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 PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Filed November 19, 1999

QUESTION PRESENTED

Whether petitioners' common law claim that respondents' 1987 Honda Accord was defectively designed because it was not equipped with an airbag is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 208.

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INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 124 corporate members representing a broad cross-section of American industry. A list of the corporate membership of PLAC is attached as an appendix to this brief. PLAC's primary purpose is to file briefs as *amicus curiae* in cases raising issues that affect the development of product liability law.

PLAC's corporate members include manufacturers and distributors whose products are regulated by the National Traffic and Motor Vehicle Safety Act ("Safety Act") and the Federal Motor Vehicle Safety Standards ("FMVSS's") issued by the United States Department of Transportation ("DOT"). Accordingly, PLAC has a strong interest in assisting the Court in defining the scope of federal preemption under the Safety Act and FMVSS 208. PLAC has filed *amicus* briefs in numerous other cases in this Court involving preemption under a variety of federal statutes, including the Safety Act. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners contend that the 1987 Honda Accord was defectively designed by respondents (collectively "Honda") because the automobile did not have a driver-side airbag.[2] Petitioners brought a common law product liability action seeking to impose potentially massive liability on Honda based on this contention. But both the district court and the court of appeals dismissed their action as preempted by federal law.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3. In compliance with Rule 37.6, PLAC states that this brief was not written in whole or in part by counsel for a party, and no person or entity, other than PLAC or its members, made a monetary contribution to the preparation or submission of this brief.

[2] Petitioners assert only a "no airbag" claim; it is their exclusive claim of defect (see, *e.g.*, Pet. Br. 44 (petitioners "attempt to hold Honda liable for failing to install an airbag")). They do not contend that any aspect of the occupant restraint system in the 1987 Accord was defective.

Like every other federal court of appeals to consider the issue,[3] the D.C. Circuit held that petitioners' common law "no airbag" claim was preempted by the Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169),[4] and FMVSS 208, 49 C.F.R. § 571.208. In reaching this conclusion, the court of appeals relied on the lengthy and "tortured" history of FMVSS 208, the occupant restraint standard, which showed that in 1984 the Secretary of Transportation had "explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety" (Pet. App. 14). The court reasoned (*id.* at 15):

> [A]llowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems.

In attacking the D.C. Circuit's holding, petitioners and their *amici* ask this Court to turn federal preemption law on its head. They begin with a diversion, arguing that their common law "no airbag" claim is not *expressly* preempted by the Safety Act. Of course, the court of appeals affirmatively declined to resolve this issue and based its holding exclusively on an *implied* preemption analysis (Pet. App. 12). It is a telling sign of the weakness of petitioners' implied preemption argument that they devote so much attention (see Pet. Br. 14, 18-34) to an issue that was not decided below.

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[3] See *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The Ninth Circuit in *Harris* v. *Ford Motor Co.*, 110 F.3d 1410 (1997), held that "no airbag" claims are expressly preempted by the Safety Act, without reaching the question of implied preemption. Thus, the six federal courts of appeals that have addressed the issue have all held that "no airbag" claims are preempted.

[4] For ease of reference, we cite to the prior codification of the Safety Act, which was cited by the courts below and by petitioners and their *amici*.

When they ultimately reach the implied preemption question, petitioners seek to radically transform federal preemption law. They first assert that there can be no implied conflict preemption under the Safety Act. But this Court rejected that very argument in *Myrick*, 514 U.S. at 285, a case in which the Court engaged in implied preemption analysis under the Act.

Petitioners finally contend, in the face of the Supremacy Clause, U.S. Const. art. VI, cl. 2, and this Court's longstanding precedents, that they should be allowed to proceed with their state law claim that the 1987 Honda Accord was defective because it lacked an airbag — even though the automobile's occupant restraint system (which consisted of lap and shoulder belts, and a warning system to indicate an unfastened belt (Pet. 3; Pet. App. 14)) fully satisfied FMVSS 208 and advanced the government's policy of promoting a variety of occupant protection devices in 1987-model-year automobiles.

Petitioners' common law theory of liability would severely impair a safety program that the federal government developed with unprecedented thoroughness over a period of 30 years. During much of that time, and in particular when the 1987 Accord was manufactured, Congress and DOT concluded that automotive safety would be *undermined* by depriving manufacturers of design flexibility in occupant restraint systems. Thus, as the government has acknowledged in this case (U.S. Br. 23-24), federal law expressly gave Honda the *option* to install lap and shoulder belts rather than airbags in the 1987 Accord.

Despite the lengthy and carefully nuanced regulatory history of FMVSS 208, petitioners claim that the States are free to come to the opposite conclusion: that automotive safety would have been better served by (and Honda was under) a *mandatory duty*, enforced by compensatory and punitive damages, to equip its 1987 Accord with airbags.

Our submission is simple and to the contrary: the federal government's resolution of the complex question whether, when, and how to require airbags in America's automobiles may not be set aside by state judges and juries who reach the conclusion that the federal policy was inadequate or wrongheaded. As the Solicitor General has explained (U.S. Br. 15-29), state law is not free, under

the Supremacy Clause, to impose requirements that conflict with and subvert this carefully calibrated federal program of occupant restraint regulation.

ARGUMENT

FEDERAL LAW IMPLIEDLY PREEMPTS A COMMON LAW REQUIREMENT THAT 1987-MODEL-YEAR AUTOMOBILES BE EQUIPPED WITH AN AIRBAG

I. FMVSS 208 REFLECTS THE JUDGMENT THAT SAFETY WOULD BEST BE ACHIEVED BY GIVING MANUFACTURERS A CHOICE IN THE SELECTION OF OCCUPANT RESTRAINT SYSTEMS

The lengthy history of the Safety Act and FMVSS 208 demonstrates conclusively that a common law claim requiring the installation of airbags is impliedly preempted because it would frustrate the policy underlying a safety standard adopted after laborious study over decades by an expert federal agency.

