No. 98-1811

IN THE SUPREME COURT OF THE UNITED STATES

ALEXIS GEIER, et al.,
Petitioner

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
Respondent

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed November 19, 1999

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On Writ of Certiorari to the
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District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law and policy center with supporters in all 50 states.[1] WLF devotes substantial resources to defending and promoting free enter-

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

prise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this and other state and federal courts in cases involving preemption issues, seeking to point out the economic inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996); *International Assoc. of Independent Tanker Owners v. Locke,* No. 98-1706 (dec. pending).

WLF is particularly concerned that the American economy suffers, and public safety or health can be jeopardized, when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that obstructs or frustrates the objectives or operation of specific federal regulatory programs, such as the National Traffic and Motor Vehicle Safety Act ("Safety Act") at issue here.

WLF supports each of the arguments raised by Respondents in their brief. WLF is filing separately in order to focus on arguments raised in the Brief *Amicus Curiae* of Robert B. Leflar, Robert S. Adler, Michael Green, and Joseph A. Page (the "Leflar Brief"). WLF strongly disagrees with the Leflar Brief's proposal that the Court's long-standing preemption jurisprudence be overturned and replaced with a regime under which implied conflict preemption would be "narrowly circumscribed." Leflar Br. 6. WLF submits this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement of the Case contained in Respondents' Brief.

In brief, Petitioner Alexis Geier was injured while driving a 1987 Honda Accord -- which did not have an airbag -- when it crashed into a tree. Petition Appendix ("Pet. App.") 2. She filed suit against Respondents American Honda Motor Company, *et al.* ("Honda"), alleging that the car was defectively designed because it did not include an airbag. *Id.*

The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's grant of summary judgment to Honda, finding that Geier's design defect claims were impliedly preempted by federal law. Pet. App. 1-16. The appeals court held that allowing those claims to continue would conflict with federal law by frustrating the implementation of specific passive restraint system policies adopted by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Safety Act. *Id.* at 15-16.

Geier thereafter filed a petition for a writ of certiorari, noting that while the decision of the appeals court was consistent with the decisions of other federal appeals courts, it conflicted with the decisions of several state supreme courts on this precise preemption issue. The Court granted the petition on September 10, 1999.

SUMMARY OF ARGUMENT

Preemption of state tort law is ultimately an issue of congressional intent. Once Congress's preemptive intent has been identified, it is not the role of the courts to construe preemption provisions broadly or narrowly, based (for example) on the types of policy considerations identified in the Leflar Brief. Because (as demonstrated by Honda in its brief) tort suits based on "no airbag" claims stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, such suits are preempted by operation of the Supremacy Clause of the Constitution.

In any event, the policy arguments raised in the Leflar Brief are not well-founded. The authors of the Leflar Brief assert that a finding of preemption in this or similar cases would undermine the viability of state tort law. But that assertion overlooks the narrowness of the preemption argument being made by Honda in this case. Honda limits its argument to those few cases (as here) in which allowing tort suits to go forward would conflict with motor vehicle safety standards adopted by NHTSA. For example, Honda does not allege that federal law preempts claims that installed airbags were defectively designed, because no NHTSA standard grants manufacturers the option of adopting a particular airbag design.

Nor is there any merit to the Leflar Brief's contention that common-law tort suits can address product liability concerns more efficiently and fairly than can federal administrative action. Indeed, the available evidence suggests just the opposite: federal administrative agencies can resolve safety issues more swiftly and have resources

available to them (including, *e.g.*, expertise, experience, information-gathering powers, national perspective, and funding) that dwarf the resources available to any trial factfinder. The Leflar Brief also asserts that common-law tort actions serve interests not served by federal regulatory programs -- in particular, compensation of the injured. But to the extent that such actions interfere with federal policy on airbag installation, preemption is clearly mandated under existing case law, regardless whether the actions serve interests distinct from those served by the federal programs.

