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IN THE
Supreme Court of the United States

ALEXIS GEIER, *et al.*,
Petitioners,
v.

AMERICAN HONDA MOTOR COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether compliance with a safety standard issued under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*, precludes liability for breach of a state common-law duty of due care in automobile design.

2. Whether the promulgation of an occupant crash protection standard that can be satisfied by a number of alternative devices including airbags provides sufficient grounds for selectively implying preemption of common-law airbag omission claims.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments, including issues of federal preemption of state law.[1] *Amici* accordingly have filed briefs in such preemption cases as *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This case involves another important preemption issue: whether the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C. § 1381 *et seq.* (now 49 U.S.C. § 30101 *et seq.*), preempts state common-law tort claims premised on a manufacturer's negligence in omitting airbags in the design of a motor vehicle.

Through the distinctive institution of the common law of torts, the States have long protected persons injured by negligently and defectively designed products by requiring that manufacturers compensate them. *See, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). In the context of negligently designed motor vehicles, state tort liability also promotes public safety by encouraging manufacturers to design their products in light of available safety technology. In keeping with the Safety Act's purpose of reducing the toll of motor vehicle accidents, deaths and injuries, *see* 15 U.S.C. § 1381 (1982 & Supp. 1987),[2] Congress expressly preserved

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

[2] All citations to the prior version of the National Traffic and Motor Vehicle Safety Act are to the 1982 U.S. Code and the 1987 Supplement thereto.

state common law tort liability even when a negligence claim is premised on a design that complies with an applicable federal safety standard. *See* 15 U.S.C. § 1397(k).

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Federal law preserves petitioners' claim that the respondent's omission of airbags in their design of the 1987 Honda Accord breached their state common law duty of due care. As a general matter, the Safety Act expressly preserves, rather than preempts, common law claims concerning automobile components that comply with an applicable federal motor vehicle safety standard. Because the common law of negligence takes regulatory requirements into account as evidence of the proper standard of due care, the intended effect of the Safety Act's preservation scheme is not to create two unrelated bodies of law affecting automakers, but to maintain the traditional sound relationship between legislative or administrative regulation and common law liability. Within the Safety Act's general framework of preservation, neither federal legislation nor the particular federal regulation addressing occupant crash protection, 49 C.F.R. § 571.208 (Standard 208), reveals any basis for selectively implying preemption of petitioners' specific airbag claim.

1. The two provisions of the Safety Act that define the preemptive force of administratively established motor vehicle safety standards, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), expressly distinguish between preempted state legislative or administrative law and preserved state common law. Section 1392(d) uses identical substantive and procedural language to describe the federal law that exerts preemptive force and the state law that it preempts—"safety standards" that have been "established" and are "in effect." It is thus read most naturally to preempt the kinds of state law that are created in the same way that the preempting federal law is: legislation and administrative regulation. Section 1397(k) reinforces this distinction by explicitly preserving "liability under common law," but not state legislation and regulation, in the face of compliance with federal standards. Unlike other federal scope-of-preemption provisions, section 1397(k) contains neither an exception for state law covered under section 1392(d), nor coverage of state statutory law that is not covered under section 1392(d). Accordingly, section 1397(k) is both too broad and too narrow to serve as a general savings clause preserving whatever state law is not inconsistent with federal law.

The intended purpose of the Safety Act's preemption scheme is to ensure unitary legislative and administrative regulation of automobile safety, while preserving the traditional relationship between administrative regulations and common-law liability, which deems regulations informative but not determinative of liability. That traditional relationship, acknowledged by this Court over a century ago in *Grand Trunk Railway Co. v. Ives,* 144 U.S. 408, 421 (1892), maintains the distinct identity of the two complementary regimes of administrative regulation and the common law of torts. Those two regimes have differences of particularity, temporal perspective, and purpose that counsel against collapsing them, as this Court has recognized in the opposite direction by its reluctance to imply private rights of action into federal regulatory schemes. Where, as here, Congress has provided in plain language for the continued partial independence of the two regimes, there is no reason not to implement that directive.

2. Against the background of general express preservation of common law claims alleging negligence in designs

complying with federal motor vehicle safety standards, neither federal legislation nor Standard 208 and its history provide any basis for selectively implying preemption of airbag claims. The case for implied preemption in the face of express preservation is at its strongest where there is an actual conflict between state and federal law, forcing an affected person to violate one law or the other, and where the express provision at issue is a general savings clause that purports to preserve all state law without distinction. It is at its weakest where, as here, there is no actual conflict, but only an invocation of Congressional purpose that is usually best defined by the text of the statute itself, and where the express language of the statute precisely limits the federal law's preemptive force to a particular type of state law.

The federal legislation mistakenly relied on by some lower courts to support selective implied preemption of airbag claims, 15 U.S.C. § 1410b, falls short in three respects. Section 1410b is completely consistent with continued preservation of common-law claims regarding airbags; it imposed only procedural limitations on the Secretary's ability to promulgate safety standards requiring airbags; and those limitations lapsed in 1977, when the Secretary first promulgated a regulation phasing in a passive restraint requirement.