A. The Safety Act

1. Federal Motor Vehicle Safety Standards

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident." 15 U.S.C. § 1391(1). Congress sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3). The Secretary is required under the statute to consider "public acceptance or rejection" of a proposed standard. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir. 1979).

Although public safety is the "paramount purpose" of the Act, Congress also directed the Secretary to give careful "consideration [to] all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." H.R. Rep. No. 89-1776, at 16-18 (1966). The

"tests of reasonableness of cost, feasibility and adequate lead time should be included among those factors which the Secretary should consider in making his total judgment." S. Rep. No. 89-1301, at 6-7 (1966). Congress specifically directed the Secretary to prescribe feasible timetables for implementing new safety standards "because it may be a practical economic and engineering impossibility, as well as a source of great hardship and unnecessary additional cost, to require that all vehicle changes required by any new safety standard" be accomplished immediately. *Id.* at 7.

2. Federal Preemption and the Need for Uniform National Standards

Congress intended the safety standards promulgated under the Act to be "uniform national standards." *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988). It achieved that objective, in part, by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

In explaining the need to preempt state law, the Senate Report on the Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 89-1301, *supra*, at 12. Accordingly, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12.

The House Report elaborated that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by

a multiplicity of diverse standards." H.R. Rep. No. 89-1776, *supra*, at 17. As President Johnson noted: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

In hearings on the Act, legislators and witnesses repeatedly stressed that uniform national standards were necessary for three reasons. *First*, the national scope of the issue of vehicle safety compelled a national response. When Secretary of Commerce John Connor was asked about the authority granted to the Secretary of Transportation under the Act, he responded:

> We think that the highway safety problem is a matter of great public concern, and national interest. We don't think that the objectives that have been defined can be accomplished on a piecemeal basis or by leaving the authority untouched that is now vested in the States and municipalities.

Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., pt. 1, at 146 (1966) (hereafter *"House Hearings"*).

Second, uniform national standards were needed because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry." *House Hearings*, *supra*, at 606 (statement of Rep. Hathaway). Senator Abraham Ribicoff testified that "if there is any item in American life that we use in our society that has to have some national standards because of the very nature of the item, it is the automobile." *Id.* at 574.

Third, uniform national standards were required because the States were unable to develop appropriate safety standards. As Senator Ribicoff observed, "[i]n simple language, we are forced to establish a Federal role in highway traffic safety because State and local authorities have been unable to do the whole job * * *. It's time that the ultimate authority of the Federal Government was exercised in the traffic safety field." *House Hearings*, *supra*, at 554, 559, 561.

3. The "Savings" Clause

Another issue that arose in the hearings on the Safety Act was whether the Act's preemption provision was intended to occupy the

field and preclude all state laws relating to motor vehicle safety. The sponsors made it clear that preemption would apply only in areas where DOT chose to act. See, *e.g.*, *Traffic Safety: Hearing on S. 3005 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 65-66 (1966).

To avoid confusion, Congress clarified that it was not occupying the field of motor vehicle safety and that the Safety Act did not establish compliance with federal safety standards as an affirmative defense in common law actions. Section 1397(k) of the Act states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

This provision is sometimes referred to as the Act's "savings" clause. See Pet. App. 4. But Section 1397(k) lacks the indicia of a true savings clause. Indeed, the text, structure, and legislative history of the Safety Act show the narrow scope of this section and its inapplicability to federal preemption. *First*, Section 1397(k) was not made part of the Safety Act's preemption provision, but instead was located five sections later.[5] *Second*, while the title of the preemption provision (Section 1392(d)) is "Supremacy of federal standards," the title of Section 1397(k) is "Continuation of common law liability" and makes no reference to preemption or federal supremacy.

Third, the sections on "Preemption" in the congressional reports make no mention of Section 1397(k), discussing only Section 1392(d). See H.R. Conf. Rep. No. 89-1919, at 16 (1966); H.R. Rep. No. 89-1776, *supra*, at 17. The Conference Report does not mention Section 1397(k) at all, and the discussion of that provision in the House Report is under the heading "Prohibited

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[5] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Section 1392(d), however, was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. No. 103-272, § 1(e), 108 Stat. 943 (1993).

Acts and Exemptions." See H.R. Rep. No. 89-1776, *supra*, at 22. *Fourth*, the floor debates on this section concerned evidentiary issues exclusively, and made no reference to preemption. See 112 Cong. Rec. 21,487-21,490 (1966).

B. The Early History Of FMVSS 208

Under the broad mandate of the Safety Act, DOT in 1967 promulgated FMVSS 208, which required the installation of manual seat belts in all new cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seat belts are not in doubt." *MVMA* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Motor vehicle occupants often failed to use their seat belts, however, thus prompting DOT to consider the feasibility of so-called "passive" or "automatic" restraint systems — including airbags. Between 1969 and 1976, the federal government conducted over 2,000 tests of such devices to evaluate their utility. *Pacific Legal Found.*, 593 at 1344.

In its examination of passive restraint systems, DOT repeatedly expressed its intent "to allow the maximum degree of manufacturer initiative in developing crash protection systems" (35 Fed. Reg. 7187, 7188 (1970)) and specifically rejected a mandatory airbag rule (*id.* at 16,927-16,928). DOT also acknowledged the need for a gradual, phased-in schedule for *any* future passive restraint requirement in light "of the extreme dislocations, and the attendant financial hardships, that would be caused by requiring the world industry * * * to introduce major new systems in substantially all their passenger cars." 36 Fed. Reg. 19,255 (1971).

