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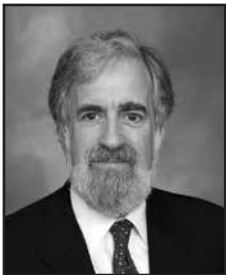
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Local Labor Law Preemption and the Market Participant Exception: A Need for Clarity

By Douglas R. Painter and Robert S. Span



Local labor laws can have a significant impact on the airline industry. Those that do may be subject to federal preemption challenges under federal labor laws and/or the Airline Deregulation Act (ADA).¹ One defense to such challenges is the “market participant

exception,” which exempts a local labor law from preemption where the local governmental entity enacting it does so in connection with its own commercial activity, traditionally characterized by its procurement of goods or services. The rationale is that a local governmental entity has a right to impose labor terms on a party with which it is contracting—i.e., as a market participant.

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Expect Further Clearance: Conflict Preemption for Aviation Manufacturer Defendants in Holding Pattern

By Lee C. Schmeer

The argument that state law design defect claims are preempted by federal law because the state law at issue conflicts with federal law presents an attractive defense for the aviation manufacturer defendant. After all, the Federal Aviation Regulations (FARs) require the manufacturer or designer to navigate a complex web of standards, testing, and benchmarks before the Federal Aviation Administration (FAA) certifies an aircraft or component for flight. The conflict preemption argument essentially boils down to this: the manufacturer could not feasibly comply with the plaintiff’s proposed alternate designs or warnings, typically made in conjunction with state

law tort claims, because it is illegal to unilaterally alter a product that the FAA already has type certified, and the state law claim therefore conflicts with, and is preempted by, the controlling federal law. Just the sort of paradox that can present a strong defense for the manufacturer.

Two U.S. Supreme Court cases—one recently decided in May 2019 and the other currently awaiting the Court’s decision whether to grant certiorari—may impact the conflict preemption landscape significantly. The recently decided case, *Merck Sharp & Dohme Corp. v. Albrecht*,¹ focused on a pharmaceutical warning label,

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EDITOR-IN-CHIEF

David A. Berg
airberg600@gmail.com

MANAGING EDITOR

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kathy.yodice@yodice.com

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dawn.holiday@americanbar.org
312/988-5660

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Chair's Message

Happy New (Forum) Year! This is my first column as Forum Chair, and I would like to start by thanking our Immediate Past Chair, Andrea Brantner, for her outstanding leadership of the Forum and recognize some of her significant accomplishments, including the addition of the General, Business and Charter Aviation and Airports practice committees and her focus on our governance and planning for the future. And, thank you to all of our other Past Chairs who have paved the (run)way for the long-term success of the Forum.

I'm excited for what lies ahead as we build upon our past accomplishments. We continue to be the one-stop-shop for aviation and space lawyers to learn and network as we work together to increase engagement, embrace and foster development of young lawyers, actively promote diversity, and provide resources to all of our members across our many various practice areas.

Under Andrea's leadership, we launched the Forum's first strategic plan to take a fresh look at the Forum's mission, offerings, membership, diversity, pipeline, and governance. I'm thrilled to report that we have completed the first phase of the process. This milestone would not have been possible without the commitment and engagement of our Strategic Planning committee—David Heffernan, Leslie Abbott, Steve Taylor, Andrea Brantner, and Brian Friedman, and our consultant, David Tabak, as well as all of you who provided input via our survey, interviews, or otherwise. Thank you.

The strategic planning report confirmed much of what we know, but also what we cannot take for granted—that the Forum is fundamentally strong, with excellent programs, quality publications, and a stellar reputation. Our plan focuses on how we can build on our strong foundation to make the necessary changes to better serve our current and future members.

From here, we plan to engage with our Governing Committee on further refining our goals around content, governance, finances, and communications, as well as develop a working group to help with its implementation. We plan to use the results of our strategic plan as a living road map for the next few years and beyond.

During the upcoming year, we will continue to update you on the goals and implementation of the strategic plan road map. Its implementation will not be possible without your help, so if you are interested in getting involved overall or in any one of these areas, please drop me a line anytime.

Finally, we hope you enjoy this issue of *The Air & Space Lawyer*, which discusses the complicated issues around local labor law preemption in the aviation sector and conflict preemption for aircraft manufacturers. We also learn more about Kyle Levine, Vice President-Legal and General Counsel of Alaska Airlines, and his tips on what to do in Seattle before or after (but of course not during) this year's Annual Meeting and Conference. I look forward to seeing you in Seattle.

Jennifer Trock
Chair, Forum on Air and Space Law

Jennifer Trock (jennifer.trock@bakermckenzie.com) is a partner at Baker McKenzie LLP in Washington, D.C., where she chairs the firm's North American International Commercial Group.



Managing Editor's Column

This is my first column as a member of the editorial board of *The Air & Space Lawyer*, and it's been more than 15 years in the making so it ought to be really good, right? Well, we'll see. For starters, I've thoroughly enjoyed working with my fellow board members, who are among some of the best lawyers in the aviation and space industries, as we have worked over the years to identify and discuss topics of interest to the Forum members and to find and assist talented and respected authors to draft articles that keep us on top of these important issues. I'm grateful for the confidence that Ken Quinn had in me when he first submitted my nomination to the editorial board. And, I'm now grateful for the opportunity to serve as Managing Editor to do what I can to assist our Editor-in-Chief, Dave Berg, and the other editorial board members as we piece articles together into an issue for our Forum members every quarter. I echo Dave's enthusiastic invitation in the last issue for anyone interested in publishing an article for *The Air & Space Lawyer* to reach out to us at any time.

In this edition of *The Air & Space Lawyer*, we have two articles on federal preemption and the turning points that may be in store for us in this area. The first discusses the market participant exception to federal preemption and the arguable expansion of that exception by the Ninth Circuit. The authors suggest that the court's decision undermines the clarity and scope of the exception and describe what that could mean to the airline industry. The second article addresses conflict preemption in the context of accident litigation involving a potential design defect. The authors explore a recent pharmaceutical case decided by the U.S. Supreme Court and explain its direct relevance to

aircraft accident cases. The authors then look at the ongoing *Sikkelee* case and whether the Supreme Court will grant certiorari and provide further clarity of the Court's view on conflict preemption or simply a view of its application in aviation-specific circumstances.