In the absence of any relevant legislation other than the Safety Act itself, it is doubtful that the Secretary had any authority to immunize manufacturers from liability for automobile components on a case-by-case basis, since section 1392(d) and section 1397(k) clothe standards issued under the Act with uniform preemptive force. In any event, neither Standard 208 nor its history reveal any evidence of an intent to create a unique "liability-free zone" around airbags. Standard 208's provision of alternative means to comply with occupant crash protection requirements is perfectly consistent with an intent to provide flexibility under federal law while leaving state common law claims untouched. Most of the regulatory history cited by the lower courts in support of selective preemption is either irrelevant or actually weighs against a finding of implied preemption. The few sentences of regulatory history that speak vaguely of automakers' discretion with regard to passive restraints are far too indistinct and equivocal to extinguish, without further notice and opportunity to object, the States' ability to provide relief to persons injured in their jurisdictions by negligent conduct.

ARGUMENT

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT'S EXPRESS PRESERVATION OF COMMON LAW CLAIMS MAINTAINS A LONG-STANDING, SOUND TRADITION

The plain language of the National Traffic and Motor Vehicle Safety Act's preemption provisions require safety standards established by state legislative and administrative bodies to be identical to federal standards validly established by the Secretary of Transportation, but do not prevent state courts from awarding compensation to individuals injured by motor vehicles that violate traditional common-law standards of due care, even if they meet federal standards. The courts that have held Safety Act standards to preempt common-law tort actions rely heavily on the view that the common law regulates in virtually the same manner as administrative schemes, and therefore should not be treated differently for preemption purposes, even in the face of plain language that mandates different treatment. This understanding, however, fails to recognize the different, complementary roles and purposes of administrative regulation and tort liability. For over a century,

both this Court and state courts have recognized the different roles of these legal regimes, and have established a traditional understanding of their distinctiveness. In light of this tradition, Congress's demonstrated intent to displace state administrative regulation while leaving state common law in place makes eminent sense.

A. The Safety Act Expressly Distinguishes Between Preempted State Legislative or Administrative Regulation and Preserved State Common Law Claims

When read together, the two Safety Act provisions crucial to this case, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), expressly establish a distinction between state legislative and administrative regulations, which are preempted if not identical to federal standards, and state common-law tort liability, which may be imposed even if the defendant has complied with a relevant federal standard. Even if read alone, section 1392(d) most naturally applies only to state administrative regulations, and not to common-law liability. Most tellingly, that section uses identical language to describe (1) the federal law that exerts preemptive force—a "safety standard" that has been "established" and is "in effect," and (2) the scope of that preemption—a removal of state authority to "establish" or to "continue in effect" any "safety standard" not identical to the federal standard. Congress may sometimes use general terms such as "requirement," "prohibition," and "standard" to encompass liability rules suggested by the verdicts in common-law tort cases. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992); *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993). Here, however, the parallel use of both substantive and procedural terms suggests that Congress meant to preempt those state "safety standards" that were

"established" and "in effect" in the same way that the federal standards were established and in effect—through legislative and administrative adoption.

Any doubt about the proper reading of section 1392(d) is put to rest by 15 U.S.C. § 1397(k), which provides in full that "[c]ompliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law." Like a perfectly matching puzzle piece, section 1397(k) expressly preserves just that portion of state law—common law—that is not preempted under the most natural reading of section 1392(d).[3] Section 1397(k) is therefore not a general savings clause of the type that this Court has sometimes construed narrowly to eliminate conflict with other substantive provisions. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (construing a provision purporting to save "the remedies now existing at common law or by statute"); *Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1980) (same); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915) (same); *Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (same); *cf.* 15 U.S.C. § 2074(a) (purporting to preserve "liability at common law or under State statutory law"); 15 U.S.C. § 4406(c) (purporting to preserve "liability . . . at common law or under state statutory law"); 21 U.S.C. § 360pp(e) (purporting to preserve "liability at common law or under Statutory law");

[3] To *amici's* knowledge, there is only one other federal statutory scheme that exhibits the same preemption-clause structure. The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 *et seq.*, contains provisions nearly identical to 15 U.S.C. §§ 1392(d) and 1397(k). *See* 42 U.S.C. §§ 5403(d), 5409(c). The only reported decision to construe these provisions concluded that they preserved the plaintiff's common-law tort claim. *See Shorter v. Champion Home Builders Co.*, 776 F. Supp. 333, 338 (N.D. Ohio 1991).

46 U.S.C. § 4311(g) (purporting to preserve "liability at common law or under State law"). Unlike these blanket provisions, § 1397(k) singles out a particular kind of state law—common law—for preservation.