Finally, there is no basis for the Leflar Brief's argument that implied conflict preemption should be limited to those cases in which a federal agency has conducted notice-and-comment proceedings and has affirmatively concluded that preemption is warranted. The argument overlooks a key aspect of federal preemption: it is Congress and the operation of the Supremacy Clause that determine the preemptive scope of federal law. Once NHTSA has established a federal motor vehicle safety standard, it is not NHTSA's role to determine whether to permit states to enforce laws that conflict with that standard.

ARGUMENT

I. PREEMPTION OF STATE TORT LAW IS ULTIMATELY AN ISSUE OF CONGRESSIONAL INTENT, AND AN INTENT TO PREEMPT GEIER'S ACTION CAN BE INFERRED HERE

Whether the federal government has preempted an assertion of regulatory authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As

this Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent . . . ." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) ("any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose.*'") (emphasis in original) (quoting *Cipollone*, 505 U.S. at 530 n.27 (opinion of Stevens, J.)).

In other words, it is the role of Congress, not a court, to define how broad or narrow a federal statute's preemptive reach should be. Of course, the courts look to a variety of sources[2] and employ a variety of interpretive techniques in attempting to discern what Congress intended. But once Congress's preemptive intent has been identified, it is not the role of the courts to construe preemption provisions broadly or narrowly, based (for example) on the types of policy considerations identified in the Leflar Brief. A court's "task in all pre-emption cases is to enforce the 'clear and manifest purpose of Congress.'" *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rice v. Santa Fe Elevator Corp.*, 331

[2] "Congress' intent, or course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S. at 486 (quoting *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

U.S. 218, 230 (1947)). That is exactly what the D.C. Circuit did here.[3]

Congress's intent to preempt state and local law may be explicitly stated in its statutory language or implicitly contained in the statute's structure or purpose. *Cipollone*, 505 U.S. at 516. State law is impliedly preempted if: (1) it actually conflicts with federal law; or (2) federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (citations omitted). State law "actually conflicts" with federal law "*either* because compliance with both federal law and state regulations is a physical impossibility, *or* because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (emphasis added and internal quotations omitted).

The D.C. Circuit held that Petitioners' tort action is barred under the second prong of conflict preemption -- that is, the tort action "stands as an obstacle to the

[3] In Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After Medtronic*, 64 Tenn. L. Rev. 691, 694-95 (1997), two of the authors of the Leflar Brief denigrate this Court's repeated emphasis on the importance of congressional intent in analyzing preemption issues. They refer to it as a "mantra" -- "a formulaic incantation of black-letter law" that "[e]very court addressing a preemption recites." *Id.* at 694. WLF respectfully disagrees. It is beyond dispute that when Congress chooses to preempt state and local regulation of commerce, it is entitled to do so under the Supremacy Clause. U.S. Const., art. VI, cl. 2; *Cipollone*, 505 U.S. at 516. Accordingly, courts have *no* legitimate basis upon which to determine preemption issues other than by examining congressional intent.

accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 13-14. The appeals court held that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department [of Transportation's] policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems," *id.* at 15, and that Congress (through the Safety Act) had authorized the Department to adopt such policies. *Id.* at 2. Honda's brief thoroughly explains why Petitioners' action would (if allowed to go forward) "frustrate" federal policy, and thus WLF will not repeat that explanation here.

The Leflar Brief does not seriously dispute the appeals court's "frustrat[ion]" finding. Rather, it advances several policy arguments in support of its contention that the bar should be raised for defendants asserting that state tort actions filed against them are preempted.[4] Those policy

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[4] The Leflar Brief asserts:

> Reasonable minds may differ on the merits of NHTSA's choice of method. The question before the Court is not whether NHTSA's phase-in strategy was justified. It is whether damage awards would *seriously disrupt* the federal regulatory program. The Court of Appeals failed to address this question.

Leflar Brief 16 (emphasis added).

