

Grounding the Preemptive Effect of the Federal Aviation Act: A Look at the Third Circuit’s Recently Modified Field Preemption Ruling in *Elassaad v. Independence Air, Inc.* and the Effect of *Wyeth v. Levine*

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I. INTRODUCTION

A flight lands on the runway at Pittsburgh International Airport. A part of the plane near the stairs malfunctions and the exit stairs become wet. Imagine that while exiting the plane, a passenger slips and falls off the top step suffering severe injuries. This hypothetical creates an interesting dichotomy; on the one hand, the plane is not in an operational state where there is a concern for air safety and the malfunctioning part plays little to no role in air safety. However, the stairs and everything included is either compliant with the standards set forth by the Federal Aviation Administration (FAA) or the design of the aircraft (including the stairs) is thoroughly reviewed by the FAA and given an “air worthiness certificate.” Using the traditional theory of negligence, the plaintiff must demonstrate that (1) a duty owed to him or her by the airline to not have wet stairs, (2) they breached that duty by having wet stairs, (3) the breach actually and proximately caused her injuries, and (4) damages. However, according to the Third Circuit, the claim brought by the passenger pursuant to state law may be preempted because the part of the plane that malfunctioned is included within the meaning of air safety.¹ In other words, because plaintiff’s claim for negligence is preempted by the Federal Aviation Act, he must set forth a claim for negligence alleging defendant violated a specific federal standard of care (i.e. duty element), which is promulgated by the FAA. Conversely, that same decision allows the injured plaintiff to still argue that state standards of care are not preempted because the plane was not “operated for the purposes of air navigation” and therefore does not concern air safety.² The analysis undertaken by the Third Circuit and the different interpretation given by other circuits represents a need for a better approach to preemption in the context of aviation law.

1. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 126-27 (3d Cir. 2010).

2. *Id.*

For over sixty years, Congress has played a substantial role in the field of aviation safety.³ As a result of military and civilian aircraft collisions,⁴ Congress enacted the Federal Aviation Act of 1958 (“Aviation Act”),⁵ which was designed to create a system of unified rules to promote safety and efficiency in the field of aviation.⁶ Subsequently, Congress amended the Aviation Act with the passage of the Airline Deregulation Act of 1978 (ADA),⁷ which removed government control over fares, routes, and market entry of new aircraft, thereby allowing private companies control over some aspects of aviation.⁸ Congress again amended the Aviation Act when it passed The General Aviation Revitalization Act of 1994 (GARA),⁹ which provided an eighteen-year statute of repose for law suits against manufacturers of general aviation aircraft and component parts.¹⁰ Because the FAA—a regulatory group within the Transportation Department—continually publishes new regulations in the Code of Federal Regulations, aviation law remains a heavily regulated field of law.¹¹ Despite over forty years of case law, there remains ambiguity regarding whether Congress—in enacting the Aviation Act and subsequent amendments—intended to preempt state standards of care in the context of negligence and product liability claims.¹² The Supreme Court has decided several issues discussing the effect of the Aviation Act, but has failed to address the question of whether state standards of care apply to negligence and product liability claims.¹³ As a result, there is little unanimity between the lower federal courts and even where these courts come to the same conclusion, they often

3. See Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731 (1958).

4. See, e.g., *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969); see Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731 (1958).

5. Federal Aviation Act, 72 Stat. 731.

6. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (noting that “a uniform and exclusive system of federal regulation [is required] if the congressional objectives underlying the [FAA] are to be fulfilled.”); see also H.R. Rep. No. 2360, reprinted in 1958 U.S.C.C.A.N. 3741, 3741 (stating that the purpose of the act was to provide the agency with full authority and responsibility of the advancement and promulgation of civil aeronautics, including the rule making and enforcement of safety regulations); see generally Federal Aviation Act, 72 Stat. 731.

7. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

8. *Id.* § 105.

9. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1993).

10. *Id.* § 2.

11. See, e.g., 14 C.F.R. § 91 (2010).

12. See John D. McClune, *There is No Complete, Implied, or Field Preemption of State Law Personal Injury/Wrongful Death Negligence or Product Liability Claims in General Aviation Cases*, 71 J. AIR L. & COM. 717, 719 (2006).

13. See generally *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *Am. Airlines v. Wolens*, 513 U.S. 219 (1995).

use markedly different analyses.¹⁴ Thus, the recent abrogated preemption ruling by the Third Circuit in *Elassaad v. Independence Air, Inc.*,¹⁵ and the Supreme Court preemption decision of *Wyeth v. Levine*, presents both a novel case to illustrate a lack of cohesion among courts and to illustrate the current state of the law dealing with preemption in the aviation context.¹⁶

The Third Circuit's decision in *Elassaad* held that state standards of care are preempted when a plane is in "operations for the purpose of air navigation."¹⁷ Though this decision is less broad than its predecessor and closer to how some other courts interpret the issue, the ruling creates distinct problems. In theory, a plaintiff can bring a claim for negligence based on state standards of care as long as the alleged harm occurred when a plane was not in "operations for the purposes of air navigation," and when no specific federal regulation is implicated.¹⁸ Whereas prior to the recently vacated ruling, a plaintiff in the Third Circuit had to allege a deviation from federal standards and show recklessness, regardless of whether the alleged negligence occurred in the context of the flight or while the plane was stationary, because the entire field of "aviation safety" was impliedly preempted.¹⁹

Plaintiffs now have a new window with which to bring claims against an airline, but this window is limited, broad, and undefined all at once. It fails to delineate with much specificity when an airplane or regulation is in "operations for the purpose of air navigation"²⁰ and, due to recent preemption analysis from the Supreme Court, the entire field of air safety may not actually be preempted.²¹ The *Elassaad* decision arguably allows state standards of care to apply in some situations, but not in other circumstances, some of which are significantly similar, other than when the plane is in

14. See generally *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 365 (3d Cir. 1999); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 835 (E.D. Tex. 2006) (finding no preemption in field of aviation safety); *Lucia v. Teledyne Cont'l Motors*, 173 F. Supp. 2d 1253, 1270 (S.D. Ala. 2001) (stating that Congress or the FAA did not intend to fully occupy the field, such that no state remedies could apply in areas not affecting such rates, routes, or services). Compare *Montalvo v. Spirit Airlines*, 508 F.3d 464, 475 (9th Cir. 2007) (finding failure to warn of deep vein thrombosis is preempted, but leaving open the question of whether unsafe seat configurations were preempted), with *Martin v. Midwest Express Holdings*, 555 F.3d 806, 812 (9th Cir. 2009) (finding no preemption in defective design of stairs and limiting preemption to areas of aviation where regulations are pervasive).

15. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 119 (3d Cir. 2010).

16. See *id.*

17. *Id.* at 126.

18. *Id.*

19. See *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 367 (3d Cir. 1999) ("[F]ederal law establish[ed] the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.").

20. See *Elassaad*, 613 F.3d at 126.

21. *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009).

flight.²² The overbroad, definitional approach to field preemption employed by the Third Circuit may completely frustrate congressional intent or misinterpret the role and purpose of the Aviation Act. It will take further decisions from the Third Circuit, lower courts, other circuits to bring a semblance of continuity with respect to clearly defining when in fact a plane is in “operations for the purposes of air navigation.”²³

This Note begins by giving a brief history of congressional legislation in aviation law and preemption. Next, the Note discusses in greater depth the relevant case law that interprets the Aviation Act and analysis of Supreme Court precedent dealing with preemption, with a specific application of aviation law to the recent Supreme Court decision *Wyeth v. Levine*. The focus then switches exclusively to the past precedent, *Abdullah v. American Airlines*,²⁴ in order to put the *Wyeth* decision in context. In the next section, the current precedent, *Elassaad*, is discussed, including a detailed review of the procedural and substantive facts. In the analysis section, this Note discusses the potential implications, flaws, and problems of the decisions in *Elassaad* and *Abdullah* by comparing these decisions to decisions from other courts, similar areas of law, recent Supreme Court preemption analysis, and some public policy considerations. This Note concludes by giving arguments for and against preemption, but ultimately concludes that a middle ground approach or claim-by-claim basis is the proper analytical framework for deciding issues of preemption in the aviation context until there is a ruling by the Supreme Court signaling whether an all or nothing approach is proper.

II. HISTORY AND BACKGROUND

A. FEDERAL AVIATION ACT AND AMENDMENTS

Beginning in 1938, the Civil Aeronautics Board regulated all of the interstate airline industry.²⁵ Desiring a more comprehensive scheme, Congress passed the Aviation Act,²⁶ which was intended to “promote safety in aviation and thereby protect the lives of persons who travel on board aircraft[s].”²⁷ The FAA, under the Department of Transportation (DOT), continues to publish comprehensive regulations dealing with all aspects of

22. See *Elassaad*, 613 F.3d at 126.

23. See *id.*

24. *Abdullah*, 181 F.3d at 337.

25. McClune, *supra* note 12, at 719.

26. Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731.

27. *Abdullah*, 181 F.3d at 368 (citing *In re Mex. City Aircrash of October 31, 1979*, 708 F.2d 400, 406 (9th Cir. 1983)); see generally *A Brief History of the Federal Aviation Act*, FED. AVIATION ADMIN., <http://www.faa.gov/about/history> (Feb. 1, 2010, 6:06 PM).

aviation.²⁸ It is the pervasiveness of these regulations that has led some courts, such as the Third Circuit, to conclude that a significant portion of aviation law is impliedly preempted.²⁹ Among the plethora of regulations, the Federal Aviation Regulations (FAR) codified in the Code of Federal Regulations specifically regulates pilot certification,³⁰ pilot pre-flight duties,³¹ pilot flight responsibilities,³² flight rules,³³ minimum standards for air worthiness (specific components of the airplane),³⁴ and when the seat belt sign should be illuminated.³⁵ These FAR are so pervasive that they police matters ranging from the time a pilot must wait after consuming alcohol before acting as pilot-in-command,³⁶ to the recommended ground loading on ski-equipped bushplanes,³⁷ all of which are codified in the Code of Federal Regulations.³⁸ It also generally regulates the standard for operating an aircraft, providing that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”³⁹

Despite the pervasive regulation and sovereignty clause, Congress included a savings clause within the Aviation Act⁴⁰ stating: “Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”⁴¹ Courts that find a lack of preemptive effect believe the savings clause was intended to allow states to pass standards in addition to federal standards.⁴² This argument is further bolstered by the passage of the

28. See 14 C.F.R. § 91 (2010). The Code of Federal Regulations has both specific and general regulations regarding aviation. *See id.*

29. See *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 126-27 (3d Cir. 2010).

30. 14 C.F.R. § 61.3 (2010) (“No person may act as pilot in command . . . without a current pilot certificate in his possession . . .”).

