No. 20-2951

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRENDA JONES, as Co-Administrator of Estate of John David Hortman; JILL HORTMAN MORRIS, as Co-Administrator of Estate of John David Hortman,

Plaintiffs-Appellants,

ADALIA LEE REDD, Individually and as Co-Administrator for Estate of Steven Burton Redd; DEZARAY REDD, Individually; JAZLYN REDD, Individually and as Co-Administrator for Estate of Steven Burton Redd; TRISTAN REDD, Individually

Consolidated Plaintiffs-Appellants,

v.

BOEING CO.; GOODRICH PUMP & ENGINE CONTROL SYSTEMS, INC.; ROLLS-ROYCE CORP.,

Consolidated Defendants-Appellees,

(*Caption continues on inside cover*)

Appeal from the United States District Court for the District of Connecticut
(No. 3:12-cv-01297-JBA)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF APPELLANTS AND REVERSAL

Allison M. Zieve
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

December 22, 2020

Counsel for Amicus Curiae Public Citizen

(*Continued from outside cover*)

L-3 COMMUNICATIONS CORPORATION; L-3 COMMUNICATIONS HOLDINGS, INC.

Consolidated Defendants,

GOODRICH CORPORATION; ROLLS-ROYCE NORTH AMERICA, INC.; MD HELICOPTERS, INC.; L3 COMMUNICATIONS INTEGRATED SYSTEMS, LP; ALLISON ENGINE COMPANY, INC.

Defendants.

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporations, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit consumer advocacy organization with members and supporters in every state. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues. Of particular relevance here, Public Citizen advocates to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, including products liability tort claims like those at issue in this case. Public Citizen has a longstanding interest in preserving remedies available to injured parties under state laws against unwarranted claims of preemption by federal law and has participated as amicus curiae in many cases involving preemption issues.

Public Citizen believes that the argument for field preemption in this case lacks a fair grounding in the statute and regulations at issue and that the district court applied an inappropriately expansive approach to field preemption. Neither the Federal Aviation Act nor its implementing regulations evince congressional intent to preclude States from providing common-law remedies for products liability within their traditional sphere of protecting public health and safety against physical injury. Public Citizen submits this brief to assist the Court in applying the Supreme

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from amici curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

Court's precedents, which require a careful inquiry both into whether a federal statute preempts state law within a particular field of regulation, and into the boundaries that demarcate which matters fall within the preempted field and which matters remain subject to a State's historic regulatory and remedial powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiffs in this case allege state-law products liability claims arising from allegations that defendants' faulty design and manufacturing of aircraft components resulted in a fatal air crash. Those claims are not "field preempted" by the Federal Aviation Act (FAA) and its implementing regulations. Field preemption does not follow simply because Congress has regulated an industry but turns specifically on whether Congress intended to "foreclose any state regulation" through the state law at issue. *Arizona v. United States*, 567 U.S. 387, 401 (2012) (citation omitted). Because "the purpose of Congress is the ultimate touchstone in every pre-emption case" *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (cleaned up), a court may not "extend a federal statute['s]" preemptive effect "to a sphere Congress was well aware of but chose to leave alone." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (lead opinion of Gorsuch, J.).

State-law products liability claims fall within the heartland of the States' historic role of regulating the health and safety of their citizens, and neither the text nor the structure of the FAA indicates that Congress intended to intrude on that

traditional domain of state regulation. Reaching a contrary conclusion, the district court relied on this Court's prior statements that the FAA preempts the "entire field of aviation safety." SA9. This Court, however, has recognized that those statements, made in cases that did not concern injuries incurred in an air crash, answer only the question whether a federal statute preempts state law within a particular field of regulation—not the question of the scope of the preempted field. *See Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210 (2d Cir. 2011). The district court thus failed to follow this Court's guidance, as well as the Supreme Court's instruction that courts "must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015).

The Court should reverse the decision below.

