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The Pre-*Abdullah* Consensus That Federal Law Does Not Preempt the Field of Aviation Safety in Tort Cases Should Remain the Law

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I. *Introduction*

In 1999, the United States Court of Appeals for the Third Circuit ruled in *Abdullah v. American Airlines*[1] that the Federal Aviation Act of 1958[2] impliedly preempts "the entire field of aviation safety" and displaces state law as the applicable standard of care

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1 181 F.3d 363, 365 (3d Cir. 1999).

2 Pub. L. No. 85-726, 72 Stat. 731, (codified as amended at 49 U.S.C. §§ 40101-49105).

in aviation tort cases. This "novel"[3] opinion created a split[4] in the federal circuits that the U.S. Supreme Court has not yet resolved.

This paper explains why *Abdullah* was wrongly decided and why implied preemption should not be used to deprive air crash victims and their families of their traditional state law negligence and gross negligence causes of action for compensatory and punitive damages. It also tells the story of the courts that have refused to follow *Abdullah* down the path of implied preemption of aviation safety, encouraging other courts to follow suit. The bottom line is if state law standards of care are to be replaced by federal standards in aviation tort cases not otherwise governed by federal law, an Act of Congress that either expressly or clearly and manifestly preempts state law is legally required, and the 1958 statute by no means qualifies.

II. *Overview of the Problem*

Negligence and gross negligence causes of action under state law against airlines, airframe manufacturers, and other members of the aviation industry in air crash cases have traditionally been the cornerstones of airline passengers' legal rights.[5] The Federal

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3 Skidmore v. Delta Air Lines, Inc., 2000 U.S. Dist. LEXIS 18587 (N.D. Tex. 2000) (referring to *Abdullah* as "the Third Circuit's novel suggestion").

4 The leading cases in the split are *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993) and *Abdullah*. Joining the Tenth Circuit's approach in *Cleveland* are the Ninth and Eleventh Circuits. *See* Martin v. Midwest Express Holdings, Inc., 555 F.3d 806, 811 (9th Cir. 2009); Hughes v. AG of Fla., 377 F.3d 1258, 1271 (11th Cir. 2004); Public Health Trust of Dade County, Florida v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993). The Sixth Circuit has joined the *Abdullah* side of the debate. *See* Greene v. B.F. Goodrich Avionics Sys., 409 F.3d 784, 795 (6th Cir. 2005). The issue has not been addressed by the First, Second, Fourth, Seventh and Eighth, D.C. and Federal circuits. The position of the Fifth Circuit is less clear but leans toward the *Cleveland* side of the argument. *See* Witty v. Delta Air Lines, Inc., 366 F.3d 380, 385 (5th Cir. 2004); Hodges v. Delta Airlines, 44 F.3d 334 (5th Cir. 1995).

5 In the United States air crash cases not covered by a Treaty, the Death on the High Seas Act or general maritime law have traditionally been governed by state law. *See, e.g.*, Zicherman v. Korean Air Lines Co., 516 U.S. 217, 230 (1996) (recognizing where the Death on the High Seas Act applies state law does not); Rustenhaven v. Am. Airlines Inc. *(In re* Aircraft Accident at Little Rock), 351 F.3d 874, 876 (8th Cir. 2003) ("Summary judgment affirmed on "punitive damages under the standard established by Arkansas law"); *In re* Air Crash Disaster near Chicago, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981) (evaluating and choosing

Aviation Act of 1958 did not create a federal cause of action to take the place of state tort law causes of action,[6] instead expressly preserving them with a "savings" clause:

> Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[7]

There was no express preemption provision in the 1958 Act, and the *Abdullah* court concedes the savings clause has "been interpreted to mean that state safety standards are not preempted because Congress provided for compensation of injured persons."[8] Yet the effect of *Abdullah* has been to interfere with or deprive injured airline passengers of compensation for airline negligence, starting with the *Abdullah* plaintiffs themselves.[9]

One problem with *Abdullah* is if Congress truly intended to oust state law and substitute a federal standard of care in air crash cases, not only is the statute silent on this point but the Supreme Court has never held this to be the case.[10] Quite to the

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which of several states' laws would apply to govern punitive damages claims); *In re* Aircrash Disaster near Roselawn, 1997 U.S. Dist. LEXIS 13794 (N.D. Ill. 1997) (state law applied on all substantive issues); Palomo v. United States, 1997 U.S. Dist. LEXIS 24103, 10-11 (S.D. Miss. 1997) (applying Mississippi substantive law on all issue in Federal Tort Claims Act case); Seaman v. Curtiss Flying Service, Inc., 231 A.D. 867, 868 (N.Y. App. Div. 1930) (applying state law in air crash case).

6 *In re* Mexico City Aircrash, 708 F.2d 400, 408 (9th Cir. 1983) ("[T]he Federal Aviation Act does not contain an implied private right of action"); Brewer v. Dodson Aviation, 2006 U.S. Dist. LEXIS 81528, 2006 WL 3231974 at *3 (W.D. Wash. 2006) ("Plaintiffs have failed to cite any case law that shows that the Federal Aviation Act or related regulations create a private right of action"); Sunbird Air Servs., Inc. v. Beech Aircraft Corp., 789 F. Supp. 360, 362-63 (D. Kan. 1992) ("the FAA does not have the power to assess damages for past wrongs").

7 49 U.S.C. App. § 1506 (1958). The current version of the savings clause reads slightly differently: "A remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c) (2009).

8 *Abdullah*, 181 F.3d at 374 (emphasis added). In support of this observation the Third Circuit cited *Hodges v. Delta Airlines*, 44 F.3d 334, 338 & n.7 (5th Cir. 1995) and *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993) (collecting cases in which courts relied on the savings clause to find no preemption of state common law).

9 The *Abdullah* story after the Third Circuit opinion was issued in 1999 has not been fully told in a public forum and is told later in this paper, proving what the *Abdullah* plaintiffs lost as a result of the preemption decision.

10 The Supreme Court has evaluated or discussed the preemptive scope of the Federal Aviation Act of 1958 on six occasions. *See* American Airlines

contrary, Justice Sandra Day O'Connor observed several years before *Abdullah* was decided that "personal injury claims against airlines are [not] always pre-empted"; and no other Supreme Court Justice has published a word of disagreement on this point.

What is more, it took thirty years after the 1958 Act was passed for any Court of Appeals to even *mention* implied preemption of the field of aviation safety, and when it was mentioned in *Bieneman v. Chicago*,[11] at issue was a local resident's attempt to obtain damages under Illinois tort law for noise emanating from Chicago's O'Hare International Airport. While the district court dismissed the plaintiff's state tort claim as preempted, the Court of Appeals reversed this ruling. Shedding light on what would and would not be preempted, Judge Easterbrook explained:

> Federal law governs much of the conduct of O'Hare and its carriers. . . . A state court could not award damages against O'Hare or its users for conduct required by [federal] regulations, or for not engaging in noise-abatement procedures that the Federal Aviation Administration considered but rejected as unsafe. Bieneman's complaint suggests that damages should be awarded because there are too many flights per hour, or because the aircraft are older models not fitted with high-bypass turbofan engines, or because the planes do not climb at a sufficiently steep rate after takeoff. These subjects

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v. Wolens, 513 U.S. 219 (1995) (no mention of implied field preemption); Hawaiian Airlines v. Norris, 512 U.S. 246 (1994) (same); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (same); Nader v. Allegheny Airlines, 426 U.S. 290 (1976) (same); Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (five of nine justices ruled Burbank could not restrict jet use of the Hollywood/Burbank airport from 11 p.m. to 7:00 a.m. because congressional legislation dealing with aircraft noise has so "pervaded" that field that Congress has impliedly pre-empted it and "[i]f we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow"); Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc., 372 U.S. 714, 723-724 (1963) (rejecting airlines' argument the Federal Aviation Act precluded a claim of racial discrimination under state law explaining the Act and its predecessor statute evinced "no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains "dormant and unexercised," will not frustrate any part of the purpose of the federal legislation.").

[11] Bieneman v. Chicago, 864 F.2d 463, 471 (7th Cir. 1988).

> are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who abide by them. There may be, on the other hand, aspects of O'Hare's operations that offend federal law, or that federal norms do not govern. Perhaps, as Bieneman insists, the airport does not use adequate noise baffles around the perimeter of the airport, or perhaps it has built more runways than federal law requires . . . or is out of compliance with the governing federal rules. The essential point is that the state may employ damages remedies only to enforce federal requirements . . . or to regulate aspects of airport operation over which the state has discretionary authority.[12]

The only mention of air crash cases in *Bieneman* was the court's mention in *dicta*, that "state courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel."[13]

The year after *Bieneman* was decided, the United States Court of Appeals for the First Circuit issued its opinion in *French v. Pan Am Express, Inc,*[14] the second Court of Appeals case to mention implied preemption of aviation safety. *French* involved a pilot suspected of smoking marijuana in violation of federal regulations who refused to submit to drug testing that was authorized by federal but not state law. The First Circuit ruled the federal interest dominated and preempted state law.

While *Bieneman* and *French* did not deal with preemption of state law standards of care traditionally used in aviation tort personal injury and wrongful death cases, nevertheless airlines and other aviation industry members soon tried to use these two cases, along with the United States Supreme Court's decision in *Burbank v. Lockheed Air Terminal, Inc.*,[15] as springboards for a new

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12 *Id.* at 472-473.

13 *Id.* at 471.

14 French v. Pan Am Express, Inc., 869 F.2d 1, 6 (1st Cir. 1989) (in case involving a pilot refusing to submit to a drug test relying on a state law, the court inferred "from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law." As a result, under federal law the airline had a right to insist the pilot submit to a drug test.).