During this formative stage of the federal regulatory program, DOT proposed a requirement that manufacturers install a passive restraint system selected in their discretion, but later postponed that requirement until the 1976 model year. 37 Fed. Reg. 3911 (1972). In the interim, DOT continued to grant manufacturers the option to install manual "lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected" — an option that nearly all manufacturers exercised. *State Farm*, 463 U.S. at 35-36. One year later, DOT suspended its passive restraint proposal because of the need for further administrative study. 38 Fed. Reg. 16,072, 16,073 (1973).

Responding to a wave of protests from consumers, Congress intervened in 1974 to supervise the future development of FMVSS 208 and rejected DOT's "ignition interlock" requirement. 15 U.S.C. § 1410b(1). At the same time, Congress declared its strong preference for traditional seat belt safety systems and provided that a non-belt safety system would be permissible only if FMVSS 208 gave manufacturers the *option* to install a seat belt system instead. 15 U.S.C. § 1410b(2)-(3). Congress prohibited DOT from mandating airbags or any other non-belt safety systems unless it complied with special hearing procedures and awaited the results of a review by both Houses of Congress. 15 U.S.C. § 1410b(b)-(f). This provision reflected Congress' opposition to inadequately considered proposals mandating passive restraints (such as airbags) and Congress' belief that it "should not require of the automobile industry and the purchasing public anything more" than the familiar "seat belt and shoulder harness" restraint system. 120 Cong. Rec. 27,815-27,816, 27,822-27,823 (1974).[6]

Following this declaration of policy by Congress, DOT renewed its study of passive restraint systems, including airbags, but continued to grant manufacturers the "option" to install manual seat belts instead of passive restraints. 40 Fed. Reg. 16,217, 16,218 (1975). Growing concern over the effectiveness and public acceptability of passive restraint devices prompted Secretary of Transportation William Coleman to defer (41 Fed. Reg. 36,494 (1976)) and ultimately to rescind (42 Fed. Reg. 5071 (1977)) a proposed passive restraint requirement, thereby continuing in effect the manual "lap and shoulder seat belt option" that had been utilized by "the vast majority of manufacturers" (41 Fed. Reg. 24,070 (1976); *id.* at 36,494; 42 Fed. Reg. 5071 (1977)). Secretary Coleman explained the policy objections to a mandatory passive restraint requirement (41 Fed. Reg. at 24,071):

> These passive restraint-equipped vehicles will cost more, but, in tests to date, have been found to provide no materially

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[6] This legislation "shows that Congress intended manual seat belts to remain one of the options for complying with federal restraint system requirements." *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1123-1124 (3d Cir. 1990).

> greater protection to those individuals who already use lap and shoulder seat belts. Nevertheless, these individuals will have to pay more for their automobiles, without any measurable benefit * * *.

Moreover, Secretary Coleman was concerned about the "feasibility" of manufacturing millions of reliable passive restraints. *Id.* at 24,072.

The Secretary also justified his decision to reject a passive restraint requirement by referring to public opinion (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 11-12 (Dec. 6, 1976)):

> The cause of safety would not be served by mandating passive restraints at the present time. Every sampling of public opinion which has been brought to my attention, including the analysis of the docket for the public hearing, indicates that a substantial majority of Americans oppose the Federal government's mandating passive restraints * * *. There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that airbags may cause or exacerbate injuries, and the question of whether airbags will deploy properly in situations in which they are needed.

Secretary Coleman further determined that mandatory passive restraint systems would have serious adverse effects on federal policy goals for motor vehicle safety (*id.* at 32):

> A decision to mandate passive restraints would be unique and of unprecedented magnitude in the history of Federal involvement in motor vehicle safety. It would involve replacing seat belts, which are effective when used, with systems which have operating characteristics unlike any other safety equipment now in automobiles and with which many people are totally unfamiliar. It would mean mandating a particular form of self-protection which (in the case of the air bag) is among the most costly safety devices ever Federally required.

After considering all of these factors, Secretary Coleman found that a passive restraint requirement would provoke "widespread negative public reaction" and precipitate a repeal of the standard by

Congress after the manufacturers had retooled their production facilities. He concluded that such action "would have disastrous economic consequences for the entire nation." *Id.* at 11. A passive restraint requirement would ultimately "constitute a general setback to the auto safety movement." *Id.* at 64.

In 1977, after further hearings, Secretary Coleman's successor, Brock Adams, reaffirmed that passive restraints should not be mandated. He concluded that automobile manufacturers should be required to install some type of passive restraint system in the future, but specifically rejected a rule that would order immediate installation of airbags or any other passive restraint system in view of the severe technological and practical difficulties that such a requirement would cause. 42 Fed. Reg. 34,295, 34,296 (1977). Secretary Adams emphasized that "the Department has determined that a lead time of four full years should precede the requirement for the production of the first passive-equipped passenger cars." *Id.* at 34,295.

In response to this proposal, Congress intervened again by declaring its opposition to a mandatory passive restraint standard and its continuing approval of manual seat belts. It provided in DOT's annual appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." 92 Stat. 450 (1978); 93 Stat. 1039 (1979). In forbidding the use of federal funds to mandate any "occupant restraint system" other than "a belt system," Congress distinguished between the familiar and publicly acceptable "active restraint system, which is the lap-shoulder belt that we have on cars today," and "a passive restraint system, which in practice means the airbag for large cars, and the automatic seat belt for small cars." 125 Cong. Rec. 36,924, 36,926 (1979).