For the past 60 years, however, the applicable test, often repeated by this Court, has been whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)). It appears that Prof. Leflar, *et al.*, in their efforts to narrowly circumscribe implied conflict preemption, simply have invented their own test, which would preclude preemption even

(continued...)

arguments are not well-founded. More importantly, those arguments simply are not relevant to the issue before the Court: whether it can reasonably be inferred that Congress intended to preempt torts actions such as Petitioners'.

II. A FINDING OF PREEMPTION UNDER THE NARROW CIRCUMSTANCES OF THIS CASE DOES NOT UNDERMINE THE VIABILITY OF STATE TORT LAW

The Leflar Brief's assertion that "implied preemption in products liability cases should be narrowly circumscribed" (Leflar Br. 6) is premised on the authors' view that a finding of preemption in this or similar cases would undermine the viability of state tort law. They assert that "a narrowly cabined implied preemption doctrine" is necessary to "allow[] for the *coexistence* of federal administrative regulation and state tort law." *Id.* (emphasis added). They assert, "Congress assumed the *continued existence* of state tort law" when it enacted consumer protection laws in the 1960s and 1970s, and "*[p]ermitting this traditional tort regime to continue* can partially ameliorate various limitations of administrative agencies." *Id.* (emphasis added).

The Leflar Brief is starting from a faulty premise: its authors are simply incorrect in assuming that a finding that Petitioners' tort claims are preempted would in some way undermine the "traditional tort regime." To the contrary, the appeals court's holding has no effect on many other types of potential design-defect claims that could be asserted

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[4](...continued)
where, as the court of appeals found here, state law would frustrate a federal agency's *full* implementation of a federal statute.

against automobile manufacturers, because it is not often true that such claims stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Indeed, while the federal appeals courts are in agreement that "no airbag" claims (such as those raised by Petitioners) are preempted by the Safety Act, they have only rarely found conflict preemption with respect to other types of product liability claims involving airbag safety. For example, in *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), the Fifth Circuit rejected a defense that the Safety Act preempted a claim that an air bag was defectively designed. The manufacturer had elected to install an airbag in the plaintiff's car; the plaintiff alleged that the airbag was defective because it failed to perform in a manner that the plaintiff thought reasonable. The Fifth Circuit held that allowing the claim to go forward would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because Congress and NHTSA (when it adopted Standard 208, the same motor vehicle safety standard at issue in this case) did *not* grant a "safe harbor" to manufacturers that would allow them to design airbags that met but did not exceed federal safety standards. *Perry*, 957 F.2d at 1265. The court explained that allowing tort liability based on defective airbag design "would not remove or require any particular choice, or otherwise frustrate 'flexibility' that the federal scheme provides." *Id.*

In contrast, Honda has convincingly demonstrated that permitting Petitioners' claims to go forward *would* frustrate federal policy by denying to manufacturers an option (not installing airbags in all cars) expressly granted them by

Standard 208. Moreover, NHTSA established that policy in furtherance of the Safety Act's goal of maximizing automobile safety.[5] The "traditional tort regime" is in no way undermined by preempting tort actions in those unusual situations where (as here) the federal government has determined that overall public safety is enhanced if use of unproven safety devices is phased in over a period of years.

The Leflar Brief's assertion -- that preemption of tort claims must be narrowly confined in order to prevent the "traditional tort regime" from being undermined -- is belied by the history of this Court's treatment of such preemption claims. The Court has not adopted any overarching presumptions regarding whether state tort claims should or should not be deemed preempted by federal laws that do not state explicitly whether such claims are to be preempted. Rather, the Court has adopted a case-by-case approach that examines whether, in light of the federal statutory framework, Congress should be deemed to have preempted each of the plaintiff's causes of action. That case-by-case approach is well illustrated by *Cipollone*, where the Court emphasized, "We must look to each of petitioner's common-law claims to determine whether it is, in fact, preempted." *Cipollone,* 505 U.S. at 523 (plurality opinion). After examining Congress's purposes in adopting the Public Health Cigarette Smoking Act of 1969, the Court determined that the 1969 Act preempted the plaintiff's common-law claims based on failure to warn but not those claims based on express warranty, fraudulent