15 411 U.S. 624 (1973).

implied preemption argument. *Burbank* involved the City of Burbank's attempt to regulate noise at Hollywood-Burbank Airport by imposing a curfew on takeoffs and landings between 11:00 p.m. and 7:00 a.m. which would have upset the national movement of air traffic. Not surprisingly, the Court found the curfew was preempted by federal law.

The first United States Court of Appeals to entertain the new[16] implied field preemption argument was *Cleveland v. Piper Aircraft Corp.*[17] In *Cleveland* the Tenth Circuit soundly rejected the argument, affirming a district court ruling that common law product liability claims against an airframe manufacturer were not preempted. Around the same time, another district court judge accepted the new preemption argument, but that ruling was later reversed on appeal by the United States Court of Appeals for the Eleventh Circuit, which chose to follow *Cleveland v. Piper* in *Public Health Trust of Dade County, Florida v. Lake Aircraft, Inc.*[18] Thus the early attempts to establish the new implied preemption argument failed.

Abdullah was next, and under remarkable circumstances American Airlines and its insurers pitched the new field preemption argument to the district court in an aviation tort case already tried under state law. The district court judge reversed his own previous ruling and held, post-trial, that the case should have been tried under an exclusively federal standard of care instead of under Virgin Islands territorial law. Later, American Airlines hit the mother lode on appeal when the Third Circuit became the first Court of Appeals to rule federal law preempts the standard of care and only federal law can supply the applicable standard of care in air crash personal injury and wrongful death cases.

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16 The procedural history of this case reveals the implied field preemption argument was not advanced until after *Bieneman* and *French* were decided. The first appeal in the case followed a trial where New Mexico substantive law governed by agreement of the parties. Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989). The court reversed and remanded the case for a new trial based on *how* New Mexico law was applied, not *whether* it should have been applied. Only after remand, which was after *Bieneman* and *French* were decided, did the defendant argue implied preemption precluded trying the case under a standard of care governed by state law.

17 Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993). This case is discussed in more detail *infra*.

18 992 F.2d 291 (11th Cir. 1993).

Clearly, federal law provides minimum safety standards that airlines and other aviation industry members must follow,[19] and proof of violations of these minimum safety standards has always been an acceptable practice in aviation tort trials.[20] Nevertheless, as mentioned, the prevailing view before *Abdullah* was that federal law did not implicitly preempt state law standards of care in the field of aviation safety;[21] and under settled and long-standing practice negligence or gross negligence has been established in aviation tort cases without a requirement that any violation of the federal aviation regulations be established.[22] In other words, federal regulation violations have not historically been the *sine qua non* for liability, and negligent conduct not covered by federal aviation regulations is sometimes the most important negligence of all in aviation tort cases.

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19 *See, e.g.*, 49 U.S.C. § 44701(a) (5) ("The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing— regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security."). *See also* U.S. v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 804 (1984) ("In the Federal Aviation Act of 1958, 49 U.S.C. § 1421(a) (1), Congress directed the Secretary of Transportation to promote the safety of flight of civil aircraft in air commerce by establishing minimum standards for aircraft design, materials, workmanship, construction, and performance. Congress also granted the Secretary the discretion to prescribe reasonable rules and regulations governing the inspection of aircraft, including the manner in which such inspections should be made. § 1421(a) (3). Congress emphasized, however, that air carriers themselves retained certain responsibilities to promote the public interest in air safety: the duty to perform their services with the highest possible degree of safety, § 1421(b), the duty to make or cause to be made every inspection required by the Secretary, § 1425(a), and the duty to observe and comply with all other administrative requirements established by the Secretary, § 1425(a);

20 *See, e.g., In re* Air Crash Disaster at John F. Kennedy International Airport, 635 F.2d 67, 76-77 (2d Cir. 1980) (pilot error air disaster case tried under New York standard of care with evidence of violations of federal aviation regulations and other evidence of negligence admitted).

21 *See Cleveland,* 985 F.2d 1438; Public Health Trust of Dade County, Florida v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993).

22 *In re* Air Crash Disaster at John F. Kennedy International Airport on June 24th,1975, 635 F.2d 67 (2d Cir. 1980) provides a good example of what occurs in many air crash trials. The case was tried under New York law by stipulation. Some of the alleged negligence involved federal aviation regulation violations; other negligence allegations were supported by the testimony of qualified expert witnesses but did not involve violations of the regulations. Both types of allegations were proper under New York law.

One good example is *In re Air Crash at Charlotte, North Carolina on July 2, 1994*,[23] litigation that grew out of the crash of USAir flight 1016 while on final approach for landing at Charlotte, North Carolina, killing 37 of the 52 passengers on board. Flight 1016 encountered severe microburst windshear at low altitude which overwhelmed the performance capabilities of the DC-9 aircraft. The microburst descended from an intense thunderstorm that was over the airport and final approach path as flight 1016 was on approach.

The National Transportation Safety Board investigated the crash and concluded the probable causes of this accident were:

> 1) the flightcrew's decision to continue an approach into severe convective activity that was conducive to a microburst; 2) the flightcrew's failure to recognize a windshear situation in a timely manner; 3) the flightcrew's failure to establish and maintain the proper airplane attitude and thrust setting necessary to escape the windshear; and 4) the lack of real-time adverse weather and windshear hazard information dissemination from air traffic control, all of which led to an encounter with and the failure to escape from a microburst-induced windshear that was produced by a rapidly developing thunderstorm located at the approach end of runway 18R.[24]

Notably, none of the three probable causes attributed to the flightcrew violated any specific provision of the federal aviation regulations.

In civil litigation arising out of the crash, the plaintiffs' complaint alleged negligence and gross negligence similar[25] to the NTSB's probable cause findings against the airline. The case

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23 MDL Docket No. 1041, reported at 982 F. Supp. 1052, 1056, 1060, 1071, 1084, 1086, and 1092. The lead author of this article served as lead trial attorney for the plaintiffs in the flight 1016 trial.

24 http://ntsb.gov/ntsb/brief.asp?ev_id=20001206X01727&key=1

25 The only specific federal aviation regulation violations involved in the case were of the sterile cockpit rule, FAR § 121.315. These violations were fully discussed in Rapoport and Weisberg, *Small Talk in the Cockpit is a Big Problem Requiring More than Just Lip Service*, [2004-2008 Transfer Binder] ISSUES AVIATION L. & POL'Y ¶ 5251, at 1115 (2007).

was tried under North Carolina law by stipulation[26] and the jury returned a verdict finding USAir negligently caused the crash despite USAir's claim their crew was not negligent and the crash instead was a result of air traffic control negligence.

The plaintiffs proved to the satisfaction of the jury that the flightcrew should not have flown into a thunderstorm at low altitude that they knew or should have known about and that the dangers involved as well as thunderstorm recognition and avoidance techniques, while not covered by the federal aviation regulations, were well-known in the industry for many years before the crash.[27] So widely known was the danger and how to avoid it that all of the pilot expert witnesses at trial admitted that the information and techniques set forth in Advisory Circular (AC) 00-54 and related documents represented the standard of care even though the regulations did not cover the topic. Additionally, like many other FAA advisory circulars, AC 00-54 is simply not anchored to the federal aviation regulations. Nonetheless Advisory Circulars form an important part of the standard of care for pilots and other aviation professionals, and without them it is doubtful our excellent record of aviation safety could be maintained.

In the industry it is not controversial that the standard of care that applies to an airline pilot includes not only the federal aviation regulations, but also the industry guidelines, procedures, and common sense; all of which must be heeded for safe operations. A lesser duty would be unsafe.

Understanding these principles perfectly, United States District Court Judge Joseph F. Anderson, Jr. did not hesitate to admit pilot expert testimony explaining the standard of care the flight 1016 pilots owed their passengers. These rulings assured that the jury was fully informed about the applicable standard of care with the best available information in the industry, unhindered by the non-comprehensive federal aviation regulations that do

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26 Given the consensus state law governs such matters some readers may wonder *why* any stipulation would be needed or even discussed. However, as aviation litigators know, in air crash cases there is often disagreement on choice of law issues, but most commonly the quarrel is not over *whether* state law should be applied, *which* state law should apply, and sometimes more than one state's law applies to different issues in the same case, a practice known as depecage.

27 *See, e.g.*, FAA, *Pilot Windshear Guide*, Advisory Circular No. 00-54 (Nov. 25, 1988).

not even cover the basics when it comes to thunderstorm avoidance and survival, even though there may be no bigger historic killer of commercial aircraft than microburst windshear spawned by thunderstorms.[28] The regulations alone have never sufficed in the real world to protect the safety of the flying public, just as they did not in the flight 1016 tragedy.[29]

III. *Federal Preemption Generally*

Preemption cases frequently divide the Supreme Court justices, as the most recently decided case illustrates. In *Wyeth v. Levine*[30] the Court upheld a large jury award in a personal injury case finding state tort law was not preempted by federal law. The plaintiff lost her arm from gangrene that developed as a result of intravenous push administration of Phenergan, an anti-nausea drug. She based her lawsuit against the drug's manufacturer on an allegedly inadequate warning. This warning had been approved by the federal Food and Drug Administration and the manufacturer vigorously argued the plaintiff's claim was preempted by federal law.

A five-member majority consisting of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer ruled the case was not preempted. Justice Thomas specially concurred; whereas Justices Scalia and Alito, joined by Chief Justice Roberts, dissented and would have preempted the claim.

Notwithstanding the different perspectives of the Justices when it comes to preemption, certain aspects of the Court's preemption jurisprudence are not controversial. For example, the basics were explained in *English v. General Electric* by a unanimous Supreme Court:

> Our cases have established that state law is pre-empted under the Supremacy Clause in three circumstances.
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> First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emp-

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28 AC 00-54.

