No. 98-1811

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

ALEXIS GEIER, *et al.*

Petitioners,

v.

AMERICAN HONDA MOTOR CO., *et al.*

Respondents.

BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, IOWA, KANSAS, MONTANA, NEW HAMPSHIRE, NEW YORK, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF PETITIONERS

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
Counsel of Record
CHARLES HATFIELD
Counsel to the Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(other counsel listed inside cover)

Janet Napolitano
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007-2969

Bill Lungren
Attorney General of California
1300 I Street
Sacramento, California 95814

Barbara McDonnell
Chief Deputy Attorney General
State of Colorado
1525 Sherman St., 7th Fl.
Denver, Colorado 80203

M. Jane Brady
Attorney General of Delaware
Department of Justice
820 N. French St.
Wilmington, DE 19801

Thomas J. Miller
Attorney General of Iowa
Hoover Building
Des Moines, Iowa 50319

Carla J. Stovall
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, Kansas 66612-1597

Joseph P. Mazurek
Attorney General of Montana
215 N. Sanders
Helena, Montana 59620-1401

Philip T. McLaughlin
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Eliot Spitzer
Attorney General of New York
The Capitol
Albany, New York 12224

W.A. Drew Edmondson
Attorney General of Oklahoma
2300 N. Lincoln Blvd., Ste. 112
Oklahoma City, Oklahoma 73105-4894

Hardy Myers
Attorney General of Oregan
1162 Court Street NE
Salem, Oregon 97310-0506

D. Michael Fisher
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Sheldon Whitehouse
Attorney General of Rhode Island
150 South Main St.
Providence, Rhode Island 02903

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

Christine O. Gregoire
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

Whether a statute that expressly saves from preemption "any common law liability" nonetheless preempts state tort law by merely precluding states and their political subdivisions from establishing motor vehicle safety standards that differ from those imposed by the federal government.

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned Attorneys General of the States of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, submit this brief in support of petitioners Alexis Geier, *et al.*[1] *Amici* have a strong interest in preserving the appropriate balance of authority between the States and the federal government. They regularly defend not just statutory but common law rights of states, state officials, and state subdivisions -- rights that are threatened by the rule adopted by the U.S. Court of Appeals for the District of Columbia Circuit. Attorneys general use powers granted both by statute and by the common law to protect the public health, safety, and welfare of the citizens of their states. The use of those powers is threatened because the holding of the court below deprives the state common law of protection expressly granted by Congress. According to that court, common law remedies conflict with a statute that on its face precludes the states only from establishing automobile safety standards in competition with those set by federal statutes and regulations, while expressly preserving common law liability.

The common law rights that the attorneys general use and seek to protect have developed through long processes of evolution, often independent of legislative enactment. The common law rights include torts that derived from English law, survived the colonial period and the ratification of the Constitution of the United States, and continue to evolve to balance the needs and rights of victims in our modern world.

[1] Some portions of this brief were originally drafted by Jonathan S. Massey, a sole practitioner in the District of Columbia. Mr. Massey is not counsel for any party.

Torts provide redress for injuries -- regardless of whether those injuries were caused by legal or illegal acts. Again, the *amici* have a significant interest in preserving the availability of that avenue for relief -- and in preventing its erosion through allegedly implicit preemption, especially when in the same statute Congress included language that led the states and potential plaintiffs to believe that tort remedies remained intact.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an aspect of the common law that redresses injury -- one that protects the health and safety of a state's citizens, albeit through relief after the fact. This Court has repeatedly said that preemption of state efforts to protect health and safety "should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (internal quotation omitted). Local laws relating to health and safety are "those 'the Court has been most reluctant to invalidate.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (citation omitted).

Even outside the health and safety context, this Court has declined to affirm preemption unless it finds "an unambiguous congressional mandate" to preempt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). Ambiguity is not tolerated; "pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York State Labor*

Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

Here, the Court should not begin its analysis with the preemption clause contained in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.*[2] Rather, it should start with the clause most pertinent to the question of the continued validity of common law remedies: the portion of 15 U.S.C. § 1397(k) that expressly saved common law remedies from preemption. Because there is nothing in the Safety Act to limit that savings clause so as to exclude traditional tort remedies, the express language of that clause dictates the result in this case.

If the Court were to consider in detail the Safety Act's preemption clause, 15 U.S.C. § 1392(d), it would find little to support the conclusion reached below. The language is prospective in every respect, addressing affirmative state laws or regulations that attempt to set manufacturing standards that differ from those set by Congress and the Department of Transportation.