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[5] For example, federal officials determined that a policy of phasing in airbags, rather than mandating their immediate installation, would maximize safety by encouraging "innovation in occupant-protection systems." *See* 49 Fed. Reg. 28962, 29001 (July 17, 1984).

misrepresentation, or conspiracy. *Id.* at 530-31 (plurality opinion); *id.* at 554 (Scalia, J., concurring in the judgment in part and dissenting in part). Similarly, the Court in *Medtronic* did not base its holding on any all-encompassing theory regarding the propriety of preempting common-law tort actions; rather, the Court engaged in a claim-by-claim analysis of whether Congress had intended to preempt the plaintiffs' negligent design, negligent manufacture, and failure-to-warn claims. *Medtronic,* 518 U.S. at 492-502.

The Court has, on a number of occasions, held that common-law tort actions are preempted by the federal statute at issue.[6] Yet despite these holdings, it cannot

[6] *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (preemption of negligence claim that a conductor operated a train at an excessive speed); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (preemption of failure-to-warn claim and certain fraudulent misrepresentation claims pertaining to adequacy of warnings regarding dangers of cigarette smoking); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (preemption of employee's state law wrongful discharge claim based upon employer's alleged attempt to avoid payment into a pension plan); *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990) (preemption of claims that union negligently conducted mine safety inspections in a wrongful death action); *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) (preemption of state law that held government contractors liable for design defects in military equipment under certain circumstances); *International Brotherhood of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987) (preemption of state law tort claim that a union breached its duty of care to provide a union member with a safe workplace); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (preemption of tort claims arising from employer's insurer's termination of disability benefits); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (implied preemption of common-law nuisance claims which could interfere with operation of federal environmental program); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (preemption of state-law tort claim involving bad-faith handling of an insurance claim); *San Diego Bldg.*
(continued...)

seriously be contended that the common-law tort system has been undermined or that tort suits no longer are an effective means of providing compensation to those wrongfully injured. Rather, the cited cases are simply a reflection of Congress' decision, in a limited number of instances, to bar tort suits that threaten to interfere with the accomplishment and execution of the full purposes and objectives of Congress. Similarly, given the Leflar Brief's concession that Congress and NHTSA's purposes and objectives included "a phase-in strategy" for airbag installation (Leflar Br. at 16), there can be no justification for permitting a common-law tort suit that would conflict with that phase-in strategy. But given the limited nature of Honda's preemption claim, a holding that Petitioners' tort suit is preempted will not undermine "the traditional tort regime."

[6](...continued)
Trades Council v. Garmon, 359 U.S. 236 (1959) (preemption of damages claim based on union picketing). Indeed, the RESTATEMENT (THIRD) OF TORTS (1998) recognizes that federal law can preempt tort claims:

> [I]n federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, *including state tort law*, with the federal statute or regulation. . . . Judicial deference to federal product safety statutes or regulations occurs . . . because, when a federal statute or regulation is preemptive, the Constitution mandates federal supremacy.

RESTATEMENT, § 4 cmt. e (emphasis added).

III. THE CONTENTION THAT PRODUCT SAFETY IS MORE FAIRLY DEALT WITH THROUGH COMMON-LAW ACTIONS THAN THROUGH FEDERAL ADMINISTRATIVE ACTION IS MERITLESS, IN ADDITION TO BEING IRRELEVANT

The Leflar Brief cites several "prudential considerations" in support of its contention that implied preemption of common-law actions be given a "narrow scope." Leflar Br. 12. Chief among those considerations is the authors' claim that state tort systems are less susceptible to political corruption than are federal administrative agencies. They assert:

> Federal agencies such as NHTSA suffer from various limitations in carrying out their charges, limitations which the coexistence of the tort system can partially ameliorate. One such limitation arises from agencies' susceptibility to political pressure, as the tortured history of airbag regulation demonstrates all too well. . . . Agencies may issue and then withdraw safety standards depending on the political winds, but if the tort system is in place the steady pressure of potential liability will provide a constant background incentive for the achievement of reasonable safety.