29 The result in the flight 1016 litigation compares favorably to what happened in *Abdullah*. Less than three years after the crash liability was resolved by a trial no one appealed, and settlements were reached in all cases for 100% of every plaintiff's compensatory damages.

30 __ U. S. __, 129 S. Ct. 1187, 173 L. Ed. 2d 151 (2009)

> tion fundamentally is a question of congressional intent and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
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> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."
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> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31]

The aspect of preemption the *Abdullah* court relied on is the second *English* category, preempting state law that "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." In this type of preemption involving state law claims for personal injury or wrongful death damages, the leading United States Supreme Court cases are *Silkwood v. Kerr-McGee Corp.*[32] and *Sprietsma v. Mercury Marine.*[33] As ex-

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31 English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (citations omitted).

32 464 U.S. 238 (1984).

33 537 U.S. 51 (2002).

plained later in this article, properly evaluated these cases each greatly undercut the reasoning in *Abdullah*.

In all types of preemption cases the "two cornerstones" governing resolution of the issue are settled:

> First, "the purpose of Congress is the ultimate touchstone in every pre-emption case."
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> Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[34]

IV. *Federal Preemption of Aviation Tort Cases*

A. *Pre-Abdullah Consensus*

Before *Abdullah*, two Circuit Courts of Appeal addressed and rejected the aviation industry's new preemption argument.[35] The seminal case is *Cleveland v. Piper Aircraft Corp.*,[36] which grew out of a 1983 crash of a general aviation aircraft. The plaintiff was piloting a Piper Super Cub airplane manufactured by the defendant when it crashed attempting to take off. The plaintiff filed suit under state law alleging he suffered severe injuries due to the negligent design of the plane and in 1986 a jury returned a $ 2.5 million verdict in his favor. The case was tried under state law without objection. Later, post-trial motions were denied and on appeal the United States Court of Appeals for the Tenth Circuit reversed on unrelated grounds.[37] After remand, for the first time Piper moved to amend its answer to assert a defense that the state common law action was preempted by the Federal Aviation Act of 1958 and its corresponding regulations and the district

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34 Wyeth v. Levine, 129 S. Ct. 1187, 1194-95; 173 L. Ed. 2d 51, 60 (2009) (citations omitted).

35 *Cleveland,* 985 F.2d 1438; Public Health Trust of Dade County, Florida v. Lake Aircraft, Inc., 992 F.2d 291 (11th Cir. 1993).

36 985 F.2d 1438 (10th Cir. 1993).

37 Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1546-51 (10th Cir. 1989), *reh'g denied,* 898 F.2d 778 (10th Cir. 1990).

court granted leave to add this defense.[38] Not surprisingly, Piper's tardy implied preemption argument relied heavily on *French* and *Burbank*, discussed in Section II above. After allowing leave to amend the answer the district court rejected the preemption defense on the merits, a ruling which was affirmed on interlocutory appeal.[39]

Piper argued:

> The Federal Aviation Act of 1958 and the regulations it has spawned impliedly preempt state tort actions by occupying the field of airplane safety. It asserts that the web of federal laws and regulations govern the field in a comprehensive manner, leaving no room for state regulation."[40]

Disposing of this argument at the outset the Tenth Circuit ruled the "district court determined the plain language of the Federal Aviation Act suggests that Congress intended that the Act have no general preemptive effect. We agree."[41]

In reaching this conclusion the Tenth Circuit first described the statute from a historical and substantive perspective, then explained that the "Act contains a savings clause that states: Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[42] The *Cleveland* court observed: "As other courts have held, this section shows that Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law."[43] Notwithstanding this consensus, in a footnote the court revealed and disposed of the center of the manufacturer's argument:

> Piper has cited several cases finding that Congress intended to occupy the field of pilot safety, thereby precluding enforcement of state laws pertaining to regulation of employee drug use. *See French v.*

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38 The record does not reveal why this argument was not raised earlier in the litigation, nor why other circuit courts of appeal had not been confronted with similar arguments in air crash litigation between 1958 and the early 1990s if the "clear and manifest" intent of Congress in 1958 was to preempt the field of aviation safety.

39 *Cleveland*, 985 F.2d at 1440.

40 *Id.* at 1441.

41 *Id.* at 1442.

42 49 U.S.C. App. § 1506 (1958).

43 985 F.2d at 1442.

> *Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989) (drug testing); *Northwest Airlines, Inc. v. Gomez-Bethke*, 5 E.B.C. 1374, 34 Fair Empl. Prac. Cas. (BNA) 837 (D. Minn. Apr. 1, 1984) (employment rights of chemically dependent workers). Although these cases suggest Congress intended uniformity of regulation, they are not persuasive because they address pilot regulation and because they do not involve tort claims that implicate the savings clause of 49 U.S.C. app. § 1506, which shows contrary congressional intent. Similarly, the Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 36 L. Ed. 2d 547, 93 S. Ct. 1854 (1973), did not involve allegations of defective design of an airplane. It involved a municipality's efforts to regulate airplane noise, which the Court found "remains peculiarly within the competence of FAA, supplemented now by the input of EPA." *Id.* at 640.[44]

The Tenth Circuit made its main point succinctly: "By its very words, the statute leaves in place remedies then existing at common law or by statute."[45] Moreover, the court buttressed this conclusion by observing "Congress has not enacted an express preemption clause governing airplane safety,"[46] and also with a "tool of statutory interpretation, *expressio unius est exclusio alterius*.[47] The latter point was tied to the fact Congress passed an express but limited preemption provision for the Federal Aviation Act as part of the Airline Deregulation Act of 1978[48] (ADA) which states:

> No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to the rates, routes, or service of any air carrier.

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44 *Id.* at 1443, n.7.

45 *Id.* at 1442-1443.

46 *Id.* at 1443.

47 *Id.*

48 The Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a) (1).

Elaborating on the use of the maxim *expressio unius est exclusio alterius*, the court explained:

> In *Cipollone v. Liggett Group, Inc.*, 120 L. Ed. 2d 407, 112 S. Ct. 2608, 2618 (1992), the Court used this doctrine to hold that implied preemption is generally inapplicable to a federal statute that contains an express preemption provision. The Court stated that "enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." n12 *Id.*
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> . . .
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> The Act, however, governs two broad areas of congressional concern and contains an express preemption provision governing one of them – rates and routes. 49 U.S.C. app. § 1305(a). Under *Cipollone*, this implies that the other broad area of congressional concern – air safety – is not preempted because it is "beyond [the] reach" of the express preemption provision. *Cipollone*, 112 S. Ct. at 2618. Although § 1305(a) was not part of the original Act, its inclusion in 1978 shows that Congress, like the states and the Civil Aeronautics Board, which at that time enforced portions of the statute, believed the Act lacked general preemptive reach.[49]

Summing up its ruling denying implied field preemption, the *Cleveland* court reiterated:

> We conclude that Congress has not indicated a "clear and manifest" intent to occupy the field of airplane safety to the exclusion of state common law. To the contrary, it appears through the savings clause that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed.[50]
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> Soon after *Cleveland* was decided the Eleventh Circuit confronted a similar fact pattern and legal argument in *Public Health Trust v. Lake Aircraft, Inc.*[51] In *Public Health* a plaintiff who was severely injured in the crash of an amphibious air-

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49 *Cleveland*, 985 F.2d at 1443-1444.
50 *Id.* at 1444.
51 992 F.2d 291 (11th Cir. 1993).

craft brought strict liability and negligence claims against the aircraft manufacturer under Florida law. Following the lead of the Tenth Circuit in *Cleveland* and observing "we do not create intercircuit splits lightly,"[52] the court reversed the district court's contrary holding and ruled the case was not preempted.

After *Cleveland v. Piper Aircraft Corp.*, and before *Abdullah*, two "express" preemption cases involving the FAA express preemption provision added to the statute in 1978 were decided by Courts of Appeals, both rejecting federal preemption of personal injury cases: *Hodges v. Delta Airlines*[53] and *Charas v. Trans World Airlines*.[54] While these courts did not discuss implied preemption of the field, the ruling in each case implicitly supports the ruling in *Cleveland*. After all, if the entire field of aviation safety was preempted there would have been no reason for either court to construe the preemptive scope of the limited express preemption provision disallowing state regulation of "rates, routes and services" in either case.

Thus, by the end of 1998 two Circuit Courts of Appeal had ruled federal law on air safety does not impliedly preempt the field precluding state law standards of care in aviation tort cases, and two Circuit Courts of Appeal ruled federal law on air safety does not expressly preempt state law standards of care in certain aviation tort personal injury cases. What is more, before *Abdullah* no Circuit's Court of Appeals had ever held federal law on air safety impliedly preempts the field precluding state law standards of care in aviation personal injury or wrongful death cases. During this time, and going backwards to the dawn of aviation in the early part of the twentieth century, every circuit had handled numerous personal injury and wrongful death aviation tort cases under the con-

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52 *Id.* at 295, n. 4.
53 44 F.3d 334 (5th Cir. 1995).
54 160 F.3d 1259 (9th Cir. 1998) (en banc).

> sensus view that unless they were governed by federal statute, treaty, or maritime law, and most were not, these cases were governed instead by state law, including state law standards of care. Indeed, an entire field of conflicts of law developed in large part as a result of this consensus. And then came *Abdullah*.

B. *Abdullah*

1. Overview

In 1999 the United States Court of Appeals for the Third Circuit decided *Abdullah v. American Airlines*[55] and changed the landscape with regard to preemption of aviation safety in personal injury and wrongful death cases. But the story began eight years earlier.