That Congress would choose to preempt state efforts to set differing standards, yet permit tort actions based on individual sets of facts, is a logical result of the key difference between the type of regulation embodied in the Safety Act and the remedy established by common law torts. The former is prospective, trying to prevent injury. The latter

[2] The provisions at issue here have been recodified to Title 49 in connection with the assignment of authority to the Department of Transportation. Thus the "savings" clause (*see* p. 5, *supra*) contained in 15 U.S.C. § 1397(k) is found at 49 U.S.C. § 30103(e). The "preemption" clause contained in 15 U.S.C. 1392(d) (*see* p. 9, *supra*) is found at 49 U.S.C. § 30103(b). Following the pattern of the petition for writ of certiorari, amici use the original Title 15 references.

is retrospective, trying to redress injury. It is implausible here, as it was in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), to suggest that Congress intended to leave injured persons without a remedy, when it merely barred competing state standards and expressly reserved the availability of common law liability.

The course chosen by the lower courts here and in similar cases demonstrates the need for this Court to clarify the limited scope of the implied preemption doctrine. That doctrine should not be applied at all where, as here, there is a provision in the statute preserving common law remedies. But even where it is applied, the doctrine must be limited if it is to avoid conflict with the constitutional concerns of federalism and with the need to preserve both regulatory and post-injury redress as key elements in our efforts to protect the health and welfare of all Americans.

ARGUMENT

I. The states and their residents were entitled to rely on the savings clause in the Traffic and Motor Vehicle Safety Act to protect their ability to assert common law damages claims.

The element that most clearly distinguishes this case from *Cipollone* and other recent preemption cases is the presence in the Safety Act of a "savings clause," by which Congress declared the continued viability of state law regardless of how the preemption language elsewhere in the Act is construed. The states and their residents were entitled to rely on the presence of that clause as they initially considered whether to support or to fight the enactment of the Safety Act. They were entitled to rely on that clause as they purchased and drove automobiles after the Act was passed.

And they should be entitled to rely on that clause now, when manufacturers seek to read the Safety Act's preemption provision so broadly that it swallows the savings clause whole.

The savings clause is, in essence, an *anti*-preemption provision. It expressly preserves state common law remedies *despite* the presence of a preemption clause in the same statute: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any common law liability." 15 U.S.C. § 1397(k). The plaintiff here asserted that the defendant had "common law liability."

The Department of Transportation recognized, when promulgating the final rule regarding automatic restraints in 1985, that tort liability remained a part (*amici* would argue, a critically important part) of the scheme to protect automobile occupants. Thus Secretary of Transportation Dole pointed to "potential liability" to rebut claims that manufacturers would always adopt "the least expensive alternative" among those permitted by the rule. 49 Fed. Reg. 28,962-29,010, at 29,000 (1984). Insurers had commented on "the potential of automatic restraint systems to reduce product liability claims" (*id.* at 28971), never suggesting (at least according to the Department's summary of comments) that the 1966 Safety Act statute had eliminated that potential. Others expressly pointed out that despite the Safety Act, "[p]eople whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of that injury." *Id.* at 28972.

Those observations were entirely rational because the savings clause is unambiguous. It preserved manufacturers' liability for state common law torts. Its presence in the

statute prevents this Court from having to reach the question of whether the Safety Act's preemption clause can be construed broadly, consistent with constitutional mandates. It prevents the Court from having to call upon its Tenth and Eleventh Amendment precedents, or applying constitutionally-required, but judicially-defined, protections for state sovereignty, such as those addressed in *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144, 170 (1992); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999).

To now, years after it was enacted, restrict the interpretation of the savings clause so severely that it has no real meaning would be to belatedly deprive the states of their ability to play their essential role in the legislative process. The States *qua* States, and through their representatives in the central government, play a critical, if indirect, role in the crafting of federal legislation. James Madison explained that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." THE FEDERALIST, No. 46, p. 332 (B. Wright ed. 1961). Madison placed particular reliance on the equal representation of the States in the Senate, which he described as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." THE FEDERALIST, No. 62, p. 408 (B. Wright ed. 1961). As the Chief Justice has remarked, "[t]he tacit postulates [of the constitutional plan] are as much engrained in the fabric of the document as its express provisions." *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting).

One of the vital "procedural safeguards inherent in the

structure of the federal system," *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552 (1985), is the requirement of a crystal-clear statement of Congressional intent before the States are stripped of the right to govern themselves and to ensure their residents redress for injuries caused by unsafe products.