ARGUMENT

I. The existence and scope of field preemption turn on congressional intent to oust state law.

Under the Supremacy Clause, federal law is "the supreme Law of the Land, … anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Pursuant to that constitutional principle, "Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation." *Oneok*, 575 U.S. at 376. The "inquiry into the scope of a [federal] statute's pre-emptive effect is guided by the rule that the purpose of Congress is the

ultimate touchstone in every pre-emption case." *Hughes*, 136 S. Ct. at 1297 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotation marks omitted)). Accordingly, "any '[e]vidence of preemptive purpose,' whether express or implied, must … be 'sought in the text and structure of the statute at issue.'" *Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Merely "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* at 1901 (citing *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

A. Where, as here, a statutory provision expressly preempting state law is not at issue, "a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (cleaned up). A state law is field preempted if it seeks to "regulate conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). A court may "infer" the "intent to displace state law altogether … from a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where

there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 567 U.S. at 399 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) ("[S]tate law is pre-empted … if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982))). Field preemption "reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id*. at 401 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984)). In short, when Congress has indicated "an intent to occupy a given field to the exclusion of state law," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), state law is ousted "in the *field* that the federal statute pre-empts." *Oneok*, 575 U.S. at 377.

When evaluating claims of field preemption, courts therefore must carefully scrutinize a federal statute to determine whether it preempts a field of state regulation and, if so, to demarcate the boundaries of the statute's preemptive effect. A court "must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field." *Oneok*, 575 U.S. at 385. The cardinal rule is that courts may not "extend a federal statute['s]" preemptive effect "to a sphere Congress was well aware of but chose to leave alone." *Va.*

Uranium, 139 S. Ct. at 1900 (lead opinion of Gorsuch, J.); *see id.* at 1912 (Ginsburg, J., concurring in the judgment).

B. In addition, here, as in any case concerning preemption of state law, the analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also Goodspeed Airport*, 634 F.3d at 210 ("There is a rebuttable presumption against the preemption of the states' exercise of their historic police power to regulate safety matters."). This assumption reflects the recognition that Congress's decision to foreclose state regulation represents "a serious intrusion into state sovereignty," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (plurality op.), "particularly [where] Congress has legislated in a field which the States have traditionally occupied." *Wyeth*, 555 U.S. at 565. Even in contexts in which the federal government has regulated in the past, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* at 565 n.3. The presumption thus "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

State-law tort claims fall squarely within those "historic police powers" of the States. The Supreme Court has recognized that "States traditionally have had great

latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic*, 518 U.S. at 475 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). States have a long history of imposing products liability on manufacturers to protect members of the public from harms caused by defective products. *See*, *e.g.*, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916). That "history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 450 (2005); *see also Medtronic*, 518 U.S. at 491 (finding "nothing in the hearings, the Committee Reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices"). Accordingly, the Supreme Court has applied the presumption against preemption in products liability cases. *See*, *e.g.*, *Wyeth*, 555 U.S. at 565; *Medtronic*, 518 U.S. at 485.

II. The district court's approach to field preemption is inconsistent with the approach of the Supreme Court and this Court.

Looking to opinions of this Court stating that "Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field," *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 208 (2d Cir. 2011), the district court concluded that,

because some aspects of state law pertaining to aviation safety are preempted, any state law that pertains to any aspect of aviation safety is preempted. As this Court recognized in *Goodspeed*, however, "concluding that Congress intended to occupy the field of air safety does not end [a court's] task." *Id.* at 210–11. Rather, a court "must determine not only the Congressional intent to preempt, but also the scope of that preemption." *Id*. (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992)). Thus, the Supreme Court's field preemption cases require a detailed "inquiry" to determine "the scope of a [federal] statute's pre-emptive effect" that is "guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes*, 136 S. Ct. at 1297 (citation omitted). Courts should "find[] pre-emption only where detailed examination convinces" the court that a particular "matter falls within the pre-empted field." *Oneok*, 575 U.S. at 385.