Because section 1397(k) does not preserve state statutory and administrative law, it is too narrow, as well as too broad, to support the lower courts' view that it was meant to clarify "that compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose." *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997); Pet. App. 5a (noting that the district court followed the Ninth Circuit's approach in *Harris*). Congress knows how to write the provision that the Ninth Circuit and the district court mistakenly read into section 1397(k), and it did so just two years after it drafted section 1397(k), in the Radiation Control for Health and Safety Act of 1968. In language similar to that of 15 U.S.C. § 1392(d), but without its precise parallelism, the first sentence of section 360F of that Act provides that promulgation of an electronic product performance standard under the Act deprives States of the authority to establish different standards respecting the same aspect of performance. *See* Radiation Control for Health and Safety Act of 1968, Pub. L. 90-602, § 360F, 82 Stat. 1173 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1352, 1367-68, *codified at* 21 U.S.C. § 360ss. Section 360C(e) of the Act then provides:

> *Except as provided in the first sentence of section 360F*, compliance with this subpart or any regulations issued thereunder shall not relieve any person from liability at common law *or under statutory law*.

Radiation Control for Health and Safety Act of 1968, Pub. L. 90-602, § 360C(e), 82 Stat. 1173 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1362, 1366, *codified at* 21 U.S.C. § 360pp(e) (emphasis added). By contrast, section 1397(k) has no qualifying clause indicating that it yields

to any potential conflict with section 1392(d), and it has no reference to the preservation of liability under statutory law. The first omission makes § 1397(k) too broad to preserve state law only when there is no applicable federal standard, and the second omission makes it too narrow, since it would then leave some state statutory and administrative law in limbo—not preempted by section 1392(d), but not preserved by section 1397(k), either. The unavoidable conclusion is that the Safety Act's preemption scheme was not cast in the same mold as the Radiation Control Act's, but instead reflects a conscious decision to distinguish between preempted state legislative and administrative regulation, and non-preempted state common law.

Legislative history materials only reinforce the plain meaning of sections 1392(d) and 1397(k), by confirming that the distinction between preempted state legislation and preserved common-law liability was indeed contemplated by members of Congress, without recorded opposition. The House Committee Report, for example, explained that § 1397(k) meant that "compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). During floor debates, Representative Dingell argued against a proposed amendment adding criminal penalties to the bill by noting that it already provided for more than enforcement of federal safety standards:

> [W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.

112 Cong. Rec. 19,663 (1966). This and other legislative history leaves no doubt that the plain meaning of sections 1392(d) and 1397(k) was the meaning aired during the legislative process.[4] That plain meaning preempts state legislative and administrative regulation, but preserves common law tort actions such as Ms. Geier's.

B. The Safety Act's Distinction Between Common Law and Administrative Regulation Seeks to Maintain a Long-Standing Tradition of Continuing Importance

Over a hundred years ago, this Court, following the broad consensus of state courts, ruled that compliance with legislative safety standards was not a conclusive defense in a common-law personal injury action, but only provided evidence of the defendant's exercise of due care. *See Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 420-21 (1892) (citing *Chicago, Burlington & Quincy R.R. Co. v. Perkins*, 17 N.E. 1 (Ill. 1888) and *Thompson v. New York Cent. R.R.*, 17 N.E. 690 (N.Y. 1888)). Over the intervening century, this principle has remained the near-universal understanding of the ordinary relationship between legislative or administrative regulation and common-law tort liability. In 1965, the Restatement (Second) of Torts acknowledged the settled understanding that "[c]ompliance with a legislative enactment or an administrative

[4] For other statements articulating this plain meaning, *see* S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) ("[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."); 112 Cong. Rec. 14,230 (1966) (statement of Senator Magnuson) ("Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was."); Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 1260 (1966) (statement of Representative Mackay) ("[T]he agency bill provides for certification of vehicles that actually met minimum safety standards. This does not . . . relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.").

regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Over three decades later, the Restatement (Third) of Torts: Products Liability reiterated that "a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect." *Restatement (Third) of Torts: Products Liability* § 4(b) (1998); *see* W. Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

As many of the lower court decisions correctly construing the Safety Act's preemption scheme have noted, the scheme preserves this traditional relationship between regulations and common-law tort liability, while ensuring unitary legislative and administrative control of the regulations. *See, e.g., Dorsey v. Honda Motor Company Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Volkswagen of America v. Young*, 321 A.2d 737, 746 (Md. 1974). Two floor statements about the Act demonstrate that Congress was entirely aware of this consequence. Senator Cotton explained that the Act "declar[es] that compliance with any Federal standard does not exempt any person from liability under common law," 112 Cong. Rec. 21,490 (1966), but further stated that "it seems clear . . . that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it." *Id.* Senator Magnuson similarly stated his understanding that

§ 1397(k), while providing that "compliance with Federal standards does not exempt any person from common law liability[,] . . . does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards." 112 Cong. Rec. 21,487 (1966).