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988). *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., dissenting) (quoting the same sentence of AMERICAN CONSTITUTIONAL LAW and describing *Gregory* as "applying this argument"); and Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 50-51 (1991) (The requirement of a "clear legislative intent to preempt" is also "consistent with the Court's reliance on clear statement rules in other areas of the law.").

By reversing the decision below, this Court will merely confirm that Congress, by choosing to preserve state common law rights, recognized the importance of the "federalist structure of joint sovereigns" and appropriately addressed the "proper balance between the States and the

Federal Government." *Gregory v. Ashcroft*, 501 U.S. at 459.

II. The preemption provision in the Safety Act would not have the broad preemptive effect as held by the court below even in the absence of a clause preserving common law remedies.

The courts that blazed the path followed by the court below held that the Safety Act's preemption clause was entirely dispositive. To reach that conclusion, each of those courts had to run roughshod over both the savings clause and the common law of the various states. Even without the presence of the savings clause, the preemption clause would have to meet the high standard this Court sets for Congress when it acts to deprive states and their residents of longstanding rights. Whether that standard is phrased as requiring an "unambiguous congressional mandate" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 147), a "clear and manifest purpose" (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230), or "drastic clarity" (*Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. at 780 (Frankfurter, J., dissenting)), it is not met by the language in the Safety Act.

The Safety Act's preemption provision does not speak of law "relating to" a subject, as do statutes such as the Employee Retirement Income Security Act (ERISA) and the Airline Deregulatory Act. *See, e.g., American Airlines v. Wolens,* 513 U.S. 219, 223 (1995), *citing*, 29 U.S.C. § 1144(a) (ERISA "provides for the preemption of state laws 'insofar as they . . . relate to any employee benefit plan'"); and 49 U.S.C.App. § 1305(a)(1) (Deregulation Act preempts laws "relating to rates, routes, or services of any air carrier"). Rather, it only speaks of "Federal motor vehicle safety standards" and only precludes states from establishing higher

"standards":

> 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.

15 U.S.C. § 1392(d). The language does not fully explain the scope of its application to state laws. But both read alone and read with the definitions found in 15 U.S.C. § 1391, it provides some clear markers for judicial construction.

1. Use of the phrase "State or political subdivision of a State" indicates that Congress was referring to positive state law, not to common-law claims. This is not a phrase that Congress would have used to refer to the bodies that issue or apply the common law. Although the term "state law" may include common law as well as statutes and regulations, *Cipollone*, 505 U.S. at 522 (plurality opinion), neither a court nor a jury in a state court case (much less a jury in a federal court case applying state law) is typically referred to as a "State or political subdivision of a State." We are aware of no practice or precedent for saying that a "State" "establishes" a "standard" by applying common law tort principles to a particular set of facts. By comparison, when legislation is signed into law, when regulations are promulgated, or when ordinances are adopted, it is often said that a "State" (or a county or city) has changed its law. That is the logical limit on preemption here.

2. States do not "establish" standards by means of the common-law tort system. The general norms embodied in the common law have been "established" over hundreds of years. Nor do individual verdicts "continue in effect" any form of requirements. The use of "continue" does not suggest the clause covers the ever-evolving concepts of common law torts. Nor does "continue" fit the repeated application of tort principles to unique sets of facts. Tort awards simply do not fit the mold of positive, concrete acts that the words "establish" or "continue" contemplate.

3. The word "standards," read in context, suggests positive enactments, not common law claims. But unlike "establish," the meaning of "standards" is evident from both its repeated use and the definition section of the Safety Act. The word is used three times in § 1392(d). In two instances -- with respect to federal safety standards -- it unquestionably means positive enactments, not court actions for damages. That is consistent with the definition section of the Safety Act. A "motor vehicle safety standard" is defined as

> a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

15 U.S.C. § 1391(2). Only once, in the reference to state-law requirements, is the word "standards" even arguably ambiguous. It is "a basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). And that meaning here is a prospective standard with objective criteria -- not the rules governing recovery for common law torts.

4. Common-law claims do not establish or continue requirements "with respect to [a] motor vehicle" at all, because a defendant is always free -- indeed, sometimes is expected -- to pay damages rather than to modify its conduct. The only action ever required by a tort claim is the payment of a damages judgment -- not action with respect to a motor vehicle. Thus, a defendant is always able to comply with the federal standard and to pay compensation to those injured by its misconduct. There is no possibility of incompatible legal commands in ordinary damages suits.