The Supreme Court's most recent decision on field preemption illustrates the proper approach—and the error of the district court's analysis. In *Virginia Uranium*, the Supreme Court rejected the claim that the Atomic Energy Act preempted a state law banning uranium mining on private land. 139 S. Ct. at 1909. Pursuant to the Act, the Nuclear Regulatory Commission (NRC) has extensive regulatory authority over nuclear power and safety, including requiring licenses for the transfer or receipt of raw uranium "source material," and the production, possession, and disposal of nuclear "byproduct material." *Id.* at 1910 (Ginsburg, J., concurring in the judgment

(citing 42 U.S.C. §§ 2091–2099, 2014(e), 2111–2014)). In addition to those licensing requirements, the NRC has issued "[f]ederal regulations govern[ing] … uranium enrichment and nuclear power generation." *Id.* (citing 42 U.S.C. §§ 2131–2142). In light of the extensive regulation, the Court had stated in an earlier case that "the Federal Government has occupied the entire field of nuclear safety concerns." *Id.* at 1913 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983)). Here, however, the Court explained that its earlier statement concerned a different aspect of nuclear regulation and did not determine which matters fall within the preempted field and which matters fall outside it. Instead, in *Virginia Uranium*, the Court parsed the Act to discern the precise boundaries of its preemptive effect. Holding that the Act did not preempt the Virginia law, the Court explained that "the statute grants the NRC extensive and sometimes exclusive authority to regulate nearly every aspect of the nuclear fuel life cycle *except* mining"—the particular area of state law at issue—and thus "it is hard to see how or why state law on the subject would be preempted." *Id.* at 1902, 1912.

An earlier Supreme Court case concerning the preemptive scope of the Atomic Energy Act shows that this careful approach to determining the scope of field preemption is longstanding. In *Silkwood*, the Court recognized that, although direct safety regulation of nuclear power plants "is the exclusive concern of the federal law," 464 U.S. at 256, "a State may nevertheless award damages based on

its own law of liability," *id*. The Court recognized that under the Atomic Energy Act and its later amendments, "states were … precluded from regulating the safety aspects of these hazardous materials." *Id.* at 250. But a close examination of the statute offered "no indication that Congress even seriously considered precluding the use of such [damages] remedies either when it enacted" or amended the Act. *Id.* at 251. The Court noted that Congress's silence with respect to preemption "takes on added significance in light of [its] failure to provide any federal remedy for persons injured by such conduct" because "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id*. In addition, the Court highlighted the importance of the fact that the "only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available." *Id.* In amending the Act, Congress created an indemnification system that "assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." *Id.* The Court therefore concluded that "Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents … even though it was well aware of the NRC's exclusive authority to regulate safety matters." *Id.* at 256.

The Court has taken the same approach when evaluating the existence and scope of field preemption under other statutes. In 2015, for example, the Court held

in *Oneok* that the Natural Gas Act did not preempt a state law antitrust suit targeting "pipelines' behavior [that] affected both federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices." 575 U.S. at 376. Much like this Court's prior statements regarding preemption under the FAA, *see Air Transport Ass'n of Am. v. Cuomo*, 520 F.3d 218, 225 (2d Cir. 2008), the Supreme Court had previously stated that "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Oneok*, 575 U.S. at 376 (quoting *Schneidewind*, 485 U.S. at 305). Nonetheless, the Court had also "repeatedly stressed [that] the [Natural Gas Act] 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'" *Id.* at 384–85 (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947)). Noting that the scope of the Act's preemptive effect was defined by "the careful balance between federal and state regulation that Congress struck when it passed" the Act, the Court held that the statute did not extend to the "common-law and statutory remedies against monopolies and unfair business practices" at issue in the case. *Id.* at 388 (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 109 (1989)).

Taking the same approach, the Supreme Court in *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625 (2012), held that state-law tort claims for defective design and failure to warn did fall "within the field pre-empted" by the Locomotive

Inspection Act. *Id.* at 628. The Court begin with its long-standing precedent that the Locomotive Inspection Act "manifest[s] the intention to occupy the entire field of regulating locomotive equipment." *Id.* at 631 (quoting *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926)). Importantly, that precedent did not end the Court's analysis. Rather, the Court went on to consider whether the state-law claims at issue, which arose from "repair or maintenance," fell within "the field pre-empted by the [Act], as it was defined in *Napier*," which addressed state-law claims "arising from use on the line." *Id.* at 633–34. Explaining that "*Napier* defined the field pre-empted by the [Act] on the basis of the physical elements regulated—'the equipment of locomotives'—not on the basis of the entity directly subject to regulation," and finding that "petitioners' claims are directed at the equipment of locomotives," the Court held that the claims fell within the preempted field. *Id.* at 636.