Leflar Br. 12-13.

There is simply no empirical evidence to support the Leflar Brief's contention. Indeed, what evidence there is points in precisely the opposite direction. For example, state courts, where much products liability litigation is brought, are themselves subject to considerable political

influences -- primarily because "[p]opular election and retention of state judges have been integral components of the American legal and political systems since the early nineteenth century." Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process,* 31 Harv. C.R.-C.L. L. Rev. 187 (1996); *see also* Robert A. Carp and Ronald Stidham, Judicial Process in America, 263-64 (4th ed. 1998). Political pressures on state trial and appellate judges who must run for election or re-election include, but are not limited to, the need to raise campaign funds and defend their own judicial decisions. Wiener, *supra;* Carp & Stidham, *supra.*[7]

Another supposed "limitation" of federal administrative actions is their "protracted" nature, which allegedly allows technological progress to "race ahead of the agency's often deliberate pace." Leflar Br. 13. But however dissatisfied the authors of the Leflar Brief may be with the pace of federal administrative agencies, they cannot seriously contend that tort litigation results in safety issues being resolved more quickly. Most state and federal trial court

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[7] Moreover, numerous commentators would take issue with the Leflar Brief's contention that common-law product liability actions are effective for achieving "reasonable safety." Leflar Br. 13. For example, critics from all ends of the political spectrum agree that, in addressing asbestos-related claims, the tort system has failed to achieve either "reasonable safety" or just compensation for those injured. *See Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2302 & n.1 (1999) (summarizing "[t]he most objectionable aspects" of the "elephantine mass of asbestos cases"); *Asbestos Litigation Problem*, Hearing of the Subcomm. on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, 106th Cong. (1999) (Testimony of Prof. Michael Green [one of the authors of the Leflar Brief]), available at 1999 WL 27595226 (arguing that "[a]sbestos compensation through the tort system is broken – seriously, irreparably, and incontrovertibly").

dockets are jammed, resulting in years of delay before a product liability case can be tried.[8] Partially as a result of long delays, less than 3% of state court product liability cases ever go to jury trial, and less than 1% go to bench trial. Brian Ostrom and Neal Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project,* National Center for State Courts (1996), at 34. Instead, the vast majority are settled or dismissed. *Id.* Indeed, as this very case shows, whether the product used by a plaintiff was defective can take years to resolve: Ms. Geier was injured more than seven years ago, yet her case has yet to go to trial.

The Leflar Brief also faults federal administrative agencies for their allegedly "limited agency resources and attention spans." Leflar Br. at 13. The brief alleges that agencies may fail to address "[i]nformation about newly-discovered product risks or more effective safety designs" because the agency has other, "more compelling" priorities. *Id.* But if NHTSA has not addressed a particular safety concern, the issue of federal preemption never arises; there can be no conflict between state regulation and a federal

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[8] *See generally* Donovan Leisure Newton & Irvine ADR Practice Book, 605 PLI/Lit 947, 949 (1999) ("Perhaps the most descriptive words for present day civil litigation are 'glut' and 'stagnation'. . . [A] litigant who gets a significant case to trial within three to four years is doing very well; often it takes eight to ten years or more."); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 Hofstra L. Rev. 867 (1996) ("Delay and backlogs are regular features of American Justice."); Brian Ostrom and Neal Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project,* National Center for State Courts (1996), at 35 (presenting statistics on the length of time from filing to disposition of state court product liability actions).

product-safety policy if the federal government has not developed a policy with respect to a specific safety concern. Moreover, the complaint regarding "limited agency resources" is wholly misplaced within the context of this case: NHTSA has devoted more resources to Standard 208 than to any other motor vehicle safety standard in its history.