1. An appreciation of this traditional doctrine, and its function in keeping the institutions of administrative regulation and the common law of torts distinct, leads to a firmer grasp of Congressional intent in delineating the scope of preemption as it did in sections 1392(d) and 1397(k). The principle that compliance with legislative or administrative regulation is not determinative of common-law tort liability reflects differences of particularity, temporal perspective, and purpose between those two legal regimes. First, while statutes and administrative regulations are necessarily abstract and general, common-law tort liability begins with and remains tied to the particular facts of each case. One corollary of this difference is that a legislative regulation cannot anticipate every particular circumstance in which a reasonable person exercising due care would take additional precautions. *See, e.g.*, *Caviote v. Shea*, 165 A. 788, 789 (Conn. 1933) (defendant's compliance with parking regulations did not preclude a finding that he should have taken additional precautions to ensure visibility on winding road in dark, foggy conditions). In the case of automobile occupant crash protection devices, for example, an automaker might learn that, whether or not airbags substantially reduce passenger injuries in car accidents generally, they dramatically reduce injuries in smaller-than-average cars, or in cars with some other specific set of features. If compliance with a general occupant crash protection standard such as Standard 208 shields the automaker from common-law tort liability for failure to install airbags in the particular models in which they would make a dramatic difference, accident victims are left without a remedy for injuries caused by

the automaker's unreasonable behavior, and the automaker has no legal incentive to act on its knowledge to reduce injuries.

The particularity of the common law—the fact that cases are its basic building blocks—also means that common-law tort litigation does not establish rules in the same way that legislative or administrative regulation does, so that preserving common-law liability does not create the same potential for conflict as would preserving state statutory regulation. First, in the common law system of precedent, defendants are always free to argue that a previous case should be read more narrowly than its explicit language suggests, to limit it to particular facts in that case.

Second, because of the importance of factual variations in product liability cases, courts have refused to let plaintiffs engage in the offensive use of collateral estoppel in those cases, outside of the narrow areas of asbestos and diethylstilbestrol (DES) cases. *See, e.g.*, *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 988 (Ohio 1983) ("non-mutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents"); John S. Allee, *Product Liability* § 9.03[2] (1989); Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work In Product Liability*, 31 N.Y. L. Sch. L. Rev. 583, 587 (1986) (footnote omitted). The result is that a finding of liability in one case does not necessarily fix a standard of conduct in the way that legislative or administrative regulation does.

2. Tort law also contributes a different temporal perspective on conduct than does legislative and administrative regulation. A statute or regulation is based on information gathered before its enactment, and yet only governs conduct after enactment. It is therefore potentially obsolete as soon as it becomes effective. No legislature

or administrative body can continuously and instantaneously update standards as new information and technology become available; amendments can only be made periodically, and with substantial lag time. The National Highway and Transportation Safety Authority is no exception to this general rule. By many accounts, its rulemaking efforts have been particularly subject to delay. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 283, 295-97 (1987). This Court itself has noted the lengthy delay in promulgating Standard 208, which "[o]ver the course of approximately 60 rulemaking notices, [was] imposed, amended, rescinded, reimposed, and . . . rescinded again." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

By contrast, the development of the common-law duty of due care is continuous. If, as a result of new information or advances in technology, a reasonable person would have changed the design of a product in time to prevent an injury—allowing for a reasonable period to implement that design through manufacturing—then that person is legally responsible for that injury, even if regulatory standards have not kept up with the relevant advances in knowledge and technology. This temporal perspective allows tort law to fill unavoidable gaps in statutory or administrative safety regulation.

3. Finally, tort law and safety regulation have different primary purposes. Traditionally, the primary purpose of the common law of torts is providing compensation for injury to private parties. Although tort law also has a deterrence function, the absence of a deterrent effect in a particular case has no effect on an injured party's ability to recover compensation.

By contrast, the primary purpose of safety regulation is to reduce future injury and property damage, not to

provide compensation for injuries. Although a few federal safety regulation schemes specifically provide for private rights of action, *see, e.g.*, 15 U.S.C. § 2072(a) (providing a private right of action for violations of the Consumer Products Safety Act), the National Traffic and Motor Vehicle Safety Act is typical in its omission of explicit private rights of action. Recognizing the important difference between public safety regulation and private liability for injuries, courts have generally refused to imply private rights of action under federal safety regulations, including the NTMVSA. *See, e.g.*, *Handy v. General Motors Corp.*, 518 F.2d 786, 788 (9th Cir. 1975) (NTMVSA); *Bailey v. Johnson*, 48 F.3d 965, 967-68 (6th Cir. 1995) (FDCA); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir.) (FAA), *cert. denied*, 479 U.S. 872 (1986); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 991-92 n.9 (2d Cir. 1980) (FIFRA), *cert. denied*, 454 U.S. 1128 (1981).

In refusing to redefine private tort liability in terms of public regulatory standards, these courts are demonstrating the same sensitivity to Congressional intent that this Court has shown in its reluctance to imply private rights of action generally. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 23-24 (1979); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring in the judgment) (suggesting that the Court "perhaps ought to abandon the notion of implied causes of action entirely"). When Congress creates an integrated scheme of public regulation and enforcement, this Court has noted that it would often defeat Congress's purpose, rather than further it, to redefine private liability based on those public regulatory standards. *See, e.g.*, *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 93-

94 (1981) (declining to recognize an implied right of action for contribution against a joint tort-feasor under the Equal Pay Act of Title VII because private enforcement would likely defeat Congressional intent).