31. *Id.* § 91.7 (ensuring that pilots verify aircraft’s worthiness); 14 C.F.R. § 91.107 (2010) (ensuring passengers are briefed on the use of their seat belts).

32. 14 C.F.R. § 91.7 (forcing pilot to discontinue flight when any mechanical problem arises).

33. *Id.* § 91.101 (governing the operation of aircraft within the United States and within twelve nautical miles from the coast of the United States).

34. *Id.* § 25.810.

35. *Id.* § 121.317.

36. 14 C.F.R. § 91.17 (2010).

37. 14 C.F.R. § 23.505 (2010).

38. Sean S. Kelly, *Federalism in Flight: Preemption Doctrine and Air Crash Litigation*, 28 *TRANSP. L.J.* 107, 115 (2000).

39. 14 C.F.R. § 91.13. Note that this provision is often cited by airline companies in cases where passengers are injured in-flight. *See, e.g., Montalvo v. Spirit Airlines*, 508 F.3d 464, 472 (9th Cir. 2007).

40. Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731.

41. *Am. Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (citing Federal Aviation Act of 1958 § 1106).

42. *See McClune, supra* note 12, at 719.

Airline Deregulation Act (ADA),⁴³ which provided an express preemption clause that prohibits states from enforcing any law “relating to rates, routes, or services” of any air carrier,⁴⁴ but maintains the original savings clause of the Aviation Act.⁴⁵ However, the legislative history of the ADA also suggests that Congress was primarily concerned with creating more freedom for private companies to experiment with new routes, reducing red tape,⁴⁶ and allowing “competitive market forces to determine the quality, variety and prices of air services.”⁴⁷ Thus, it is difficult to infer congressional intent to not preempt other areas of aviation law because nothing in the legislative history demonstrates a concern or awareness of the savings clause or a problem with how courts interpret preemption outside of rates, routes, and services.⁴⁸

Congress again amended the Aviation Act with the passage of the GARA.⁴⁹ The GARA provides an eighteen-year statute of repose for general aviation aircraft and aircraft components, which preempts suits dealing with defects in design and manufacturing after eighteen years of the aircrafts delivery from the manufacturer.⁵⁰ Congress narrowly defined “general aviation aircraft” as an aircraft with a maximum passenger load of less than twenty passengers that, at the time of an accident, was not operating “in scheduled passenger-carrying operations”⁵¹ The GARA’s preemption provision states that “[federal law] supersedes any State law to the extent that such law permits a civil action described in [the statute of repose] section”⁵² Indeed, proponents of no preemptive effect find that the continued existence of the savings clause and no express preemption clause, despite two opportunities for Congress to amend the Federal Aviation Act, suggests that Congress did not originally intend to preempt state standards

43. 49 U.S.C. § 1305 (1978).

44. *Id.* § 1305; *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 378-79 (1992).

45. *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 320 (E.D. Mich. 1993) (stating that Congress retained the savings clause that preserved common law and statutory remedies).

46. H.R. REP. NO. 95-1211, at 2-3, *reprinted in* 1978 U.S.C.C.A.N. 3737, 3738-39.

47. *Margolis*, 811 F. Supp. at 320 (quoting H.R. REP. NO. 95-1779, 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737).

48. *See* H.R. REP. NO. 95-1211, at 2-3, *reprinted in* 1978 U.S.C.C.A.N. 3737, 3742.

49. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552. For a general discussion of the General Aviation Revitalization Act and its preemption clause, see Scott David Smith, *The General Aviation Revitalization Act of 1994: The Initial Necessity for, Out-Right Success of, and Continued Need for the Act to Maintain American General Aviation Predominance Throughout the World*, 34 OKLA. CITY U. L. REV. 75 (2009).

50. General Aviation Revitalization Act of 1994, Pub L. No. 103-298, § 3, 108 Stat. 1552, 1553 (1994).

51. *Id.* § 2.

52. *Id.*

of care and narrowly defined the situations where preemption would occur.⁵³ In theory, a statute of repose would not be necessary if those claims were already preempted. However, both the ADA and the GARA preempt very narrow areas of law, leaving the courts to discern whether the Aviation Act has general preemptive effect.⁵⁴

B. WHAT IS PREEMPTION AND HOW DOES IT FIT INTO AVIATION LAW?

The foundation for preemption is in the Supremacy Clause⁵⁵ of Article VI of the U.S. Constitution.⁵⁶ It states that the laws of the United States “shall be the supreme law of the land; . . . any Thing in the Constitution or Laws of any state to the contrary notwithstanding.”⁵⁷ Thus, state law must yield to constitutionally valid federal law whenever a conflict between the two arises.⁵⁸ There are two ways Congress may indicate preemptive intent: “through a statute’s express language or through its structure and purpose.”⁵⁹ Thus, courts have concluded that state laws are invalid under express or implied preemption.⁶⁰ Express preemption occurs when Congress deliberately articulates—through the statute in question—that it expressly prohibits enforcement of any state law within the scope of the express preemption provision.⁶¹

Preemption can also be implied, when the statute lacks express language, through either conflict or field preemption.⁶² Conflict preemption occurs when it is impossible to comply with both federal law and state law or where state law stands as an obstacle to the desired results of Congress.⁶³ Field preemption arises when Congress occupies an entire field of a substantive area of law, which precludes any type of state interference within that field.⁶⁴ However, despite the title, field preemption can be very nar-

53. See *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006) (stating that the adoption of the GARA implied a continued viability of state tort law claims); see also *Pub. Health Trust of Dade Cnty. v. Lake Aircraft Inc.*, 992 F.2d 291, 295 (11th Cir. 1993).

54. Kelly, *supra* note 38, at 115.

55. U.S. CONST. art. VI, cl. 2.

56. *Id.*

57. *Id.*

58. *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm’n.*, 461 U.S. 190, 204 (1983).

59. *Altria Grp. v. Good*, 555 U.S. 70, 70 (2008).

60. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1993).

61. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Note that the reach of the express preemption clause is another question the court must decide. See *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).

62. *Mass. Ass’n of HMOs v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999).

63. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

64. *Abdullah*, 181 F.3d at 367.

row.⁶⁵ Congress does not expressly state its intent to occupy the entire field. But due to the pervasiveness of federal control or as a result of the practical implications of state regulations, in addition to those that are federal, on the intended national scheme—these state regulations or standards are preempted by federal law.⁶⁶

1. *Supreme Court Precedent in Aviation Context: A Limited Framework*

The Supreme Court has never explicitly addressed whether state law is preempted in the context of negligence or product liability cases in the field of aviation.⁶⁷ The Supreme Court first discussed preemption in the context of aviation law in *Northwest Airlines, Inc. v. Minnesota*.⁶⁸ However, before the passage of the Aviation Act, Justice Jackson did allude to implied federal preemption in the field of aviation due to the “intensive and exclusive” federal control over the scheme of flight operations.⁶⁹

Because the Supreme Court has never addressed negligence claims in the context of aviation law, the Court offers minimal guidance to lower courts in analyzing congressional intent under those claims.⁷⁰ However, the history of the Supreme Court’s interpretation of preemption in the area of aviation does offer a limited framework.⁷¹ In *City of Burbank v. Lockheed Air Terminal*,⁷² the Court issued a landmark decision that laid the foundation for preemption analysis in aviation law, albeit before the addition of the ADA and the GARA.⁷³ Citing the “pervasive nature” of the scheme of federal regulation of aircraft noise, *City of Burbank* provided a comfortable context for the Court to find field preemption.⁷⁴ In *City of Burbank*, a city ordinance barred flights between the hours of 11:00 p.m. and 7:00 a.m. due

65. *Id.* (noting that the scope of field preemption can be “narrowly defined”).

66. *Id.*

67. *See, e.g., Am. Airlines v. Wolens*, 513 U.S. 219, 219 (1995); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 624 (1973); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 374 (1992).

68. *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J. concurring).

69. *Id.* at 303. It should be noted that the heart of the holding was a limitation on state power to tax domiciled federal airplanes. *Id.* at 300-01.

70. *See generally Am. Airlines*, 513 U.S. 219 (noting that the Court has never approached the issue on the preemptive effect of the Code of Federal Regulations); *Morales*, 504 U.S. at 374; *City of Burbank*, 411 U.S. at 624.

71. *See, e.g., City Of Burbank*, 411 U.S. at 633 (discussing the issue of aircraft noise, the Supreme Court found preemption as a result of the pervasiveness of federal regulation).

72. *Id.*

73. *See id.* at 624.

74. *See id.* at 633. Note that the Court never stated it was field preemption, but the language suggests they mean field preemption. *See id.*

to noise levels.⁷⁵ The regulation of time that flights could depart and arrive due to noise levels conflicted with a combined departmental role (Environmental Protection Agency (EPA) and FAA) under the Aviation Act.⁷⁶ The Court cited the Noise Control Act of 1972,⁷⁷ which amended the Aviation Act for the sole purpose of proposing regulations to provide control over airplane noise.⁷⁸ The amended section stated that “the FAA after consultation with the Secretary of Transportation and with [the] EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the [Aviation Act] may find necessary”⁷⁹ In reaching its decision that states were preempted from regulating flight times due to noise, the Supreme Court discussed the pervasiveness of the Code of Federal Regulations dealing with noise control.⁸⁰ Treating the power to promulgate regulations as additional evidence of congressional intent, it created the framework that many courts use today to determine whether Congress intended preemption under the Aviation Act.⁸¹

City of Burbank provided an easier context for preemption than many of the issues that courts face today because the legislative history provided much richer evidence that Congress intended to preempt state and local laws dealing with aircraft noise.⁸² Congress stated: “States and local governments are preempted from establishing or enforcing noise emissions standards for aircraft unless such standards are identical to standards prescribed under this bill.”⁸³ In essence, the Court reasoned that the cumulative effect of each individual city having its own flight schedule would severely debilitate the FAA’s ability to regulate flights.⁸⁴ However, the dissent pointed out that a finding of preemption was suspect because the Noise Control Act gave the EPA a role in the FAA’s exclusive authority to reduce noise through regulations and standards directed at multiple causes regarding the level of noise, but did not explicitly state that local governmental bodies were prevented from dealing with the noise problem by an alterna-

75. *City of Burbank*, 411 U.S. at 625-26.

76. *See id.* at 628-35.

77. Federal Aviation Act of 1958, 40 U.S.C. § 611, amended by the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234.

78. *City of Burbank*, 411 U.S. at 628-29.

79. *Id.* at 654 n.6 (quoting the Federal Aviation Act of 1958, 40 U.S.C. § 611 (amended 1972)).

80. *See id.* at 630.