2. The District Court Proceedings

On August 28, 1991, American Airlines flight 1473 en route from New York to Puerto Rico encountered severe turbulence causing injuries to several passengers who sued the airline for damages under state law in the United States District Court for the Southern District of New York[56] and the District Court of the Virgin Islands, Division of St. Croix.[57] The plaintiffs claimed that American's "pilots negligently flew directly into a developing thunderstorm which they knew to contain potentially severe turbulence" and also "that the pilots failed to provide adequate warning to the passengers so as to cause them to fasten their seatbelts prior to the turbulence encounter."[58] The plaintiffs also alleged American should be held liable for associated failures by the flight attendants; whereas American denied liability and claimed the passengers' damages should be reduced for contributory negligence for failing to put on their seat belts after the seat belt sign illuminated.

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55 181 F.3d 363 (3d Cir. 1999).

56 Trinidad v. American Airlines, 932 F. Supp. 521, 523 (S.D.N.Y. 1996).

57 Abdullah v. American Airlines, 969 F. Supp. 337, 340 (D.V.I. 1997).

58 *Trinidad*, 932 F. Supp. at 523.

After the district court judge in the Virgin Islands refused to transfer the case filed in the Virgin Islands to the Southern District of New York, and after the Third Circuit denied American's Writ of Mandamus on this issue:[59]

> A jury trial commenced on August 7, 1995, in the District Court of the Virgin Islands, Division of Saint Croix. The plaintiffs' cases were consolidated for trial. On August 25, 1995, the jury found American liable, found plaintiffs to be without any contributory fault, and awarded monetary damages aggregating more than two million dollars.[60]

The implied preemption issue was first raised by American Airlines as part of a motion in limine before the 1995 trial. After carefully reviewing the authorities the district court judge denied the motion in limine, ruling "the field of aviation safety is not federally preempted."[61] The case was thereafter tried under territorial law.[62]

After the trial American moved for judgment as a matter of law or, in the alternative, a new trial.[63] This motion was under advisement for close to two years. Meanwhile, in the New York litigation American moved "in limine to establish the applicable law governing the standard of care that applies to American," arguing plaintiffs' claims are either expressly preempted by the Airline Deregulation Act of 1978 (ADA), or, alternatively, implicitly preempted by the Federal Aviation Act of 1958 (which the ADA amended)."[64] Finding American's argument "unpersuasive," on June 3, 1996, United States District Court Judge Shira A. Scheindlin rejected preemption and ruled the case would be governed by New York law.[65]

Nearly one year later Judge Finch of the United States District Court for the District of the Virgin Islands finally ruled on American's post-trial motion, reversing himself on the preemption issue and ruling "that the standards of care required by pilots, flight

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59 *Abdullah*, 181 F.3d at 365 (citing Abdullah v. AMR Corp., 60 F.3d 813 (3d Cir. 1995)).

60 *Id.* at 365.

61 *Abdullah*, 969 F. Supp. at 340-341.

62 The opinion never clarifies whether the applicable territorial law was from the Virgin Islands or Puerto Rico.

63 *Abdullah*, 969 F. Supp. at 340.

64 *Trinidad*, 932 F. Supp. at 523.

65 *Id.* at 528.

attendants, and passengers during the course of an airline flight are federally preempted, but that damages may be awarded under state or territorial law for violation of the federally established standards of care."[66] As a result, according to Judge Finch, a new trial was necessary.[67] It seems Judge Finch was unaware

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66 *Id.* at 356.

67 In a remarkable passage that sheds great light on the problems left behind in the wake of *Abdullah*, Judge Finch addressed his perceived need for a new trial in light of his preemption conclusion:

> In this case, the jury was allowed to consider standards other than the federal standards of care. Although the jury was informed of the federal standards of care, they were told that such standards were minimum standards: "FAA regulations only establish minimum requirements for air carriers' or airlines. The defendant may have been required to do more under the circumstances."
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> The jury was permitted to create its own standard as to when it is reasonable for a passenger to fasten their seat belts despite a federal standard requiring "each passenger [to] . . . fasten his or her safety belt about him or her and keep it fastened while the "Fasten Seat Belt" sign is lighted." 14 C.F.R. 121.317(f) (1996). The federal regulation does not make a passenger's duty dependent on any enhanced warning from the pilots or on whether the flight attendants check whether passengers are wearing their seat belts. Yet the jury was instructed that "if the [pilot's] warning . . . is insufficient to come to the attention of the passengers, then the passengers are not contributorily negligent for not heeding the warning, and the pilot and airline is still liable to the passengers for any injury caused by the pilot's act." The jury was further charged that "if you find that during the incident which is the subject of this case, the flight attendants or crew did not use reasonable care to adequately warn and inspect the safety of the passengers, then you may find for one or more of the plaintiffs."
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> According to these instruction[sic], even if the jury determined that the seat belt sign had been lit at the time of the incident and that the Plaintiffs had not been wearing their seat belts, the jury still could have found the Plaintiffs to be not contributorily negligent. The jury was permitted to consider whether the pilot should have made additional warnings in addition to lighting the seat belt sign and whether the flight attendants should have supplemented the lighted seat belt signs with warnings and inspection.
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> At trial, evidence of standards of care other than federally mandated standards of care were introduced, particularly with respect to passenger warnings. Expert witness Dr. Cunitz testified for the Plaintiffs:
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> "I hold an opinion that the pilots . . . should have adequately and fully warned . . . the passengers . . . that we're about to encounter or there's a possibility of encountering some very rough weather and you need to take appropriate precautions and

make yourself ready both physically by belting in tightly and so on. . . .

I also believe that they should have made a P.A. [public address system] announcement . . . 2 or 3 minutes just immediately before so that people could in fact prepare themselves and say all right another minute or two we're going to be in it so the message, the warning needed to have been given in a very timely fashion. (Tr. Trial Vol. 5 at 16, 17, 18)

During cross-examination Dr. Cunitz was asked: Dr. Cunitz, I believe I heard you testify earlier that you must advise passengers of the potential for danger whenever you tell them to put on their seat belt or else we're not giving them enough information to let them make a reasonable decision as to why they [should] put on their seat belt?

He answered: "If there's a potential for that danger yes, sir." (Tr. Trial Vol. 5 at 53).

Dr. Cunitz further testified: [The pilots] needed to tell [the flight attendants] that there is . . . potential for severe turbulence. You are to warn the passengers of this. If they don't do it themselves you are to make sure everybody's wearing their seat belts, that they return from the lavatories, get them out of there and get them in their seats and get their seat belt on tight. (Tr. Trial Vol. 5 at 79).

Counsel for the Plaintiffs referred to such evidence in the opening statement and the closing argument. In opening, Plaintiffs' counsel stated: [The pilot] has to tell you what's going on and he has to warn you, and he has to warn you in a way that you can understand what's going to happen to you. This Mr. Cunitz-Dr. Cunitz will tell you even if they had turned on the seat belt signs that's not enough, there's a movie going on, people walking up and down, there's bells going off all the time, nobody would notice it. You got to get on that loud speaker and you got to talk to um. You got to say danger is ahead, be careful, buckle up, don't get out of your seat.

The other thing that Dr. Cunitz will tell you should have happened these stewardesses should have been going around and talking to each of these people and saying you need to get your seat belts on and stay in your seats. (Tr. No. 290 at 51).

Plaintiff's counsel argued in rebuttal that once the captain had told the passengers that they were free to move around, he had to tell them when they need to be seated and "in a way that lets them know that they've really got to take their seats." (Tr. 8/24/95 at 16). According to Plaintiffs' counsel, "the flight crew had an obligation to make sure the gravity of the situation was properly conveyed to the passengers, and we say that that was not done and we know that from the evidence." (Tr. 8/24/95 at 33).

The jury instructions, the evidence presented at trial, the Plaintiffs' opening statement and closing argument, all indicate that the jury considered evidence beyond the federal requirements. American was prejudiced because the jury was permitted to find the Plaintiffs not contributorily negligent under lower and contradictory standards than the mandatory

of the very high standard of care for airlines set by federal law, higher in fact than any state's formulation of the duty an airline owes: "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest."[68] Given he had tried the case and instructed the jury on a lower territorial standard of care it is hard to understand why a new trial would be necessary using a federal standard.

3. The Appeal

On appeal the Third Circuit largely affirmed Judge Finch's ruling, but not entirely; as the Third Circuit explained:

> In coming to our conclusion on preemption, we do not, however, agree with the narrow nature of the federal standard set out by the District Court. We conclude instead that there is an overarching general standard of care under the FAA and its regulations. This standard arises in particular from 14 C.F.R. § 91.13(a): "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Thus, we do not agree with the District Court's determination that evidence on "reasonable standard of care" should necessarily have been excluded – as long as a "reasonable standard of care" is compatible with an avoidance of carelessness or recklessness in the operation of the aircraft. We will remand this case to the District Court to review both the testimony and the jury instructions on standards of care in order to determine if they are consistent with the standards we set out here. If they are, the jury verdict should be reinstated. If they are not, the District Court should proceed with a new trial, and in that trial the court should follow the federal standards as we establish them here.[69]

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obligations imposed by federal law. Thus, the Court orders a new trial.

Id. at 340-341.

68 49 U.S.C. §§ 44701(d)(1)(A) & 44702(b)(1)(A).

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

Strangely, the Third Circuit also failed to acknowledge the federal "duty of an air carrier to provide service with the highest possible degree of safety in the public interest."

The *Abdullah* court based its preemption ruling on a conclusion that "the FAA and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions."[70] For this point the court relied on *Burbank v. Lockheed Air Terminal, Inc.*[71] as supporting this proposition: "Congress found the creation of a single, uniform system of regulation vital to increasing air safety."[72] However, the United States Supreme Court in *Burbank* did not say this either directly or implicitly; it did not deal with this issue at all. What was in dispute in *Burbank* was not aviation safety but aircraft noise. As mentioned earlier, the Supreme Court ruled a municipality's attempt to impose a curfew at the local airport would negatively affect the efficient management of navigable airspace, and this was inconsistent with the objective of the federal statutory and regulatory scheme, and it was "the pervasive nature of the scheme of federal regulation of aircraft noise" that led the Court to conclude that the local ordinance was preempted.[73] This may explain why few other courts, if any, have relied on *Burbank* in the manner the *Abdullah* court did.