We also have an interview with Kyle Levine, General Counsel of Alaska Airlines. Kyle has been in Alaska's legal office since 2006, taking the helm in 2016, and he has been part of some significant changes at that airline and in the airline industry over the past 13 years. He brings passion and varied experience to the role, which has no doubt contributed to his success. Interestingly, when I was still at the FAA, I was fortunate to have Kyle come to work in our office as an intern, and I now am pleased to work with him as a colleague. Don't miss Kyle's suggestion of a not-to-miss opportunity when visiting Seattle.

This edition of *The Air & Space Lawyer* coincides with the Forum's Annual Meeting and Conference and a change in Forum leadership. The conference in Seattle promises to be a great opportunity to hear lively discussions on the current topics in aviation and space law, and the city of Seattle is a perfect setting to keep the enjoyment of aviation and space interests going after the presentations are over. We thank Andrea Brantner for leading the successful effort to prosper and grow the Forum over the last two years. And we look forward to Jennifer Trock's stewardship over the Forum's continued surge during the next two years. If you're wondering if we're having fun, we are!

Kathleen A. Yodice
Managing Editor

Kathleen A. Yodice (kathy.yodice@yodice.com) is the managing partner at Yodice Associates and started her career as a law clerk at the FAA before moving into private practice in 1998. Her practice touches all aspects of aviation law. She has been on *The Air & Space Lawyer* editorial board since 2004.



A Few Questions for . . . Kyle Levine

In this issue, we feature Kyle Levine, Alaska Airlines' Vice President-Legal, General Counsel, and Corporate Secretary.

A&SL: Tell us a little bit about how you came into your current position with Alaska Airlines.

KL: I've always loved the airline industry and seriously considered becoming a professional pilot. When I decided to go to law school instead, I naturally gravitated toward an aviation focus. My law school, Southern Methodist University, has close ties to Dallas's aviation community and let me arrange my class schedule so that I could work part-time in American Airlines' legal department. I spent my 2L summer as an intern in the legal office at the FAA. After graduating, I worked in two law firms in the aviation products liability practice area. A long-distance relationship had me commuting between Seattle and San Francisco for four years. I finally decided to make the leap north and try a new area of law when a transactional attorney role opened at Alaska. I joined Alaska in 2006, and after 10 years working in different capacities became the general counsel in 2016. The airline industry still fascinates me, and I thrive on the variety and constant problem-solving opportunities that come with this role.

A&SL: What do you see as the biggest legal challenges to the airline industry in the coming years?

KL: State and local regulation of pilot and flight attendant pay and benefits. Airlines are a key part of interstate commerce and can't easily manage the complexities and potential liabilities that come with a patchwork of regulations regarding the level and administration of pay and benefits for employees who often perform work in more than one jurisdiction in a single day. Besides differing and sometimes conflicting with each other, these state and local laws can conflict with airlines' collective bargaining agreements with their represented employees. Small carriers like Alaska are financially and operationally more exposed than their large competitors to the burdens of these laws

and the staggering penalties that some states exact through their private right of action enablement laws.

A&SL: Alaska merged with Virgin America in 2016. What was it like to lead the legal team through this transaction?

KL: I actually feel fortunate that the intense legal work related to the merger happened in my first year as general counsel. The other lawyers and I were energized for a new chapter and to stretch our capabilities. I was more patient and forgiving of myself at the time because the whole experience was new territory. The legal team bonded and grew in a way that still benefits us today. The merger also let us reinvigorate a law firm relationship that had existed for decades (with O'Melveny, our primary M&A, antitrust, and labor/employment counsel in the merger) by introducing new in-house lawyers to the upcoming generation of the firm's partners. The merger also taught me a lot about patience and pace. The Hart-Scott-Rodino clearance process was a rare point at which Legal was on the frontline to get the job done, rather than supporting business units from the sidelines. The process took much longer than expected, so my team got valuable experience in explaining contingencies and managing internal expectations.

A&SL: Looking back, what would you say was the hardest part of your career? What was your most difficult challenge to overcome, and if you had it to do over again, would you do it the same or differently?

KL: The hardest part of my career coincided with a big decision in my personal life: whether to follow my partner to Seattle and exchange a satisfying law firm job and California's climate for an in-house role at a then virtually unknown airline in the cloudy Pacific Northwest. I worried then that I was giving up earning potential and career momentum that could never be regained, and that it would be just a matter of time before I'd crave a sunnier climate. With the benefit of hindsight, I know I made the right decision by placing family before profession and geographic factors, and definitely don't regret taking the leap.

A&SL: Is there a particular time or circumstance in your career that stands out?

KL: Yes, I'll always remember how it felt to have someone take a chance and open the first door on the path of my legal career. As a brand-new law student in Dallas, I wrote to local companies, including American and Southwest Airlines, asking if they offered internships to budding lawyers. American was possibly the only company to respond. I was offered an interview with American's corporate secretary, Chuck Marlett. Even though I had little to offer but enthusiasm and a passion for the airline industry, Chuck offered me an intern role in the corporate law department that carried me through all three years of law school. That internship taught me more than I ever learned in law school and inspired a duty of mentorship and sponsorship that I try to carry out every day.

A&SL: You've seen this industry from several different perspectives—the government, private practice, in-house counsel. How do they compare, how do they differ, and which do you think was the most impactful?

KL: That's a hard question. I view government, corporate, and law firm interests as complementary in the aviation world. I don't think one sector is any more impactful in our industry than another. In private practice, I encountered great lawyers on the plaintiff and defense sides who in their own ways helped advance important commercial and general aviation issues in the United States. I would also say that FAA and DHS/TSA lawyers do a great job at keeping aviation safe and secure for the greater good. At Alaska, we work with several firms (Davis Wright, Jones Day, O'Melveny, to name a few) whose lawyers are outstanding advocates on issues that impact our business.

A&SL: Do you have a particular goal that you want to make sure you achieve in your career?

KL: I can't say that I have a goal of that nature in mind. At this point, I'm focused on making sure that my job duties don't overtake other enriching aspects

of my life, and that I create a work environment for my team that's equally pressurized and fun.

A&SL: If you were to give one piece of advice to a budding aviation lawyer based on something that you've learned, either the hard way or the easy way, what would it be?

KL: When I was early in my career, "aviation lawyers" fit a distinct and homogenous mold that sometimes discouraged me. A few special people who helped my career immensely, including Kathleen Yodice who managed this interview, were beginning to break that mold for the better. So, my advice is start new traditions in our industry and never let resistance or preconceptions keep you from becoming a success in whatever aviation sector calls to you.