81. *See, e.g.,* *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385-86 (5th Cir. 2004); *Pub. Health Trust of Dade Cnty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 294 (11th Cir. 1993).

82. *City of Burbank*, 411 U.S. at 635 (noting that the legislative history illustrated an expanded role in aviation noise regulation that was already preempted by federal law).

83. H. REP. NO. 92-842, at 10 (1972).

84. *City of Burbank*, 411 U.S. at 639.

tive method.⁸⁵ The conversation between the majority and dissent is characteristic of the controversy regarding field preemption in the aviation context—as an entirely judicial creation, there is significant room to second guess a finding of implied field preemption when congressional intent is not dispositive. Unlike run-of-the-mill negligence claims however, the Court had at its disposal greater evidence of preemption; even so, the decision was a single vote majority and expressly limited to the area of noise control.⁸⁶ As the Third Circuit specifically relied on the “judicial interpretation” of the Aviation Act in *City of Burbank*, the extended position of the Third Circuit is not indefensible.⁸⁷ In fact, *City of Burbank* and other subsequent decisions discussed below illustrate that it is not inconceivable that a comprehensive analysis of the Federal Aviation Act could indicate significant facets of aviation law—or even the entire field of aviation safety—are impliedly preempted.⁸⁸

Returning briefly to the preemptive effect of the Aviation Act, the Supreme Court held that another narrowly defined area of aviation law was preempted.⁸⁹ In *Philko Aviation, Inc. v. Shcket*,⁹⁰ the Court decided that all state laws allowing undocumented or unrecorded transfers of interest in aircraft were preempted by the Aviation Act.⁹¹ Relying instead on conflict preemption, because the FAA required that all transfers of title be in writing and recorded with the FAA, any state law permitting undocumented or unrecorded transfers created “direct conflict” with the Aviation Act.⁹² Next, the Supreme Court addressed the express preemption clause contained in the ADA.⁹³

In *Morales v. Trans World Airlines Inc.*,⁹⁴ state attorneys general tried to enforce state deceptive practices laws on airline advertising.⁹⁵ In a six to three decision, the Court held that state fare advertising guidelines were

85. *Id.* at 652 (Rehnquist, J., dissenting).

86. *Id.*

87. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 125 (3d Cir. 2010).

88. *See* Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731; *City of Burbank*, 411 U.S. 624.

89. *See* *Philko Aviation, Inc. v. Shcket*, 462 U.S. 406, 406 (1983).

90. *Id.*

91. *Id.* at 410.

92. Federal Aviation Act, 49 U.S.C. § 1403. Section 503(a) of the Act states that “[n]o conveyance or instrument the recording of which is provided for by [§ 503(a)(1)] shall be valid in respect of such aircraft . . . against [third parties] until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.” *Id.*

93. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 1301, 1305 (1978)).

94. *Morales v. Trans World Airline, Inc.*, 504 U.S. 374 (1992).

95. *Id.* at 379.

preempted by section 1305(a)(1) of the ADA⁹⁶ because they related significantly to the prices, routes, and services; and thus, the guidelines were within the scope of the express preemption clause.⁹⁷ After *Morales*, the Court declined to extend the express preemption clause in a class action suit involving members of airline frequent flyer programs for breach of contract under the Illinois Consumer Fraud and Deceptive Business Practices Act.⁹⁸ In *American Airlines v. Wolens*,⁹⁹ the Court held that contracts made wholly between the airline and passengers were normally not preempted, but a plaintiff's claim under any state Consumer Fraud and Deceptive Business Practices Act¹⁰⁰ was expressly preempted by the ADA.¹⁰¹ Justice Ginsberg, writing for the majority, reasoned that the airline's frequent flyer program was a "self-imposed undertaking[.]" and Congress did not intend, by passing the ADA, for "[private] terms and conditions" to be similar to a state enacted or enforced law.¹⁰² Thus, preemption occurs for all claims that have "more than a tenuous connection to airline services"¹⁰³ Decided by a five to three vote, *Wolens* appeared to be a fractured decision.¹⁰⁴ The lack of agreement in *Wolens* under the ADA's express preemption clause suggests that if presented with the question of whether preemption occurs in the context of enforcing state standards for negligence and product liability claims, the result would be a decidedly split opinion.¹⁰⁵ Unfortunately for the lower courts, the Supreme Court has never approached preemption outside of the ADA or other tangential areas of the Aviation Act.¹⁰⁶

96. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 1301, 1305 (1978)).

97. *Morales*, 504 U.S. at 385-86.

98. *Am. Airlines v. Wolens*, 513 U.S. 219, 226 (1995).

99. *Id.*

100. See, e.g., Illinois Consumer Fraud and Deceptive Business Practice Act, 815 ILL. COMP. STAT. 505 (1992) (original version at ch. 121 1/2 ILL.REV.STAT. ¶ 261 et seq. (1991)).

101. *Wolens*, 513 U.S. at 228.

102. *Id.* at 228-29.

103. Matthew J. Kelly, *Federal Preemption by the Airline Deregulation Act of 1978: How do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873, 895 (2000).

104. See *Wolens*, 513 U.S. 219 (1995) (Stevens, J., concurring in part and dissenting in part). Justice Stevens believed there was no preemption for private tort actions. *Id.* at 236. Justice Scalia did not participate in the decision. *Id.* at 235.

105. *Id.* at 234. (Stevens, J., concurring in part and dissenting in part); *Id.* at 238 (O'Connor, J., concurring in part and dissenting in part) (holding that none of the plaintiffs' claims should be allowed to proceed).

106. See Smith, *supra* note 49, at 89.

2. *How Lower Courts Interpret Preemption in Aviation Law*

Prior to *Abdullah v. American Airlines* and consistent with the Supreme Court, most decisions regarding common law claims prior to the passage of the ADA involved discrete aspects of aviation law.¹⁰⁷ For example, the Seventh Circuit in *Kohr v. Allegheny Airline, Inc.*¹⁰⁸ found that the Federal Rules of Contribution and Indemnity among joint tort-feasors should control in aviation collisions, thus preempting state law rules of indemnity and contribution.¹⁰⁹

With the passage of the ADA,¹¹⁰ there was sufficient controversy regarding whether preemption still applied because Congress retained the original savings clause from the Aviation Act and added an express preemption provision.¹¹¹ Many courts have found that even though the Department of Transportation (DOT)—through the FAA—maintains heavy involvement in aviation regulations, state standards are not preempted.¹¹² As Congress intended with the passage of the ADA, privatizing the airline industry created more airline companies, which increased the number of flights, and inevitably increased the frequency of litigation revolving around the intent of the Aviation Act, and thus preemption analysis among the courts accelerated.¹¹³ Yet, as illustrated above, the decisions of the Supreme Court regarding aviation law have provided only a minor framework in guiding lower courts in analyzing preemption.

3. *The History and Current State of Preemption Analysis*

The addition of an express preemption clause in the ADA led courts to inconsistent results when analyzing whether state law was subject to implied field or conflict preemption under the Aviation Act. The Supreme Court itself has inconsistently scrutinized the intended effect of an express preemption clause on a statutory scheme.¹¹⁴ In the 1992 decision, *Cipollone v. Liggett Group, Inc.*, the Supreme Court held that there was no implied field preemption when it examined the scope of a cigarette warning statute

107. See, e.g., *Kohr v. Allegheny Airline, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974).

108. *Id.*

109. *Id.* at 404.

110. Airline Deregulation Act of 1978, 49 U.S.C. § 1301, § 1305(a)(1).

111. *Id.* § 105(a).

112. See, e.g., *Pub. Health Trust of Dade Cnty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 298 (11th Cir. 1993); *In re Air Crash Disaster*, 635 F.2d 67, 74-75 (2d Cir. 1980).

113. See *Kelly*, *supra* note 103, at 873.

114. Compare *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530-31 (1992), with *Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 872-73 (2000) (finding that an express preemption clause precluded implied preemption, but later found implied preemption applicable in the context of an express preemption provision).

containing an express preemption provision.¹¹⁵ The Court reasoned that because Congress defined the preemptive reach of the statute through the utilization of an express preemption provision, it implied that matters beyond that reach are not preempted.¹¹⁶ Indeed, this decision may have indicated to the lower courts that the existence of an express preemption clause in the ADA and the original savings clause in the Aviation Act precluded an implied preemption analysis—meaning state standards of care were applicable to product liability and negligence claims in the aviation context.¹¹⁷

Yet the Supreme Court backtracked from its previous holding two years later, finding that the existence of an express preemption provision did not automatically preclude a lack of preemptive intent outside the scope of the express preemption provision.¹¹⁸ Rather, the Court found that implied preemption may coexist with an express provision in some contexts.¹¹⁹ The Supreme Court further backed away from its holding in *Cipollone v. Liggett Group, Inc.*,¹²⁰ when it concluded that the presence of an express preemption provision and a savings clause in a statute does not, in and of itself, foreclose an implied conflict preemption analysis.¹²¹ Indeed, *Geier v. American Honda Motor Co.*¹²² bolstered some lower courts to find conflict preemption in aviation law when regulations promulgated by the FAA make it impossible to comply with both federal and state law.¹²³

115. *Cipollone*, 505 U.S. at 517.

116. *Id.*

117. *See* *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1443 (10th Cir. 1993), *abrogated by* *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326-27 (10th Cir. 2010); *O'Hern v. Delta Air Lines, Inc.*, 838 F. Supp. 1264, 1267 (N.D. Ill. 1993).

118. *Freightliner v. Myrick*, 514 U.S. 280, 288 (1995). *Freightliner* involved two combined cases where plaintiffs sued for negligent design by two freight truck companies because the trucks were not equipped with anti-lock brakes, which were not required under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1391 (2006). *Id.* at 283. The Court ultimately found no preemption. *Id.* at 289.

119. *Id.* at 288. Justice Thomas stated: “The fact that an express definition of the preemptive reach of a statute . . . 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.” *Id.*

120. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 504 (1992).