Likewise, in *Hughes*, the Supreme Court in 2016 held that a state program that "provide[d] subsidies, through state-mandated contracts, to a new [electricity] generator," conditioned on the generator "selling capacity into a [federally]-regulated wholesale auction" was preempted by the Federal Power Act. 136 S. Ct. at 1292. In essence, the state program required in-state retail electricity utilities to pay a set price to the new generator, regardless of the clearing price in the federally regulated wholesale auction. *Id.* at 1295. Because the Federal Power Act "allocates to [the federal agency] exclusive jurisdiction over 'rates and charges ... received ...

for or in connection with' interstate wholesale sales," the Court concluded that those subsidies intruded on the domain that Congress determined the federal agency should exclusively occupy. *Id.* at 1297 (quoting § 824d(a)). The Court was clear, however, that its "holding [wa]s limited," and "[n]othing in [its] opinion should be read to foreclose … States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." *Id.* at 1299 (internal quotation marks omitted).

In accordance with Supreme Court precedent, this Court has applied the same approach to determining the boundaries of a field preempted by a federal statute. For instance, following *Hughes*, this Court rejected an argument that the Federal Power Act field preempts a state subsidy program that "aims to prevent nuclear generators that do not emit carbon dioxide from retiring until renewable sources of energy can pick up the slack" by providing them with fixed subsidies based on carbon pricing. *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 47 (2d Cir. 2018). In so holding, this Court explained that, unlike the state program at issue in *Hughes*, which "insulated generators from fluctuations in wholesale prices by guaranteeing" the effective price utilities paid, the state program at issue in *Zibelman* grants subsidies only "when electricity is produced in a statutorily-defined manner, regardless of whether or how the electricity is ultimately sold." *Id.* at 54. "[E]ven though the [state] program exerts downward pressure on wholesale electricity rates,"

the Court held, "that incidental effect is insufficient to state a claim for field preemption under the [Act]." *Id.*; *see id.* at 46 (holding that Federal Power Act's field preemption of the wholesale electricity market is limited to state programs with an "impermissible 'tether' [to] wholesale market participation," (citing *Hughes*, 136 S. Ct. at 1293)); *see also Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017) (rejecting argument that Federal Power Act field preempts Connecticut renewable energy program); *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control*, 531 F.3d 183, 190 (2d Cir. 2008) (stating that federal regulation "does not evince an intent to occupy the relevant field—namely, the regulation of renewable energy credits").

* * *

As these cases exemplify, the Supreme Court and this Court consistently engage in a "detailed examination" to determine whether a particular "matter falls within the pre-empted field." *Oneok*, 575 U.S. at 385. Failing to undertake that examination, the district court's conclusion was inconsistent with the Supreme Court's admonition that courts may not "extend a federal statute['s]" field preemptive effect "to a sphere Congress … chose to leave alone." *Va. Uranium*, 139 S. Ct. at 1900.

III. The FAA does not preempt the field of state-law tort claims.

"In occupying the field of air safety, Congress did not intend to preempt the operation of state statutes and regulations like the ones at issue here." *Goodspeed Airport*, 634 F.3d at 212 (addressing state environmental protection laws). A finding of field preemption cannot properly be "based on nothing more than a [federal] statute granting regulatory authority over that subject matter to a federal agency," and "Congress must do much more to oust all of state law from a field." *Kurns*, 565 U.S. at 638 (Kagan, J., concurring) (citing *N.Y. State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973)). Here, the FAA's text and its history demonstrate the Congress left state-law products liability claims in place.