A&SL: What are your interests outside of work?

KL: I try to maintain my sanity and basic fitness by lap swimming four times a week. In the summer months, I take a dip in Seattle's freshwater Lake Washington just about every day. I cross-country ski in the winter or take advantage of my travel benefits to visit sunny destinations with my husband, often with our niece and nephew in tow.

A&SL: The Forum Annual Meeting and Conference is going to be in Seattle this year. If you had to pick one thing that every attendee at the conference should do, what would it be?

KL: Take Kenmore Air's float plane tour of Seattle on a clear day. It's close to a perfect experience for anyone who loves aviation and appreciates the special places where mountains and water come together.

"Start new traditions in our industry and never let resistance or preconceptions keep you from becoming a success."

On June 24, 2019, the U.S. Supreme Court denied certiorari from a divided Ninth Circuit case, *Airline Service Providers Ass'n v. Los Angeles World Airports*,² which arguably expands the scope of the market participant exception to the point where the exception threatens to swallow the rule. This is a concerning development for the airline industry because virtually every commercial service airport in the United States is owned and operated by a governmental authority. This article examines *Airline Service Providers* and why courts need to develop clear, consistent, and

workable criteria in determining how and when to apply the market participant exception in preemption challenges.

Federal Preemption and the Market Participant Exception

Under federal law, labor-management relationships are generally governed by the National Labor Relations Act (NLRA)³ (which applies generally to most industries) and the Railway Labor Act (RLA)⁴ (which applies to railroad and air carriers), including the processes by which union representation occurs. Federal preemption challenges to local labor laws involve field and/or conflict preemption concepts⁵

and are based on related preemption doctrines stemming from two Supreme Court decisions: *Machinists*⁶ and *Garmon*.⁷ Generally, *Machinists* preempts state regulation of labor-management conduct that Congress intended to be left unregulated, while *Garmon* preempts state regulation of activity that federal law protects or prohibits, or arguably protects or prohibits.

ADA preemption challenges derive from the ADA's express statutory prohibition on local laws that are "related to" air carrier "prices," "routes," or "services."⁸ According to the Supreme Court, ADA preemption is to be interpreted and applied broadly, in keeping with the statutory scheme's purpose of allowing competition and market forces to promote "efficiency, innovation, and low prices."⁹

Douglas R. Painter (dpainter@steinbrecherspan.com) and **Robert S. Span** (rspan@steinbrecherspan.com) are partners with Steinbrecher & Span LLP in Los Angeles, California. Their firm represented Airlines for America in *Airline Service Providers Ass'n v. Los Angeles World Airports*. Mr. Span was Chair of the Forum on Air and Space Law from 2013 to 2015.

When a local labor law is challenged on preemption grounds, the local governmental entity may argue that the law is exempt from preemption under the market participant exception, also known as the market participant doctrine. Up until recently, a governmental entity's status as a market participant generally relied on a sufficient showing of its procurement of goods or services subject to the regulation at issue. For example, in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor)*,¹⁰ a governmental entity hired a construction company to remediate environmental contamination and required the company to honor prehire and other labor agreements. A labor organization challenged these labor requirements, claiming that they violated the NLRA by interfering with private labor relationships and were therefore preempted. The Supreme Court, in rejecting that claim, distinguished between labor requirements imposed on other private parties (i.e., where the state acts as a regulator) versus those imposed on a private party with which the state entity is directly transacting in a commercial manner (i.e., where the state is a market participant):

When a State owns and manages property, . . . it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*. . . . To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same.¹¹

Because the local entity was not acting as a regulator, but as a market participant, the Supreme Court in *Boston Harbor* found that the challenged labor requirements were exempt from preemption.¹²

Courts have established standards to determine whether a local governmental entity is a market participant. In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, the Fifth Circuit held that a governmental entity is a market participant when (1) the challenged regulation reflects the state's "own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances"; and (2) the "narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."¹³ The Ninth Circuit holds that either one of these two criteria is sufficient to satisfy the market participant exception.¹⁴ Regardless, the essence of the exception has been that the challenged regulation is aimed at services or goods procured directly by the governmental entity.¹⁵

Until recently, a governmental entity's status as a market participant generally relied on a sufficient showing of its procurement of goods or services.

Featured Titles from the Forum on Air and Space Law

Drones Across America Unmanned Aircraft Systems (UAS) Regulation and State Laws

By Dr. Sarah Nilsson

The popularity of drones (unmanned aircraft systems, or UAS) and drone technology in the United States has excited entrepreneurs and corporations, while sending lawmakers scrambling to keep pace with the industry's growth. This comprehensive book lays out a framework for demystifying the sometimes unwieldy and ever-changing area of federal and state drone laws.

This book allows readers to develop a detailed understanding of the organization of federal and state regulations of drone law. It also provides a detailed exploration of policies and best practices for the operation of commercial, government, and recreational drones in different airspaces. Also included is a comprehensive matrix of state laws related to UAS. This book is a necessary and important resource for anyone working with unmanned aircraft systems.

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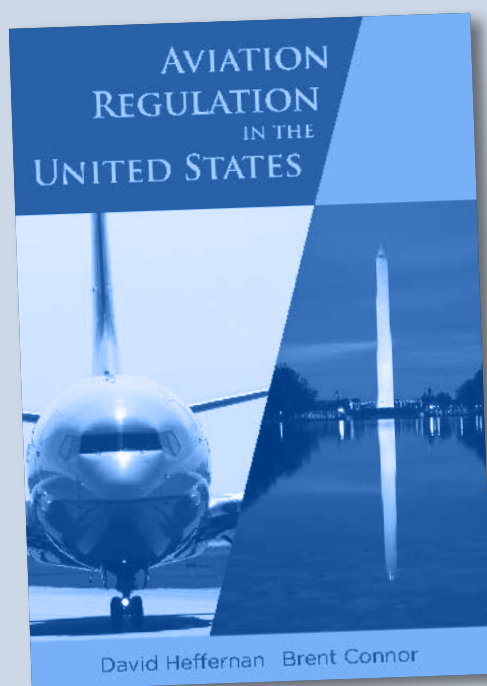
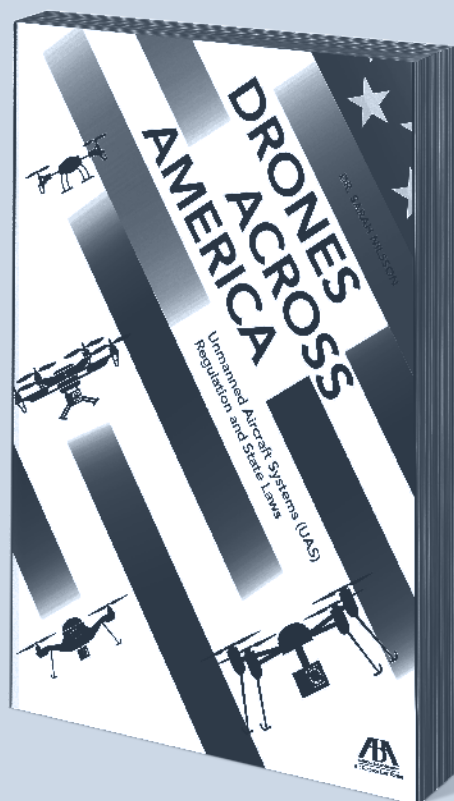
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The Ninth Circuit's Blurry Expansion of the Market Participant Exception