Following the direction of Congress, Secretary of Transportation Drew Lewis decided against passive restraints in 1981, concluding that manufacturers should "continue to have the current option of providing either automatic or manual occupant restraints." 46 Fed. Reg. 53,419, 53,425 (1981). That decision was later set aside by this Court on the ground that the Secretary's

decision was not adequately explained. The Court affirmed, however, the Secretary's power to suspend any passive restraint requirement pending further agency review, *State Farm*, 463 U.S. at 57 n.21, and the Secretary promptly did so. 48 Fed. Reg. 39,908 (1983).

On remand, Transportation Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection," including a study of the voluminous regulatory record on the subject. 49 Fed. Reg. 28,962, 28,964, 28,967-28,975, 28,984-28,996 (1984). The Secretary again rejected an immediate mandate of passive restraints. The standard adopted by Secretary Dole was in effect when Honda manufactured the 1987 Accord.

C. The 1984 Amendment Of FMVSS 208

As amended by Secretary Dole in 1984, FMVSS 208 called for careful implementation of passive restraints over time. The final rule explicitly authorized manufacturers to continue to use manual three-point seat belts on all automobiles manufactured before September 1, 1986. 49 Fed. Reg. 28,963, 29,009-29,010 (1984). FMVSS 208 also authorized the continued use of manual seat belts in all automobiles manufactured after September 1, 1986, if a designated number of States enacted mandatory seat belt use laws complying with federal requirements. *Id.* at 28,963, 28,997-28,999, 29,010. Thus, seat belts and not airbags were the occupant restraint system of choice for DOT. Even in the event that state seat belt use laws were not enacted, FMVSS 208 continued to authorize a substantial percentage of automobiles to be equipped with manual seat belts prior to September 1, 1989. *Id.* at 28,963, 28,999.

Most significantly, the standard adopted by Secretary Dole in 1984 — like the standards adopted by all of her predecessors — *explicitly rejected a mandatory airbag requirement* and reaffirmed the need to encourage automobile manufacturers to develop a variety of alternative occupant restraint systems. 49 Fed. Reg. at 29,000-29,002. And contrary to petitioners' suggestion (Pet. Br. 11-12), there is absolutely no indication in the record that Secretary Dole believed the States could mandate airbags through common law liability rules. Indeed, in refusing to mandate airbags, Secretary Dole cited several fundamental considerations of federal

safety policy that would be severely undermined by any state-imposed airbag requirement.

1. The Secretary found (49 Fed. Reg. at 28,985) that there was substantial uncertainty about the effectiveness of airbags:

> Based on field experience through December 31, 1983, * * * the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

The Secretary also identified other serious unresolved safety problems with the deployment of airbags. *Id.* at 28,974, 29,001.

2. Secretary Dole found that airbags are "unlikely to be as cost effective" as other safety devices. 49 Fed. Reg. at 29,001. She explained that airbags may be "priced much higher than it has [been] estimated" and that such costs would "further compound" the safety problems associated with airbags because "the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile." *Ibid.*

3. Secretary Dole noted that "[s]everal technical problems concerning airbags have been mentioned by manufacturers, consumers, and the vehicle scrapping industry." 49 Fed. Reg. at 29,001. Those included hazards from propellants used to inflate airbags and the danger to small children who may not be properly restrained and hence may be severely injured by a rapidly deploying airbag. Thus, "the Department cannot state for certain that airbags will never cause injury or death to a child." *Id.* at 28,992. The Secretary remarked that these unresolved safety problems made DOT unwilling to "mandate across-the-board airbags." *Id.* at 29,001.

4. The Secretary expressed reservations about the "public acceptability" of airbags. She explained that "[s]ome people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags." 49 Fed. Reg. at 29,001. The Secretary added that "these consumer perceptions must be recognized as real concerns." *Ibid.* She emphasized that "[t]he

ability to offer alternative devices should enable the manufacturers to overcome any concerns about public acceptability by permitting some public choice." *Id.* at 28,997.

5. The Secretary decided that a mandatory rule requiring installation of a particular passive restraint device, such as airbags, would stifle innovation in occupant protection systems (49 Fed. Reg. at 29,001):

> [DOT] believes that by taking away the manufacturers' discretion to comply with an automatic occupant restraint requirement through the use of a variety of technologies, it creates a number of problems. First, by restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a mandatory airbag requirement would be contrary to federal safety goals because it "runs the risk of killing or seriously retarding the development of more effective, efficient occupant protection systems." *Ibid.*

D. The Subsequent Reviews Of The Occupant Restraint Standard By Congress, The D.C. Circuit, And DOT

Following Secretary Dole's decision not to require manufacturers to install airbags, the D.C. Circuit reviewed and affirmed that decision in *State Farm Mutual Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986). The court noted that the Secretary's "ultimate decision not to require airbags" rested on a meticulous weighing of competing interests and a specific finding that the high costs associated with airbags threatened to *reduce* public safety. *Id.* at 487-488 & n.27. The court emphasized that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of an agency.'" *Id.* at 488; see *Public Citizen* v. *Steed*, 851 F.2d 444, 447-448 (D.C. Cir. 1988) (affirming DOT's 1987 decision extending the option of driver-side-only airbags to September 1, 1993, and DOT's finding that serious technical issues remained unresolved with dual (driver-side and passenger-side) airbags).

Congress later amended the Safety Act in 1991 to require DOT to modify FMVSS 208 to mandate airbags in 95% of all passenger cars built after September 1, 1996, and 100% of the cars built after September 1, 1997. Pub. L. No. 102-240, § 2508, 105 Stat. 2085 (1991). In passing this legislation, Congress noted in Section 2508(d) that it did not seek to change the preemptive effect of FMVSS 208 for motor vehicles manufactured without airbags *before* they were required by federal law. See 49 U.S.C. § 30127(f)(2) ("[t]his section and amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]").