121. *Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). The decision was limited to implied conflict pre-emption. *Id.*

122. *Id.*

123. *See, e.g., Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185-KES, 2006 WL 1084103, at *19, *24-25 (D. S.D. April 20, 2006) (finding conflict preemption in state claim based on defendant’s failure to provide additional emergency procedures in flight training handbook when standards dictated what specific procedures could be in manual). *Sheesley* represents a novel interpretation of the FAA. The court specifically held that it disagreed with the broad field preemption ruling in *Abdullah*, but found that standards promulgated by FAA had the potential to create conflict preemption if complying with state law became impossible. *Id.*

4. Wyeth v. Levine

Recently, the Supreme Court made arguably its most significant ruling in the area of implied preemption. *Wyeth v. Levine*¹²⁴ involved a claim brought by a musician who developed gangrene and subsequently lost her arm.¹²⁵ Relying on common law negligence and strict liability theories, plaintiff alleged that Wyeth had failed to instruct/warn of the danger of intravenously administering nausea medication called Phenergan with an IV-push.¹²⁶ However, Phenergan's labeling was approved by the Food and Drug Administration (FDA) and contained a warning of the danger of gangrene and amputation.¹²⁷ Before the Court, Wyeth argued that because the Food, Drug, and Cosmetic Act (FDCA) required the FDA to determine that a drug is safe and effective under the conditions set forth in the drug labeling, the FDA presumed to have performed a precise balancing of risks and benefits, establishing a specific labeling standard.¹²⁸

In other words, they argued any state standard of care impliedly conflicted with the federal statutory scheme because changing the label would inevitably lead to violating federal law.¹²⁹ Again arguing that state law conflicted with the federal scheme, Wyeth gave the broader argument that a state-law duty to provide stronger warnings "would obstruct the purposes and objectives of federal drug labeling regulation."¹³⁰ In rejecting both arguments, the Court reasoned that the minimum federal labeling standards, arguably very similar in formulation to the Code of Federal Regulations' (CFR) minimum aircraft worthiness standards, were a "floor upon which States could build"¹³¹ However, contrary to the regulations passed pursuant to the Aviation Act, the Court relied on specific provisions which allowed the company to enhance or strengthen the labeling on a drug if that information was newly acquired.¹³² Further, the plaintiff was able to point

124. *Wyeth v. Levine*, 555 U.S. 555, 555 (2009).

125. *Id.* at 558.

126. *Id.* at 559.

127. *Id.* at 558.

128. *Id.* at 568.

129. *Wyeth*, 555 U.S. at 568. It should be noted that Wyeth unsuccessfully argued in front of the lower courts that the entire field of drug labeling was impliedly preempt. *Id.* at 559.

130. *Id.* at 573.

131. *Id.* at 577.

132. Compare 21 U.S.C. § 321(p)(1) (2006), and 21 C.F.R. § 314.105(b) (2008), with 14 C.F.R. § 21.113 (2008) (stating that major alterations to an already type certified aircraft must be accompanied by a Supplemental Type Certificate), and 14 C.F.R. § 43.3 (2008) ("[N]o person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part to which this part applies. Those items, the performance of which is a major alteration, a major repair, or preventive maintenance"). But see 14 C.F.R. § 43.3 ("A manufacturer may . . . [r]ebuild or

to twenty instances where injuries resulted from the product subject to the lawsuit.¹³³ Contrary to the findings of most courts in aviation cases, the Court noted that the FDA had never intended to preempt failure to warn claims despite many opportunities to do so.¹³⁴

Prior to *Wyeth*, there was always a “presumption against preemption” when analyzing an express preemption provision,¹³⁵ but the Court had never explicitly applied the presumption in the context of implied conflict preemption analysis.¹³⁶ Taking the language used by the Court to its furthest conclusion, there appears to be a presumption against preemption anytime an implied preemption analysis is undertaken, even in areas that historically have been under federal control.¹³⁷ This may raise the burden on the defendant to prove that implied preemption applies. Still remaining however, is that much of the language from the *Wyeth* decision implies an acceptance of the *Grier* Court’s methodology, which placed greater emphasis on the purposes and objectives of Congress as opposed to the degree and length of federal control over the industry. Thus, the absence of an express preemption provision is never dispositive in determining the preemptive reach of a statute.¹³⁸

Ultimately, the Court cited two major reasons that illustrated a lack of preemptive intent by Congress. First, the existence of an express preemption clause, which dealt with a different, but related aspect to drug regulation in the context of medical devices illustrating that Congress did not wish to preempt drug labeling.¹³⁹ Second, Congress failed to add an express preemption clause despite awareness of heavy state tort litigation.¹⁴⁰ The Court noted that even though congressional intent indicated that labels were

alter any aircraft, aircraft engine, propeller, or appliance manufactured by him under a type or production certificate”); *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992).

133. *Wyeth*, 555 U.S. at 569.

134. Compare *id.* (noting that the FDA relies on state law to maintain an extra layer of consumer protection in addition to FDA regulation), with *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004) (finding failure to warn of risks of DVT not within Federal Regulations and thus preempted as a matter of law), and *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) (finding failure to warn claims not based on federal standard preempted under implied field preemption).

135. See *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

136. *Wyeth*, 555 U.S. at 567 n.3.

137. Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 221 (2009).

138. *Wyeth*, 555 U.S. at 567 (Thomas, J., concurring). In contrast with the majority, Justice Thomas stated: “[I]n assessing the boundaries of the federal law—*i.e.*, the scope of its pre-emptive effect—the Court should look to the federal statute itself, rather than speculate about Congress’ unstated intentions.” *Id.* at 596 n.4.

139. *Id.* at 574.

140. *Id.*

both a floor and ceiling, Congress never thought that state tort claims frustrated the purpose of the statute.¹⁴¹ The Court concluded that these two factors created “powerful evidence” that Congress did not intend to preempt state law.¹⁴²

5. *The Effect of Wyeth on the Aviation Context*

Although *Wyeth* was decided under implied conflict preemption, arguably the decision relates to implied field preemption and indicates a major shift in preemption analysis, which may have consequences in the aviation context. However, noting that field preemption analysis focuses on the extent of control, whereas conflict preemption focuses on the overall objective and purpose of the statute, and given the extensive control that the FDA wields under the FDCA, it may be a non-issue. Still, the distinction may limit the decisions effect even though the two judge created doctrines can be conflated.

Arguably, the FDCA is very similar to the Federal Aviation Act in its structure and scheme. Both involve a large statutory scheme that prescribes a significant role to large agencies within the federal government that continue to assert an extensive role in their respective spheres.¹⁴³ The FDA’s regulation of warning labels is analogous to the DOT’s regulation of specific aircraft components known as type, production, and air worthiness certificates.¹⁴⁴ Like the FDA’s minimum drug labeling standards, the FAA continually publishes regulations that prescribe a minimum specification on manufacturing parts.¹⁴⁵ Further, both statutory schemes contain an express preemption clause dealing with a different component within the larger governing statute, presenting ample opportunity for Congress to add an

141. *Id.*

142. *Id.*

143. *See* Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301); Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731.

144. *See* 21 U.S.C. § 355 (2010); 21 C.F.R. § 314.105 (2010); 14 C.F.R. § 91.7 (2010) (ensuring that pilots verify aircraft’s worthiness); 14 C.F.R. § 43.3 (2008) (“A manufacturer may . . . [r]ebuild or alter any aircraft, aircraft engine, propeller, or appliance manufactured by him under a type or production certificate”). *But see* 14 C.F.R. § 21.113 (2008) (stating that major alterations to an already type certified aircraft must be accompanied by a Supplemental Type Certificate), *and* 14 C.F.R. § 43.3 (2008) (“[N]o person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part to which this part applies. Those items, the performance of which is a major alteration, a major repair, or preventive maintenance . . .”).

145. *Id.*

express preemption clause.¹⁴⁶ Indeed, *Wyeth v. Levine* may have a profound effect on the state of preemption in aviation law.

III. MOST OF THE FIELD OF AVIATION SAFETY IS IMPLIEDLY PREEMPTED

A. *ABDULLAH V. AMERICAN AIRLINES, INC.*

When the plaintiffs in *Abdullah v. American Airlines, Inc.* filed in the District Court of the Virgin Islands, the Third Circuit and accompanying district courts had never ruled on the issue of preemption in the aviation context.¹⁴⁷ In *Abdullah*, an American Airlines airplane—while en route to New York from San Juan, Puerto Rico—encountered severe turbulence that caused serious injuries to a number of passengers.¹⁴⁸ The First Officer noticed the weather system developing within the flight path and illuminated the seatbelt sign, but the pilot told only the flight attendants that there would be turbulence.¹⁴⁹ None of the crew alerted the passengers and the pilot did not circumvent the storm.¹⁵⁰ Plaintiffs suffered injuries ranging from unconsciousness and subsequent injuries, to minor physical injuries.¹⁵¹ Plaintiffs claimed that the pilot and flight crew were negligent in failing to take reasonable precaution to avoid turbulent conditions known to them, and for failing to warn passengers so that plaintiffs could protect themselves.¹⁵²

After the plaintiffs won at trial under a reasonable person standard of care, American Airlines filed a motion for a new trial, asserting that the FAA established the standards of care and the trial court's use of state and territorial standards was prejudicial.¹⁵³ The district court granted the motion and decided in favor of defendants, finding a strong similarity to the Third Circuit's previous holding in the area of nuclear safety as precedent for preemption.¹⁵⁴ The court specifically found that the objective of Congress was to both promulgate and enforce safety regulations for airlines,¹⁵⁵ that

146. See Food, Drug, and Cosmetic Act § 521, 90 Stat. 539, 574 (1976) (codified as amended at 21 U.S.C. § 360); General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

147. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 364 n.1 (3d Cir. 1999) (stating that claim was an open question).

148. *Id.* at 365.

149. *Id.*

150. *Id.*

151. Brief for Petitioners-Appellants at 4-5, *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999) (No. 98-7055).

152. *Abdullah*, 181 F.3d at 365.

153. See *Abdullah v. Am. Airlines, Inc.*, 969 F. Supp. 337, 337 (D.V.I. 1997).

154. *Id.* at 344.

155. *Id.* at 342.

these regulations were perverse,¹⁵⁶ and that the very nature of aviation law required uniformity.¹⁵⁷

On appeal, the Third Circuit agreed with the lower court and found that state standards of care were preempted.¹⁵⁸ Diverging from the lower court's decision however, the Third Circuit extended its holding beyond the scope of the lower court's ruling.¹⁵⁹ Whereas the lower court argued that state standards are preempted for pilots, passengers, and attendants while in the "course of . . . a[] flight,"¹⁶⁰ the Third Circuit held that the "entire field of aviation safety" was preempted.¹⁶¹ Further, the court expounded on the method that courts should use to find a governing federal standard of care by looking at both the specific minimum standards and the general standard of care promulgated under the Code of Federal Regulations.¹⁶² Since the Third Circuit decision, defendants have cited *Abdullah* repeatedly in the course of litigation.¹⁶³

B. *ELASSAAD V. INDEPENDENCE AIR, INC.*

Upon landing in Philadelphia, the flight attendant asked plaintiff to wait until the other passengers left before disembarking the plane.¹⁶⁴ Plaintiff was an amputee and used crutches to disembark, but did not ask for help because he believed the only assistance would be for them to carry him down, which he believed to be demeaning.¹⁶⁵ As plaintiff descended the stairs, he lost his balance and fell off the right side of the stairs, tearing cartilage in his shoulder that required surgical repair.¹⁶⁶

156. *Id.* at 344-46.

