2009); see also Drinking and Serving of Alcoholic Beverages, 25 Fed. Reg. 168, 168–69 (Jan. 9, 1960) (discussing the safety concerns associated with an airline’s alcoholic beverage service).} The court of appeals found these regulations as evidence that airlines’ service of alcohol implicated greater safety concerns than just serving alcohol.\footnote{O’Donnell, 627 F.3d at 1327 (quoting Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982) (“Federal regulations have no less preemptive effect than statutes.”)).} For instance, airlines are concerned not only about passengers’ safety but also want to avoid situations where an intoxicated passenger becomes a security risk—potentially endangering other passengers and the flightcrew or obstructing flight operations—causing flight diversions.\footnote{See, e.g., ‘Drunk’ British Passenger Forces Plane to Divert to Alaska After Threatening to Attack Pilot, THE DAILY MAIL (Apr. 7, 2010), http://www.dailymail.co.uk/news/worldnews/article-1264110/Drunk-British-passenger-forces-plane-divert-Alaska.html; Drunk Passenger Forces Flight to Make Emergency Landing in Colorado Springs with F-16 Escorts, THE HUFFINGTON POST (Jan. 1, 2010), http://www.huffingtonpost.com/2010/01/08/drunk-passenger-forces-f-16-escorts_n_416891.html.} Second, the court found that the “NMLCA’s regulatory scheme extends beyond the field of airline alcoholic beverage services” because it requires training and certification for airline crew members serving alcohol on an aircraft.\footnote{O’Donnell, 627 F.3d at 1325 (citing N.M. STAT. ANN. § 60-6E-4 (West 2010) (“No person shall be employed as a server on a licensed premises unless that person obtains within thirty days of employment alcohol server training pursuant to the provisions of [N.M. Stat. § 60-6E-1 et seq.]”) and N.M. Stat. Ann. § 60-6E-5B (West 2010) (delineating the subjects that the training program for employees serving alcoholic beverage must cover)).}

Having established that aviation safety was “the legislative field at issue,” the court next turned to “whether Congress intended to occupy [that] field to the exclusion of the states.”\footnote{Id. (citing Martin ex rel. Heckman v. Midwest Express Holdings, Inc., 555 F.3d 806, 808 (9th Cir. 2009) (“To find field preemption here, we must infer that Congress intended to exclude all state law . . . from [this] area . . . even though it didn’t say so.”)).} Cautioning that because “Congress does not cavalierly [preempt] state-
law causes of action,"574 the court noted that the purpose of Congress must be clear before a court may conclude that Congress has preempted state law.575 Exercising that caution, the court concluded that "the field of aviation safety 'has long been dominated by federal interests'"576 and from that concluded the normal presumption against finding state law preemption did not apply.577 The court summed up by concluding "that the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively."578

The O'Donnell court's conclusion about congressional intent marked a significant departure from its earlier decision in Cleveland v. Piper Aircraft Corp.579 Before O'Donnell, a number of courts already disagreed with or declined to follow Cleveland.580 Others, while conceding that Cleveland had been weakened by Geier, continued to follow it, either because the court was compelled to follow it as circuit precedent581 or because they did not agree that Abdullah was a better-reasoned decision.582 O'Donnell,