Since then, DOT — through the National Highway Traffic Safety Administration ("NHTSA") — has undertaken "a comprehensive plan of rulemaking and other actions * * * addressing the *adverse* effects of air bags." 62 Fed. Reg. 798 (1997) (emphasis added). As early as October 1994, NHTSA noted the "air bag/infant restraint interaction problem" caused by the incompatibility of rear-facing infant car seats and passenger-side airbags. 59 Fed. Reg. 51,158, 51,159 (1994).

Over time, NHTSA has acknowledged broader problems with airbags, stating that they "are not a cure-all for every type of injury in crashes" and that airbags "have contributed to serious injuries and even death to vehicle occupants." 60 Fed. Reg. 56,554 (1995). The agency has been "extremely concerned * * * about deaths caused by air bags," 61 Fed. Reg. 40,784, 40,787 (1996), observing that "while passenger side air bags are estimated to have saved 164 lives to date, they have also killed 32 children in relatively low speed collisions." 62 Fed. Reg. 798 (1997).[7]

As a result, NHTSA (i) ordered warnings posted in motor vehicles about the hazards of airbags and the need to use manual three-point seat belts to reduce those hazards, 61 Fed. Reg. 60,206 (1996); (ii) allowed manual cut-off switches to be installed, 62 Fed. Reg. 62,406 (1997); and (iii) authorized manufacturers to "depower

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[7] NHTSA acknowledged in 1998 that over 100 persons had been killed by deploying airbags. 63 Fed. Reg. 49,958, 49,959 (1998).

all air bags so that they inflate less aggressively." 62 Fed. Reg. 12,960 (1997). Congress also has mandated, Pub. L. No. 105-178, § 7103(a), 112 Stat. 466 (1998), and DOT has proposed, the development of "advanced airbags" to "cushion and protect occupants of different sizes, belted and unbelted, [which] would require air bags to be redesigned to minimize risks to infants, children, and other occupants," 63 Fed. Reg. 49,958 (1998); see also 64 Fed. Reg. 60,556 (1999).

In sum, contrary to the suggestion of petitioners and their *amici* (Pet. Br. 7-9; see, *e.g.*, AIEG Br. 7), airbags were not in 1987, and are not today, a costless panacea that was irrationally resisted by motor vehicle manufacturers. However inevitable the introduction of airbags may seem from the perspective of 1999, in 1987 (when the Accord at issue here was built) airbags were perceived as merely one among many occupant restraint systems whose safety and public acceptability had to be tested.[8] The debate over the wisdom of mandatory airbags and the development of airbag technology continues to the present day. Accordingly, seat belts were and are DOT's occupant restraint device of choice; airbags are merely a supplemental restraint system (see pages 12-15, *supra*).

II. PETITIONERS' COMMON LAW CLAIM WOULD FRUSTRATE THE PURPOSES OF FMVSS 208

Petitioners do not dispute that Honda's 1987 Accord, which was equipped with a manual three-point lap belt and shoulder harness, complied fully with FMVSS 208. In particular, the automobile was not required by FMVSS 208 to have airbags; the Safety Standard in effect at the time the vehicle was manufactured granted Honda an option — for safety reasons — to install either airbags or manual lap and shoulder belts. Indeed, in 1987 Secretary Dole reaffirmed the need for flexibility and choice in passive restraint systems, 52 Fed. Reg. 10,096 (1987), and noted that federal safety policy purposefully did not "require

[8] See Pet. App. 15-16 ("Even if the Secretary's gradual adoption of an airbag requirement has increased public acceptance of the technology over time, concerns about public reaction still existed when Geier's 1987 Honda was manufactured").

manufacturers to install airbags or any other particular type of automatic restraint system." *Id.* at 42,441.

Petitioners' effort to impose a mandatory airbag requirement on Honda under state law conflicts with and undermines this federal safety policy. As this Court has long held, state law that conflicts with federal law — either by making it impossible "to comply with both state and federal requirements," *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990), or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 53, 67 (1941) — is preempted by the Supremacy Clause. See also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) (state law "is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal").

In this case, regardless of the scope of the express preemption provision, petitioners' common law claims are impliedly preempted by the Safety Act. It is undisputed that Congress gave DOT plenary authority to issue uniform national safety standards for automobiles and that DOT, after a thorough investigation extending over decades, determined that public safety would be undermined if airbags were required in the 1987 Accord. It would frustrate the purpose of this comprehensive federal safety scheme for the States to second-guess the judgment of this expert federal agency and impose just such a requirement.

Petitioners' principal response is to cite the language of the Section 1397(k), the Act's so-called "savings" clause. But this provision does not preserve or validate petitioners' claim. This Court has held for nearly a century that even broadly written savings provisions do not "save" state law claims that would conflict with or frustrate the purpose of a federal statute. Any other reading would cause the federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

Petitioners' arguments would turn federal preemption law upside down. They assert that — despite the comprehensiveness of the federal motor vehicle safety program, the clarity of Congress' purpose in reserving to DOT the authority to issue uniform national standards, and the presence of a broadly worded preemption

provision — Congress meant to allow each State, through its common law, to impose standards different from the federal standards (and different from those of other States as well). Rather than a scheme of uniform national standards, the outcome under petitioners' regime would be chaos, with standards varying from State to State — and even within a single State — based on the case-by-case assessments of lay juries. Congress could not conceivably have intended that result.