The *Abdullah* court also claimed support for its view that the field of aviation safety is preempted in the decisions of other courts finding preemption of discrete safety-related matters, such as the *French* decision regarding pilot qualifications.[74] But, the court did not cite these examples as evidence of Congressional intent. Instead, the court relied on these authorities explaining: "It follows . . . from the decisions in which courts have found federal preemption of discrete, safety-related matters, that federal law preempts the general field of aviation safety."[75]

This argument is a *non sequitur*. Cases finding preemption in small discrete areas instead of the entire field of air safety do not support the *Abdullah* court's reasoning, these cases undercut it.

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70 181 F.3d at 365.
71 411 U.S. 624 (1973).
72 *Abdullah*, 181 F.3d at 369.
73 *Burbank*, 411 U.S. at 633.
74 French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989).
75 *Abdullah*, 181 F.3d at 371.

The Supreme Court has made clear that the intent of Congress to preempt the field is paramount and must be "clear and manifest." If it was, there would have been no need for these earlier courts to rule on the narrow grounds they chose.

In resolving the issue as it did the *Abdullah* court acknowledged and tried to reconcile its ruling[76] with the FAA savings clause preserving state court tort actions[77] and the ADA requirement that airlines carry sufficient insurance to cover claims.[78] In essence, the *Abdullah* court argues since it is not allowing preemption to outright destroy all crash victims' rights the opinion is consistent with what Congress intended to accomplish when it passed the savings and insurance clauses. But substituting a lower standard of care that results in no damages for some crash victims who would otherwise be entitled to damages, and lower damages for others, could hardly be what Congress intended based on the plain language of the statute.

The *Abdullah* court offered explanations for refusing to adhere to the prevailing view against preemption of state law standards of care. For example, the court rejected the *Cleveland* court's *expressio unius est exclusio alterius* argument and reliance on *Cipollone v. Liggett Group, Inc.*,[79] claiming the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one and noting that the ADA was enacted more than 20 years after the FAA.[80] Of course, this criticism assumes that the intent of the earlier Congress to preempt the field was clear and manifest, which it was not.

Finally, the *Abdullah* court acknowledged earlier decisions which viewed the federal regulations governing aviation safety as "minimum standards" Congress intended to leave open for states to expand upon through development of the common law.[81] The Court nevertheless rejected this argument because it reasoned the field of aviation safety has been so thoroughly regulated that there is no gap in the federal standards to fill with state common law standards.[82] Specifically, the court found that the prohibition of "careless or reckless" operation of an aircraft found in 14

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76 *Id.* at 375.
77 49 U.S.C. § 40120(c).
78 49 U.S.C. § 41112(a)
79 505 U.S. 504 (1992)
80 *Abdullah*, 181 F.3d at 373.
81 *Id.* at 373-374.
82 *Id.* at 374.

C.F.R. 91.13(a) occupies the apparent void beyond the specified "minimum" standards,[83] while ignoring the air carrier's duty to exercise the highest possible degree of care to protect the safety of the public. According to the *Abdullah* court, "[t]herefore, because the Administrator has provided both general and specific standards, there is no need to look to state or territorial law to provide standards beyond those established by the Administrator."[84]

This reasoning exposes a large flaw in the *Abdullah* court's analysis and conclusion. As discussed more fully below, and paraphrasing Judge Easterbrook in *Bieneman*, "while a state may not use common law procedures to question federal decisions or extract money from those who abide by them, there may be, on the other hand, aspects of American Airlines' operations that offend federal law, or that federal norms do not govern. As to these aspects, it is submitted, the power is reserved to the states respectively, and to the people.

The *Abdullah* court relied heavily upon *Silkwood v. Kerr-McGee Corp.*,[85] adopting the scheme established by the Supreme Court of exclusive federal regulation over safety coexisting with state law tort remedies. This reliance is misplaced. *Silkwood* involved regulation of the construction and operation of nuclear power plants. An employee of the defendant's nuclear facility suffered radiological contamination and, after she died of unrelated causes, her estate brought a personal injury action and was awarded compensatory and punitive damages. The Tenth Circuit reversed the award of punitive damages on the ground that such damages were preempted by federal law.[86]

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83 If this were true the *Abdullah* case would be much ado over nothing. But as what happened in *Abdullah* illustrates, it is not true. After a plaintiffs' jury verdict in a turbulence case against an airline the district court vacated the judgment because it had instructed the jury to apply territorial law in a turbulence case instead of federal law. On interlocutory appeal the Third Circuit agreed this was error and remanded the case for the district court to consider if a new trial was warranted. The possibility a new trial might have been necessary is proof the ruling may have made at least some difference in the trial.

84 *Id.* at 374.

85 464 U.S. 238 (1984).

86 The Tenth Circuit also reversed the award of compensatory damages on the ground that the state workers' compensation law provided the sole remedy, but the plaintiff did not appeal this part of the decision. *Id.* at 245-246 (citations omitted).

The Supreme Court reversed. First, the Court examined the statutory scheme and legislative history of the Atomic Energy Act and concluded that Congress did not intend to preempt state tort remedies; to the contrary, various provisions of the Act revealed Congress's intent to preserve state law causes of action.[87] At the same time, the Court confirmed its earlier conclusion in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*[88] that Congress did intend to reserve the regulation of nuclear safety exclusively to federal law.[89] As to whether this pervasive and exclusive regulation so occupied the field as to preclude state law, the Court reasoned that "pre-emption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law. We perceive no such conflict or frustration in the circumstances of this case."[90] Accordingly the Court ruled that Congress had established a system whereby federal regulation of safety exists side by side with state liability law.

While the *Abdullah* Court claimed to be following *Silkwood*, in fact the decision is at odds with the Supreme Court's ruling. The *Silkwood* Court focused on the coexistence of federal regulation and state law remedies. *Abdullah* takes this approach as well, but *Abdullah* takes it further by imposing a federal standard of care to the exclusion of a state (usually common-law) standard. This is at odds with *Silkwood's* allowance of punitive damages under state law. The Court in *Silkwood* acknowledged that a state law punitive damages provision is regulatory by nature.[91] Nevertheless, because the imposition of punitive damages neither conflicted with federal law nor frustrated the purposes of Congress, federal law did not preempt state liability standards, thus punitive damages would be available if the defendant "does not conform to state standards."[92] Clearly the Supreme Court envisioned

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87 *Id.* at 251.

88 461 U.S. 190 (1983).

89 *Silkwood*, 464 U.S. at 250-251.

90 *Id.* at 256.

91 *Id.*

92 The *Silkwood* jury was charged with the following Oklahoma state punitive damages standard of conduct:

a system whereby safety regulation is left exclusively to federal law, but state tort claims remain viable and continue to proceed using state law standards of care.

The *Silkwood* Court showed a healthy respect for existing state law and created a formula that preserved state law to the extent possible without creating a conflict with or frustrating the purposes of federal law. Applied to aviation safety, the *Silkwood* rationale would seem to leave state law regarding standard of care intact: applying a state standard of care, for example the traditional common carrier standard, would neither directly conflict with any FAA provision nor would it frustrate the Congressional purpose. On the contrary, this would further that purpose by maintaining high safety standards. *Abdullah's* contrary conclusion is inconsistent with the Supreme Court's view.

In conclusion, by limiting the standard of care to the lower federal standard the *Abdullah* court applied preemption in a manner directly at odds with the stated Congressional intent in the Federal Aviation Act. In this light it appears that the Third Circuit did not follow its own proclamation that 'the purpose of Congress is the ultimate touchstone' of preemption analysis.[93]

4. The District Court Proceedings After Remand

The *Abdullah* story after the Third Circuit opinion was issued in 1999 has not been fully told in a public forum.[94] The remand order required the district court "to evaluate whether the evidence on standards of care and the instructions given to the jury conformed to the federal aviation safety standards as we have de-

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> [The] jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant or defendants have been guilty of oppression, fraud, or malice, actual or presumed. . . . "Exemplary damages are not limited to cases where there is direct evidence of fraud, malice or gross negligence. They may be allowed when there is evidence of such recklessness and wanton disregard of another's rights that malice and evil intent will be inferred. If a defendant is grossly and wantonly reckless in exposing others to dangers, the law holds him to have intended the natural consequences of his acts, and treats him as guilty of a willful wrong.

Id. at 244-245 (citation omitted).

93 *Id.* at 366.

94 The authors thank Lee Rohn, one of the attorneys who represented the plaintiffs in *Abdullah*, for discussing the case with them for this article.

scribed them, and for such further proceedings as it may deem necessary."

The docket on remand reveals that the district court decided a new trial was necessary.[95] It never happened. After another nineteen months of litigation with a retrial rapidly approaching, the case finally settled under a confidentiality agreement on October 23, 2002.[96] Whatever the amount of the settlement, it was not received until five years after the trial.

C. *Turbulence in the Wake of Abdullah*

At the first level of analysis the question is whether *Abdullah* continues to be a viable precedent in light of the subsequent United States Supreme Court decision in *Sprietsma v. Mercury Marine*,[97] briefly mentioned earlier.