For the same reasons that this Court has become reluctant to create new private rights of action by implication, it should be reluctant to destroy existing private rights of action by implication. Both actions are likely to misconstrue Congressional purpose by oversimplification, assuming that, if Congress approved of a substantive standard, it wanted that standard and only that standard enforced by all possible means. Congress legislates against the background of a legal system in which the common law of torts is a longstanding institution with a focus, perspective, and purpose distinct from administrative regulation. Because of those distinctions, it makes perfect sense that Congress would want the federal government to become the sole administrative regulator, preempting administrative regulation at the state level, while leaving the state common law of torts intact.

To be sure, one of Congress's interests in adopting a scheme of federal automobile safety regulation was an interest in uniformity, as various snippets of legislative history suggest. *See, e.g.*, S. Rep. No. 1301, 89th Cong. 2d Sess. 12, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (describing the desideratum of motor vehicle safety standards that are "uniform throughout the country"). Yet Congress could well have believed that the lion's share of uniformity benefits were achieved by ensuring that automakers will only have to deal with one set of administrative safety regulations rather than fifty. After all, most automobile safety issues will never become the subject of litigation by an individual against an automaker, because the amounts involved are too small. In that small percentage of cases in which individuals are gravely enough injured by a defective automobile to contemplate an expensive,

time-consuming product liability suit against an automaker, Congress could have decided that the balance tilted in favor of allowing States to award compensation for negligent conduct.[5] In those infrequent cases, the interest in providing relief to the injured party is at its apex, and the automaker's conduct is of the type that it is most important to deter to promote automobile safety, which is, after all, the principal purpose of the Safety Act. *See* 15 U.S.C. § 1381 (declaring that the purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents"). Ultimately, however, neither Congress's particular reasons for preserving common law tort claims nor their persuasiveness are controlling. The plain language of the Safety Act makes clear Congress's intent to distinguish between preempted administrative regulation and non-preempted common-law actions.

II. THERE IS NO BASIS IN FEDERAL LEGISLATION OR ADMINISTRATIVE REGULATION FOR SELECTIVELY IMPLYING PREEMPTION OF COMMON-LAW TORT CLAIMS INVOLVING AIRBAGS

A number of lower courts, including the court below, have used implied preemption doctrine to create a non-textual "airbag exception" to the Safety Act's express preservation of common-law tort claims. *See* Pet. App. 15a-16a; *Taylor v. General Motors Corp.*, 875 F.2d 816, 827-28 (11th Cir. 1989); *Pokorny v. Ford Motor Co.*, 902

[5] If Congress had indeed judged that automotive product liability litigation would be relatively rare and inconsequential, that judgment has been confirmed by a recent study that uncovered only 93 automotive product liability awards over an eleven-year period—less than nine per year—and that found that the awards had no statistically significant effect on the defendants' stock prices or on sales of the defective automobile model. *See* Steven Garber & John Adams, *Product and Stock Market Responses to Automotive Product Liability Verdicts*, in *Brookings Papers on Economic Activity: Microeconomics* 1 (Martin Bailey, *et al.*, eds., 1998).

F.2d 1116, 1123-25 (3rd Cir. 1990); *Cooper v. General Motors Corp.*, 702 So.2d 428, 438-40 (Miss. 1997); *Cellucci v. General Motors Corp.*, 706 A.2d 806, 811 (Pa. 1998).

These courts acknowledge that a Federal Motor Vehicle Safety Standard does not ordinarily create a safe harbor immunizing manufacturers from common-law defective design liability. *See, e.g., Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) (holding that the Federal Motor Vehicle Safety Standard governing illumination did not preempt state common-law tort claims for defective design of illumination, and expressly distinguishing airbag cases). Yet they conclude that in the case of defective design claims involving airbags, preemption of the common law of torts must be implied to protect a Congressional purpose abstracted from various bits of federal legislation, administrative regulation, and legislative history. *See* Pet. App. 14a-15a (citing Standard 208 and its "tortured history"); *Taylor*, 875 F.2d at 826-28 (citing Standard 208 and three pieces of federal legislation); *Pokorny*, 902 F.2d at 1123-24 (citing Standard 208 and one piece of federal legislation); *Cooper*, 702 So.2d at 438 (citing Standard 208); *Cellucci*, 706 A.2d at 810 (citing Standard 208). This conclusion relies both on an excessive loosening of this Court's implied preemption requirements and on unwarranted inferences of legislative and administrative intent. A careful reading of the relevant legislation and regulations reveals no evidence of intent sufficient to imply preemption under proper preemption standards.