Airline Service Providers is a divided Ninth Circuit decision extending the market participant exception to local labor requirements imposed on parties which do not contract with the governmental entity imposing them and which do not receive funds or compensation from that entity. Although the court relied on *Cardinal Towing's* market participant requirements in evaluating the challenged regulation, its expansive application of those requirements is arguably inconsistent with prior case law and appears to expand the exception to almost any regulation related to a government-operated enterprise.

The Ninth Circuit found a governmental entity's proprietary interest in efficiently running an airport sufficient to satisfy the market participant exception.

In *Airline Service Providers*, the regulation at issue was a requirement (section 25) imposed by the City of Los Angeles (City) on companies providing services such as baggage handling, fueling, aircraft cleaning, and counter and gate services to airlines at Los Angeles International Airport (LAX). Section 25 mandated that these service companies enter into labor peace agreements (LPAs) containing “no-strike” and mandatory arbitration provisions with any labor organization requesting one. This was so regardless of whether the service providers’ employees had consented to representation by the labor organization requesting the LPA or had even been union-

ized. The penalty for not agreeing to section 25 was losing licensure to operate out of LAX.

Section 25 gave labor organizations, even those that had not gone through the required processes under the NLRA or the RLA to become a representative for an employee class or craft, significant leverage with service providers, potentially forcing them to make labor concessions in exchange for the labor terms mandated by the City. Plaintiffs Airline Service Providers Association (representing companies providing airline services at LAX) and Airlines for America (representing airlines that contracted with these service providers) brought suit against the City and challenged section 25 on preemption grounds. Specifically, the plaintiffs argued that section 25 impermissibly intrudes into labor relations governed by the NLRA and the RLA and violates the ADA’s preemption clause by directly regulating airline services. On the City’s motion to dismiss, the district court rejected these claims and determined that section 25 was not preempted because, among other things, it “merely seek[s] to protect [the City’s] proprietary interest in . . . the efficient, revenue-generating operations

of LAX.”¹⁶ Accordingly, the district court dismissed the complaint without leave to amend.¹⁷

On appeal, the Ninth Circuit, in a 2–1 decision, reversed portions of the district court’s opinion, but held that the market participant exception immunized section 25 from preemption because of the City’s claim¹⁸ that section 25 was enacted to avoid strikes, picket lines, and work stoppages at LAX.¹⁹ According to the majority, this satisfied the two market participant requirements of *Cardinal Towing*: the City (1) had a “proprietary interest in running the airport smoothly” because “[a]irports are commercial establishments . . . [that] must provide services attractive to the marketplace”;²⁰ and (2) had “defeat[ed] an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem” because section 25 “focuses on specific proprietary needs” in “avoiding labor disruptions of airport services.”²¹ In short, the Ninth Circuit held that the City’s claimed “interests” in efficiently running LAX were alone sufficient to satisfy the market participant exception. The dissent noted that such claimed “interests” were “markedly different in kind” than those found in prior market participant cases,²² and that without the development of any factual record, the “manifest purpose and inevitable effect” of section 25 may simply be to regulate private labor relations, which is unlawful.²³

The plaintiffs filed a petition for writ of certiorari, after which the Supreme Court invited the solicitor general to express the views of the United States as to whether certiorari should be granted.²⁴ On May 21, 2019, the solicitor general filed the United States’ amicus curiae brief. The United States was critical of the Ninth Circuit’s decision, stating that it was “wrong” and (1) “misframed the test for the NLRA’s market-participation exception”;²⁵ (2) has troubling implications—“both here and in other cases”—because it allows “state and local governments to escape preemption of what are regulatory measures”;²⁶ (3) allows state and local governments to evade preemption of “virtually any regulation of labor relations” at airports and other public facilities, which always “could be reframed as a proprietary measure” to avoid claimed service disruptions;²⁷ and (4) raises “particularly acute” concerns, because the City is a recidivist that “continues to take an unduly expansive view of the market-participation exception,” even after the Supreme Court’s unanimous decision against it in *American Trucking Ass’n v. City of Los Angeles*.²⁸

Despite its determination that the decision was wrong, the United States declined to recommend certiorari on procedural grounds, one being that the definition of the market participant exception it urged was slightly broader than the one sought by the petitioners. Specifically, the market participant exception as proposed by the petitioners was a bright-line rule based solely on local governmental procurement of

goods or services, whereas the United States, while considering procurement a quintessential case for the exception, would also allow it to apply in other limited circumstances based on “close[] scrutiny to ensure that [a local labor law] fairly serves proprietary, rather than regulatory, interests,” such as when a city imposes labor requirements on an entity carrying out a project for which the entity has borrowed money from the city.²⁹ Accordingly, the solicitor general concluded “[i]t is . . . uncertain that this case will provide an appropriate opportunity for the Court to resolve broader questions about the proper test for the market participant exception,”³⁰ notwithstanding that the Supreme Court has traditionally granted review of proposed rules or standards with which it or the United States does not entirely agree.³¹

Prior to *Airline Service Providers*, there had been no published authority holding that the proprietary interest requirement of the market participant exception can be satisfied by a governmental entity’s mere operations of a public business, such as an airport. Rather, almost all cases finding the exception involved the governmental entity’s direct procurement of goods or services, and the few which did not involved the entity’s direct and immediate financial interest in the transaction being regulated.³²