In *Sprietsma* a unanimous Supreme Court refused to preempt a product liability wrongful-death claim that alleged under Illinois law that an outboard boat engine was unreasonably dangerous due to the manufacturer's failure to place propeller guards on it. Certiorari was granted to review a decision by the Illinois Supreme Court that affirmed dismissal on implied preemption grounds[98] relying on the Federal Boat Safety Act of 1971.[99] Notwithstanding extensive federal legislation and regulations gov-

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95 James v. American Airlines, 3:93-cv-00108, [Doc. No. 74 & 76] (D.V.I. 12/27/2000 and 1/26/01). One issue for retrial was the legal significance of one or more of the plaintiffs failing to obey the illuminated seat belt sign. However, Judge Finch did not fully explain the precise problem with the way the comparative negligence defense was submitted to the jury at the trial. He assumes without proving, in ordering a new trial, that the violation itself, under federal law, must constitute contributory negligence *per se*. Perhaps this is the "federal rule" he would favor, but the states do not have uniform law on such issues. Compare, *e.g.*, *Huff v. Shumate*, 360 F. Supp. 2d 1197, 1212 (D. Wyo. 2004) ("the "seat belt defense" has never been recognized as a valid defense in Wyoming") with *Zollinger v. Owens-Brockway Glass Container, Inc.*, 233 F. Supp. 2d 349, 356 (N.D.N.Y 2002) (under New York law the seat belt defense cannot be used to attack liability but is a defense on the issue of mitigation of damages). What the seat belt issue really reveals is how unworkable the *Abdullah* solution is, because it would require developing federal common law to answer such questions, whereas the various states have already tackled them.

96 *James*, *supra* note 95, at [Doc. No. 153 & 155].

97 537 U.S. 51 (2002).

98 *Id.* at 55; Sprietsma v. Mercury Marine, 197 Ill. 2d 112, 757 N.E.2d 75 (2001).

99 46 U.S.C.S. § 4301 *et seq.*

erning outboard boat manufacturers[100] and the fact the Coast Guard thoroughly studied the propeller guard issue and decided not to require propeller guards[101] the Supreme Court reversed the Illinois Supreme Court, ruling Congress in passing "FBSA did

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[100] The Illinois Supreme court summarized how extensive federal involvement is in this area:

> Congress enacted the FBSA "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating-presently the Secretary of Transportation." S. Rep. No. 92-248 (1971), reprinted in 1971 U.S.C.C.A.N 1333. Due to an increase in the number of boat-related accidents and fatalities, Congress enacted the FBSA to establish "a coordinated national boating safety program." S. Rep. No. 92-248 (1971), reprinted in 1971 U.S.C.C.A.N. 1331, 1334-35. To implement this goal, the FBSA authorized the Secretary of Transportation (Secretary) to prescribe regulations necessary to establish minimum safety standards for recreational boats. 46 U.S.C. § 4302(a) (1994). The Secretary may delegate regulatory functions to an organization or agency under his supervision (46 U.S.C. § 4303(a) (1994)) and, in fact, has delegated the regulatory authority to the Commandant of the United States Coast Guard (49 C.F.R. § 1.46(n) (1) (1999)). Before issuing a regulation, the Coast Guard must consult with the National Boating Safety Advisory Council (Advisory Council) to consider the need for a regulation and the extent to which the regulations will contribute to recreational boating safety. 46 U.S.C. § 4302(c) (l) through (c) (4) (1994).

Sprietsma, 197 Ill. 2d at 116-117.

[101] The Illinois Supreme described this effort in detail:

> In 1988, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors. The Coast Guard directed the Advisory Council to review the available data on prevention of propeller-strike accidents and to assess the feasibility and potential safety advantages and disadvantages of propeller guards. The Advisory Council appointed a Propeller Guard Subcommittee (Subcommittee) to review and analyze the data and to consider whether the Coast Guard should move toward a federal propeller guard requirement. National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee, November 7, 1989, at Appendix A.
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> After studying the issue and conducting public hearings, the Subcommittee unanimously recommended that the "Coast Guard should take no regulatory action to require propeller guards." Report of the Propeller Guard Subcommittee, at 24. The Subcommittee made this recommendation after finding that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an

not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies."[102]

The analogies between the FBSA and the United States Coast Guard on the one hand; and the Federal Aviation Act of 1958 and the Federal Aviation Administration on the other, while not a perfect match, are strong. Both federal laws and both federal agencies regulate important aspects of our national transportation system. The federal interests in the airways and waterways are similar when it comes to safety, and the federal statutory and regulatory safety programs have similarities. These similarities are only one of the reasons the ruling in *Sprietsma* undercuts *Abdullah*. Another is that in *Sprietsma* the Coast Guard actually considered and decided not to mandate propeller guards for outboard engines for seemingly good reasons; whereas in *Abdullah* there is no evidence the Federal Aviation Administrative ever considered whether pilots, knowing severe turbulence would soon hit their aircraft, should be required to warn their passengers so the passengers could protect themselves and decrease the risk of injury.[103] There also is no evidence the Federal Aviation Administration ever considered mandating or forbidding this particular example of common sense. It is hard to imagine a federal policy that would forbid pilots from sharing pertinent turbulence

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arm or leg could be caught between the guard and the propeller blades. Report of the Propeller Guard Subcommittee, at 19-21.

The Subcommittee's report was presented to the Advisory Council, which accepted and adopted the recommendations. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (November 6-7, 1989). The report and recommendations were then sent to the Coast Guard, which adopted the Advisory Council's recommendations, including its recommendation that no regulatory action should be taken to require propeller guards because "available propeller guard accident data [does] not support imposition of a regulation requiring propeller guards on motorboats." Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety Advisory Council (February 1, 1990).

Id.

102 *Id.* at 68.

103 For other Supreme Court decisions handed down since *Abdullah* that bode poorly for *Abdullah's* long term viability see *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 151 (2009) (state tort law standards for warnings related to an FDA regulated and approved drug not preempted) and *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (Clean Water Act's water pollution penalties, 33 U.S.C. § 1321, do not preempt punitive-damages awards in maritime oil spill cases).

warnings with passengers, not a controversial issue as is whether the Coast Guard should require propeller guards on outboard engines.

At the Court of Appeals level the split in the circuits *Abdullah* created remains. In other words, the Tenth and Eleventh Circuit opinions in direct conflict with *Abdullah* (*Cleveland v. Piper Aircraft* and *Public Health Trust v. Lake Aircraft*) remain good law in those circuits. Additionally, while *Charas v. Trans World Airlines*[104] and *Hodges v. Delta Airlines*,[105] were "conflict" preemption cases, their holdings are sufficiently analogous that they too should be counted on the *Cleveland* side of the split, meaning the Fifth Circuit is fairly included with the Tenth and Eleventh Circuits on the *Cleveland* side of the ledger. Additionally, each side of the divide has gained one circuit, with the remaining Courts of Appeal not yet weighing in.[106]

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104 160 F.3d 1259 (9th Cir. 1998) (en banc).

105 44 F.3d 334 (5th Cir. 1995).

106 It is arguable that the Seventh Circuit would join the *Cleveland* side of the debate. In *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007), *reh. den.* 493 F.3d 762 (1997), the court rejected Southwest's argument the federal court had subject matter jurisdiction over plaintiff's state tort law claims, pointing out in part: "that some standards of care used in tort litigation come from federal law does not make the tort claim one "arising under" federal law." In denying Southwest's Petition for Rehearing Judge Easterbrook gave no sign *Abdullah* would be followed in the Seventh Circuit:

> Southwest Airlines' petition for rehearing asserts that it presented an argument that our opinion overlooked: "whether the 1958 Federal Aviation Act, 49 U.S.C. § 40101 et. [sic] sec. [sic], preempts State authority to establish non-uniform and individual State standards for aviation safety."
>
> We had not overlooked this argument; we just thought it too feeble to require comment. Southwest does not rely on any particular section of the Federal Aviation Act, so this argument collapses to the contention, which our opinion considered at length, that the FAA's establishment of uniform federal standards *for many* aspects of air transportation means that the suit arises under federal law.
>
> Restated as an argument for preemption—but not "complete preemption" of the field, as Southwest does not deny that state law controls damages, *if not other subjects*—the contention is weaker than the one our opinion addressed. . . .
>
> The petition for rehearing is denied, and no judge has asked for a vote on the petition for rehearing en banc.

The oral argument in *Bennett* is well worth listening to, as any who were there will attest. Counsel for Southwest, a leading advocate for preemption of air crash cases and one of the attorneys for American Airlines in *Abdullah*, had

On the *Abdullah* side of the split the Sixth Circuit followed *Abdullah's* preemption analysis in a product liability and failure to warn case against a gyroscope manufacturer in *Greene v. B.F. Goodrich.*[107] In *Greene* the Sixth Circuit ruled that the failure to warn claim was preempted by federal law, rejecting the claim that this should not be so because there is no federal statutory or regulatory requirement that a manufacturer maintain a database to track malfunctions, register employee concerns, or track internal communications regarding manufacturing and quality assurance. Judge Cole dissented from the majority's preemption decision, explaining there was no reason why the state's more stringent requirements would not supplement rather than frustrate the federal statutory scheme.[108]

On the other hand, while the Ninth Circuit initially adopted *Abdullah's* rationale in *Montalvo v. Spirit Airlines*,[109] a case involving an airline's failure to warn passengers of the danger of developing deep vein thrombosis during flight, in the latest Ninth Circuit opinion the court limited *Montalvo* to its facts and virtually abandoned *Abdullah* in *Martin v. Midwest Express Holdings.*[110]

In *Martin* the issue was the airline's liability to its passenger for injuries caused by an allegedly defective stairway on its airplane. The airline settled with the plaintiff and sought indemnity from the third-party defendant airplane manufacturer; while the manufacturer claimed that the passenger's claim was preempted by federal law. While the trial court ruled that the passenger's claims were preempted and granted judgment to the third-party defendant, on appeal this ruling was reversed.