A. Section 1397(k) Does Not Preserve Common Law Claims That Are Inconsistent With An FMVSS

Petitioners' reliance on Section 1397(k) of the Safety Act, the so-called "savings" clause, to defeat implied conflict preemption is wholly misplaced. Even if, contrary to the text, structure, and legislative history of the statute (see pages 4-14, *supra*), Section 1397(k) were viewed as a limitation on the Act's *express* preemption provision, it has no application to an *implied* preemption analysis.

This provision indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could continue to be brought in areas *not* covered by and *not* conflicting with a Federal Motor Vehicle Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow States to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Abilene Cotton*, 204 U.S. at 446, the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.* This Court has repeatedly adhered to these pronouncements. See, *e.g.*, *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998) (relying on and quoting *Abilene Cotton* in rejecting a construction of a savings clause that would have permitted common law claims that were "'inconsistent with the provisions of the'" federal statute at issue); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-385 (1992); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

Consistent with these precedents (which petitioners neglect to cite, much less discuss), Section 1397(k) was added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety *not* covered by and *not* inconsistent with those federal standards. This case is a good example: FMVSS 208 expressly grants, for safety reasons, a choice to manufacturers whether to use airbags. Section 1397(k) would thereby preserve a common law claim that an airbag system in a vehicle was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Safety Standard. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted safety option

to utilize a restraint system other than an airbag. Such a lawsuit is impliedly preempted because it extinguishes a choice granted, as a matter of safety, by DOT whether to install a particular type of equipment (airbags). See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).[9]

Rather than addressing these precedents, petitioners rely (Br. 33-34, 47-48) on *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), and *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), for the proposition that Congress somehow intended, through the adoption of Section 1397(k), to allow state common law to apply unchecked by any form of federal preemption. But none of the cases cited involved the Safety Act or even remotely similar regulatory schemes. In *Goodyear Atomic*, for example, the Court interpreted a statute waiving the federal government's immunity from state regulation of federal enclaves. In discussing the limits of that waiver, and whether state workers' compensation awards would interfere with a federal program, the Court distinguished between a State's "incidental" and "direct" regulation of federal activities. The Court ultimately concluded that there was "clear congressional authorization" for the state action (486 U.S. at 182) and that the "incidental regulatory pressure" of occasional workers'

[9] This reading of Section 1397(k) is in accord with the early case law interpreting the Safety Act (which is relied on by petitioners, see Pet. Br. 2 n.2). In the absence of a federal Safety Standard addressing the same aspect of performance as a proposed common-law tort standard, Section 1397(k) authorizes a tort action to proceed because the Act does not preempt the entire field of motor vehicle safety. See, *e.g.*, *Schwartz* v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983) ("there were no federal standards governing the relevant portions of the" vehicle); *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSS's "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"); *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976).

compensation awards was fully consistent with the federal scheme. *Id.* at 186. In particular, there was no claim in *Goodyear Atomic* that state law would frustrate any federal regulation or policy.

The decisions in *English* and *Silkwood* are equally beside the point. Both cases involved preemption under the Atomic Energy Act, which explicitly preserves significant authority for the States (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). In *Silkwood*, the Court found no preemption of the common law claim at issue because the Price-Anderson Act — which established an indemnification scheme for nuclear plant operators held liable under state tort law — constituted affirmative evidence of Congress' acceptance of state tort actions (464 U.S. at 251-256).[10] As the Court explained in *English*, 496 U.S. at 86, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries."

These cases stand in marked contrast to the federal scheme created by the Safety Act — on which the regulatory effects of state compensatory and punitive damages awards would be direct, not incidental. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 498-499 n.19 (1987) (rejecting the contention that "compensatory damages only require the [defendant] to pay * * * and thus do not 'regulate'"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "'a form of regulation'"); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

In the final analysis, petitioners grossly misconstrue Section 1397(k) of the Safety Act by attributing to Congress the truly

[10] *Silkwood* was a field preemption case; there was no conflict with a federal regulation. The sole question in the case was whether federal law preempted state punitive damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for compensatory damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law.

perverse desire to authorize all common law claims even though they clash with an existing Safety Standard. Thus, as petitioners read this provision, it would even "save" a common law claim that a manufacturer acted tortiously by doing something that was required by federal law or by not doing something that was prohibited by federal law.

But petitioners cannot explain why Congress would allow the States to undermine a federal regulatory scheme of national safety standards so long as they act through their common law and not through regulatory or statutory enactments. Under this regime, a jury in California or New York might decide that airbags are necessary to meet a common law duty of care; while a jury in Texas or Florida might decide that airbags are dangerous and breach common law standards in those jurisdictions. The adverse effects on safety and interstate commerce of this system of nonuniform standards are clear.

In advancing a construction of the Safety Act that undermines its carefully drawn system of nationally uniform safety standards, petitioners fail to heed this Court's admonition not to interpret a statute to "destroy itself." *Abilene Cotton Oil Co.*, 204 U.S. at 446. Their interpretation of Section 1397(k) must therefore be rejected.

B. Implied Conflict Preemption Is Fully Applicable Under The Safety Act

Relying again on Section 1397(k) and this Court's preemption analysis in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), petitioners contend that the text of the Safety Act provides a "reliable indicium of congressional intent" to preclude implied conflict preemption. Pet. Br. 35-41. Thus, petitioners assert (*id.* at 37-40) that the absence of any reference to preemption of common law claims in the text or history of the Safety Act or FMVSS 208, combined with the language of Section 1397(k), show a congressional "*intent not to preempt.*" Pet. Br. 39 (emphasis in original).