A Need for Clarity

As the solicitor general recognized, the implications of the Ninth Circuit’s decision in *Airline Service Providers* are significant and worrisome. One amicus brief in support of certiorari noted:

In the Ninth Circuit alone, there are 756 significant publicly-owned airports, and each may now be subject to labor rules like respondents’—precisely the patchwork of labor regulation that Congress sought to avoid in enacting the NLRA, RLA, and ADA. The decision below necessarily applies also to the myriad sea ports, train stations, bus depots, public schools, public parks, and public stadia in the Ninth Circuit—indeed, to any public venue in which state or local government can claim a “proprietary interest” in the efficient provision of services. And it threatens to distort Dormant Commerce Clause and federal antitrust jurisprudence, where market participation is also a threshold issue in cases challenging state action.³³

Of particular concern to the airline industry, the Ninth Circuit’s decision could, for all practical purposes, negate the preemption clause of the ADA. That clause expressly preempts state and local regulations that are “related to a price, route, or service” of an airline.³⁴ But the Ninth Circuit’s reasoning arguably gives airport proprietors carte blanche to enact rules directly related to the “prices, routes, and services” of airlines

under the guise of furthering the airport’s “proprietary interest” in avoiding service disruptions. While the ADA preemption clause allows certain, limited proprietary regulation, that exception historically has been construed narrowly and has never been construed to allow the breadth of intrusive economic regulation the Ninth Circuit’s decision appears to sanction.

The Supreme Court’s decision to deny certiorari in this case, while disappointing, leaves open the door for further case law development of this issue, including the possibility of future Supreme Court review. Two things could help evolve and clarify the current state of the law. First, claimants and courts evaluating the market participant exception in a preemption challenge should, where applicable, distinguish *Airline Service Providers* and reiterate the requirements of *Cardinal Towing* in the context of a governmental entity’s procurement of goods or services or direct and concrete financial stake in the regulated subject. This could help limit the adoption of *Airline Service Providers* by other courts and crystallize a circuit split on the issue such that the Supreme Court would be more likely to grant certiorari in a future case.

Second, as the dissent in *Airline Service Providers* makes clear, courts must examine a local labor law’s “manifest purpose and inevitable effect.”³⁵ Consistent with this requirement, courts must permit factual inquiry into a governmental entity’s claim as to the purpose and effect of a local labor law, and not, as the Ninth Circuit did in *Airline Service Providers*, take the entity’s allegations on this issue at face value. Only then can the market participant exception requirements of *Cardinal Towing* be properly analyzed and applied.

Endnotes

1. 49 U.S.C. §§ 40101 *et seq.*
2. 873 F.3d 1074 (9th Cir. 2017), *cert. denied*, No. 17-1183, 2019 WL 2570657 (U.S. June 24, 2019).
3. 29 U.S.C. §§ 151 *et seq.*
4. 45 U.S.C. §§ 151 *et seq.*
5. Generally, field preemption occurs when Congress, without expressly declaring that state laws are preempted, nevertheless legislates in a way that is so comprehensive as to occupy the entire field of an issue, whereas conflict preemption arises when a state law conflicts with federal law. *See, e.g.,* *Glow v. Union Pac. R.R. Co.*, 652 F. Supp. 2d 1135, 1145 (E.D. Cal. 2009).
6. *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976).

The Supreme Court’s decision to deny certiorari leaves open the door for further case law development of the market participant exception.

7. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).
8. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).
9. *Id.* at 378–79, 383–84 (holding that the words “related to” in the preemption provisions of the ADA “express a broad pre-emptive purpose” and have an “expansive sweep”).
10. 507 U.S. 218 (1993).
11. *Id.* at 227, 231.
12. *Id.* at 232–33.
13. 180 F.3d 686, 693 (5th Cir. 1999). This case involved preemption under the Federal Aviation Administration Authorization Act of 1994.
14. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1025 (9th Cir. 2010).
15. *See, e.g., White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204, 214 (1983).
16. *Airline Serv. Providers Ass’n v. L.A. World Airports*, No. 2:14-cv-08977, slip op. at 9 (C.D. Cal. Mar. 18, 2015).
17. *Id.* at 16.
18. Because the opinion involved a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), no factual record had been developed beyond the pleadings concerning the purpose or effect of section 25.
19. *Airline Serv. Providers Ass’n v. L.A. World Airports*, 873 F.3d 1074, 1080–81 (9th Cir. 2017).
20. *Id.* at 1080–82.
21. *Id.* at 1080–83 (alteration in original). This finding was based on the pleadings alone, as no record had been developed as to the purpose or effect of section 25 beyond the parties’ allegations. *See supra* note 18.
22. *Airline Serv. Providers*, 873 F.3d at 1090 (Tallman, J., concurring in part and dissenting in part).
23. *Id.* at 1091.
24. *See Airline Service Providers Association v. Los Angeles World Airports*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/airline-service-providers-association-v-los-angeles-world-airports/> (last visited Aug. 19, 2019).
25. Brief for the United States as Amicus Curiae at 23, *Airline Serv. Providers Ass’n v. L.A. World Airports*, No. 17-1183 (U.S. May 21, 2019).
26. *Id.*
27. *Id.* Ironically, the Ninth Circuit previously held that the City’s “business interest” as a “property manager” did *not* constitute proprietary interests sufficient to trigger the market participant exception. *Am. Trucking Ass’ns v. City of Los Angeles*, 660 F.3d 384, 400–01 (9th Cir. 2011).
28. Brief for the United States as Amicus Curiae, *supra* note 25, at 23 (citing *Am. Trucking Ass’ns v. City of Los Angeles*, 569 U.S. 641, 648–52 (2013)).
29. *Id.* at 18–19.
30. *Id.* at 23.
31. *See, e.g., Byrd v. United States*, 138 S. Ct. 1518, 1528 (2018) (issuing a broader rule concerning expectation of privacy than the petitioner argued for); Brief for the United States as Amicus Curiae Supporting Neither Party, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (advocating for standard different than what was urged by the petitioners).
32. *See, e.g., Hotel Emps. & Rest. Emps. Union v. Sage Hospitality Res., LLC*, 390 F.3d 206, 208, 215–17 (3d Cir. 2004) (finding that the city had a direct interest in the money it lent to the developer and thus could impose labor conditions on the developer’s project), *cert. denied*, 544 U.S. 1010 (2005); *Bldg. & Constr. Trades Dep’t v. Allbaugh*, 295 F.3d 28, 29, 34–36 (D.C. Cir. 2002) (concluding that the government may impose labor conditions on any entity receiving governmental assistance because “the Government unquestionably is the proprietor of its own funds”), *cert. denied*, 537 U.S. 1171 (2003).
33. Brief for International Air Transport Ass’n as Amicus Curiae in Support of Petitioner at 5, *Airline Serv. Providers Ass’n v. L.A. World Airports*, No. 17-1183 (U.S. Mar. 26, 2018) (citation omitted).
34. 49 U.S.C. § 41713(b)(1).
35. *Airline Serv. Providers Ass’n v. L.A. World Airports*, 873 F.3d 1074, 1089 (9th Cir. 2017) (Tallman, J., concurring in part and dissenting in part).