In reversing, the Ninth Circuit acknowledged that in *Montalvo* it had employed broad language suggesting broad federal preemption over the entire field of aviation safety, while noting that its actual ruling was not as broad as the language implied.[111] Rather, according to the *Martin* court the basis for the *Montalvo*

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few answers that satisfied Judge Easterbrook on his questions relating to preemption.

107 409 F.3d 784 (6th Cir. 2005). *Greene* has been followed by at least one district court in the Sixth Circuit. McWilliams v. S.E., Inc., 581 F. Supp.2d 885 (N.D. Ohio 2008).

108 *Greene*, 409 F.3d at 795.

109 508 F.3d 464 (9th Cir. 2007).

110 555 F.3d 806 (9th Cir. 2009).

111 *Id.* at 809.

ruling was pervasive federal regulation, but only in the specific area of passenger DVT warnings. The court reasoned that additional state-required warnings would have the effect of drowning out the federally required warnings, thus additional state regulation in this area would conflict with the federal scheme.[112] The *Martin* court thereby limited its earlier preemption holding to a very specific circumstance:

> *Montalvo*, then, neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, it means that when the agency issues 'pervasive regulations' in an area, like passenger warnings, the FAA preempts all state law claims in *that* area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.[113]

While the *Martin* court did not describe it in these terms, its holding has the effect of abandoning implied field preemption in favor of a form of conflict preemption. The court backed away from its earlier assertion in *Montalvo* that "the regulations enacted by the Federal Aviation Administration, read in conjunction with the FAA itself, sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress' intent to preempt all state law in this field."[114] Instead of preempting the entire field, the court in *Martin* found preemption limited to only those discrete areas of aviation safety – such as passenger warnings – in which regulation is so pervasive that an airline could not follow a state law without creating a conflict with the federal regulatory scheme. Thus, because the regulations regarding stairs were not so pervasive, the airline's conduct was governed by the state law standard of care.[115]

In summary, the Fifth, Ninth, Tenth, and Eleventh Circuits are all on the *Cleveland* side of the circuit split, whereas the Third

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[112] *Id.* at 809-810.
[113] *Id.* at 811.
[114] *Montalvo*, 508 F.3d at 471.
[115] *Martin*, 555 F.3d at 812.

and Sixth Circuits remain on the *Abdullah* side. Additionally, at least five lower courts have recently refused to follow *Abdullah*.[116]

First, in *Skidmore v. Delta Airlines* an airline passenger was injured by a trash cart during a flight and filed suit for these injuries against the airline which, relying on *Abdullah* and its progeny, argued the passenger's claims were preempted by federal law. United States District Court Judge A. Joe Fish strongly disagreed. First he explained "in *Hodges v. Delta Airlines, Inc.*, the Fifth Circuit Court of Appeals undertook an *en banc* review of prior precedent and held, contrary to *Abdullah*, that the FAA – as amended by the Airline Deregulation Act ("ADA")[117] – preempts state regulation of aircraft "services" but not aircraft "operation."[118] The court refused to apply a federal standard of care as suggested by *Abdullah*, observing:

> Whatever the merits of the Third Circuit Court's novel suggestion that the federal standard of care should be applied in state personal injury actions brought by airline passengers, the defendant in the present case has not cited – nor has the court independently discovered – any cases from Texas or the Fifth Circuit in which courts have so held. Indeed, in *Continental Airlines, Inc. v. Kiefer*, the Texas Supreme Court appears to have rejected that notion.[119]

Second, in *Vinnick v. Delta Airlines* a passenger was injured when luggage fell on her from the overhead compartment and she filed a negligence lawsuit against an airline in California state court. The trial court dismissed the case, believing it was preempted under *Abdullah*, but the California Court of Appeals reversed this ruling, finding *Abdullah* "unpersuasive" and applying California's common carrier standard of care instead.[120] Notably, in reaching this conclusion the court isolated *Abdullah*:

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116 Wong v. Precision Airmotive, LLC, 2008 U.S. Dist. LEXIS 2201 (D. Conn. 2008); Monroe v. Cessna Aircraft Co., 417 F. Supp.2d 824 (E.D. Tex. 2006); Sheesley v. Cessna Aircraft Co., 2006 U.S. Dist. LEXIS 27133 (D.S.D. 2006); Skidmore v. Delta Airlines, 2000 U.S. Dist. LEXIS 18587 (N.D. Tex. 2000); Vinnick v. Delta Airlines, 93 Cal. App. 4th 859 (2001).

117 49 U.S.C. App. §§ 1301 *et seq.*

118 *Skidmore*, 2000 U.S. Dist. LEXIS 18587 at 6-7.

119 *Id.*

120 *Vinnick*, 93 Cal. App. 4th at 872-873.

> *Abdullah* does not seem to represent the prevailing view on the preemptive effect of the 1958 Act. For instance, *Cleveland v. Piper Aircraft Corp.* cited the savings clause of that act and found "this section shows that Congress did not intend to occupy the field of airplane safety to the exclusion of the state common law," citing numerous other cases which so held. ["Before Congress enacted the ADA, it was understood that the 'savings clause' preserved state law personal injury actions"].) *Abdullah* itself notes that it "depart[s] from the precedent established by a number of cases which hold that federal law does not preempt any aspect of air safety," citing several cases.[121]

Third, in *Sheesley v. Cessna Aircraft Co.*,[122] three consolidated lawsuits were filed against multiple defendants in a general aviation plane crash case. One of the issues Chief Judge Karen E. Schreier resolved was whether claims the plaintiffs filed against one of the defendants, FlightSafety, were preempted. She held they were not, first noting and explaining the split of authorities this paper describes, then choosing the *Cleveland* side of the dispute. Judge Schreier reasoned:

> The *Cleveland* court's reasoning must be considered in light of the later Supreme Court decision in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). In *Geier*, the Supreme Court considered the effect a savings clause and an express preemption provision had on application of implied, conflict preemption. The *Geier* decision dilutes[123] the strength of the Tenth

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121 *Id.* at 870 (citations omitted).

122 2006 U.S. Dist. LEXIS 27133 (D.S.D. 2006).

123 This may no longer be true in light of the Supreme Court's latest preemption decision. In *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (emphasis added) the Supreme Court applied similar reasoning to the Cleveland court's in an analogous context:

> If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, see § 521, 90 Stat. 574 (codified at 21 U.S.C. § 360k(a)), Congress has not enacted such a provision for prescription drugs. *See Riegel*, 552 U.S., at ___, 128 S. Ct. 999,

Circuit's argument based upon *expressio unius est exclusio alterius*, because the Supreme Court stated that an express preemption provision does not bar application of implied preemption principles to other parts of the same statutory or regulatory scheme.

Additionally, some courts have interpreted *Geier* as abrogating the Tenth Circuit's reliance on the savings clause as evidence that Congress did not intend to preempt the field of aviation safety. *See Curtin v. Port Auth. of N.Y. & N.J.*, 183 F. Supp. 2d 664, 670 (S.D.N.Y. 2002). The court, however, disagrees with this interpretation. First, the court notes that *Geier* involved conflict preemption, not field preemption. Additionally, *Geier* is completely consistent with the Tenth Circuit's ruling. *Geier* states that Congress's adoption of a savings clause does not limit application of ordinary implied preemption principles. Pursuant to ordinary preemption principles, however, field preemption only occurs when Congress intended to preempt an entire field. Indeed, the Court in *Geier* acknowledged that it look[s] for a specific statement of pre-emptive intent when it is claimed that the mere Volume and complexity' of agency regulations demonstrate an implicit intent to displace all state law in a particular area . . . so-called "'field pre-emption.'" **As recognized by the Tenth Circuit in *Cleveland*, the savings clause evidences Congress's intent to pre-**

1009, 169 L. Ed. 2d 892, 905 (2008) ("Congress could have applied the pre-emption clause to the entire FDCA. It did not do so, but instead wrote a pre-emption clause that applies only to medical devices"). **Its 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.** As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989) (internal quotation marks omitted).

> **serve state common law personal injury claims following adoption of the Act. The court concurs with the Tenth Circuit's analysis and finds that Congress did not intend to preempt the entire field of aviation safety.**
>
> Two other statutory provisions support the court's conclusion. The first is an insurance requirement that requires air carriers to procure insurance or to self-insure in order to pay "for bodily injury to, or death of, an individual or for loss of, or damage to, property of other, resulting from the operation or maintenance of the aircraft. . . ." 49 U.S.C. § 41112(a). This insurance requirement acknowledges Congress's intent that state tort claims survive adoption of the Act. . . .
>
> The other provision is GARA, which, as noted above, provides a rolling repose period barring state tort claims if the defective part or aircraft is more than 18 years old. Congress adopted GARA in 1994. In doing so, Congress explicitly limited GARA's preemptive effect to state laws granting a cause of action in contravention of the statute of repose. See GARA, § 2(d). GARA's legislative history indicates that Congress intended GARA to preempt state tort law in "one extremely limited instance," namely when the defective part was over 18 years old. H.R. Rep. No. 103-525(11), at 6 (1994), reprinted in 1994 U.S.C.C.A.N. 1644, 1648. Congress's adoption of GARA to preempt state tort law in this narrow instance indicates its recognition of the continued viability of state tort claim following adoption of the Act.[124]

Judge Schreier dealt decisively with *Abdullah*:

> The court disagrees with the Third Circuit's conclusion that Congress intended to preempt the field of aviation regulation by adopting the Act. First, in adopting the Act, Congress empowered the FAA to adopt minimum safety standards. See 49 U.S.C.

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[124] *Sheesley*, 2006 U.S. Dist. LEXIS at 63-66 (emphasis added) (citation omitted).