Contrary to petitioners' arguments, neither Section 1397(k) nor the express preemption provision in the Safety Act precludes application of this Court's traditional principles of implied conflict

preemption. As discussed above (at pages 6-8), Section 1397(k) is not addressed to implied conflict preemption at all. Moreover, the express preemption provision in the Safety Act does not bar implied conflict preemption. This Court has emphatically and unequivocally rejected the proposition "that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute." *Myrick*, 514 U.S. at 287. The *Myrick* Court dismissed this argument as premised on a plain misreading of a single sentence in *Cipollone*, in which the Court had observed (505 U.S. at 517):

> When Congress has considered the issue of implied pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone* v. *White Motor Corp.*, 435 U.S. [497], at 505 [(1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

The Court rejected as entirely "without merit" any interpretation of this sentence that would preclude an implied preemption inquiry in the face of an express preemption clause. 514 U.S. at 285. "The fact that an express definition of the pre-emptive reach of a statute 'implies' — *i.e.*, supports a reasonable inference — that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Ibid.* Congressional intent is ultimately the "touchstone" in determining whether implied preemption is foreclosed. *Malone*, 435 U.S. at 504.

Thus, the Court held in *Myrick* that the express preemption provision in the Safety Act does *not* "obviate the need for analysis of [the] * * * statute's [implied] pre-emptive effects." 514 U.S. at 285. The Court in that case considered *on the merits* the respondent's implied preemption argument under the Safety Act, although it found the claim "ultimately futile" because there was no conflict between the respondent's tort suit and the suspended standard at issue, FMVSS 121, which governed antilock brakes on trucks. 514 U.S. at 285; see also Pet. App. 13 ("in *Myrick* the

Supreme Court engaged in implied pre-emption analysis of the Safety Act").[11]

This Court's subsequent precedents are in accord. For example, in *Medtronic*, the plurality opinion by Justice Stevens — which in the face of an express preemption clause found no express preemption under the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act — pointedly observed that common law claims might still be "preempted under conflict preemption analysis." 518 U.S. at 503; see also *id.* at 507 (Breyer, J., concurring) (citing "ordinary principles" of conflict preemption). And in *Boggs* v. *Boggs*, 520 U.S. 833 (1997), the Court decided the case on the basis of implied conflict preemption under the Employee Retirement Income Security Act even though that statute has an express preemption clause. Indeed, the Court has often considered (and accepted) implied preemption arguments in cases involving federal statutes with express preemption provisions.[12]

At the end of the day, it is hard to imagine any reason why Congress, simply by including an express preemption provision in

[11] The Court in *Myrick* also noted that even in *Cipollone*, "just two paragraphs after the [misinterpreted] passage * * * [the Court] engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act * * * and found 'no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions.'" 514 U.S. at 288-289.

[12] See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

the Safety Act, would have wanted to authorize the States to impose requirements that conflict with or frustrate the purposes of an FMVSS. Congress often includes an express preemption provision in a statute because it wants to preempt state law *more broadly* than would occur under implied preemption principles. It is absurd to assume that Congress intends to eliminate the constitutional baseline of implied preemption (see *Brown* v. *Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984)) when it legislates to give a federal statute *additional* preemptive effect.[13]

C. Petitioners' Common Law Claim Would Frustrate The Purpose Of DOT's 1984 Decision And Would Undermine Congress' Goal Of Creating Uniform National Standards

Turning finally to the merits of the preemption issue before the Court, petitioners try to show that their common law "no airbag" claim somehow does not conflict with or undermine FMVSS 208. Pet. Br. 41-50. But, as all five federal courts of appeals to consider the issue have concluded, a common law standard such as that proposed by petitioners is impliedly preempted because it would punish a manufacturer with massive tort liability for exercising a federally granted *option* not to install airbags in its automobiles. Petitioners' claim would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the Safety Act, *Hines*, 312 U.S. at 67, and would "interfere[] with the methods by which th[at] federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494.

In this case, as the Solicitor General has explained (see U.S. Br. 15-29), a collision between state and federal law is inevitable. The central feature of the federal safety program codified in FMVSS 208 is a carefully calibrated plan to provide the automobile industry with occupant restraint options. See *Pokorny*, 902 F.2d at

[13] Certainly, when it enacted the Safety Act in 1966, Congress could not possibly have known that its inclusion of a preemption provision and Section 1397(k) in the Act would eliminate implied conflict preemption, which this Court had long held occurs by direct operation of the Supremacy Clause. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).

1124 ("flexibility and choice is an essential element of the regulatory framework established in Standard 208"). As the D.C. Circuit found (Pet. App. 14-16) and as we described in detail above (at pages 12-14), DOT's goal was to provide design flexibility over time to foster technological innovation that would make passive restraint systems acceptable to the general public. Moreover, DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems.

The element of "choice" in the federal program was, therefore, not an expression of neutral indifference to airbags by DOT, but a purposeful element of the program designed to address the serious, substantive doubts about the effectiveness, public acceptability, and feasibility of requiring the industry to adopt airbags prematurely. In view of the consumer (and congressional) opposition to passive restraints — particularly airbags — DOT deliberately conferred flexibility on manufacturers to allow them to introduce new restraint technology on a gradual basis.

By contrast, the state law tort standard advocated by petitioners would punish automobile manufacturers for not taking the very step that the federal program refused to mandate: installing airbags in 1987-model-year automobiles. The effect of upholding such liability would be directly to nullify the policy balances that are at the heart of FMVSS 208. It is difficult to imagine a clearer example of state law acting as an "obstacle" to the "accomplishment and execution" of a federal administrative program — a program with "an intricate and contentious history of over 20 years" that has involved intensive administrative and congressional attention and effort. *Wood*, 865 F.2d at 398. During that time, "[m]ost of this national controversy has concerned the very issue which underlies [petitioners'] claim, namely, * * * whether vehicles should be equipped with 'passive restraints' * * * such as airbags." *Id.* at 399.