To begin with, the FAA authorizes the Federal Aviation Administration to establish "minimum standards" for aircraft design. 49 U.S.C. § 44701(a). That provision thus sets a regulatory floor, not a ceiling, that immunizes aircraft manufacturers who fail to satisfy a more stringent state-law standard. And as the Supreme Court has recognized, the setting of federal minimum standards, without more, is insufficient to preempt state law. *See*, *e.g.*, *Wyeth*, 555 U.S. at 573–74 (rejecting the contention that the Food, Drug, and Cosmetic Act "establishes both a floor and a ceiling for drug regulation" such that "[o]nce the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate"); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (rejecting "suggest[ion]

that a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations").

Congress's intent to preserve state-law tort actions is further manifest by two provisions that evince its assumption that state-law damages claims would continue to exist. *See Silkwood*, 464 U.S. at 256. First, the FAA contains a "savings clause," which provides that any remedy provided under the FAA "is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). The current version of the statute was enacted in 1994 as an amendment "without substantive change" to the FAA as originally enacted. Pub. L. No. 103-272, 108 Stat. 745, 745 (1994); *see Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 58 n.9 (2d Cir. 2006) (recognizing that 1994 enactment did not "substantive[ly] change" the FAA). The original provision stated that the statute did not "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731, 798 (1958). The savings clause reflects Congress's assumption "that there are some significant number of common-law liability cases to save." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000).

Second, the FAA as amended contains a statute of repose that applies to state-law products liability claims: "[N]o civil action for damages for death or injury to

persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or [an aircraft component] … if the accident occurred … after [an 18 year] limitations period." General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat. 1552, *reprinted in* 49 U.S.C. § 40101 note. The notion that Congress intended to oust all state-law claims is incompatible with its creation of a limitations period for "civil action[s] for damages" against an aircraft manufacturer "arising out of an accident," because only state law (not federal law) provides for damages actions against airline manufacturers. The legislative history of this provision confirms that Congress understood that "[t]he liability of general aviation aircraft manufacturers is governed by tort law" and that "in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference." H.R. Rep. No. 103-525, pt. 2, at 3, 7 (1994).

Finally, Congress enacted the FAA against the background of an existing body of state law adjudicating such claims. *See Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 690–92 (3d Cir. 2016) (detailing history beginning in 1914 of "aviation torts … be[ing] consistently governed by state law"). It is implausible that Congress would supplant that longstanding body of state tort law without mentioning that it was doing so. *See Wyeth*, 555 U.S. at 575 (Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation,

is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness"); *Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."). It is doubly implausible that Congress would do so when those state-law remedies were the only means for the injured victims of air crashes to seek compensation. *See Medtronic*, 518 U.S. at 487 (finding it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct") (quoting *Silkwood*, 464 U.S. at 251).

Consistent with the statute's text and history, this Court's only decision addressing whether the FAA preempts state-law damages claims arising from an air crash held that the FAA does not do so. *See In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980) (rejecting claim that a "state statute" providing duty of care for operation of aircraft was preempted because "the federal statute does not preclude common law remedies" (citing 49 U.S.C. § 1506)); *see* 49 U.S.C. § 40120 note (stating that § 40120(c) was substituted for § 1506 "to eliminate unnecessary words and for clarity and consistency in the revised title"). Every other appellate court to have addressed the question agrees. *See Sikkelee*, 822 F.3d 680; *Pub. Health Tr. of Dade Cty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993); *Cleveland ex rel. Cleveland v.*

Piper Aircraft Corp., 985 F.2d 1438, 1442–43 (10th Cir. 1993); *Estate of Becker v. Avco Corp.*, 387 P.3d 1066, 1067 (Wash. 2017); *Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 135 (Tex. Ct. App. 2011).

CONCLUSION

For the foregoing reasons and the reasons stated in the brief of plaintiffs-appellants, the district court's decision should be reversed.

Dated: December 22, 2020

Respectfully submitted,

/s/ Allison M. Zieve

Allison M. Zieve
Adina H. Rosenbaum
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amicus Curiae Public Citizen

CERTIFICATE OF COMPLIANCE

The brief complies with Fed. R. App. P. 32(a)(5) and (6); it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. This brief contains 4,575 words, excluding the portions exempted by Fed. R. App. P. 32(f).

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit on December 22, 2020, by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Allison M. Zieve
Allison M. Zieve