Again, though, this commonsense understanding of the preemption provision is fortified by the savings clause. In light of that enactment, it would defy Congressional intent to resort to implied preemption analysis. This is indeed an instance where "there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517.[3]

The effort by the court below to place the round peg of a common law tort into the square hole of an equipment or performance standard should be rejected. Until Congress repeals the savings clause *and* modifies the preemption clause to match the nature of a common law remedy, the availability of such remedies must remain a matter of state, not federal law.

[3] Thus, five state courts of last resort have properly held that no-airbag claims are not subject to either express or implied preemption. *Amici* seek to preserve the holdings in *Ford Motor Co. v. Tebbets*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072 (1996); *Wilson v. Pleasant and General Motors Corp.*, 660 N.E.2d 327 (Ind. 1995); *Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997); *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648 (Ohio 1997); and *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998).

III. The choice made by Congress to retain common law remedies while prohibiting regulatory actions flows from an essential distinction between the Safety Act and the common law: the former prevents injury; the latter redresses injury.

Congress' decision not to preempt state common law is hardly surprising. Here, as in many other contexts, Congress chose to address prevention of harm through the imposition of nationwide standards on manufacturers of goods placed in interstate commerce. But Congress, again, as in many other contexts, left to the states the question of redress for particular injuries.

Although awarding damages for injuries after the fact has some deterrent effects, its principal purpose is to compensate injured victims.[4] "'Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.'" *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). The tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular victim and a particular tortfeasor. Tort law is tied to the goal of compensation. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("Every State has a body of tort law serving" its

[4] *See, e.g.*, Stephen Breyer, REGULATION AND ITS REFORM 176 (1982) (explaining that tort law has deterrent effects, but that "the common law, as administered by the courts, may reflect certain noneconomic or moral factors that will make it difficult to use shifts in common-law liability to achieve basically economic ends").

"compelling interest" in "ensuring that victims . . . are compensated by those who harm them.").

By contrast, statutes and regulations are typically prospective in nature. They focus not on compensating persons for injuries already sustained, but on preventing socially harmful activities. "Regulation is not designed to provide or account for compensation" to the victims of dangerous products and their families. Mary Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 172 (1995). Safety standards can only attempt to head off injuries in the future -- including injuries for which common law torts provide remedies.

The difference between the tort and regulatory systems means that a Congressional decision to prevent States from adopting conflicting positive-law enactments is entirely different from a decision to curtail the compensatory function of tort law. Even if a State cannot alter a product's design, it should be able to provide a judicial system that resolves claims for wrongful injuries to its citizens and to decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries it could have prevented. To hold otherwise collapses the tort system's secondary purpose, deterrence, into its primary purpose, relieving the burden of those injured by the decisions and acts of others.

Recognizing the important distinction between regulation and the tort system, this Court has traditionally held that statutes like the Safety Act do not cut off victims' rights to fair compensation under state law. *E.g.*, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954) (where Congress "neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by

tortious conduct," this Court refused "to cut off the injured respondent from this right to recovery," observing that to do so would "deprive it of its property without recourse or compensation" and "in effect, grant petitioners immunity from liability or their tortious conduct."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (where there was "no indication that Congress even seriously considered precluding the use of [tort] remedies," this Court declined "to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). Recently, in *Medtronic v. Lohr*, a plurality observed that an argument that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" would be "implausible." 518 U.S. at 486 (Stevens, J.). Moreover, because there is no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices. *Id.* at 487.

Rather than compete, the regulatory system and the tort system complement each other, with one system attempting to anticipate problems before they occur and the other providing relief when consumers suffer injuries. Indeed, there is significant cross-fertilization between the tort system and regulation. For example, information obtained in individual tort suits often informs the judgment of federal regulators about whether existing standards are adequate or whether new protections should be proposed. "Obtaining accurate, relevant information" often constitutes a "central problem" for an administrative agency. Stephen Breyer, REGULATION AND ITS REFORM 103 (1982); *see also id.* at 112 ("the information problem is central and endemic to the standard-setting process"). As one scholar observed, tort litigation is "an important social learning mechanism" because it generates data about the risks of new technologies.

Lyndon, *supra*, 12 YALE J. ON REG. at 176. "[T]ort law's signals contain necessary basic messages that are not delivered through any other medium," "offer[ing] advantages that we need to account for before preempting tort law." *Id.* Reading regulatory statutes as preempting common-law claims for damages would sacrifice the important information-gathering function of the tort system.