157. *Id.* at 346.

158. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).

159. *Id.* at 365.

160. *Abdullah*, 969 F. Supp. at 341.

161. *Abdullah*, 181 F.3d at 365.

162. *Id.* at 371.

163. *See, e.g.*, *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009); *Montalvo v. Spirit Airlines*, 504 F.3d 464, 468 (9th Cir. 2007); *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385 n.8 (5th Cir. 2004). District courts sitting in the Third Circuit have also inconsistently applied *Abdullah*. *See Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 439 (M.D. Pa. 2010) (finding all product liability, breach of warranty, and negligence actions must be pled using federal standards); *DuVall v. AVCO Corp.*, No. 4:CV 05-1786, 2006 WL 224020, at *3 (M.D. Pa. Jan. 30, 2006) (finding that plaintiffs need not plead that defendants violated federal standard for products liability, negligence, and wrongful death action arising from plane crash) (overturned on motion to reconsider); *Allen v. Am. Airlines, Inc.*, 301 F. Supp. 2d 370, 377 (E.D. Pa. 2003) (finding that airline did not violate C.F.R. § 91.13(a) (2010) when passenger ignored seatbelt sign to grab luggage and luggage fell on plaintiff).

164. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 119 (3d Cir. 2010).

165. *Id.*

166. *Id.*

Plaintiff commenced the lawsuit against Independence Air and Delta in the Court of Common Pleas of Philadelphia County, Pennsylvania, advancing three separate negligence claims under Pennsylvania law.¹⁶⁷ Plaintiff claimed that defendants were negligent in operating an aircraft made defective by design features of the aircraft steps, failing to inspect and maintain the steps, and failing to offer and render assistance to him as he disembarked.¹⁶⁸ Defendants removed to federal court based on diversity of citizenship.¹⁶⁹ In June 2005, plaintiff dismissed Delta from the suit.¹⁷⁰ The remaining defendant, Independence Air, then moved for partial summary judgment with respect to the first claim and the district court granted it unopposed.¹⁷¹ The plaintiff, likely sensing that precedent was not favorable, also voluntarily dismissed the second claim based on Independence Air's failure to inspect and maintain the steps.¹⁷² Defendant moved for summary judgment on the remaining claim of failing to render assistance as he disembarked the plane.¹⁷³ The district court concluded that based on *Abdullah*,¹⁷⁴ federal law dictated the standard of care for his negligence suit.¹⁷⁵ Plaintiff then appealed and the Third Circuit granted review.¹⁷⁶

Plaintiff claimed that because the FAA did not prescribe a minimum standard of care for disembarking passengers, that state law standards of care apply, or alternatively, assuming that the standard of care is the general standard of care set forth in Code of Federal Regulation section 91.13(a): "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another" that defendants were reckless in not offering assistance to the plaintiff.¹⁷⁷ Defendant argued that the Air Carrier Access Act (ACAA) provided the standard of care, but even if it did not, that plaintiff had failed to meet his burden of a "careless or reckless manner" under Code of Federal Regulation section 91.13(a).¹⁷⁸

Holding that the regulations pertaining to offering passengers assistance did not preempt plaintiffs claim, the court abrogated their previous holding in *Abdullah*,¹⁷⁹ stating that state standards of care are preempted

167. *Id.*

168. *Id.*

169. *Elassaad*, 613 F.3d at 122

170. *Id.* at 122-23.

171. *Id.* at 128.

172. *Id.*

173. *Id.*

174. *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

175. *Elassaad*, 613 F.3d at 128.

176. *Id.* at 124.

177. *Id.* at 129 (quoting 14 C.F.R. § 91.13 (2010)).

178. *Id.*

179. *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

only when the plane is “operat[ed] for the purpose[s] of air navigation.”¹⁸⁰ The Third Circuit focused heavily on the meaning of Code of Federal Regulation section 91.13(a), which provides: “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.”¹⁸¹ Under the general definitions section of the Aviation Act, “[o]perate” is defined as “use, cause to use or authorize to use aircraft, for the purpose (except as provided in [section 91.13]) of air navigation including the piloting of aircraft, with or without the right of legal control”¹⁸² The court then concluded that the general definition of “operate” referred only to “operations for the purpose of air navigation,”¹⁸³ thus making it part of the definition of operate derived from Code of Federal Regulation section 91.13(a) and “the except as provided in 91.13” applied to section 91.13(b), which meant that a careless and reckless standard did not apply unless the plane was operating or manipulated for the purpose of operating.¹⁸⁴ Then the court looked to other parts of the Aviation Act to clarify the meaning of section 91.13(a).¹⁸⁵ Armed with their definition of section 91.13(a), the court concluded that section 91.13(b), which sets out the standard of care for when a plane is not operated for the purpose of air navigation, was meant to limit the applicability of the rule to “those acts which impart some physical movement to the aircraft, or involve the manipulation of the controls of the aircraft such as starting or running an aircraft engine.”¹⁸⁶ In other words, regulations regarding pilots, flight attendants, and other personnel associated with the aircraft when the plane is not in flight are preempted under either section 91.13(a) or (b).

The Third Circuit reasoned that because regulations adopted pursuant to the Aviation Act are predominantly associated with flight,¹⁸⁷ when a plane is not “in flight” or engaged in any activity related to flight, there is no federal standard.¹⁸⁸ Meaning that the purpose of the act was safety, and safety is only implicated when it concerns flight. Applying their reasoning to the facts of the case, the court stated that the federal regulations published by the DOT are perverse, but do not regulate the conduct of a flight

180. *Elassaad*, 613 F.3d at 130.

181. 14 C.F.R. § 91.13 (2010).

182. *Id.* § 1.1.

183. *Elassaad*, 613 F.3d at 129 (citing 14 C.F.R. §§ 1.1, 91.13 (2010)).

184. *Id.* (citing 14 C.F.R. § 1.1 (2010)).

185. *Id.* at 129. The court concluded that “[a]lthough the statute does not define ‘air navigation,’ it does define two related terms: ‘navigate aircraft’ and ‘air navigation facility.’ ‘[N]avigate aircraft’ and ‘navigation of aircraft’ include piloting aircraft.” *Id.* (quoting 49 U.S.C. § 40102 (2008)).

186. *Id.* at 130.

187. *Id.*

188. *See Elassaad*, 613 F.3d at 130.

crew when a passenger disembarks.¹⁸⁹ Therefore, because the flight crew and pilot were not engaged in any act that “imparted . . . physical movement” under section 91.13(a) or “manipulat[ed] . . . the controls of the aircraft” under section 91.13(b), state standards of care applied.¹⁹⁰

IV. ANALYSIS

It is possible that the Third Circuit was influenced by the recent Supreme Court decision in *Wyeth v. Levine*,¹⁹¹ though it only mentioned the decision in passing.¹⁹² The Third Circuit ultimately concluded that it was, in the very least, overbroad in their holding of *Abdullah*.¹⁹³ Though the Third Circuit was clear in reconciling *Ellassaad* with *Abdullah*, there remains doubt about the fullest extent of the Third Circuit’s language, “operated for the purpose of air navigation.”¹⁹⁴ Thus, the analysis section discusses the problems with the phrase, “operated for the purpose of air navigation,”¹⁹⁵ in the context of run-of-the-mill negligence claims, and to the general question of whether product liability claims, breach of warranty, or negligent design claims should regularly be preempted. Then it discusses whether the Third Circuit’s preemption analysis is reconcilable with other courts, other transportation statutory contexts with similar statutory schemes, and current preemption analysis. The analysis section then gives competing arguments relating to preemption and concludes that the scaled back approach employed by the Ninth Circuit, which focuses on the specificity and pervasiveness of the regulations, is the proper way to construe preemption in aviation law, absent a ruling by the Supreme Court.

A. ELASSAAD AND THE PROBLEMS WITH A DEFINITIONAL APPROACH

The Third Circuit failed to illustrate how future litigants should allege violations in light of *Ellassaad*. Under the *Abdullah* framework, plaintiffs had to allege that the defendant was careless and reckless under the Code of Federal Regulation section 91.13(a) and cite to a specific regulation that the

189. *Id.* at 130.

190. *Ellassaad*, 613 F.3d at 130. The court also held that the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), did not relate to safety, and thus did not set the standard of care. *Id.*

191. *Wyeth v. Levine*, 555 U.S. 555, 567-69 (2009).

192. *Ellassaad*, 613 F.3d at 131 n.7-8 (stating that because *Abdullah* did not apply to the facts of the case, the effect of *Wyeth* on *Abdullah* was not at issue).

193. See *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

194. *Ellassaad*, 613 F.3d at 130.

195. *Id.*

defendant violated.¹⁹⁶ Because the entire field of aviation safety was preempted, even when there was no specific regulation on point, plaintiffs could not proceed with their claim.¹⁹⁷ Foreseeably, the Third Circuit would now conduct future aviation preemption analysis differently, but only if the plane is stationary or the pertinent regulation does not deal with operation or navigation.¹⁹⁸

Even if the framework for alleging a violation was clear, potential problems arise through the Third Circuit's definition centered approach. The Third Circuit's first definitional problem is its failure to delineate when "operations" begin and end, or which activities are for the purposes of "operations."¹⁹⁹ Failing to delineate fully the contours of "operations" or "navigation" leaves a small, but significant gray area.²⁰⁰ In fact, the court was explicit in stating that it "do[es] 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."²⁰¹ Judging from the language employed by the Third Circuit, claims occurring when a plane is flying, landing, or taking off are almost always preempted, but taxiing and other forms of disembarking are open questions, creating the second problem with this approach.

The second problem that arises from the definition centered approach of *Elassaad* is how inconsistently applied the language "operated for the purpose of navigation" could potentially have on most common law claims.²⁰² Arguably, there would be some hypothetical negligence action occurring while a plane is stopped that is not preempted, but a claim based on the same facts is preempted while the plane is exerting independent movement.²⁰³ Thus, the Third Circuit's decision may cover many more situations not envisioned by Congress in passing the Aviation Act, or may create inconsistent results.

196. Bomanski v. U.S. Airways Grp., Inc., 620 F. Supp. 2d 725, 729-30 (E.D. Pa. 2009).

197. *Id.*

198. *See Elassaad*, 613 F.3d at 130.

199. *See id.* at 130. Note that the court did use some examples. *Id.*

200. *Id.*

201. *Id.* at 130 n.14.

202. *See id.* at 130.

203. *Elassaad*, 613 F.3d at 130.