and the other, *Avco Corp. v. Sikkelee*,² involves a petition for certiorari that squarely addresses the conflict preemption issue in an aviation design defect context. *Merck*, although a pharmaceutical case, provides another important defense theory for the aviation entity arguing for conflict preemption. Indeed, pharmaceutical defect and warning label cases have yielded by far the most extensive body of case law addressing conflict preemption over the last decade, and the parallels between relevant Food and Drug Administration (FDA) and FAA guidelines are undeniable. Furthermore, the Supreme Court has the opportunity in *Sikkelee* to provide concrete guidance to the aviation bar on the extent to which compliance with the FARs' certification standards preempts state law defect claims. Should the Court deny certiorari in *Sikkelee*, the defense bar should keep the faith: the Third Circuit's holding from which the manufacturer defendant appealed is narrow and based on specific facts.

Finally, this article briefly discusses how the two recent 737 MAX 8 accidents, which have thrust FAA certification squarely into the crosshairs of the media and lawmakers, may impact conflict preemption in the aviation context. Specifically, the accepted practice of having a manufacturer's designated engineering representative (DER), rather than an FAA employee, carry out some certification work will now undergo increased scrutiny.³

Conflict Preemption Background

Preemption arguments derive from the U.S. Constitution's supremacy clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land."⁴ "Preemption" comes in three basic forms: express, field, and conflict preemption. The type of preemption defense applicable in a given situation largely depends on the plain language and pervasiveness of, and intent behind, the federal regulations involved.

Express preemption arises when Congress includes plain language in a federal statute providing that state laws that differ from the federal scheme are without effect. Neither the Federal Aviation Act nor other legislation typically invoked in aviation product liability cases—e.g., the General Aviation Revitalization Act—contains an express preemption provision,⁵ so litigants typically must focus on implied preemption, which is comprised of both field and conflict preemption.

Field preemption arises when Congress manifests its intent to preempt state law⁶ by pervasively legislating over the subject matter.⁷ Conflict preemption in aviation products litigation often arises when a manufacturer cannot comply with federal law while simultaneously implementing the design change a plaintiff contends would have prevented the accident at issue and was required under state law standards of care because it

would have prevented the accident at issue.⁸ A court conducting a conflict preemption analysis must ascertain "whether the private party could independently do under federal law what state law requires of it."⁹

The federal regulatory scheme governing certification of aircraft and aircraft components is "onerous" and "requir[es] numerous submissions that precisely detail the specifications of the proposed aircraft, its engine, and related components."¹⁰ Once initial certification is complete, the certificate holder may make significant design changes only after receiving FAA approval and upon the issuance of a supplemental type certificate.¹¹

The Impact of FDA Regulations and *Merck*

A trio of Supreme Court cases decided over the last decade have played a significant role in shaping the current rule for conflict preemption and, accordingly, have played a central role in the development of preemption arguments in aviation litigation. In the first case, *Wyeth v. Levine*, FDA regulations permitted a brand name pharmaceutical manufacturer to change a warning label unilaterally, leading the Court to conclude that it was not impossible for the manufacturer to comply with state requirements that would have required a change to the warning label without running afoul of federal law, which did not require the change but did not prohibit it either—i.e., the manufacturer could make whatever changes to product labeling were required by the applicable state law.¹²

Two later cases further shaped the Supreme Court rule on conflict preemption. In *PLIVA, Inc. v. Mensing*, the Court held that conflict preemption bars state law claims where "a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency."¹³ Finally, in *Mutual Pharmaceutical Co. v. Bartlett*, the Court held that "state laws that require a private party to violate federal law are pre-empted and, thus, are 'without effect.'"¹⁴

The typical aviation design defect case involves allegations by a plaintiff that a defendant should have designed, manufactured, or installed some design modification (almost always of the "major" variety because it would impact the aircraft's power plant or overall airworthiness), to replace whatever allegedly faulty design was on board at the time of the accident. Thus, the usual aviation case is more analogous to *PLIVA* and *Bartlett* than *Wyeth*, because aviation manufacturers are not permitted to implement a design change unilaterally, but instead *first* must receive federal regulatory approval.

Lee C. Schmeer (lschmeer@schnader.com) is an associate with Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania.

The Supreme Court's latest pharmaceutical preemption case, *Merck Sharp & Dohme Corp. v. Albrecht*, features a slightly different fact pattern from the standard aviation situation and those addressed in the three preceding bellwether Supreme Court preemption cases. The case centered around allegations by hundreds of women that Merck failed to warn users of the drug Fosamax of an associated increased risk of femoral fractures. The Third Circuit previously held that a plaintiff's state law tort claims are not federally preempted unless the manufacturer adduces evidence that it was "highly likely" the FDA would have rejected the label change (we will see similar language in a Third Circuit aviation preemption case shortly).

In *Merck*, the FDA already had considered and *rejected* a proposed warning label addressing the issues relied on by the plaintiffs. Merck claimed that the FDA's informed rejection of a previous label change prevented it from altering the Fosamax warning label to include the plaintiffs' proposed warnings. Merck argued that the plaintiffs' claims were conflict preempted because it could not have satisfied the state law duties the plaintiffs would foist upon it while simultaneously complying with federal law—particularly where the FDA was purportedly aware of the risk of the injury addressed in the warning through Merck's proposal package relating to the rejected warning label change.