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574 Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).
575 Id.
576 Id. (quoting Montalvo v. Spirit Airlines, 508 F.3d 464, 471 (9th Cir. 2007)).
577 Id. (citing Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347-48 (2001) (explaining that the presumption against preemption did not apply because the field at issue was "hardly a field [that] the States have traditionally occupied") (internal citation and quotation omitted)).
578 Id. at 1327.
579 Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1447 (10th Cir. 1993). Cleveland deals with general aviation. Plaintiffs commonly argue that there can be no preemption in the field of general aviation—express, implied, field, or otherwise—because if there were preemption, a plaintiff would be left without a remedy because the FAA did not create a federal cause of action. See, e.g., John D. McClune, There Is No Complete, Implied, or Field Federal Preemption of State Law Personal Injury/Wrongful Death Negligence or Product Liability Claims in General Aviation Cases, 71 J. Air L. & Com. 717, 727 (2006) (citing Margolis v. United Airlines, Inc., 811 F. Supp. 318, 324 (E.D. Mich. 1993)). As the Third Circuit in Abdullah recognized, however, the FAA's saving clause may properly be read to retain a plaintiff's state-law remedy, while the standard of care is preempted. Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 375 (3d Cir. 1999).
581 See, e.g., Hart v. Boeing Co., No. 09-cv-00397-REB-MEH, 2009 WL 4250122, at *2–4 (D. Colo. Nov. 23, 2009) (conceding that Cleveland is an "outlier" and has been "undermined" by Geier, the court said "regardless whether these opinions [contrary to Cleveland] are better reasoned and more persuasive from an intellectual standpoint, I do not write on a clean slate [in the Tenth Circuit], but am bound to follow Cleveland.")
582 See, e.g., Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 835 (E.D. Tex. 2006) (concluding that Cleveland was consistent with its facts, still good law in the
however, must put Cleveland's continued utility in doubt, as its
days as good law in the Tenth Circuit are numbered, if not al-
ready ended. If so, many of the decisions relying on Cleveland
may also be susceptible to attack. Given that Cleveland and
Abdullah are cited as "the seminal cases supporting each [oppos-
ing] view" on the issue of preemption, a reemergence of cases
asserting FAA federal preemption in the Third, Fifth, Seventh,
and Tenth Circuits is quite likely.

Express preemption under the ADA was the first argument in
US Airways's opening brief, suggesting the airline believed that
the touchstone of preemption—congressional intent—was to be
found in Congress's express language. Analyzing the two
types of preemption in this order also makes intuitive sense. If
congressional intent is key, and such intent is clear from the
language of a federal law, there is no need to go further by first
defining the field in which the federal law operates and then
deciding whether the law occupies the field to the exclusion of
state statutes or regulations. This also is consistent with the Su-
preme Court's observation that express preemption is typically a
simpler analysis than implied preemption. The O'Donnell
panel, however, offered little to explain why it opted to decide
the case on the less well-defined—and arguably more difficult—
grounds of implied field preemption under the FAA.

On the basis of judicial economy and efficiency alone, it ap-
ppears that the court went out of its way to decide the case on
implied preemption grounds. Stated more bluntly, it appears

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584 See Brief for Appellant US Airways, Inc., supra note 557, at 17.
fundamentally is a question of congressional intent, and when Congress has
made its intent known through explicit statutory language, the courts' task is an
easy one."); see also Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299
(1988)); see also Choate v. Champion Home Builders, Inc., 222 F.3d 788, 792
(10th Cir. 2000).
586 See US Airways v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010) ("Be-
cause we conclude that applying New Mexico's regulatory scheme to [US] Air-
ways implicates the field of aviation safety that Congress intended federal law to
regulate exclusively, we need not reach the question of express preemption.").
that the court had, for reasons left unstated, chosen implied preemption as the basis of its decision to reconcile the Tenth Circuit preemption caselaw (principally Cleveland) with Geier\textsuperscript{587} and to bring it more in line with other circuits.\textsuperscript{588} Had the court gone the other way and based its decision on express preemption under the ADA, it would not have needed to address the broader issue of implied field preemption under the FAA and make the case apply to both airlines (O'Donnell) and general aviation operations (Cleveland).

V. CONCLUSION

The federal preemption arguments currently being posed in aviation cases are not new. Federal courts continue to wrestle with the issue just as they have over the past several decades. Recent cases are no different; federal courts recognize the merits for and against recognition of federal preemption in aviation cases. With the Tenth Circuit's recent decision in O'Donnell recognizing the numbered days of Cleveland, however, federal preemption opponents' arguments may have lost some luster. This is far from certain, as evidenced by other circuits' reluctance to embrace fully arguments about implied preemption under the FAA. Aviation practitioners must remain apprised of the newest developments in this area as both points of view retain merit. At least, that is, until the Supreme Court instructs otherwise.

\textsuperscript{587} Id. at 1326.

\textsuperscript{588} Id. at 1327.