1. *The Ninth Circuit Versus the Third Circuit: Different Approaches to Preemption*

Most courts that address negligent failure to warn cases have come to the conclusion they are usually preempted.²⁰⁴ The pervasiveness of regulations dealing with pre-flight and in-flight warnings indicates that the DOT has exerted significant control.²⁰⁵ The conclusion by most courts that failure to warn claims not based on federal standards makes sense, allowing states to require further warnings to passengers would create havoc among airlines. Not only would every airline have to vocalize different warnings in different states, but the prospect of further warnings would be especially impractical considering that a flight can have unaccounted for problems or more important warnings could be drowned out.²⁰⁶ Arguably, this should even apply to airlines whose parts malfunction when they are not at fault. However, the *Elassaad* decision raises many questions regarding other aspects of negligence, such as a failure to maintain safe conditions inside of the airplane.²⁰⁷ By focusing on whether the context of the negligent action requires the exertion of movement or control of the plane, the court missed the point of preemption—stopping those affected by litigation from having a duty that would be impracticable or inconsistent with congressional intent. Forcing a plaintiff, who is injured while on an airplane, to find both a governing regulation, and prove that it was careless or reckless is extremely difficult and fundamentally unfair when a plane or manufacturer is clearly negligent. It obstructs the traditional role of state law in tort claims. The Third Circuit believes this was the intent of Congress.²⁰⁸

A different approach is employed by the Ninth Circuit when analyzing typical personal injury claims. In *Martin v. Midwest Express Holdings Inc.*,²⁰⁹ the Ninth Circuit held that only when an agency issues “pervasive regulations” in a particular area of flight safety, such as passenger warnings, are state standards preempted.²¹⁰ Thus, the Ninth Circuit’s reasoning seems to indicate an agreement with the Third Circuit, that when there are pervasive or precise regulations, there is preemption, but does not agree

204. See, e.g., *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) (finding failure to warn claims not based on federal standard preempted under implied field preemption); *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004) (finding failure to warn of risks of DVT not within federal regulations and thus preempted as a matter of law); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

205. See 14 C.F.R. § 121.317 (2010).

206. *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 810 (9th Cir. 2009).

207. See *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 130 (3d Cir. 2010).

208. See *id.*

209. *Martin*, 555 F.3d 806.

210. *Id.* at 811.

with how broadly to define the scope of pervasive regulations.²¹¹ While the Third Circuit would classify most common law claims as preempted because a majority of time for passengers is spent while the plane is navigating,²¹² the Ninth Circuit's analysis does not depend on the current state of the aircraft, but the pervasiveness and preciseness of the regulations.²¹³ In fact, the negligent design claim in *Martin* would have been preempted if it was brought in the Third Circuit, because the ladder at issue in that case likely had an accompanying air worthiness certificate.²¹⁴

2. *Moving Toward Cohesion: The Circuit Split*

Currently, the Fifth, Sixth, and Eleventh Circuit Courts follow the approach of the Ninth Circuit. The Sixth Circuit in *Greene v. B.F. Goodrich Avionics Systems, Inc.*,²¹⁵ found that the Aviation Act preempted failure to warn claims but used state law analysis in determining whether a navigational instrument was defectively designed.²¹⁶ The Fifth Circuit in *Witty v. Delta Airlines*²¹⁷ used the analysis of the Ninth Circuit by narrowly holding that only specific aspects of aviation law are preempted, and failed to address the issue of whether a broader contextual or definition approach was applicable.²¹⁸

The claim-by-claim approach, however, does not have full-fledged support. Recently, the Tenth Circuit abrogated their prior holding, which was arguably more unfriendly to preemption than the Ninth Circuit.²¹⁹ It recently overturned *Cleveland v. Piper Aircraft Co.*, and implicitly adopted

211. *Id.* at 814.

212. *See Ellassaad*, 613 F.3d at 130.

213. *Martin*, 555 F.3d at 810.

214. *Id.*

215. *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788-89, 794-95 (6th Cir. 2005).

216. *Id.* at 794-95 (agreeing with the central holding of *Abdullah* in finding that the entire field of aviation safety was preempted, but did not conclude that *Abdullah* was applicable in its discussion about product liability).

217. *Witty v. Delta Airlines*, 366 F.3d 380, 381 (5th Cir. 2004).

218. *Id.* at 385. *See, e.g., Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 835 (E.D. Tex. 2006) (finding no preemption in field of Aviation safety).

219. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993), *abrogated by* *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326-27 (10th Cir. 2010). *See also* *Pub. Health Trust of Dade Cnty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993) (finding lack of pertinent regulation and statutory command to indicate preemption). It should be noted that in *Public Health Trust*, the Eleventh Circuit relied on old Supreme Court precedent in determining proper preemption analysis. *Id.*

the holding of *Abdullah*.²²⁰ Whether that includes the broader holding of *Abdullah*, the modified ruling of *Elassaad*, or the approach undertaken by the Ninth Circuit in *Martin*, remains to be seen.²²¹

In sum, the Ninth Circuit's preemption analysis allows airline companies to claim preemption in situations where the regulations are so perverse and precise that deviations based on each state law would be impractical and burdensome regardless of context.²²² Further, a claim by claim approach allows plaintiffs injured on an airplane to only prove negligence, as opposed to recklessness, if there are no applicable regulations or significantly broad regulations.²²³ A specific and pervasive regulation approach, as opposed to a context or definition centered approach, will lead to more uniform results amongst the courts.²²⁴

3. *Elassaad is Incorrect in Finding that whenever Plaintiff Implicates any Air Worthiness Certificate or Type Worthiness Certificate, There is Preemption*

It would be difficult to argue with conviction that the decision in *Elassaad* did not represent an explicit acceptance that product liability, breach of warranty, or negligent design claims are always preempted because there are specific, minimum aircraft worthiness requirements that regulate components of an airplane.²²⁵ The court stated in explicit terms that "it is not surprising, then, that most of the regulations adopted pursuant to the Aviation Act concern aspects of safety that are associated with flight. For example, the regulations detail certification and 'airworthiness' requirements for aircraft parts."²²⁶

Even if one could argue that the focus in *Abdullah* and *Elassaad* strictly dealt with the operations of an aircraft, and thus, air worthiness certificates were not implicated, the interpretation of "operations" suggests an inclusion of product liability claims, because after all, each part of the plane is built for the purpose of operations.²²⁷ Assuming that a slightly narrower

220. U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1327-28 (10th Cir. 2010) (relying on specific federal standard relating to alcoholic beverages as evidence of preemption).

221. *Id.*

222. *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 810 (9th Cir. 2009).

223. *Id.*

224. *See Wyeth v. Levine*, 555 U.S. 555, 565-67 (2009).

225. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 128 (3d Cir. 2010); *see supra* notes 132, 144 and accompanying text.

226. *Elassaad*, 613 F.3d at 128.

227. *See id.* at 130.

definition of “air safety”²²⁸ includes minimum aircraft worthiness certificates, any claim of state product liability or negligent design would more likely than not, be preempted.²²⁹ It is impossible to prove recklessness when the FAA approves the malfunctioning part and the company did not deviate from its design.

However, the Third Circuit may be mistaken in its conclusion that air worthiness regulations preempt state product liability and negligent design claims.²³⁰ First, the GARA and its statute of repose provision indicate that Congress did not believe that federal law preempted claims that implicate minimum air worthiness certificates.²³¹ Indeed, the statute of repose would be wholly unnecessary if claims not based on deviations from federal standards were already preempted.²³² Moreover, the GARA²³³ was passed in response to significant depreciation in the general aviation manufacturing industry for which “products liability lawsuits were blamed”²³⁴ As the Ninth Circuit noted in *Martin v. Midwest Express Holdings, Inc.*,²³⁵ the FAA requires airlines to maintain liability insurance; there would be no need to carry insurance if an airline or manufacturer could claim preemption.²³⁶ If product liability claims or negligent design claims are always preempted, it would leave plaintiffs with legitimate claims unable to receive compensation unless the airline or manufacturer acted recklessly or deviated from federal regulations.

The process for approving aircraft worthiness or type certificates/standards may itself indicate a lack of preemptive intent. Minimum standards are not conclusive of preemptive intent²³⁷ or a lack of preemptive intent.²³⁸ As the Supreme Court explained, every plane is certified by the FAA to meet certain minimum standards.²³⁹ However, this process is main-

228. *Id.* at 129.

229. *Id.*

230. *Id.* at 128.

231. See *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006) (stating that the adoption of the GARA implied a continued viability of state tort law claims).

232. *Id.*

233. General Aviation Revitalization Act of 1994, Pub. L. No. 103- 298, 108 Stat. 1552.

234. Kelly, *supra* note 38, at 129. Accord McClune, *supra* note 12, at 725.

235. *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 806 (9th Cir. 2009).

236. *Id.* at 808 (quoting 49 U.S.C. § 41112 (1994)). Airline must have insurance “sufficient to pay . . . for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft” 49 U.S.C. § 41112 (1994).

237. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 n.19 (1978).

238. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147-48 (1963).

239. *United States v. Varig Airlines*, 467 U.S. 797, 800 n.1 (1984).

ly done by the manufacturer and the certificates do not provide a completed product.²⁴⁰ The FAA gives airplane manufacturers “broad responsibilities” for assuring their own compliance by appointing aircraft company employees to “act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification.”²⁴¹ The Tenth Circuit reiterated that FAA approval was “not intended to be the last word on safety”²⁴² and “by its very nature, a minimum check on safety.”²⁴³ Other courts agree with this sentiment: in *Monroe v. Cessna Aircraft Co.*,²⁴⁴ the Eastern District of Texas held that the certification process did not create a pervasive regulatory scheme demonstrating preemption.²⁴⁵ It further stated that the regulations that control design and safety are “broad and provide a non-exhaustive list of minimum requirements leaving discretion to the manufacturer.”²⁴⁶

The question to be asked then is, how can a process which places such a great emphasis on manufacturer compliance have preemptive effect? The Third Circuit approach in *Elassaad* is overly broad in this regard because there are some instances when claims that implicate air worthiness certificates or general regulations should be preempted and others where they should not—merely because there is a general regulation requiring that a plane is not operated carelessly or recklessly does not, in and of itself, preclude state standards.²⁴⁷ Like the Fifth Circuit stated in *Witty v. Delta Airlines*,²⁴⁸ after finding plaintiffs’ claims for failure to warn preempted: “[W]e note our intent to decide this case narrowly by addressing the precise issues before us We do not . . . express an opinion as to whether emergency or unplanned situations on flights can form the basis of a state failure to warn claim that is not preempted.”²⁴⁹ The federal courts have fashioned different approaches to preemption in the aviation context, which have led to different conclusions on nearly the same facts.²⁵⁰ This lack of cohesion

240. *See id.* at 800-08.