Furthermore, the Leflar Brief provides no support for its assertion that federal agencies are inferior to tort suits in their fact-finding abilities. NHTSA, for example, has resources (including, *e.g.*, expertise, experience, information-gathering powers, national perspective, and funding) that dwarf those of any trial jury. NHTSA has performed thousands of crash tests in order to investigate air-bag safety; no jury can begin to replicate the expertise thus acquired. Indeed, the Leflar Brief acknowledges that federal agencies regulate product safety "more expertly" than juries. *Id.* at 18. *See also* Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 Notre Dame L. Rev. 30 (1986) ("a jury inherently lacks the expertise of NHTSA in evaluating . . . information. . . . Even the best trial cannot present a jury with the range of information available to NHTSA.").

In any event, all of these alleged "prudential considerations" for limiting the scope of implied federal preemption are largely beside the point. Congress and NHTSA adopted a policy with respect to installation of airbags; given the evidence that common-law tort actions undercut that policy, the actions are impliedly preempted -- regardless whether the Court is inclined to credit any of the prudential arguments raised in the Leflar Brief. Moreover, there is no

evidence that Congress itself thought that product safety could be dealt with more fairly through common-law actions; indeed, it is highly unlikely that Congress would deem the federal government institutionally incapable of addressing such issues as fairly as state courts. The relevant inquiry in this case is whether Congress intended to impose limitations on the preemptive scope of its own federal policies. In the absence of such evidence, there is no reason to consider any of the "prudential considerations" raised in the Leflar Brief.

Finally, the authors of the Leflar Brief assert that common law tort actions serve many interests not served by federal regulatory programs -- including compensation of the injured, spreading the risk of loss throughout the entire population, and upholding consumer expectations. Leflar Br. 16-19. They assert that those interests are "worthy of respect in our federal system" and thus should be subject to federal preemption only in the rarest of circumstances. *Id.*

But to the extent that common-law tort actions undercut federal policy on air-bag installation, preemption is clearly mandated under existing case law, regardless whether the tort actions serve interests distinct from those served by the federal programs they undercut. The Court has stated repeatedly that tort actions that undercut federal policy are no less subject to preemption than "positive" actions under state law -- such as statutes or written regulations issued by a state agency. As the Court explained in *Cipollone:*

> [S]tate regulation can be as effectively asserted through an award of damages as through some other form of preventive relief. The obligation to pay compensation

> can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Cipollone, 505 U.S. at 521 (plurality opinion) (citation omitted); *accord, id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).

A majority of the Court reaffirmed that principle in *Medtronic*; as Justice Breyer explained, in parsing the preemption language of the Medical Devices Amendments of 1976:

> One can reasonably read the word "requirement" as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law. . . . [O]rdinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action.

Medtronic, 518 U.S. at 504-05 (Breyer, J., concurring in part and concurring in the judgment); *accord, id.* at 512 (O'Connor, J., concurring in part and dissenting in part).

Petitioners argue that a judgment entered in 1999 will not retroactively affect how automobile manufacturers actually responded to Standard 208 in their production of 1987 model cars (such as Petitioners' 1987 Honda Accord). That is an unprincipled view of preemption. Tort law is premised on a state-law duty -- here, alleged to consist of a duty to install airbags in any 1987 vehicles. NHTSA could not have implemented its phase-in policy, which was

dependent on achieving a variety of restraint designs, if state law imposed that duty. Had they believed that such a duty existed, manufacturers (contrary to Congress's and NHTSA's policy goal) would have rushed to install airbags in all new cars.[9] Moreover, the federal government would have a much more difficult time obtaining compliance with future federal policies regarding product safety if the Court were to find against federal preemption in this case.