1. As this Court noted in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995), the presence of an express preemption provision does not "entirely foreclose[] any possibility of implied pre-emption." The latitude for supplementary implied preemption, however, differs greatly depending upon the type of implied preemption and the

type of express provision at issue. In this case, where preemption is being implied only to further an abstract purpose imputed to Congress, and the relevant express provision precisely defines the preemptive force of federal law, proper analysis does not support a finding of implied preemption.

Conflict between state and federal law that renders it "impossible for a private party to comply with both state and federal requirements," *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990), most easily trumps an express preemption provision. Here, preemption is supported by an elementary principle of fairness, namely, that a person under the concurrent jurisdiction of two coordinate sovereigns should not be forced by one to do something prohibited by the other. Just as the principle that individuals should be able to plan their conduct according to knowable law leads to the strong judicial presumption against statutory retroactivity, *see, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), so this principle leads to a strong presumption in favor of preemption. This presumption, when applicable, counters and outweighs the general presumption against preemption, and should require for rebuttal a clearer statement than is provided by a general preemption clause.[6]

By contrast, preemption should rarely be implied beyond the scope of an express preemption provision

[6] In theory, the Safety Act could provide an occasion for application of this type of preemption. In the unlikely event that an automaker were found liable under state common law for manufacturing an automobile to a specification *mandated* by an established federal safety standard (if, for example, liability was based on a finding that a headlight of the minimum brightness mandated by the federal safety standard was excessively bright), a court might be justified in finding that the federal standard impliedly preempted state law, even though section 1397(k) provides that compliance with a federal standard never exempts anyone from common-law liability. Of course, no such conflict is presented by this case.

merely on the basis that 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). After all, every statute reflects a compromise between competing purposes, which may include uniformity or flexibility, on the one hand, and preservation of established law affording compensation to injured parties, on the other. The compromise struck between those purposes is best reflected in the text of the statute itself, including any provision defining the scope of preemption. Thus, it is a mistake to construct from a substantive statutory provision or from legislative history, some abstract purpose that purportedly justifies overriding another provision of the same statute. As this Court has noted, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States.* 480 U.S. 522, 526 (1987); *see Board of Governors v. Dimension Financial Corp.,* 474 U.S. 361, 374 (1986).

The case for implying preemption to further some purpose imputed from a substantive statutory provision is even weaker when, as in the case of the Safety Act, the express clauses governing preemption do not purport either to preempt all conflicting state law or to save it, but instead strike a specific compromise. When implying preemption from a substantive provision in the face of a universal savings clause, courts will often refer to the "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992). The assumption underlying that canon of construction is that general clauses framed in absolute terms are often boilerplate that statu-

tory drafters have not measured against the more thoroughly considered substantive provisions. That assumption does not apply when, as here, the drafters have crafted language that indicates the precise balance struck between preemption and preservation of state law. In that case, the statutory language "provides a 'reliable indicium of congressional intent with respect to state authority,'" *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517 (1992) (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 505 (1978)), leaving no room for supplementary implied preemption.

2. In this case, the legislation and regulations concerning occupant crash protection provide no evidence that Congress or the Secretary of Transportation intended to create a specific exception to the general rule that federal safety standards do not preempt the state common law of torts. The principal legislation purportedly supporting implied preemption is 15 U.S.C. § 1410b, which Congress passed in 1974. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. 93-492, Title I, § 109 (1974), 88 Stat. 1470, *reprinted in* 1974 U.S.C.C.A.N. 1687, 1701-04; *Taylor,* 875 F.2d at 826 (discussing section 1410b); *Pokorny,* 902 F.2d at 1123-24 (same). Section 1410b placed limitations on the Secretary of Transportation's authority to promulgate an occupant crash protection regulation that required or allowed compliance by any restraint system other than a seat belt system.

The limitations, however, were merely procedural rather than substantive, and had lapsed by 1977. Initially, section 1410b provided that the Secretary had to follow a special procedure when promulgating an occupant crash protection standard that required or permitted compliance by means of anything other than a seat belt system. *See* 15 U.S.C. §§ 1410b(b)(3)(B), 1410b(c). The procedure specified was designed principally to give Congress the

opportunity to exercise a "legislative veto."[7] *See* 15 U.S.C. § 1410b(d). In 1977, the Secretary of Transportation used this procedure to issue a standard that required automakers to phase in passive restraints between 1981 and 1983, and that allowed manufacturers to use airbags to satisfy the passive restraint requirement. *See* Federal Motor Vehicle Safety Standard Occupant Restraint System, 42 Fed. Reg. 34,289 (July 5, 1977). Congress chose not to exercise its authority under section 1410b's legislative veto provision, and the regulation became law. *See* 49 C.F.R. § 571.208 (1977). When that occurred, a special provision in section 1410b lifted its procedural limitations with respect to any future occupant crash protection standard promulgated by the Secretary.[8] Thus, in 1977 section 1410b became a dead letter. It had been designed to give Congress a one-shot opportunity to consider a legislative veto of a safety standard requiring or permit-

[7] This Court declared the legislative veto process unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). By then, however, as explained immediately below, section 1410b no longer gave Congress a legislative veto opportunity.