241. *Id.* at 807. The Court further stated: “[T]he duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance [T]he FAA then reviews the data for conformity purposes by conducting a ‘spot check’ of the manufacturer’s work.” *Id.* at 816-17.

242. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1445 (10th Cir. 1993), *abrogated by* *US Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326-27 (10th Cir. 2010).

243. *Id.* at 1446.

244. *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830 (E.D. Tex. 2006).

245. *Id.* at 833.

246. *Id.*

247. *See Witty v. Delta Airlines*, 366 F.3d 380, 385 (5th Cir. 2004).

248. *Id.* at 380.

249. *Id.* at 385-86.

250. *See generally* *Abdullah v. Am. Airlines Inc.*, 181 F.3d 363, 365 (3d Cir. 1999); *Lucia v. Teledyne Cont’l Motors*, 173 F. Supp. 2d 1253, 1270 (S.D. Ala. 2001) (stating that Congress or the FAA did not intend to fully occupy the field, such that no state remedies

could be solved through a claim-by-claim approach. Without clear guidance from the Supreme Court, most federal and state courts will continue to differ in great respects in their preemption methodology and conclusions in the context of aviation.

B. DOES *ELASSAAD* FIND SUPPORT FROM OTHER CONTEXTS?

1. *Maritime and Transportation Law*

The statutes governing maritime law are thought to be “strikingly similar” to the Federal Aviation Act.²⁵¹ Therefore, the Supreme Court decisions dealing with the Ports and Waterways Safety Act of 1972 (PWSA)²⁵² may offer a foretelling of a decision by the Supreme Court, if they were to grant certiorari on the issue of preemption in aviation law.

The Supreme Court first addressed preemption in maritime law in *Ray v. Atlantic Richfield Co.*²⁵³ In *Ray*, due to a recent oil spill, Congress responded by enacting the PWSA.²⁵⁴ The Court addressed whether the PWSA preempted attempts by states to require additional safety equipment.²⁵⁵ The PWSA contained two pertinent provisions: Title I focused on traffic control at local ports,²⁵⁶ whereas Title II focused on design and construction of oil tankers.²⁵⁷ Using implied field preemption, the Court held that Title II had a preemptive effect because “Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord.”²⁵⁸ The Court further explained that under Title II, the DOT had to determine the seaworthiness of all oil tankers by certifying their compliance with federal law.²⁵⁹ Moreover, the PWSA

could apply in areas not affecting such rates, routes, or services); *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 835 (E.D. Tex. 2006) (finding no preemption in field of aviation safety). Compare *Montalvo v. Spirit Airlines*, 508 F.3d 464, 475 (9th Cir. 2007) (finding failure to warn of deep vein thrombosis is preempted, but leaving open question whether unsafe seat configurations were preempted), with *Martin v. Midwest Express Holdings*, 555 F.3d 806, 812 (9th Cir. 2009) (finding no preemption in defective design of stairs and limiting preemption to areas of aviation where regulations are perverse).

251. Thomas J. McLaughlin, et al., *Navigating the Nations Waterways and Airways: Maritime Lessons for Federal Preemption of Airworthiness Standards*, 23 AIR & SPACE L. 5, 9 (No. 2, 2010).

252. Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227.

253. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 151 (1978).

254. 33 U.S.C. § 1221 (1972).

255. *Ray*, 435 U.S. at 155.

256. See 33 U.S.C. §§ 1221-1227 (1972).

257. McLaughlin, et al., *supra* note 251, at 8.

258. *Ray*, 435 U.S. at 168.

259. See *id.* at 166-69.

implicated international interests and comity because the DOT had to accept valid certificates issued by sister sovereigns under various treaties.²⁶⁰

The Supreme Court more recently addressed the preemptive effect of the PWSA in the decision *United States v. Locke*.²⁶¹ Reconfirming *Ray*, the Court held that some laws which the State of Washington had passed for additional safety measures were preempted.²⁶² The Court concluded that Congress entrusted the DOT with exclusive power to determine which oil tankers are sufficiently safe to navigate the waters of the United States.²⁶³ The Court noted that each title of the PWSA was entitled to a different preemption analysis; Title I, which gave authority, but did not require the Coast Guard to promulgate regulations, was entitled to conflict preemption analysis, whereas Title II, where the promulgation of regulations is required, was entitled to field preemption analysis.²⁶⁴

It appears that the Third Circuit's decision in *Elassaad* is consistent with the Supreme Court's line of cases in the context of the PWSA.²⁶⁵ This conclusion makes sense, as both Acts designate federal regulation as minimum standards²⁶⁶ and create a comprehensive scheme. Some commentators have argued that if the Supreme Court ever decided an aviation safety case, it would find that the PWSA and Federal Boat Safety Act "have essentially identical enabling statutes affirmatively requiring that a designated federal agency establish all necessary standards to ensure the sea or airworthiness of approved vessels or aircraft."²⁶⁷ Further, the PWSA's seaworthiness certification provisions and the FAA's airworthiness or type certification provisions are similar because both are "mandatory . . . comprehensive . . . and are designed to ensure . . . safe[ty]."²⁶⁸ Finally, like tankers under the PWSA, the FAA is "generally required" to recognize airworthiness certificates issued by other countries.²⁶⁹

Yet, there are some flaws in automatically assuming that the PWSA and Aviation Act are sufficiently similar to merit precedential value. Unlike the Aviation Act, which contains an express preemption provision in the

260. *Id.* at 162.

261. *United States v. Locke*, 529 U.S. 89, 89 (2000).

262. *Id.* at 116.

263. *Id.* at 110.

264. *Id.* at 110-11.

265. *See Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 130 (3d Cir. 2010).

266. McLaughlin, et al., *supra* note 251, at 5.

267. *Id.* at 9. The first federal act regulating aviation, the Air Commerce Act of 1926, was derived directly from the statutory framework governing marine vessels. *Id.*

268. *Id.* "Both are mandatory and comprehensive. Both laws also have certification processes that flow from pervasive regulation and are designed to ensure that oil tankers and aircraft can safely navigate the nation's waterways and airways, respectively." *Id.*

269. *Id.* at 10.

subsequent amendments, the PWSA contains no such provision.²⁷⁰ In fact, the PWSA contains no preemptive language.²⁷¹ The preemptive reach of the PWSA is entirely judicially created, but the Aviation Act contains both an express preemption provision under the ADA and GARA, with no other express preemption provision.²⁷² Further, the Supreme Court has only addressed the PWSA in the context of state passed substantive safety requirements on tankers, not in the context of run-of-the-mill negligence claims based on centuries of workplace injury common law.²⁷³

The National Traffic and Motor Vehicle Safety Act of 1966 may also provide an analogous statutory scheme that supports preemption.²⁷⁴ Like the Aviation Act, the National Traffic and Motor Vehicle Safety Act contains both an express preemption clause and savings clause that classify its regulations as minimum standards.²⁷⁵ However, there are also some problems with comparing the two acts. Unlike the Aviation Act, the National Traffic and Motor Vehicle Safety Act's express preemption provision states the preemptive scope of the regulations.²⁷⁶ Further, the Supreme Court in *Grier* only used implied conflict preemption as opposed to field preemption because the preemptive reach of the statute was stated in the express preemption clause.²⁷⁷ Thus, comparing minimum standards in the aviation context to the transportation context would mean that states may impose safety standards in addition to the FAR and states would only be precluded from drafting conflicting regulations.²⁷⁸

Thus, the precedential value of either statutory scheme is suspect. Although it is not unforeseeable that the Supreme Court will use other contexts to determine the preemptive reach of the FARs because there are some similarities between aviation and other transportation statutory schemes.

270. Kelly, *supra* note 38, at 139.

271. *Id.*

272. *See id.*

273. *See id.*

274. *See* Nat'l Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988).

275. *Id.*; *see also* Kelly, *supra* note 38, at 137-38.

276. *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 895 (W.D. Ky. 1993). “[N]o State . . . shall have any authority to either establish or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard . . . which is not identical to the Federal standard.” *Id.* (quoting 15 U.S.C. § 1392(d)).

277. *Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000).

278. Kelly, *supra* note 38, at 137-38. Whether state law would conflict with federal law is another question entirely not addressed by courts or this author.

C. COMPETING ARGUMENTS: IS *ELASSAAD* RECONCILABLE WITH *WYETH V. LEVINE* AND PUBLIC POLICY?

The Third Circuit in *Elassaad* was unwilling to go into the affect that *Wyeth* had on their decision.²⁷⁹ It was correct when it stated that the issue of preemption was not before it because *Abdullah* only extended to “air safety” and exiting a stationary plane did not implicate it.²⁸⁰ Yet, *Elassaad*, despite keeping in place a very broad and undefined area still subject to preemption, may not be misguided.

1. *Wyeth v. Levine Does Not Explicitly Overturn Preemption Rulings in the Aviation Context and Thus a Scaled Back Approach Would Not Be Modified by the Supreme Court*

Key language from the *Wyeth* decision and the distinctions between the Aviation Act²⁸¹ and FDCA²⁸² illustrate that although *Wyeth* may have changed the landscape of preemption analysis, there are still significant questions about its applicability to other contexts. It should not be assumed that the broad preemption decision in *Elassaad* is inconsistent with *Wyeth*.

Wyeth was clear that the Supreme Court will not grant *Chevron*²⁸³ deference to the conclusions of a federal agency dealing with preemption without a specific express preemption provision.²⁸⁴ However, the Court does look to a particular agency’s opinion as to the affect that the “state requirements” will have on the “purposes and objectives” of Congress when the statute is ambiguous.²⁸⁵ The Court found unpersuasive that the FDA had recently reversed a long-standing policy of the agency regarding preemption, and a lack of any discussion by the FDA as to how state tort law interfered with FDA drug labeling regulation during the previous decades.²⁸⁶ The Court was also influenced by recent scholarship that suggested the FDA was either “unwilling[] or [unable] to protect doctors, patients, or the

279. *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 127 n.7 (3d Cir. 2010).

280. *Id.* at 127.

281. Federal Aviation Act of 1958, Pub. L. No. 85-276, 72 Stat. 731 (1958).

282. Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (1938).

283. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 16-18 (2011); see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (using a two part test, a court may give deference to the interpretation that a particular agency has given to their organizing statute; before granting deference, the statute must be ambiguous).

284. *Id.*

285. *Wyeth v. Levine*, 555 U.S. 555, 557 (2009); see also Metzger, *supra* note 283, at 16-18.