Thus, the common law standard petitioners advocate would conflict with FMVSS 208 in several direct and obvious ways:

1. The imposition of massive tort liability for the failure to install airbags in automobiles that comply with FMVSS 208 would

strip away an option (and attendant manufacturing flexibility) that Congress and DOT believed to be essential to achieve federal policy goals. See *Pokorny*, 902 F.2d at 1124-1125; *Taylor*, 875 F.2d at 827; Pet. App. 14 (DOT was concerned that "not affording manufacturers discretion to install an automatic occupant restraint system" would undermine "public safety"). Among other things, DOT sought to encourage "experimentation with designs for even safer systems." *Id.* at 15.

Petitioners' attempt to mandate airbags — and thus eliminate the "several options" authorized by federal law, Pet. App. 15 — cannot survive application of this Court's longstanding precedents holding that any state law that removes or restricts an option granted by a federal regulation conflicts with federal law and is preempted. In *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982), for example, the Court held that a federal regulation granting federal savings and loan associations the option of including "due-on-sale clauses in their contracts" preempted California common law, which provided that due-on-sale clauses were unenforceable. California common law was preempted because it purported to give "the California courts * * * [authority to] forbid[] a federal savings and loan to enforce a due-on-sale clause solely 'at its option' and * * * deprived the lender of the 'flexibility' given it by the" federal regulation. *Ibid.* See also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law).

2. A common law airbag rule would punish automobile manufacturers — in an unforeseeable, retroactive manner and with unprecedented severity — for exercising a right granted to them by federal law. The States cannot impose common law damages, including punitive damages, on parties for doing what federal law "authorized them to do." *Kalo Brick*, 450 U.S. at 318, 326-330 (a State cannot award damages on account of a railroad abandonment approved by the ICC); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

3. Punishing manufacturers for failing to install airbags at a time when the federal government deliberately refused to mandate such equipment would clash directly and irreconcilably with the federal timetable for phasing in passive restraints:

> [I]mposition of an air bag requirement where none previously existed would conflict with the effective dates for the implementation of standard 208 and the purpose of gradually phasing in passive or automatic restraint systems. Clearly, such a result "stands as an obstacle" to the methods chosen by the Secretary of Transportation to administer the Act, and is incompatible with the federal regulations.

Schick v. *Chrysler Corp.*, 675 F. Supp. 1183, 1186 (D.S.D. 1987); see Pet. App. 15 (by "gradually phasing in airbags" DOT sought to "allow[] consumers to adjust to the new technology").

4. Application of a common law standard that conflicts with FMVSS 208 would "destroy the national uniformity of the federal standard." *Wood*, 865 F.2d at 412. Instead of uniformity, some States could punish manufacturers for not having four-point seat belts, others could require three-point seat belts, yet others frontal airbags (driver-side or passenger-side, front or rear), and still others motorized seat belts — or some combination of these and a host of other restraint devices. See *Kalo Brick*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"). The "unthinkable" situation feared by President Johnson 30 years ago ("50 standards for 50 different States" (112 Cong. Rec. 14253 (1966)) could become a reality.

5. Petitioners' position cannot be defended by the assertion that there is no frustration of Congress' purpose because both the federal regulatory scheme and the state common law seek to promote "safety." To reduce this carefully calibrated federal program to such a nebulous generalization is to suggest that the States are free to mandate *any* requirement that a lay jury is prepared to characterize as reasonably conducive to product safety — no matter what its effect on the federal program. But this Court expressly rejected that proposition in *Ouellette*, 479 U.S. at 494, explaining that "it is not enough to say that the ultimate goal of

both federal and state law is to eliminate [a risk to the public]. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." As the First Circuit observed in *Wood*, 865 F.2d at 408:

> Even though the goal of [plaintiff's] design defect action might be the same as that of the Safety Act — that is, to increase automobile safety — [plaintiff's] theory of recovery is preempted by FMVSS 208 and the Safety Act because it interferes with the *method* by which Congress intended to meet this goal.

At bottom, "improving [automobile] safety does not admit to easy solution" and requires "considerable expertise." *State Farm*, 463 U.S. at 33. In the course of lengthy and comprehensive regulatory reviews during the 1970s and 1980s, the Secretaries of Transportation exercised that expertise and repeatedly concluded that a mandatory airbag requirement for automobiles would be *contrary* to federal safety goals because airbags present countervailing safety risks. As a result, in 1984 DOT expressly made airbags optional and thereby established a "policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." Pet. App. 15. Secretary Dole's decision thus specifically granted Honda the option *not* to install airbags in its 1987 Accord.

Since FMVSS 208 was amended by Secretary Dole in 1984, Congress, the courts, and DOT have reaffirmed the need for federal primacy in setting occupant restraint policies, as airbag technology has evolved and the benefits and dangers of airbags have become manifest. There is no room for the States to intervene to decide, for example, that manual cut-off switches for airbags — which are expressly authorized by DOT to address the risks posed to certain individuals by deploying airbags (see page 15, *supra*) — are unreasonably dangerous.

Allowing common law claims to set aside a determination of DOT's safety policies would unduly interfere with the regulatory means authorized by Congress to achieve the Safety Act's stated goals. In this case, DOT determined that federal safety policy required granting manufacturers the *option* whether to install airbags in 1987-model-year automobiles. Petitioners cannot, more

than a decade after the fact, second guess that judgment under state law. The Supremacy Clause will not permit that result.

CONCLUSION

The judgment of the court of appeals should be affirmed because petitioners' common law claim is impliedly preempted by the Safety Act and FMVSS 208.

Respectfully submitted.

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