In sum, as the Court made clear in both *Cipollone* and *Medtronic*, states may not avoid the preemptive effect of federal law by regulating through their common law rather than through statutes or administrative regulations. In either circumstance, state regulation is impliedly preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress -- regardless whether (as Petitioners contend) common-law tort actions deal with product safety issues more fairly than do federal administrative agencies and regardless whether they serve interests not served by federal administrative regulation.

[9] The authors of the Leflar Brief suggest that manufacturers who followed the federal phase-in policy did so because they had decided to assume "the risk of later paying tort damages." Leflar Br. 7. Given the catastrophic effect that tort damage awards can have on even the largest corporations, it is unrealistic to think that any manufacturer would have assumed such a risk voluntarily unless it had assured itself that adherence to federal policy protected it from common-law tort liability.

IV. FEDERAL AGENCIES SHOULD NOT BE REQUIRED TO PREDICT WHAT UNKNOWN FUTURE TORT CLAIMS MIGHT CONFLICT WITH THE STATUTES, REGULATIONS, AND PROGRAMS THEY ADMINISTER

The authors of the Leflar Brief also propose that the scope of implied conflict preemption be constricted in one other significant way. They argue that claims under the second prong of implied conflict preemption (preemption of state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress) should be rejected "unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals." Leflar Br. 22.[10] They assert that such notice-and-comment procedures would ensure that preemption would "be tested by public debate in the political process, rather than imposed on the nation by the federal judiciary." *Id.*

The argument is without merit. WLF notes initially that the Leflar Brief cites no statutory authority for this notice-and-comment requirement. Nothing in the federal Administrative Procedure Act (APA), for example, requires public notice and comment regarding the possible preemptive effect of statutes or regulations on state tort claims. *See* 5 U.S.C. § 553. Thus, it is the authors of the Leflar Brief, not

[10] They also assert that the Court should entirely abandon this second prong of conflict preemption; they argue (without citing case authority) that implied preemption should be limited to cases in which compliance with both federal law and state regulation is a physical impossibility (preemption in such cases is referred to by the Leflar Brief as "dictate preemption"). Leflar Br. 14.

Respondents, who are proposing that the federal judiciary create a new procedural rulemaking requirement and impose it on federal agencies. This Court has stated in no uncertain terms that it is not the role of the federal courts, acting on their own, to create rulemaking procedures utilized by federal agencies. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-45 (1978).

Furthermore, the Leflar Brief's proposal is hopelessly unworkable. Even assuming that a federal agency wanted to undertake the notice-and-comment procedure that the Leflar Brief suggests, the agency could not possibly identify, in advance, every possible type of federally conflicting tort claim that some plaintiff in some case at some point in the future might attempt to assert under the current (or future) law of any of the 50 states. There is little to recommend a procedural rule that would allow common-law tort actions to go forward even when (as Honda has demonstrated here) they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal safety policy, simply because an administrative agency failed to anticipate that such actions might be brought.

Finally, the Leflar Brief's argument overlooks a key aspect of federal preemption: it is Congress and the operation of the Supremacy Clause that determine the preemptive scope of federal law. Once NHTSA has established a federal motor vehicle safety standard, it is not NHTSA's role to determine whether to permit states to enforce laws that conflict with that standard. *See Medtronic*, 518 U.S. at 512 (O'Connor, J. concurring in part and dissenting in part).[11] By authorizing NHTSA to issue nationwide vehicle safety standards, Congress preempted all state laws that conflict with any properly promulgated standards. Accordingly, NHTSA has no authority to conduct notice-and-comment proceedings that would purport to second-guess the preemptive scope attached by Congress to NHTSA standards.

[11] The Safety Act plainly authorized NHTSA to establish its passive restraint system policy by issuing Standard 208, and WLF does not understand Petitioners to contend otherwise.

CONCLUSION

For the foregoing reasons and those presented in Respondents' brief, *amicus curiae* Washington Legal Foundation respectfully requests that the decision of the court below be affirmed.

Respectfully submitted,

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