The plaintiffs argued that the FDA rejected only a specific phrasing of the proposed warning—one that included a warning for a lesser risk without explicitly including femoral fracture—and that Merck was free to propose other warnings related to the plaintiffs' claimed injury. Drug makers, the plaintiffs claimed, "are responsible at all times for keeping their labels up to date," even where the FDA has rejected a certain label or evidences some uncertainty about the proper way to warn about a risk.¹⁵ The plaintiffs claimed this issue is one that routinely is decided by jurors.

The Court¹⁶ sided with Merck, holding that the question of whether the FDA would have approved a change to a drug's warning label is an appropriate question for a judge, not a jury, and that the Third Circuit erred by finding that inquiry a question of fact. The Court also determined that "clear evidence," a standard that appeared to be on the rise in conflict preemption jurisprudence, is evidence that the drug manufacturer informed the FDA of the reasoning for

the warnings required by state law and that the FDA made an informed decision to reject the new warnings. In his concurring opinion, Justice Alito made his feelings known on the "clear evidence" standard, writing that use of the phrase in the *Wyeth* decision was little more than a "rhetorical flourish," and not an actual standard of proof.¹⁷ *Merck* is now remanded to the Third Circuit for a determination of whether the respondents' claims are preempted.

Although *Merck* differs from the typical aviation preemption case, in which the manufacturer typically has not submitted the plaintiff's proposed modification or warning for review by the FAA, the case still may shed light on the extent to which the Supreme Court will entertain preemption arguments. In the typical aviation case, a manufacturer sends a certification package to the FAA requesting permission to implement an alternative design, just as Merck submitted a certification package to the FDA. Should the FAA reject a proposed alternative design—just as the FDA rejected the proposed warning in *Merck*—it is easy to imagine the plaintiffs advancing a quasi-Sisyphian argument that, if successful, would preclude the defendants from relying on FAA rejection of a proposed alternative design on the basis that they should have kept trying until the FAA finally approved the perceived "upgrade" over the already certificated design or component.

In light of the similarities between the FDA alteration process—as explained in *PLIVA* and *Bartlett*—and the process before the FAA, one might expect the preemption analysis applicable to these two industries also to be similar. Perhaps predictably in light of its initial opinion in *Merck*, the Third Circuit has not found that to be the case.

Sikkelee and Conflict Preemption in Aviation Design Defect Cases

In October 2018, the Third Circuit issued its long-awaited opinion as to whether the certification processes provided in the FARs preempt state law negligence and strict liability claims. The case, *Sikkelee v. Precision Airmotive Corp.*, arose from the 2005 crash of a Cessna 172N aircraft, which resulted in the death of the plaintiff's husband, David Sikkelee. The plaintiff alleged that the crash was caused by a defective after-market carburetor in the aircraft's engine. In an apparent blow to aviation manufacturers, the court held that unless the manufacturer could adduce "clear evidence" to show that the FAA would not have approved the proposed design change, the conflict preemption doctrine would not preempt state law claims.¹⁸

The *Sikkelee* decision is challenging for aviation defendants largely because it diverges from the analogous *PLIVA/Bartlett* line of cases even though the aviation manufacturer—like the generic pharmaceutical manufacturer—cannot simply implement a proposed

The Third Circuit held that absent "clear evidence" that the FAA would not have approved the proposed design change, the conflict preemption doctrine would not preempt state law claims.

design change without obtaining approval from a federal regulatory body. The trouble does not stop there. The majority's test for conflict preemption in *Sikkelee* would place judges in the shoes of experienced FAA certification officials by requiring them to predict whether those officials would certify every alternative aircraft or component design proposed by the plaintiffs.¹⁹

Notwithstanding the foregoing, *Sikkelee* is not all bad news for the defense bar and their clients. The *Sikkelee* dissent abides by the more recent Supreme Court pharmaceutical guidance embodied in *PLIVA* and *Bartlett*, and may yet provide the reasoning behind a Supreme Court reversal, or for different results under similar circumstances in other federal circuits (assuming the Supreme Court does not provide clear, binding guidance). In the *Sikkelee* dissent, Judge Roth explained that she would find a claim alleging that state law required a manufacturer to change an FAA-certificated item conflict preempted where the change could not be implemented without first obtaining FAA approval.

Moreover, the majority in *Sikkelee* placed great import on discussions the defendant previously had with the FAA regarding the safety of the component at issue, and the fact that the FAA had approved similar modifications to the component in the past. The Third Circuit, therefore, did not create a categorical rule that federal aviation law never conflict preempts state tort law under impossibility principles, but rather focused on the history of interactions between the manufacturer and the FAA. As a result, the decision in *Sikkelee* ultimately might be of only limited influence on other decisions where the facts differ.

Finally, the *Sikkelee* majority stopped short of fully adopting the plaintiff-appellant's proposed rule, which would have made the defendant's requisite "clear evidence" showing contingent on a demonstration that an FAA employee (as opposed to a DER) would have rejected the design change. The court noted that "the involvement of DERs in the certification- and change-approval process alone cannot defeat conflict preemption."²⁰

FAA Certification Process in the News

The timing of the *Sikkelee* petition for certiorari aligns with the current situation involving the Boeing 737 MAX 8 and its high-profile focus on FAA aircraft certification issues. On March 13, 2019, the FAA grounded the MAX 8 domestic fleet, as well as any international carriers operating the MAX in the United States, after two catastrophic accidents involving that aircraft model during flights by foreign carriers within a six-month period. Questions have been raised in the media about the certification of the MAX and the roles of Boeing and the FAA. The FAA certified the airplane with a new flight control system that, in certain situations, allegedly forces the aircraft into an uncommanded nose-down attitude even when a stall is not imminent.²¹

The two crashes have noteworthy similarities, especially the phase of flight in which they occurred. Lion Air flight 610 crashed into the Java Sea shortly after takeoff on October 29, 2018, resulting in the deaths of 189 people. Ethiopian Airlines flight 302 crashed shortly after taking off from Addis Ababa, Ethiopia, on March 10, 2019, killing all 157 people on board. While investigations into both accidents are ongoing, preliminary reports reveal that the crashes might have been caused, at least in part, by the pilots' inability to counter flight control inputs made by the MAX's Maneuvering Characteristics Augmentation System (MCAS), an anti-stall system installed in the 737 product line for the first time in the MAX.