[8] Section 1410b(3)(C) provided:

> Paragraph (2) [which prevented the issuance of safety standards requiring occupant crash protections other than seat belts] shall not apply to a Federal motor vehicle safety standard if at the time of promulgation of such standard (i) the 60-day period determined under subsection (d) of this section has expired with respect to any previously promulgated standard which the Secretary has elected to promulgate in accordance with subsection (c) of this section, and (ii) both Houses of Congress have not by concurrent resolution within such period disapproved such previously promulgated standard.

15 U.S.C. § 1410b(3)(C) (1982). Once the 1977 standard became law, it would be a conforming "previously promulgated standard" with respect to any future occupant crash protection standard, thus freeing that standard from any strictures imposed under section 1410b.

ting compliance by means of non-seat belt systems, and Congress declined to take that opportunity.[9]

3. The version of the occupant crash protection regulation in force at the time Ms. Geier's automobile was designed and manufactured likewise provides no basis for creating a nontextual "airbag exception" to the Safety Act's express preservation of common law liability. That regulation, Standard 208, provides manufacturers with three alternative means of compliance, two of which require some form of "passive" or "automatic" restraint such as airbags, automatic seat belts, or passive interiors, and one which requires only manual seat belts. *See* 49 C.F.R. § 571.208, S4.1.3.1 (1986). The courts that have implied preemption of airbag claims reason that this regulation evinces an intent not only to give manufacturers flexibility in complying with federal law, but also to shield them from any potential state common-law consequences of choosing one option or another. *See, e.g.*, Pet. App. 14a-15a. The regulation's provision of alternatives, how-

[9] In *Taylor*, the Eleventh Circuit cites as additional support for implying preemption two Department of Transportation appropriations bills which provided that " '[n]one of the funds appropriated [for the Department of Transportation] 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).' " *Taylor*, 875 F.2d at 826 (quoting Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978)); *see* Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, § 317, 93 Stat. 1023, 1039 (1979).

There are a plethora of problems with implying state common law preemption from federal appropriation riders. Without considering all of them, it suffices for this case to say that if one infers from these provisions a Congressional objection to airbags in 1978 and 1979, then one should infer from the absence of similar provisions in subsequent appropriations bills a withdrawal of that objection in 1980, seven years before the manufacture of the Honda Accord here at issue.

ever, provides no basis for creating a unique "liability-free zone" around airbags.

As an initial matter, the Safety Act nowhere grants the Secretary the authority to decide on a component-by-component basis whether and to what extent to immunize automakers from common-law liability. Rather, it authorizes the Secretary to issue "minimum standards for performance" and clothes those standards with uniform preemptive force. *See* 15 U.S.C. § 1392(a) (authorizing the Secretary to promulgate "motor vehicle safety standard[s]"); 15 U.S.C. § 1391(2) (defining "motor vehicle safety standards" as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance"); 15 U.S.C. § 1392(d) (defining scope of preemption for established standards); 15 U.S.C. § 1397(k) (preserving state common-law claims). Thus, were the Secretary to decide explictly to immunize automakers from common-law liability regarding some particular component—whether airbags, or tempered-glass windshields, or breakaway engine mounts, or anything else—it seems almost certain that the Secretary would be acting *ultra vires*.

In any event, neither the language and structure of Standard 208 nor its regulatory history provides any evidence of such a decision. Because the provision of alternatives in Standard 208 is entirely compatible with an intent to provide flexibility under federal law but *not* to have any effect on state law, no inference in favor of preemption can be drawn from the mere fact that manufacturers need not install airbags to meet Standard 208. Hence, to draw such an inference, courts must rely on extratextual regulatory history about the Secretary's motives in providing the alternatives, such as the supplementary information provided in the Federal Register upon promulgation of the standard. Arguably, evidence of agency motives that failed to find any expression in the promulgated standard itself should never be a sufficient

basis for creating an exception to an explicit statutory provision preserving common law liability. Even assuming that such evidence could conceivably be sufficient, however, the motives revealed by the regulatory history in this case cannot further the cause of selective implied preemption.

First, one of the Secretary's expressed motives—a doubt whether the Safety Act even authorizes the promulgation of an airbag requirement—weighs against drawing any inference of an intent to preempt. *See* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 29001 (1984). The Safety Act only authorizes the establishment of performance standards, which specify, for example, the maximum pressure to which an automobile occupant's body can be subjected; it does not authorize the Secretary to direct the design of devices that will meet those standards. *See* 15 U.S.C. § 1392(a) (authorizing the Secretary to promulgate "motor vehicle safety standards"); 15 U.S.C. § 1391(2) (defining "motor vehicle safety standard" as "a minimum standard for motor vehicle equipment *performance*") (emphasis added). Thus, the fact that Standard 208 provides manufacturers the flexibility to use airbags, automatic seat belts, or conceivably some other technology to provide passive restraint, is traceable to the fundamental approach of the Safety Act, and cannot be used to infer an intent to immunize manufacturers from common-law tort liability.