At bottom, the contention that government acquiescence in a particular manufacturer's design should insulate it from tort liability -- even in the absence of an explicit Congressional statement to that effect -- is an argument about substantive social policy, not preemption law. The defendant's plea is one that should be addressed to elected legislatures and politically accountable executive officers, not to the courts. The States should be free to decide, as a matter of distributive justice, whether manufacturers should bear the cost of injuries resulting from devices whose design is not dicatated by federal law, but merely meets minimum federal standards.

Preemption is all the more unjustified because state tort law has *already* accommodated the defendant's concern. It is axiomatic that standards set by federal agencies are useful benchmarks for the finders of fact in particular tort cases and that compliance with federal standards is at least evidence of due care. *See generally* Restatement (Second) of Torts § 288(c).[5] Some jurisdictions go further and mandate

[5] *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 175 (1989) ("For a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citations omitted).

that compliance with such standards is a conclusive defense to tort liability;[6] establishes a rebuttable presumption of non-negligence;[7] or bars punitive damages.[8]

In recent years, nearly every State has considered -- and the vast majority have implemented -- legislative reform of product liability laws. Congress itself has considered legislation on the topic. The matter should be left to the politically accountable branches. Preemption law should not become, as a weapon against the States' historic role in allocating the cost of injuries, the modern-day equivalent of *Lochner v. New York*, 198 U.S. 45 (1905).

IV. To preserve the position of the states in our federal system, and to obligate Congress to take responsibility for preempting state laws, this Court should clarify the limited scope of the implied preemption doctrine.

In *Cipollone*, this Court corrected the Third Circuit's impressionistic judgment that tort suits would upset the "balance" struck by Congress in the cigarette warning statutes. In *Medtronic*, this Court corrected the sweeping preemptive effect that lower courts had accorded to the Medical Device

[6] Mont. Code Ann. § 69-4-201.

[7] *E.g.*, Model Uniform Product Liability Act § 108(A); Colo. Rev. Stat. § 13-21-403(1)(b); Kan. Stat. Ann. § 60-3304(a); Ky. Rev. Stat. Ann. § 411.310(2); N.D. Cent. Code § 28-01.1-05(3); Utah Code Ann. § 78-15-6(3).

[8] *E.g.*, Ariz. Rev. Stat. Ann. § 12-701; N.J. Stat. Ann. § 2A:58C-5(c); Ohio Rev. Code Ann. § 2307.80(C); Or. Rev. Stat. § 30.927; Utah Code Ann. § 78-18-1.

Amendments. In this case, this Court should reaffirm that express preemption is limited to the text drafted by Congress, and must be interpreted according to the conventional tools of statutory construction and with due regard for two fundamental principles.

The first is the strong presumption against preemption arising from the constitutional concerns of federalism rooted in the Tenth Amendment and in what the Chief Justice has described as "[t]he tacit postulates" of the constitutional plan. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

The second principle is that Congress legislates against a background understanding of the significant distinction between the tort and regulatory systems. Accordingly, a Congressional decision to displace state positive-law enactments should not be equated with a decision to bar state-law tort suits for damages. Indeed, the presumption against preemption is especially strong when Congress has failed to provide a separate federal remedy for a person injured by tortious conduct, as in the Safety Act.

This Court should also reaffirm the limited scope of implied preemption. When Congress has expressly addressed the matter of preemption in a specific statutory provision whose meaning can be ascertained through the conventional tools of statutory construction -- applied with reference to the two principles outlined above -- preemption analysis should ordinarily be at an end. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (establishing "an inference that an express pre-emption clause forecloses implied pre-emption"). This Court should emphasize to the lower courts the need to avoid reliance on imprecise statutory language to eliminate decisions made by sovereign states.

When, as in this case,

> the courts preempt state laws without explicit congressional guidance, unelected and unaccountable officials substitute their preferences for those of the citizens of local communities. . . . [The courts] in effect assume a legislative role without accepting legislative responsibility.

Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 48 (1991). This Court, by reversing the use of implied preemption in this case, will further force Congress to accept responsibility for the choices it makes as it balances state and federal interests. Again, Congress, not the courts, must decide how or whether to implement the contemporary preference for market-oriented incentives that continually stimulate manufacturers to innovate and develop safer products.[9]

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[9] *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359 (1984) (explaining that administrative regulation is a centralized system of government control, while tort law is essentially a market-based system that employs the expertise and information already accumulated by private firms in the ordinary course of their business); Stephen Breyer, REGULATION AND ITS REFORM 105 (1982) (design standards "diminish[] incentive[s] to look for better methods" and "freeze existing technology").