The FAA has come under intense scrutiny for what some have alleged was a lax certification process for the MCAS and other design features unique to the MAX, including the incorporation of bigger engines and accompanying changes to the traditional 737 design necessary to accommodate those engines.²² These criticisms may bolster and encourage the argument frequently espoused by plaintiffs that FAA certification does not carry with it a talismanic seal that the certificated aircraft or component is the safest possible design (particularly where, as with the MAX, DERs performed much of the certification activity).

It remains to be seen whether the MAX problems will impact conflict preemption where the defense centers on FAA certification and product alteration regulations. At the very least, the MAX story may operate in the subconscious of a judge or justice considering the issue, even if such concerns do not overtly make their way into an opinion. Judges are, after all, humans and airline passengers, and they do not necessarily consider legal issues divorced from real-world realities and risks. The Third Circuit's recent *Sikkelee* opinion, while an overall setback for manufacturers, at least endorsed the DER process, although the court of public opinion and resultant pressure on lawmakers have been known to prompt regulatory changes. For now, a practitioner who may benefit from or need to counter a preemption argument should stay abreast of the inquiry relating to the MAX's certification.

Conclusion

While planes fly across the country "only by federal permission, subject to federal inspection, in the hands

The *Sikkelee* dissent would find a claim conflict preempted where the proposed design change could not be implemented without first obtaining FAA approval.

of federally certified personnel and under an intricate system of federal commands,²³ the extent to which compliance with federal certification standards preempts state law design defect claims remains very much in question. It behooves all attorneys involved in litigating aviation product liability cases to stay tuned to the developments in *Merck* and *Sikkelee*, as well as news related to the Boeing 737 MAX. Although *Merck* is distinguishable from the typical aviation case, the decision likely signals the Court's willingness to continue strengthening its implied preemption doctrine, something that at least should be mentioned in any conflict preemption argument. If the Court denies certiorari in *Sikkelee*, defendants outside the Third Circuit should continue to raise conflict preemption as a defense to design defect claims, and those within the Third Circuit should focus on distinguishing factors that would support preemption in their case notwithstanding the narrow holding in *Sikkelee* (although they will be arguing in what seemingly has become the federal circuit court most hostile to implied preemption defenses).

Endnotes

1. 139 S. Ct. 1668 (2019).
2. No. 18-1140 (U.S. filed Mar. 1, 2019). On June 24, 2019, the Court invited the solicitor general to file a brief expressing the views of United States as to whether the Court should grant certiorari. See *Avco Corp. v. Sikkelee*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/avco-corp-v-sikkelee/> (last visited Aug. 19, 2019).
3. See, e.g., Ted Mann & Siobhan Hughes, *Fast-Tracked Aircraft Certification, Pushed by Boeing, Comes under the Spotlight*, WALL ST. J. (Mar. 24, 2019), <https://www.wsj.com/articles/fast-tracked-aircraft-certification-pushed-by-boeing-comes-under-the-spotlight-11553428800>.
4. U.S. CONST. art. VI, cl. 2.
5. 49 U.S.C. § 40101 note.
6. See *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 709 n.6 (3d Cir. 2018).
7. Nat'l Fed'n of the Blind v. United Airlines, Inc., 813 F.3d 718, 734 (9th Cir. 2016) (affirming dismissal of the plaintiffs' claims due to the preemptive effect of the Air Carrier Access Act, which pervasively regulated the airport service at issue).
8. Obstacle preemption is another form of conflict preemption, which occurs when state law presents an "obstacle" to the purposes or requirements of federal law. *Id.* This form of preemption is not at issue in the cases discussed in this article.
9. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620 (2011).
10. *Sikkelee v. Avco Corp.*, 268 F. Supp. 3d 660, 667 (M.D. Pa. 2017), *rev'd on other grounds*, 907 F.3d 701.
11. Other less significant design changes, or "minor" changes, still require that the change be made by a "method acceptable to the FAA." 14 C.F.R. § 21.95. Any change that impacts airworthiness of the aircraft or component is a "major" change that requires advanced FAA approval before being rolled out to operators. 14 C.F.R. pt. 43 app. A.
12. 555 U.S. 555, 573 (2009). *But see Sikkelee*, 907 F.3d at 722 (Roth, J., dissenting in part) ("[I]n the field of safety regulation of civil aeronautics, there is no . . . process [as there was in *Wyeth*] for a manufacturer to effect changes to a type certificate prior to FAA approval of that change.").
13. 564 U.S. at 623–24.
14. 570 U.S. 472, 475 (2013).
15. Transcript of Oral Argument at 31, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (No. 17-290), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-290_0811.pdf.
16. Five justices signed on to the Court's opinion, with four justices concurring (Justice Thomas authored one concurrence, while Justice Alito, joined by Chief Justice Roberts and Justice Kavanaugh, authored the other).
17. *Merck*, 139 S. Ct. at 1685 (Alito, J., concurring in the judgment).
18. *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 704 (3d Cir. 2018).
19. The Fourth Circuit already has discussed the issue of judicial competency in this highly technical field. See *Holbrook v. United States*, 673 F.3d 341, 346, 350 (4th Cir. 2012) (finding that "Congress' broad delegation of discretion to the FAA recognized that an agency equipped with specialized knowledge would be best able to stay abreast of accelerating change in a technical and hazardous area and to update minimum air safety standards accordingly," and that "[judges] are ill-equipped to revisit . . . policy decisions committed by Congress to those with greater expertise than courts").
20. *Sikkelee*, 907 F.3d at 714 n.12 (noting that "to the extent [the plaintiff] is arguing FAA approval provides no guarantee of safety because the agency delegates much of its certification work to DERs, we have rejected that argument").
21. Dominic Gates, *Flawed Analysis, Failed Oversight: How Boeing, FAA Certified the Suspect 737 MAX Flight Control System*, SEATTLE TIMES (Mar. 17, 2019), <https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash>.
22. See Memorandum from Elaine Chao, Sec'y of Transp., U.S. Dep't of Transp., to Calvin L. Scovel III, Inspector Gen., U.S. Dep't of Transp. (Mar. 19, 2019), <https://www.transportation.gov/sites/dot.gov/files/docs/briefing-room/334391/memorandum-secretary-audit-certification-boeing-737-max8-2012-2017.pdf> (requesting "that the Office of Inspector General proceed with an audit to compile an objective and detailed factual history of the activities that resulted in the certification of the Boeing 737-MAX 8 aircraft").
23. *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944); see also *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) ("The interdependence of [factors relating to airplane safety and noise mitigation] requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.").

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