Second, the Secretary expressed a desire to provide consumers with a choice between different occupant crash protection schemes, and to be able to gather comparative data about the use of different schemes. *See* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 29001 ("Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts."); *id.* ("Widespread

use of both systems is the only way to develop definitive data."). Yet Standard 208, as promulgated, does not guarantee consumer choice or the widespread use of different systems. It allows automakers to make all of their cars with manual seat belts only, or with airbags only.[10] The only method of guaranteeing diversity would be to require minimum production quotas for each option. If Standard 208 required an automaker to produce some percentage of its cars with manual seat belts only, presumably the stronger "actual conflict" implied preemption would protect it from common law liability for failing to install airbags. Because Standard 208 as promulgated does no such thing, the Secretary's desires remain unaccomplished, and cannot be used to support implied preemption.

Third, most of the Secretary's other reasons for allowing automakers to install crash protection systems other than airbags are the types of reasons that the Safety Act anticipates will shape the limitations of every Federal Motor Vehicle Safety Standard. Because the Safety Act also provides that such standards will not preempt state common law, Congress cannot intend these reasons to count toward implied preemption. The Safety Act requires the Secretary to consider "whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed." 15 U.S.C. § 1392. The Secretary expressed doubts whether airbags would be cost effective, *see* Federal Motor Vehicle Safety Standard: Occupant Crash Protection, 49 Fed. Reg. 28991-92, 29000-01 (1984) and whether some consumers

[10] For the year in which Ms. Geier's car was manufactured, Standard 208 required automakers to equip at least 10% of their cars with passive restraints. *See* 49 C.F.R. § 571.208 S4.1.3.1.2 (1987). This requirement, however, does not guarantee diversity, since it provides no maximum percentage for passive restraints.

might fear airbags, *see id.* at 29001. These are the type of concerns that might have prompted the Secretary simply to require manual seatbelts only, in which case the occupant crash protection standard would not have the three-option scheme that has impressed all of the courts that found implied preemption; the Secretary's decision to include options that could be satisfied by airbags demonstrates only that these concerns were weak. More generally, they are the type of concerns that undoubtedly shape every safety standard the Secretary issues, from bumpers to illumination systems. If the mere recitation of such concerns were deemed sufficient to establish the Secretary's intent to displace state common law, then every promulgated standard would preempt common law, rendering section 1397(k) a nullity. Thus, the expression of such concerns in the regulatory history of Standard 208 cannot be used to build a case for selective implied preemption of airbag omission claims.

Finally, the few sentences in the regulatory history suggesting that automakers should retain some discretion over the type of passive restraint they install are simply too equivocal to provide evidence of an intent selectively to preempt state common-law tort liability when airbags are at issue. *See, e.g., id.* ("[B]y restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems."). At the time the relevant version of Standard 208 was promulgated in July 1984, the Safety Act's express savings clause had been uniformly held by a federal court of appeals and three state courts of last resort to preserve common law actions in the face of the federal regulatory scheme. *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. 1974); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1975); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*,

345 N.E.2d 683, 688 (Mass. 1976).[11] Against this background, a few statements about "flexibility" that make no mention of preemption hardly give the States fair notice that their ability to provide relief for negligent, injurious conduct is about to be extinguished. Thus, the political process would be ill-served by finding implied preemption on such a tenuous basis. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) ("The political process ensures that laws that unduly burden the States will not be promulgated.").[12]

In sum, neither federal legislation, nor Standard 208, nor the regulatory history of that standard, provides any basis for selectively implying preemption of airbag claims

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[11] Moreover, just a few months earlier, the Ford Motor Company had settled a state common-law airbag omission claim during trial for $1.8 million, making common-law liability for airbag omission a live issue, as well publicized in a feature article in The Wall Street Journal. *See* Amal Nag, *Ford Settles Lawsuit Over Accident Victim For $1.8 Million Total*, The Wall Street Journal 17 (March 16, 1984).

[12] The "phase-in" of federal passive restraint requirements over a period from 1986 to 1989 similarly provides no basis for implying preemption of state tort liability regarding an automobile manufactured in 1987. The version of Standard 208 promulgated in 1977 required a phase-in of passive restraints by 1983. The Secretary rescinded that requirement in 1981, but this Court held in 1983 that the rescission was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983). At that time, the Court noted that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost—the inflatable restraint was proven sufficiently." *Id.* at 49 (footnote omitted). When the Secretary, in the wake of *State Farm*, reinstated the passive restraint requirements in 1984, she could not, for reasons of fairness given her predecessor's vacillation, assess penalties against automakers for failing to equip cars with passive restraints overnight. Yet that unjustified vacillation should not necessarily have prevented automakers from recognizing that their common-law duty of due care required the installation of passive restraints before 1987, nor should it prevent persons injured by the automakers' breach of that duty from seeking compensation for their injuries.

in the face of the Safety Act's express preservation of all common-law claims regarding automobile safety.

CONCLUSION

The judgment of the court of appeals should be reversed.

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