> § 44701. Minimum standards of aviation safety "do not preclude a finding of negligence where a reasonable person would take additional precautions." *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 363 (D. Kan. 1992). Additionally, *Abdullah* does not mention GARA and its narrow preemption of state tort law affecting aviation safety. In adopting GARA, Congress went to great lengths limiting its preemption of state tort law in a narrow set of circumstances. This would have been unnecessary if Congress had already preempted all state tort actions affecting aviation safety when it adopted the Act. Instead, as indicated above, Congress did not intend the Act to preempt the entire field of aviation safety. **After considering both *Cleveland* and *Abdullah*, this court finds *Cleveland* more persuasive and adopts it here.** See *Monroe*, 417 F. Supp. 2d 824, 2006 WL 385300, at *9 (stating that *Cleveland* is "better reasoned"); *Vinnick v. Delta Airlines, Inc.*, 93 Cal. App. 4th 859, 113 Cal. Rptr. 2d 471, 478 (Cal. Ct. App. 2001) (finding *Abdullah* unpersuasive). But see *Curtin*, 183 F. Supp. 2d 664.[125]

Fourth, in *Monroe v. Cessna Aircraft Co.*,[126] two people were killed in an airplane crash following a bird strike. Representatives of the estates sued the manufacturer claiming negligence in failing to adequately warn of bird strikes and the structural damage that can result, failing to design and manufacture the aircraft to reduce the potential for structural damage, and failing to design and manufacture the aircraft to mitigate the risk of landing with structural damage. Cessna sought dismissal of these state tort law claims on the ground that the entire field of aviation safety had been preempted by Congress. The district court began its analysis by looking for controlling authority and finding none. The court determined that neither the Fifth Circuit decision *Witty v. Delta Air Lines, Inc.*[127] nor the Supreme Court decision *Burbank v. Lockheed Air Terminal, Inc.*[128] held that federal law

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[125] *Id.* at 67-68 (emphasis added).
[126] 417 F. Supp.2d 824 (E.D. Tex. 2006).
[127] 366 F.3d 380 (5th Cir. 2004).
[128] 411 U.S. 624 (1973).

preempts the field of aviation safety.[129] Next the court examined the language and legislative history of the Federal Aviation Act of 1958 and the FAA regulations and found no clear intent by Congress to preempt the field.[130] The court then acknowledged the split among the circuit courts and examined the leading cases *Cleveland* and *Abdullah*. The court rejected *Abdullah*, finding that *Cleveland* was not only more factually similar but also better reasoned.[131] Specifically, the court noted that the Third Circuit appeared to misread the *Burbank* decision, whereas "in addressing Cessna's arguments related to the Act's legislative history and the Supreme Court's decision in *City of Burbank* above, the Court [in *Cleveland*] revealed significant shortcomings in the Third Circuit's analysis."[132]

Finally in *Wong v. Precision Airmotive, LLC*,[133] a pilot injured in a crash sued the manufacturer of the aircraft's allegedly defective carburetor. The manufacturer argued based upon *Abdullah* that the plaintiff's state law claims were preempted. The court rejected the argument, relying instead upon the finding in *Cleveland* and *Public Health Trust* that "no 'clear and manifest' proof of Congressional intent to preempt existed."[134]

V. *Abdullah* Provides Convenient Cover for Courts Inclined to Lower the Airlines' Standard of Care

Replacing a state law standard of care with a federal standard raises the question: how do the standards differ? Our view is that, at least as to airlines, the federal standard of care is actually higher than that of any state: "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest."[135] We believe, however, because *Abdullah* fails to mention this provision of the Federal Aviation Act while suggesting a lower federal standard governs the point has been lost by too many courts.[136] The federal standard *Abdullah* proposes is not well developed.

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129 417 F. Supp.2d at 828.
130 *Id.* at 830.
131 *Id.* at 835.
132 *Id.*
133 2008 U.S. Dist. LEXIS 2201 (D. Conn. 2008).
134 *Id.* at 7.
135 49 U.S.C. §§ 44701(d)(1)(A) & 44702(b)(1)(A).
136 In *Barber v. United Airlines, Inc.*, 17 Fed. Appx. 433 (7th Cir. 2001), the court acknowledged the issue but found it unnecessary to resolve:

Traditionally, the states have held airlines to the heightened standard of care applied to common carriers for hire. This standard has been described generally:

> Common carriers who enter into an undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care; and this has been described as 'the utmost caution characteristic of very careful prudent men' or 'the highest degree of vigilance, care and precaution.'[137]

For example, in deciding against preemption in *Vinnick*, the Court of Appeal of California preserved the application of California's common carrier standard: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."[138]

This elevated standard contrasts with the general standard the *Abdullah* court states applies across the board in the absence of a more specific regulation: "No person may operate an aircraft in a

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> On appeal, Barber also argues that the district court improperly determined the appropriate standard of care. Prior to trial, the district court concluded that 14 C.F.R. § 91.13(a) establishes the standard of care at issue: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." Barber asserts that the appropriate standard is set forth in 49 U.S.C. § 44701(1)(A), which provides "the duty of an air carrier [is] to provide service with the highest possible degree of safety in the public interest." Barber also cites the standard of care section in Section 44702 which recognizes "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44702. Thus, according to Barber, United Airlines owed her a duty of the "highest possible" care. We need not decide this issue today, however, because no matter how high the standard of care, as discussed above, Barber has failed to present sufficient evidence to support her claim against United Airlines under any standard of care because there is no evidence from which a reasonable jury could conclude that United Airlines could have foreseen (and thus warned about or avoided) the turbulence.

Id. at 440.

137 W.P. KEETON, PROSSER AND KEETON ON TORTS section 34 (5th ed. 1984) (citations omitted).

138 93 Cal. App. 4th at 861 (citing Cal. Civ. Code § 2100).

careless or reckless manner so as to endanger the life or property of another."[139]

The "careless or reckless" standard may require some analysis to determine its precise contours, but it cannot be seriously contended that it is the same as the California standard, which is an example of the traditional common law standard most states apply in similar circumstances. Indeed, the *Abdullah* court seems to concede this point.[140] Put another way, under *Abdullah* airlines and their personnel may be held by some courts to a lower safety standard than operators of trains and buses. This cannot be what Congress intended when it enacted the FAA.

Not only does the "careless or reckless" standard represent a downward departure from the heightened standard traditionally applied to airlines, it also arguably conveys a lower standard than that used in run-of-the-mill negligence claims. The standard of conduct routinely applied in negligence cases is "that of a reasonable man under like circumstances."[141] Carelessness and recklessness may imply conduct that is worse than failure to comply with the reasonable man standard. Certainly recklessness denotes conduct that is substantially worse than simple negligence and contains elements of deliberate or conscious disregard for the safety of others.[142] Carelessness likewise may convey a relaxed or cavalier attitude toward safety that could lead jurors to conclude that an honest mistake by a well-meaning flight crew does not satisfy the standard and is not actionable.

The real world consequences of trading state law standards for the lower federal standard *Abdullah* proposes can be seen in the results of some of the cases applying the *Abdullah* rationale. For example, in *Greene*[143] the plaintiff contended that a reasonable care standard required the defendant manufacturer to maintain a database of manufacturing defects for its gyroscopes. The court ruled the state law standard was preempted by federal law and that the plaintiff was therefore required to demonstrate that the defendant breached a federal statutory or regulatory requirement.

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139 14 C.F.R. § 91.13(a).

140 181 F.3d at 374.

141 RESTATEMENT (SECOND) OF TORTS § 283 (1965).

142 *Id.* § 500, comment (a).

143 Greene v. B.F. Goodrich, 409 F.3d 784 (6th Cir. 2005)

Since there is no federal regulation or statute requiring this, the case was dismissed with prejudice.[144]

Even more troubling is the result in *Landis v. U.S. Airways*.[145] In that case the plaintiff was injured when the aircraft shook violently as it pushed back from the gate. She alleged that the airline failed to act appropriately to avoid the incident even though a crew member was aware of a problem with the nose gear. Plaintiff based her claim on violations of a state law due care standard of care, and also alleged generally that the airline was "careless and reckless." The court, following *Abdullah*, first found that the plaintiff's reliance upon the state standard of care was misplaced as the standard had been preempted by federal law. The court then went further, dismissing the case despite the plaintiff's allegations of careless or reckless conduct by the airline. The court ruled that an allegation of careless or reckless conduct is not enough to sustain a claim, but rather that "the specific federal standard of care alleged to have been violated, *and which may have contributed to the careless and reckless operation of the aircraft*, must also be set forth."[146]

The results in cases like *Greene* and *Landis* significantly undermine the notion that the "careless and reckless" provision left no gaps in the federal standard of care to be filled by state law. These decisions show not only that the *Abdullah* court's rationale was flawed, but that its new approach to preemption in aviation tort cases has made it more difficult for plaintiffs to prove deviations from the standard of care, effectively weakening aviation safety standards.

VI. *Conclusion*

The decision in *Abdullah* does not further Congressional intent to promote aviation safety and protect lives. On the contrary, the decision frustrates this purpose by weakening airline safety standards through creating a false federal ceiling where a floor was intended instead. *Abdullah* does not withstand analytical scrutiny and the policy it promotes is the antithesis of what Congress intended. Accordingly, courts faced with resolving whether there is implied federal preemption over the field of aviation safety in

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144 *Id.* at 794.
145 2008 U.S. Dist. LEXIS 21300 (W.D. Pa. 2008).
146 *Id.* at 8 (emphasis added).

the context of personal injury and wrongful death cases should follow the lead of the Tenth Circuit in *Cleveland*, and follow the lead of its progeny, now representing the majority view, that reject *Abdullah* and adhere to the pre-*Abdullah* rule in favor of state standards of care.