286. See generally *Wyeth v. Levine*, 555 U.S. 555, 557 (2009); Metzger, *supra* note 283. It can be presumed that the FDA failed to illustrate its interpretation was reasonable, the second requirement of the *Chevron* deference test.

public from unsafe drugs, poor labeling, or untrue marketing.²⁸⁷ This is significant in light of the fact that the FAA, unlike the FDA, has always maintained that their role is exclusive in regulating aviation law.²⁸⁸ Therefore, a hypothetical amicus brief submitted by the FAA would demonstrate that they have not reversed their opinion or policy as to their preemptive reach.²⁸⁹ Thus, even though the FAA would not be given *Chevron* deference, arguably it would be much more persuasive than the FDA's recently changed role in drug labeling.

In *Wyeth*, the Supreme Court stated that the FDA was not the final word on safety, meaning that the drug company could and should make their labeling as comprehensive and safe as possible beyond the approval of the FDA.²⁹⁰ However, defense manufacturers and airline companies can argue that the FAA's role within the DOT is different from the FDA because the FAA's word is truly final.²⁹¹ Even though the Supreme Court in *Wyeth* rejected the argument that greater warning labels would drown out or dilute other, more significant ones, the regulations in Title 14 are different contextually.²⁹² Federally mandated warnings in the aviation context are stated orally to passengers, including demonstrations.²⁹³ Further, regulations in the aviation context must deal with international interests and unlike the medical drug labeling context, there is no doctor or pharmacist intermediary, unless you include the airline company.²⁹⁴ The idea that the FAA is the final word on all things aviation is reflected by the Supreme Court in *City of Burbank v. Lockheed Air Terminal*, where the Court found that cities were preempted from imposing state laws regulating air traffic noise due to the exclusive role of the federal government.²⁹⁵

Unlike medical labeling, which affects the health and welfare of citizens, a role usually reserved for the states, aviation arguably is only indi-

287. Elizabeth J. Cabraser, *When Worlds Collide: The Supreme Court Confronts Federal Agencies with Federalism in Wyeth v. Levine*, 84 TUL. L. REV. 1275, 1289 (2010).

288. Geoffrey M. Hand, Comment, *Should Juries Decide Aircraft Design: Cleveland v. Piper Aircraft Corp. and Federal Preemption of State Tort Law*, 29 U.S.F. L. REV. 741, 786-87 (1995).

289. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1438 (10th Cir. 1993). *Piper* is significant because the "United States file[d] its first historic brief as amicus curiae" on behalf of the manufacturer. Kelly, *supra* note 38, at 123.

290. See *Wyeth*, 555 U.S. at 560-72. The Court stated that "the very idea that the FDA would bring an enforcement action against a manufacturer for strengthening a warning pursuant to the CBE regulation is difficult to accept-neither Wyeth nor the United States has identified a case in which the FDA has done so." *Id.* at 572.

291. See *Abdullah v. Am. Airlines*, 181 F.3d 363, 369-70 (3d Cir. 1999).

292. Compare *Wyeth*, 555 U.S. at 576-79, with *Abdullah*, 181 F.3d at 369-70 (discussing the role of minimum air worthiness certificates).

293. See, e.g., 14 C.F.R. § 91.107 (2011).

294. McLaughlin, et al., *supra* note 251, at 10.

295. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 650 (1973).

rectly associated with the health and welfare of citizens and has always been the prerogative of the government within our scheme of federalism.²⁹⁶ Moreover, there are stiff penalties for manufacturers and airline companies when they deviate from FAA regulations, for any reason.²⁹⁷ Thus, it is not a stretch to assume that the Supreme Court would give greater deference to the Federal Aviation Administration and could conclude that Federal Aviation Administration regulations preempt state tort law.

Finally, a district court within the Third Circuit recently addressed a claim alleging negligent design post *Elassaad* and *Wyeth*. In *Sikkelee v. Precision Airmotive Corp.*,²⁹⁸ the court stated that the analysis used in *Abdullah*, and reconfirmed in *Elassaad*, was consistent with the preemption analysis undertaken by the Supreme Court in *Wyeth*.²⁹⁹ Thus, from the perspective of a lower court, the *Elassaad* decision was applicable post-*Wyeth*.³⁰⁰

2. *Public Policy and the Traditional Role of Tort Law Support a Finding that Preemption Should Be Applicable to the Field of Aviation Law, but Only in Some Situations*

The FDCA and the Aviation Act are sufficiently similar to warrant a comparison between the two.³⁰¹ Proponents of non-preemption argue that the Supreme Court is trending significantly toward anti-preemption.³⁰² As the similarities between the two statutes and flaws of the *Elassaad* decisions are already discussed throughout the paper, the remainder of the Note deals with public policy concerns.³⁰³

Some claims should not be preempted for policy reasons. Even though aviation has been exclusively regulated by the federal government, tort law has historically been left to the states.³⁰⁴ State police powers include public safety and general welfare, therefore the “[s]afety of the skies and general welfare of the flying public is no different.”³⁰⁵ A significant principle be-

296. See McLaughlin, *supra* note 251, at 5.

297. Harro Ranter, *FAA Proposes Civil Penalty Against American Airlines of \$24.2 million*, AVIATION SAFETY NETWORK (Aug. 28, 2010), <http://aviationsafetynetwork.wordpress.com/tag/american-airlines/>. Recently, the FAA issued a \$24.2 million civil penalty against American Airlines for failing to check wiring bundles required by an Airworthiness Directive. *Id.*

298. *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429 (M.D. Pa. 2010).

299. *Id.* at 438-39.

300. *Id.*

301. See discussion *supra* Part III.B.4.

302. See Cabraser, *supra* note 287, at 1304.

303. See discussion *supra* Part III.B.4.

304. Kelly, *supra* note 38, at 122.

305. *Id.* at 122.

hind tort law and product liability law is to place the burden of loss upon those most deserving to bear it.³⁰⁶ It is argued that between equally blameless parties, equity favors placing the loss upon the party who placed the product into the stream of commerce, such as manufacturers and airline companies.³⁰⁷ Airline companies and manufacturers are more likely to carry insurance, and are in a better position to inspect the product. Allowing full preemption could potentially leave manufacturers, who largely self-certify their components with oversight from the FAA, subject to fraud.³⁰⁸ Thus, the scheme of federalism supports the applicability of common law claims in some contexts, but not in others. Situations where a state is trying to impose additional safety measures where there already is pervasive and specific control by the federal government should be preempted. Where there is not that degree of control present, there should not be preemption.

Next, many of the proponents of non-preemption in the aviation context point to recent congressional action in the realm of aviation law. When Congress passed the GARA, they “turned down a proposal that would have expressly removed aircraft design from state authority.”³⁰⁹ Instead the GARA, like the ADA, only removed certain discrete aspects of the aviation industry from state control.³¹⁰ Congress’s consideration of an expansive preemptive reach, and deciding against it, illustrates that the field of aviation safety is not already preempted.³¹¹

V. CONCLUSION

The district court in *Sikkelee* was not however, adamant in their approval of the decision in *Elassaad*.³¹² The court stated in response to plaintiff’s argument:

[W]e 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 . . . [but] we must follow the state of the law as

306. *Id.* at 139-40.

307. *Id.* at 139.

308. *Id.* at 122.

309. Kelly, *supra* note 38, at 129-30.

310. *See Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944).

311. Kelly, *supra* note 38, at 129-30.

312. *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 438-39 (M.D. Pa. 2010).

articulated by the Third Circuit. The legal principle of stare decisis commands no less.³¹³

Stare decisis aside, the uncertainty illustrated by the district court represents the larger problem: there is no consensus among the courts about the effect of the Federal Aviation Act or its subsequent amendments.³¹⁴ Even though the Supreme Court has changed course on preemption, the history of Supreme Court jurisprudence is mired in inconsistency among the justices and subject to change as quickly as it begins to have any effect on lower courts.³¹⁵ Until the Supreme Court takes a case in the aviation context, the scaled-back approach utilized by the Ninth Circuit is fairest to all parties.³¹⁶

The decision in *Elassaad* likely will remain good law despite the weakness in a definition centered approach.³¹⁷ The effect that *Wyeth* has on *Elassaad* or aviation law in general is inconclusive and highly subjective at this point.³¹⁸ The middle ground approach employed by the Ninth Circuit is the fairest to the aviation industry and potential plaintiffs. *Elassaad* is a step in that direction, but the flaws of a definitional and contextual approach are endless.

Looking to the governing Code of Federal Regulations to determine if air safety is truly implicated and whether a federal standard is applicable will be the most equitable solution for all parties and will satisfy the competing ambitions of federalism. In the hypothetical discussed in the introduction, the Third Circuit would likely find that the claim is preempted because that particular regulation is within the definition of air safety.³¹⁹

313. *Id.*

314. *See generally* *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999) (finding entire field of aviation safety is impliedly preempted); *Lucia v. Teledyne Cont'l Motors*, 173 F. Supp. 2d 1253, 1270 (S.D. Ala. 2001) (stating that Congress or the FAA did not intend to fully occupy the field, such that no state remedies could apply in areas not affecting such rates, routes, or services); *Monroe v. Cessna Aircraft Company*, 417 F. Supp. 2d 824, 835 (E.D. Tex. 2006) (finding no preemption in field of Aviation safety); *Compare Montalvo v. Spirit Airlines*, 508 F.3d 464, 475 (9th Cir. 2007) (finding failure to warn of deep vein thrombosis is preempted, but leaving open question whether unsafe seat configurations were preempted), *with Martin v. Midwest Express Holdings*, 555 F.3d 806, 812 (9th Cir. 2009) (finding no preemption in defective design of stairs and limiting preemption to areas of aviation where regulations are perverse).

315. *See Metzger, supra* note 283, at 44.

316. *Martin*, 555 F.3d at 812.

317. *See discussion supra* Part IV.

318. *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (holding that recent Supreme Court decision calls into doubt their previous decision in *Cleveland v. Piper Aircraft Co.*). Ironically, the circuit that bucked the trend among other courts and arguably went further than the rest of the circuits and Supreme Court precedent decides to question their decision as soon as the Supreme Court gave implicit support for their prior decision. *See generally Wyeth v. Levine*, 555 U.S. 555, 569-70 (2009).

319. *See Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 128 (3d Cir. 2010).

Even though the plane landed and therefore is not in operation, it would still be preempted because the part of the plane that malfunctioned is covered in an air worthiness certificate. Merely because there is a regulation governing the malfunctioning aircraft component does not mean that a plaintiff should not be allowed to recover damages for the airline's negligence. The scaled-back approach allows the FAA to promulgate specific and numerous regulations in areas that should be exclusively under their control. It further allows manufacturers to push for greater regulation, which would make flying safer, but also allow plaintiffs to use product liability and negligence claims in situations where the regulations are not precise or pervasive.

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